U.K. ADOPTS PUBLIC REGISTER OF PEOPLE WITH SIGNIFICANT CONTROL OVER U.K. CORPORATIONS

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INTRODUCTION

With effect from April 6, 2016, U.K. companies and L.L.P.'s are required to maintain a statutory register setting out the individuals who are considered "persons with significant control" ("P.S.C.'s"). The requirement was introduced by the Small Business, Enterprise and Employment Act 2015 and is designed to create more transparency around the ownership of companies.[1]

With effect from June 30, 2016, U.K. companies and L.L.P.'s will be subject to a further requirement to register that information with Companies House. The P.S.C. information will be available to the public.

POLITICAL CONTEXT

International pressure for transparency has been a recurring theme in recent years, as transparency has become increasingly high on many political agendas. Its proponents have included the G-20, the Financial Action Task Form ("F.A.T.F."), and the International Monetary Fund ("I.M.F."), and it was also the focus of E.U. anti-money laundering directives.

The immediate genesis of this particular measure began life in 2013, as a personal commitment by the U.K.'s prime minister, David Cameron, to introduce a public register of beneficial ownership. It was certainly a brave move, and businesses were alarmed. It was also unexpected, given that Prime Minister Cameron had previously decided to withdraw a proposal for public registers from the Lough Erne G-8 agenda – in part on the basis that other G-8 countries were unlikely to endorse the proposal.

As part of the consultation process that followed, a number of bodies, including the Law Society, voiced concerns. Inevitably, many of the concerns were based on issues of personal privacy. Policy initiatives preserving personal privacy are increasingly maligned, but few would suggest that public policy requires us to make available on Google the contents of our bank accounts or other statements of personal wealth. Yet, as significant wealth is held through the medium of companies, commentators have argued that this is exactly the effect of a public register of beneficial ownership of shares. The U.K. takes for granted its (relative) political stability and assurance of personal security. However, this position is not mirrored in all jurisdictions.

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[1] The authors would like to acknowledge the contribution of Alice Foster, trainee solicitor at Memery Crystal LLP. Ms. Foster will qualify into the corporate department of the Firm in September 2016.

There was also particular concern that the U.K. would be the first jurisdiction to create and maintain a central public register of beneficial ownership. Investment might therefore be diverted from the U.K. to other jurisdictions. Although many jurisdictions have paid lip service to the concept of transparency and there are a number of supranational efforts to introduce further disclosure, this is generally limited to disclosure between government agencies (in particular, tax collection agencies). Although a number of jurisdictions offer information to the public in relation to the share registers of companies, the U.K. is the first to extend the breadth of transparency to include ultimate beneficial ownership, as opposed to nominee ownership.

PERSON OF SIGNIFICANT OF CONTROL DEFINED

The legislation is complex, but essentially, a P.S.C. is someone who meets one or more of the following conditions:

- Directly or indirectly owns more than 25% of the share capital
- Directly or indirectly controls more than 25% of the voting rights
- Directly or indirectly holds the right to appoint or remove a majority of the board of company directors
- Exercises, or holds the right to exercise, significant influence or control over a company
- Exercises, or holds the right to exercise, significant influence or control over activities of a trust or firm which itself meets one or more of the first four conditions

The legislation contains detailed provisions relating to the interpretation of these conditions and includes anti-avoidance provisions.

In the vast majority of cases, it will be easy to determine whether any particular individual is a P.S.C. – it will be a straightforward binary analysis. However, in the context of more complex structures, the determination will be much more difficult. For example, convoluted cross-border investment structures comprising share capital of different classes, shareholder agreements, and investment agreements will require a lengthy, cumbersome, and undoubtedly expensive analysis. The legislation is designed to identify ultimate beneficial ownership – these are individuals, not companies or other legal entitles. Therefore, there are provisions to “look-through” intermediate entities.

The government has recognized that the exercise will be difficult in certain circumstances, and has published extensive draft guidance. Nonetheless, it advises also that it is likely that companies will require expert advice in difficult cases, particularly given that failure to comply with the legislation can result in fines and imprisonment.

EXEMPTIONS TO MANDATORY DISCLOSURE

Given that the obligations created by the legislation are onerous, the availability of exemptions was fiercely debated at the consultation stage.

