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UK Government Considers New Foreign Agents Registration Act

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Election and Political Law

On 21 July 2020, the UK Intelligence and Security Committee (the "Committee") published a long-awaited report regarding evidence of Russian threats against the United Kingdom. In addition to setting out the nature and extent of what the Committee considered to be hostile activities on the part of operatives with ties to Russia, the report addressed the powers and tools available to the UK intelligence community to respond to such activities, and noted that "current legislation enabling action against foreign spies is acknowledged to be weak".

The Government had already announced in the Queen's Speech in December 2019 that "[m]easures will be developed to tackle hostile activity conducted by foreign states," and indicated at that time that it was "considering whether to follow allies in adopting a form of foreign agent registration". The Committee's conclusion that such legislation "would clearly be valuable in countering Russian influence in the UK" may increase the likelihood of Government action in the current parliamentary session.

This alert provides an overview of the perceived gaps in the current legal framework, explains how the Government might seek to address those gaps, and considers how a new foreign agent registration requirement could be formulated, based on the experience with equivalent legislation in the United States and Australia. It also summarises related developments regarding the transparency requirements set out in the Code of Conduct applicable to members of the House of Lords.

The Current Legal Framework In The UK

At present, the UK does not have a single, comprehensive counter-espionage law. Instead, the legislation has developed in a piecemeal way, and relevant criminal offences are currently set out in three key statutes: the Official Secrets Act 1911, the Official Secrets Act 1920, and the Official Secrets Act 1939.[1]

The Official Secrets Acts 1911-1939 reflect the threats of their time. For example, when introducing the 1911 Bill to the House of Lords, the then Secretary of State for War

[1] There is, in addition, an Official Secrets Act 1989. However, unlike the Official Secrets Acts 1911-1939, which are focused on the criminalisation of those who engage in espionage, the 1989 Act is focused on the criminalisation of the unauthorised disclosure of specified categories of information.

characterised the problem as "an intelligent stranger" who was "found in the middle of the fortifications at Dover", another individual who was "found looking at the emplacement of guns in a battery at Lough Foyle", a "case of a man who was sketching fortifications", and "photographers taking photographs of things of which they ought not to be taking photographs".[2]

Against this backdrop, the criminal offences established by the Official Secrets Acts 1911-1939 focus on the acquisition of sensitive information or material, the harbouring of those engaged in spying, and the improper access of prohibited places. Although the legislation has been interpreted to extend to acts of sabotage,[3] the mere presence of a hostile foreign agent in the United Kingdom is not a criminal offence. Nor is it an offence for a foreign agent to engage in covert operations that are intended to influence the UK Government or public opinion.

In his testimony to the Committee, the former Director-General of the Security Service (commonly known as MI5) described this legislative gap in the following terms:

"So if somebody was a Russian illegal, or something like that, today it is not an offence in any sense to be a covert agent of the Russian Intelligence Services in the UK — just to be that, to be in covert contact, to be pursuing a brief — unless you acquire damaging secrets and give them to your masters."

Characterising the existing legislation as "dusty and largely ineffective", he noted that the intelligence community is:

"[…] left with something which makes it very hard these days to deal with some of the situations we are talking about today in the realm of the economic sphere, cyber, things that could be [...] more to do with influence."

In that regard, the Committee's report concluded that the United Kingdom "is clearly a target for Russia's disinformation campaigns and influence operations", which serve a "wide range of purposes, but all in support of [Russia's] underlying foreign policy objectives". These include: "direct support of a pro-Russian narrative in relation to particular events", "direct support of Russia's preferred outcome in relation to an overseas election or political issue", and "general poisoning of the political narrative in the West by fomenting political extremism and 'wedge issues', and by the 'astroturfing' of Western public opinion".[4] In addition, the report observed that the presence of Russian elites and their wealth in the United Kingdom had allowed money to be "invested in extending patronage and building influence across a wide sphere of the British establishment", concluding that "PR firms, charities, political interests, academia and cultural

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[2] House of Lords Debate, 25 July 1911, vol. 9, cols. 642-643, available at: https://bit.ly/2ZQvKh2.
[3] In *Chandler v. Director for Public Prosecutions* [1964] AC 763, the House of Lords held that "if a person's direct purpose in approaching or entering [a prohibited place] is to cause obstruction or interference, and such obstruction or interference is found to be of prejudice to the defence dispositions of the State, an offence is thereby committed" (*per* Viscount Radcliffe at 795).
[4] The report describes "astroturfing" as "a propaganda technique whereby a viewpoint is falsely presented as belonging to a certain group". This might include, for example, Russian state employees or Russian-controlled bots masquerading as British citizens on social media to give the impression that the views espoused are genuinely those of a majority of UK nationals.

institutions were all willing beneficiaries of Russian money, contributing to a 'reputation laundering' process".

