The PSC Register Requirements: A Practical Guide for Private Fund Structures

All UK incorporated companies (that are not exempt) and LLPs will need to keep a register of people with significant control over them (**PSC register**) from 6 April 2016. They will also need to file their PSC information at Companies House when making their confirmation statement (which replaces the annual return) from 30 June 2016 onwards. Non-compliance with the PSC register requirements is a criminal offence.

This briefing explains how to identify the entities in your group and fund structures that will be required to keep a PSC register, the individuals and legal entities that need to be recorded in those registers and what information must be recorded. It also provides practical guidance to help you carry out your "PSC register analysis" for each of the entities, fund vehicles and investee companies in your structures.

How to identify companies and LLPs in your structures that need to keep a PSC register

- All companies formed and registered under the UK Companies Acts (apart from exempt companies) and all LLPs incorporated under the Limited Liability Partnerships Act 2000 need to keep a PSC register.
- A company is **exempt** from keeping a PSC register if the company:
  - is an issuer subject to Chapter 5 of the DTRs (**DTR 5 issuer**), which includes a UK company listed on the LSE or AIM;
  - has voting shares admitted to trading on a regulated market in an EEA State other than the UK; or
  - has voting shares admitted to trading on certain markets in Israel, Japan, Switzerland or the USA[1].
- English limited partnerships and Scottish limited partnerships are not subject to the requirement to keep a PSC register. If the general partner or manager is a UK company or LLP, such general partner or manager will be required to keep a PSC register.
- An exempt company, such as a UK company listed on the LSE or AIM, still needs to consider these new requirements if it has subsidiaries that are UK companies and/or LLPs in its group structure. It also might need to be recorded as a relevant legal entity on a PSC register.

How to identify persons with significant control (PSCs) and relevant legal entities (RLEs) in relation to a company or LLP

- Only PSCs and RLEs can be registered in a PSC register.

1 These markets are listed in Schedule 1 of The Register of People with Significant Control Regulations 2016 (**PSC Regulations**).

PSCs

Company conditions

- A PSC of a company is an individual who satisfies one or more of the following conditions in relation to the company:
  - **Condition 1** – holds, directly or indirectly, more than 25% of the shares in the company.
  - **Condition 2** – holds, directly or indirectly, more than 25% of the voting rights in the company.
  - **Condition 3** – holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the company.
  - **Condition 4** – has the right to exercise, or actually exercises, significant influence or control over the company.
  - **Condition 5** – has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm that is not a legal entity which would itself satisfy any of conditions 1 to 4 in relation to the company if it were an individual.

LLP conditions

- A PSC of an LLP is an individual who satisfies one or more of the following conditions in relation to the LLP:
  - **Condition 1** – holds, directly or indirectly, the right to share in more than 25% of any surplus assets of the LLP on a winding up.
  - **Condition 2** – holds, directly or indirectly, more than 25% of the rights to vote on those matters which are to be decided upon by a vote of the members of the LLP.
  - **Condition 3** – holds, directly or indirectly, the right to appoint or remove the majority of the persons who are entitled to take part in the management of the LLP.
  - **Condition 4** – has the right to exercise, or actually exercises, significant influence or control over the LLP.
  - **Condition 5** – has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm that is not a legal entity which would itself satisfy any of conditions 1 to 4 in relation to the LLP if it were an individual.

- PSCs are always individuals.
- A person holds shares or rights **indirectly** if he/she holds the share or right through a chain of legal entities and each legal entity in the chain (other than the last) has a majority stake in the legal entity immediately below it in the chain.
- A **majority stake** is defined as holding or controlling a majority of the voting rights, having the right to appoint or remove a majority of the board of directors or otherwise having the right to exercise, or actually exercising, dominant influence or control (similar to the subsidiary undertaking test in the Companies Act 2006).
- Examples of direct and indirect interests are illustrated in Diagrams 1 and 2 on page 3.

