

PSC REGISTER: IMPACT ON TRUSTS AND TRUSTEES

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Part 21A of the Companies Act 2006 requires certain UK companies to keep a register of people with significant control over the company (PSC register). This practice note looks at the impact of the PSC regime on trusts and trustees.

Josh Lewison, Radcliffe Chambers

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SCOPE OF THIS NOTE

Part 21A (*sections 790A to 790ZG*) and Schedule 1A to the Companies Act 2006 (CA 2006) came into force on 6 April 2016. Every company that is subject to Part 21A is required to produce, keep and maintain a dedicated register of people with significant control over that company (a PSC register). The breadth of the legislation is designed to ensure that every method of holding significant control over a company is potentially registrable.

This practice note focuses on aspects of the PSC register of particular significance to *trustees* (www.practicallaw.com/8-107-7419) and their advisors.

For other Practical Law resources on the PSC register, see:

- *Practice note, PSC register: identifying people with significant control* (www.practicallaw.com/9-624-0527).
- *Practice note, PSC register: completing the register* (www.practicallaw.com/7-625-2125).
- *Practice note, PSC register: official wording for a PSC register* (www.practicallaw.com/8-625-2605).
- *Practice note, PSC register: statutory notices under Part 21A of the Companies Act 2006* (www.practicallaw.com/9-625-0007).
- *Flowchart, PSC register: who must keep a PSC register* (www.practicallaw.com/2-624-6207).
- *Flowchart, PSC register: identifying people with significant control* (www.practicallaw.com/8-624-6209).



PSC REGISTER

The PSC register is designed to capture the identities of individuals who have control over UK private (limited and unlimited) companies, whether directly or indirectly.

For more information on which companies must keep a PSC register, see *Practice note, PSC register: identifying people with significant control: Is the company required to keep a PSC register?* (www.practicallaw.com/9-624-0527)

Strictly speaking, the PSC register is not a register of ultimate beneficial ownership because:

- It is concerned with ownership only insofar as ownership confers control of a company.
- Except in certain circumstances, the register for any given company will only record details of immediate controllers, be they individuals or legal entities, and not the ultimate controllers.

There are two important aspects of the PSC register that trustees and their advisors should be aware of:

- The register can capture details of people who exercise control of companies through trusts.
- The register is open to public inspection.

The introduction of the PSC register represents a fundamental shift in the landscape of trust administration. Trustees will need to be properly prepared for the complex new regulatory framework. At all stages, trustees must be cautious as to how they resolve the tension between their duties of confidentiality and the obligation to disclose information under the new regime.

The public nature of the PSC register distinguishes it from ultimate beneficial ownership regimes in other jurisdictions. Many offshore financial centres require registration of ultimate beneficial owners of companies incorporated in their jurisdictions. None, at present, make that information available to the public (see, for example, *Legal update, Beneficial ownership transparency: UK reaches agreements with British overseas territories and Crown dependencies* (www.practicallaw.com/7-627-0596)).

HOW THE PSC REGISTER WORKS

Key definitions: PSC and RLE

Part 21A of the CA 2006 relies heavily on definitions to create substantive law. There are two key definitions to understand:

- Person with significant control (PSC) (see *Person with significant control* below).
- Relevant legal entity (RLE) (see *Relevant legal entity* below).

These definitions are found in section 790C of the CA 2006.

Person with significant control

A PSC is an individual (X) who meets one or more of the following five specified conditions in relation to a company:

- X holds, directly or indirectly, more than 25% of the shares in the company (**first specified condition**).
- X holds, directly or indirectly, more than 25% of the voting rights in the company (**second specified condition**).

- X holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the company (**third specified condition**).
- X has the right to exercise, or actually exercises, significant influence or control over the company (**fourth specified condition**).
- X has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm that, in each case, does not have legal personality under its governing law, where the trustees or members of that trust or firm meet any of specified conditions one to four (in their capacity as such) in relation to the company, or would do so if they were individuals (**fifth specified condition**).

(Section 790C(2) and (3) and paragraphs 1-6, Schedule 1A, CA 2006.)

The test is aimed at control, whether legal or actual. The specified conditions have been drawn broadly, so as to capture as many behaviours as possible. The term “significant influence or control” (as used in the fourth and fifth specified conditions) has been clarified, to some extent, by statutory guidance (see [Registering persons with significant influence or control over a trust](#) below).

