

# An Overview of the PSC Regime - People with Significant Control

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Corporate - Europe

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## What Is Happening?

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From April 6, 2016, UK companies and limited liability partnerships (“LLPs”) will be required to maintain a central public register of any individual with significant control over them (“PSC Register”).

From June 30, 2016, those same details will also need to be included in a company’s annual confirmation statement (currently known as an annual return) and filed at Companies House, meaning that the information contained on the PSC Register will be updated at least once every 12 months.

In addition, from June 30, 2016, newly incorporated companies and LLPs will be required to provide a “statement of initial significant control” on incorporation.

## Why Is It Happening?

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The new rules are driven by the government’s desire to tackle tax evasion and money laundering and to increase transparency of who owns and controls UK companies.

## To Whom Does This New Regime Apply?

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The following entities must maintain a PSC Register:

- UK incorporated companies limited by shares or by guarantee, including dormant companies or community interest companies;
- UK Societates Europaeae; and
- UK LLPs.

In addition, this regime has extra-territorial reach, meaning that the rules apply equally to UK companies sitting within corporate structures with only UK-incorporated entities and to those with overseas holding companies. In short, UK companies must disclose any PSC, regardless of jurisdiction.

However, the regime does not apply to UK incorporated companies:

- that are subject to Chapter 5 of the Disclosure Rules and Transparency Rules of the Financial Conduct Authority (“DTR 5”) (i.e. UK companies listed on the LSE, AIM or ISDX);
- with voting shares admitted to trading on a regulated market in another EEA state; or
- with voting shares admitted to trading on one of the specified markets in Switzerland, USA, Japan, or Israel, each of which are subject to their own requirements around the disclosure of major shareholder information.

## **What Constitutes a Person with “Significant Control”?**

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A person with significant control over a company is any individual, government, or government department that, either alone or as one of a number of joint holders, meets one or more of the following conditions:

1. directly or indirectly owns more than 25 percent of the shares of the company;
2. directly or indirectly owns more than 25 percent of the voting rights of the company;
3. directly or indirectly holds the right to appoint or remove the majority of the board of directors of the company;
4. has the right to exercise, or actually exercises, significant influence or control over the company; and/or
5. has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm which is not a legal entity, but which would satisfy any of the above conditions, if it were an individual (each a “PSC Condition”).

## **What Exactly Does “Significant Influence” Mean?**

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In the context of this regime, a person has “control” of a company if they have the power to direct its policies and activities. A person is deemed to have “significant influence” if they can ensure that the company adopts those policies or carries out the activities that they want, regardless of whether they are on the board of directors. This “influence” is not limited in scope to a company’s financial and operating policies, nor does it have to be exercised with a view to gaining economic benefit. For example, absolute decision rights over certain matters, including adopting or amending a company’s business plan, changing the nature of the business, making additional borrowings, and appointing/removing the CEO will satisfy the test.

In addition, an individual may exercise significant influence or control even if they do not have a right to do so; for example, a person who is not a director but who is regularly consulted on board decisions and whose views influence those decisions will be deemed to be exercising “significant influence”.

Having a right to do or prevent a particular activity or operation, even if it is not exercised, may also be classified as “significant influence”; for example, having a veto right over changing a company’s constitution or business plan, preventing a dilution of share capital, or entering into arrangements with lenders beyond agreed limits could all be classified as “significant influence”.

Given the broad scope of the definition of “significant influence”, it could also potentially capture former shareholders who still provide input and guidance after their exit and any other people “lurking behind the shadows” influencing or controlling the company.

## **What if the Person with Significant Control Is in Fact a Legal Entity?**

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The new legislation recognises that a company may also be controlled by a legal entity (as opposed to an individual). If a legal entity (i) would satisfy one or more of the PSC Conditions if it were an individual and (ii) is subject to its own disclosure requirements (as noted above in “To Whom Does This New Regime Apply?”), it must be included on the PSC Register. Such legal entities are known as “relevant legal entities” (“RLEs”) in relation to the company that is required to keep the register.

Where a legal entity is not subject to its own disclosure requirements, it cannot be an RLE and, therefore, must not be listed on a company’s PSC Register.

In cases where the interest of the PSC in a company is held through an RLE, the RLE should be entered into the PSC Register of that company. It would then be necessary to look “up the chain” of the RLE to identify any PSC behind it. It is worth noting that the chain of ownership for entry of an RLE onto a company’s PSC Register extends only to the first RLE in the chain.

