

Transparency and Trusts: The implications of the new PSC Register for trustees

Diana Davidson and Christine Payne-Smith | August 2016

Recently there has been a succession of initiatives aimed at increasing the transparency of asset-holding structures. The rate at which these proposals have been announced, together with the administrative burdens they impose, may have left some with a sense of 'information overload'. However, as the penalties for failing to comply with the new obligations can be severe, it is vital that adequate consideration is given to them. An important example of this is the position of trustees in relation to the new PSC register regime which this note considers.

What are PSC registers?

A new regime was introduced in April 2016 requiring UK unlisted companies and limited liability partnerships to maintain a register of people who have significant control over them (**PSCs**). Such registers record certain information in relation to PSCs, including their name, date of birth, nationality and the nature of the control they exercise. Importantly, subject to certain very limited exceptions, this information is publicly available from Companies House with effect from 30 June 2016. Moreover, failure to comply with the new PSC regime may result in criminal penalties as well as the freezing of transactions or rights held in the company's shares.

What are PSCs?

Broadly, a PSC is an individual who:

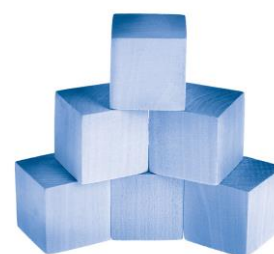
- a. directly or indirectly holds more than 25% of the company's shares by nominal value (or its voting rights);
- b. directly or indirectly has the right to appoint or remove a majority of directors;
- c. has the right to (or in fact does) exercise significant influence or control over the company; or
- d. has the right to (or in fact does) exercise significant influence or control over a trust (or a firm that is not a legal entity such as a partnership) where the trustees or members would meet any of conditions a.- c. above (in their capacity as such) in relation to the company or would do so if they were individuals.

What about shares held by companies?

Some companies (and other legal entities) which qualify as 'relevant legal entities' (**RLEs**) may also need to be included in the PSC register. A company qualifies as a RLE if:

- it would qualify as a PSC if it had been an individual; and
- it is subject to its own disclosure requirements (broadly it is a UK company and has its own PSC register).

Therefore most offshore companies will not currently qualify as RLEs and so cannot be included on the PSC register.



“
Failure to
comply with
the new
PSC regime
may result in
criminal
penalties
”

If you require further information on anything covered in this briefing please contact a member of our Private Client Team on 020 3375 7000 or your usual contact at the firm. Further information can also be found on the [Private Wealth](#) page on our website.

Do all PSCs/RLEs need to be registered?

A PSC/RLE will only need to be included on the PSC register if it does not hold its interest in the company through a RLE. If it does then only the intermediate RLE needs to be registered. In this way duplication of entries on the register is avoided.

What happens if shares are held by non-RLEs?

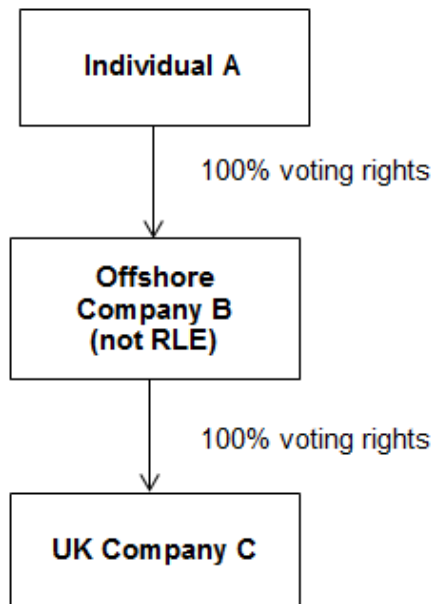
Where a corporate shareholder of a company is not a RLE (**a non-RLE**) this is not the end of the story. It is then necessary to investigate whether any individuals or RLEs hold a 'majority stake' in the non-RLE in order to identify whether they have an indirect interest in the underlying company. If so, such persons will need to be included in the company's PSC register.

A majority stake is held where an individual or RLE:

- holds a majority of the voting rights;
- is a member of the company and holds the right to appoint or remove a majority of its board of directors;
- is a member of the company and controls a majority of the voting rights by agreement with the other shareholders or members; or
- has the right to exercise (or does in fact exercise) dominant influence or control over the company.

Example A below shows how the rules work. Company B meets the PSC conditions as regards Company C. However, Company B is not a PSC because it is not an individual and it is not a RLE because it is an offshore company. Therefore it cannot be included on Company C's PSC register. However, as A is an individual and holds a majority stake in Company B, A will need to be entered on Company C's register.

