



Law Society
of Scotland

Economic Crime (Transparency and Enforcement) Bill

Law Society of Scotland – briefing for Second Reading

March 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 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.

We have previously responded to the UK Government's consultations on *Property ownership and public contracting by overseas companies and legal entities: beneficial ownership register in May 2017*¹, and on the Draft Registration of Overseas Entities Bill in September 2018². In March 2019, we provided written evidence to the Parliament's Joint Bill Committee on the Draft Registration of Overseas Entities Bill³.

We now welcome the opportunity to consider and provide comment on the Economic Crime (Transparency and Enforcement) Bill⁴ ahead of the Bill's passage through the House of Commons on 7 March 2022.

General remarks

The Scottish legal sector is strongly committed to fighting economic crime and Scottish solicitor firms vehemently take their AML responsibilities seriously, taking a front-line defence approach through their AML processes and measures to ensure they diligently prevent, identify and report money laundering activity. As the professional body and AML supervisor for Scottish solicitors, we fully support the aims of the Bill in increasing transparency and its provisions which seek to combat money laundering, corruption and terrorism.

We deplore the use of legitimate business structures for criminal intent and purposes and are fully supportive of proportionate, appropriate and targeted measures aimed at preventing money laundering activities and we would take decisive and robust disciplinary action against any Scottish solicitor who was

¹ https://www.lawscot.org.uk/media/9489/prop_bci_lss-response_overseas-companies-beneficial-ownership-register-may-2017.pdf

² https://www.lawscot.org.uk/media/361020/17-09-2018-ban-pllr_lss-response-to-draft-roe-bill_september-2018.pdf

³ https://www.lawscot.org.uk/media/362324/18-01-2019_bci_pllr-plr-draft-written-evidence-ocbor-bill-final.pdf

⁴ <https://bills.parliament.uk/bills/3120/publications>

involved in facilitating this. The impact of money laundering activity is a serious crime which touches upon society as whole and as such any measures that prevents or reduces such activities is strongly welcomed.

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.

In addition, disclosure alone will not be sufficient to meet the aims of the regime but needs to be coupled with active monitoring and enforcement of the provisions. Adequately resourcing law enforcement agencies may help to meet to address the issues at which the regime is targeted.

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.

The Economic Crime (Transparency and Enforcement) Bill is a significant measure which been introduced as part of the Government's urgent response to the Russian invasion of Ukraine. It contains 55 clauses and three Schedules. The bill is fast-tracked legislation, and all House of Commons stages are being considered on 7 March 2022. No dates have yet been confirmed for the House of Lords proceedings. Acknowledging that much of the Bill has been subject to pre-legislative scrutiny, we highlight the need to scrutinise this legislation carefully and not to sacrifice that scrutiny for speed. However, the nature of the fast-evolving threat which economic crime, especially in the context of the invasion of Ukraine, poses to the community at large is potentially devastating, so the law's response must match the nature of the threat.

This does not mean that there should not be close post-legislative scrutiny of how the legislation works in practice and each legislature in the UK will need mechanisms to ensure that scrutiny will take place in a searching and comprehensive manner.

Registration of overseas entities

Registration at Companies House

We consider there will need to be a short time limit for processing of the information submitted to Companies House under this regime so that it does not unfairly delay the conveyancing process and those inspecting it know that they can rely on the information recorded. A consistent timescale for making entries or amendments would help to ensure that there is the increased transparency which the creation of the register is intended to achieve. Consideration could be given to the possible use of some form of interim check of the basic information required which would allow transactions to proceed, with Companies House to review the detail in line with normal processing of applications. However, any such provision would need to be on the basis that a land transaction would not be unwound at a future date if Companies House were to decide that the application for registration could not be accepted.

We consider that there should be certainty as to the maximum time for processing any application for registration, or for accepting an annual update (including the shortening of an update period). If it was

possible for an application for registration to be held up for any length of time, then there is the potential for a party to a contract involving the transfer of property to be put in breach of their obligations as a result of such delays by Companies House or parties would need to provide for flexibility for the date of settlement. In some cases, where the date of entry is time critical (for example, at the year end, or where settlement is linked to other transactions), the need to provide for flexibility as to the date of entry to allow for uncertainty arising from delays in registration would likely have an adverse impact of parties.

