

Home thoughts from abroad

Richard Wynne explains how new legislation will impact on overseas entities who own or wants to buy and sell UK property

Legislation for a new register for overseas entities with UK land or property and their beneficial owners was passed by Parliament on 14 March 2022. It will have huge implications for anybody managing an overseas entity that owns UK property or wants to buy or sell UK property. In turn, it will create complications for anybody in the UK who wants to transact with an overseas entity. The sting in the tail is the reduced transitional period from 18 to six months; and 14 September is now the deadline for overseas entities with UK property to complete their registration requirements.

Unless the overseas entity is on the new register it should not be able to register any land transaction with the Land Registry be it a sale, purchase or lease renewal. Moreover, the directors of the overseas entity could face financial penalties or a prison sentence for failing to register or entering into a transaction before registering.

Whilst the legislation currently requires registration, as noted below, at the time of writing this article it is not actually possible to register yet. Until the registration system is in place, the Land Registry will not be able to prohibit the disposal. Consequently, an overseas entity could sell UK property before 14 September but this does not mean that there is no requirement to register.

What is behind the register?

The new legislation is part of the Economic Crime (Transparency and Enforcement) Act 2022. The drive for the new register is part of the strategy for defeating money laundering and intercepting the proceeds of crime. We are all familiar with the anti-money laundering regulations and the bureaucracy it creates in everyday business; it is a fact of life. The same will be true of the new register but, as with the anti-money laundering laws, there are serious consequences to getting things wrong.

Who needs to register what?

The new register will be run by Companies House. The latest update published on its website on 23 June 2022 does not indicate when the register will be available. It records that a draft Statutory Instrument has been laid before Parliament that includes provisions for the operation of the register including the delivery of electronic data and data protection. Clearly the legislative framework is not yet in place for the register to operate.

What we know from the legislation in place, is that any entity such as a body corporate, partnership or another legal person, that is governed by the law of a country or territory outside the UK is an overseas entity for these purposes. Where an overseas entity owns property in the UK it must register and disclose details of its registrable beneficial owners. A beneficial owner is any person who holds:

- More than 25% of the entity's shares;
- More than 25% of the voting rights over the entity;
- The right to appoint or remove directors; or
- The right to or exercises significant influence or control over the entity.

Where a trust or partnership meets the criteria, the beneficial owner includes anybody who can influence or control the trust or partnership. The legislation also specifies that where a person acts as a nominee for another person, the other person is the beneficial owner.

What about trusts?

Identifying a beneficial owner may not be as straightforward as the criteria above suggest and the legislation, as drafted, may not produce the intended result. Non-UK trusts are typically administered by a trustee company in the relevant territory. Where the assets held in a non-UK trust include shares in a non-UK company, the trustee company may register as the holder of the shares in the company's share register, albeit the entry will name the trustee company with the added disclosure of "...as trustee for ABC Trust".

On this basis, an offshore trustee company would be the registrable beneficial owner; the trust it manages will go unnamed, unless the nominee provisions override the share holding test for beneficial ownership. This aspect of how the legislation is intended to work is far from clear. The trustee company may hold the legal title to the shares, but it holds the shares for the benefit of the beneficiaries in its capacity as a trustee. Dividing legal title and beneficial ownership is characteristic of a nominee arrangement but that does not square easily with trust law, which gives trustees discretionary powers that are very different to a simple nominee arrangement.

It is difficult to understand why the legislation is not crystal clear on this point when the purpose of the register appears aimed at recording the ultimate beneficial owner of UK property. That usually means a warm-blooded person, not a legal entity. The trust would certainly be recorded as the beneficial owner if it held the property directly or was named as the shareholder of an underlying company which held UK property, with details of the settlor and beneficiaries included in the required information and so why should the interposition of a company change this outcome?

There is also an overarching test that applies where an individual is able to exercise control or exert significant influence over the trustees. In these circumstances, the individual exerting such influence will be treated as the registrable beneficial owner. This would make such individuals the beneficial owner, if this test was met, in all such trust arrangements irrespective of whether the UK property was held in a company.

It is also worth remembering that whilst the identity of the trust in the circumstances highlighted is unlikely to be named on the new public register, the trust will also fall within the scope of the UK trust register, which will provide the UK authorities with extensive information about the settlor, beneficiaries and the source of funds settled into trust. Any offshore trustee company that is regulated will also be required to report under the Common Reporting Standard and so the information may reach the UK regardless.

An offshore trust which acquired UK property after 6 October 2020 or which has any UK tax liability in relation to the property should have already registered with the UK trust register. Given the interaction with the Register of Overseas Entities, failure to register the trust is likely to be regarded more harshly.