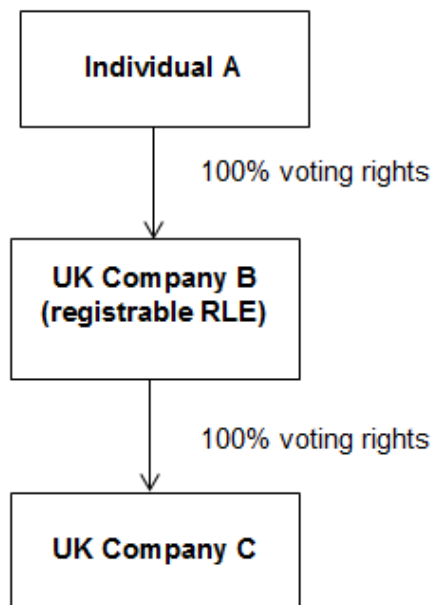
Example A



If the majority stake had been held by a legal entity which was not a RLE then it would have been necessary to consider the ownership and control of that entity. Therefore the practical effect of the PSC rules is to investigate a company's ownership chain until

a PSC or registrable RLE has been identified or it is clear than neither of these exists (in which case this must be noted on the register). Consequently, as already noted above, PSCs or RLEs who hold an interest in a company indirectly through a registrable RLE do not need to be included on the register (see Example B below).

Example B



As Company B will be included on Company C's PSC register it is not necessary to include A's indirect interest in Company C's register. However, A will need to be entered on Company B's PSC register.

What other obligations are placed on a company?

A company has a duty to take reasonable steps to identify its registrable PSCs or RLEs and is required to serve notice on the PSC or RLE, requesting the information needed, if this is not already held. In addition, the company must update the information held on the register on an annual basis. In addition, individuals and legal entities have a duty to contact a company within one month of becoming a registrable PSC or RLE in relation to such company if they are not already included on its PSC register.

What are the penalties for non-compliance?

A person who fails to respond to the notice served by a company may be committing a criminal offence. Moreover, in the event of a failure to respond to an additional warning notice the company has power to freeze that person's interest in the company. This means that it will not be possible to transfer the interest, or to exercise any right or derive any benefit (such as the receipt of dividends) from it, until such time as the requested information has been provided. Therefore this is a significant power and is likely to prove effective in assuring compliance with the new rules.

How does this affect trustees?

Where trustees hold shares in a UK unlisted company (whether directly or indirectly) a two stage test needs to be applied, as follows:

- **Stage one:** Ascertain whether the trustees meet any of the PSC conditions in paragraphs a.- c. above (for the purposes of these rules each registered trustee shareholder is deemed to hold all the trustees' shares). If so, and they are individuals, they will need to be included on the register as PSCs and stage two of the test must be considered. Note that corporate trustees are treated in the same way as any other company under these rules. Therefore, if the trustee is a UK trust corporation it will be included on the register assuming it is a registrable RLE. However, if the trustee is an offshore trust corporation it will be a non-RLE and it will be necessary to investigate its ownership and control.
- **Stage two:** Consider whether any individual or registrable RLE has 'significant influence or control' of the trust. If so they, too, will qualify as PSCs and must be included in the register. As before, if a non-RLE controls the trust then it is necessary to continue to investigate the ownership chain until a PSC or registrable RLE has been identified or it is clear that neither exists.

What is 'significant influence or control'?

The statutory guidance indicates that a person will have 'significant influence or control' over a trust if that person has the right to influence the administration of the trust, such as the right:

- to appoint or remove trustees;
- to direct the distribution of trust assets;
- to direct trust investment decisions;
- to amend the trust deed; or
- to revoke the trust.