Scottish land registration

We highlight the importance of respecting the devolution settlement. The Scottish land registers and the legislation the Bill proposes to amend under Schedule 4 are devolved matters and therefore sit within the competence of the Scottish Parliament. We note previous commitment from the Department for Business, Energy & Industrial Strategy to “continue to work with the Devolved Administrations as the proposals are refined.”⁵ Under section 28(7) of the Scotland Act 1998, the UK Parliament has the power to make laws for Scotland. The exercise of this power is subject to “the Legislative Consent” or “Sewel” convention, being that the UK Parliament will not normally legislate on a devolved matter without the consent of the Scottish Parliament as set out in section 28(8) of the Scotland Act 1998. We note that the Explanatory Notes to the Bill indicate that the Legislative Consent Motion process will be engaged in respect of clauses 1 – 39 and Schedule 4⁶.

Clarification is needed as to how the UK Government's proposed Register of Overseas Entities will operate alongside the Register of Persons Holding a Controlled Interest in Land in Scotland⁷. There is obvious overlap and therefore consideration is required as to the potential for both duplication and conflict in operating two separate systems.

We are 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. It will be necessary for the Keeper of the Registers of Scotland to be afforded additional resources to discharge her increased responsibilities and safeguard the integrity of the Scottish property registers and the accuracy of the information recorded.

We are concerned that the proposed registration system as presented in the Bill would be likely to create additional risks for purchasers in the purchase of property from overseas entities.

Dispute resolution

Whether or not an entity has legal personality will be a matter of fact under the law of the relevant jurisdiction. We do note that there is a potential for a dispute to arise if an entity considers it does not meet the requirements for registration and Companies House takes a different view (or even vice versa). We

⁵ See page 3

⁶ Explanatory Notes, Annex

⁷ See The Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021

consider that in the first instance it would be appropriate for advice to be sought from an independent expert, competent to advise on the law of the relevant jurisdiction. In the longer term, there may be merit in guidance notes or similar being produced by Companies House, including a list of those organisation types which are accepted as being overseas entities and those which are not.

At the same time, we acknowledge that disputes might nevertheless arise and consider that it should be possible to lodge an appeal and go through a dispute resolution process. If the dispute involves determining the application of the Bill in relation to a particular type of entity, we consider it most appropriate that this be resolved by the courts, which would allow Companies House and the relevant party/parties to lead evidence on foreign law as a matter of fact. We note that if no such system was established, the offence mechanisms would apply. We note that there is also a potential for the Keeper of the Land Register in Scotland to reject an application if there were concerns although there is a question as to the degree to which the Keeper would be under a duty to form a view.

Criminal offences

The question of whether or not to introduce a criminal offence for failure to update information (clause 8 and Schedule 4, Part 2, paragraph 10) is a matter for policymakers. However, we have concerns that this is not a practicable or efficient method to ensure compliance. We note the potential difficulties in identifying who in fact is “in control” of an entity. We do not think a criminal sanction would be effective in that context, particularly considering the potential harm involved should there be a failure to comply.

There is a further question as to the effectiveness of criminal offences in the context of overseas entities, 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 criminal liability is likely to be of limited purpose. We note the enabling provisions in clause 38 which if utilised, would enable financial penalties to be issued rather than prosecuting an offence. Financial penalties may have limited effects in deterring those who are determined to circumvent the regime.

Comments on the Bill

Part 1: Registration of Overseas Entities & Schedules 1, 2 and 4

Clauses 1 & 2 (Introduction)

Clause 1 provides an overview of Part of the Bill. We have no particular comments.

Clause 2 sets out the definition of “overseas entity”, being a “legal entity that is governed by the law of a country or territory outside the United Kingdom”. We note the following concerns:

- (a) 'Entity' is not defined. 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, for example, disponent where that person is acting as nominee of an (unregistered) 'overseas entity'. Consideration is required as to whether the Bill's aims will be met by considering only 'legal personality'. The same ends can often be achieved by other means, for example, the use of trusts. We are concerned that this could leave the system open to abuse and thereby circumvent the aims of the regime.

