

UK Corporate Transparency Rules and the Impact of the PSC Register on Lenders

MAY 24, 2016

This briefing follows on from our earlier note on the new UK Corporate Transparency Rules – *“Disclosure of Persons with Significant Control over UK companies and LLPs.”*

1. What is the PSC Register?

As noted in our earlier briefing, from 6 April 2016 UK-incorporated companies and limited liability partnerships (LLPs) will be required to maintain a register of persons having significant control over them, known as a **“PSC Register”**. This register will need to be filed with Companies House from the end of June 2016 and will be available to the public.

This requirement has been introduced following commitments by the UK government to increase the transparency of corporate ownership. It is targeted at those who carry out criminal activity, such as money laundering, behind opaque corporate structures. However, it will also impact legitimate unlisted UK companies, as they will need to record information about ultimate controllers for the first time.

In this briefing, we consider the potential implications of this development for lenders to UK companies (or to any borrower whose group includes a UK company).

2. What makes someone a person having significant control (“PSC”)?

A PSC of a company (or LLP) is someone who satisfies one or more of the following five criteria in relation to it:

- i. holding, directly or indirectly, more than 25% of the shares;
- ii. holding, directly or indirectly, more than 25% of the voting rights;
- iii. holding, directly or indirectly, the right to appoint or remove directors holding a majority of the votes that can be cast at a meeting of the board of directors;
- iv. having the right to exercise, or actually exercising, significant influence or control over the company; and/or
- v. having the right to exercise, or actually exercising, significant influence or control over the activities of a trust or firm which is not a legal entity and which meets any of the above conditions.

In a chain of legal entities, a company's PSC Register will need to identify any UK company or LLP, or non-UK company with voting shares listed on certain markets (i.e. an entity that is subject to its own disclosure requirements), that would have been a PSC if it were an individual. For the purposes of this briefing, we refer to the relevant individuals and the relevant legal entities as "**PSCs**". Someone wishing to identify the ultimate owners of the company would then be able to look at the PSC Register, or other publicly available information, on ownership of that entity above it in the chain. There is an exception so that a company that holds its interest through a chain of other companies would not need to be registered if at least one company in that chain was a UK company.

3. Do lenders meet any of these criteria?

The key question for lenders will be whether they could be seen to meet any of the criteria (i) to (v) set out above. Our view is that, save in the case of arrangements which give lenders an unusually high level of control over a borrower or its business, lenders are unlikely to be deemed to be PSCs.

To take the five criteria in turn:

i. *holding, directly or indirectly, more than 25% of the shares*

This condition could, on its face, be met by the granting to a lender of security over 25% of the shares in a company. However, the guidance to the new regime provides an exception that, where:

- the person granting the security retains control over the rights attaching to the shares; or
- the person granting the security retains that control except where the lender exercises rights for the purpose of "*preserving or realising the value of the security*"; or
- the lender controls the rights attaching to the shares but, other than to exercise them to preserve or realise the value of the security, must exercise them in the interests of the shareholder,

the lender will not be required to be entered in the PSC Register.

As a result, it will be normally be the case the lenders will not need to be entered in PSC Registers as a result of security arrangements, but care should be taken in the drafting and indeed enforcement of security arrangements to ensure that the exception conditions are met.

ii. *holding, directly or indirectly, more than 25% of the voting rights*

The same analysis applies as per (i) above. Consideration should also be given to any other arrangements in place which might give the lender voting rights (for example, certain types of warrant arrangements).

iii. *holding, directly or indirectly, the right to appoint or remove directors holding a majority of the votes that can be cast at a meeting of the board of directors*

It would be unusual for lenders to have the ability to appoint or remove a majority of the directors of a borrower and as such this condition is unlikely to be met in most cases (although further consideration should be given to arrangements with unusual provisions of this nature).

iv. *having the right to exercise, or actually exercising, significant influence or control over the company*

The meaning of "*exercising significant influence or control*" is defined in statutory guidance, which includes examples of situations which are, or are not, indicative of having the right to exercise significant influence or control. However, the guidance also provides that certain roles are "*excepted roles*" and one of these is the role of lender – in the ordinary course, a lender with a genuine commercial relationship with a borrower will not be deemed to be a PSC under this limb. Once again, we would emphasise that care should be taken when considering the question in relation to any arrangements under which the lender (taking into account all of its various rights) has an unusual level of control.

v. *having the right to exercise, or actually exercising, significant influence or control over the activities of a trust or firm which is not a legal entity and which meets any of the above conditions*

The same analysis applies as per (iv) above.

4. What else do lenders need to be aware of?

An important feature of the PSC regime, and one that gives it its “*teeth*”, is that it allows for the imposition of restrictions on shares held by PSCs who do not comply with the requirements of the PSC Rules.

If a registrable person fails to comply with its disclosure obligations, a company may serve on that person a warning notice and, after a 30-day period, a restrictions notice. The effect of the restrictions notice will be, among other things, that:

- any transfers of the relevant shares are void (including transfers pursuant to security arrangements);
- no rights (including voting rights) may be exercised in respect of the relevant shares; and
- the company may not pay any sums due on them except in liquidation.
- One consequence of a restriction being in place may be that a lender could not effectively enforce security over the relevant shares held by the PSC without a court order.

Lenders should be aware of this possibility in their due diligence exercises on future investments and may also wish to consider what contractual provisions it could build into security arrangements to avoid the need to have to apply to court to sanction enforcement of security.

5 Min Read

Related Locations

Brussels

London

Paris

Related Capabilities

Transactions

Related Regions

Europe

Related Professionals



Nicholas Usher