

Draft Registration of Overseas Entities Bill

European Convention on Human Rights

Memorandum by the Department for Business, Energy and Industrial Strategy

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the draft Registration of Overseas Entities Bill. This memorandum has been prepared by the Department for Business, Energy and Industrial Strategy. On publication of the draft Bill, the Secretary of State (the Rt Hon Greg Clark MP) made a statement that, in his view, the provisions of the Bill are compatible with the Convention rights.

Summary

2. The aim of the Registration of Overseas Entities Bill (“the **Bill**”) is to combat the laundering of money through UK property, and to improve transparency of ownership of property in the UK more generally. The 2017 National Risk Assessment of Money Laundering and Terrorist Financing identifies a specific risk to the UK from the use of “anonymous corporate structures” to invest in UK property. It also highlights the fact that “property continues to be an attractive vehicle for criminal investment, in particular for high end money laundering” and “the risks relating to abuse of property are most acute where the property is owned anonymously through corporate structures or trusts”¹.
3. When land is currently owned by an overseas entity, the information available about that entity on the three Land Registers for England and Wales, Scotland and Northern Ireland is very limited, at most showing the entity name and territory of incorporation. In practice, it is extremely difficult to ascertain the true owners of a large number of properties in the UK and particularly in London. Due to the opacity offered by company structures, which helps to distance the

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/655198/National_risk_assessment_of_money_laundering_and_terrorist_financing_2017_pdf_web.pdf

ultimate owners from assets they really own and control, entities are at high risk of being used as a vehicle by crime organisations and corrupt individuals to hide proceeds of bribery, corruption and organised crime.

4. Investigations could be boosted by increasing the amount of information available about the individuals who ultimately own or control the entities owning UK land, i.e. the entities' 'beneficial' owners.
5. The Bill therefore establishes a register of overseas entities, in which an overseas entity can apply to be registered by providing details about itself and its beneficial owners. While registration is *prima facie* voluntary, the Bill provides that not doing so will result in: (1) an overseas entity being unable to register as proprietor of land in the UK (critical for obtaining full legal title) via the three Land Registries in the UK, and (2) certain dispositions made by an overseas entity registered proprietor being incapable of registration at the Land Registries.
6. Clauses 1 to 14 create the register and the framework in which an overseas entity can apply to be registered. Once registered, an overseas entity has a responsibility to provide, via an annual update to Companies House, either a confirmation that their beneficial ownership has not changed, or details of any changes and new beneficial owners. It must do so until such time as it successfully applies to be "removed" from the register. Both the application for registration in the register and the application for removal from the register will require the overseas entity to disclose information about itself and its beneficial owners; the latter being necessary for enforcement purposes so that at the time an entity removes itself, the register holds information that is up to date up to that point.
7. The register will be held by the registrar of companies and will be, for the most part, accessible to the public. Clauses 17 to 27 replicate a number of functions and powers contained in the Companies Act 2006 ("the 2006 Act") pertaining to the registrar in relation to the register it keeps for UK companies.

8. Schedule 1 to the Bill sets out the information required about an overseas entity, its beneficial owners, and where required, its managing officers for the purposes of the application to register and the updating requirements.
9. Schedule 2 to the Bill sets out “who” is a beneficial owner of an overseas entity. This is modelled on the “People with Significant Control” Regime for UK companies set out in Part 21A of, and Schedule 1A to, the 2006 Act.
10. Part 1 of Schedule 3 to the Bill inserts new “Schedule 4A” into the Land Registration Act 2002 (“LRA 2002”). Schedule 4A provides that no application may be made to register an overseas entity as proprietor of a “qualifying estate” (a freehold estate or a leasehold estate of over 7 years), unless the overseas entity is a “registered overseas entity” at the time of the application (or is exempt). For these purposes, an overseas entity will not be a “registered overseas entity” unless it has registered on the overseas entity register and has complied with the update requirement.
11. Where an overseas entity is registered as proprietor of a qualifying estate, Schedule 4A requires HM Land Registry for England and Wales (“HMLR”) to insert a restriction into the title register for the estate. The restriction will prohibit the registration of certain dispositions in respect of the estate unless the entity is a registered overseas entity (or is exempt) at the time of the disposition. The dispositions are (a) a transfer of the estate (i.e. sale); (b) the grant of a lease of over 7 years out of the estate; and (c) the creation of a charge over the estate.
12. When land is sold to a person, it is legally possible for that person to make dispositions in respect of the land before being registered as the proprietor. Schedule 4A therefore also prohibits the registration of the dispositions mentioned above made by an overseas entity in these circumstances.
13. Both the restriction and the prohibition on registration are subject to exceptions, aimed at protecting third party rights. An overseas entity that makes a disposition which cannot be registered by virtue of the restriction or prohibition against registration (as the case may be) will be guilty of a criminal offence.