For more information on the test for a PSC, see [Practice note, PSC register: identifying people with significant control: Does any individual meet any of the specified conditions in relation to the company?](#) (www.practicallaw.com/9-624-0527).

Relevant legal entity

An RLE is a legal person that meets both of the following conditions:

- If it were an individual it would be a PSC.
- It is subject to its own disclosure requirements.

(Section 790C(6), CA 2006.)

A legal entity is subject to its own disclosure requirements if either:

- It is required to keep a PSC register under Part 21A of the CA 2006 (or under another enactment that extends the application of Part 21A).
- It is a DTR5 issuer (essentially a traded company).
- It is of a description specified in regulations. (Current regulations provide that companies whose shares are traded on a [recognised exchange](#) (www.practicallaw.com/2-200-8362) in the [EEA](#) (www.practicallaw.com/1-107-6197) are subject to their own disclosure requirements for these purposes (*Register of People with Significant Control Regulations 2016 (SI 2016/339)*)).

(Section 790C(7), CA 2006.)

For more information on the definition of an RLE, see [Practice note, PSC register: identifying people with significant control: Would any legal entity meet any of the specified conditions if it was an individual?](#) (www.practicallaw.com/9-624-0527).

Is a PSC or RLE registrable?

Every company that is subject to Part 21A of the CA 2006 is under a duty to take reasonable steps to determine if there is anyone who is a **registrable PSC** or a **registrable RLE** in relation to that company and, if so, to identify them in the company’s PSC register (*section 790D(1), CA 2006*).

The default position is that PSCs and RLEs are registrable.

When registration is not required

In limited circumstances, registration of a PSC or RLE is not required.

The most important situation is where an individual (a PSC) holds an interest in the company keeping the register only through an RLE or a corporate chain that includes an RLE (*section 790C and paragraphs 9 and 18, schedule 1A, CA 2006*). If that is the case, then the RLE is registered and the PSC is not. The RLE will be keeping its own register, in which the PSC will be registered.

A second situation is where a person holds an interest in the company keeping the PSC register only as a *nominee* (www.practicallaw.com/4-382-5718). A nominee is not registrable in its capacity as a nominee, but the person on whose behalf the nominee acts is registrable (*paragraph 19, Schedule 1A, CA 2006*).

It is also possible, in special circumstances, for the Secretary of State to exempt a person from the information and registration requirements under the PSC regime (see *Exemptions and exceptions* below).

For more information on the circumstances in which a PSC or RLE qualifies as non-registrable, see *Practice note, PSC register: identifying people with significant control: Is any PSC or RLE registrable?* (www.practicallaw.com/9-624-0527).

Gathering information

In taking reasonable steps to find out if there is anyone who is a registrable PSC or RLE in relation to it, a company must give notice to anyone who it knows or has reasonable cause to believe to be a registrable PSC or a registrable RLE (*section 790D(2), CA 2006*).

A notice sent to an individual or RLE must require that individual or RLE to confirm the information that the company holds about them and to supply any of the required particulars that the company does not have (*section 790D(3) and (4), CA 2006*; for details of the required particulars in each case, see box *Information recorded on the register*).

The company can also send a notice to any other person if the company has reason to believe that that person knows the identity of someone who is a registrable PSC or RLE or that person knows the identity of someone else who has that knowledge (*section 790D(5) and (6), CA 2006*).

Failure to send a notice to a known PSC or RLE is a criminal offence, and the company and its officers are all criminally liable (*section 790F, CA 2006*). Failure to respond to a notice or providing a response that contains false information is also an offence if the respondent knew about or was reckless as to the false information (*paragraph 13, Schedule 1B, CA 2006*).

For further guidance on gathering information for the register and offences under the PSC regime, see *Practice note, PSC register: completing the register: Investigate registrable PSCs and registrable RLEs* (www.practicallaw.com/7-625-2125) and *Offences under the PSC regime* (www.practicallaw.com/7-625-2125).

Updating information

The company has a duty to update the information in its PSC register whenever it knows or has reason to believe that the information is out of date (*section 790E, CA 2006*).

PSCs and RLEs have a corresponding duty to supply updated information to the company (*section 790H, CA 2006*).

For more information on updating the register, see *Practice note, PSC register: completing the register: Keep the PSC register up to date* (www.practicallaw.com/7-625-2125).

