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UK unveils draft Economic Crime (Transparency and Enforcement) Bill

Attorneys
Amanda N. Raad
Sean Seelinger
Judith Seddon
Sarah Lambert-Porter

On 1 March 2022, the UK government introduced the long-awaited Economic Crime (Transparency and Enforcement) Bill (the "Bill") to Parliament. This draft legislation has been on the cards for many years, and its arrival has been turbo-charged by Russia's invasion of Ukraine on 24 February 2022. Just a week earlier, the government had announced rather vaguely that it intended to put forward the Bill at some point before the end of the year.

The Bill should not be seen in isolation, however. In early February, the Law Commission confirmed that it will report on its proposal for reforming the UK's corporate criminal liability laws in the spring of 2022, and the House of Commons Treasury Committee produced its latest report on economic crime. The latter was critical of the UK's performance in relation to economic crime and fraud issues, noting that such crime "has not reduced but has instead continued on an upward trend." Further legislative change in this area is therefore likely.

What does the Bill propose to change?

In broad terms, the Bill is designed to help the UK's authorities to identify and prevent foreign owners from laundering money by means of UK assets. To that end, the Bill focuses on three key areas: introducing registration and transparency requirements for foreign ownership of land in the UK, expanding and improving the unidentified wealth orders (UWOs) regime, and adding certain sanctions powers.

This Alert summarises the main changes in those areas.

1. Establishment of a register of overseas entities and beneficial owners

The Bill proposes to establish a register of overseas entities, which will include information as to their beneficial owners, and also to require overseas entities who own land in the UK to register and provide the necessary information in certain circumstances. The registration requirements will apply retrospectively to property bought by overseas owners up to 20 years ago in England and Wales, and since December 2014 in Scotland. The Secretary of State is empowered to issue regulations regarding the form and content of the information on beneficial owners and officers of overseas entities, including pertaining to the verification measures required, which remains a major point of criticism levelled at Companies House, which accepts information in good faith. Overseas entities that fail to provide the required information about their beneficial ownership will face restrictions on the registration of disposals or transactions involving the property, and those who break the rules could face up to five years in prison.

The new register will be held by Companies House, the UK's corporate registrar, with support from the UK's Land Registries. Anyone will be able to inspect and obtain copies of the register, although certain information will be protected or redacted from public inspection (e.g. dates of birth, residential addresses, etc.).

Who will be caught?

An entity will be an 'overseas entity' for the purposes of the Bill if it is governed by a country or territory other than the United Kingdom and is a body corporate, partnership, or other entity that is a legal person under the law by which it is governed. In outline, an overseas entity must take reasonable steps (a) to identify any registrable beneficial owners in relation to the entity (whether those are individuals, corporates, governments, public authorities, or 'other legal entities' such as trusts), and, if it identifies any, (b) to obtain and provide the information specified in a Schedule to the Bill (the 'required information'). Furthermore, registered overseas entities will be obliged to update the registration particulars annually. Where an overseas entity fails to comply with any of these requirements, an offence will be committed by the entity and by every officer of the entity.

In order to comply with these obligations, overseas entities are required to serve an 'information notice' on any person that it knows, or has reasonable cause to believe, is a registrable beneficial owner. The notice must require the recipient to state whether or not it is a registrable beneficial owner, and to confirm, correct, or supply any of the required information that the overseas entity does or does not have.

Notably, overseas entities will also be empowered (under section 13 of the Bill) to send an information notice to any person/entity that it knows or has reasonable cause to believe has (or is likely to have) knowledge of the identity of a person or legal entity who is a registrable beneficial owner in relation to the overseas entity. This power seems designed to enlist cooperation and transparency from professional services firms (e.g. lawyers, accountants, estate agents, corporate services providers), which have frequently been criticised as 'facilitators' of global illicit finance. The Bill clearly seeks to pre-empt and allay privilege concerns by expressly stating that recipients of information notices are not required to disclose any information that would be covered by legal professional privilege. It will be particularly interesting to see how this proposal develops during the Parliamentary process, and whether or how assertions of privilege in this context might be challenged in practice.

In all cases, the recipient of an information notice will have a month to respond and supply any information that might help the overseas entity to comply with its obligations and/or to identify registrable beneficial owners. Failing to comply with an information notice will be an offence. It will also be an offence knowingly or recklessly to make a false statement in purported compliance with any of the obligations related to the new register. Where such offences are committed by a legal entity, the offence will also be committed by every officer of the entity in default.