14. Part 2 of Schedule 3 provides for a transitional regime for overseas entities that are registered proprietors of qualifying estates when the Bill comes into force and became so on or after 1 January 1999 (the date when HMLR began to record whether or not a registered proprietor is an overseas entity). These entities will have 18 months from the Act's commencement date in which they can register as an overseas entity or dispose of the land if they choose to. If, at the end of that period, the overseas entity remains the registered proprietor of the estate and has not registered in the overseas entities register, it will have committed an offence. HMLR is also required to insert the restriction described above into the title registers of these estates before the end of the period of 12 months beginning with the commencement date, which will come into effect at the end of the transitional period.
15. Schedule 4 to the Bill amends the Land Registration Act etc. (Scotland) Act 2012. It inserts new Schedule 1A into that Act which makes equivalent provision as Schedule 4A described above in respect of Scotland, subject to existing differences in land registration in Scotland. The key difference is that, while the requirements will apply to some overseas entities that are existing registered proprietors of qualifying estate at the time of commencement, it is limited to those entities that registered from 8 December 2014 (rather than 1 January 1999 in England and Wales). This is the relevant date on which the Registers of Scotland (the equivalent to HMLR) began to record whether or not a registered proprietor was an overseas entity.
16. Schedule 5 to the Bill inserts Schedule 8A into the Land Registration Act (Northern Ireland) 1970. Schedule 8A makes provision equivalent to Schedule 4A described above in respect of Northern Ireland, again subject to existing differences in land registration in Northern Ireland. The key difference is that the requirements will only apply to new purchases by overseas entities on or after the commencement date; those which are existing registered owners of land in Northern Ireland are not in scope due to the lack of information held about those entities by the Northern Ireland Land Registry currently.

The Government considers that the provisions of the draft Bill are compatible with the European Convention on Human Rights.

ECHR Issues

17. The table below shows where ECHR issues arise in the draft Bill.

<i>Clauses</i>	<i>Article 8</i>	<i>Article 14</i>	<i>Article 1 of Protocol 1</i>
<i>Clauses 4, 11 and 12</i> <i>Paragraphs 3 and 6 of Schedule 1</i>	•		
<i>Paragraph 3 of new Schedule 4A (which Schedule 3 inserts into the Land Registration Act 2002)</i> <i>Paragraph 5 of Schedule 3</i>			•
<i>Paragraph 8 of Schedule 4</i>			•
<i>Schedules 3 and 4</i>		•	

18. The Government considers that the clauses of, and Schedules to, the Bill which are not mentioned in this table do not give rise to any ECHR issues.

Article 8: Right to respect for private and family life, home and correspondence

Clauses 4, 11 and 12

Paragraphs 3 and 6 of Schedule 1

19. An overseas entity will be required to have registered in the overseas entities register before applying to the relevant Land Registry to register as a proprietor of a qualifying estate. A disposition of registered estate does not operate at law until it is registered at the Land Registry, and therefore an overseas entity will not be able to acquire full legal title to the estate until it is registered as an overseas entity. Similarly, an overseas entity will be required to have registered

in the overseas entities register (and have complied with the updating duty) for any subsequent dispositions made in relation to that estate to be registered.