Listed companies

A significant number of companies will benefit from the exemption available to listed companies. Broadly, and on the basis that their significant shareholdings are already in the public domain, the following companies are not required to complete and maintain a P.S.C. register:

- Companies that are subject to D.T.R. 5 (Disclosure and Transparency Rules), which includes companies on the Main Market, A.I.M., and I.S.D.X. Growth Market
- Companies that are admitted to trading on a regulated market in an E.E.A. state (other than the U.K.)
- Companies listed on certain markets in Israel, Japan, Switzerland, and the United States

However, these exemptions do not simply flow through to any U.K. subsidiaries. Further, the exemption from these rules for A.I.M. and I.S.D.X. Growth Market companies is likely to fall away in July 2017, when the fourth E.U. anti-money laundering directive comes into force.

Protection Regime

The legislation also provides for a "protection regime," which allows a company to apply to Companies House on behalf of the P.S.C., requesting that Companies House refrain from publicly disclosing information about the P.S.C. if the company reasonably believes that the disclosure will expose the P.S.C. to the risk of violence or intimidation. Thus, there is still a requirement to disclose *vis a vis* Companies House; however, there is no further obligation on the company to make this information publicly available. The draft guidance states that applications will be assessed on a case-by-case basis, and there is no set list of circumstances in which protection will be granted.

INFORMATION THAT MUST BE DISCLOSED ON THE P.S.C. REGISTER

For individuals on the P.S.C. register, certain personal information will need to be disclosed, including name, service address, nationality, date of birth, and usual residential address. The P.S.C. register will also include details of the nature of the control exercised by the P.S.C.

U.K. companies and L.L.P.'s will have to file the information on their P.S.C. registers with an Annual Return (to be renamed as a Compliance Statement). The information must be filed with Companies House at least once every 12 months, from June 30, 2016, and the P.S.C. register must also be made available for inspection at the entity's registered office from April 6, 2016.

TERRITORIAL AMBIT AND ENFORCEMENT

The legislation applies to companies and other bodies corporate incorporated under the U.K. Companies Act and to L.L.P.'s formed under the Limited Liability

Partnerships Act 2000. It does not apply to the overseas subsidiaries of U.K. companies, for example.

The legislation requires an affected company to take reasonable steps to find out if it has any registrable P.S.C.'s and, if so, to identify them. The company must then record the requisite details in its P.S.C. register. Failure to maintain a register or take reasonable steps to find and identify P.S.C.'s will make the company liable to a fine and its director(s) liable to a fine and imprisonment. However, many individuals may be P.S.C.'s in relation to U.K. companies without having ever set foot in the U.K. This raises the following questions of fairness:

- How can a company elicit the required information?
- What are reasonable steps in these circumstances?

The legislation contemplates that the company will submit a notice to the potential P.S.C. requesting the information. It is a criminal offense for a person to fail to comply with a notice sent by a company. Further, the legislation allows the company to impose restrictions on shares or rights held by an individual if he or she does not comply with the terms of a notice.

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But, what if the company receives plainly inaccurate information? Is it under an obligation to investigate further? What steps are "reasonable" steps? And, more importantly, what steps are *not* "reasonable" steps? If a shareholder sent back a return stating that his full name was Mickey Mouse and his address was on Pluto, presumably it would be difficult for the company to claim that it had taken reasonable steps. But where does the boundary lie? What degree of investigation is required?

The government's draft guidance states the following:

> 2.3.1 You must take reasonable steps to determine whether any individual or any legal entity meets the conditions for being a P.S.C. or registrable [relevant legal entity] in relation to your company, and if so, who that person or registrable [relevant legal entity] is. It may be that, having taken these steps, you cannot identify the person or confirm their details, but failure to take reasonable steps is a criminal offence.

The draft guidance does therefore anticipate the possibility that it may not be feasible to identify the control by the company. However, it offers little else by way of guidance.

Further, there is no system for the verification of information. This was one of the objections voiced by a number of commentators during the consultation process. Effectively, the register relies on self-reporting only. There are no procedures in place for systematic and objective verification, which leads to the following two questions:

- Are there enough regulations to ensure that the data reported is reliable?
- Is a system that elicits and stores inaccurate information worse than no system at all?

