TRUST & ESTATE PLANNING

UK Private Company Ownership going public – threat or opportunity?

By Mark Pattimore

Britain is pressing ahead with plans to have a publicly-accessible, central register of the individuals who ultimately own, and control, UK companies. Will this move to transparency increase trust in UK business as the government hopes or have investors running for cover?

In 2013, while holding presidency of the G8, the UK government pressed for a publicly-accessible register of people with significant control of companies (PSC Register) to be adopted by all G8 members. While other G8 members would not, at the time, go as far as this they did to agree to publish plans to ensure companies know who owns them. Meanwhile the UK was undeterred in not getting agreement and has pressed ahead with its plans to construct its own public PSC Register. It is their stated belief that transparency and accountability are essential for trust and that businesses, investors and society will have greater confidence in the UK, and in doing business in the UK, if the company register and, in particular, the details of the ultimate beneficial owners of companies, are accessible to the public.

UK position and other European initiatives

Having initially consulted on this the UK is now working the Small Business, Enterprise and Employment Bill 2014-15 through parliament including fundamental changes to the manner in which company data is maintained and accessible to the public. As the Bill presently stands all companies will have to identify and disclose details of the ultimate beneficial ownership of any shareholder who holds, or exercises control of, more than 25% of the shares in issue of a company or anyone who exercises undue influence on the board to the Company Registry. A consultation document is currently in existence outlining the proposals for the secondary legislation that sets out how it will operate (and crucially exemptions to the rule) which runs until 9 December. That consultation document can be found by clicking here!

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The stated aims are to minimise illicit activities whether they be money laundering, tax evasion, corruption or terrorist financing. All are, of course, highly laudable proposals, aims and concepts. However the question remains that, with the UK running well ahead of other countries, will the UK public register achieve those aims and to what extent will it create a burden or hindrance to business? The European Parliament passed a motion in March to implement public registers for trusts as well as companies and discussions on this motion are currently under way. What the outcome of this will be and whether it ever makes it to European law is as yet unclear. The UK has not currently been successful in applying its plans to Europe or its Crown Dependencies. Guernsey, for example, has stated it already has an effective system in place and has done so for over a decade. Guernsey insists companies know who owns them. This information is readily available albeit not in a central registry. The information will be disclosed should there be a valid enquiry relating to either criminal/terrorist/tax evasion or aggressive tax avoidance matters. As a consequence the Crown Dependencies are, as are a number of other jurisdictions, resisting the plan to have an open registry; they do not see that it brings any great benefit and potentially produces commercial risks and, in many ways, believe its current system is more effective than the proposed UK model.

Other countries, such as the Czech Republic, list the shareholders but not the ultimate beneficial owners. Tellingly the Financial Action Task Force (FATF) issued a guidance paper on Transparency and Beneficial Ownership in October which states that, in order to prevent the misuse of corporate vehicles, information on both the legal owner and the beneficial owner is able to be made available to "competent authorities". Crucially for the UK, the FATF guidance stops some way short of its publicly-available register of PSCs.

The current position

If the Bill was enacted as currently drafted all companies would be required to know the name, address, date of birth and nationality of beneficial owners and it will become an obligation of companies to maintain that record. Indeed failure to disclose to the register will be a criminal offence. This would encompass UK bodies corporate and limited liability partnerships and it will also take in certain forms of trust particularly those where individuals exercise control over the activities of a trust. Some had pressed for the level to be lowered to 10% but on balance the UK government has accepted that 25% is the level at which influence can be brought to bear - particularly to block resolutions.

Certain protections are likely to be put in place by means of the secondary legislation. A PSC's date of birth will not be publicly-available and nor will their usual residential address. Other disclosure exemptions may be granted especially if disclosure would put a person in serious risk of harm.

The future

The UK would like the legislation to be in place by the middle of 2015. Although there is acknowledgement that such a register could negatively affect businesses, which for entirely legitimate commercial reasons may wish to maintain ownership hidden from the public and/or its competitors, this fear has been forgone in the name of transparency. Guernsey's position is that they will only entertain the UK's proposal if the playing field is level and all competing jurisdictions were to sign up.

It is not clear why only making this information available to the UK tax authorities, and certain government departments, is not sufficient but it is clear that there is a risk that, while implementing this process may discourage some unwanted business, perfectly legitimate and desirable business will also be lost. It is understandable that the UK is trying all it can to encourage other jurisdictions to follow its lead because if the UK stands alone on this it will severely limit the effectiveness of the register and certain legitimate businesses may think twice about setting up or staying in the UK.

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