20. A condition of registration is that the overseas entity discloses information about its beneficial owners. Where the entity has none, or they cannot provide complete information about them, details about their managing officers (e.g. a director) are required - see clause 4.
21. The required information about a beneficial owner or managing officer that is a natural person is set out in paragraphs 3 and 6 of Schedule 1 respectively, and includes their name, date of birth and nationality, a service address and usual residential address. Before making an application or updating, an overseas entity is required by clause 11 to take reasonable steps to identify its beneficial owners. This includes sending an information notice to any person that it believes is its beneficial owner (clause 11(3)). The notice will require the person to whom it is given to state whether they are a beneficial owner and to confirm or correct the required information. The overseas entity may also send a notice under clause 12 to a person who the entity believes will know the identity of their beneficial owner. Any person who receives a notice under clauses 11 or 12 and fails to respond within 1 month of receipt without reasonable excuse will have committed an offence (see clause 14).
22. The draft Bill therefore requires the beneficial owner of any overseas entity wishing to transact with land in the UK to provide to the overseas entity personal information. The overseas entity is then required to disclose that information onto the register, the majority of which will be publicly accessible. Overseas entities may voluntarily provide their information to Companies House at any time, but **must** do so if they wish to enter into land transactions.

Interference

23. The Government considers that clauses 4, 7, 11 and 12, as well as paragraphs 3 and 6 of Schedule 1, engage Article 8 of the ECHR which provides that everyone has the right to respect for his private and family life, his home and his correspondence. The European Court of Human Rights ("ECtHR") has

established that private life is a broad concept and the collection of information by officials of the state about an individual without his consent will interfere with the right to private life².

Justification

24. The Government considers that this interference with Article 8 is justifiable under Article 8(2) of the ECHR, and necessary in a democratic society both in the interests of the economic well-being of the country and for the prevention of crime. Making beneficial ownership information of overseas entities which own land in the UK publicly available will significantly aid law enforcement in identifying and sanctioning those who ultimately control overseas entities that are used for criminal purposes, as well as potentially deter the criminal misuse of corporate structures.
25. The Government also considers the measure to be proportionate to the aims, given the wider and public and economic benefit of increasing transparency. The information required about individual beneficial owners and managing officers does not go beyond what is necessary in order to achieve the underlying policy objective. Moreover it closely follows the information that is required of individuals in relation to the “People with Significant Control” (PSC) Regime for UK companies and in respect of UK company directors (see sections 790K(1) and 163(1) of the 2006 Act respectively). This information is also made publicly available on the register for UK companies.
26. As is the case for PSCs and UK company directors, there are safeguards in the draft Bill provisions about disclosure of certain information. For example, an individual’s usual residential address and day of date of birth will not be included in the material on the register that is open to public inspection (clause 20(1)). That information will only be available to law enforcement and other public authorities specified in regulations made under the power in clause 21. Clause 22 also contains a power to make regulations which will allow an individual to apply for their details to be protected from public disclosure. The policy intention

² X v UK No 9702/82, 30 DR 239 (1982)

is that regulations made under this power will allow a person to make this application where the public disclosure of their details (either as a beneficial owner or managing officer of the entity) will put them at risk of physical harm. The criteria and thresholds for such applications will be set out in regulations; it is likely that these regulations will be based on those currently in place for the People with Significant Control regime.

27. In relation to new purchases of land in the UK, it will be for the overseas entity (and where they have sufficient control, its beneficial owners) to decide whether they are content with the requirements of registration when considering the purchase. In relation to those overseas entities that are existing registered proprietors and in scope of the requirements, the transitional period will provide beneficial owners of the overseas entities 18 months in which to divest from/reduce control over the overseas entity or (where they have sufficient control) direct the overseas entity to dispose of the property – either of which will result in that person’s details not going on the public register.

28. The Government’s view is that while Article 14 is relevant in respect of the draft Bill’s engagement of A1P1, it is not relevant in relation to the draft Bill’s engagement with Article 8. While it is the case that provisions in the draft Bill will interfere with the Article 8 rights of a beneficial owner of an overseas entity, in the context of the UK’s wider domestic legal framework, this is not a discriminatory measure. Since the implementation of the People with Significant Control regime in 2016, UK companies and other entities, e.g. Limited Liability Partnerships, have been required to disclose the same information in respect of their beneficial owners to a publicly accessible register held at Companies House. The effect of the draft Bill is to create a more level playing field between the transparency of UK companies and other entities vs the transparency of overseas entities which, while not incorporated/formed in the UK, have a significant presence here via land ownership.

