The City of London Law Society

The Law Society

Economic Crime and Corporate Transparency Bill 2022

Amendments to be moved in Grand Committee proposed by Lord Johnson of Lainston

17 April 2023

Introduction

1. The views set out in this paper have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society** and, together with the CLLS, the **Committees**). The members of the Joint Working Party are set out in the Appendix to this note.

2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

3. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

4. The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to company law and partnership law.

5. We have prepared this paper with a degree of urgency with a view to contributing to debate and discussion of the Bill as it enters Grand Committee stage, and our comments should be seen in that context. We look forward to continuing to contribute to that discussion as the Bill continues to make its way through Parliament.

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Our comments

Background

6. This paper follows our previous paper dated 7 October 2022 on the Economic Crime and Corporate Transparency Bill 2022 (the **Bill**) following its introduction into Parliament. As mentioned in that paper, we support the Government's ongoing commitment to tackling economic crime, preventing the misuse and abuse of limited partnerships and corporate structures and increasing the integrity of the registers maintained by the Registrars of Companies.

7. In this paper, we comment on the proposed amendments to the Bill moved by Lord Johnson of Lainston, to be moved in Grand Committee, which we understand to be proposed amendments supported by the Government.[1]

8. We welcome, in particular, Lord Johnson's proposed amendment to include a new clause in the Bill after Clause 155, which would amend section 16 of the Economic Crime (Transparency and Enforcement) Act 2022 in relation to the verification of registrable beneficial owners ("**RBOs**") and managing officers of overseas entities.

9. Independent legal advisers ("**ILAs**") constitute one of the categories of persons who are permitted to conduct verification pursuant to section 16. ILAs will also often (if not usually) be the persons carrying out the legal analysis as to the registrability of an overseas entity and its beneficial owners and/or managing officers, and so there is clear utility in ILAs being in a position

[1] HL Bill 96(I), https://bills.parliament.uk/publications/50394/documents/3173.

to verify information to be provided to Companies House following that analysis.

10. The Law Society has previously highlighted concerns with the procedure for and standards of verification as they currently stand, noting that certain aspects of the procedure make it difficult for ILAs to carry out verification on behalf of their clients. These include, in particular:

    - the inability to verify on a "risk-based approach";
    - the need to verify not only identity information but also the nature of an RBO's control; and
    - the fact that, in some cases, the information to be verified may not be available from someone who is independent of the person being verified.

11. The proposed amendments to section 16 would pave the way to secondary legislation that could, in theory, address these issues and so make verification by ILAs more feasible. We would be delighted to engage with the Government on secondary legislation to be made under any amended section 16 to ensure it achieves its purposes.

12. The remainder of our comments on the proposed amendments relate to Lord Johnson's proposed amendment to include a new clause in the Bill after Clause 46, which would amend sections 112, 113 and 771 of the Companies Act 2006, insert new sections 113A to 113I (inclusive), re-number existing section 115 as section 113J and make other consequential amendments.

13. Our comments in this paper are predicated on the assumption that the amendments tabled by Lord Johnson are now unlikely to be withdrawn or further amended. As such, we have not suggested any changes to the specific wording of the proposed amendments. However, many of the concerns we raise in this paper are capable of being addressed through revised wording. Should the Government feel minded to propose alternative amendments on this basis, we would be happy to engage on how those amendments might look. Whilst we remain to be convinced as to the concerns and mischief which the amendments are intended to address, our focus in raising the comments set out below is to ensure that the proposed amendments operate in a way which is proportionate and practicable.

14. In this paper, unless specified otherwise:

    - references to **sections** are to sections (or proposed new sections) of the Companies Act 2006;
    - references to **subclauses** are to subclauses of the proposed new clause described in paragraph 12 above; and
    - references to **register** are to a company's register of members.

Form of name

15. Subclause (2) would insert a new subsection (4) into section 112 to the effect that, where an individual's name is entered in a company's register but is not in the form required by section 113A, that does not affect the person becoming a member of the company by virtue of section 112(2).[2]

16. Subclause (5) would insert a new section 113A setting out the information on an individual that is to be included in a company's register (the so-called "required information"). This is the individual's "name" and "service address".

