All redactions are under S40(2) of the FOI Act

From: [redacted]
Sent: 09 May 2017 18:14
To: Transparency and Trust Paper <Transparencyandtrust@beis.gov.uk>
Cc: [redacted]
Subject: Register of beneficial owners of overseas Companies and other legal entities
Importance: High

In response to your paper, we set out our response below.

If you would like to discuss any details with us, we will be happy to assist.

Please contact either myself, [redacted]

Yours

[redacted]

Question 1: Do you agree that all legal forms that can hold properties should be in the scope of the new register's requirements? If not, what legal forms should we consider an exemption for and why?

(a) **Bodies governed by diplomatic immunity may be required to be excluded by international law**
(b) **There may be other cases where an exemption is appropriate. A discretion (on proper grounds) to grant exemption should be reserved**
(c) **If the objective is to address criminality – or tax evasion (which, of course, is criminal) it should be observed that the criminal world will find ways round any rule based regime. (An obvious route would be to use a UK based trustee (also a criminal) who would find ways to conceal correct information from any register).**
(d) **If the object is to prevent (legal, but questionable) tax avoidance; the record of the tax avoidance industry shows ingenuity in circumventing a rules based regime – but the disclosure proposals would make it far more difficult for such activities to be promoted**

Question 2: Is the suggested definition of leasehold appropriate?

(a) **To apply this to rack rent leases (which are for occupational use and do not have a capital value) is not appropriate. Such properties do not have any substantive capital value and the burden coupled with the problems associated with the regime as currently promulgated creates considerable "overkill".**
(b) **A minimum threshold value would avoid the regime applying to land interests of low value**
(c) **The original term is an irrelevant factor. What is important is the length of the outstanding term (as only this has any value) plus – where applicable – any renewal rights or options**
(d) **The original term of a lease could be only 10 years; but, for example, if it contains a perpetual renewal option, it is converted by the Law of Property Act 1922 into a lease for 2,000 years. In this case, the "original term" would still be 10 years, so it would be exempt. This is an obvious loophole to any experienced property lawyer.**

Question 3: Will setting the leasehold definition at leases over 21 years create any unintended consequences?

(a) **It is the *residue of the term* that counts. If a lease had been granted in 2001 for a term of 21 years from 1999, the true term on grant would have been 19 years. It would not have been registrable at the Land Registry then as before 2003 leases granted for terms of less than 21 years (from the date of the lease) would not have been registrable.**

(b) **Much depends on the location. Residential properties in very high value parts of central London have considerable worth – even when they are for shorter terms. Most (but not all) other locations will not generate high values unless the term is closer to 60 years as the Council of Mortgage lenders advises their members not to lend on shorter leases.**

Question 4: Do you agree that the definition of beneficial owner for the new overseas register should be aligned to the definition of PSC in the PSC regime?

This seems a sensible proposal. Whilst the definition of a person with significant control for the purposes of the PSC regime is not a simple concept for companies and individuals to understand or apply, the consistency provided by using the same definition is a positive thing, not least because it is aligned with money laundering requirements. Applying a different test to this proposed regime is likely to cause even greater confusion.

Question 5: Do you agree that entities that are not similar to UK companies limited by shares should use these adaptations to identify their beneficial owners?

(a) **A call for evidence of what adaptations are used in practice would be appropriate – coupled with a disclosure duty for entities taking up interests in UK property.**

(b) **Where legal entities do not have share capital, it may (for consistency) be preferable (where appropriate) to use the adaptation that is applied for LLPs in relation to the PSC regime. In particular, the first condition for LLPs (adapted from the condition relating to holding shares) covers only rights to share in assets on a winding up. Right to profit is addressed, on a lesser footing, through the guidance on the meaning of significant influence or control condition.**

(c) **The other proposed adaptations resemble those already found in Part 21A Companies Act 2006 in relation to the PSC regime.**

Question 6: Do these adaptations provide sufficient flexibility in the beneficial owner conditions to apply to most legal entities? If not, what additional adaptations should there be?

Yes.

Question 7: What methods of raising awareness would be most effective?

