

This guide should not be relied on as a definitive guide to the legislation and should not be relied on as legal advice. The particular circumstances of any situation will need to be considered to determine if the overseas entity is one that is captured by the legislation, if the estate is a qualifying estate, and whether the beneficial owners need to be registered. As a result, this guide is intended only as a high-level overview.

This guide covers the position of property and land situated in England and Wales only.

What is the Register of Overseas Entities?

As from 5 September 2022, overseas entities wishing to buy, sell, lease, charge or transfer UK property or land must be registered on the Register of Overseas Entities (ROE) at Companies House before HM Land Registry will register the transaction. The ROE records beneficial ownership of qualifying estates in UK properties.

Overseas entities are required to:

- Apply for registration on the ROE at Companies House (disclosing details of their beneficial owners) if they acquire or currently own property or land in England and Wales
- Provide information to Companies House in respect of certain recent property or land transactions
- Ensure that, once registered at Companies House, information on the register is kept up to date

Failure to do any of the above is an offence, punishable by fine and/or imprisonment.

Why and When Might the Overseas Register Be an Issue for R&I Practitioners and Secured Lenders?

If an overseas entity owning or intending to own property in England and Wales is not registered on the ROE, this may impact restructuring and insolvency transactions in the following ways:

- Require additional steps to be taken when registering security
- Impact enforcement of security
- Cause difficulties when refinancing or restructuring
- Create additional hurdles when an insolvency practitioner (IP) sells to an overseas entity
- Impact sales where an IP is appointed over an overseas entity

To understand when, why and what to do in a particular situation, it is necessary to have a broad overview of the legislation.

Overview

The Economic Crime (Transparency and Enforcement) Act 2022 created the ROE that shows who the beneficial owners of an overseas entity are.

The purpose behind the legislation is to provide greater transparency about who the ultimate owners of UK land and property are, when an entity owning UK property is based outside of the UK. The legislation is largely aimed at preventing money laundering.

There are transitional arrangements in place governing what an overseas entity needs to do if it has purchased, disposed of, or currently owns land or property in England and Wales. These transitional arrangements, although summarised below, should be considered in detail alongside advisers to ensure that they have been complied with.

When Is Registration Required?

If an “overseas entity” owns or wishes to deal with a “qualifying estate”, it must be registered on the ROE at Companies House.

As part of the registration process, the entity must identify its beneficial owner(s) (each of which will need to be verified) and/or their managing officers.

Upon registration the overseas entity will be provided with an overseas entity ID Number (“OE ID”) that will be required by HM Land Registry when registering dispositions of property or land.

What Is a “Qualifying Estate”?

A freehold or leasehold interest of longer than seven years.

What Is Classed as an Overseas Entity?

This is defined in the legislation as a legal entity that is “governed by the law of a country or territory outside of the UK” and broadly will capture non-UK incorporated companies, LLPs and partnerships. There are currently no exemptions.

What Is a Beneficial Owner?

The legislation defines what a beneficial owner is. In simple terms, this is an individual or entity that has significant influence or control over the overseas entity – these terms are also defined in the legislation.

At its simplest, it includes any holder of more than 25% of the shares in an overseas entity. However, the position needs careful consideration. For example, not all beneficial owners are registrable, certain conditions and qualifications need to be met, and there are also certain exemptions.

Restriction on Title Preventing Dispositions

For “qualifying estates” owned by an overseas entity HM Land Registry will register a restriction on the title that will prevent a disposition from being registered unless the overseas entity has a valid OE ID or exemptions apply.

Historic Transactions (Transitional Arrangements)

Property Owned Since 1 January 1999 by an Overseas Entity

Overseas entities that currently own property or land in England and Wales must register on the ROE at Companies House before 1 February 2023, otherwise they will be committing an offence to which both civil and criminal penalties apply.

This applies to property purchased between 1 January 1999 and 11 August 2022 where the overseas entity is still the registered owner.

Property Disposed of After 28 February 2022 by an Overseas Entity

Overseas entities that have disposed of – or intend to dispose of – English or Welsh property or land, between 28 February 2022 and 31 January 2023, must give certain details about the disposal to Companies House before 1 February 2023; although, in this instance (unless the entity owns other UK property) there is no need to register on the ROE.



How Does the Overseas Register Impact IPs?

The below are examples of when an IP is likely to encounter these new rules.

IP Selling Property or Land Situated in Either England or Wales to an Overseas Entity

Although a sale of a “qualifying estate” to an “overseas entity” will be contractually binding notwithstanding that the entity is not registered on the ROE, legal title to the estate will remain with the insolvent company because the transaction will not be registered by HM Land Registry. This is not ideal for IPs who require certainty that the assets of an insolvent estate have been dealt with.

When dealing with an overseas purchaser that is not registered on the ROE, an IP should ensure the sale is made conditional upon the overseas entity registering on the ROE on (or ideally before) completion and providing a valid OE ID, and include mechanisms in the contract for dealing with the position should they fail to do so.