RLEs

- The PSC register requirements recognise that a company or LLP may have legal entities with significant influence or control over it.
- Such a legal entity may only be registered in a PSC register if it is a **relevant legal entity (RLE)**.
- The test for an RLE is that the legal entity:
  - is a body corporate or firm that is a legal person under the law by which it is governed; AND
  - would be a PSC over the company or LLP if it were an individual; AND
  - is **subject to its own disclosure requirements**.
- A legal entity is **subject to its own disclosure requirements** if it:
  - is required to keep a PSC register itself;
  - is a DTR 5 issuer;
  - has voting shares admitted to trading on a regulated market in an EEA State other than the UK; or
  - has voting shares admitted to trading on certain markets in Israel, Japan, Switzerland or the USA[1].
- A legal entity will not meet the definition of RLE if it is not subject to its own disclosure requirements, for example, unlisted overseas companies or unlisted UK legal entities not required to keep a PSC register (e.g. a Scottish limited partnership).
- If a legal entity does not meet the RLE test it cannot be registered on a PSC register. However, you must look through these entities until you find an indirect PSC or RLE or determine that there are no PSCs or RLEs.

Tips for identifying PSCs and RLEs

- You must consider all the factual circumstances in your analysis.
- The documents that you need to review to determine whether a PSC condition is met by an individual (or would be met by a legal entity if it was an individual) are:
  - companies: the register of members, the articles of association, any shareholders' agreement, any other agreement between shareholders and any rights attaching to shares; and

- LLPs: the LLP agreement and any other agreement between members.

- Limited partners will not be PSCs or RLEs under PSC condition 1, 2 or 3 solely by virtue of any interest that is held as a limited partner.
- If an individual or legal entity meets one or more of PSC conditions 1, 2 and 3, you do not need to carry out any analysis as to whether such individual or legal entity meets PSC condition 4.
- If you need to carry out an analysis to determine whether PSC condition 4 or 5 has been met, you need to review the statutory guidance on the meaning of “significant influence or control” over companies or LLPs (as applicable) published by BIS.
- When carrying out a PSC condition 4 analysis, it will be important to review any absolute decision rights (i.e. veto rights) over decisions related to the running of the business. This analysis will be particularly relevant in the context of companies owned by a consortium.
- The absolute decision rights which, according to the guidance, might constitute **significant influence or control** are very broad (and not based on a positive control concept or parent undertaking test) and include by way of example:
  - establishing or amending any profit-sharing, bonus or other incentive scheme of any nature for directors or employees;
  - the grant of options under a share option or other share based incentive scheme; as well as
  - fundamental decision rights such as adopting or amending the business plan.
- The statutory guidance also sets out minority protection rights that would not on their own constitute rights to exercise significant influence or control, such as:
  - changing the company’s constitution; and
  - making any additional borrowing from lenders outside previously agreed lending thresholds.
- The statutory guidance also states that where a person is more likely than not to receive more than 25% of the profits of an LLP (including profits allocated automatically or otherwise) this might constitute a right to exercise significant influence or control.

Direct interests v Indirect interests[2]

Diagram 1

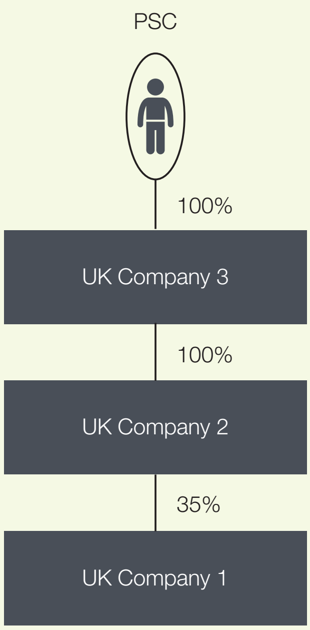


Diagram 2

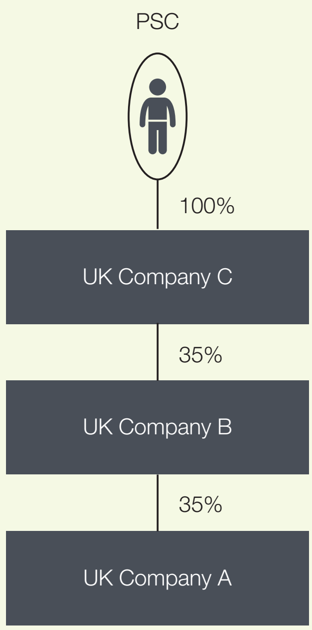


Diagram 1:
- ***UK Company 1:*** UK Company 2 is a **direct** RLE. UK Company 3 is an **indirect** RLE. The PSC is an **indirect** PSC.
- ***UK Company 2:*** UK Company 3 is a **direct** RLE. The PSC is an **indirect** PSC.
- ***UK Company 3:*** The PSC is a **direct** PSC.