17. New section 113A(2) would define a person's "name" for the purposes of that section as their

[2] This version of subsection (4) in effect modifies subsection (4) as proposed by clause 46(2) of the Bill.

"forename and surname". Section 113A(3) includes optionality for including titles for peers and other individuals usually known by a title. However, beyond this, section 113A does not prescribe a "form" in which a name is to be included in the register.

18. Setting aside titles, a name which is entered into a register other than in the form of a "forename and surname" is arguably not a "name" for the purposes of section 113A(1)(a) or, by extension, section 112(4).[3] It is not immediately clear, therefore, how a name can be entered in a form other than that required by section 113A.

19. We assume that section 112(4) may be intended to deal with issues such as typographical errors[4], shortened names or nicknames[5], and inversions of forenames and surnames[6] (although our comments in paragraph 18 above may apply equally in these circumstances). **We recommend that the Government set out in the explanatory notes to the Bill a non-exhaustive list of circumstances in which section 112(4) is likely to apply**. Alternatively, this could be set out in non-statutory guidance.

Changes to information in a company's register of members

20. Subclause (4)(e) would insert a new subsection (6A) into section 113 which would (among other things) require a note to be included in a company's register of members where information in the register changes. That note would need to record the date on which the information changed and the date on which the change was entered in the register.

21. Under section 113(7) (as amended by subclause (4)(f)) a company would commit a criminal offence if, without reasonable excuse, it makes default in complying with section 113. This includes failing to:

- make a note of a change in any information in the register (section 113(6A)); and/or
- include the updated information in the register (section 113(2)(a)).

22. The wording of the amendments gives rise to several uncertainties.

- **When does the obligation to update the register arise?** As worded, section 113(6A) could suggest that the obligation arises the moment the change occurs. However, in most cases, a company will not be aware of a change occurring. (Indeed, this is specifically contemplated by proposed new section 113E, which imposes an obligation on a member of a company to notify the company of a change in their required information within two months of the change occurring.)
- **How long would a company have to update its register?** Section 113(6A) sets no deadline for entering the note. Indeed, section 113(6A)(c) contemplates that a company will not enter the note on the date of the change, as it requires the note to include two separate dates: the date on which the information changed and the date on which the change is entered in the register.
- **How would a company become aware of the information that needs to be entered in the register?** A company will presumably need to rely on the information provided to it by the member in question. It is impracticable, and likely to be costly and time-consuming, for a company to be under a positive obligation to validate or verify

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3 For example, a name entered as "J. Smith" would not, strictly speaking, be a "name" under section 113A(2), as it does not include a "forename", and so would not, for the purposes of section 112(4), be a "name" in a form other than that required by section 113A. Indeed, it may even have the effect that the individual in question has not become a member at all under section 112(2), because their "name" (as defined in section 113A(2)) has not been entered in the company's register.

4 For example, "Steven Hawkins" instead of "Stephen Hawking".

5 For example, "Bill Gates" instead of "William Gates".

6 For example, "Lloyd Christopher" instead of "Christopher Lloyd".

information provided to it by a member.

23. The proposed amendments to section 113 do not deal with these issues. Instead (on the face of it), section 113(7) is arguably engaged the moment a change occurs. We therefore anticipate that, in many cases, the key question will be whether a company has a "reasonable excuse" for non-compliance at any given point in time.

24. To provide certainty for companies and their officers and advisers, **we recommend that the explanatory notes to the Bill set out a non-exhaustive list of circumstances in which a company is likely to have a "reasonable excuse"** for the purposes of section 113(7).

25. For example, the explanatory notes might state that a company has a "reasonable excuse" for failing to enter information in its register if (among other things):

- it relies on information provided by the member in question and has no obvious reason to doubt that information;
- it has sent a member a notice under section 113F and relied on the information provided in response;
- it becomes aware that the information in its register for a member is not correct and has sent a notice to the member under section 113F, but the member has not responded (see paragraph 49 below); or
- it becomes aware that the information in its register for a member is not correct but concludes that it is not appropriate to send a notice to the member under section 113F (see paragraph 50 below).

