

DIRECTORS OF OVERSEAS COMPANIES AND THE EC(TE)A

HOW DIRECTORS OF OVERSEAS COMPANIES MAY BE IMPACTED BY THE
UK'S ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT) ACT 2022

The Economic Crime (Transparency and Enforcement) Act 2022 is the UK's latest^[1] piece of legislation in the fight against dirty money and the enforcement of financial sanctions. It contains a number of provisions that should be of particular concern to directors^[2] of overseas companies, especially those of companies with legitimate activities which fall within the scope of the Act without being its 'targets', as the Act sets civil and criminal penalties (including imprisonment) for a number of the offences it introduces.

As is well known from press coverage over the past few months, the Act aims to reinforce the UK's powers to fight economic crime in three different ways: with the creation and enforcement of a public national registry of overseas interests in UK properties to force anonymous foreign owners to reveal their beneficial owners and prevent transfers of property held by unregistered foreign interests (Part 1 of the Act), the relaxation of the conditions for the granting of unexplained wealth orders (UWOs) to give law enforcement more effective powers to obtain civil recovery orders under the Proceeds of Crime Act 2002 against UK property used as a money laundering vehicle (Part 2) and the introduction of a strict civil liability test for sanctions violations to replace the existing tests of knowledge or reasonable cause to suspect to make it easier for the Office of Financial Sanctions Implementation (OFSI) to impose fines on those dealing with designated (i.e. sanctioned) persons (Part 3).

Whilst Part 1 introduces a completely new legal framework (the Register of Overseas Entities or ROE to be administered by Companies House, Parts 2 and 3 update and strengthen existing legal tools, namely the UWO introduced in the Criminal Finances Act 2017 to order individuals to explain spending which is suspected to derive from proceeds of crime^[3] and the financial sanctions legislation of the Sanctions and Anti-Money Laundering Act 2018 and its enforcement under the Policing and Crime Act 2017. All three parts have in common the fact that directors of overseas companies may be caught for breaches of their rules.

Indeed, it is a criminal offence for the directors[4] who operate foreign entities that are legal persons and are holding or wish to buy property in the UK to fail to register those entities with Companies House and declare and update annually the ROE with the details of the beneficial owner(s)[5] of that entity, or to deliver or cause to be delivered misleading, false or deceptive information to the registrar. The penalties that may be imposed on officers include unlimited fines, daily default fines and/ or up to two years in prison depending on the offences. Registration of overseas entities wishing to acquire UK property becomes compulsory from 5 September 2022 and registration of those with existing UK property[6] must be completed by 31 January 2023. It is also a criminal offence to make a disposition of (or lease, charge, etc.) the UK land of an unregistered overseas entity and is punishable by a fine or up to five years' imprisonment.

The Act provides that the UK national agencies[7] permitted to apply to the High Court for UWOs may request that the orders to be granted against respondents that are not individuals may be served nominatively on their directors[8] as well. The intention is to allow the agencies to gather information from persons involved in the management of companies or property of which there are concerns about the source of funds, even if such persons do not own them[9]. If named in the UWO, the directors are required to comply with the disclosure required within the time frame set in the order and failure to do so (without a proper excuse) or providing false or misleading information in response to a UWO will trigger the presumption that the asset in question is recoverable property for the purpose a CRO and lead to the grant of a CRO and the seizure of the asset in question. The directors named in the UWO may also be prohibited from selling the asset in question under a concurrent interim freezing order. The amendments to the UWO regime came into force on 15 May 2022.

Lastly, the Act makes it impossible for the director of a company which is in violation of UK financial sanctions (for transacting with a designated person under the sanctions legislation) to challenge the imposition of a civil penalty on the basis that the director did not know, or had reasonable cause to suspect, that they or their company was transacting with such a person. It is a significant change which exposes directors to liability even where they have carried out due diligence in good faith. The amendments to the Policing and Crime Act 2017 set out in the Act came into force on 15 June 2022.

This article does not constitute legal advice and should be considered in the light of the legislation referred to therein and its implementing guidelines, etc. Comprehensive advice is required before taking any action or withholding any action purported to be described in this article.

1. The Act came into force on 15 March 2022.

2. Among others; in this article, references to directors are to the directors and/ or other officers of a company, as more specifically set out in the Act in each case.
3. Note that the Act adds a new alternative test to this income requirement, namely that there are reasonable grounds for suspecting that the property has been obtained through unlawful conduct.
4. Anyone whose directions the management body of the entity is used to following, whether or not directors.
5. A person who is considered to have 'significant influence or control' over the overseas entity.
6. The Act applies retrospectively to property acquired since 1 January 1999 in England and Wales.
7. The National Crime Agency among others.
8. The Act covers company director, managers, officers, trustees, partners and other 'responsible officers', both in and outside the UK.
9. UWOs can also require a person who is a Politically Exposed Person (PEP) or reasonably suspected of involvement in, or of being connected to a person involved in, serious crime to explain the origin of assets (minimum combined value of £50,000) that appear to be disproportionate to their known lawfully obtained income.

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8 September 2022