



The City of London Law Society



The Law
Society

**Joint Law Society and City of London Law Society
Q&A on the PSC Registers**

November 2019



*This Q&A has been drafted by a joint working party of the Law Society and City of London Law Society Company Law Committees (the "**Committees**") as a result of practitioner experience on the regime for the Register of People with Significant Control ("**PSC Register**") in Part 21A and Schedules 1A and 1B of the Companies Act 2006 ("**CA 06**") and associated secondary legislation between 2016 and 2019.*

*The purpose of the Q&A is to highlight certain areas of complexity within the regime which are not specifically covered by the PSC Register primary and secondary legislation or the related guidance issued by the Department for Business, Energy and Industrial Strategy ("**BEIS**").*

This Q&A is generic and is not intended to be and should not be relied upon as constituting legal advice. Users of this Q&A should consult their own advisers directly before taking any action based upon any aspect of this Q&A. No member of the joint working party or his or her respective firm represents or warrants that it is accurate, suitable or complete and none shall have any liability arising from, or relating to, the use of this Q&A.

The Committees are grateful that BEIS has considered this Q&A and has advised that it does not disagree with any of the statements made, but that the interpretation of the law as to the PSC Register, and compliance with it, is ultimately for the Courts.

References in this Q&A to Schedules are to Schedules to CA 06. Reference to Conditions are to the conditions set out in part 1 of Schedule 1A.

1 Holding shares/votes/board appointment rights

- 1.1 One of the criteria for being registrable is holding more than 25% of shares. This is to be calculated by reference to the nominal value of the share capital (paragraphs 2 and 13 of Schedule 1A). When shares are denominated in different currencies, when and how often should the calculation be made?

Answer: As the nominal value of shares is fixed on issue, the exchange rate on issue of the shares would be appropriate.

- 1.2 If a person directly holds more than 50% of voting rights in a company, they could use their votes at a general meeting to pass an ordinary resolution to remove any director under section 168 CA 06. Does this mean that any person who is the direct (or indirect) holder of more than 50% of voting rights in a company automatically satisfies Condition 3 (right to appoint or remove a majority of the board)? Or is this Condition only satisfied by an explicit right to appoint or remove a majority of the board, for example in the articles of association or a shareholders' agreement?

Answer: If a person is the direct (or indirect) holder of more than 50% of voting rights in a company, they will, in normal circumstances, satisfy Condition 3 unless the articles of association or a shareholders' agreement restrict that person from exercising their statutory right to remove a director under section 168 CA 06.

- 1.3 If someone has control over a right granted to them by another but may lose it in certain circumstances, do they still control that right? Or does the grantor? Often the grantor of the right has the power to "step in" at any time so, in theory, the grantor's powers are exercisable all the time.

Examples include a power of attorney that can be revoked at any time or where a general partner has delegated voting rights to an investment manager under an investment management agreement but the general partner can exercise a contractual right to terminate such agreement.

Answer: Until the grantor takes back the rights, both the grantor and grantee are treated as holding the rights. Paragraph 22 of Schedule 1A states that rights exercisable in certain circumstances are to be taken into account when the circumstances are within the control of the person having those rights. So if the grantor has a general discretion to "step-in", the grantor is treated as holding the rights all the time. The person who typically exercises those rights is also treated as holding them as paragraph 20 of Schedule 1A states that where a person controls a right, the right is to be treated as held by that person (and not by the person who in fact holds the right, unless that person also controls it).

- 1.4 Paragraph 11 of Schedule 1A provides that if two or more persons each hold a share or right jointly, each of them is treated as holding that share or right. If rights (e.g. to appoint a majority of the board) can be exercised by a body such as a committee, or trust protectors, comprising a number of individuals, should those rights be considered as “jointly held” for the purposes of paragraph 11?

Answer: Where a right can only be exercised by a certain number of persons voting the same way, that does not mean that they each hold that right as they do not hold that right independently and are not able to exercise the right without the cooperation of others. Therefore there is no joint holding of rights in such a situation. However, it is still necessary in these circumstances to consider whether there is a joint arrangement between the individuals within the meaning of paragraph 12 of Schedule 1A as to how the right will be exercised and whether any of those individuals controls the exercise of the right within the meaning of paragraph 20 of Schedule 1A. In such cases, one or more of the individuals may be a registrable person with significant control.

- 1.5 Where a security trustee holds security over shares or rights on behalf of a syndicate of banks would the syndicate of banks be considered to hold rights jointly under paragraph 11 of Schedule 1A?