26. Similarly, we think it is important that the explanatory notes state that a company has a "reasonable excuse" for not entering a change in its register if (among other things):

- it has not been made, or otherwise become, aware of the change;
- it is made aware of a change but it is obvious that the change is, or is likely to be, incorrect;
- it becomes aware of the change and has sent a notice to a member under section 113F, but the member has not responded (see paragraph 49 below); or
- it becomes aware of the change but concludes that it is not appropriate to send a notice to the member under section 113F (see paragraph 50 below).

27. Separately, section 113(6A) states that it applies where information to be entered in a company's register "changes". The inference we draw from the natural meaning of this language is that section 113(6A) would apply only to changes that take place **after** section 113(6A) comes into force; in other words, that there would be no need for a company to go back in time to investigate and record historic changes in the required information for its members. This is clearly the most logical and sensible approach from a practical perspective, and **we recommend that this be made clear in the commencement order that brings section 113(6A) into force**.

28. Finally, registers (whether physical or electronic) are currently kept in particular formats. The requirement to include the new required information in the register is likely to necessitate a change in format for many company service providers. **We recommend that the Government engage early with registrars and trust and company service providers** to ensure that they are able to accommodate the new information in their standard forms of register.

Duty to notify company of required information on becoming a member

29. Subclause (5) would insert a new section 113D requiring a member of a company to provide the company with the required information about the member (section 113D(1)). The member would need to do this within two months of the date on which they become a member (section 113D(3)).

30. For these purposes, the “required information” is set out in sections 113A and 113B. For an individual, this is the person’s name and a service address (section 113A(1)). For a legal entity, this is the entity’s corporate or firm name and a service address (section 113B).

31. It is not immediately clear to us in what circumstances a person is likely to become a member of a company without the company already possessing the required information for that person or, at least, the name of the relevant person so that this can be entered in the company's register.

32. A person becomes a member of a company either:

- by subscribing to the company’s memorandum (section 112(1)); or
- when their name is entered in the company’s register (section 112(2)).

33. The circumstances in which a person’s name may be entered in a company’s register include:

- for a company limited by shares, where the company issues shares to the person or the person takes shares under a transfer of shares or by transmission of shares; and
- for a company limited by guarantee, where the person applies to become a member.

34. The duty in section 113D(1) to notify the company of the required information would not apply to a person who becomes a member of a company on incorporation if all the required information is provided in the application for registration of the company (section 113D(2)(b)).

An application to register a company can be made online or using Companies House Form IN01. Either way, under new section 9A (proposed by Lord Johnson), the incorporators of a company would need to provide the name and service address of each subscriber to its memorandum as a prerequisite to incorporation. Companies House will reject an application for incorporation that does not contain this information.

As a result, the conditions in section 113D(2)(b) would appear always to apply to a subscriber to a company’s memorandum, and so it is difficult to see how the duty in section 113D(1) could be activated when a person becomes a member by virtue of section 112(1).

35. Subclause (11) would amend section 771 by inserting a new subsection (1A) prohibiting a company from registering a transfer of shares in it unless the company has the information it is required to enter in its register in relation to the transferee. This includes the required information for a member. As a result, the Act (as amended) does not contemplate a person becoming a member of a company limited by shares following a transfer of shares unless the company already has all the required information.

36. If a member of a company limited by shares dies or becomes bankrupt, legal title to that member’s shares automatically vests in their personal representatives (“**PRs**”) or trustee-in-bankruptcy (“**TiB**”) (as appropriate). This is not a transfer *per se* and so section 771(1A) would not apply.

However, whilst transmission results in legal title to a member’s shares passing to their PRs or TiB, it does not automatically result in the PRs or TiB becoming (a) member(s) of the company. Depending on the company’s articles, for this to happen, the PRs or the TiB would usually need to elect by notice in writing to have the shares transferred to them (albeit without needing to produce an instrument of transfer). Alternatively, the PRs or TiB could transfer the shares to some other person by executing an instrument of transfer.