Diagram 2:
- ***UK Company A:*** UK Company B is a **direct** RLE. UK Company C is **NOT** an **indirect** RLE. The PSC is **NOT** an **indirect** PSC.
- ***UK Company B:*** UK Company C is a **direct** RLE. The PSC is an **indirect** PSC.
- ***UK Company C:*** The PSC is a **direct** PSC.

2 This does not indicate which PSCs and RLEs are registrable or non-registrable.

Registrable v Non-registrable

Diagram 1

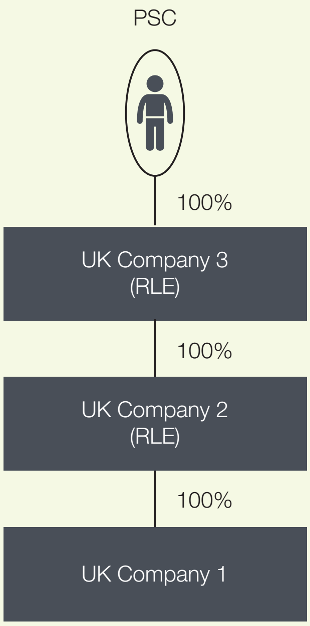


Diagram 2

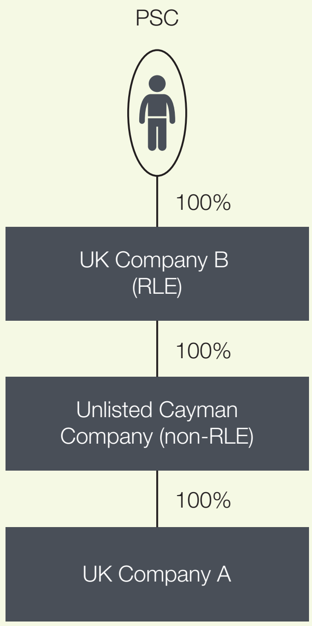


Diagram 1:

- ***UK Company 1 PSC register analysis*****:** only register UK Company 2 as an RLE in the PSC register of UK Company 1. UK Company 3 is a non-registrable RLE and the PSC is a non-registrable PSC in relation to UK Company 1.
- ***UK Company 2 PSC register analysis*****:** only register UK Company 3 as an RLE in the PSC register of UK Company 2. The PSC is a non-registrable PSC in relation to UK Company 2.
- ***UK Company 3 PSC register analysis*****:** register the PSC in the PSC register of UK Company 3.

Diagram 2:

- ***UK Company A PSC register analysis*****:** only register UK Company B as an RLE in the PSC register of UK Company A. The unlisted Cayman Company cannot be an RLE as it is not subject to its own disclosure requirements. The PSC is a non-registrable PSC in relation to UK Company A.
- The unlisted Cayman Company is an overseas entity so is not required to keep a PSC register.
- ***UK Company B PSC register analysis*****:** register the PSC in the PSC register of UK Company B.

How to determine whether a PSC or RLE is registrable or non-registrable in relation to a company or LLP required to keep a PSC register

- A PSC or RLE is non-registrable in relation to a company or LLP if the PSC or RLE only holds the interest in the company or LLP through one or more legal entities over each of which he/she/it has significant control and:
  - the legal entity through which the interest is held is an RLE in relation to the company or LLP; or
  - at least one of the legal entities in the chain is an RLE in relation to the company or LLP.[3]
- Please see Diagrams 1 and 2 illustrating how this works.

What needs to be recorded on the PSC register for a registrable PSC or RLE?