Answer: Joint arrangement requires a degree of predetermination of how the rights would be exercised. If the security trustee acts as nominee for the banks, each of which has a separate interest in a specified number of shares, there is no joint holding. A syndicate of banks is not akin to a partnership or members recorded as jointly holding shares on the share register. Each bank does not have an indivisible right to all the shares or rights like partners in a partnership or members recorded as jointly holding shares on the share register.

- 1.6 Where shares or rights held by more than one person are subject to a joint arrangement, each person is treated as holding all of the combined shares or rights (paragraph 12 of Schedule 1A). Where a certain percentage or number of people has to vote in favour in order to exercise a right, does that constitute a joint arrangement under paragraph 12 if there is no agreement between the relevant people as to how they should vote (i.e. they each vote independently)? For example, if 60% of shareholders or, in the context of a syndicated loan, lenders/secured creditors, need to approve something or at least three members of a committee of five, is this a joint arrangement?

Answer: Where members of a group hold individual rights but agree that exercise of those rights requires a prescribed majority, there is no joint arrangement simply because that arrangement exists, as each member of the group acts independently when making its decision. There would also need to be a pre-determined arrangement that they will exercise their rights (or substantially all their rights) jointly (i.e. in the same way) when voting in order for there to be a joint arrangement for the purposes of paragraph 12 of Schedule 1A.

- 1.7 In paragraph 12(2) of Schedule 1A, what is meant by an arrangement that rights will be exercised “jointly in a way that is pre-determined by the arrangement”? In particular, is this satisfied by a pre-determination of the manner in which votes/rights will be exercised (e.g. two people will always vote the same way as each other, so they vote as a block) or does there need to be a pre-determination of the way the right is exercised (e.g. a pre-determination that two shareholders will both vote in favour as opposed to a pre-determination that one will vote the same way as another)?

Answer: This covers the situation where shares will be voted as a block (i.e. it is the process and not the outcome which must be pre-determined).

- 1.8 Paragraph 23 of Schedule 1A sets out the treatment of *rights attaching to shares* held as security and not to shares which are actually held by a lender as security. Some types of security result in the person with security becoming the registered shareholder (e.g. an English law legal mortgage or a Scottish share pledge). Does a lender or security agent which takes registered title to more than 25% of a borrower’s shares as part of its security package therefore satisfy Condition 1, as it would hold more than 25% of the shares, even though it is not treated as holding the voting rights because of paragraph 23?

Answer: A lender that has taken registered title to shares as part of its security package would satisfy Condition 1 where it holds more than 25% of the shares.

- 1.9 If an individual makes a substantial donation to a charity established as a company limited by guarantee (and so within the PSC regime) and for example the charity was established by that individual and/or with a view to receiving donations from that individual, is the donor (without more) a PSC – assuming that there is a board of individuals, who do not include the donor, which decides which grants to make (in pursuance of the charitable objects for which the charity has been established)?

Answer: An individual would not be considered a PSC just because they make a donation. There would need to be more, for example, the individual would satisfy Condition 1 where they hold a right to share in more than 25% of the capital, or profits (if there are any), of the company limited by guarantee (as per paragraph 13(2) of Schedule 1A) or they could have significant influence or control under Condition 4.

- 1.10 If an individual indirectly owns more than 25% of a UK company through a chain of companies that includes an entity that is a relevant legal entity, the relevant legal entity would appear on the UK company’s PSC register and the individual would be a non-registrable PSC in relation to the UK company. However, if the individual also has a right to exercise, or actually exercises, significant influence or control over the UK company and therefore meets the Condition 4 test, what do you register on the UK company’s PSC register? The individual only becomes a registrable PSC because of their Condition 4 interest, because they don’t only hold their interest through a chain of legal entities that includes a relevant legal entity. However, the Register of People with Significant Control Regulations 2016 state that you only register a Condition 4 interest where the person does not meet any of conditions 1 to 3 – see regulation 7(d) of those Regulations. Therefore, in

this scenario: (a) do you need to register the PSC under Conditions 1 to 3; and (b) if you do need to register the PSC under Conditions 1 to 3, do you also have to register the PSC under Condition 4 despite regulation 7(d) of the Regulations?

Answer: The legislation can be read both ways, but the individual can just state that they meet Condition 4.

2 Indirect interests/majority stake

2.1 Condition 4 makes no reference to “direct or indirect”, therefore paragraph 18 of Schedule 1A (majority stakes) does not apply. If a right to exercise significant influence or control over a UK company is held by an unlisted overseas legal entity, would a shareholder of that legal entity that is "subject to its own disclosure requirements" (as defined in section 790C(7) CA 06) go on the PSC register of the UK company?