(a) **In the case of acquirers of new property, advisers will be heavily involved, so we would suggest focussing a lot of communications on lawyers, accountants, land and estate agents and surveyors (who could raise awareness when a prospective purchaser is considering an acquisition).**

(b) **In the case of existing property owners, HM Land Registry would seem best placed to contact the registered owners, as to their imminent new obligations.**

(c) **In the case of entities participating in public procurement, this information could perhaps be communicated in invitations to tender and on government websites. Perhaps all companies which have tendered in a certain period (the last two years, for example) could be contacted directly.**

Question 8: Do you have any information that is relevant to our assessment of the cost and benefits of the policy to businesses, society and the economy?

(a) **The issue of fraud is a significant problem. This has been exacerbated by the Land Registry "open register" coupled with the dematerialisation into electronic format – such that cases of property registration or vendor identification fraud are reported monthly (and almost certainly arise in far more cases which are not reported. The Land Registry reports that fraud is one of its significant challenges. The cost of fraud is massive and the percentage of cases which the police are capable of addressing given their current resources is (according to media reports) unacceptably low.**

(b) **Wider publicity of beneficial ownership has become an open door to the criminal fraternity to access publicly available information to pursue criminal activities and facilitates identity fraud and registration fraud. The integrity of the Land Registry Register has to be protected – but the costs of indemnity claims – and the offloading of these onto the conveyancing professional community (refer to the recent reported cases) will inevitably increase the costs by involving greater due diligence and requirements for insurance which was previously not needed as the risks used to be negligible.**

(c) **If a new constraint is engineered, it needs to be one which is manageable – otherwise investors may turn away from the UK.**

(d) **The mechanism put in place must fit into the conveyancing process – otherwise a separate specially orchestrated conveyancing process will be required for all situations where the buyer, seller or lender ("mortgagee") has any overseas threshold level of beneficial ownership. This process would be expensive to implement. The reason is that all conveyancing is organised on the basis that a commitment is binding when contracts are exchanged – and the completion (and payment of monies) occurs later. Still later than this – after completion has been effected, the transaction is registered at the Land Registry. A system where the necessary clearances (effected by obtaining priority searches) cannot be obtained in advance (because there is the possibility of registrations under the new regime not being available or , far worse, being withdrawn on short notice, would result in any transaction involving an overseas entity being "at risk" – not only until completion of the transaction – but until completion of the registration at the Land Registry. That risk cannot be catered for under the current system and a new series of arrangements would need to be created. If it is (even) possible to put these in place, additional expense is inevitable. This would distort the marketplace.**
For example, if an overseas entity has a registration number, and contracts to buy a property – but has its registration withdrawn or cancelled before completion, both seller and buyer and their respective solicitors are placed in an impossible position. This may be appropriate for the buyer for non-compliance with the new regime – but the innocent seller – who carried out all proper due diligence before entering into the sale contract now has a contract which is binding, but unenforceable – and the property is sterilised indefinitely. Whilst it might be possible to provide a "protected" registration (which could not be withdrawn or modified from the date of contracts being exchanged until final completion of registration) such arrangements would appear to run counter to the objective of the proposed new regime.

(e) **Mortgage securitisation – which is quite common in major transactions – sees a number of entities – usually some from overseas – taking a stake in a portfolio of mortgage assets. If the regime affects mortgage lenders, then the UK lenders who are part of the securitisation will be prejudiced if their overseas counterparts fail to register. This would impair a thriving area of the market. Although this would not be a problem at the outset of a transaction (when arrangements could be catered for) the subsequent marketability of securitised assets (or shares of securitised assets) could become problematical.**

(f) **A different approach not involving sterilisation of property interests would avoid the very significant problems which arise under the suggested regime. A system which attaches to the proceeds of sale – rather than the title to the land – might well address these issues. Experienced conveyancers could (if requested) provide more detailed proposals.**

Question 9: What, if any, impact do you think that the proposed policy will have on the UK property market (residential and commercial)? Please describe the impacts and provide evidence.