- The PSC details to be registered are name, date of birth, nationality, country or state (or part of the UK) where the PSC is usually resident, service address, usual residential address, date on which the PSC became a registrable PSC, nature of the control over the company or LLP and details of any restrictions on using or disclosing the PSC's information.
- The RLE details to be registered are name, address of its registered or principal office, legal form and governing law, register of companies in which it is entered and registration number, date on which the RLE became a registrable RLE and nature of the control over the company or LLP.

3 The provisions of the Companies Act 2006 that set out how to determine whether a PSC or RLE is registrable or non-registrable were recently changed by The Companies Act 2006 (Amendment of Part 21A) Regulations 2016.

Tips for what to record on a PSC register

- The PSC register must never be empty. If you are not in a position to enter details in a PSC register, including because investigations are still ongoing to determine PSCs or RLEs or PSC information has not yet been confirmed, the relevant fact must be entered in the PSC register.[4]
- If there are no PSCs or RLEs the register must record this.
- The Regulations are also prescriptive as to the wording that needs to be recorded in relation to the nature of the control.
- Where PSC conditions 1 and 2 apply (i.e. holding more than 25% of shares or voting rights of the company or holding more than 25% of any surplus assets of the LLP on a winding up or voting rights of the LLP) there are three options to choose from: (i) more than 25% but not more than 50%; (ii) more than 50% but less than 75%; and (iii) 75% or more.
- The date on which an individual or legal entity became a PSC or RLE in relation to a company or LLP already incorporated when the provisions come into effect is 6 April 2016.

What does this mean for your fund structures?

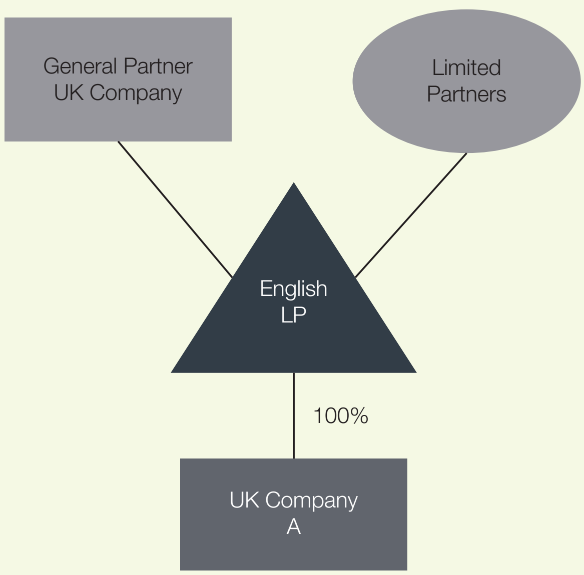
- Funds with UK entities in their structures should be working through each of their structures to identify which entities are required to keep a PSC register, then carry out an analysis to identify registrable PSCs and RLEs for each such entity and obtain the relevant information to complete the registers.
- In a typical limited partnership private fund structure, the limited partnership fund vehicle will hold shares in the underlying investment holding structure/portfolio companies. The PSC analysis may be different depending on whether your structure has an English, Scottish or foreign limited partnership (and whether such partnership has legal personality) and how the shares are registered.

Examples

English limited partnership – Diagram A

- **UK Company A PSC register analysis:**
  - The limited partners, whether corporate limited partners or individuals, do **not** need to be registered if they satisfy the PSC or RLE test by only satisfying one or more of PSC conditions 1, 2 and 3. This exemption also applies to individuals or legal entities that only satisfy one or more of PSC conditions 1, 2 and 3 because they hold direct or indirect shares or rights in a corporate limited partner that only satisfies one or more of PSC conditions 1, 2 and 3.[5]
  - If a limited partner has the right to exercise, or actually exercises, significant influence or control over UK Company A or the English LP, then PSC condition 4 or 5 respectively will be satisfied. This means an individual limited partner would be registered as a PSC or a corporate limited partner would be registered as an RLE (if it meets the rest of the RLE test). This would be very unusual in a typical limited partnership, blind-pool fund structure (given limited partners are passive) but may possibly be relevant in a single-investor structure, or separate account arrangement, incorporating a limited partnership, depending on the terms of the limited partnership agreement.
  - As the general partner in this example is a UK company required to keep its own PSC register, it will be registered as an RLE. This is either because, depending on how the shares in Company A are registered and the limited partnership is structured:

Diagram A



4 The PSC Regulations and the draft Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016 (**Regulations**) set out the wording that needs to be recorded in the PSC register for the relevant factual position.