INFORMATION RECORDED ON THE REGISTER

The required particulars that a company must keep of a registrable PSC are:

- Person's name.
- Address for service.
- Country, state or part of the UK in which the individual is usually resident.
- Nationality.
- Date of birth.
- Usual residential address.
- Date on which the person became a registrable person in relation to the company.
- Nature of his or her control, by reference to the specified conditions by which the person is identified as a PSC.
- If restrictions on using or disclosing any of the person's PSC particulars are in force, that fact.

The required particulars that a company must keep of a registrable RLE are:

Entity's name.

- Registered or principal office.
- Legal form of the entity and law by which it is governed.
- If it is registered, the register in which it is entered, the state in which the register is kept and its registration number.
- Date on which it became a RLE in relation to the company.
- Nature of its control over the company, by reference to the specified conditions by which the entity is identified as a RLE.

(Section 790K, CA 2006; see also *Practice note, PSC register: completing the register: Required particulars* (www.practicallaw.com/7-625-2125)).

Exemptions and exceptions

The protection from disclosure provisions that apply to remove directors' residential addresses from public view apply equally to PSCs. There is therefore a limited protection so that PSCs' residential addresses do not become immediately available to the public (see *Practice note, PSC register: completing the register: Protected information* (www.practicallaw.com/7-625-2125)).

In addition, the Secretary of State may completely exempt a person from the information and registration requirements under the PSC regime (*section 790J, CA 2006*). The Secretary of State must be satisfied that there are special reasons to grant the exemption. The effect of such an exemption is that the person does not have to supply their information, companies do not have to request their information and no other person has to give information about that person under the PSC regime (see *Practice note, PSC register: completing the register: Investigate registrable PSCs and registrable RLEs* (www.practicallaw.com/7-625-2125)).

The register

The PSC register itself must be kept by the company and made available to the public for inspection at the company's registered office or a nominated alternative address (*section 790N, CA 2006*). In addition, the company must supply a copy of its PSC register on request and payment of a fee (*section 790O, CA 2006*).

A private company may make an election to keep records by an alternative method. When that election is made, the register is held at Companies House and the company may deliver the required information to the registrar of

companies. That information will be kept centrally and made available to the public accordingly. (Sections 790X and 790ZA, CA 2006.)

For more information on the location and inspection of the register, see *Practice note, PSC register: completing the register: Make the PSC register available for inspection* (www.practicallaw.com/7-625-2125) and *Alternative method of keeping PSC information* (www.practicallaw.com/7-625-2125).

IMPLICATIONS FOR TRUSTEES

When to register

For trustees, registrability will be relevant in two situations:

- When the trustees themselves need to be registered on a company's PSC register (see *Registering trustees* below).
- When the trustees are in control of a company and need to work out whether to register one or more of the persons concerned in the trust on the company's PSC register (for example, a *settlor* (www.practicallaw.com/7-107-7245), *protector* (www.practicallaw.com/8-107-7075) or *beneficiary* (www.practicallaw.com/9-382-5565)) (see *Registering persons with significant influence or control over a trust* below).

Registering trustees

The following examples consider trustee registrability in relation to three common situations:

- Where the trustee is an individual and meets one or more of the specified conditions, they will need to register as a PSC (see *Person with significant control* below). If there is more than one trustee, then all of them will need to register.
- Where the trustee is a UK company or *trust corporation* (www.practicallaw.com/2-107-7417) and would meet one or more of the specified conditions if it were an individual, it will need to register as an RLE (see *Relevant legal entity* above).
- Where the trustee is an offshore company, it cannot be an RLE because, as the law currently stands, it is not subject to its own disclosure requirements. Trustees in this position will need to take specialist advice. The author's view is that unless an RLE stands between the offshore trust company and a controlling individual, the individual will be registrable.

Registering persons with significant influence or control over a trust

Turning next to trustees maintaining an accurate PSC register as regards other persons involved in the trust, the most relevant consideration will be whether a person (other than a trustee) has the right to exercise, or actually exercises, significant influence or control over the activities of that trust (and therefore needs to be registered as a PSC under the fifth specified condition or would do if they were an individual, see *Practice note, PSC register: identifying people with significant control: The fifth specified condition* (www.practicallaw.com/9-624-0527)).

However, it should be remembered that the fifth specified condition cannot be met unless the trustees themselves meet at least one of specified conditions one to four in relation to the company in question (or would do if they were individuals).

