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United Kingdom Legislates Against Opaque Overseas Ownership of Property

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With sanction regimes taking centre-stage in the global response to the Russian invasion of Ukraine, transparency of property ownership has accelerated to become a priority of the United Kingdom's government.

On 15 March 2022, the Economic Crime (Transparency and Enforcement) Act 2022 (the **Act**) passed into law. By doing so, the United Kingdom introduced measures to ensure that the vast majority of foreign owners of qualifying real estate would need to identify both themselves and their beneficial owners to government authorities.

The Act's provisions are extensive and require foreign entities to take prompt action to identify and comply with their obligations. The effect of the legislation, however, goes well beyond the owners of property, meaning anyone dealing with property held by a foreign entity such as a buyer, lender or investor needs to be equally cognisant of the Act's consequences.

A new Register of Overseas Entities

The principal feature of the Act in respect of transparency of ownership is the establishment of a *Register of Overseas Entities* (the **Register**), which will be administered by Companies House (the United Kingdom's registrar of Companies).

Any legal entity that is governed by laws of a jurisdiction other than the UK (**Overseas Entity**) which directly owns qualifying UK real estate will be required to apply to Companies House for inclusion on the Register.

The Overseas Entity will be required to supply information to Companies House that is akin to that supplied by companies incorporated in the UK. This will include details of the office address of the Overseas Entity, a service address and in some cases details of its officers.

Crucially, the Overseas Entity will also be required to supply the names and information of each of its registrable beneficial owner (**RBO**). Information to be provided differs based on whether the RBO is an individual or legal entity. In all cases, the link between the Overseas Entity and the RBO and the date on which the RBO became such must be declared. Other information may include the date of birth, nationality and main residential address of any individual RBO, while information on an RBO that is a legal entity will include its office address and country of origin.

A legal entity, individual, or government or public body will be considered an RBO where it:

1. holds, directly or indirectly, more than 25% of the shares in the Overseas Entity;
2. holds, directly or indirectly, more than 25% of the votes of the Overseas Entity;
3. has the power to appoint or remove a majority of the board of directors of the Overseas Entity; or
4. exercises, or has the right to exercise, significant control over the Overseas Entity.

To what property does this apply?

Importantly, the Act only applies to certain interests in land. For the purposes of the Act these are:

1. freehold property in England, Wales or Scotland (known as a Heritable title in Scotland);
2. lease of more than 7 years in length in England and Wales; or
3. lease of more than 20 years in length in Scotland.

This means that foreign owners of other types of UK real estate are outside the scope of registration.

Who must apply for entry to the Register?

Though the impetus behind the Act derived from the ongoing situation in Ukraine, the Act has wide reaching implications for all foreign owners of qualifying UK real estate.

Existing Owners

An Overseas Entity must apply to be placed on the Register within a *transitional period* if it holds qualifying real estate acquired from and including:

1. 1 January 1999 for properties in England and Wales; or
2. 8 December 2014 for properties in Scotland.

The length of the transitional period to make an application will be six months, calculated from a commencement date to be confirmed by secondary legislation. Notwithstanding this, every Overseas Entity should ensure that it is ready to make the relevant application once the timeframe to submit an application is confirmed.

Following the end of the transitional period, the Act requires the land registrars in England & Wales and Scotland to place a restriction each land title owned by an Overseas Entity.

The restriction will prevent all disposals of the real estate, except where the:

1. Overseas Entity is registered with Companies House on the Register at the time of the disposition;
2. disposition is made in pursuance of a statutory obligation or court order, or occurs by operation of law;
3. disposition is made out of a contract made before the restriction is entered into the register;
4. disposition is made in the exercise of a power of sale or leasing conferred on the proprietor of a registered charge or a receiver appointed by such a proprietor;
5. Secretary of State gives special dispensation; or
6. disposition is made by a specified insolvency practitioner.

This will mean that if an Overseas Entity has not been placed on the Register by the end of the transitional period, in most situations it will not be able to deal with the property it owns.

An Overseas Entity cannot simply avoid the requirement to register by disposing with its property prior to the end of the transitional period. The Act contains provisions which obliges any Overseas Entity that disposes of qualifying property interests on or after 28 February 2022 to apply for the Register, even where the disposal means that the entity is no longer an owner of UK real estate.

New Buyers

An Overseas Entity that is looking to acquire qualifying UK real estate for the first time will need to apply for the Register before acquiring the property.

Failure to pre-register as an Overseas Entity will prevent the perfection of legal title to the property.

Whether the registration requirements will drive structural change to avoid the provisions of the Act will become evident in the fullness of time. It is however clear that a foreign company could structure the purchase so that a subsidiary company registered in the UK be incorporated to own the real estate moving ownership outside of the effects of the legislation. Alternatively, a nominee company (for instance a professional asset manager) could be engaged to own the real estate on behalf of the foreign entity.

Consequences of non-compliance

The Act's requirement to register is policed by a comprehensive system of penalties should an Overseas Entity not comply. The following penalties apply alongside the addition of restrictions on title.

Fines

A number of offences under the Act, including failing to register as an Overseas Entity, may be punished by fines. Under the Act, a non-compliant Overseas Entity may be fined up to £2,500 *per day of non-compliance*. Refusal to register for the period of a year could therefore cost an Overseas Entity close to £1 million.

