



Law Society
of Scotland

Consultation Response

Overseas companies and other legal entities
beneficial ownership register: call for evidence

May 2017



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 Property and Land Law Reform and Banking, Company and Insolvency Law Sub-committees welcomes the opportunity to consider and respond to the Department for Business, Energy * Industrial Strategy's *call for evidence on proposals for an Overseas companies and other legal entities beneficial ownership register*.¹

The Sub-committees have the following comments to put forward for consideration.

General comments

We fully support the aims of the proposal in increasing transparency and in seeking to combat money laundering, corruption and terrorism. Any action that prevents or reduces such activities is strongly to be welcomed.

We do not condone the use of legitimate business structures for criminal intent and purposes and are fully supportive of proportionate, appropriate and targeted measures aimed at preventing this. As the professional body for Scottish solicitors we would take robust disciplinary action against any Scottish solicitor who was involved in facilitating any criminal activity. However, in considering any proposed measures, care should also be taken to avoid introducing measures which may impose a burden on legitimate businesses and commercial activities but which may not effectively dissuade those businesses or individuals intent on criminal behaviour.

Furthermore, the Scottish legal profession serves clients across the globe. We recognise the benefits which may result from a more transparent economy and welcome measures to encourage investment.

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

Lastly, we note that the Scottish Government has also been doing work on increasing transparency of land ownership in a Scottish context. The Property and Land Law Committee previously responded to the Scottish Government's consultation on *Improving Transparency in land ownership in Scotland*.²

We would like to offer the following comments in response to the questions posed.

Response to questions

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?

Yes, we agree that all legal forms that can hold property should fall within the scope of the new Overseas Companies Beneficial Ownership Register (OCBOR) requirements.

Question 2: Is the suggested definition of leasehold appropriate?

The term "leasehold" is an English/Welsh and Northern Irish law term: as it is not recognised under Scots law, it might cause confusion and if legislation is introduced it should be drafted using the Scottish terminology where it introduces obligations with Scottish relevance.

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

We understand the reasoning for including leases of 21 years or more within the requirements of the register and consider that the benefit of a single UK wide period outweighs the disadvantages of having various lease periods for each jurisdiction.

We are not aware of any unintended consequences which are likely to transpire provided that there is clarity as to how to take into account options to extend.

See also comments regarding use of the terms "leasehold" at question 2.

² <https://www.lawscot.org.uk/media/978135/prop-improving-transparency-in-land-ownership.pdf>

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?

Yes, aligning the definition of beneficial owner to the PSC regime should help to ensure coherence between the PSC regime and the proposed regime for overseas entities.

However, it is important to avoid replicating the issues which have arisen under the PSC regime regarding its application to banks and other lenders who have taken security over shares in Scottish companies. A possible interpretation of paragraph 23 of Schedule 1A to the Companies Act 2006 (which refers to "rights attached to shares", but does not expressly refer to "shares") is that a bank or other lender which has taken fixed security over the shares of a Scottish company could become registrable under the PSC regime. While it is clear that this was not the intention, concerns have been raised that this could nevertheless be a consequence of the wording of that legislation. If the definition under the PSC regime is to be replicated for the proposed regime for overseas entities, it is important that this particular problem is not replicated for the new register. We do not consider that it is appropriate for a bank or other lender to be considered to own or control an overseas entity merely because it has taken security over shares or membership interests in such an entity.

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?

In principle, this approach seems logical but it is possible that difficulties may be encountered in practice. It could be helpful to have some further guidance around this issue to provide greater clarity.

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?

At present the adaptations appear to provide sufficient flexibility to cover most legal entities.

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

Solicitors and other conveyancing professionals should be made aware of the changes. We expect that in many cases they would take the initiative and inform overseas clients of the new obligations. Many professional bodies, membership organisations and individual businesses would be likely to circulate information on legal changes such as this in any case but BEIS could contact relevant stakeholders to ensure such information is communicated if it was felt that a special approach might be needed for this particular measure.

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?

Any additional requirements to be complied with in the course of a transaction are likely to generate costs to one or both parties. However, there are also costs generated by crime, terrorism and money laundering as well as the broader benefits of undermining these activities.

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.

We have no statistical or other research to offer on this point.

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 year seems a fair period to allow overseas companies to ensure that they comply with the new requirements.

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?

If it is clear from the register that a particular property is owned by an overseas company, this should ensure that entities are aware that they need to take the OCBOR requirements into account.

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?

We are concerned that any new system should not prevent or act as a disincentive to completion of property transactions in Scotland.

We would favour the relevant date for a purchasing entity requiring a valid registration being at the date of settlement. The date of settlement is fixed by the contract/missives and would allow purchasing entities an element of certainty as to the date by when they require to satisfy the OCBOR requirements.

We do not consider the date of concluding the missives/contract to be an appropriate date as it is generally an uncertain date and no property interest transfers at that date.