Article 1, Protocol 1: Right to peaceful enjoyment of possessions

Paragraph 3 of Schedule 4A to the Land Registration Act 2002 (inserted by paragraph 3 of Schedule 3 to the Bill)

Paragraph 5 of Schedule 3

Paragraph 8 of Schedule 4 (makes equivalent provision in respect of Scotland)

29. Paragraph 3 of Schedule 3 to the Bill inserts a new Schedule 4A into the LRA 2002. Paragraph 3(1) of Schedule 4A requires HMLR to enter a restriction on the title register of a qualifying estate where satisfied that the registered proprietor of the estate is an overseas entity, and that entity became registered as proprietor on or after 1 January 1999. This will therefore apply to any overseas entity that was registered as proprietor after that date, and any new registrations on or after the commencement date.
30. The legal effect of the restriction is described above. The practical effect of the restriction is that where an overseas entity makes a relevant disposition at a time when it is not registered, and none of the exceptions apply, those dispositions cannot be completed by registration. For example, if the overseas entity sold the estate to 'A', A would not be able to register him or herself as the new proprietor. The policy intention is to prevent third parties conveyancing with the overseas entity where the overseas entity has not complied with the registration requirements. An overseas entity that makes a disposition which cannot be registered will commit an offence under paragraph 5. There are four exceptions to the effect of the restriction. The first is if the overseas entity is an exempt overseas entity at the time of the disposition under regulations made using the power in clause 30 of the Bill. The remaining three are aimed at protecting third parties and include when the disposition is made in pursuance of a statutory obligation, court order or a contract made before the restriction is entered in the register, or in exercise of a power of sale or lease conferred on the proprietor of a registered charge.
31. The operation of the restriction in relation to proprietors that registered before the commencement date is dealt with in the transitional regime in paragraph 4 of Schedule 3. Although HMLR will be required to enter this restriction after commencement, it will not come into effect until 18 months after that date. It is proposed that Companies House will write to overseas entities currently holding

land which will fall into the scope of the new regime to ensure that they are aware of the new requirements. During the 18-month transitional period overseas entities in scope may freely dispose of their land if they choose not to register with Companies House.

32. Paragraph 8 of Schedule 4 is intended to have the same effect in relation to overseas entities that are proprietors of land in Scotland at the commencement date as the restriction in paragraph 4 of Schedule 3, described above. There is no equivalent concept to a “restriction” (or an “inhibition” in the case of Northern Ireland) in land registration law for Scotland. Therefore, instead of the Keeper of the Registers of Scotland being under a duty to insert a restriction into the title registers of land owned by overseas entities, paragraph 8 of Schedule 4 provides that an overseas entity which is the proprietor of land in Scotland on the commencement date, and became proprietor on or after 8 December 2014, will have an 18-month transitional period in which they will be free to dispose of the property if they choose to. At the expiry of that 18-month period, if the overseas entity remains a proprietor in relation to that estate, and has not complied with the registration requirements (and is not an exempt entity), not only will that entity commit an offence (see paragraph 8 of Schedule 4), any relevant dispositions made by that entity from that point onwards will not be capable of registration at the Registers of Scotland. The dispositions in scope are the same as for England, Wales and Northern Ireland: a transfer of the estate, the grant of a long lease or creation of a charge out of the estate.

Interference

33. Paragraph 3 of Schedule 4A to the LRA 2002, in so far as it applies to overseas entities that are existing registered proprietors at the commencement date, and paragraph 8 of Schedule 4 to the Bill, engage Article 1, Protocol 1 ECHR (“A1P1”) as they have the potential to interfere with the right of overseas entities to peaceful enjoyment of their property located in England, Wales or Scotland (as the case may be). The analysis that follows refers to paragraph 3 of Schedule 4A, but it is equally applicable in relation to paragraph 8 of Schedule

4 to the Bill (which, as described above, makes equivalent provision in relation to overseas entities that own land in Scotland).