2. Changes to the unexplained wealth orders (UWOs) regime

The Bill also proposes key changes to the unexplained wealth orders (UWOs) regime, which was introduced by the Criminal Finances Act 2017 in January 2018.

Where there are reasonable grounds to suspect that a person with involvement in serious crime or a politically exposed person (PEP) holds an asset (or assets) valued over £50,000 that appears disproportionate to their known legitimate income, a number of UK enforcement agencies (i.e. the National Crime Agency (NCA), the Serious Fraud Office (SFO), HM Revenue and Customs (HMRC), the Crown Prosecution Service (CPS), and the Financial Conduct Authority (FCA)) may apply to the High Court for a UWO requiring the individual to explain how they obtained those assets.

A UWO can be imposed on any person (including those outside the UK) and requires the target to respond with a statement and documentary evidence to prove, among other things, the nature and extent of their interest in the property, how it was obtained, and how any costs were met. Failure to comply or provide legitimate explanation will result in asset forfeiture. UWOs can be obtained with weaker evidence than would be needed to start a criminal investigation because an enforcement agency need only satisfy itself that the evidence is strong enough to argue that there has been a criminal act on the application of the civil standard of proof (i.e. on the balance of probabilities) rather than the criminal standard of proof (i.e. beyond reasonable doubt).

The proposed changes essentially aim to improve the UWO regime in three ways, by:

- Expanding their scope of application by extending the definition of 'holders' to include a broad category of 'responsible officers' of a legal entity (encompassing directors, partners, managers, secretaries, or anyone with whose instructions the equivalent of its board is accustomed to act), regardless of where such officers are located. UK property held in trusts will also be within the scope of UWOs. This expansion will enable agencies to seek UWOs in cases where assets are held through complex corporate structures.

- Allowing enforcement agencies more time in which to consider the information provided by UWO targets.

- Protecting enforcement agencies from costs rules that would otherwise lead to liability for a target's potentially substantial legal costs in cases involving unsuccessful UWO actions, unless the agencies have acted unreasonably or improperly. This may help to shift the cost-benefit analysis for enforcement agencies considering whether to apply for a UWO.

UWOs are a potentially invaluable investigative and enforcement tool (for intelligence gathering as much as asset seizure). They were launched in 2018 with much fanfare and excitement, but have been used sparingly to date – just nine have been secured so far in relation to four cases, with some high-profile failures. The proposed changes to the UWO regime will no doubt be welcomed by the UK's enforcement agencies. The costs protection, in particular, may also reveal the extent to which the risk of significant adverse costs orders has been a chilling factor in their underuse to date, or whether more needs to be done to unleash their full potential.

3. Changes to the sanctions regime

In a fortnight that has seen considerable sanctions activity under the UK's autonomous sanctions regime (covered in detail in our Alerts here, here, and here), the Bill proposes to amend the Policing and Crime Act 2017 (PACE) to introduce a 'strict civil liability test' in relation to sanctions breaches. This will replace the current requirement for firms to have actual knowledge or reasonable cause to suspect that sanctions have been breached and bring the UK in line with the US, where sanctions violations are enforced by the Office of Foreign Assets Control (OFAC) as strict liability offences. The net result is that it should be much easier for the Office for Financial Sanctions Implementation (OFSI) to impose sizeable fines for sanctions breaches. OFSI will also be given a new power to 'name and shame' firms that have breached financial sanctions but not received fines.

These proposed changes and the rapidly changing UK and international sanctions landscape in the wake of Russia's invasion of Ukraine mean that firms should be all the more focused on and diligent about assessing and addressing their exposure to sanctions risks (including by ensuring that they have robust systems and controls and due diligence frameworks in place), since the prospect of enforcement (or at least reputational fall out) is likely to increase.

Concluding comments

The draft Bill is certainly overdue and will be a significant step towards countering illicit finance in the UK. These proposals would undoubtedly raise the bar for transparency globally and may also prove to be a watershed for global economic crime enforcement, given the increase in international collaboration between law enforcement agencies.

The new register of overseas entities and beneficial owners is certainly the most critical, if not the most significant, development in the Bill's package of changes. Potent enforcement depends on decent intelligence. The additional information and clarity around beneficial ownership in the new register would not only be an invaluable source for authorities' investigation into and enforcement of money laundering and economic crime generally, but would also be particularly useful in enabling enforcement agencies to target UWOs more precisely and effectively than they have done to date. It remains unclear, however, whether UK enforcement agencies can expect any increase in resourcing to support and deploy these legislative developments to real effect.

Ropes & Gray will produce further updates as the Bill progresses through Parliament.

In the interim, the draft Bill is available here.