(a) **For those for whom privacy is a genuine and realistic concern; and for those who (like all property owners) need to identify the registration requirements to qualify for full marketable ownership the proposed regime creates significant barriers. It seems inevitable that, unless adjusted, the regime would have very significant adverse consequences on the market and on the ability of the UK to attract overseas investment. In addition, it may well encourage a flight of overseas investment from the UK as compliance costs of UK investment would be heavier than overseas (although that has to be balanced against the attractiveness of the UK property market for some investors).**

(b) **The blunt weapon of rendering property unmarketable or potentially unmarketable (if registrations are withdrawn or not renewed or new burdens are imposed for renewal) would clearly be a significant discouragement to invest in the UK. If industrialists wish to establish a manufacturing facility here and are faced with additional compliance costs and risk, it will be more difficult to secure such investment and employment possibilities may be lost.**

(c) **No advisor will wisely allow clients to enter contracts with overseas investors – as compliance may not be in place (or have been withdrawn) by completion date. Worse, compliance may be in place at completion; but withdrawn or not renewed by the date the Land Registry commence to deal with the paperwork – so avoiding the transfer despite completion. In the case of leasehold property the seller will find itself (again) bound by the obligations (to pay rent etc.) under the lease – even though the asset had been sold.**

(d) **The potential for a conveyancing impasse with the currently proposed regime is serious and significant. The likely impact would either be (i) to discourage participation in the market by overseas investors or (ii) (and far worse) encourage them to find loopholes to use UK entities and hide their true identities by other means.**

(e) **Where serious international criminal money is involved, no amount of rule setting will work – as history demonstrates that criminals will find ways of circumventing the rules (or simply break them).**

(f) **It would seem that financial confiscation measures are more likely to be effective without risking dislocation to the entire market.**

Question 10: Do you agree that the duration of the period given to overseas entities to comply with the new requirements should be one year?

(a) **Broadly yes, but so long as exceptions are available on reasonable discretionary grounds – some overseas owners are under a disability due to age etc. and should not be discriminated against.**
(b) **For corporate bodies with high value properties the likelihood of well-run organisations should make a period of 12 to 18 months achievable.**
(c) **Discretion – particularly as the initial deadline approaches is important – as the dislocation would be very considerable. A value threshold and discretion would make administration easier – possibly with (self-financing fees for entitlement to any discretionary extension of time)**

Question 11: Is a system of statutory restrictions and putting notes on the register, backed up by criminal offences, a comprehensive way to ensure compliance?

(a) **No, it is far to prescriptive and disruptive to the conveyancing process. Finding a method of conducting conveyancing when transactions are at risk of (subsequent) interdict and quarantine would be expensive – if achievable at all.**

(b) **Particular problems arise in relation to existing statutory rights of tenants- for example how are tenants' enfranchisement rights going to be addressed if their landlord's title is frozen?**

(c) **Pre-existing options could be overridden by the new regime – and so effectively confiscate existing rights of innocent buyers or potential tenants.**

(d) **Pre-existing pre-emption rights would be subjected to similar problems**

(e) **A practical issue is how would tenants be able to deal with their landlords when they have been informed of aa change in ownership; but the title is not then vested in the new "owner"?**

(f) **Further issues include:**

(i) **How can mortgagees protect themselves where they wish to appoint a receiver – and not go into possession?**

(ii) **How can a prescriptively acquired easement over the property be registered if a title is "in limbo" or a transfer is treated as void?**

(iii) **How can solicitors safely accept instruction where their client or the counterparty is an overseas entity and the overseas companies house registration might potentially be revoked?**

(g) **It seems inappropriate to involve criminal law as the burden of proof is "beyond reasonable doubt". It would appear more appropriate to involve civil penalties, or forfeiture of proceeds of a transaction where the burden of proof can be maintained at a "balance of probabilities" likelihood.**

(h) **Is there not a better mechanism available – for example a system where transactions may proceed (particularly where ownership is already in the hands of an overseas entity) if the proceeds of the transaction can be lodged with an independent (or government) body until the issue can be satisfactorily addressed – or the moneys forfeited (subject to relief from forfeiture on appropriate terms)**

Question 12: Do you agree that we should prevent any beneficial interest in the property passing to an overseas legal entity that does not have a valid registration number at completion or settlement?

In theory this is desirable. The question is by what mechanism can this be secured. The current proposals fall short of satisfying the requirements of natural justice, market needs and avoiding "overkill".

Question 13: Do you agree that the most appropriate way to do this would be to void the transfer document?