The former Director-General's comments regarding the inadequacy of the current legislative framework were echoed by the then Home Secretary, whose testimony to the Committee was that the Official Secrets Acts are "completely out of date". And the report notes that the former Prime Minister, Theresa May, had asked the Home Secretary to "consider whether there is a need for new counter-espionage powers to clamp down on the full spectrum of hostile activities of foreign agents in our country" in March 2018 — a request that coincided with the poisoning of Sergei and Yulia Skripal in the United Kingdom, apparently by officers from the Russian Main Intelligence Directorate.

Although the report does not specifically address the adequacy of the broader UK regime regarding lobbying transparency, it is noteworthy that the lobbying activities of relatively few foreign governments are captured by the current registration scheme. This arguably reflects three key limitations in the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (the "Transparency of Lobbying Act"):

- First, the Transparency of Lobbying Act only requires registration by persons engaged in "consultant lobbying", the definition of which focuses on communications with a narrow range of public officials — ministers, permanent secretaries and certain equivalents — relating to: (i) the development, adoption, or modification of any proposal of the Government to make or amend legislation; (ii) the development, adoption, or modification of any other policy of the Government; (iii) the making, giving or issuing by the Government of, or the taking of any other steps by the Government in relation to, any contract or other agreement, any grant or financial assistance, or any licence or other authorisation; or (iv) the exercise of any other function of the Government. No registration is required where a person communicates with other categories of public officials, such as parliamentarians, special advisors, private secretaries, or civil servants below the rank of permanent secretary or its equivalent. Nor would a registration be required if a lobbyist were to engage in communications intended to influence public opinion on a policy issue — even if such communications are made on behalf of a foreign government.
- Second, the requirement to register under the Transparency of Lobbying Act is only triggered where a person is carrying on "the business of consultant lobbying", the definition of which requires the relevant person to be acting "in the course of a business and in return for payment", and registered under the Value Added Tax Act 1994. In practice, no registration would be required if a person were to engage in lobbying activities for free, rather than as part of a business.
- Third, the Transparency of Lobbying Act includes a further broad exception which provides that a person does not "carry on the business of consultant lobbying" by reason of making a communication of the kind described above if: (i) the person carries on a business which consists mainly of non-lobbying activities; and (ii) the making of the communication is incidental to the carrying on of those non-lobbying activities. Guidance issued by the Registrar of Consultant Lobbyists provides that "incidental" means "ancillary or a minor accompaniment to the main focus of a business (which is not lobbying)", and communications will not be regarded as "incidental" where the making of the communications is a "substantive part of the main business, either by volume or significance to the client offering".

Even where a person is subject to the registration requirement under the Transparency of Lobbying Act, the legislation only requires the quarterly disclosure of a client list, rather than meaningful information regarding the nature of the work undertaken on behalf of the clients, or the specific targets of the lobbying activity.

Addressing The Gaps With New Legislation

As noted above, the legislative programme announced by the Government following the General Election in 2019 already reflected an intention to reform counter-espionage laws, as well as the possibility that the Government might introduce new measures requiring the registration of foreign agents.

In addition, the Law Commission has been considering possible reforms in this field for several years. In late 2015, the Cabinet Office instructed the Commission to "examine the effectiveness of the criminal law provisions that protect Government information from unauthorised disclosure", and the Commission published a consultation paper on the topic in February 2017. That paper expressed a preference for the replacement of the Official Secrets Acts 1911-1939 with a new Espionage Act, and included an overview of the U.S. Foreign Agents Registration Act, but the Commission stopped short of expressly seeking views on the introduction of equivalent registration requirements in the UK.

It is unlikely that the Government will publish its detailed legislative proposals until the Commission has concluded its work, which is now significantly delayed. The consultation paper noted that the Law Commission originally intended to publish its final report in spring 2017, whereas the Law Commission's website now states that it will report on its final recommendations this year. Nonetheless, the Minister of State for Security used the House of Commons debate on the Russia report to reassure members that "the commitment of this Government is to act at pace and speed to get this right".

Although we will need to await those recommendations and a specific legislative proposal to understand the precise parameters of any new registration requirement, the Government has already signalled that it is "considering like-minded international partners' legislation, to see whether the UK would benefit from adopting something similar", and it has specifically referred to the U.S. and Australian approaches. We therefore summarise the key features of the U.S. and Australian legislation in the sub-sections below, and consider the possible implications of similar requirements in the United Kingdom.

The U.S. Approach: Foreign Agents Registration Act

In the United States, the relevant legislation is the Foreign Agents Registration Act 1938 ("FARA"). The statute requires "agents of foreign principals" to register with the U.S. Department of Justice and file detailed disclosure reports describing their activities and copies of any "informational materials" that are distributed within the United States. Such materials must bear a disclaimer reflecting that they were prepared by a foreign agent. When FARA registration is required, both individuals acting as agents and their employers must register.

