



Law Society
of Scotland

Consultation Response

Draft Registration of Overseas Entities Bill

September 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Banking, Company & Insolvency Law and Property and Land Law Reform Sub-committees previously responded to the *call for evidence on proposals for an Overseas companies and other legal entities beneficial ownership register*¹ in May 2017. The Committees welcome the opportunity to consider and respond to the UK Government's consultation on the *Draft Registration of Overseas Entities Bill*.² We have the following comments to put forward for consideration.

General remarks

Relationship with Scottish registers

Clarification is needed as to how the UK Government's proposed Register of Overseas Entities will operate alongside the Scottish Government's proposed Register of Persons Holding a Controlled Interest in Land. There is obvious overlap and therefore the two government bodies will need to address the potential for both duplication and conflict in operating two separate systems. At this stage, our comments should therefore be considered with this concern in mind.

The Scottish land registers and the legislation it is proposed to amend (Schedule 4 of the Bill) are devolved matters and therefore sit within the competence of the Scottish Parliament. We note the Department for Business, Energy & Industrial Strategy "will continue to work with the Devolved Administrations as the

¹ <https://www.gov.uk/government/consultations/property-ownership-and-public-contracting-by-overseas-companies-and-legal-entities-beneficial-ownership-register>

² <https://www.gov.uk/government/consultations/draft-registration-of-overseas-entities-bill>

proposals are refined.”³ Additional information is needed as to how this will operate and further consultation with Scottish stakeholders may be required.

We are also concerned that the proposed registration system as presented in the Bill would be likely to add to the delays in the registration procedure already being experienced in Scotland. The Keeper of the Registers of Scotland would need to be permitted additional resources to discharge her increased responsibilities and safeguard the integrity of the Scottish property registers and the accuracy of the information recorded.

We also note that this system would create an additional expense in any transaction affecting land in Scotland as the Bill would require those acting for the transactions parties to establish whether any party is, or should be considered, a registered overseas entity even where this is *prima facie* not the case (eg where a relevant party is a Scottish partnership).

We also note that the proposed register of overseas entities is to be maintained by the registrar of companies for England and Wales (Bill cl.3), even where the entity has an interest in Scottish land. This will require Scottish solicitors to inspect the register in London in every case. There is a question as to whether this would be acceptable from the perspective of Scottish stakeholders as there is a separate Scottish register of companies, and therefore Scottish registrar.

Beneficial ownership and significant control

We note that the proposed register will 'mirror as far as possible the regime currently in place for UK entities subject to the PSC regime' (ie the requirement to maintain a register of people with significant control over a company under the Companies Act 2006 ss.390C and Schedule 1A).⁴ In this regard, we note the following points.

Schedule 2 para 6 of the Bill states ('condition 4') that the 'beneficial owner' of an entity includes a person who may exercise 'significant influence or control' over the entity. There is no attempt to define the meaning of this phrase for the purposes of the Bill, which is identical to paragraph 5 of Schedule 1A to the Companies Act. Moreover, the Bill does not contain provisions equivalent to para 24 of Schedule 1A which requires the Secretary of State to publish 'guidance' (which is subject to parliamentary control) about the meaning of 'significant interest or control'. We do not consider it to be satisfactory that the question of whether a criminal offence has been committed under the Bill's proposals should depend on the precise meaning of this undefined phrase. Even if guidance were to be given, this might not be sufficient to give the level of clarity necessary where a person may find themselves guilty of a criminal offence.

³ See page 3

⁴ Explanatory Notes, paragraph 23

Schedule 2 paragraph 18(3)(d) of the Bill provides that a person has a 'majority stake' in an entity if that person exercises 'dominant influence or control' over that entity. 'Dominant influence or control' is not defined (and this term does not appear in the companies' PSC legislation). For the reasons indicated above, we consider that this phrase should also be given further definition.

Response

Types of overseas entities that may not have beneficial owners or managing officers

Question 1.1: Are there any types of overseas entities that do not have beneficial owners and/or managing officers, who are in scope of the regime but would not have a route to be able to comply? Please provide evidence.

We are not aware of any specific types of overseas entities that would be within the scope of the regime but would not have a route to comply. However, as commented in our previous response, if a company is not sufficiently similar to UK companies limited by shares, there may be practical difficulties in determining how the relevant company ought to comply.