For the reasons explained, this would undermine the conveyancing system. It is not a sensible way forward – particularly when alternatives which are not nearly so damaging which can be identified.

Question 14: Is there another way that we could achieve this result?

Yes.

Financial sanctions – so all proceeds are frozen or held by government until the compliance position is resolved – without unfairness to bona fide buyers who could not have discovered there might be a problem
Fines and civil penalties – for non-compliance subject to discretionary relief where satisfactory explanation can be provided – which would have materially less adverse impact on the market

Question 15: Which is your preferred option for procurement and why?
[this question has not been addressed]

Question 16: Do you agree that the information on the new register for overseas entities should be the same as the information required under the PSC regime?

Yes (as clarified by the next two sentences), although we note that you also require email addresses. To avoid the beneficial owner being able to veto a transaction by refusing to confirm their details, could the entity be able to register, with a statement to the effect that they have sent out a notice and are awaiting for details to be confirmed (in much the same as a UK company can include this in its register)? Also, should the company only need to get information confirmed in relation to individuals? A UK company only needs details "confirmed" (as defined in section 790M(9) Companies Act 2006) from or on behalf of an individual.

Question 17: Do you agree that entities unable to give information about beneficial owners should be asked to provide information about their managing officers?

Some flexible system should be put in place – a "reasonable" criterion should be applied to producing full details of ultimate ownership.

Question 18: Is there any additional information that we should ask for from entities that are unable to give information about their beneficial owners?

See 17 above

Question 19: Is a requirement for an update every two years appropriate?

(a) **A duty to notify significant changes within a few months might be more appropriate – as the obvious loophole of taking the property out of current ownership immediately after the transaction – and transferring back (for a temporary period of a few weeks every two years – would be adopted by those intent on avoiding the regime.**

(b) **This is unless the proposal envisages that changes in beneficial owners during that 2 year period must also be included?**

Question 20: Would a criminal offence be an appropriate way of enforcing the requirement to update information?

(a) **Civil penalties are more appropriate in the first instance (with the Registrar of Companies and/or HM Land Registry having the power to issue civil penalties).**

(b) **Then criminal sanctions could arise in the case of further (subsequent) failures.**

(c) **(The media report that the police cannot currently handle even a small percentage of the fraud cases that are perpetrated. Throwing more such cases into their supervision will bring the criminal law into disrepute as there is an under-resourcing issue**).

Question 21: Do our proposals achieve the right balance between ensuring compliance and enabling overseas entities to maintain existing assets?
No – for the reasons explained above.

Question 22: Are these mechanisms enough to deal with situations where bidders provide false beneficial ownership information or do not keep their information up to date?

It appears that they are simply inappropriate to the issues involved. Any determined criminal could find ways to circumvent them.

Question 23: Do you think that this provides the correct balance between protecting individuals from harm and ensuring transparency of how properties are owned?

(a) No. Given the identification of residential addresses, the information should have narrower public access than that provided under the PSC regime and should be limited to public bodies and credit reference agencies only.
(b) The individuals should not be required to have to demonstrate the risk to their safety to keep their residential address private.
(c) No UK-based director or shareholder (or PSC) is required to have their residential address easily retrievable from other public records at Companies House in this way. For example, the risk may arise or become more serious after their details have already been made public.

Question 24: Are there additional situations we should consider where protections should be granted?
[This has not been considered in detail]

Question 25: Are there other situations where exemption from putting information on the register should be permitted for entities participating in procurement?
[This has not been considered in detail]

Question 26: How can we best ensure that only legitimate lenders are able to repossess and dispose of a property with a restriction against it?
(a) **Create a register of legitimate lenders – or ask the mortgage lending industry to propose a different solution**
(b) **[It may be this requires further consideration]**

Question 27: We are interested in views and evidence of other commercial transactions that could be disrupted by the proposed restrictions regime.

See answer to question 11 above

Question 28: Are there additional third party impacts that should also be addressed?

See answer to question 11 above

[redacted]

[redacted]

[redacted]

www.taylorwessing.com

TAYLOR WESSING LLP
5 New Street Square, London EC4A 3TW Tel +44 (0)20 7300 7000 Fax +44 (0)20 7300 7100
Website www.taylorwessing.com