The term "significant influence or control" is clarified, to some extent, by statutory guidance (see *BIS: Statutory Guidance to the meaning of "significant influence or control" over companies in the context of the register of People with Significant Control* (www.practicallaw.com/0-622-3160)). The guidance sets out non-exhaustive examples of rights that would, in themselves, give rise to significant influence or control, as well as attempting to illustrate behaviour that would constitute significant influence or control. The examples of rights giving significant influence or control over a trust are:

- The right to appoint or remove any of the trustees, except through application to the courts or as a result of a breach of fiduciary duty by the trustees.
- The right to direct the distribution of trust funds or assets.
- The right to direct investment decisions of the trust.
- The right to amend the trust.
- The right to revoke the trust.

The guidance also states that:

“A person is likely to exercise significant influence or control over a trust [...] if they are regularly involved in the running of the trust [...], for example a person who issues instructions, which are generally followed, as to the activities of the trust [...] to the trustee(s) [...].”

Settlers who retain certain common administrative powers (such as the power to appoint and remove trustees) will therefore fall within the definition of significant influence or control as extended by the statutory guidance. Settlers who wish to remain off the PSC register should consider releasing such powers.

The scope of the definition of significant influence or control is such that protectors and even some beneficiaries may need to consider the nature of their involvement with the trust.

When to send notices

Where trustees are in control of a company that is required to keep a PSC register, there are two types of notice they need to know about:

- A notice to PSCs or RLEs or persons who may be able to supply information about PSCs or RLEs (see [PSC/RLE notices](#) below).
- A restrictions notice that limits transactions and the exercise of rights in relation to shares or ownership interests in companies (see [Restrictions notices](#) below).

PSC/RLE notices

In taking reasonable steps to find out if there is anyone who is a registrable PSC or RLE in relation to it, a company that is required to keep a PSC register must serve a notice on any person who it knows or has reasonable cause to believe is a registrable PSC or RLE (see [Gathering information](#) above). For examples of notices in this form, see [Standard documents, PSC register: notice by a company to an individual under section 790D\(2\) \(www.practicallaw.com/8-624-6370\)](#) and [PSC register: notice by a company to a legal entity under section 790D\(2\) \(www.practicallaw.com/4-625-2985\)](#) .

The company may also serve a notice on any other person if it knows or has reasonable cause to believe that that person either knows the identity of, or knows someone likely to know the identity of, a registrable PSC or RLE in relation to the company. For an example of a notice in this form, see [Standard document, PSC register: section 790D\(5\) notice to an individual or legal entity with knowledge of a PSC or RLE \(www.practicallaw.com/2-625-3033\)](#) .

Where trustees are in control of a company required to keep a PSC register and are also the directors, they will need to decide whether there is any person with significant influence or control over the trust to whom a PSC/ RLE notice should be sent by the company. If the trustees are satisfied that no person has significant influence or control, then there is no need to send a notice. Specific advice is almost certainly to be recommended before reaching that conclusion.

A more difficult question is how far the trustees need to go in order to have taken reasonable steps to discover the existence or identity of a PSC or RLE. In particular, the trustees will need to decide whether those steps include causing the company to send notices to people who may have information about PSCs and RLEs. If the trustees hold shares in a company keeping a PSC register and they hold those shares on behalf of a different group of trustees, then it will be obvious that the chain does not end there. How many notices should be sent and to whom is a question that can only be answered on specific facts. The author's view is that trustees need to send notices until they reach a dead end or until they can be satisfied that they have identified all of the registrable individuals or entities.

For more information on PSC/RLE notices, see *Practice note, PSC register: completing the register: Company obligation to give notice to PSCs and RLEs* (www.practicallaw.com/7-625-2125) and *Optional notices seeking information on the identity of PSCs and RLEs* (www.practicallaw.com/7-625-2125).

Restrictions notices

A restrictions notice is the company's tool to secure compliance with finding, identifying and registering PSCs and RLEs. The relevant provisions are in schedule 1B to the CA 2006.

Where a person who holds shares or voting rights in the company or who has the right to appoint or remove any member of the board of directors has failed to comply with a PSC notice, the company can serve that person with a warning notice, followed by a restrictions notice. The effect of a restrictions notice is to freeze that person's interest in the company: any transfer will be void, no voting, appointment or removal right can be exercised and, crucially, no payment can be made in respect of the interest, including a dividend.