It should be noted that fines can also be issued to officers of an Overseas Entity due to the fact that breaches are deemed to be committed by both the Overseas Entity itself and every one of its officers.

Imprisonment

For more serious offences, the Act empowers courts in the UK to not only fine but imprison non-compliant persons for up to 5 years. Therefore, the importance for an Overseas Entity of ensuring it is fully compliant with the Act cannot be overstated.

Actions for each Overseas Entity

Whilst the obvious required step for each Overseas Entity is to apply to be added to the Register, as we await details to be promulgated as to the process for registration this cannot be effected at present.

Despite this, preparations for registration can and should begin. For some, provision of the information required to register will be an arduous and demanding process. As a result, it is recommended that officers take steps to compile the details required to be submitted to Companies House, including the details of all RBOs.

Part of the above process is the issuing of *information notices*. The notices compel recipients to respond and provide information that may be utilised within the Overseas Entity's application for registration. The Act requires that information notices *must* be given to all known or suspected RBOs, so these should be prepared at this time and issued as soon as possible once the provision is given effect by regulations.

The Act also allows each Overseas Entity to issue information notices to those that may have information that is useful to trace an RBO. This allows professional advisors to RBOs, such as accountants, to be asked for information they may have on the Overseas Entity's RBOs. At this time, each Overseas Entity should consider whether giving an information notice to a third party may be beneficial.

When it comes to making an application to Companies House for admittance to the Register, we advise that parties act expeditiously. Teething problems are to be expected with any new system and we envisage that Companies House will encounter difficulties and delays over the coming weeks and months. If issues do arise, this will be particularly problematic both for those that have applied but are not yet on the Register when the transitional period comes to an end and also new buyers who are not on the Register at the point of purchase. If an Overseas Entity is in this position, the Act will prevent the Overseas Entity from dealing with its property until registration with Companies House has been completed (this includes registration of its interest).

Importance for RBOs

RBOs may read the above and think that the onus is on each Overseas Entity, meaning that the action they need to take is limited. This is not the case.

Highlighted above is the requirement for each Overseas Entity to issue information notices to all RBOs. In order to compel responses to information notices, the Act requires that each suspected RBO respond within a month. The Act also obliges those answering the information notice to do so honestly.

RBOs that do not respond or act dishonestly will commit offences under the Act, the punishment for which is imprisonment and/or fines on the same basis as a non-compliant Overseas Entity. Thus the construction of the legislation effectively transfers liability for compliance with the Act onto an RBO unless or until it responds to the information notice.

RBOs should therefore carefully consider the information they provide to the requesting Overseas Entity. For the reasons above the information must be honest and accurate but the RBO should be aware that details provided will be published in the Register (with the exception of some sensitive data such as residential addresses).

We draw attention to this as those wishing to trace an RBO will be able to obtain a service address with ease. RBOs should ensure that any service address provided is accurate and monitored.

Relevance to third parties

Many individuals and legal entities in the property investment and lending sector will interact with foreign owners of UK real estate to which the Act's provisions apply.

There are four particular relationships that should be carefully considered:

1. **Lending to an Overseas Entity**: Lenders to an Overseas Entity may be prejudiced by its borrower's non-compliance due to the state having powers to secure unpaid fines against the property as well as a lender which steps into a structure inheriting liability for existing non-compliance. Whilst standard loan documents will undoubtedly be updated in the interim, specific compliance diligence and undertakings should be considered.
2. **Buying from or selling to an Overseas Entity**: Given the potential issues that may be experienced by an Overseas Entity when registering with Companies House, care should be taken to ensure that:
    a. For buyers, either that the:
        b. Overseas Entity is either registered before the transaction is completed; or

2. restriction on title has not been registered prior to completion.

3. For those selling, that the Overseas Entity is registered before the transaction is completed to ensure that the transfer of the legal title can be perfected by registration. Without registration of the new owner, a seller will continue to appear on title records as the owner of the sold property. This can be problematic for a seller seeking to distance themselves from ownership of the land.

3. **Renting from or to an Overseas Entity**: Those who rent property from an Overseas Entity *or* have granted leases to an Overseas Entity should consider the implications of the Act.

Though non-compliance by an Overseas Entity landlord should not ultimately impact use and enjoyment of land under pre-existing leases, there may be less direct consequences for a tenant. For instance, if an Overseas Entity landlord does not register, the tenant may find that the landlord is restricted from dealing with the land in future. This may impact the tenant's ability to obtain a new lease to stay at the premises.

For those seeking to take a new lease from an Overseas Entity landlord, the checks required by a buyer would apply so the proposed tenant should ensure, prior to the grant of the lease, either that the landlord is registered or that a restriction on the title has not yet been added to the title.

Where property is let to an Overseas Entity and the lease is caught by the Act, the landlord should ensure the tenant is registered as an Overseas Entity. In this case, this is to ensure that the tenant can register the creation of the lease with the relevant land registrar and preserve the accuracy of the Landlord's title.

Proskauer's Private Equity Real Estate team is focused on supporting clients navigate compliance with the Act. If you would like to discuss or have further questions on this client alert please reach out to our global PERE team.

Related Professionals

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