We consider that there may be difficulties faced by those acting for purchasers in assessing whether an overseas entity is a legal person under foreign law. We anticipate that very few Scottish solicitors will be qualified to advise on the foreign law affecting each overseas entity. The example of a partnership as understood in the UK may be instructive here. In Scotland, a partnership has separate legal personality⁸; in England, however, it does not. We anticipate that similar situations will arise in foreign jurisdictions where it will not be clear whether an entity has legal personality. We note that in the event of there being uncertainty, there is the potential for the over-registration of entities, which could lead to further confusion and frustrate the objective of transparency.

Clause 3 – 6 and Schedules 1 and 2 (The register and registration)

Clause 3 gives effect to the establishment of the register and provides that the register of overseas entities is to be maintained by the registrar of companies for England and Wales, even where the entity has an interest in Scottish land. We note that checks will have to be carried out in both the Companies House register and with Registers of Scotland.

Clause 4 sets out what must be provided in an application for registration, with the required information set out in Schedule 1.

In relation to paragraph 3 of Schedule 1, we consider that it should be sufficient that the beneficial owner's address be that of a contact address at which they are able to be reached, such as a business or service address. For privacy reasons, we do not consider they should be required to give their private residential address although we note the terms of clause 22 in respect of residential addresses.

We note that the date on which the individual became a registrable beneficial owner is part of the information to be provided under paragraphs 3(1)(d), 4(1)(e) and 5(1)(f). While this is likely to be clear and demonstrable in the case of voting rights or ownership of shares, establishing the date on which an individual "... actually exercises, significant influence or control..." may be hard to demonstrate if the control is demonstrated by a pattern of behaviour over time.

Schedule 2 sets out the meaning of "registrable beneficial owner" and "beneficial owner".

⁸ See Partnership Act 1890

We note that “the information aspects of the register will mirror as far as possible the regime currently in place for UK entities subject to the PSC regime”⁹, which refers to the People with Significant Control (PSC) register which was implemented in the UK in June 2016. Generally, we consider that 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, the PSC regime has particular impacts on corporate finance in Scotland, as different to England and Wales.

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.

Scottish legal commentary has noted that this language from the PSC regime disproportionately affects access to finance for Scottish companies and reduces the attractiveness of incorporating in Scotland. We have raised this point in a number of previous responses and would strongly encourage the Government to consider a reformulation of this language.

Schedule 2, paragraph 6 of the Bill sets out the conditions under which a person is a “beneficial owner” of an overseas entity or other legal entity. The paragraph provides (condition 4) that the ‘beneficial owner’ includes a person who has the right to exercise, or actually exercises, “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 the same as paragraph 5 of Schedule 1A to the Companies Act.

In addition, the Bill does not contain provisions equivalent to paragraph 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 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.

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

⁹ Explanatory notes, para 21.

defined (and this term does not appear in the relevant legislation establishing the PSC regime). For the reasons indicated above, we consider that this phrase should also be given further definition.

In Schedule 2, paragraph 23(4) and (5), we consider that further clarity is required in relation to the definition of foreign limited partner. It is not clear what “arrangements” means (paragraph 23(5)(a)), nor the scope of characteristics which the Secretary of State might provide for in delegated regulations (paragraph 23(5)(b)). It is therefore unclear if the proposed delegated powers could be considered appropriate.

Clause 7 – 8 (Updating)

Clause 7 sets out the requirements for a registered overseas entity to update the register.

Where a registered overseas entity has failed to update the information in line with clause 7, then it is not to be regarded as being a “registered overseas entity” until it remedies that failure by virtue of the provisions of Schedule 4, paragraph 9 of the Bill (see paragraph 9(2) of the new Schedule 1A of the 2012 Act).

We expect that this will mean that the Keeper would require to reject any relevant application for registration of a qualifying registrable deed. Accordingly, the Register of Overseas Entities must show not only the date of registration of the overseas entity, but also the date to which the register has been updated and include the extent of the relevant “update period” which is 12 months by default (clause 7(7)) but can be shortened by the entity (clause 7(8)).

