The PSC regime: What you need to know

From 6 April 2016, UK companies and limited liability partnerships (LLPs) will be required to hold, and maintain, a register of people with significant control (“PSC Register”). They will also be required to file the information with Companies House from 30 June 2016. This forms part of a suite of measures reflecting the government’s commitment to increase transparency of company ownership and control. The requirements were implemented under the Small Business, Enterprise and Employment Act 2015 ("SBEE Act") which inserted a new Part 21A into the Companies Act 2006. BIS has also issued both statutory guidance (on the meaning of “significant influence or control”) and non-statutory guidance on the operation of the new rules, as well as a host of secondary legislation containing certain specific provisions on the operation of the regime.

Overseas companies with UK subsidiaries (but not those which only have UK branches) need to be aware of the regime, as each of their UK subsidiaries will be required to keep a PSC register and, as with any other company within the scope of the regime, will need to obtain the information needed to complete the register.

This briefing gives a general overview of the PSC regime, highlights some practical issues, and summarises what action companies need to take to comply with the regime.

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**Key action points for companies**

- For corporate groups, consider preparing template PSC registers which can be distributed and used by UK subsidiaries within the group
- Review register of members, shareholder agreements in joint ventures, and constitutional documents at each level to identify any registrable persons or RLEs
- Put in place internal procedures to ensure that information required to be included in the PSC register can be easily updated, e.g. in the event of group reorganisations
- Overseas companies with UK subsidiaries within the structure need to educate themselves on the regime and ensure that their UK subsidiaries are prepared
- Companies should familiarise themselves with the information that is required to be included in the register in different circumstances
Overview

A person with significant control ("PSC") is an individual who meets one or more of the following conditions (the "specified conditions") in relation to a company:

i. Directly or indirectly holds more than 25% of the shares;

ii. Directly or indirectly holds more than 25% of the voting rights;

iii. Directly or indirectly holds the right to appoint or remove the majority of directors (this is defined as the directors holding the majority of voting rights);

iv. Otherwise has the right to exercise, or actually exercises, significant influence or control over the company (the “fourth condition”);

v. Has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm (not being a legal person, such as a partnership), which itself satisfies one or more of the first four conditions.

The PSC register is therefore primarily a register of individuals. However, UK companies (and certain non-UK listed companies) may also be recorded in the PSC register of a company if they are "relevant legal entities" ("RLEs") and "registrable" in relation to that company.

In line with the general aim to increase transparency, the register will be open to public inspection and information from the register must be filed with Companies House. A protection regime exists under which a company may, on behalf of a PSC (who has consented to the company doing so), apply to the registrar requiring the registrar to refrain from publicly disclosing information about the PSC if the company reasonably believes that disclosure will result in a serious risk of the PSC being subjected to violence or intimidation.

Importantly, listed companies subject to Chapter 5 of the Financial Conduct Authority’s Disclosure and Transparency Rules (“DTR5”) are exempt as are companies traded on an EEA regulated market or on specified markets in Switzerland, the USA, Japan and Israel.

Companies must take “reasonable steps” to determine whether they have a PSC or a registrable RLE and if so, to establish their identity. In addition, a person who knows or ought reasonably to know that he or she is a PSC or a registrable RLE in relation to a company and is not entered as such in the company’s PSC register, must inform the company of the person’s status in relation to the company.

Completing the register

The particulars of a PSC that are required to be included in a company’s PSC register include details such as name, address, country of residence, and nationality. Details of the date on which an individual PSC became a registrable person in relation to the company, and the nature of his or her control over the company must also be included. Information about a PSC must be complete and confirmed before it is entered into the register.

Under the legislation, the date on which all existing PSCs are stated in the PSC register as having become registrable in relation to a company will be 6 April 2016 (when the regime comes into force). However, going forward, it may in some circumstances be difficult to specify this information, particularly in circumstances where a person is a PSC as a result of meeting the fourth condition (otherwise having a right to exercise, or actually exercising, significant influence or control over a company). Whether or not that condition is met can only be determined by considering a number of factual circumstances, making it difficult to precisely date when a person can be said to have become registrable in relation to the company.
It should be noted that the PSC register can never be blank. Even if a company has no PSCs, that fact should be noted. The non-statutory guidance prescribes official wording that must be included in a company’s register for each outcome and in respect of the nature of the person’s control over the company. Companies are not allowed to “free draft” the information. If the company is still in the process of identifying its PSCs or awaiting confirmation on the information it has in respect of the PSC, there is official wording to that effect which must be entered into the register.

**Indirect holdings**

Indirect holdings held through companies are attributed to an individual if the individual has “control” over those companies. Control is determined using the concept of “majority stake”, which relates to having a majority control of voting rights or appointment or removal of directors of, or having dominant influence over, the company. If the individual’s interests in a company are all held indirectly through a registrable RLE (see below), the individual will not be registrable in respect of that company. However, if some interests are held directly and some indirectly, the individual may be registrable.

