Feature

**KEY POINTS**

- The Act implements a register of beneficial ownership of UK property owned by overseas entities (the Register). Failure to comply will lead to restrictions affecting dispositions of affected land, unless exemptions apply.
- Lenders will still be able to enforce charges which pre-date the implementation of the Register over qualifying property interests held by overseas entities.
- For new finance transactions which fund or involve security over property owned by an overseas entity, lenders should seek provision of its overseas entity ID as a condition precedent to drawdown and require evidence that the relevant overseas entity complies with the updating requirements under the Act.

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# The impact of the new Economic Crime Act on loan documentation

The Economic Crime (Transparency and Enforcement) Act 2022 (the Act) implements the highly anticipated register of beneficial ownership of UK property, forcing overseas entities to disclose details of beneficial ownership in order to transact with UK property. It is designed to improve the transparency of foreign ownership of UK property and clamp down on economic crime. However, the new regime is not faultless, and the new register is at risk of exploitation in certain areas. In this article, we consider key aspects of the Act, the new register, and issues for lenders ahead of the implementation of the new regime.

The Economic Crime (Transparency and Enforcement) Act 2022 (the Act) is a fast-tracked piece of legislation, receiving its first reading in the House of Commons on 1 March and Royal Assent just two weeks later on 15 March 2022. The Bill was expedited in response to Russia's invasion of Ukraine and to assist with the enforcement of sanctions against Russian entities and individuals with assets in the UK.

The Act experienced a long run up before it eventually hit the statute book, starting life in the form of the Registration of Overseas Entities Bill that was originally published in July 2018. Before the Ukrainian crisis, that Bill had threatened to languish in the history books following initial consultation under Theresa May's government but without any imminent plans for implementation.

The Act is comprised of three parts:

- Part 1 implements a brand-new register of overseas entities (relating to ownership of UK-registered property) (the Register) as envisaged under the original Bill;
- Part 2 extends the existing legislative framework for unexplained wealth orders (UWOs); and
- Part 3 amends the existing sanctions regime, imposing strict liability for failure to comply with sanctions legislation.

Only Part 3 of the Act (sanctions) is currently in force, with a date to be confirmed for the implementation of the Register and the extension of the UWO regime.

The Act is expected to be supported by a further economic crime bill, on which a White Paper has recently been released.[1] This White Paper proposes the most significant reforms to the function of Companies House and the role of the Registrar since inception, with the reported aim of promoting the UK's economic security, to clamp down on fraud and prevent the usage of UK companies as vehicles for money laundering.

## THE REGISTER OF OVERSEAS ENTITIES

Arguably the most significant element of the Act for English law loan documentation is the establishment of the Register. When it comes into force, the Register will be administered by Companies House and is designed to sit alongside the UK's three land registries.

### Who will feature on the Register?

Under the Act, overseas entities seeking to buy, sell or transact with UK property will be required to identify and disclose their beneficial owners in the Register in order to become registered proprietors of a "qualifying estate" at the relevant UK land registry. Under s 2(1) of the Act, an "overseas entity" means a legal entity that is governed by the law of a country or territory outside the UK. A "qualifying estate" includes freehold property and leasehold interests for a term of more than seven years, unless the estate was registered in the name of the overseas entity before 1 January 1999 (s 41(6) of the Act).

Any existing overseas owners of UK properties will have a six month "transitional period" from the date on which the Register comes into effect to comply with the new requirements, failing which they will be prevented from selling, leasing or creating a legal charge over the property interest (subject to certain exemptions).[2] Pending the establishment of the Register (for which we await secondary legislation), overseas entities selling UK properties from 28 February 2022 onwards will have to submit details of beneficial ownership to register the transfer,[3] seemingly to prevent the disposal of illicit assets before the Register is in place.

Registered overseas entities are also required to update the Register (at least) annually. Failure to keep the Register updated is an offence.

### What about non-compliance?

Where an overseas entity fails to provide details of beneficial ownership in relation to a qualifying estate before the end of the transitional period, the Land Registry will impose restrictions against title to prevent the transfer, creation of a lease (for more than seven years) or creation of a charge over the relevant property interest (subject to certain exceptions).[4] For lenders with existing security over UK property under foreign ownership, this potentially creates an enforcement issue where the relevant beneficial ownership details are not provided by the end of the transitional period.

Fortunately, the Act provides some relief for lenders with existing security over UK

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property. Specifically, any restriction entered on title to a property (for failure to disclose details of beneficial ownership), will *not* prevent a disposition made:[5] (i) pursuant to a contract (such as a charge) made prior to the entry of the restriction; (ii) in exercise of a power of sale or leasing in favour of a registered charge-holder (or receiver appointed by such charge-holder); or (iii) by a specified insolvency practitioner in certain circumstances (to be prescribed).