34. The ECtHR, when applying A1P1, follows the approach set out in *Sporrong and Lönnroth v Sweden*³, which separated interference into three types, relating to peaceful enjoyment of possessions, deprivation of possessions or control of their use. The Government considers that the control limb is most likely to be engaged on the basis that the proposed sanctions fall short of a “de facto expropriation”. In short, the draft Bill will control the use of an overseas entity’s property where that overseas entity is in scope of paragraph 3(1)(b) of Schedule 4A, and the 18-month transitional period has expired. The overseas entity will subsequently not be able to make certain registrable dispositions in relation to the estate unless it is a “registered overseas entity” at the time of the disposition (or one of the exceptions applies).

Justification

35. The Government considers that the potential interference of paragraph 3 of Schedule 4A with A1P1 is justifiable because the restriction on registration of certain dispositions made by an overseas entity is in the public interest, is proportionate and strikes a fair balance between competing interests. In particular, it pursues the legitimate aim of tackling serious crime and corruption, and constitutes a proportionate means of achieving that aim.

36. The ECtHR accepts that States are best placed to determine whether a given aim is in the public interest and therefore will not interfere unless the determination is “manifestly without reasonable foundation”.

37. Where property rights are concerned, States have a considerable margin of appreciation in determining the existence of a problem of general public concern and in implementing measures designed to meet it. The general interest has been held to encompass a wide variety of measures including

³ (1983) 5 EHRR 35

measures taken to combat crime⁴ and in relation to criminal proceedings⁵. In *Air Canada v United Kingdom*⁶ the ECtHR held that the measures taken (seizure of aircraft) conformed to the general interest in combatting international drug trafficking. It can be argued that the measures imposed by the overseas entities regime to prevent and combat the use of UK property for money laundering is one that is in the general interest and therefore justified.

38. The Introduction to this memorandum explains the potential difficulties in identifying the true owners and controllers of property in the UK where the land is owned directly by an overseas entity. As mentioned above, the opacity offered by corporate structures facilitates a situation in which land is bought and sold in the UK using proceeds of bribery, corruption and organised crime. Therefore the Government's view is that there are compelling public interest reasons in requiring overseas entities that wish to carry out conveyancing transactions to register and provide beneficial ownership information as a way of identifying, combatting and preventing money laundering through UK property.

39. These compelling public interest reasons for the measures form part of the proportionality analysis. The Government considers that the restriction on registration of certain dispositions is a proportionate measure. There is a clear link between the aim of the restriction (to prevent the use of UK property as a means to launder money and to improve the transparency of overseas entities that own property in the UK) and the restriction as a measure which will prevent an overseas entity from enjoying the benefits of owning that property where that overseas entity has not complied with its legal obligations. In determining whether a fair balance is achieved, the State enjoys a wide margin of appreciation "both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question"⁷.

⁴ *Air Canada v United Kingdom* (1995) 20 E.H.R.R. 150

⁵ *Vendittelli v Italy* (1994) 19 E.H.R.R. 464

⁶ (1995) 20 E.H.R.R. 150

⁷ *AGOSI v United Kingdom* (1987) 9 EHRR 1 at [52]

40. Paragraph 4 of Schedule 3 provides that an overseas entity which is still the registered proprietor at the end of the 18-month transitional period and has not registered on the overseas entity register will have committed an offence. The Government considers that the criminal offence, while necessary to ensure the overseas entity registers *before* it comes to making a disposition (which may not be until many years down the line) will not be sufficient in isolation. There are challenges to enforcing any criminal sanctions against overseas entities that may not have a physical presence in the UK beyond the land in question (they might not have an office or officers in the UK). The proposed restriction will act as an additional and effective method of enforcement. As explained above, the Bill provides for an 18-month transitional period in which an overseas entity can, if it chooses do so, dispose of the property freely rather than register in the overseas entities register.

41. Paragraph 8 of the new Schedule 4, achieves the same result as the restriction described above in relation to property owned by overseas entities in Scotland. There is no equivalent of a “restriction” under Scots law but the requirement on the Keeper to reject an application to register a “qualifying registrable deed” will have the same effect as the restriction. Therefore this provision also engages A1P1 and the justifications for the interference discussed above in relation to the provisions for England and Wales are applicable here.