For example: (i) Where an unlisted French company has a veto right over the business plan of UK Company A and the French company is wholly owned by UK Company B. Do you record UK Company B as satisfying Condition 4 on the PSC register of UK Company A? (ii) What if UK Company B controls the rights held by the French company for the purposes of paragraph 20 of Schedule 1A? Do you also need to consider whether UK Company B is in fact controlling the right to exercise, or actually exercising, significant influence or control over UK company A? (iii) What if the French company is owned by two individual shareholders and both have a veto right over the French company exercising its veto right over the business plan of UK Company A. Do you record both individuals as satisfying Condition 4 on the PSC register of UK Company A?

Answer: Condition 4 is direct control only. The right is considered to be held by the person who exercises control. Therefore, in scenario (i) above, UK company B does not go on the register of UK company A simply by virtue of being the controlling shareholder of the French company. In scenario (ii) where UK company B controls the right, UK company B is considered to hold it directly (regardless of whether UK company B holds any interest in the French company) and should be entered on the PSC register as satisfying Condition 4.

In scenario (iii), the individuals only have veto rights over the exercise of the French company's veto right, they do not exercise the right themselves. Therefore, they do not meet paragraph 20 Schedule 1A and do not need to be recorded on the PSC register of UK Company A. However, if the consent of an individual is needed before the rights can be exercised then that person would be treated as controlling that right under paragraph 20(2)(c) Schedule 1A.

2.2 The majority stake test set out in paragraph 18(3) Schedule 1A includes a limb that states that A has a majority stake in B if A has the right to exercise, or actually exercises, dominant influence or control over B. How should we interpret dominant influence or control?

Answer: “Dominant influence or control” for the purposes of this test should be construed in the same way as “dominant influence or control” is construed for the purposes of section 89J(4) Financial Services and Markets Act 2000 – see para 468 of the Explanatory Notes to the Small Business, Enterprise and Employment Act 2015 – and sections 1162(2)(c) and 1162(4)(a) CA 06 in the parent and subsidiary undertaking test. Therefore the supplementary provisions in Schedule 7 CA 06 and applicable case law can be applied in determining if there is dominant influence or control for the purposes of paragraph 18(3) Schedule 1A.

- 2.3** Where a person holds an interest through a chain which includes a limited partnership that is not a legal entity, can that person still hold a “majority stake” or does the intermediate limited partnership break the chain of legal entities for the purposes of paragraph 18(1) and (2) of Schedule 1A?

Although paragraph 18 Schedule 1A refers to a chain of legal entities when establishing if a share/right is held indirectly, and does not deal with firms that are not legal entities, such as English limited partnerships, the effect of paragraph 20 is that rights should be treated as held by the person who controls their exercise (which would typically be the general partner or other fund manager, which would typically be a legal entity). This would usually be as part of the fund management arrangements/investment management agreement. Paragraph 20 may therefore require the control of these rights to be traced up the chain through the general partner, even if it does not form part of a “chain of legal entities”.

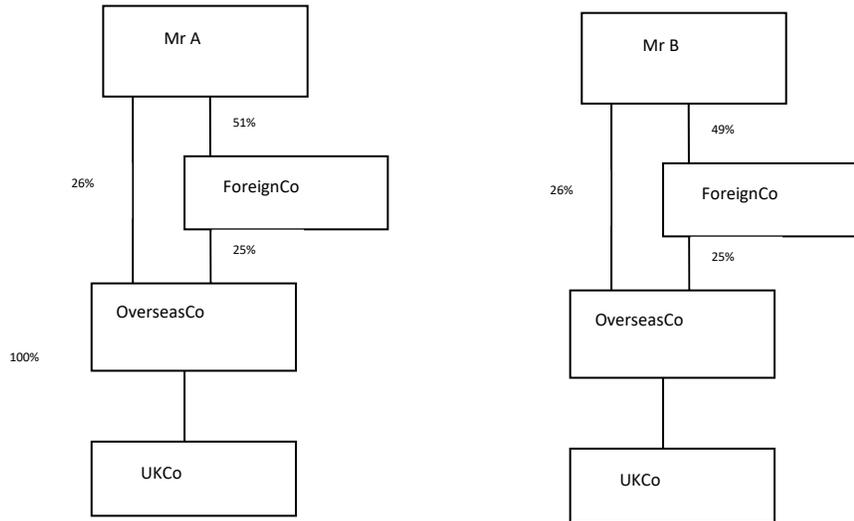
Answer: Where the general partner cannot be recorded, one should continue up the chain to any majority stake in the general partner who holds shares on behalf of the non-legal entity (and beyond if the general partner is also a non-legal entity).

