

# SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015 NOW IN FORCE

As anticipated, the Small Business, Enterprise and Employment Act 2015 (SBEE) received Royal Assent on 26 March 2015 and the provisions dealing with the prohibition/abolition of bearer shares came into force two months after that date. Other provisions of the SBEE, which are not in force, but which are of interest to corporates include the requirement for companies (other than DTR 5 issuers) to keep a register of people with significant control over the company, the ban on corporate directors and the requirement for large companies to report on their payment practices.

## Creating a Register of People with Significant Control

One of the most significant elements of the government's transparency and trust agenda has been the creation of a central public register of people with significant control (PSCs) over UK companies (sometimes referred to as a register of beneficial owners). The purpose of such a register is, in the government's view, to increase the accountability of companies by making it easier to see who actually owns or controls them and who might be making decisions about how they are run.

The government legislated for this in the SBEE. The SBEE includes a new obligation on companies to maintain a register of people with significant control over them (the **PSC register**). Companies will then have to provide this information to Companies House, where it will be made publicly available in a central searchable register. The SBEE also sets out the duties on companies to obtain and on PSCs/relevant legal entities to supply information to be included in the PSC register (and to keep such information up to date); provisions dealing with the consequences of failure to obtain/supply such information (a criminal offence for the company/officers in default, and which may result in the PSC's/relevant legal entity's interest in the company being frozen); rights to inspect the PSC register and detailed provisions as to whether a person/legal entity is a PSC (or, in the case of a legal entity, would be a PSC if it were an individual) in relation to a company. These

provisions are due to come into force in January 2016. However, much of the additional detail has been left to be included in regulations.

On 19 June 2015 BIS published the first draft of one set of such regulations as part of a consultation paper in relation to the Register of People with Significant Control covering the scope, nature and extent of control, the fees companies can charge for providing copies of the entries in their PSC register, the protection regime and warning and restrictions notices (see below for more on each of these). On 23 June 2015 BIS updated this consultation paper to state that it had decided not to implement the ban on corporate directors in October 2015, and that it would announce its intentions for implementing these provisions shortly (see below for further discussion of this).

### *Overview of the PSC regime*

The consultation contains a helpful overview of the PSC regime. The first step is to determine whether an individual or legal entity satisfies one or more of the following conditions:

1. directly or indirectly owns more than 25% of the shares in the company;
2. directly or indirectly holds more than 25% of the voting rights in the company;
3. directly or indirectly has the power to appoint or remove the majority of the board of directors of the company;

4. otherwise has the right to exercise (or actually exercises) significant influence or control over the company (statutory guidance on what this means is currently being prepared); or
5. has the right to exercise or actually exercises significant influence or control over a trust or firm that is not a legal entity, which in turn satisfies any of the first four conditions over the company.

A PSC is defined in the SBEE as a person (i.e. an individual) who meets one or more of the conditions. For many corporate groups, it will often be a legal entity (i.e. another group company) rather than an individual that fulfils one or more of the conditions set out above. Entities that satisfy one of the conditions **and** are required to hold a PSC register themselves or are a DTR 5 issuer (or similar) are called relevant legal entities.

Once you have identified a PSC or a relevant legal entity, the next step is to work out whether the PSC or the relevant legal entity is registrable or non-registrable. In the case of a corporate chain of companies, each of which is a relevant legal entity, only the first entity in the chain will be registrable. The entities further up the chain are non-registrable. This is to avoid having to include all of the entities in the chain in the PSC register given it is possible to track the information through the chain by looking at the PSC register of each entity in the chain. A similar approach is adopted with regard to individuals who hold their interests in a company through a chain of relevant legal entities, so that only the first relevant legal entity in the chain needs to be entered in the relevant company's PSC register. In order for the relevant legal entities to be part of a chain of legal entities for SBEE purposes, each company in the chain (other than the last) must have a majority stake in the entity immediately below it in the chain. A "majority stake" is defined as holding or controlling a majority of the voting rights, having the right to appoint or remove a majority of the board of directors or otherwise having the right to exercise or actually exercising dominant influence or control (similar to the subsidiary undertaking test in the Companies Act 2006).

All UK incorporated companies, other than DTR 5 issuers or other companies that are subject to similar disclosure regimes, must hold their own PSC register from January 2016. DTR 5 issuers have been exempted from the new regime (and the government is proposing to exempt companies subject to similar disclosure regimes) on the basis that they already have to provide a substantial amount of information about their major owners and the government felt that it was unnecessary duplication to require these companies to provide information about their controlling owners in different formats to different authorities. Further regulations will apply the regime to

LLPs and UK Societas Europaea (SEs), and adapt it for foreign limited partnerships (so that only the general partner/manger and not the limited partners are caught) as well as implementing it for corporations sole and government bodies etc. From April 2016 onwards companies (and other entities within the scope of the regime) will need to send the information to Companies House with their confirmation statement (which replaces the annual return), which will then be included in the central public register.