**Interests held by companies**

Although a company cannot be a PSC, it will be entered into on a PSC register if it is a “registrable relevant legal entity”. A company is an RLE if it meets one or more of the specified conditions and is itself required to keep a PSC register, or subject to DTR5, listed on a regulated market or on a specified overseas exchange. It will be “registrable” unless its interests in a company are all held indirectly through one or more legal entities, at least one of which is a registrable RLE in relation to that company.

The practical result of these rules is that, in a group of UK incorporated companies, each wholly owned subsidiary will only need to record its immediate parent in its PSC register.

The diagram below illustrates which entity needs to be registered in relation to each UK subsidiary within a group of UK subsidiaries wholly owned by a listed parent subject to DTR5 requirements.

A simple checklist for completing the PSC register is set out at Appendix 1. A decision tree to help determine whether a person or entity needs to be registered in relation to a company is set out at Appendix 2.

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**Group of wholly owned UK subsidiaries with an ultimate parent which is listed**

Each subsidiary’s register will have recorded in it, its immediate parent as its registrable RLE

- Required particulars of the relevant parent company must be entered

- The following official wording needs to be entered in each register (all applicable statements must be entered):

  “The person holds, directly or indirectly, 75% or more of the shares in the company.”

  “The person holds, directly or indirectly, 75% or more of the voting rights in the company.”

The listed parent is exempt from keeping a PSC register but will be recorded as a RLE in the registers kept by Sub 2 and Sub 3.
Meaning of “significant influence or control”

Given the aim of the regime is to increase transparency, the fourth condition serves as a “catch-all” condition to ensure that PSCs cannot avoid the requirements by structuring their interests so as to fall outside the scope of the first three of the specified conditions. If a person does not meet one or more of the first three specified conditions but nonetheless has a right to exercise significant influence or control, or actually exercises significant influence or control, over a company, then he or she will be a PSC in relation to that company.

BIS has issued some useful, if not comprehensive or definitive, statutory guidance on the meaning of “significant influence or control”. The guidance states that the following is indicative of “control” and “significant influence” respectively:

- “Where a person can direct the activities of a company, trust or firm”
- “Where a person can ensure that a company, trust or firm generally adopts the activities which they desire”

The guidance sets out a non-exhaustive list of examples of a right to exercise significant influence or control. This includes a person having absolute decision rights or veto rights related to the running of the business, for example adopting or amending the company’s business plan, changing the company’s business plan, or the appointment or removal of the CEO.

Helpfully, a veto right that exists for the purpose of protecting minority interests is unlikely to constitute significant influence or control, nor are any decision or veto rights that are granted to purchasers on a temporary basis in M&A transactions, for example, pending competition clearance.

Examples of a person actually exercising significant influence or control are also set out. Most significantly, a person who is not a director but who regularly influences or directs the decisions of the board would likely be exercising significant influence or control. A “shadow director” (as defined in section 251 of the Companies Act) is, by definition, caught, which means that there would, in effect, be a register of shadow directors for the first time.

The guidance also sets out a non-exhaustive list of “excepted roles”, which would not, on their own, result in a person being regarded as meeting the fourth condition. These roles include:

i. A person providing advice or direction in a professional capacity (such as lawyers and accountants)
ii. Supplier/customer or lender relationships
iii. A regulator or liquidator
iv. Employees acting in the course of their employment
v. Directors

Nonetheless, these do not act as full “safe harbours”. If the role has some unusual features so that it materially differs from how that role is generally understood or if a person combines a number of those roles such that the role is simply one of several opportunities which the person has to exercise significant influence or control, then that person may still be regarded as someone with significant influence or control over the company.

Taking “reasonable steps” and imposition of restrictions

“Reasonable steps” may include a review of available and existing information such as the register of members, articles of association and statements of capital, shareholder agreements
and/or voting patterns to determine whether one or more of the specified conditions are met by any person. Any other relevant information should be followed up by the company. The test is what a reasonable person would do if he or she had the same information as the company.

To ensure the regime has teeth, companies have been given broad powers to obtain information and restrictions can be imposed on shares if the information is not provided. Where there are any gaps in the information available to a company, the company must make enquiries by issuing notices to persons whom they have reasonable cause to believe are PSCs or registrable RLEs. A company also has the power to issue notices to a person whom it knows or has reasonable cause to believe that the person knows the identity of the relevant PSC or registrable RLE, or who knows someone else likely to have that knowledge. This is a broad power and may result, for example, in notices being sent to professional advisers or family members of persons whom the company may have reasonable grounds to believe is a PSC. A failure to take steps or to issue notices where required is a criminal offence. On a practical level, the responsibility is on a UK company and its directors to comply with the regime and UK companies will be required to disclose their PSCs, wherever they are based. A UK company (and its directors) controlled by an overseas person may find themselves in a difficult position if that overseas person who does not fall within UK jurisdiction refuses to comply for whatever reason.