We also do not consider the registration date to be appropriate as this could be many weeks or even months after settlement of the transaction. A situation might therefore arise where, although there had

been a valid registration of the purchasing entity on the OCBOR at the date of settlement, by the time of registration of their property conveyance at the Land Register (which may be some time after the date of settlement) the OCBOR registration could have expired.

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

Voiding the transfer document works to ensure that the company attempting to acquire a real right in property, if in default of its obligations under the proposed register, would not be able to acquire that right.

This would increase the level of diligence required on the part of the seller/seller's solicitor to ensure that an overseas purchasing company was compliant with its obligations under the register. This is a further reason why the date of compliance needs to be easily ascertainable. It should also be noted that even if the seller had ascertained that the purchaser was up to date with their registration obligations in temporal terms, this would be no guarantee as to the accuracy of the information registered.

However, this could also cause prejudice to the seller, not least because they might incur legal liabilities if they were still registered as the owner of the property.

One possible solution would be for the property to vest in the Crown if the purchaser was not in compliance at the relevant date. This would ensure that the vendor would not incur liabilities and similarly that they would not benefit from a windfall gain by holding both title and the purchase price.

Furthermore, in relation to the control of sales the suggestion seems to be that a sale by a non-compliant seller would be void. If a transfer document had been delivered and the price paid, then the consequence of the seller's failure would be that (i) they had received the purchase price, and (b) still retained title to the property. This prejudices the purchaser more than the seller.

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

We have no comment on this question.

Question 15: Which is your preferred option for procurement and why?

We have no comment on this question.

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?

This seems to be sensible.

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

This seems to be sensible.

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

We do not think that that is any such additional information which should be required.

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

We have no comment on this question.

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

Ultimately, the question of whether or not to introduce a criminal offence for failure to update information is a matter for policymakers.

However, in our response to the consultation on improving transparency in land ownership in Scotland we took the view that, on balance, a failure to comply with registration requirements should not constitute a criminal offence. In particular we highlighted potential difficulties in identifying who in fact is in “control” – which relates to overseas companies as it would to domestic companies. We did not think a criminal sanction would be effective or justified in that context, particularly considering the potential harm involved should there be a failure to comply.

One possibility might be to introduce a civil penalty, or perhaps automatic deregistration – if the foreign entity failed to comply with the requirement to update records – which might be more appropriate.

There is a further question as to the effectiveness of introducing a criminal offence which applies solely to overseas companies, many of which are likely to be beneficially owned or controlled by individuals over whom the UK cannot easily claim jurisdiction. Without effective enforcement, the creation of such a criminal liability would be of limited purpose. In this context also, a civil penalty may be more effective as it would potentially be easier to ensure enforcement in practical terms, for example a judgement in a UK court setting a particular penalty for failure to comply could be enforced against other assets held in the UK.

Question 21: Do our proposals achieve the right balance between ensuring compliance and enabling overseas entities to maintain existing assets?

It seems that the proposals would be likely to achieve an appropriate balance but it is not possible to answer this question fully until we have seen more detailed proposals.

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?

There are too many uncertainties as to the final form of the proposals to answer this question.

We do not consider that it would be appropriate if failure to provide an update were automatically to trigger the same sanctions as providing false information. Careful drafting could mitigate against the chances of this distinction being open to abuse.

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

Yes: as referred to above, we think that the register should mirror the PSC register.

Question 24: Are there additional situations we should consider where protections should be granted?

The PSC Register has not yet had a chance to bed in: it is, therefore, not yet clear if there will need to be additional provisions.

Question 25: Are there other situations where exemption from putting information on the register should be permitted for entities participating in procurement?

We have no comment on this question.

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?

We note that it would be almost impossible to define “legitimate” lenders without either greatly restricting the definition (eg, those holding a banking licence issued by the UK Government or recognised state) or producing such a lengthy list or wide definition as to render the exercise pointless. We also note that lenders come in every size and form. Directors may lend to their companies. Third parties such as family, friends, high-net-worth individuals or family and small private equity businesses may all lend to businesses.

It is also possible for lenders to sell on a security and unless there was also a restriction on selling beyond the tightly controlled group, the asset would pass to the new owner.

The protection, however, is aimed at ensuring that the lender itself cannot take possession of a property and then sell it on unless it complies with the OCBOR prior to sale and so this effectively puts the property under the control of the statutory regime.

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

Until the PSC Register has been in operation for some time, it would be difficult to produce evidence of the effect on commercial transactions. All transactions which are subject to the new regime will, to a certain extent, be “disrupted” as the regime introduces additional procedures which will be both time consuming and have an economic impact. However, the costs associated with this disruption may be outweighed on the other side by the benefits of introducing a register if it succeeds in the overall objectives of increasing transparency and reducing criminal activity.

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

We are not aware of any additional third party impacts that need to be addressed.

For further information, please contact:

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