From a practical perspective, offshore trustee companies may find that they need to make multiple registrations as the registrable owner of UK property to comply with the new legislation, whilst simultaneously reporting a different beneficial owner for the UK trust register.

The rules

An overseas entity with UK property must file a return annually. The information in the return depends on whether there is a registerable beneficial owner. The company may not have a registrable beneficial owner because the entity is owned by a number of shareholders each holding less than 25% of the shares and votes. If it does, then it must provide details of each beneficial owner, including name, address, date of birth and date of acquisition of the interest.

The timeframe

The legislation applies now despite the absence of a functioning register.

An overseas entity that acquires property cannot apply to the Land Registry to be shown as the owner of English property until it is registered. Given that it is not possible yet to be registered, no overseas entity acquiring property can get its ownership shown on the Land Registry.

An overseas entity that wants to sell the property will need to be registered before it can sell the property. The owner of the overseas entity can sell the shares in the entity, and the new owner will then be required to update the register with details of the new beneficial owner.

Entities that owned an interest in the property before the legislation was introduced have until the end of the transitional period to complete the registration process. The transitional period, however, has been reduced to six months and we are partway through the first month. This is going to be a serious challenge for non-UK trust and corporate service providers, who will now need to identify all relevant entities with UK property, test to see if there is a registrable beneficial owner and then register with Companies House.

The practical consequences

The legislation places restrictions on the UK Land Registry. It cannot register the title of an interest in land to an overseas entity that is not listed on the new register with Companies House. That appears to mean an overseas entity will not be able to complete a purchase until it is listed on the register.

Where the Land Registry identifies land owned by an overseas entity that is not listed on the register it will prevent any sale or disposition of the land from being registered. More importantly, an overseas entity entering into a transaction without first registering will be committing an offence that attracts either a fine or prison sentence.

There may be an awkward situation where an overseas entity holds a leasehold interest in the UK. It will not be able to renew that lease and register it with the Land Registry. That could lead to all sorts of consequential difficulties like renewing building insurance, breaching covenants on mortgage security, etc. as well as risking penalties under the new legislation.

Penalties

The legislation carries some significant penalties. Failing to register or providing incorrect information can lead to fines of up to £500 per day or a summary offence with a maximum prison term of up to 6 months rising to 12 months.

Entering into a transaction without first registering the overseas entity on the new register can attract a prison sentence of up to five years.

Significantly, where an overseas entity is liable for a failure then all of the directors are held culpable. Any directors of overseas entities, who delegate this task to a colleague need to be sure that any registration programme is managed properly. This makes it even more important that anyone leaving a corporate service provider needs to make sure they have resigned any directorships they hold in their own names.

Example: UK property acquired by Jersey company: The company is a legal person and is required to register and provide information about its beneficial owner(s).

Example: UK property acquired by Jersey corporate trustee for Jersey trust: A Jersey trust is not itself a legal person. The Chartered Institute of Taxation says "many overseas owners of UK properties might do so through direct trust structures, which are not subject to registration under these rules".

However, we understand that others consider that since the Jersey corporate trustee is a legal person and an overseas entity acquiring the property, it is required to register. The registration for the trustee company is then required to include details of the beneficial ownership of the trustee company. As already mentioned, the issue is not free of doubt.

A trust which owns UK property would be required to register with the Trust Registration Service.

Public information and tax issues

Unlike the Trust Registration Service, the Register of Overseas Entities is public (although it may not be searchable). The Land Registry is also public and so it will be possible for HMRC to link the owner to the property.

Trustees and directors may therefore wish to consider now whether all relevant tax disclosures and returns have been made. Apart from the question of whether rental income has been returned, there might be issues around:

- Whether non-resident capital gains tax returns have been filed in relation to transfers of shares in companies owning UK property.
- Whether individuals who live in these UK properties have acknowledged UK tax residence where appropriate.
- Whether family members who visit those who live in the properties have included this as “available accommodation” in considering their UK tax residence position.
- Whether any ATED liabilities have been paid or relief claimed.
- Whether the funds to pay for the UK property have been remittances of foreign income and gains of individuals arising in these trusts, and if so whether those remittances have been declared.
- A heightened awareness of owners of overseas companies that own residential property and future inheritance exposures.

Summary

Anybody that manages an offshore entity or provides professional advice to offshore entities needs to be aware of this legislation. The directors of those entities or equivalent persons need to have a plan for dealing with their registration requirements. The deadline of 1 September remains despite the register not yet operating. Offshore trustees and entities should be ready to react and make the necessary registrations without delay.

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