Although the service of a restrictions notice is expressed to be optional rather than mandatory, there is a mandatory duty for the company to take reasonable steps to identify PSCs and RLEs. Under some circumstances, service of a restrictions notice may well be a reasonable step, in which case the company must take it. As with PSC/RLE notices, the particular circumstances of the case will dictate whether trustees need to go down the restrictions notice route.

For more information on warning and restrictions notices, see *Practice note, PSC register: completing the register: Enforce the obligation to disclose* (www.practicallaw.com/7-625-2125). For examples of these types of notice, see *Standard documents, PSC register: warning notice by a company to an individual or legal entity* (www.practicallaw.com/6-624-6984) and *PSC register: restrictions notice by a company to an individual or legal entity* (www.practicallaw.com/3-624-6985).

How to respond to notices

A trustee who is served with a PSC/RLE notice requiring them to identify PSCs and RLEs has only one month in which to respond (*section 790D(8), CA 2006*). The trustee will need to think carefully about how to do so. The starting point is to have in mind the fact that failure to respond, or failure to respond accurately, is a criminal offence. In the case of a corporate trustee, both the trustee and its officers commit the offence (*paragraph 13, Schedule 1B, CA 2006*).

Trustees will need to consider whether there are any PSCs or RLEs of whom they are aware. They will need to be particularly careful in assessing whether there are any individuals who have significant influence or control over the affairs of the trust. It may be that with sufficiently robust trust administration, trustees will be able to put hand on heart and say that there are no PSCs or RLEs. However, the statutory guidance on significant influence or control has been widely drawn and so trustees will need to act cautiously.

OFFSHORE DIMENSION

The government has applied significant pressure on the *Crown Dependencies* (www.practicallaw.com/6-506-3758) and *British Overseas Territories* (www.practicallaw.com/2-506-3468) to encourage them to adopt measures similar to the UK's PSC regime. In particular, the government has been keen to push for corporate beneficial ownership

registers that are open to public inspection. Since the leak of documents from the Panamanian law firm Mossack Fonseca in April 2016, pressure to expand the transparency regime has intensified.

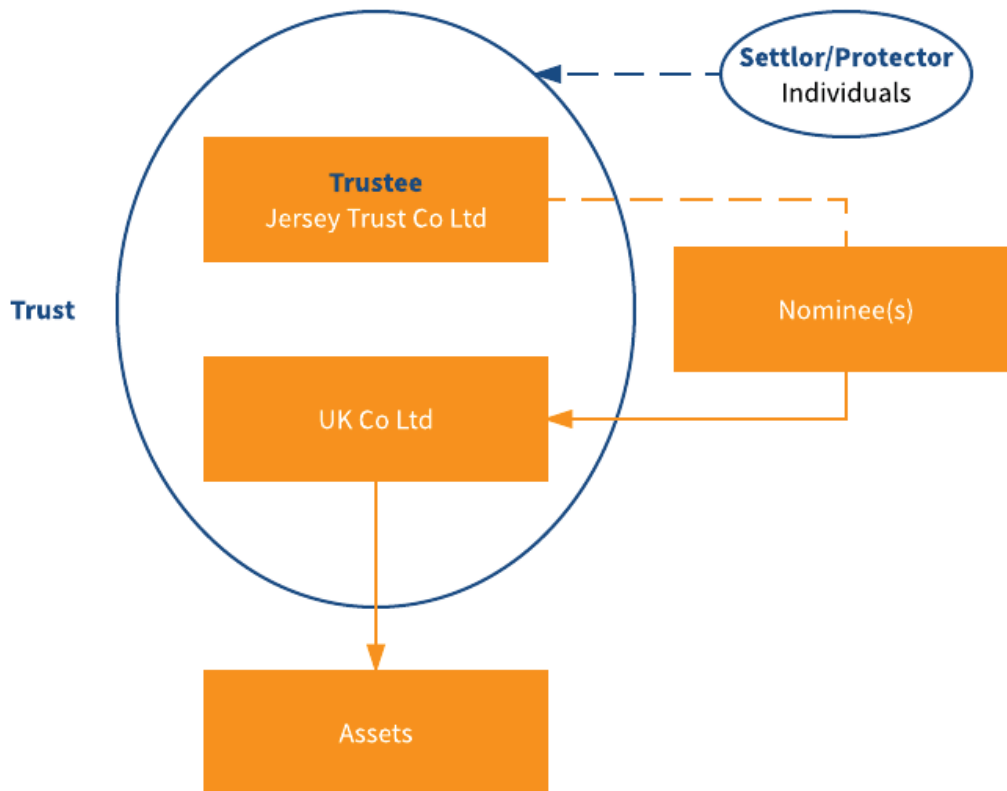
Part 21A of the CA 2006 incorporates two provisions that are likely to add to the pressure on offshore jurisdictions to adopt similar legislation:

