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By Email

Clarifications from Economic Crime and Corporate Transparency Bill Grand Committee – Day 1, 27 March 2023

My Lords,

I thank those of you with whom I have had the pleasure to engage with around the Economic Crime and Transparency Bill. Following the first day of Grand Committee for the Bill on 27 March, I would also like to express my gratitude for all the constructive contributions during the debate. I am now writing to set out more detail on areas which we discussed and on which I committed to provide further information.

The Registrar's powers and objectives

Lord Agnew indicated during the debate that it would be helpful if the Registrar could write to the Committee setting out her philosophy in regard to implementation of the new powers and objectives the Bill will provide her. Given, however, that the Registrar is ultimately accountable to the Secretary of State and Ministers in this regard, it is more appropriate that I expand on the Government's expectations of how the Registrar will fulfil her objectives once the Bill becomes law.

As I said in Committee, the new powers, duties and objectives in the Bill will collectively deliver a step-change in the functioning of the Registrar and of Companies House. They are the product of very close collaboration with the Registrar and Companies House has been instrumental in their development. And I have no doubt that, as an organisation, Companies House - under the stewardship of the Registrar – is eager to deliver that improvement.

The philosophy of the Bill which will enable this step-change is very much to focus on those key areas where the register is open to abuse and to give the Registrar – who with her staff is at the sharp end of delivery – the necessary levers to identify and mitigate that abuse. Given the scale of the register, with almost 5 million registered companies filing almost 14 million documents every year, it would be unrealistic and disproportionate to expect the Registrar to identify and address every instance of wrongdoing. Therefore, although the Bill does not explicitly require the Registrar to take a risk-based approach, it

is what will happen in practice. The alternative would be for the Registrar to apply equal scrutiny to each and every filing, which would be impossible given that her resources are not limitless and disproportionate as it would inevitably limit her ability properly to investigate the most serious cases.

The provisions in the Bill therefore afford the Registrar a degree of discretion as to where she focuses her effort so that she can focus on the cases of highest risk. Given her experience (and that of Companies House) the Registrar is ideally placed to exercise the necessary judgments and the Bill directs her towards maximising the beneficial impact of her interventions through a risk-based approach. That approach is the very product of the interplay between the Registrar's powers and her objectives.

Companies House will operate a risk-based approach by targeting its efforts primarily in those areas where information and intelligence gleaned through new data sharing powers, and through its own systems and processes, suggests particular scrutiny is warranted. As well as ensuring an efficient two-way flow of intelligence and investigative support between Companies House and law enforcement, Companies House is developing an internal intelligence hub to identify strategic and tactical threats of economic crime on the register, enabling it to provide fast and comprehensive support to law enforcement investigations. Companies House also intends to increase its use of data science and digital research to develop data-driven insights on patterns of activity and behaviour from information held on the Register, and will make this available to partners through its intelligence hub.

It is, of course, the responsibility of the Department to ensure both that Companies House is suitably resourced to deliver the improvements this Bill will enable, and to enable Parliament to properly hold Companies House to account for that.

That is why, at Report Stage in the House of Commons, the Government brought forward an amendment which will require the Government to produce an annual report to Parliament, until 2030, on the implementation and operation of Parts 1 to 3 of the Bill. This will ensure that Parliament is provided with reassurance on the further work that will be required after Royal Assent, such as the laying of secondary legislation or the development of IT during the implementation period. It will also ensure that Parliament receives a narrative on how Companies House is operating and making use of its new powers. It is right that Parliament should be informed about how these powers are being used and how effective they are, as well as any difficulties that are being encountered.

<u>People with Significant Control (PSC) information</u>

During the debate, Lord Vaux of Harrowden questioned how many penalties have been issued for failing to provide information about being a person with significant control, where they did not hold more than 25% of shares or voting rights.

I regret that providing a precise answer to the question as asked would take a significant amount of time as the data held on prosecution does not provide this level of detail. However, I can confirm that since the People with Significant Control register came into force, a number of prosecutions have been brought for failure to provide information. Through to the end of September last year there had been 662 prosecutions against companies or directors resulting in fines of £267,614.

It is worth reiterating why it is that the threshold to be a person with significant control holds, directly or indirectly, more than 25% voting rights in a company (condition 2). It is because important decisions in companies and decisions affecting a company's constitution require special resolution. Special resolutions require a majority of not less than 75% (section 283 of the Companies Act). They are needed for example to change a company's name, reduce

its share capital, or change a company's constitution. Special resolutions can be blocked by anyone holding more than 25% of voting rights in a company. Therefore, once you have 25% of voting rights in a company you can block special resolutions and have a material control and influence over a company. In principle, in companies limited by shares, each member usually has one vote in respect of each share they hold (section 284), unless otherwise provided in the company's constitution. Therefore, in many cases shareholders with more than 25% of shares (condition 2) will have automatically 25% of voting rights and will be able to block special resolutions.

However, if a person has the right to exercise, or actually exercises, significant influence or control over a company, (irrespective of them holding 25% of shares or voting rights), they must also be registered as a person with significant control. This is designed to capture those persons who either hold, directly or indirectly, less than 25% of the shares or voting rights of a company, but who nonetheless have the right to exercise, or actually exercise, significant influence or control over a company. This is why the Government does not consider that the threshold to be registrable as a person with significant control under the first or second conditions needs to be amended.