#### *Details contained in the draft regulations*

The draft regulations and the consultation paper cover the following areas:

- *Which companies should not be required to keep a PSC register* – the government is proposing to add an exemption for companies that have voting shares admitted to trading on a regulated market in any EEA state (on the basis that they are subject to similar disclosure/transparency requirements to those in DTR 5).
- *Recording the nature and extent of control* - the SBEE sets out the information that should be recorded in the PSC register, which for individuals or relevant legal entities includes their name, residential or registered address (which will not be made publicly available), a service address, date of birth (for individuals) and information about how they have significant control. To address this last point, the draft regulations propose requiring a statement to be included in the PSC register indicating which of the conditions (1 to 5 above) are met and to what extent i.e. over 25% to 50%; over 50% to 75%; and over 75% in the case of holdings of shares or voting rights. The consultation paper seeks views on this approach and in particular whether it would be helpful to have another category of 100%. It also suggests requiring companies to include certain other statements in the register e.g. that there is no PSC/relevant legal entity or where the company has been unable to identify a PSC/relevant legal entity.
- *The fees that companies can charge for providing copies of entries in their PSC register.*
- *The protection regime* – the regulations propose that an application for "protection" can only be made in "exceptional" circumstances i.e. where the applicant reasonably believes that there is a serious risk that the PSC (being an individual), or a person who lives with them, will be subjected to violence or intimidation broadly as a result of the activities of the companies of which they are PSCs or directors.

- *Warning and restrictions notices* – if a company identifies a person or entity that should be included in its PSC register, or who might have knowledge of such a person or entity, it may be required to contact them (by serving a notice under s.790D or E of the Companies Act 2006 (as amended by the SBEE)) in order to obtain the details needed for its PSC register. If a person or entity fails to respond to such a notice within one month the company may send them a warning notice, which will inform them that the company is proposing to issue them with a restrictions notice. Failure to respond to the warning notice within a further one month period, will entitle the company to issue a restrictions notice, freezing the person or entity's interest in the company until the company obtains the information it needs and lifts the restrictions. Whilst the shares or rights are frozen in this way, the holder of the interest will not be able to sell, transfer or receive any benefit from the shares or rights. The draft regulations set out proposals for what information must be included in the warning and restrictions notices, and what might constitute a valid reason for not responding. The government is seeking views on these points.

#### **Further changes ahead**

It is worth noting that the EU Fourth Money Laundering Directive, which was adopted in June 2015, will require all Member States to hold central registers of company beneficial ownership information from 2017. These requirements are similar in many respects to those contained in the SBEE. Any additional requirements will not be implemented until 2017 and will be the subject of separate consultations by HM Treasury.

The BIS consultation closes on 17 July 2015 and a copy can be obtained from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/395478/bis-14-1145-the-register-of-people-with-significant-control-psc-register-register-final-1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395478/bis-14-1145-the-register-of-people-with-significant-control-psc-register-register-final-1.pdf) .

#### **Exception to the ban on corporate directors**

In November 2014 BIS consulted on whether the Secretary of State should make exceptions to the ban on corporate directors contained in the SBEE. In response to the feedback received, it published a questionnaire in March 2015 seeking views on whether a "principles based" exception should be introduced. This "principles based" exception proposes that a company may only appoint a corporate director if all of the directors of the corporate director are themselves natural persons and the law under

which the corporate director is established (if overseas corporate directors are to be permitted) requires certain details of the directors of the corporate director to be included in a publicly available register. The questionnaire also covered whether the corporate director could be something other than a UK incorporated company e.g. an LLP, European or overseas company; if it were an LLP, whether all of its members would have to be natural persons; if it were an overseas company who would be the equivalent of the directors who would have to be natural persons and what details of these persons would have to be publicly available. The deadline for responses was 27 April 2015 and we are currently awaiting the outcome. However, as mentioned above, BIS has announced that it intends to postpone the implementation of the ban on corporate directors beyond the previously announced date of October 2015.

#### **Reporting on payment practices**

The SBEE also contains a power for the Secretary of State to make regulations requiring certain types of (large) company to report on their payment practices and policies. On 20 March 2015, BIS published a statement setting out their plans for implementing this regime and an indicative format for the report; as a result, large companies will be required to report on their payment practices and policies from April 2016. The stated purpose of these new provisions is to tackle the UK's late payment culture, which the government perceives to be a significant problem for the UK economy and small businesses in particular. The government wants large businesses to lead by example in paying their suppliers promptly and fairly, with 30 days terms the norm and 60 days the maximum. Whether these reforms will achieve these aims remains to be seen.

The government has concluded that the reporting duty should only be mandated for large organisations, by which they mean large quoted companies, large private companies and large LLPs. Small and medium sized quoted companies will not be caught. The definitions of small, medium and large to be used are those set out in the Companies Act 2006 i.e. a company is large if it satisfies two or more of the following conditions: turnover of more than £25.9m; balance sheet total of more than £12.9m; or more than 250 employees. Interestingly, previous provisions requiring disclosure around a company's policy and practice on payment of creditors in the Large and Medium Sized Companies and Groups (Accounts and Reports) Regulations 2008 were revoked back in October 2013.

The types of payment which are caught by the regulations are in respect of business to business contracts (for example contracts for goods, services or intangible assets

(such as intellectual property) and which are connected to the carrying on of a business). Financial services contracts are specifically excluded. The report will include, amongst other things, details of standard payment terms; the average time taken to pay; and the proportion of invoices paid in 30 days or less ("good practice"), between 31 and 60 days and beyond 60 days ("bad practice"). Reporting will be on a half-yearly basis and the reports will need to be

provided in open data format to a single central location. The government has said that it is going to work with stakeholders in the coming months to design and implement a system that is as business- and user-friendly as possible, and that the purpose of publishing the statement in March 2015 was to give those affected as much notice as possible of their future obligations.

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