PART 3 INFORMATION ABOUT CONTROL OF LAND

In the December Consultation, the Scottish Government proposed that it should be incompetent in law for anyone wishing to own land in Scotland via a corporate entity (most typically a company) to do so via any such entity that was not registered in an EU member state.

In other words, should anyone (literally anyone - Scot, a Peruvian or an Ethiopian) acquire land and seek to register their title in the Land Register in the name of a Bahamas company or a company in Grand Cayman, the Keeper of the Registers of Scotland would be legally bound to reject it. The person concerned would be required to resubmit the application in the name of a company that was registered in an EU member state.

In light of ongoing concerns about money laundering, criminality and transparency and in the context of commitments by EU member states to establish registers of beneficial ownership, this move was welcome and timely.

By eliminating offshore tax havens from property ownership and insisting on EU incorporation, such landowners would then be legally accountable via Directors and would be required to submit publicly available Annual Returns and Accounts to the relevant Registry including details of the names of beneficial owners. This would represent a substantial step forward in efforts to tackle the impact of secrecy jurisdictions and would set a leading example to the UK Government about how to tackle such impacts.

In responses to the December consultation, 79% of respondents agreed with this proposal.

This proposal, however, has been dropped and does not appear in the Bill. What does appear is provision for Ministers to make regulations that would allow only those members of the public affected by land held in secrecy jurisdictions to request that information on beneficial ownership to be divulged.

Such requests are to be made to the Keeper of the Registers of Scotland who, in turn, by Ministerial regulation, is given power to request information from an overseas registered company.

The arguments advanced by Scottish Ministers as to why the original proposal has been abandoned in the Policy Memorandum (para, 128) are unconvincing.

It suggests that barring offshore companies would still allow trusts to own land. That is true but if that is deemed a problem then that should be dealt with on its own merits. It has no bearing on the question of whether to bar corporate entities.

I have seen no evidence of offshore trusts owning land in Scotland to date. All of the reported instances are of companies.

The argument about companies owned by companies is also specious. By insisting that the parent company is registered in the EU, the primary purpose of ensuring
transparency and accountability is significantly enhanced through the public availability of identified persons (Directors) with legal responsibility, through the enhanced availability of information available via annual returns, and through the liability of EU registered companies to disclose beneficial ownership under EU law.

I submit to the Committee that the original proposals contained in the December 2014 Consultation be reinstated in the Bill. This proposal would be effective in preventing the future use of offshore tax havens as places to incorporate and register title to land in Scotland. It also aligns itself well with the proposed register of beneficial ownership contained within Part 7 of the Small Business, Enterprise and Employment Act 2015.

If reinstated then all titles held by legal persons will be within the EU and all such corporate entities will be required to disclose their beneficial ownership in a register.

The provision will have to be compatible with EU law - most importantly the Treaty on the Functioning of the EU (TFEU), Article 26 of which provides for the internal market and free movement of goods and capital. Article 345, however makes clear that this in no way prejudices the rules in Member States governing the system of property ownership.

Furthermore there is no discrimination involved. Individuals from anywhere in the world are all free to buy land in Scotland. They simply need to register it either in their own name or in an incorporated body registered in any member state of the EU. Inward investors, for example, typically set up UK subsidiary companies to hold assets and contract within the UK.

The provision should also be made retrospective. This would involve existing companies being obliged to transfer title to an EU registered company.

On one reading of the situation, this is problematic and, indeed, that is the view taken by the Scottish Government in the December consultation (para. 47). This view probably arises as a consequence of Article 1 Protocol 1 of the European Convention on Human Rights which provides that, Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Were this proposal to be applied retrospectively, it would require landowners who currently own land held by offshore entities to transfer ownership to a compliant entity such as the human beneficiary of xyz Corporation or an incorporated body registered within the EU.

The ECHR obliges Governments to “secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.” xyz Corporation, it could be argued, is not within the jurisdiction of any contracting party to the ECHR and thus cannot
argue any violation of convention rights. But even if it was, such an obligation is arguably entirely consistent with the public interest provisions of the convention.

Moreover, the beneficial owner would not be losing their beneficial ownership. They would still enjoy possession of their land but they would now have to make a different arrangement with regard to holding title to the land. Their convention rights would not have been violated.

The use of offshore secrecy jurisdictions to hold title to land is now increasingly regarded as problematic in relation to transparency and tax avoidance and evasion. In a speech on 31 Oct 2013, the Prime Minister said that, “We need to know who really owns and controls our companies, not just who owns them legally, but who really benefits financially from their existence. For too long a small minority have hidden their business dealings behind a complicated web of shell companies, and this cloak of secrecy has fuelled all manners of questionable practice and downright illegality. This summer at the G8 we committed to do just that: to establish a central register of company beneficial ownership. And today I’m delighted to announce that not only is that register going to go ahead, but it’s also going to be open to the public.”

The Prime Minister has recently made further commitments to crack down on offshore secrecy jurisdictions and it seems odd that the Scottish Parliament should not do everything in its powers to assist this wider process.

The proposals in the Bill are, essentially meaningless. There is no means of verifying that the information on controlling interests to be provided is correct as secrecy jurisdictions refuse to reveal such information. For example, in recent correspondence with HM Governor of the British Virgin Islands, he confirmed that the only circumstances in which the BVI would co-operate in the investigation of the beneficial ownership of a BVI company is under the terms of the BVI Criminal Justice (International Co-operation) act 1993. Any investigation to satisfy Scottish authorities of the veracity of any answer to a request made under Part 3 of the Bill is constrained by the term of this Act.

The simplest and most effective means of ensuring full transparency is to make it incompetent to record a title in such jurisdictions in the first instance.