Article 14: Prohibition of discrimination

Schedules 3, 4 and 5 to the Bill

42. As mentioned above, Schedules 3 to 5 insert new land registration provisions into the relevant land registration legislation for England and Wales, Scotland and Northern Ireland, which require an overseas entity to register in the overseas entities register in order to register title to land with one of the UK’s three land registries. A failure to register with Companies House or to adhere to the updating duty will in most cases also affect the ability of the overseas entity to either sell the land, or create a long lease or a legal charge over the

land as any buyer, lessee or chargee would be unable to register title/the charge (as relevant) with any of the land registries.

Interference

43. Article 14 of the ECHR provides that the enjoyment of rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground, such as national or social origin. Article 14 therefore provides for a right not to be discriminated against in respect of the other rights laid down in the ECHR and its Protocols. It can be relied upon by both natural and legal persons. A measure can violate Article 14 taken in conjunction with another substantive article because it operates in a discriminatory way, even if the requirements of the substantive article are met.
44. The entities in scope of the new registration requirements are overseas entities; registration at Companies House is a pre-requisite to (i) registration of land ownership with the land registries and (ii) making certain registrable dispositions in relation to their land. UK-registered entities, while subject to the requirement to disclose the same information about their beneficial owners (referred to under the domestic regime in the Companies Act 2006 as “people with significant control”), they are not subject to the same consequences in respect of land registration where they have failed to comply. Instead, the PSC requirements are enforced by way of making disclosure an initial condition of incorporation/formation and, going forward, underpinned by criminal offences.
45. Therefore the Government is of the view that as the provisions in Schedule 3–5 engage A1P1, they also engage Article 14 because their effect is that an overseas entity which has not registered in the overseas entities register will face consequences in respect of land registration which would not be the case for a UK entity in equivalent circumstances.

Justification

46. Different treatment does not constitute discrimination contrary to Article 14 where it has an objective and reasonable justification; that is where it is in pursuit of a legitimate aim and proportionate to that aim⁸.
47. The Government considers that the measures have a legitimate aim in preventing the use of UK property as a means to launder money and to improve the transparency of overseas entities that own property in the UK.
48. For a measure to be proportionate it must strike a fair balance between the rights and freedoms of the individual and the general interest, having regard to the requirements of a democratic society. States are not required to show that there was no alternative non-discriminatory means of achieving the same aim.⁹ The Government's view is that enforcing the registration requirements through land registration provisions is necessary because of the type of entity in scope of the regime. In contrast to UK entities, in relation to which the PSC regime is underpinned by criminal sanctions, limiting the enforcement measures under the draft Bill purely to criminal sanctions would give rise to a much less effective policy. In contrast to UK entities, which are much more likely to be based in the UK (as well as those individuals managing the affairs of those entities) it will be challenging for prosecutors to bring proceedings against overseas entities that may well not have any presence in the UK (other than through the land itself). It is therefore necessary that an additional enforcement mechanism is put in place, to ensure compliance with the new regime.
49. In addition, while UK-registered entities are subject to criminal sanctions for non-compliance with the domestic PSC regime, the domestic regime also has a dual enforcement mechanism; UK companies cannot incorporate in the UK if they do not provide information about their beneficial owners (i.e. people with significant control) to Companies House as part of their incorporation

⁸ See Case "*relating to certain aspects of laws on the use of languages in education in Belgium*" v Belgium ("*Belgian Linguistics*"), App. No. 1474/62 et al; (1968) 1 E.H.R.R. 252 ("*The Law*", Part I(B), para. 10)

⁹ *Rasmussen v Denmark*, App. No. 8777/79; (1984) 7 E.H.R.R. 371 (para. 41)

application. These two methods of enforcement are sufficient and adequate to ensure compliance of UK-registered companies with the PSC regime; however, in the context of the overseas entities regime, (i) enforcement through criminal sanctions is challenging and (ii) the UK has no control over incorporation of overseas entities and therefore the latter method of ensuring compliance cannot be used. The Government's view is that any potentially different treatment is proportionate given the nature of the entities in scope of the regime. Finally, as the policy is aimed at preventing the use of UK property for money laundering purposes, there is a clear link between the enforcement method (preventing the registration of certain land transactions in respect of the overseas entity) and the ultimate aim of the policy.

Department for Business, Energy and Industrial Strategy

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