Any failure by overseas borrowers to provide the necessary details to the Register before the expiry of the transitional period should not therefore impact the enforcement of such security under a pre-existing charge, so long as it falls within one of the categories specified above.

## WILL THE REGISTER ACHIEVE ITS STATED AIMS?

For some, the Register is not as comprehensive as it could perhaps have been. Under the Act, the threshold for disclosure of "beneficial owners" is 25% of shares or voting rights in the relevant overseas entity, mirroring the Companies House "persons with significant control" regime. This means that where an overseas entity has just five shareholders with equal (20%) shareholdings, for example, their identities do not need to be revealed. (Note that "beneficial ownership" will also include those who exercise significant power and control in the overseas entity or who hold the right to appoint or remove the majority of the board.)

The Act also conflates ownership of the overseas entity with beneficial ownership of UK property. While those with significant influence in the entity purchasing the property must be named on the Register (such as major shareholders or key directors), the beneficial owners of the property itself do not need to be disclosed. Non-UK trusts who acquire UK land will also fall outside the scope of the Register,[6] although foreign companies acquiring property (as nominee or trustee) on behalf of a trust will be disclosed on the Register.[7]

Moreover, the details which an overseas entity must submit regarding beneficial ownership contain an obvious lacuna which could allow beneficial owners to go unnamed. An overseas entity is required to confirm that it has taken "reasonable steps" to identify its beneficial owners and declare that either: (i) it has identified beneficial owners and provided the required information; or (ii) it has no registrable beneficial owners; or even (iii) there is at least one registrable beneficial owner about which the required information cannot be provided (in which case as much information as possible should be provided about the beneficial owner).[8] Sceptics have highlighted that those wishing to evade the Act will inevitably use the last option (iii) referred to above.

As such, the Register might not be the silver bullet to achieve greater transparency in relation to foreign ownership of UK property that it was hoped to be. It is of course possible however that any loopholes might be addressed through changes to the Register via secondary legislation in future.

## THE IMPACT OF THE ACT ON FINANCE DOCUMENTS

As detailed above, for existing financings the immediate concern will be to identify any security interests granted by an overseas entity over a "qualifying estate". The exception in favour of existing charges mentioned above may allay some concerns about the impact of the Register on the enforcement of such security. However, once the Register is fully up and running, lenders may wish to rely upon further assurance type undertakings in existing finance documents to ensure that relevant obligors take appropriate steps to comply with any reporting requirements (particularly where new security is taken under such finance arrangements over a qualifying interest in UK property held by an overseas entity that is not registered (and is not exempt)).

For new finance transactions which involve the funding of a qualifying estate owned by an overseas entity, or where such interests are subject to transaction security, lenders will want to ensure that the relevant parties provide their overseas entity ID number as a condition precedent prior to drawdown or accession (or alternatively evidence that the entity is exempt).

Arguably, compliance with the Act is already addressed under existing loan documentation (including those based on the Loan Market Association templates) through covenants dealing with the compliance by obligors with laws in general or more specifically through sanctions-related laws in particular. A lender with particular concerns may wish to refer specifically to the Act within such provisions, or remove any grace periods or other material adverse effect-type qualifications from any related defaults.

Separately, lenders may wish to re-visit information covenants under loan agreements to require obligors to provide evidence of their ongoing compliance with the Register, including certification to demonstrate that the Register has been updated annually or at such other times as required under the Act.[9]

Lenders who fund against UK leaseholds may wish to specify that registrable leases (ie those with a term of seven years or more) can only be granted or assigned to an overseas entity if it has an overseas ID number and continues to comply with the updating requirements as set out under the Act.

A residual question is what happens when a financing secured on a relevant UK property interest owned by an overseas entity is discharged and a lender is asked to release its security and re-convey that property interest to the overseas entity? A lender might be reluctant to grant such release (and may want to amend any related covenant requiring them to do so) until the overseas chargor is registered on the Register or can demonstrate that it is exempt.

Finally, we note that these are still relatively early days for the Act, and more will inevitably become clear as secondary legislation is introduced dealing with the commencement of the new regime and other ancillary matters. ■

1 https://www.gov.uk/government/publications/corporate-transparency-and-register-reform
2 Schedule 3, para 6(2) of the Act, and Sch 4A, para 3(2) of the Land Registration Act 2002 (inserted by the Act).
3 See ss 41 and 42 of the Act.
4 See note 2 above.
5 Schedule 3, para 3 of the Act, inserting Sch 4A (para 3(2)) of the Land Registration Act 2002.
6 As trusts are not separate legal entities – although if a trustee is a registrable beneficial owner by virtue of his role as trustee then he will be required to disclose details of the trust.
7 See s 12(2)(b)(ii) and Sch 1, para 8, of the Act on the information required regarding trusts generally.
8 See s 4(2) of the Act.
9 See s 7 of the Act for the updating duty generally.