

Response to Consultation on Corporate Transparency and Register Reform: Powers of the Registrar (January 2021)

This response has been prepared by Mrs Donna McKenzie Skene and Dr Alisdair MacPherson, acting as a working group of the Centre for Commercial Law at the University of Aberdeen.

General Comments

Having responded to the consultation on corporate transparency and register reform in 2019, we welcome the opportunity to respond to this and the two other related consultations. We are generally in favour of the proposals contained in these consultations, but have some reservations regarding some aspects of the proposals. We also note that the expansion of the powers of the registrar gives rise to resource issues and may also give rise to issues of potential liability. The various proposals will require a more active role for the registrar and this has resource implications necessitating significant additional funding in order for the reforms to be successful. More active involvement by the registrar may also mean a greater possibility of liability to third parties (including in tort/delict) if, for example, the registrar is required to act and does not do so or does so negligently. This is more likely to be the case if there is insufficient funding provided for the registrar to carry out her functions effectively. These matters require to be given significant attention before proceeding with the reforms.

Responses to Questions

We would respond to the specific consultation questions as follows.

A risk-based Approach

1. Do you agree that the querying power should be exercised on a risk-based approach? If you disagree, please explain your rationale.

We agree that a risk-based approach seems sensible. We consider that it avoids problems of definition, helps to future-proof the legislation and aids decisions on the best use of limited resources.

Querying power: potential scenarios

2. Are there specific circumstances under which you consider the querying power should be exercised? Please give reasons for your answer.

We agree that the scenarios given are circumstances under which the power might appropriately be exercised. We also consider that cases in which there is unusual (and potentially suspicious) activity in relation to a company, such as a high turnover of directors or other company office-holders, especially in small family companies, might warrant consideration regarding when the querying power should be exercised.

Application of the new querying power to company names

3. In what circumstances do you think the power should be used in the context of company names? Please provide reasons for your answer.

We consider that the circumstances outlined in the consultation paper are appropriate circumstances for the potential use of the querying power in the context of company names and have no other suggestions to add.

4. Do you agree that this is an appropriate use of the querying power? Please provide reasons for your answer.

In general, yes. However, we do not consider that Companies House should have the power to change a company's name while a response from the company to a query is awaited as we consider that this would be disproportionate. We consider that it would be more appropriate to put a note on the register to the effect that a query is in progress pending resolution of that query. This would alert users of the register to a possible issue without having to reverse a change of name if a satisfactory response is ultimately received.

5. Is it appropriate to place the onus on the company and/or the applicant to demonstrate that a name is being registered or was registered in good faith?

Yes, the relevant information is within the company's knowledge, not the registrar's, and it would be unreasonable to expect the registrar to prove a negative in this context.

6. Do you agree that the "sensitive words and expressions" regulations should be amended to capture circumstances such as that described above?

Yes.

Other company name loopholes

7. Do you agree that we should close this gap in the way we propose? Are there any other gaps that we should consider?

Yes, we agree this gap should be closed. We are not aware of any other gaps.

The querying process and annotation of the register

8. What sanctions do you consider are most appropriate to incentivise compliance with the new requirement to respond to a query raised by the Registrar?

On balance, we consider that civil penalties would be appropriate, although criminal penalties might be considered for repeat failures. The failures would also be relevant for the purposes of director disqualification.

Legal effect documents

9. Do you agree that the removal of most documents which have legal effect by virtue of registration at Companies House should be a matter for the courts?

Yes.

10. We propose that the Registrar should be able to remove certain filings which in future, will give legal effect such as director appointments. Do you have any views on whether the Registrar should have any other role in respect of legal effect filings?

We have some reservations about the proposed power given that the documents do have legal effect and we have some concerns about the implications of their removal without an order from the court.

What information will be published?

11. Do you agree that the evidence provided as a result of the Registrar's queries should not be published unless it comprises information that would normally be published? Please give reasons for your answer.

Yes, we do not see any reason to publish anything which would not otherwise be published. It may, however, be appropriate to add a note to the effect that evidence has been provided for so long as any note remains on the register.

Transparency on the use of the querying power

12. The Registrar will provide an explanation about why the query is being made. What other information would you expect the query to contain?

We agree that it might not always be appropriate to disclose the source of the information giving rise to the query, although we consider that this should be done if there is no real reason not to. We think the query should be as detailed as possible and should set out the kind of evidence needed to resolve it and/or a link to the guidance which should be developed for those in receipt of queries.

13. What kinds of evidence do you think it would be appropriate for the Registrar to request in support of a response to a query?

We consider that the kind of evidence will depend on the query, and there should be flexibility to provide alternative kinds of evidence where appropriate. As already referred to, we consider that this could be the subject of the guidance which should be developed for those in receipt of queries.

