Editorial

The cost of "going public": examining recent public beneficial ownership register commitments

Traditionally, the idea of holding company information extended little beyond such relating to its mere existence. Today, either through central or public registers, the regulatory position pertains to increased transparency as to ultimate ownership. With the accepted nexus of money laundering and the ability to hide behind the corporate veil, it is unsurprising that corporate anonymity has become the target of the tax justice and transparency lobby and governments alike with the UK and EU taking the lead. However, problems arise when considering what the international standard is. The standard-bearer for anti-money laundering ("AML") regulation is the Financial Action Task Force ("FATF"). On BO, their Recommendation 24 states that:

> [. . .] countries should ensure that there is adequate, accurate and timely information on the BO and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities [1].

While this does not prioritise between centrally held or public registers, it clearly invokes the central register framework complemented by bilateral information exchange to share BO information with authorities and thereby assist foreign investigations. The 4th EU AML Directive (2015) aligned somewhat with this standard, stipulating that such information can be held in a central or public register [2]. Removing what might appear to be a reasonably held expectation of choice, the 5th EU AML Directive goes further by stipulating that states should provide access to any member of the general public [3]. The very wording of this standard invokes the notion of the public right to scrutinise, which aligns with the UK's approach in terms of its public register and that which it has sought by legislation to impose on OTs.

However, outside the UK and EU, public registers are not a global norm. As recent as 2018, only 6 G20 countries had functioning central registers [4], let alone publicly accessible ones. Even within the EU, appetite for a unitary approach has been protracted. By March 2020, only 5 (including the UK) of 27 states have implemented freely accessible registers. By comparison, with the USA only recently tabling legislation to create a central register [5], the prospect of a public one seems unlikely.

The transparency campaign relies at its core on the notion of "nothing to hide" [6]. In other words, business which is legitimate ought to have no reticence of its ownership information being publicly accessible. This gives rise to an adverse presumption that if a company objects to complete transparency of its information, then it must have something to hide. The implication is that central registers do not suffice, despite them forming the basis of FATF r24 and that providing such information to domestic and foreign law enforcement is substandard to that same information being public. Exemplifying this point, one of the architects of the "public register" amendment of SAMLA stated:

> The territories may well allow access to law and order agencies, within an hour in the case of terrorism, through closed registers, but that does not allow civil society – charities, NGOs and the media – to expose them to the sort of scrutiny that the Paradise and Panama papers did [7].

Many jurisdictions, and in this context those OTs which have developed sophisticated business sectors, have built their economies upon the provision of offshore financial services. Confidentiality as a concept has been an intrinsic element of their economic and

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sustainable development [8]. However, OTs that operate financial centres have found themselves the subject of increasing external pressure for some time [9]. Notwithstanding the slow implementation of public registers in the EU, to date some 8 of 14 OTs have committed to implementing public registers, including Anguilla, Cayman Islands, Turks and Caicos and, most recently, in July 2020, Bermuda. The reaction was formerly mixed in the OTs [10]. Notably, the British Virgin Islands remains opposed to creating a public register [11] – a position which was formerly shared by OTs such as Bermuda on constitutional, political and economic grounds [12]. Of interest, and perhaps concern, is that at no stage during the discourse surrounding OTs' creation of public registers has there been any meaningful examination of their existing registers. Further, OTs such as the Pitcairn Islands have committed to public registers [13] – the world's least populated jurisdiction with circa 50 inhabitants. The applicability of this for Pitcairn and the global fight against financial crime is unclear; however, it provides support for the notion that the territories are different and a unitary approach to legislating on their behalf while technically achievable, may not be appropriate in all situations. By contrast, while SAMLA does not apply to the Crown Dependencies ("CDs"), all three have committed to public registers on their own volition.

For jurisdictions like Bermuda, who operate a decades-established central register, the move is a positive one for several reasons. It demonstrates that their framework currently in use is adaptable to changing circumstances. Set within a broader record of compliance with international AML standards and recent proactivity in the areas of economic substance, national risk assessments and anti-bribery reform, committing to absolute transparency demonstrates a regulated environment prioritising legitimate business. FATF reviewed Bermuda's regulatory regime as "robust" in 2020 [14]. With the increasing momentum towards transparency and also the prevalence of formal and informal actors engaged in the business of blacklisting and greylisting, it is evident that committing to more transparency is positive for those jurisdictions which have done so. It is difficult to see what the cost may be in terms of economic impact and competitiveness. However, it marks an awareness of a changing landscape. Complying with public BO requirements, should such become a norm, is a means of acknowledging "buy-in" to the UK's lead. This fact alone is important when considering the status of the territories and their relationship with the UK in a post-Brexit era.