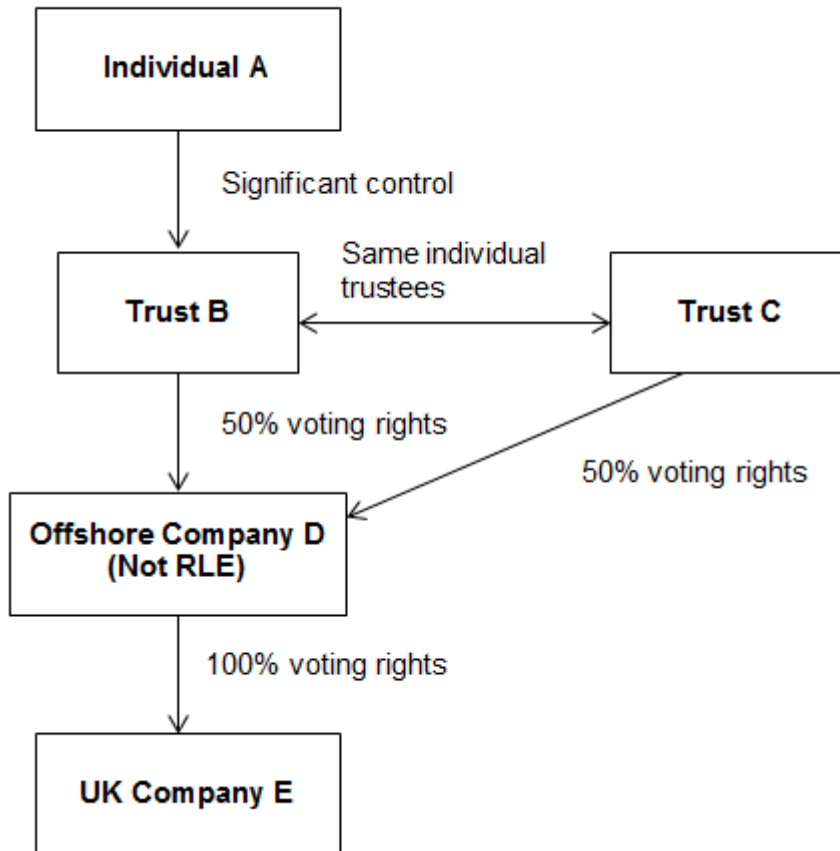
Therefore this could have significant implications for settlors or protectors with reserved powers. The broad scope of 'significant influence or control' is shown by the fact that it also extends to any person, such as a settlor or beneficiary, who is regularly involved in running the trust. However, where a person carries out a role in a professional capacity, such as a lawyer, tax adviser or the directors of a corporate trustee, this will not, by itself, be viewed as an exercise of significant influence or control.

What about bare trusts?

Where shares or rights in a company are held by a nominee (such as in the case of a bare trust) they will be treated for the purpose of the PSC rules as if they were held by the beneficial owner who may qualify as a PSC or a RLE if the relevant conditions are met.

What about shares held in different capacities?

Where share interests or rights are held by a person in separate capacities (ie as an individual and as a trustee, or as trustee of separate trusts) they must be aggregated when applying the rules (see Example C below).

Example C

As the same individuals act as trustees of Trust B and Trust C, their holdings are aggregated when applying the PSC rules so that in aggregate they have a majority stake in Company D and therefore an indirect interest in Company E. Consequently, the trustees must be entered on Company E's PSC register. In addition, as A has significant control over Trust B he must also be included on Company E's PSC register.

What other new transparency initiatives should trustees be aware of?

The PSC regime is just one part of a number of transparency measures that may impact on trust structures in the next year or so. Key among these are:

- The introduction of a central register providing beneficial ownership information in relation to trusts. Although it was originally intended that these registers would only be accessible to competent authorities and financial intelligence units, rather than being publicly available, it has recently been proposed that the registers may also be accessed by persons with a 'legitimate interest'. The EU Fourth Money Laundering Directive requires Member States to introduce new rules by June 2017 to establish the registers. However, the extent to which the recent UK vote to leave the EU will impact on this initiative in the UK is unclear at present.

- A proposal announced by the government earlier this year to require overseas companies that hold properties in the UK to provide details of their beneficial owners on a public register. Importantly, it is intended that this proposal will apply to existing companies who already own UK properties, as well as those that make a purchase going forward. This proposal was subject to a public consultation that ended on 4 April 2016 and a consultation on the detail of the proposals is expected to be published later this year.

What action should be taken in relation to the PSC regime?

- Trustees should review their position to ascertain whether they meet any of PSC conditions above (remembering that interests held in different capacities must be aggregated when applying the conditions) and be mindful of the obligations imposed on them.
- Trusts should be carefully reviewed to ascertain what rights are held by protectors, settlors, beneficiaries and other persons. In addition, consideration should be given to the manner in which a trust is administered to ascertain whether there is a risk that any person may be regarded as having significant influence or control over the trust activities. Trustees may need to contact individuals or legal entities to obtain the information they require to comply with their duties under the PSC regime.
- Persons who have significant influence or control over a trust may wish to consider releasing rights (eg to appoint trustees) especially where there are confidentiality concerns about their details appearing in the PSC register.
- Where trustees or other persons associated with the trust qualify as PSCs or registrable RLEs, the trustees will need to ensure they provide the required information to the company as soon as possible in order to avoid any action being taken against them, or the relevant interests being frozen.

Conclusion

The administrative burden introduced by the new PSC regime, together with the impact on privacy will be of concern to trustees and settlors. In addition, the wide ambit of 'significant influence or control' is likely to lead to uncertainty in the application of the new regime, which is particularly worrying in view of the severe penalties which may be incurred by those who do not comply with the rules. However, one thing is clear, it will be important for trustees to give careful consideration to how the PSC rules may impact on the structures they administer in order to ensure that they (and associated persons) are not adversely affected by the new regime.

This publication is a general summary of the law. It should not replace legal advice tailored to your specific circumstances.
© Farrer & Co LLP,
August 2016