- The first is the provision offering exemption from the PSC regime for companies of any description specified by the Secretary of State in regulations (*section 790B(1)(b), CA 2006*). In formulating those regulations, the Secretary of State is under a statutory duty to have regard to the extent to which companies of that description are bound by disclosure and transparency rules, in the UK or elsewhere, broadly similar to those applying to DTR5 issuers (*section 790B(2), CA 2006*).
- The second is the provision offering RLE status to companies that are subject to their own disclosure requirements (*section 790C(6) and (7), CA 2006*; see also *Relevant legal entity* above). Companies subject to their own disclosure requirements can be specified by the Secretary of State by regulations. Again, in formulating those regulations, the Secretary of State is obliged to have regard to whether a company is bound by disclosure and transparency rules, in the UK or elsewhere, that are broadly similar to those applying to other exempt entities (*section 790C(11), CA 2006*).

In each case, there is clear scope to bring further pressure to bear on offshore jurisdictions by providing only limited exemptions for companies subject to offshore reporting requirements.

By way of example, consider a structure in which assets are held by a UK company limited by shares and the shares in that UK company are held by nominees on behalf of an offshore trust company.

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The offshore trust company (Jersey Trust Co Ltd) is not a RLE in relation to UK Co Ltd, because it is not subject to its own disclosure requirements. Persons (such as a settlor or protector) giving instructions to Jersey Trust Co Ltd as to the control of UK Co Ltd would therefore be registrable PSCs in relation to UK Co Ltd (under the fifth specified condition). However, if Jersey Trust Co Ltd is treated as subject to its own disclosure requirements and so qualifies as a RLE, the PSCs will be registrable offshore (in Jersey) rather than in the UK (Jersey Trust Co Ltd being registrable in the UK as a RLE).

In drafting the regulations and deciding where to grant exemptions, the Secretary of State will enjoy a significant bargaining tool. It will be possible to set out a list of criteria that a jurisdiction's transparency regime must meet in order to avoid having to register controlling individuals in the UK. Jurisdictions that fail to fall into line may face their trust clients being publicly exposed on the UK's PSC register.

AVOIDANCE STRATEGIES

A number of PSC regime avoidance strategies have been promoted, some examples of which are outlined below. Most seem to have been adapted from strategies seeking to disguise ultimate beneficial ownership of companies. Where they generally fall down is that at some point in the structure, an individual retains control. As noted above, the UK's PSC regime is concerned with control rather than ownership, save to the extent that ownership confers control.

Purpose trusts

The idea behind the use of a purpose trust is to create a structure in which:

- At no point does legal title to the UK company's shares appear in the name of the individual wishing to stay off the PSC register.
- The beneficial interest in the UK company's shares cannot be directly attributed to that individual.