While foreign governments and political parties are well understood to be "foreign principals", the term also includes any non-U.S. individual, partnership, association, corporation, or "organization". The statute's reach therefore extends, for example, to foreign businesses, including foreign parents of U.S. companies.

When an individual or entity is an "agent" of a foreign principal, the obligation to register under FARA is triggered when the agent conducts, on behalf of the foreign principal, one or more of the following activities within the United States:

- engaging in "political activities", a term that encompasses any activity that is intended to, or even "believed" to, influence the U.S. government or any section of the U.S. public regarding: (1) formulating, adopting, or changing the foreign or domestic policies of the United States or (2) the "political or public interests, policies, or relations of a government of a foreign country or a foreign political party";
- acting as a "public-relations counsel", "publicity agent", "information-service employee", or "political consultant";
- collecting or dispensing money; and/or
- representing the interests of the foreign principal before an agency or official of the U.S. Government, generally by making direct contact with government officials.

These registration triggers are interpreted in a broad manner; there is no *de minimis* threshold and even the slightest activity that meets one of the statutory triggers can require registration.

The FARA includes several statutory and regulatory "exemptions" that can be relied upon to exempt a person from registration. Commonly-invoked exemptions include the following:

- A statutory "commercial exemption" for "private and nonpolitical activities in furtherance of the bona fide trade or commerce" of a foreign principal. Department of Justice regulations also add a commercial exemption for "political activities" undertaken for a foreign corporation "in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation." These exemptions, however, do not apply when the activities are directed by, or "directly promote the public or political interests of" a foreign government or political party.
- An exemption for those engaged in lobbying activities and registered under the federal Lobbying Disclosure Act, the federal lobbying transparency statute in the United States. This exemption does not apply to agents of a foreign government or political party or if a foreign government or political party is "the principal beneficiary" of the work.
- A narrow exemption for lawyers engaged in the practice of law on behalf of a foreign client.
- An exemption for persons engaged solely in bona fide religious, scholastic, academic, or scientific pursuits or the fine arts. This exemption, however, does not apply if the person is engaged in political activities.

Wilful violations of FARA can be punished by a fine of up to $10,000 or five years imprisonment. In recent years, the Department of Justice's FARA Unit has dramatically ramped up enforcement under the statute, bringing more cases in the previous three years than the government brought in the previous fifty.

The Australian Approach: Foreign Influence Transparency Scheme Act

In Australia, the Foreign Influence Transparency Scheme Act 2018 ("FITSA") requires registration of certain activities that are undertaken in Australia on behalf of a foreign principal for the purpose of political or governmental influence. Under FITSA, the term "foreign principal" is defined broadly to include:

- foreign governments (including national, regional or local government authorities);
- foreign political organisations (including political parties and organisations that exist primarily to pursue political objectives);
- foreign government-related entities (including, for example, companies in which a foreign government or political organisation holds more than 15 per cent of the issued share capital or voting power, or is in a position to appoint at least 20 per cent of the company's board of directors, and companies in which the directors are accustomed or under an obligation to act in accordance with the directions, instructions, or wishes of a foreign government or political organisation); and
- foreign government-related individuals (including, for example, individuals over whom a foreign government, foreign government-related entity, or foreign political organisation is able to exercise total or substantial control).

Although this definition is somewhat narrower than the equivalent definition in the U.S. legislation, the common feature of the U.S. and Australian approaches is that the definition of "foreign principal" in the Australian legislation does not depend on the nature of the diplomatic relationship between Australia and the home state of the foreign principal. Foreign principals from allied or friendly nations are captured by the registration requirements, not just foreign principals from enemy states or states that are deemed to be hostile to Australian interests.

Registrable activities on behalf of foreign principals include, for example:

- parliamentary lobbying for the purpose of political or governmental influence (including lobbying directed towards members of parliament and their staff), where such activities are conducted on behalf of a foreign government-related entity, foreign political organisation, or foreign government-related individual;
- general political lobbying for the purpose of political or governmental influence (including lobbying directed towards national public officials, national government departments or agencies, registered political parties, or candidates in national elections), where such activities are conducted on behalf of any kind of foreign principal;
- communications activity for the purpose of political or governmental influence (including disseminating, publishing, disbursing, sharing, or making available to the public information or material in any form), where such activities are conducted on behalf of any kind of foreign principal; and
- disbursement activity for the purpose of political or governmental influence (including the distribution of money or things of value on behalf of a foreign principal, if such activity is not already disclosed under the Commonwealth Electoral Act 1918), where such activities are conducted on behalf of any kind of foreign principal.