14. What guidance on the Registrar's use of the querying power would you expect Companies House to publish?

We would expect the guidance to contain information on the nature of the power, how and when it is likely to be used, with illustrative examples, the kind of evidence which may be required/accepted for different types of queries, timescales, sources of help/contact points for queries, how to respond/submit evidence and so on.

Complaints

15. Do you agree that complaints should be handled using the same process as the current Companies House complaints process? If not, please include reasons for your answer.

Yes. We consider that the established complaints process would provide consistency. The likelihood of a greater volume of complaints, due to the increased involvement of the registrar, necessitates additional resources to appropriately deal with the complaints.

Removal of information

16. Do you agree that the Registrar should have greater powers to remove information? Do you have suggestions for other approaches we could take?

We agree that the processes should be reviewed and updated as necessary. On balance, we do not have major concerns about widening the powers to remove non-legal effect information, subject to appropriate procedures, but as noted above, we do have some concerns about widening the power to include removal of some legal effect filings without further details as to how this would operate and the implications. We accept that there may be circumstances where this would be appropriate following a request from, for example, an individual, where this is supported by the appropriate evidence, but we are mindful of the fact

that the process would not be the same as a court process where matters of legal effect are concerned. We note that in the context of land registration in Scotland, there are particular rules regarding the keeper of the registers and rectification of the Land Register of Scotland which might be used as a model here. See, in particular, the Land Registration etc (Scotland) Act 2012, ss 80-85 and note, especially, the requirement to rectify where the Keeper becomes aware of a “manifest inaccuracy” and where what is needed to be done to rectify the inaccuracy is “manifest” (s 80). This test may be met by powerful evidence without a court order but in some circumstances a court order will be necessary. It should also be noted that the Keeper is entitled to appear and be heard in any civil proceedings in which the accuracy of the register or what is needed to rectify an inaccuracy in the register is put in question (s 83).

Rectification of registered office address

17. Do you agree that the Registrar should close this loophole or are there circumstances where remaining at the default address, or moving to the default address more than once, is warranted?

We agree that this loophole should be closed. We are not able to think of any circumstances in which remaining at the default address or moving to it more than once would be warranted, although it may be that provision should be made for this if it can be justified in exceptional circumstances (see answer to next question).

18. Do you agree that the amount of time a company (or other entity) can be defaulted to the Companies House address be limited to a specified period, e.g. 12 months?

Yes. As referred to in the previous answer, however, it may be appropriate to make provision for this to be extended if this was justifiable in exceptional circumstances.

19. What action do you consider should be taken if a company remains at the default address for longer than 12 months?

As previously, we consider that civil penalties would be appropriate, although criminal penalties might be considered for repeat failures. Any failures would also be relevant for the purposes of director disqualification.

Speeding up processes

20 Do you agree that it is appropriate to reduce the 28-day period? If not, what period do you consider is appropriate and why?

On balance, we can see the arguments for reducing the period to 14 days. There may, however, be genuine reasons why it is not possible for evidence to be provided within that timescale, so we would favour an approach where engagement with the query should take place within that period but the time for the provision of evidence could be extended if there was a good reason why it could not be provided within that period.

21. Do you agree that Companies House should have the ability to remove the name or address of the affected individual while a response is awaited from the company?

Consistent with our response to question 4, we do not consider that Companies House should have the power to remove details from the register while a response from the company to a query is awaited as we consider that this would be disproportionate. We consider that it would be more appropriate to put a note on the register to the effect that a query was in progress pending resolution of that query. This would alert

users of the register to a possible issue without having to reverse any removal of information if a satisfactory response is ultimately received.

Power to require delivery by electronic means

22. Do you agree that the power to require (or mandate) delivery by electronic means should be conferred from the Secretary of State to the Registrar?

We have some reservations about this proposal since it was obviously felt necessary previously to make the exercise of this power subject to the affirmative procedure and thereby the active scrutiny of Parliament. We understand, however, that things have moved on since then with the rapid development of technology and increasing recognition of electronic delivery etc, and since the registrar's decision would no doubt be subject to judicial review, this may justify a new approach.

Rules governing company registers

23. We intend to remove the requirement for companies to keep and maintain their own Register of Directors. Do you have any concerns about this approach?

24. What impact would changes to the requirement to keep any of the registers in the list above have?

We would be supportive of the removal of the requirements for companies to keep any of the registers mentioned provided that the information which would otherwise be available therein can be obtained from the public register on the same (or an improved) basis as it could have been obtained from the registers kept by the company. We consider that this would reduce burdens on the company and indeed might improve ease of access for those wishing to inspect the registers.

25. We may also consider further changes to the election regime for private limited companies which was introduced in 2016. How useful is the election regime for private limited companies?

We do not have any practical experience of this, although on the face of it, it would seem to be a useful regime. We agree, however, that it seems sensible to review it as part of the wider proposed reforms.