A remedy is available to companies to facilitate compliance. If, following the service of a notice, the information is not supplied by the relevant person, the company can impose restrictions on the shares or interests of that person in the company. This requires the sending of a “warning notice” and if, notwithstanding the warning notice, the person still has not supplied the relevant information within one month of the warning notice, the company may then issue a “restriction notice”, the effect of which is to prevent the sale, exercise of any rights attached to, or any payment by the company in respect of, the relevant interest of the person who has failed to comply.

To protect third party rights, a court may, on application by an aggrieved person, give a direction that certain acts may nonetheless be taken in respect of the restricted interests, if it is satisfied that the restrictions “unfairly” affect the rights of the third party in respect of those interests. However, there is unfortunately currently no guidance on what will render restrictions “unfair” to third parties in this context.

Conclusion

Companies (including overseas companies with UK subsidiaries) should familiarise themselves with the PSC regime. They should ensure that they have started putting together their PSC register template(s) and have in place processes to obtain (and going forward, update) the relevant information which must be entered into the register in advance of 6 April 2016.

Nonetheless, although the legislation looks complex, for most UK listed companies with wholly owned subsidiaries, the actual identification, and recording of the required particulars, of the registrable person or RLE in relation to each of their UK subsidiaries should be fairly straightforward.

For further information on the matters highlighted in this briefing, please contact William Underhill or your usual Slaughter and May contact.

William Underhill
T +44 (0)20 7090 3060
E william.underhill@slaughterandmay.com
Completing the register: A simple checklist

1. The PSC register cannot be blank.

2. If your company has no PSCs or registrable RLEs, or if the company has yet to identify the PSC, that fact must be stated.

   - Only official wording can be used (see Annex 2 of the non-statutory guidance)
   
   Example: for a company with no PSCs or registrable RLEs
   “The company knows or has reasonable cause to believe that there is no registrable person or registrable relevant legal entity in relation to the company.”
   (Wording (a) of Annex 2).

3. Particulars of the PSC cannot be entered into the register until the information is confirmed. If the relevant information has not been confirmed, the following official wording must be used.

   “The company has identified a registrable person in relation to the company but all of the required particulars of that person have not been confirmed.”
   (Wording (c) of Annex 2).

4. In relation to a PSC, the following details need to be entered:
   - Name
   - Date of Birth
   - Nationality
   - Country, state or part of the UK where the PSC usually lives
   - Service Address
   - Usual residential address
   - Date when the individual became a PSC in relation to the company
   - Any restrictions on disclosing the PSC’s information that are in place.

5. In relation to a registrable RLE, the following details need to be entered:
   - Name of legal entity
   - Address of registered or principal office
   - Legal form of entity and law by which it is governed
   - If applicable, register on which it appears (including state) and registration number
   - Date when the RLE became registrable in relation to the company.

6. There are special rules in relation to persons or entities which are corporations sole, governments, international organisations, or local authorities or governmental bodies.

7. In relation to both a PSC and a registrable RLE, the register must set out which of the specified conditions for being a PSC the individual or legal entity meets, with quantification of interest where relevant.

   - Only official wording can be used (see Annex 2)
   
   Example: for a company wholly owned by a PSC (all applicable statements must be entered)
   “The person holds, directly or indirectly, 75% or more of the shares in the company” (Wording (l) of Annex 2)
   “The person holds, directly or indirectly, 75% or more of the voting rights in the company” (Wording (o) of Annex 2)
   
   - If the PSC or RLE meets one or more of the first three of the specified conditions, the company need not identify whether the fourth condition is also met.
Appendix 2: Register of Persons with Significant Control (PSC)

This decision tree does not purport to cover all scenarios. This material is for general information only and is not intended to provide legal advice. For further information, please speak to your usual Slaughter and May contact.

Note: this decision tree does not deal with cases where an individual or company satisfies Condition 4 (otherwise has the right to exercise, or actually exercises, significant influence or control)

* Relevant Legal Entity (RLE)
  Body corporate or legal person:
  - that would have been a PSC if it was an individual; and
  - to which the PSC requirements will apply;
  - is a DTR5 issuer; or
  - has shares admitted to trading on an EEA regulated market (other than UK) or to markets in Israel, Japan, Switzerland and USA

** Indirect interest
  Interests held through a chain of majority stakes
  Majority stake
  - Majority voting rights alone or with others
  - Appoint remove/majority directors
  - Dominant influence/control

This decision tree does not deal with cases where an individual or company satisfies Condition 4 (otherwise has the right to exercise, or actually exercises, significant influence or control)