IPs should be mindful of the fact that if conditions for registration are not met, and the transaction fails, they will have to source another buyer.

In cases where there are a number of offers on the table, the fact that a potential buyer is an unregistered overseas entity could have a bearing on who the IP chooses to sell to.

In addition, the verification requirements and application timeframes (see further below) could adversely impact a sale, particularly a pre-pack sale, where the proposed sale is to an overseas entity that does not have a valid OE ID.

Even if the overseas entity is registered on the ROE, IPs should also satisfy themselves that the OE ID is still valid (i.e. the entity has kept the register up to date).

IP Taking Security Over English or Welsh Property or Land From an Overseas Entity

In some situations, an IP may take security (such as to secure deferred consideration). If the security is provided by an overseas entity over property or land situated in England or Wales, then the security can only be registered at HM Land Registry if the overseas entity has a valid OE ID.

If the overseas entity is not registered on the ROE at Companies House or does not have a valid OE ID (i.e. the register has not been kept up to date), the charge will only take effect as an equitable charge.

In this situation, the security may (a) be impacted by the priority rules, meaning that a later created interest could take priority to the IP’s security, and/or (b) make enforcement more difficult (see *Enforcement of Security* below).

To overcome this, an IP should consider making a transaction conditional upon the overseas entity being registered on the ROE at Companies House, and for the overseas entity to provide its OE ID to the IP.

Completed Disposals

There are transitional arrangements in place that impact overseas entities that currently own – or have recently disposed of – property or land (see *Historic Transactions* above). How do these impact office holders?

If an office holder (more likely a foreign office holder) has disposed of property owned by an overseas entity between 28 February 2022 and 1 August 2022, it is unclear if the officeholder is required to provide details of the disposal to Companies House.

Until further guidance/regulation clarifies the position, an officeholder should speak to their advisers to confirm what step(s) they should take.

Group Restructurings

The legislation may impact group restructurings where a sale to – or by – an overseas entity is contemplated.

Although registration on the ROE may create challenges, they are not insurmountable, but the need to register on the ROE (if not already registered) should be factored into timeframes and the restructuring strategy. Consider, for example, the impact of Companies House refusing to register an overseas entity on the ROE.

In addition, if an overseas entity is not registered when it ought to be, the fines that accrue can be significant (up to £2,500 per day) – something that may adversely impact intended restructuring plans.

The legislation should also be considered in the context of a company voluntary arrangement, restructuring plan, or scheme of arrangement where, for example, the plan is to dispose of property or land overseas.

Refinancing

The registration requirements may also impact group refinancing where the existing portfolio includes security taken from an overseas entity over property or land in England or Wales. If the overseas entity does not have a valid OE ID, new security cannot be registered at HM Land Registry until it does.

IP Selling Property or Land Situated in England or Wales Owned by an Overseas Entity

For English IPs who are primarily appointed over English companies, this is unlikely to be a common situation, but it is possible for an overseas company to be wound up in the UK as an unregistered company. Further, a foreign officeholder appointed over an overseas entity may find themselves having to deal with property or land in England or Wales. In either situation, can the office holder sell property or land owned by an overseas entity?

Registered Entities

If the overseas entity has a valid OE ID, there should be no adverse impact on a transaction – it will proceed in the normal way. However, a buyer will require certain information in order to be able to register the disposition at HM Land Registry, including evidence of appointment and a valid OE ID in order to deal with the restriction on title.

Non-registered Entities

If an entity is not registered on the ROE the restriction on title will prevent a disposition being registered. However, there is an exception that allows a “specified insolvency practitioner” in “specified circumstances” to dispose of property despite the restriction on title.

Presently (and unhelpfully), there are no regulations that set out who a specified insolvency practitioner is, or what specified circumstances are. In these circumstances, an IP may prefer to rely on a charge holder (if there is one) to sell using its power of sale or alternatively seek a court order, in order to be certain that the restriction on title will be dealt with.

Impact on Lenders

The legislation will impact UK lenders that hold (or intend to hold) security over property or land in England and Wales that is owned by an overseas entity. An overseas entity that does not have a valid OE ID will not be able to deal with that property, including granting security, without first registering on the ROE at Companies House, unless one of the specified exceptions applies.

Taking a Legal Charge

If a lender intends to take security from an overseas entity over property or land in England or Wales, and that entity does not have a valid OE ID the restriction on title will prohibit the disposition and therefore prevent the registration of a legal charge.

In order to address this, a lender can (and should) make it a condition of the loan that the overseas entity registers on the ROE at Companies House and/or provides a valid OE ID.

If the overseas entity does not register and provide a valid OE ID, then aside from the fact that it will be committing an offence and accruing potentially hefty fines (up to £2,500 a day), a lender's charge will only take effect in equity leaving it in a less secure position and impacting enforcement options.

A lender may also wish to consider the time that it will take for an overseas entity to register on the ROE and the impact of that on completion arrangements – see *Timing* below.