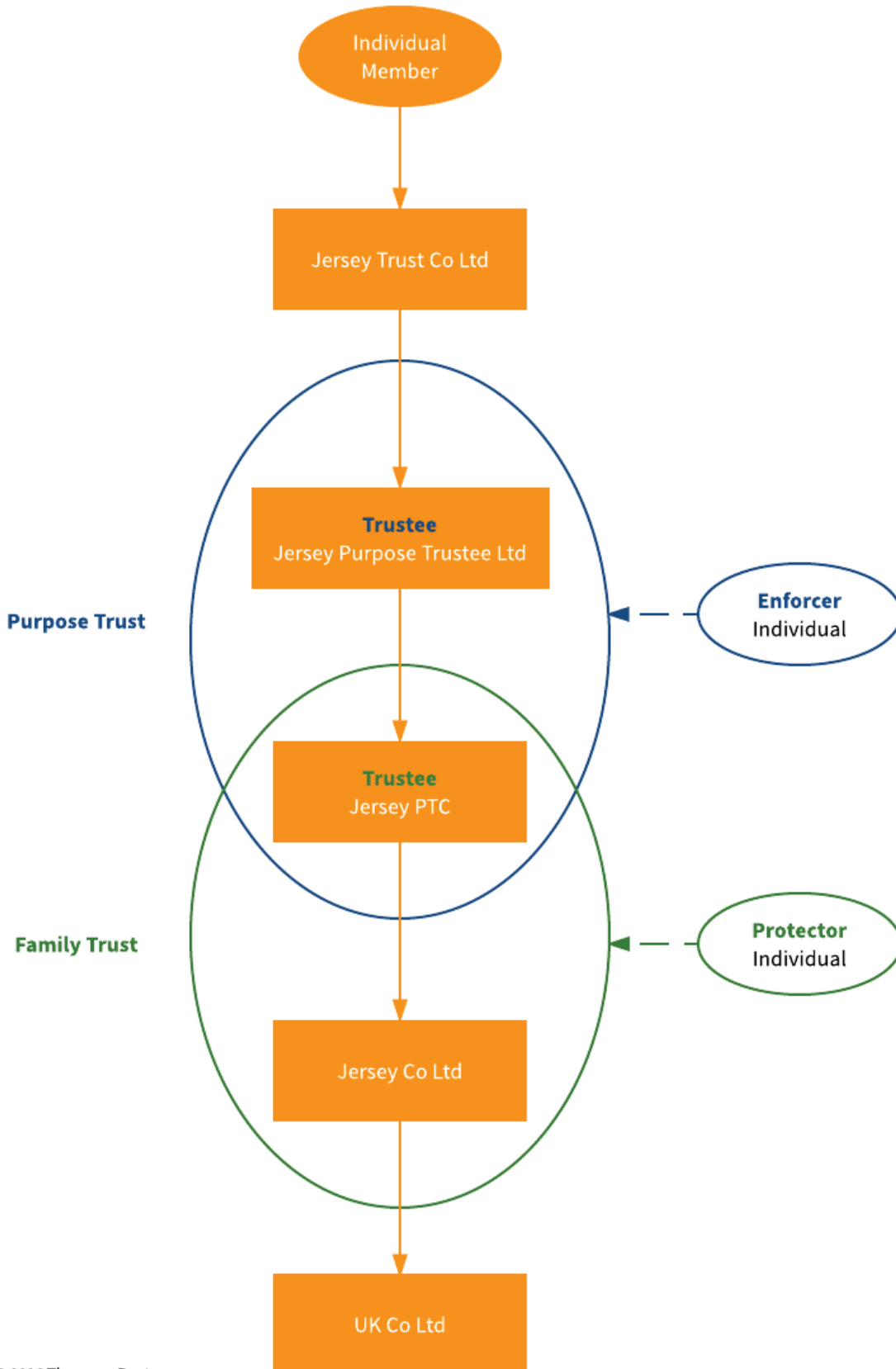
An example of a structure of this type involves a purpose trust holding shares in a private trust company (PTC), which in turn holds the shares in the UK limited company (either directly or indirectly). If that is the limit of the structure, then there may be no PSC. However, purpose trusts usually have an enforcer, or an individual in a similar position. If the enforcer has significant influence or control over the trust's activities and the trustee meets one or more of the first four specified conditions (or would if it was an individual), then the enforcer is a PSC in relation to the UK limited company (under the fifth specified condition) and the attempt to stay off register fails.

In the structure depicted right, the trustee of the Family Trust (Jersey PTC) has a majority stake in Jersey Co Ltd, which in turn holds a majority stake in UK Co Ltd. Jersey PTC would therefore meet the definition of a PSC if it were an individual. If the protector of the Family Trust has significant influence or control over the trust's activities (for example, if the protector can appoint and remove trustees), then the protector meets the fifth specified condition and is a registrable PSC in relation to UK Co Ltd.

Further, the trustee of the Purpose Trust (Jersey Purpose Trustee Ltd) has a majority stake in Jersey PTC and would therefore be a PSC in relation to UK Co Ltd if it were an individual. If the enforcer of the Purpose Trust has significant influence or control over the trust's activities, then the enforcer will also meet the fifth specified condition and be a registrable PSC in relation to UK Co Ltd.

Finally, Jersey Purpose Trustee Ltd is held by a Jersey fiduciary services provider (Jersey Trust Co Ltd), which may hold other similar trustee companies. A member owns Jersey Trust Co Ltd (it being his or her business) and that member is also a registrable PSC in relation to UK Co Ltd (as a result of holding a majority stake in UK Co Ltd indirectly through the corporate chain). The member may never have heard of UK Co Ltd.