In either case, though, the transmission is followed by a transfer to which section 771(1A) *would* presumably apply. Once again, the Act (as amended) does not contemplate a person becoming a member of a company limited by shares following a transfer of shares unless the company already has all the required information.

37. The relationship between new section 771(1A) and section 112(2) is not entirely clear. Although section 771(1A) would forbid a company from registering a transfer of shares without having all

the required information for the transferee, section 771(1A) does not appear to override section 112(2). It therefore appears, for example, that a person could become a member of a company following a transfer (albeit in contravention of section 771(1A)) despite not providing all the required information (e.g. if no service address has been provided).

38. The only circumstances, therefore, in which it would appear to be possible for a person to become a member of company, yet for section 113D(1) to be relevant, are as follows:

- Where a person becomes a member of a company limited by shares on being issued shares or becomes a member of a company limited by guarantee following a membership application, and (in either case) the company does not enter all the required information in its register at that point.[7]

  However, the issue of shares and the acceptance of a membership application are matters that are generally within a company's control. Given that the company will (or should) be aware that its register must (by virtue of section 113(2)(a)) contain all the required information for each member, it seems unlikely that a company would enter a person in its register without obtaining this information.

- Where a person other than the company (i.e. a registrar) is responsible for maintaining the register and updates it without all the required information, or the registrar becomes aware of all the required information but the company does not.

  However, a registrar is an agent of the company and its actions should, for all intents and purposes, be treated as those of the company. There does not, therefore, seem to be any reason to distinguish between the registrar's knowledge and actions and those of the company itself. A registrar should equally be precluded from registering a transfer unless it has all the required information, and the company would presumably have constructive knowledge of whatever the registrar knows in this context.

- Where a person becomes a member of a company (whether by virtue of section 112(1) or 112(2)) and, in connection with that, provides misleading information to the company, such that the company is not in possession of the correct required information for that person.

- Where a person becomes a member of a company following a transfer and not all the required information is provided (in contravention of s.771(1A)).

39. If it is, indeed, these circumstances that section 113D is designed to address, **we recommend that the Government clarify this in the explanatory notes to the Bill**. Otherwise, the inclusion of section 113D could well give rise to confusion, given that, in the majority of circumstances, it would appear not to be relevant.

Penalties for failing to notify company of required information

40. Alongside new section 113D, subclause (5) would insert a new section 113E requiring a member of a company to notify the company of any change in their required information (section 113E(1)). The member would need to do this within two months of the date on which the change occurs (section 113E(3)).

41. Subclause (5) would also insert a new section 113G(1), the effect of which is that a member of a company who, without reasonable excuse, fails to comply with section 113D or 113E commits a criminal offence.

42. We query the need for criminal sanctions in this context, particularly in relation to individual shareholders who may historically have made investments in UK companies (or received investments in UK companies as gifts or bequests) but who have, over time, forgotten about

[7] Noting that the proposed amendments do not include restrictions similar to those in section 771(1A) in relation to issues of shares.

those investments.

Whilst there is a clear and valuable policy objective of ensuring the integrity of company registers by requiring correct information on members, this needs to be balanced against the equity of imposing criminal sanctions on unwitting individuals. Many registers of publicly traded companies contain a number of "gone-aways": members to whom a company sends documents but the documents are returned undelivered. These persons are unlikely actually to receive any notice issued by the company under the proposed new provisions or proactively to provide updated information on the proposed new provisions coming into force.

43. We assume, however, that the Government has considered this balance and concluded that criminal sanctions are the appropriate method of pursuing this policy objective, with the onerous consequences of non-compliance being mitigated through a combination of the concept of a "reasonable excuse" and prosecutorial discretion.

44. That being so, and the nature of criminal sanctions being serious, **we recommend that the explanatory notes to the Bill set out a non-exhaustive list of circumstances in which a member will (or, at least, is likely to) have a "reasonable excuse"** for failing to comply with section 113D or 113E. This could include (for example) where a member is incapacitated, or where they are genuinely unaware of their membership of the company in question. This would provide more clarity to members of companies and their advisers.

