From Rt Hon Harriet Harman MP, Chair

Kelly Tolhurst MP
Parliamentary Under Secretary of State,
Minister for Small Business,
Consumers and Corporate Responsibility
Department for Business, Energy and Industrial Strategy

24 April 2019

Dear Kelly,

Draft Registration of Overseas Entities Bill

The Joint Committee on Human Rights (JCHR) has been considering the draft Registration of Overseas Entities Bill, as requested by the Joint Committee set up to consider the Bill. Following a request from JCHR lawyers, we were very grateful to receive your department’s ECHR Memorandum for the Bill last week.

The JCHR fully supports efforts to combat money laundering in the UK, including the use of the UK property market by money launderers. We therefore understand and fully support the need for this legislation. We also appreciate the difficulties in legislating for entities that may not be subject to the jurisdiction of the UK in all respects. However, we do have some concerns about some of the (possibly unintended) consequences of the Draft Bill, which we would like to raise with you in this letter to ensure these potential consequences have been fully tested.

We agree with BEIS’ ECHR Memorandum that the Draft Bill potentially engages Article 8 (right to private and family life), Article 1, Protocol 1 to the ECHR (right to peaceful enjoyment of one’s possessions) and Article 1, Protocol 1 to the ECHR as read with Article 14 ECHR (non-discrimination in relation to property rights).

Article 1, Protocol 1 (Property) and the potential impact on innocent third parties

The potential interference with the property rights of the overseas entities seems largely proportionate, necessary and justified, as set out in your Department’s ECHR Memorandum. However, we do have concerns about the Article 1, Protocol 1 rights of innocent third parties.
In particular, we are concerned that any purchase by a third party of land in the UK from an overseas entity that has not completed the registration requirements (or annual update) might not be capable of being registered so as to obtain legal title of the property concerned. While restrictions on the title deed of property owned by an overseas entity provide some protection to help forewarn innocent buyers about this risk, this does not extend very far. It might also be the case that these issues can be easily addressed by those undertaking the conveyancing, but we would need further information to be reassured that this could indeed adequately guard against these eventualities.

The Explanatory Notes explain (para. 33) that “[t]he practical effect of the restriction is that where an overseas entity makes a relevant disposition at a time when it is not a registered overseas entity, is not exempt and no exceptions apply, those dispositions cannot be completed by registration” (emphasis added). Clearly, any innocent third-party acquiring rights to property in these circumstances could suffer significant loss by, for instance, having paid for a property, and then not being able to register the transaction in their name.

The questions we have about this aspect of the Draft Bill include:

- How transparent will the system be? In other words, how easy will it be for a third party to discover whether an overseas entity has complied with all registration and updating requirements?
- How would a third party in Scotland be alerted to the fact that the counter-party is an overseas entity (we understand that the registration of a restriction on title deeds is not possible in Scotland)?
- Would those undertaking the conveyancing be easily able to resolve these issues without a significant increase in effort and cost? What are the views of the Law Society of England and Wales and the Law Society of Scotland?
- What mechanism is envisaged to resolve the situation where, for instance, an innocent third party buys and pays for property title to which can then not be registered because the selling overseas entity has not complied with registration requirements?
- How do you justify as proportionate such a potentially serious interference with the property rights of an innocent third party?

In order to protect innocent third parties, it would be better to ensure that it is very easy to determine whether a seller is an overseas entity and whether they are adequately registered at the time of sale. In order to make the interference with property rights justified and proportionate, it would also be better to ensure that there is a method to resolve legal ownership of property where an innocent third party has bought real estate from an overseas entity that was not properly registered.

Article 14: Prohibition of Discrimination (in the enjoyment of other Convention rights) and the impact of “restrictions” in the land register

Given the fact that the provisions will only be applicable to overseas entities (i.e. those legal entities that are governed by the law of a country or territory outside the United Kingdom), a further consideration is whether the scheme under the Bill
engages Article 14 (prohibition of discrimination), in conjunction with Article 1 Protocol 1 property rights, on the basis of nationality.

We recognise fully that the scheme under the Draft Bill is intended to mirror, to the extent possible, the People with Significant Control scheme applicable since 2016 to UK entities, and that it is not meant to be any more onerous. However, due to the different enforcement methods available the sanctions are quite different in that the sanctions for overseas entities bite more in relation to property rights.

In particular, the JCHR is concerned by the potential consequences of the restriction requirement (and the potential further risks for third parties buying property from overseas entities as set out above). The restriction requirement, introduced into the 2002 Act by paragraph 3(1) of Schedule 3 to the Draft Bill, requires the registrar to enter a “restriction” in the register in relation to a qualifying estate if an overseas entity is registered as the proprietor of the estate. This is irrespective of whether or not the overseas entity has already registered as an overseas entity (i.e. as a “registered overseas entity”).

The entry of such a “restriction” may have serious adverse effects on the proprietor’s property rights, which would not affect a UK entity in a similar way under the PSC scheme; if this were the case, it is possible that this discriminates against overseas entities.

Again, the main issue is transparency:

- How easy will it be for banks and other lenders, potential buyers and tenants to assess whether a particular owner of property (who happens to be an overseas entity) is compliant and can be trusted?
- Furthermore, does the Department have any concerns about a potentially “chilling effect” on the ability of compliant and honest overseas entities to deal effectively with their property because of wariness of potential buyers, lenders etc, whenever they were dealing with restricted property?

Article 8: Right to respect for private and family life

We largely agree with your Department’s analysis in the ECHR Memorandum that the interference with privacy rights under Article 8 ECHR are justifiable, taking into account the reasonably limited nature of the information, the aims of the Bill and the consequences that follow.

One aspect that causes us some concern is the provision that allows for information of “managing officers” to be provided where the overseas entity has no beneficial owners, or they cannot be found or cannot provide complete information. The ECHR Memorandum summarises the position as follows:

“20. A condition of registration is that the overseas entity discloses information about its beneficial owners. Where the entity has none, or they cannot provide complete information about them, details about their managing officers (e.g. a director) are required - see clause 4.”

The question we have here is how much effort an overseas entity would have to make to find its beneficial owners before simply providing information of individuals
who could provide a useful front for what might be a corrupt entity? Given the potentially serious consequences that could result for innocent third parties, outlined above, we are a little uneasy with a system that could be easily circumvented.

What measures are in place (or should be put in place) to ensure that this provision can not be easily misused?

We also note that the clause 22 of the Draft Bill allows for regulations which will allow an individual to apply for their details to be protected from public disclosure.

The Department’s ECHR Memo suggests that this will be done on the basis that disclosure would put them at risk of “physical harm”. Our questions in this regard are:

- Whether the Department thinks this is an appropriate standard for this protection, given that some lesser, yet still serious, level of harassment, threat or harm would not allow an application to be made?
- In the Department’s view, will such an application be possible if the risk of harm was to family members of beneficial owners / managing officers?

We look forward to the Department’s clarifications and remain willing to provide any further assistance we can.

Yours sincerely

Rt Hon Harriet Harman MP
Chair, Joint Committee on Human Rights