In addition, lenders should consider including provisions requiring the overseas entity to comply with the annual updating requirements and other covenants or conditions that ensure that dealings with the property or land can be registered at HM Land Registry.

Enforcement of Security

The legislation exempts disposals by a lender exercising its power of sale and disposals by a receiver appointed by a lender, but this may not assist in all cases.

Security Taken on or After 5 September 2022

The exemption only applies where the charge is registered at HM Land Registry; therefore, if a lender takes security from an overseas entity that is not registered on the ROE, the charge only takes effect in equity, and the lender will not be able to rely on the exemption if seeking to enforce at a later date.

As suggested above, requiring registration or a valid OE ID as a condition precedent should address this.

New Security Under Existing Finance Agreements

In this situation, it is unlikely that a lender will be able to register a legal charge unless the overseas entity is registered on the ROE and has a valid OE ID.

Existing Security

For lenders that already hold security over property or land in England or Wales that was owned by an overseas entity before 5 September 2022, the security will (or should) be registered at HM Land Registry as a legal charge, and the legislation will not change that.

In this situation, even if the overseas entity has not registered on the ROE (as it ought to before February 2023), the lender can rely on its power of sale or ability to appoint receivers to dispose of the property, relying on the exceptions in the legislation.

Additionally, the legislation includes further exceptions that permit dispositions pursuant to contracts made before the legislation came into force, which might assist a lender with enforcement.

Security Reviews

Prudent lenders should review their existing portfolio to check whether security granted to overseas borrowers before 5 September 2022 has been properly registered at HM Land Registry. If the charge has not been registered at HM Land Registry, a lender will face difficulties when seeking to enforce, because the charge will take effect in equity only and the lender therefore cannot rely on the exemption.

In the limited circumstances where this might be the case, lenders should look to remedy the position, if possible, before it becomes necessary to enforce.

Appointment of Receivers

A lender that has a registered charge can appoint a Law of Property Act (LPA) receiver, and the fact that the overseas entity is not registered on the ROE does not matter. In these circumstances the LPA Receiver can rely on the exemption in the legislation. This will address the restriction on title and enable a disposition to be registered at HM Land Registry.

Refinancing

The legislation is likely to impact refinancing an existing portfolio that includes securities taken over land or property in England or Wales from an overseas entity. If the overseas entity is not registered on the ROE at Companies House, then the restriction on title will prevent the security from being registered. A lender is unlikely to wish to proceed until the entity is registered on the ROE, because its charge will only take effect in equity. Addressing the need to deal with registration on the ROE will potentially delay refinancing strategies.

Even if the overseas entity is registered, lenders must still check that the OE ID is valid. If the entity has not updated the register as it is obliged to on a yearly basis, HM Land Registry will not register the disposition until the register has been updated.

Other Considerations for IPs and Lenders

Checking the Register

The register is publicly available, so an IP or lender can check whether an entity is registered. However, it is worth noting that an overseas entity, once registered on the ROE, has to keep the register up to date, and must do so every 12 months from the point of registration. If this is not done, the entity will be treated as if it has not registered, until the breach is remedied. This will require the overseas entity to provide up-to-date information about its beneficial owners.

Timing

Before registering on the ROE at Companies House, the overseas entity has to give notice to its beneficial owners, asking the owners to confirm if the information they retain about the beneficial owner is correct, and to provide any missing information. The beneficial owners have one month to respond.

Even where beneficial owners are cooperative, if a transaction involves an overseas entity that has not yet registered on the ROE, the requirements to send notice and to gather the information required to make an application to Companies House will impact completion timings.

Verification and Registration

There is a list of UK regulated agents who can complete verification checks. Most UK lawyers do not offer this service.

Once checks have been completed, the overseas entity (or UK regulated agent) can apply to Companies House to register the entity on the ROE. There is a fee.

Companies House will require information about the overseas entity itself (such as its registered office and address), as well as details about the beneficial owner(s). For example, if the beneficial owner is an individual, their name, address, date of birth, etc. will be required. The type of information required is not dissimilar to that required by professional bodies in the UK that are required to verify the identity of their clients/customers.

Only once the application is accepted will the overseas entity be entered on the ROE.

The process of verification and registration will take time to complete. This will also impact completion timings and arrangements, and, where the overseas entity has a complicated ownership structure, the registration requirements may take longer.

Conclusion

Ultimately, the primary question for all lenders and IPs in any property transaction is "Is there an overseas entity involved?"

If yes, then lenders and IPs should take advice on what steps, if any, can and should be taken to enable the property or land to be dealt with. This will involve careful consideration of the following:

- (a) Whether the entity and intended disposition is caught by the legislation
- (b) Whether exemptions apply that enable the disposition to be registered
- (c) What steps need to be taken to ensure that adequate protections are included within contracts and lending documentation
- (d) Due consideration as to whether the restriction on title can be addressed if the transaction will be caught

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