

THINK YOU'VE SOLD, THINK AGAIN! HEFFALUMP TRAPS SET BY THE ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT) ACT 2022

This is the first of a series of articles highlighting some traps for the unwary under the Economic Crime (Transparency and Enforcement) Act 2022 (ECTEA).

The ECTEA was passed into law at a fast pace on March 15 2022. The government launched the new Companies House system on August 1 2022 and the land registration elements of the ECTEA came into force on 5 September 2022.

The aim of the ECTEA is to elicit disclosure of the beneficial (actual) owners or managing officers of entities holding UK property. However, now we had had practical experience of the ECTEA, it is feasible that parties could unwittingly commit offences under the ECTEA.

Background – what overseas entities must do:

Existing property owners

Overseas entities which as at 31 January 2023 are registered proprietors at the Land Registry of real estate acquired on or after 1 January 1999 (but before 5 September 2022) must:

- submit an application to Companies House and obtain an overseas entity ID;
- identify and disclose **beneficial owners or managing officers** (as such terms are defined in the ECTEA);
- keep the data on the register of overseas entities (ROE) up to date by an annual submission; and
- demonstrate compliance to the relevant land registry (in England and Wales, the Land Registry).

New property purchases

Overseas entities seeking to acquire an interest in new UK property (whether by transfer or taking a lease of 7 years or more) will need to obtain the same overseas entity ID prior to completing a transaction.

Recent property disposals

Overseas entities which disposed of relevant real estate interests on or after 28 February 2022 but before 1 February 2023 must still disclose certain details to the ROE whether or not such entities continue to hold relevant real estate interests. This is an anti-avoidance provision.

Does this apply to me?

An overseas entity is any body corporate, partnership or other legal person or entity governed by the law of a country or territory outside of the United Kingdom. It can be overlooked that the United Kingdom does not include Crown Dependencies and registration on the ROE will be required for entities incorporated in any Crown Dependency. Whilst there are certain specific exemptions, each overseas entity that holds UK property should proceed on the basis that it will need to be on the ROE.

What are the consequences?

The ECTEA imposes criminal penalties for non-compliance, including fines which will quickly and easily aggregate to hundreds of thousands of pounds and, in certain cases, imprisonment.

What are the unintended offences?

There are several scenarios where an overseas entity may think it has complied or thinks it is outside the scope of the ECTEA, but actually, it is not and there is a risk that an offence is unwittingly committed. This article is based on the position as at 11 November 2022, we would hope that the legislation and guidance will evolve to resolve some of these scenarios.

Scenario 1. Overseas entity sold a freehold before 28 February 2022

It is feasible that an overseas entity sold its UK property before the ECTEA was on the agenda and openly discussed in Parliament and therefore, thinks it is outside the scope of the ECTEA.

It is well known in the property industry that the Land Registry is experiencing significant delays in completing Land Registry applications. It is therefore possible that an overseas entity that sold its property in, or prior to, February 2022 is still registered at the Land Registry as the legal owner of that land on 31 January 2023. Technically, under the ECTEA, the overseas entity should be on the ROE (or have made an application to be) on 1 February 2023 and could technically incur penalties and/or criminal sanctions if it isn't.

The Land Registry have been working hard to clear the back log of pending applications and, in the run up to 31 January 2023, it would make sense for the Land Registry

to prioritise applications relating to disposals by overseas entities.

In this Scenario, one option might be to speak to the Land Registry and ask them to expedite the application to register the pre-28 February 2022 disposal so that overseas entity is not registered as the proprietor at the Land Registry after 31 January 2023.

Scenario 2. Overseas entity sold a freehold property on 15 March 2022

This is like the scenario one but this time, the overseas entity is within the terms of the ECTEA because it would need to comply with the anti-avoidance provisions that require the disclosure of certain details to the ROE of disposals made on or after 28 February 2022.

Under the ECTEA, the overseas entity might have complied with those anti avoidance provisions by 31 January 2023 (thereby avoiding the offence which it would otherwise have committed under section 42 of the ECTEA) but, due to the delays at the Land Registry, it might still be the registered proprietor of the freehold at the Land Registry. Once again, the ECTEA provides that a registered proprietor of an estate on 31 January 2023 should be on the ROE or have a pending application to be on the ROE and could technically incur penalties and/or criminal sanctions if it isn't.

Again, the overseas entity could ask the Land Registry to expedite the application.

Scenario 3. Overseas entity is the registered proprietor of a freehold estate and sells the freehold on 29 January 2023 to a UK company as part of a reorganisation to bring all its property interests onshore

Assuming the buyer makes an application to register the transfer before the 31 January 2023 deadline (which is possible but could be complicated), the overseas entity would still be the registered proprietor of the freehold at the Land Registry as at the 31 January 2023 deadline. Unlike the other scenarios, this is due to the timing of the transaction and not any Land Registry delays. Once again, the ECTEA provides that a registered proprietor of an estate on 31 January 2023 should be on the ROE or have a pending application to be on the ROE and could technically incur penalties and/or criminal sanctions if it isn't.

The timing of the transaction also makes it nigh on impossible for the overseas entity to make the required anti avoidance disclosures in time for the 31 January 2023 deadline and it would commit an offence under the

anti-avoidance provisions until such time as those disclosures were made.

Once the Land Registry does process the registration of the disposal, the title at the Land Registry is updated with retrospective effect (in this scenario to around 30 January 2022 being the assumed date the application was submitted) but the offence is committed on 31 January. The retrospective defence is no defence. There is also the possibility that the buyer's Land Registry application could be cancelled, which would then prolong the period over which the seller commits the offence.

This scenario also causes issues for the buyer. If it failed to get the Land Registry application in before the 31 January 2023 deadline, its application would be rejected as the overseas entity does not have an overseas ID.

It follows that, practically speaking, in such circumstances the real deadline for "last minute" transactions is rather earlier than 31 January 2023!

Guidance and reassurance needed

It is clearly not the intention of the ECTEA that those who have followed the terms of the ECTEA should face penalties or criminal sanctions especially where the offence has been created by a backlog and/or delays on the part of an unrelated third party such as Land Registry.

However, the ECTEA does not contain any comfort on the point. Under the ECTEA, the Secretary of State could enact regulations for the purposes of stating that overseas entities in the scenarios highlighted above are exempt from the need to be on the ROE.

The enforcing authorities could publish guidance that they would not seek to enforce against those in the scenarios highlighted above. However, a lack of enforcement also does not alter the fact that a criminal offence has been committed and that could have other consequences.

The ECTEA could be amended to provide that a party that has made the anti-avoidance disclosures does not need to be on the ROE if it also happens to remain the registered proprietor at the Land Registry on 31 January 2023.

It is not known whether the enforcing authorities have the capacity or resources to act in such scenarios but that does not detract from the possibility that the overseas entity unwillingly commits an offence and clarity on the point is urgently needed.

What should an overseas entity do?

For now, all an overseas entity can do is comply with the terms of the ECTEA as far as it can. We hope that these

points are clarified as soon as possible. The most cautious overseas entities may decide to upgrade the anti avoidance disclosures it makes **and** also make an application to the ROE. This would mean that the details of the overseas entity would be on the public register for two years and it would need to apply to deregister before the need to comply with the annual updating duty – all in a situation where it no longer holds any UK property.

Further advice

Wedlake Bell has been working closely with BEIS, Companies House and Land Registry on the implementation of the new regime. If you require further advice or assistance in understanding the obligations which this new regime will impose on you and/or our assistance in complying with such obligations, please contact the person with whom you usually deal or, alternatively contact Philip Matthews, Gemma Cook or Edward Craft.

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