5 Paragraph 25, Part 3, Schedule 1A of the Companies Act 2006.

  - Conditions 1, 2 and 3: the general partner holds more than 25% of the shares or voting rights or has the right to appoint or remove the majority of the board of directors of Company A; or
  - Condition 4: the general partner has the right to exercise, or actually exercises, significant influence or control over UK Company A; or
  - Condition 5: the shares or rights in UK Company A are treated as held by all the partners jointly and the general partner has significant influence or control over the activities of the limited partnership (which does not have separate legal personality) which in turn satisfies PSC conditions 1, 2 and 3 in relation to UK Company A.
- Similarly, a manager of a limited partnership may satisfy PSC condition 4 or 5 in which case, if it is a legal entity and subject to its own disclosure requirements, it will need to be registered as an RLE.

Scottish limited partnership – Diagram B

- **UK Company A PSC register analysis:**
  - Limited partners of a Scottish limited partnership (and individuals and legal entities that hold direct or indirect shares or rights in a corporate limited partner) do **not** need to be registered as they have the benefit of the limited partner exemption referred to above (unless they satisfy PSC condition 4, see analysis under English limited partnership).
  - The Scottish limited partnership is a legal entity itself and therefore the indirect interest test applies. As the general partner in this example is a UK company required to keep its own PSC register, it will need to be registered as an RLE. This is because the general partner indirectly owns (through the Scottish limited partnership, being a legal entity that is not an RLE) more than 25% of the shares and voting rights in UK Company A by virtue of its majority stake in the Scottish limited partnership.

Diagram B

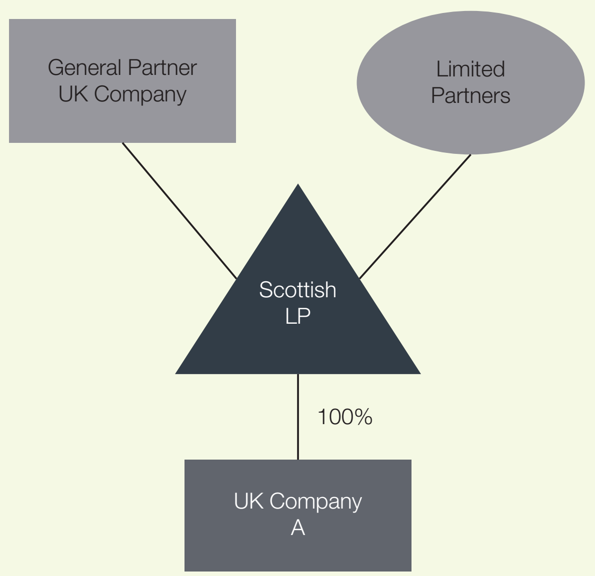
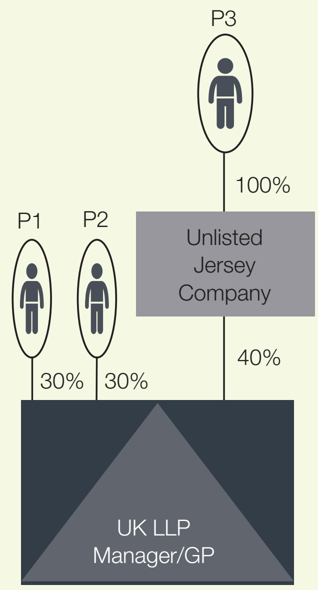


Diagram C



UK LLP – Diagram C

- The fund's general partner or manager may be a UK LLP as illustrated in Diagram C.
- **UK LLP PSC register analysis:**
  - Both P1 and P2 will need to be registered as PSCs. This is because each of them directly owns more than 25% of the voting rights in the UK LLP.
  - P3 will also need to be registered as a PSC. This is because P3 indirectly owns (through Jersey Company, being a legal entity that is not an RLE) more than 25% of the voting rights in the UK LLP.

Further advice

- If you need any further information or would like help carrying out your PSC register analysis, please contact your Clifford Chance relationship partner.

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