My officials will be hosting a technical briefing session on shareholder transparency on 17 April at 3pm for all Peers, and would welcome the opportunity to discuss any concerns you have in further detail. If you are interested, please contact EconomicCrimeEngagement@homeoffice.gov.uk.

Director disqualification sanctions – Crown Dependencies

Lord Wallace of Saltaire queried whether the new director disqualification sanctions measure would apply to Crown Dependencies in such a way that an individual who was sanctioned and therefore disqualified within the UK would be prohibited from acting as a director of a company formed in, for instance, Jersey or Guernsey.

The disqualification of an individual within the UK will not apply to any director position they hold in a company registered in a Crown Dependency or Overseas Territory. The clauses in this Bill only extend to the UK, as the Crown Dependencies legislate for themselves. However, as a matter of policy they generally follow UK sanctions and we are in discussion with both them and the Overseas Territories about the application of equivalent measures in their jurisdictions. For the majority of the Overseas Territories, the FCDO will legislate on this new sanctions measure via Orders in Council. Bermuda and Gibraltar legislate for themselves but also follow UK sanctions.

False statement offences

A number of concerns were expressed about the drafting of the false statement offences in Government amendment 42, in particular from Lord Clement Jones, Lord Thomas of Gresford, Lord Trevethin and Oaksey, Baroness Bowles of Berkhamsted, Lord Browne of Ladyton, Lord Faulks, and Lord Ponsonby of Shulbrede. I thought it would be expedient to respond to these concerns in this letter and look forward to ongoing engagement on this subject.

There was some discussion during the debate regarding whether it was accurate to describe the basic offence as a strict liability offence, as it includes a defence of a "reasonable excuse". A strict liability offence merely refers to the fact that there is no "mens rea" aspect to the offence – that is, the person does not have to intend to do something wrong in order to commit an offence. The mere fact that they have been found to have committed the prohibited activity is sufficient to be found guilty. The basic offence found in amendment 42 follows that same principle; there is no requirement for someone to know they are making,

or intend to make, the false statement and it is therefore a strict liability offence. However, it includes a defence of a “reasonable excuse”. This inclusion is intended to provide for proportionality in prosecution. This is not an uncommon inclusion in strict liability offences.

For example, during the debate an example was provided of a strict liability offence with a defence - section 139 of the Criminal Justice Act 1988. This makes it an offence to have an article with a blade or point in a public place, unless a person charged with an offence can prove that he had the article with him for use at work, for religious reasons, or as part of any national costume. In that example, it is practical to provide an exhaustive list of defences as the legitimate reasons for carrying such a weapon can easily be conceptualised. However, it would not be practical to do so in the context of false filings, as each case will need to be considered on its own merits, and the reasons for a false statement being made without intent cannot be as easily summarised. This is why reasonable excuse is not defined.

I must express my surprise that this amendment, and the inclusion of the reasonable excuse defence, attracted the opposition that it did during the debate, given that it serves to align an older style pre-existing offence in the Companies Act 2006 to the newer form of offence that members of both Houses expressly argued for and supported during debate on the Economic Crime (Transparency and Enforcement) Act 2022 last year; and which has already been included as a revised false filing offence elsewhere in the Companies Act 2006 (see, for example, Clause 100). As a reminder, the concerns expressed at the time of the 2022 Act hinged on the difficulty in proving that a person had acted “knowingly” or “recklessly” when delivering a misleading filing, meaning that it would be difficult to bring prosecutions for false filings. The new two-tier formulation and the “reasonable excuse” defence were welcomed, as it makes it easier to ensure that those seeking to abuse corporate structures are held to account, while protecting those who, despite unwittingly delivering the misleading material, had a reasonable excuse for doing so. Revisiting the formulation in these amendments (and in the offences already in the Bill on which they are modelled) could serve to undermine that original intent of Parliament.

In response to the point raised by Lord Faulks, section 1121 of the Companies Act 2006 sets out the definition of an “officer who is in default”, as set out in Annex A. The words “officer in default” appear in the drafting of offences throughout the Companies Act 2006, the Economic Crime (Transparency and Enforcement) Act 2022, and the Economic Crime and Corporate Transparency Bill. This includes in the existing drafting of the offences in paragraphs 13 and 14 of Schedule 1B to the Companies Act 2006, which amendment 42 amends. The Government considers the drafting achieves the policy intent and intends to re-table this amendment at Report. I hope noble Lords feel able to support it based on the assurances I have given.

I look forward to continuing to work with you as this Bill continues its scrutiny in Committee. I am placing a copy of this letter in the House library.

Best wishes,

Lord Johnson of Lainston CBE
Minister for Investment
Department for Business and Trade

Annex A – Companies Act 2006 definition of an officer in default

1121 Liability of officer in default

(1) This section has effect for the purposes of any provision of the Companies Acts to the effect that, in the event of contravention of an enactment in relation to a company, an offence is committed by every officer of the company who is in default.

(2) For this purpose "officer" includes—

(a)any director, manager or secretary, and

(b)any person who is to be treated as an officer of the company for the purposes of the provision in question.

(3) An officer is "in default" for the purposes of the provision if he authorises or permits, participates in, or fails to take all reasonable steps to prevent, the contravention.