While the aforementioned advantages are plainly relevant for individual jurisdictions concerned with safeguarding or improving their international reputation, public registers still give rise to concern – at both jurisdictional and global levels. Given that public registers are far from normative, if only a select few jurisdictions implement them, then it may have a counterproductive effect in encouraging the "race to the bottom" towards countries with weaker regulatory environments. It is unclear whether such will serve as a catalyst for other jurisdictions to act (i.e. those competitor jurisdictions who are not subject to legislative interference by a metropolitan power), or whether it will simply encourage illicit wealth to go where it is darkest [15]. Unless *all* countries which operate sophisticated financial centres follow this path in establishing public registers, then it is concerning to think that suspect wealth may transit into jurisdictions within which investigation or cooperation (which may have already existed in OTs and CDs by virtue of cooperation initiatives like the Common Reporting Standard and Information Exchange Agreements) is frustrated.

Unresolved issues with public registers require attention if OTs are going to benefit from their introduction. One shortcoming of the UK's register, which has been well-documented by transparency campaigners [16], is that information is not independently verified. The success or failure of the public register rests on the honesty and accuracy of data therein [17]. If owners or agents submit false or outdated information, then the benefits of public scrutiny

are undermined. This presents obvious challenges if the objective of full transparency is to disrupt dishonest criminals.

Finally, there is an under-acknowledged concern about the 2023 timeframe for public registers given to OTs. There will doubtless be companies registered in OTs which desire privacy after the registers go public. The timeframe affords legitimate businesses wishing to retain privacy, and of course illegitimate entities concealing behind corporate anonymity, the luxury of years to order their affairs and re-domicile in jurisdictions whose registers are not public.

While international standards on BO remain ill-defined, it is positive that many jurisdictions which continue to face international reputation challenges have announced commitment to public registers. It stands to strengthen their regulated environments, market integrity and international cooperation efforts. However, on the macro-level, there remain significant concerns about public registers – in terms of its likely normativity; issues with verification; and whether the international community will have an easier or more difficult task in disrupting crime if only a few jurisdictions have committed to such transparency within a reasonable time. If illicit wealth continues to move around the world through transaction chains, it is concerning if such a move which presupposes the benefits of transparency, counterproductively pushes suspect wealth to jurisdictions with far less transparency. It will be critical to monitor the position beyond the EU, UK, its OTs and CDs.

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Notes

1. FATF Recommendation 24.
2. Directive 2016/849 art 30(3).
3. Directive 2018/843 art 30(5)(c) as amended.
4. Transparency International (2018) 'G20 Leaders or Laggards? Reviewing G20 promises on ending anonymous companies', Executive Summary, [3].
5. Corporate Transparency Act (2019).
6. See: Solove, D.J. (2008) "'I've Got Nothing to Hide" and Other Misunderstandings of Privacy', *San Diego Law Review*, 44:745:772.
7. HC Deb (1 May 2018) Vol 640, Col 203.
8. Antoine, R-M. (2014) *Confidentiality in Offshore Financial Law*, OUP, [26].
9. For example, since the Panama papers.
10. See an earlier account of the differences in territories' reaction in Thomas-James, D. (2020) "Reviewing International Standards on Beneficial Ownership Information of Companies", *Company Lawyer*, 41(5): 129-132.
11. Government of the Virgin Islands, Statement by Premier Fahie on BVI's Beneficial Ownership Secure Search System, 21 July 2020, available at: https://bvi.gov.vg/media-centre/statement-premier-fahie-bvi-s-beneficial-ownership-secure-search-system
12. Bermuda Government "The British Government vs the Bermuda Constitution", 4 May 2018, available at: www.gov.bm/articles/british-government-vs-bermuda-constitution

13. UK Government, Written Statement FCO "Public Accessible Registers of Company Beneficial Ownership Information in the British Overseas Territories" 15 July 2020, available at: www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-15/HCWS369/

14. CFATF (January 2020) Anti-Money Laundering and Counter-Terrorist Financing Measures: Bermuda – Mutual Evaluation Report, [6].

15. HC Deb (1 May 2018) Vol 640, Col 186, Geoffrey Cox MP and Liam Byrne MP.

16. Global Witness & Open Ownership (2017) "Learning the Lessons from the UK's Public Beneficial Ownership Register", available at: www.globalwitness.org/en/campaigns/corruption-and-money-laundering/learning-lessons-uks-public-beneficial-ownership-register/

17. Transparency International (2017) "Taking a Step Back: Why do we care so much about public registers of beneficial ownership?".