As referred to above, clause 8 creates an offence of failing to update the register of overseas entities. Subsection (2) provides that a person guilty of an offence under clause 8(1) is liable on summary conviction to an initial fine as well as a daily default fine (of currently up to £500) for continued contravention. These penalties may have limited effects in deterring those who are determined to circumvent the regime.

Clause 9 – 11 (Removal)

We have no comments.

Clause 12 - 16 (Obtaining, updating and verifying information)

We have no comments on clause 12.

Clause 13 provides for the service of an information notice requiring provision of details by an individual of legal entity. The clause provides an exemption for “any information in respect of which a claim for legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings” (clause 13(4)). While this formulation appears in other legislation, we consider that it is outdated and potentially confusing. What was once termed ‘confidentiality of communications’ is increasingly referred to as ‘legal professional privilege’ in practice.

The concept of legal professional privilege is well-recognised in Scots law and the Supreme Court in the case of *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another*¹⁰ indicated that the law of privilege in Scotland is substantially the same as in England. On that basis we consider consistency of description to be preferable.

We have no comments on clauses 14 - 16.

Clauses 17 – 18 (Exemptions)

We have no comments.

Clause 19 (Language requirement)

We have no comment.

Clause 20 (Annotation of the register)

We have no comments.

Clauses 21 – 25 (Inspection of the register and protection of information)

We have no comments on clauses 21 – 23.

Clause 24 is an enabling provision for the Secretary of State to make regulations in relation to the protection of information beyond the date of birth and residential address of a registrable beneficial owner or managing officer in relation to an overseas entity. As the provisions are enabling, it is difficult to assess whether the Bill provides sufficient protections.

Given the potential nature of the circumstances in which an individual will wish to apply to have information protected, we consider such applications should be given high priority in the registration process.

As it is likely that the decision as to whether or not to accept an application will be at the discretion of the Registrar, it is important that there are clear and thorough guidelines for this process. We suggest that careful consideration be given as to “the information to be included in and documents to accompany an application” under clause 24(3)(c) - victims of abuse, intimidation, or threats may find it difficult to obtain certain information or documents, particularly if this is required within a short period of time. It is essential that the registration requirements do not cause harm to individuals at risk.

Clause 25 confirms that nothing in clauses 21 or 23 authorises or requires a disclosure of information which would contravene the Data Protection Act 2018. We consider this provision appropriate to avoid any uncertainty between the regimes.

¹⁰ [2013] UKSC 1

Clauses 26 – 30 (Correction or removal of material on the register)

We have no comments.

Clause 31 (False statements)

Clause 31 provides that it is an offence for a person knowingly or recklessly to deliver or cause to be delivered to the Registrar “any document that is misleading, false or deceptive in a material particular”; or to make a “statement that is misleading, false or deceptive in a material particular”. This provision therefore criminalises reckless, as well as intentional, misrepresentations.

The potential penalties for sending an inaccurate document are significant where this could be done in error (recklessly) rather than intentionally.

Clause 32 – 33 and Schedule 4 (Land ownership & transactions)

Clause 32 provides for amendments to be made within the Bill’s schedules in relation to land ownership. The relevant provisions concerning Scotland are found in Schedule 4.

Under clause 33(6), the Secretary of State will have power to make regulations, subject to the affirmative resolution procedure, to determine the meaning of “exempt overseas entity”. We are concerned that this could raise key policy considerations and so we do not consider that it is appropriate for regulations. This goes to the heart of the issues the legislation is seeking to address and should be set out in the Bill itself.

Turning to Schedule 4 which amends existing land registration legislation in Scotland, we consider that there is potential for some differences in the manner in which the Bill’s objectives will be achieved in the different jurisdictions. As different to England, Wales, and Northern Ireland, there will not on the face of the Land Register be a “red flag” showing that a title is currently held by an unregistered overseas entity. The reform of the Scottish Land Register by virtue of the Land Registration etc. (Scotland) Act 2012 incorporated as a principle that the title sheet should deal only with title matters.