In support of this, note that paragraph 25(2) of Schedule 1A contains an exemption from satisfying Conditions 1 to 3 for individuals that directly or indirectly hold shares or rights in limited partners that meet one or more of Conditions 1 to 3.

- 2.4** Do the joint arrangement rules in paragraph 12 of Schedule 1A apply when determining if there is a majority stake under paragraph 18?

Answer: Yes, on the basis of paragraph 10 that provides: “This part sets out rules for the interpretation of this Schedule” (i.e. Schedule 1A CA 06).

2.5 Should you aggregate interests held at two different levels in a corporate structure where the majority stake test in paragraph 18 of Schedule 1A is not met at the second level? So in circumstances where a person holds 26% directly in an intermediate holding company but also holds a further 25% indirectly, do they hold a majority stake in the intermediate company? See diagrams:



Answer: If a person holds an interest directly (e.g. Mr A's or Mr B's interest in OverseasCo) and another interest indirectly (e.g. Mr A's or Mr B's interest in OverseasCo held via ForeignCo), the two interests would not be automatically aggregated under paragraph 18(3)(a) Schedule 1A. It is necessary to analyse the facts with reference to each limb of paragraph 18 separately to establish whether the majority stake test is met.

In the first diagram above, as Mr A holds a majority stake in ForeignCo, this will commonly enable him to control ForeignCo's 25% vote in OverseasCo (in the absence of any special circumstances which mean that Mr A does not in fact control ForeignCo's vote, such as veto rights held by other ForeignCo shareholders). Therefore his direct and indirect interests should be aggregated either under paragraph 18(3)(c) or under paragraph 18(3)(a) (in conjunction with paragraph 20) Schedule 1A.

However, in the second diagram above, as Mr B does *not* hold a majority stake in ForeignCo and, in the absence of any special circumstances such as a joint arrangement with another shareholder in ForeignCo, his direct and indirect interests should therefore not be aggregated.

3 Trusts/Funds

- 3.1 Paragraph 7.4.12 of the non-statutory guidance suggests that ordinarily the general partner of a limited partnership should go on the PSC register of UK companies owned by it. If management rights in relation to an investment in a UK company which are held by the general partner of a fund have been delegated to an investment manager, would the investment manager be deemed to control the rights held by the general partner under paragraph 20 of Schedule 1A so that the investment manager (if capable of being recorded) is registrable but the rights are not deemed to be held by the general partner? Or where the general partner can terminate the arrangement should both the general partner and the investment manager (if capable of being recorded) be registered?

Answer: The rights would be treated as held by those who can exercise their control. If the investment manager controls the rights alone, then the investment manager would be registrable (if capable of being recorded). If the general partner can terminate that arrangement then both are registrable (if both are capable of being recorded) until the general partner terminates. After termination the general partner holds the rights alone (if it has not delegated control to another manager). This scenario is covered by Q&A 1.3.

- 3.2 Paragraph 25 of Schedule 1A says that a person does not meet Conditions 1 to 3 by virtue only of being a limited partner. So it appears that limited partners of a limited partnership still need to consider Condition 4 if, for example, the limited partnership has a veto right over the business plan of the UK company in a shareholders' agreement. Is this right, even though typically the limited partnership agreement confers management of the limited partnership's affairs on the general partner alone and forbids the limited partners from participating in management?

Answer: Our view is that, unless a limited partner exercises control over the rights, they would not be treated as satisfying Condition 4 by virtue of them jointly having significant influence or control when in fact those rights are controlled by a general partner or an investment manager. As such, the general partner and/or the investment manager is/are treated as holding the rights under paragraph 20 Schedule 1A and the limited partners are not.

- 3.3 In assessing whether Condition 5 is met in relation to a firm, it is necessary to consider first if the members of the firm meet one of the other Conditions and then if a person (usually the manager/general partner) has the right to exercise, or actually exercises, significant influence or control over that firm. Note that the reference in paragraph 6 Schedule 1A is to a firm in the singular. Where no one firm meets any of the other specified Conditions on its own, but there are multiple fund vehicles, must firms be considered together if there is a joint arrangement between them within the meaning of paragraph 12 Schedule 1A? Note also that the general partner/manager may be treated as holding rights within the meaning of paragraph 20 where it controls their exercise.