## **What Is the Impact on LLPs?**

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LLPs will also be required to keep a PSC Register. The differences between the regime for companies and that for LLPs are predominantly to ensure that provisions are relevant in the context and structure of an LLP, as opposed to a company. In the context of an LLP, an individual will be a person with significant control when it meets any of the following specified conditions:

1. it holds, directly or indirectly, the right to share in more than 25 percent of the LLP's surplus assets on a winding up;
2. it holds, directly or indirectly, more than 25 percent of the rights to vote on matters to be decided by a vote of members of the LLP (including rights only exercisable in certain circumstances);
3. it holds, directly or indirectly, the right to appoint or remove the majority of persons entitled to take part in the LLP's management;
4. it has the right to exercise, or actually exercises, significant influence or control over the LLP; and/or
5. it has the right to exercise, or actually exercises, significant influence or control over the trustees or members of a trust or firm that is not a legal person, where those trustees or members would meet any of the specified conditions (or would do so if they were individuals).

In addition, it should be noted that a person exercising “significant influence” might, or might not be a member of the LLP.

## How Far “Up the Chain” of Ownership Does a Company Need to Look?

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Once a PSC or RLE has been identified, a company needs to determine whether the PSC or RLE is registrable or non-registrable. To avoid having duplicate indirect PSC or RLE information in the PSC Registers at each level of a corporate chain, PSCs and RLEs are generally not registrable if they only hold their controlling interests indirectly through a chain of RLEs. Only the first RLE in the chain is registrable, and PSCs/RLEs higher up in the chain are not registrable. In addition, a PSC that holds their interest indirectly through one or more legal entities only needs to be registered if there are no RLEs in the chain.

**Example 1:** Where there is a chain of only UK-incorporated holding companies, each company (other than the top holding company) will include on its PSC Register only its direct RLE holding company and not the holding companies higher up the structure. The test is whether the immediate parent would have met one of the PSC Conditions if it were an individual. Any controlling individuals (or trustees or members) at the top of the structure will only be disclosed on the top holding company’s PSC Register.

**Example 2:** Where an overseas company is included anywhere in a corporate chain, every UK-incorporated company below the overseas company is required to include in its PSC Register details of: (a) its immediate UK holding company; (b) any UK companies in the corporate chain above the overseas company; and (c) the identity of any individual who either meets one of the tests above directly in relation to the company or who has a “majority stake” in any of its holding companies (whether or not a UK holding company).

## What Steps Does a Company Need to Take in Light of This New Regime?

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There are a number of things that a company must do in order to be ready for the new regime:

- *Take reasonable steps to identify people with significant control:* this means reviewing documents such as the constitution, register of shareholders, shareholder agreements, and other agreements concerning appointment and removal of directors. The test is then what action a reasonable person would take with regard to the new regime if they became aware of that information. If necessary, the company must then give notice to anyone whom it either knows to be registrable or has reasonable cause to believe is registrable, requesting confirmation of the particulars in the PSC Register.
- In addition, if the company knows or has reasonable cause to believe that another person knows of the identity of a PSC or RLE, it must also give notice to that person requesting details of the shareholder and his/its shareholding (see “What Information Will Be Available on the PSC Register?”). The notice must be responded to within one month, and failure to do so is a criminal offence. Once approved by Parliament, the final PSC guidance will be published and will contain specimen notices. A company can also issue a so-called “warning notice” to a person or entity who has not responded to the initial notice requesting information. If the PSC/RLE still does not respond to the warning notice requesting information, the company can, as a last resort, impose restrictions on any shares or rights that PSC/RLE holds in the company until the request has been complied with.

- *Record details of the PSC and/or registrable RLE in the Company's PSC Register:* the onus here is again on the company to contact the PSC/RLE to confirm that the information it holds about them/it is correct. Once confirmed, that information must be registered as soon as possible.
  - A company's PSC Register must not be empty, even if there are no PSCs or its investigation process is still underway. Pro-forma wording must be used, which will be provided in the final PSC guidance, once published.
- *Provide this information to Companies House:* once it has gathered the necessary information and/or received responses to any notice it may have sent out, a company must provide the relevant information to Companies House and then keep that information updated, both when it changes and through the annual confirmation statement.