In addition, where a former cabinet minister undertakes any activity on behalf of a foreign principal, that activity will be registrable, even if it does not fall within one of the other categories of registrable activity, such as those outlined above. Similarly, where former members of

parliament and certain senior office-holders who have left office within the prior 15 years undertake any activity on behalf of a foreign principal that involves the contribution of experience, knowledge, skills, or contacts gained in their former position, the activity will be registrable.

However, FITSA includes several exemptions from registration, including (without limitation) where:

- the activity primarily relates to the provision of humanitarian aid or assistance;
- the activity primarily relates to, or is incidental to, the provision of legal advice, legal representation in judicial, criminal or civil inquiries, investigations or proceedings, or legal representation related to government administration processes;
- the person undertaking the activity holds a position or appointment as a member of parliament, a member of a state legislative assembly, or a national or state office holder;
- the activity is within the scope of the person's function as a diplomatic or consular official, or as a United Nations official;
- the person is undertaking a religious activity on behalf of a foreign principal in good faith, such as attending a place of worship or a prayer meeting;
- the person undertaking the activity is employed as an officer of a foreign government which is the relevant foreign principal; or
- a commercial or business activity is undertaken on behalf of a foreign government-related entity under the name of that foreign government-related entity, or by an individual in their capacity as a director, officer or employee of the foreign principal.

It is a criminal offence under FITSA for a person to undertake registrable activities while not being registered; to fail to fulfil responsibilities under the scheme, such as the reporting and disclosure obligations; to provide false or misleading information or documents relating to a registration; or to destroy records in connection with the scheme. The maximum penalties for these offences vary, with the most substantial penalty of up to five years' imprisonment being reserved for persons who undertake registrable activities while not being registered.

Possible Implications for Businesses and Individuals in the UK

If the UK Government were to adopt legislation based on either of the U.S. or Australian models, it would represent a significant departure from existing counter-espionage laws, and a marked expansion of lobbying transparency requirements. It could also have broad implications for businesses and individuals in a range of sectors. For example:

- If the UK were to adopt the U.S. definition of "foreign principal", UK businesses with foreign parents, public relations firms with international clients, media companies with foreign ownership, and UK lobbying firms could all find themselves within the legislation's reach.
- If the UK Government's definition of "foreign principal" includes not only foreign governments but also foreign corporations and other organisations, the routine governmental affairs activities of multinational corporations active in the UK could be captured by the new statute.

- Even if the UK Government were to favour the somewhat narrower definition of "foreign principal" in the Australian statute, rather than the broader U.S. definition, the registration requirement — and the scope of the activities covered by the registration requirement — could still be far broader than the existing registration requirements under the Transparency of Lobbying Act.
- Likewise, if the UK Government were to imitate the Australian approach to registering the employment of former cabinet ministers and senior government officials by foreign principals, this would significantly strengthen the current UK rules on hiring former public officials, which are administered by the Advisory Committee on Business Appointments.

Related Developments Regarding The Code Of Conduct For Members Of The House Of Lords

In addition to addressing possible legislative reforms that could impose obligations on foreign agents, the Committee's report also identifies potential weaknesses in the transparency obligations that apply to members of the House of Lords. Those obligations are set out in the House of Lords Code of Conduct. Specifically, the Committee's report notes that:

- "a number of Members of the House of Lords have business interests linked to Russia, or work directly for major Russian companies linked to the Russian state";
- "[i]t is important that the Code of Conduct for Members of the House of Lords, and the Register of Lords' interests, including financial interests, provide the necessary transparency and are enforced"; and
- "the Code of Conduct for Members of Parliament requires that MPs register individual payments of more than £100 which they receive for any employment outside the House", whereas "this does not apply to the House of Lords, and consideration should be given to introducing such a requirement".

The Government's response to the Committee's report observes that the Code "is the responsibility of the House itself", but expressed its confidence that "the Conduct Committee will give due consideration to the recommendation". Lord Mance, the Chairman of the House of Lords Conduct Committee and a former Deputy President of the Supreme Court, responded swiftly, and stated that the recommendation will be considered at the next meeting of the Conduct Committee. We therefore expect that the Code will be modified in the near future.

However, as Lord Mance also noted, the Code of Conduct currently requires members of the House of Lords to register all paid and unpaid employment, and the current version of the Code — which was updated earlier this month — had already tightened the disclosure rules relating to work for foreign governments. Specifically, where a member of the House of Lords is a director of a company, paragraph 55(b) of the Code provides that the member must register any client of the company that is a foreign government to which the member personally provides services. Likewise, paragraph 57(b) of the Code imposes a similar requirement where a member holds remunerated employment, in which case the member must register any client of the employer that is a foreign government to which the member personally provides services.

If you have any questions concerning the material discussed in this alert, please contact the following members of our compliance and investigations practice group in London, and our election and political law practice group in Washington:

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