Powers to require information from members

45. Subclause (5) would also insert a new section 113F giving a company power, by notice to a member or former member, to require the member or former member to provide their required information to the company (section 113F(1)). The member or former member must comply with the notice within one month (section 113F(2)). Failure to do so would be a criminal offence (section 113G(2)).

46. Section 113F(1) states that a company "may" require a member or former member to provide the required information. It would appear, therefore, that a company would not be *obliged* to send a notice under section 113F.[8]

47. Whether a company sends a section 113F notice, therefore, would appear to be a matter which its directors would need to consider in the round.

48. In deciding whether a company should send a section 113F notice, the directors of a company will need to have regard to various matters. These include not only the directors' duties to the company and the ability of the company to communicate effectively with its members, but also the company's duty to ensure that the register contains all the required information (section 113(2)(a)).[9]

49. For example, a company may discover that the service address entered in the register for a particular member is incorrect (e.g. if communications sent to that address are returned with a message that the recipient is not recognised). In those circumstances, the directors of the company might conclude that the company's register does not include all the required information and that the company should send a section 113F notice in an attempt to obtain it.[10] Pending a response to that section 113F notice, this would presumably also result in the company having

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8 Contrast this with section 790D(2), which states that a company "must" send a notice to a person it knows or has reasonable cause to believe to be a registrable person or registrable relevant legal entity in relation to it.

9 We assume that, where the register contains incorrect information (e.g. the wrong service address), that information does not amount to the required information and so the register would not contain all the required information.

10 Note that, if communications to a member have failed because the company does not have the correct address, it is not immediately clear quite how the company will be able to ensure a section 113F notice reaches the member unless it has another method of communicating with the member (such as email).

a reasonable excuse (under section 113(7)) for its register not containing the required information.

50. By contrast, there may be circumstances where a company becomes aware that the required information for a member is incorrect, but it is unwise, or unlawful, for the company to send a section 113F notice. This might occur if (for example) a member has supplied a false name[11] or false address to the company for criminal purposes and to inform the member of this might amount to "tipping off" or might otherwise prejudice a criminal investigation. In that case, this would presumably also result in the company having a reasonable excuse (under section 113(7)) for its register not containing the required information.

51. **We therefore recommend that the explanatory notes to the Bill set out the circumstances in which a company may be expected to use its power to serve a section 113F notice**. If it is felt that the explanatory notes are not the appropriate place for this, this could instead be set out in non-statutory guidance published by the Government. That guidance could also set out whether and how a decision to serve a section 113F notice (or not to do so) impacts on the company having a "reasonable excuse" for its register not containing all the required information.

52. As noted above, subclause (5) would also insert a new section 113G(1), the effect of which is that a member of a company who, without reasonable excuse, fails to comply with a notice sent under section 113F commits a criminal offence.

53. Again, the nature of criminal sanctions being serious, **we recommend that the explanatory notes to the Bill set out a non-exhaustive list of circumstances in which a member will (or, at least, is likely to) have a "reasonable excuse"** for failing to comply with a section 113F notice. Again, this could include (for example) where a member is incapacitated or where the notice has genuinely not come to their attention. This would provide more clarity to members of companies and their advisers.

Informing members of the proposed changes

54. A key part of ensuring compliance with the proposed amendments described above would be to ensure that members of companies are made aware of them and their new obligations.

55. **We therefore recommend that the Government explore and suggest ways in which a company might draw members' attention to the new requirements.**[12] This might include (for example) a letter sent to a person when they first become a member, or a note included in the company's next annual report and accounts or AGM notice after the amendments come into effect.

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11 Although query, in this case, whether the person who has supplied that information would in fact be a member of the company, as their (true) name would not be entered in its register and section 112(2) would presumably not apply.

12 These suggestions could be set out in separate non-statutory guidance.

APPENDIX

THE JOINT WORKING PARTY

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