We consider that there is scope for delay in the conveyancing process where it is clear that a seller or a purchaser is governed by a foreign jurisdiction but has not been registered as an overseas entity. In such circumstances, it will be necessary to establish that the seller or purchaser is not a registrable overseas entity. As mentioned above, that analysis is likely to depend upon a composite analysis of the effect of the UK Act, as interpreted under UK legislation; and the nature of the seller or purchaser in terms of the jurisdiction under which it was incorporated. This would almost certainly require input from lawyers in two different jurisdictions, which may create difficulties in reconciling two separate pieces of advice. In this scenario we would anticipate that there may be further delays if the Keeper were to carry out separate checks.

Through the previous consultation on these provisions, we had considered it necessary for there to be protection for those purchasing in good faith.

We had considered that there was potential for difficulty for a purchaser in particular circumstances. In Scotland, the process of the registration of land can take a number of months. Within that period there is always a risk that the application is rejected, and a purchaser has to re-present the application to the Keeper. While a solicitor may undertake all the necessary diligence at the time of purchase to establish that the seller is duly registered and its records are up-to-date, if the entity ceases to update or removes itself from the register after the date of settlement and the application is thereafter rejected, a purchaser may not be able to obtain valid title.

Such circumstances have the potential to result in the overseas entity both retaining the property and having the proceeds from the sale of that property: this seems counterintuitive. We therefore consider that there should be general measures included within the Bill to protect a good-faith purchaser.

We note that this issue has been partially addressed by:

- a) the provision in paragraph 7 of the proposed new Schedule 1A to the Land Registration etc. (Scotland) Act 2012 for the Scottish Ministers to be able to consent to allow certain applications to proceed; and
- b) the obligation on the overseas entity to continue to be registered until completion of registration of the title in favour of the grantee.

We welcome these adjustments.

Paragraph 7 of Schedule 4 inserts a new section 112A (Offence by an overseas entity) into the Land Registration etc. (Scotland) Act 2012. We consider this provision would merit greater clarity. The cross referencing in section 112A(1) to paragraph 2 of the new schedule 1A to the 2012 Act (as per paragraph 9 of schedule 4 of the Bill) is confusing and we suggest that the requirements of the offence be set out in full in section 112A.

Section 112A sets out a definition of “qualifying registrable deed” for the purposes of that section. The new Schedule 1A then sets out a definition “qualifying registrable deed” for the purposes of that schedule. The use of the same defined term, but with two different meanings in different parts of the same Bill is likely to cause confusion.

We have concerns about the drafting, under paragraph 9 of Schedule 4, of paragraph 9(2) and (3) of the new Schedule 1A to the 2012 Act. The provisions would require the Keeper of the Registers of Scotland to refuse to register a disposition if the overseas entity has “failed to comply with the duty in Section 7 of Economic Crime (Transparency and Enforcement) Act 2022 (updating duty)”.

We are concerned that this drafting could create uncertainty and increased risks to purchasers. The drafting implies that there is a difference between the submission and acceptance of the annual update (which may or may not be correct) and compliance with the duties to submit an annual update. If the first, wider interpretation is applied, then on any application for registration of a qualifying registrable deed, each applicant and the Keeper of the Registers of Scotland would need to check that an annual update had

been submitted to (and we assume accepted by) Companies House, but also that the annual update complied with the duty in clause 7 of the Bill.

If all that is required is for the annual update to have been submitted to (and if relevant accepted by) Companies House, we consider that Paragraph 9(3) of Schedule 1A should state that with greater clarity. If there is to be a wider test, then we note that this is in effect imposing a duty on the Keeper of the Register of Scotland to investigate the substance of the annual update, which is not a duty imposed on the Keeper in relation to the initial application for registration of the overseas entity.

Clauses 34 – 37 (Supplementary provision about offences)

We have no comments.

Clause 38 (Financial penalties)

Clause 38 is an enabling provision giving power to the Secretary of State to make regulations conferring power on the registrar to impose financial penalties.

We note the provision that regulations may include provision “conferring rights of appeal against penalties” (clause 38(2)(d)). We consider that in the event that regulations are made by the Secretary of State concerning penalties, this must include provision for appeals. Ideally such provisions relating to appeals would be detailed on the face of the Bill.

Clause 39 (Interpretation)

We have no comments.

Part 2: Unexplained Wealth Orders

We have no comments.

Part 3: Sanctions

We have no comments.

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