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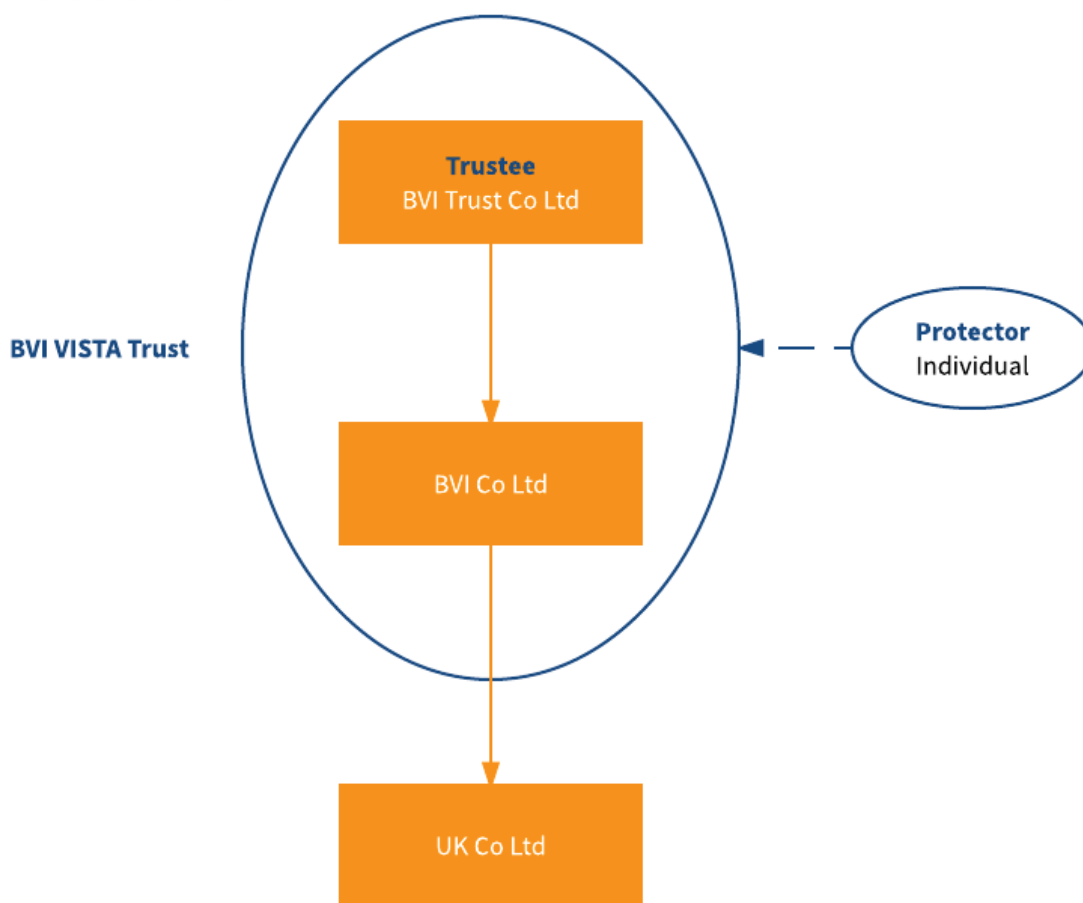


VISTA trusts

As we have seen, the key concept on which the PSC regime focuses is control. Where trustees have control over shares and an individual has significant influence or control over the trustees, then the individual falls within the fifth specified condition. So what about a British Virgin Islands (BVI) VISTA trust (see *Private client law in British Virgin Islands: overview: Trusts* (www.practicallaw.com/0-512-8748))? The intention of a VISTA trust is to exclude the trustees from exercising the voting rights attached to company shares that they hold, except in specified circumstances.

Schemes using VISTA trusts have the shares in the UK limited company held by a BVI company, the shares in which are held by the trustee of the VISTA trust.

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Superficially, the scheme is attractive because it focuses attention on the absence of voting rights in the trustees. However, it ignores the difficulty canvassed above that someone has to be the trustee and, whatever means one chooses to constitute the trustee, at some point there will be a protector or enforcer who is likely to have significant influence or control over the trust. Moreover, the voting rights don't just disappear, but in some circumstances may be exercised and in other circumstances must be exercised. Where that is the case, the trustee will meet at least one of the first four specified conditions in its capacity as trustee, and where the individual protector or enforcer has significant influence or control over the activities of the trust, that individual will be a PSC and most likely registrable in the PSC register.