Answer: It is likely that the interests of multiple funds with the same manager/general partner will be aggregated due to either paragraph 12 or paragraph 20 of Schedule 1A.

3.4 Condition 5 refers to a trust in the singular. Where multiple trusts are involved but the trustee(s) of each individual trust (in their capacity(ies) as trustees of each such trust) would not meet any of the other specified Conditions, will limb (a) of Condition 5 only be satisfied where the trustee's or trustees' interests are aggregated under paragraph 12 of Schedule 1A?

Answer: Where an individual has control over multiple trusts with the same trustees and either the same or different beneficiaries the trusts may sometimes need to be aggregated under paragraph 12 of Schedule 1A when assessing if any of them satisfy the relevant tests. This will require a factual assessment in each case.

3.5 Where under a trust document an individual (such as a settlor) has consent rights over various matters (such as the power to exclude/add beneficiaries or change the applicable law) but which are not the matters set out in paragraph 5.5 of the statutory guidance on the meaning of "significant influence or control" over companies in the context of the PSC register (i.e. significant powers such as the right to appoint or remove trustees) should these consent rights (over relatively less significant matters) be taken together to give the individual "significant influence or control" over the trust for the purposes of Condition 5?

Answer: No, such rights would not mean that the individual has "significant influence or control" over the trust for the purposes of Condition 5 unless they were exercised in such a way to block matters which fall within paragraph 5.5 of the statutory guidance in such a way that the person was in fact directing or influencing such matters (for example, using a consent right relating to distributions to actively block distributions other than those which such individual wishes to be made).

3.6 Where under a trust document an individual (such as a settlor) has the right to appoint a trustee but only in certain circumstances (such as in the place of a deceased/dissolved trustee or a trustee wishing to withdraw) when would such individual have "significant influence or control" over the trust?

Answer: Applying paragraph 22 of Schedule 1A, the individual will not have "significant influence or control" over the trust unless and until those circumstances have arisen and continue to exist (e.g. a trustee has died or been dissolved).

4 Reasonable steps, restrictions and warning notices

4.1 A restrictions notice may be issued to any person who has a relevant interest in a company. Pursuant to paragraph 2(1) of Schedule 1B a person has a relevant interest in a company if the person holds shares, voting rights or board appointment rights in the company. So the only interests which can be restricted are the shares/rights in the UK company and not any indirect holding (e.g. the direct holding the person has in another company which directly holds the shares in the UK company).

However, paragraph 8.4.4 of the non-statutory guidance states that a relevant interest is any share or right in the company held or controlled directly or indirectly by the individual or legal entity you are trying to contact.

Which interests can be restricted?

Answer: Only interests directly in the UK company can be restricted. It is not possible to serve a restrictions notice on the direct holder where the direct holder is in compliance but an indirect holder is not in compliance.

- 4.2 Under paragraph 1(6) of Schedule 1B, the company must have regard to the effect of a restrictions notice on the rights of third parties. Could it ever be appropriate to issue a restrictions notice in circumstances where a third party lender has security over the shares which are the subject of the relevant interest?

Answer: This will depend on the circumstances. However, if the lender sought to enforce the security and delivered a stock transfer form to the company, the company should lift the restrictions notice at that point under paragraph 11(c) of Schedule 1B. If the company fails to do so, the lender could apply to Court for the restrictions notice to be lifted.

- 4.3 The Financial Collateral Arrangements (No 2) Regulations 2003 (as amended) give a security taker rights to appropriate shares upon its security becoming enforceable. Do the Financial Collateral Arrangements (No 2) Regulations 2003 (as amended), as an implementation of EU legislation (the Financial Collateral Directive (2002/47/EC)), take priority over Part 21A and Schedules 1A and 1B?

Answer: No. However, once a company receives a stock transfer form it should lift the restrictions notice (see Q&A 4.2). If the company fails to do so, the lender could apply to Court for the restrictions notice to be lifted.

5 Position on incorporation

- 5.1 There is a discrepancy between what a company can record on its PSC register on incorporation if it does not yet know whether there are any registrable persons and what information it must provide to Companies House. Most companies can state on their register that they have not yet completed taking reasonable steps to find out their PSC position. However, this option is not reflected in section 12A CA 06 or on the incorporation form IN01. On Form IN01 companies must either state that they have reasonable cause to believe there is no registrable person, or state that there is a registrable person and provide details. Is a company required to identify its registrable persons (if any) on incorporation?

Answer: Yes, a company is required to identify its registrable persons (if any) on incorporation.

Appendix

Members of the joint working party of the Law Society and City of London Law Society Company Law Committees on PSC Registers

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