When this objection was raised during consultation, the response was that if an entry was incorrect, public scrutiny would identify and report it. This seems weak at

best and, given that the consequent penalties are criminal in nature, arguably wholly inadequate. Commentators have questioned the propriety of having the accuracy and verification of U.K. government regulation dependent on the N.G.O. community's agenda – a largely unregulated but politically powerful sector.

RECENT (IRONIC) DEVELOPMENTS

Transparency has moved further up the current political agenda with the recent unprecedented leak from Panamanian law firm Mossack Fonseca. The sheer scale of the leak has been dramatic, as has the number of high-ranking government officials that have been implicated. Ironically, given that he has been the prime protagonist in the development of the world's first publicly-available register of beneficial ownership of companies, Prime Minister Cameron has suffered in particular as a result of disclosures about the nature and background of his family's wealth.

As a result of the leak, tax and law enforcement agencies in the U.K., Germany, France, Italy, and Spain have agreed to additional data-sharing arrangements and are now seeking to establish cross-border company register information. However, although this is demonstrative of the continued drive for transparency, this information sharing is still at government level only and, therefore, can be clearly distinguished from the substantive content of the U.K.'s P.S.C. register. The U.K. remains the only jurisdiction to have implemented this type of legislation.

Some will be irritated by the continued assumption by the media (the good and the bad) that "offshore" jurisdictions are all created equal. For a start, the term "offshore" means different things to different people. In this context, "offshore" is widely used as a pejorative shorthand to suggest tax evasion, organized crime, terrorism, arms trade, or drug dealing.

The evidence suggests otherwise. A recent academic study, "Global Shell Games,"[2] looked at compliance with F.A.T.F. guidelines. In summary, the authors posed as consultants wishing to form a shell company. They sent emails asking over 3,500 different incorporation agents in 182 jurisdictions to form companies for them. Overall, 48% of the agents who replied failed to ask for proper identification. Almost half of these did not want any documentation at all.

The authors compiled a table of compliance, ranking jurisdictions in terms of their compliance. It makes for interesting reading. The following is an extract from the authors' conclusions:

> One of the biggest surprises of the project was the relative performance of rich, developed states compared with poorer, developing countries and tax havens.… The overwhelming policy consensus, strongly articulated in G20 communiqués and by many NGOs, is that tax havens provide strict secrecy and lax regulation, especially when it comes to shell companies. This consensus is wrong. The Dodgy Shopping Count for tax havens is 25.2, which is in fact much higher than the score for rich, developed countries at 7.8 – meaning

[2] Michael G Findley, Daniel L Nielson and JC Sharman, *Global Shell Games: Experiments in Transnational Relations, Crime and Terrorism*, (Cambridge: Cambridge University Press: 2014).

it is more than three times harder to obtain an untraceable shell company in tax havens than in developed countries. Some of the top-ranked countries in the world are tax havens such as Jersey, the Cayman Islands and the Bahamas, while some developed countries like the United Kingdom, Australia, Canada and the United States rank near the bottom of the list. It is easier to obtain an untraceable shell company from incorporation services (though not law firms) in the United States than in any other country save Kenya.

THE ROAD AHEAD

Perhaps the most controversial aspect of the new provisions has been the requirement not just to collate information on the ultimate beneficial ownership of companies, but to make it publicly accessible. Recent developments notwithstanding, no other jurisdictions have made firm commitments to introduce equivalent measures.

No doubt the rest of the world will be watching the U.K. with interest over the coming months. The measures will undoubtedly add to the burden of doing business through a U.K. company – in some cases, considerably. Whether the benefits of that burden will be worthwhile remains to be seen. If the data is inaccurate, what will have been achieved but another layer of costly administration and a deterrent to doing business through U.K. entities? Anecdotal evidence suggests that reputable tax advisers try not to associate with criminals, and it seems likely that criminals are not much interested in accurate self-certification for government authorities.

As a final point, the lack of certainty surrounding a company's "reasonable" attempts to obtain information is of particular concern, particularly given that failure to make such efforts carries criminal penalties. In a sense, the requirement to maintain the P.S.C. register is simply an expansion of F.A.T.C.A. and the C.R.S. from financial institutions to everyday companies with an added twist: a failure to comply with an undefined standard of reasonableness elicits criminal penalties for non-performance. In the world of F.A.T.C.A., noncompliance is burdened only with withholding tax.

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