Furthermore, the Bill only applies to an 'overseas entity' as defined in cl.2, ie a 'legal person' governed by the law of a country or territory outside the UK. However, this raises a couple of concerns:

(a) 'Entity' is not defined. However, a statutory definition would be preferable in case there is difficulty particularly with foreign concepts of what exactly constitutes an 'entity' and its 'legal personality'.

Practitioners and the registers may have difficulty in applying this to unfamiliar foreign judicial concepts.

(b) No attempt is made to control the use of an individual as (eg) disponent where that person is acting as nominee of an (unregistered) 'overseas entity'. We are concerned that this could leave the system open to abuse. There may be an answer if the relationship between this proposal and the Scottish register noted in 3 above is adequately clarified.

Power to exempt types of overseas entities from the requirement to register

Question 2.1: Is it reasonable to keep the current requirements (described at paragraphs 18 and 19) applicable as they relate to foreign governments and public authorities as beneficial owners? If not, how can the regime be modified to keep with the intent of the policy?

We have no comment on this question.

Question 2.2: Do you consider that foreign governments and public authorities should be exempt from the requirements to register in the overseas entities register? Please provide evidence as to why this should or should not be the case.

We have no comment on this question.

Question 2.3: Are there other types of overseas entities that you consider should be exempt from the regime? If so, please explain why and provide evidence.

We consider that all legal forms that can hold property should fall within the scope of the new regime.

Question 2.4: How should the power described at paragraph 18 be exercised to apply in a coherent and workable way in relation to these types of entities (referred to at Questions 2.2 and 2.3 above)?

We have no comment on this question.

3. Power to modify the application of the regime for types of overseas entities

Question 3.1: Are there other types of overseas entities that you consider should have their application and update requirements modified in relation to an application to register in the overseas entities register and to their updating duty? If so, please explain why and provide evidence.

We have no comment on this question.

Question 3.2: Do you consider that the application requirements for those overseas entities that have already declared their beneficial ownership information on a public register overseas should be modified? Please provide evidence as to why this should or should not be the case.

We have no comment on this question.

Question 3.3: How should this power be exercised to apply in a coherent and workable way in relation to the types of entities described at Questions 3.1 and 3.2 above? For example, what criteria should be used to determine which registers may be considered “equivalent”?

We have no comment on this question.

4. Registration of entities unable to identify their beneficial owners

Question 4.1: Should it be possible for an entity to register without providing full details of its beneficial owners in the circumstances explained in paragraph 25?

We have no comment on this question.

Question 4.2: If so, should this be the case only in specified circumstances, and, if so, what should these be (for example, for those entities that already own land in the UK when the provisions commence)? Please provide examples.

We have no comment on this question.

5. Scope of the prohibitions to certain dispositions relating to land

Question 5.1: Do you agree that the inhibition in Northern Ireland shouldn't capture the granting of leases for less than 21 years without occupation (noting the inhibition also currently doesn't capture leases for less than 21 years with occupation)? If not, please provide evidence of why.

We have no comment on this question.

Question 5.2: Are there any unintended consequences if applications for registration as a proprietor by a "prescriptive claimant" in Scotland are prevented in the situation where either the prescriptive claimant is the overseas entity that is not a "registered overseas entity" within the meaning of the Bill, or where the application is in relation to land owned by an overseas entity that is not a "registered overseas entity"? Please provide evidence.

We have no comment on this question.

6. Power to disapply the effect of the prohibitions placed on land

Question 6.1: Do you consider the Bill should include provisions to allow an "appeal" of the effect of the prohibitions placed on the property, and/or a power by the Secretary of State to "disapply" the effect on a case-by-case basis? If so, in what scenarios should this be used, and what evidence should be required? Given the concept of owner's powers is unique to England and Wales, should any such provisions only apply in England and Wales?

We consider such provisions should only apply in England and Wales.

7. Exceptions to prohibitions placed on land

Question 7.1: Are there other exceptions, in respect of England and Wales, Scotland or Northern Ireland that you consider should be included in the Bill? If so, please explain why and provide evidence. What type of evidence could be provided to demonstrate exception?

We are not aware of any such exceptions.

For further information, please contact:

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