Given the potential lead-in time that a company may require in order to compile a PSC Register - particularly a company with overseas shareholders - it is important to address these new requirements sooner rather than later.

## **What Does a PSC Need to Do?**

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In certain circumstances, a PSC is required to be pro-active and to notify the company for which they are a PSC and provide it with relevant information if they know, or ought reasonably to know, that they/it are/is a PSC or a registrable RLE. This requirement arises when a PSC has not already been entered into the PSC Register or has not received a request for information from the company for a period of one month since it became a PSC. Failure to comply with this requirement on the part of the PSC is a criminal offence. As noted above in "What Steps Does a Company Need to Take in Light of This New Regime?", if a PSC or RLE refuses to comply with a request for information issued by a company, the company may disenfranchise that shareholder and impose restrictions on any shares held by them/it.

## **What Information Will Be Available on the PSC Register?**

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The PSC Register will contain details on a PSC's name, date of birth, nationality, service address, residential address, date on which the individual became a registrable person with regard to the company and details of their interest in the company under three broad ranges of shareholdings: 25-50 percent; 50.1-74.9 percent; and 75 percent and above. In addition, the nature of control must be recorded, being which of the PSC Conditions have been satisfied - although it should be noted that if any of the first three PSC Conditions have been satisfied, there will be no requirement to consider whether either of the remaining conditions four or five have been satisfied.

All information will be publicly accessible with the exception of the residential address. The day of the date of birth will also not be disclosed on the public register on Companies House unless the company elects to hold its own register at Companies House. Individuals at serious risk of violence or intimidation will be able to have information suppressed from disclosure. In addition, specified public authorities will be able to access information protected from public disclosure on request.

## Who Will Have Access to the PSC Register?

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The PSC Register must be open to the public, which means it must be kept at either the company's registered office or at Companies House. The public register will also be available online and be searchable by individual name and legal entity name. The fee payable by someone requesting a copy of the PSC Register will be £12 per request.

From June, private companies will be able to elect for their PSC Registers to be maintained by Companies House only, rather than maintaining them with their existing statutory registers.

## What Are the Offences for Failure to Comply?

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There are a number of offences which can be committed by the company (and its defaulting officers) or the PSC/RLE or person in receipt of a notice requesting information for inclusion on a PSC Register, such as:

- failure to take reasonable steps to identify registrable PSCs and RLEs;
- failure to confirm the details of such PSC before the details are registered;
- failure to ensure that the PSC Register is kept up-to-date;
- failure of a PSC/RLE to notify a company within one month of becoming a PSC or registrable RLE of their/its status and to keep the company up-to-date; and
- failure to respond without a valid reason to a notice issued by a company within one month.

Any such failure to comply by companies, their officers and those required to provide the information risks leading to conviction for a criminal offence which is punishable by up to two years imprisonment and/or a fine. There is no defence for any inadvertent or slight breach, nor is there any loophole to avoid compliance (save in very limited circumstances where the Secretary of State might grant an exemption, for example if it was in the interests of national security, the economic well-being of the UK, or to support the prevention or detection of serious crime).

## Where Can I Find Further Information?

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Links to the relevant statutory instruments underpinning the new regime and the statutory guidance notes published by the UK Department for Business, Innovation & Skills, can be found here:

- [draft statutory instrument for companies](#)
- [statutory guidance for companies](#)
- [draft statutory instrument for LLPs](#)
- [draft statutory guidance for LLPs](#)
- [guidance for companies, Societates Europaeae and LLPs](#)
- [draft non-statutory guidance for companies and LLPs](#)

The statutory instruments provide clarity around, among other things, what exactly needs to be noted in a PSC Register, the content of a warning notice and restriction notice that a company might send to a PSC/RLE that has not responded to requests for information and the list of markets in Switzerland, USA, Japan, and Israel which allow UK incorporated companies with voting shares traded there to be exempt from the regime.

The statutory guidance notes provide some useful examples of which people are, and are not, considered to be exercising “significant influence”.

The guidance on the PSC regime for companies, LLPs and Societas Europaea explains what must be done to identify and register PSCs, and highlights the differences between identification of a PSC for an LLP as opposed to a limited company.

The draft non-statutory guidance also contains some worked examples applying the principles of the regime to various corporate structures.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Corporate practice group:

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