CAN YOU KEEP A SECRET? PUBLISHING THE IDENTITY OF ULTIMATE BENEFICIAL OWNERS

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Customer due diligence is a familiar phrase for many. But at a time when money laundering is estimated to represent between 2 - 5% of GDP globally [1], customer due diligence is set to change and the UK Government is at the forefront of developments.

WHO ARE YOU?

Customer due diligence is a key stage in anti-money laundering procedures. However, identifying who a customer is can be difficult if the direct owner of a company is not necessarily the person who ultimately controls or benefits from it (the ultimate beneficial owner ("UBO")). Opaque company structures are often used to disguise the UBO, sometimes for legitimate reasons of privacy but also to provide the secrecy needed for criminal activity.

In the wake of the Panama Papers and public outrage and political concerns around corporate transparency, the UK became the first G20 country to implement a public register of local companies' beneficial owners [2] (the "PSC Register" [3]). The aim of the PSC Register is to make it easier for regulators, businesses and the general public to identify the "true owners" of companies by searching on Companies House.

The UK Government is now turning its attention to the hotly debated issue of UBO transparency in British Overseas Territories and Crown Dependencies. [4]

WHAT CAN WE FIND OUT OVERSEAS?

The Panama and Paradise Papers highlighted the extent to which the UBOs of companies can be disguised, particularly by taking advantage of privacy traditionally provided by offshore financial centres. Many countries have committed to maintaining registers of beneficial interest. Since April 2017, all British Overseas Territories and Crown Dependencies have maintained registers of local companies' beneficial owners that can be accessed by UK authorities within 1 hour. These registers help to undermine the secrecy that may facilitate criminal activity whilst maintaining the privacy afforded in some offshore financial centres.

In May 2018, the UK Government passed The Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"), which includes the requirement that British Overseas Territories establish public registers of local companies' beneficial owners by 31 December 2020. British Overseas Territories that fail to establish a register by this deadline can be compelled to do so by the UK Government.

The UK Government has proposed extending the requirement to Crown Dependencies. In contrast to SAMLA, separate legislation and consultation with three independent legislatures will be required for UK legislation to apply to the Crown Dependencies. The UK Government's proposal to extend the public register requirement to Crown Dependencies has led to severe tension between the jurisdictions, with suggestions that the Dependencies will secede from the UK.

With the exception of Montserrat and Gibraltar [5], British Overseas Territories and Crown Dependencies do not currently intend to publish their registers of beneficial interests.

Many British Overseas Territories and Crown Dependencies are financial centres that benefit from the fact that many individuals and entities are attracted by the privacy afforded by those jurisdictions. There is an overriding fear that publishing sensitive information could remove an incentive to invest and carry on business in these jurisdictions, without making a significant impact on anti-money laundering.

HOW TRANSPARENT IS THE UK?

The PSC Register is not without faults. In March 2019, the House of Commons Treasury Committee published a briefing paper [6] which includes concerns raised about the effectiveness of the PSC Register:

- Enforcement policy: Companies House's approach to enforcement is to help companies to comply with filing requirements. No criminal or civil sanctions apply.
- No verification: information is not verified for accuracy by Companies House. For example, 5 beneficial owners are registered on Companies House as "Persons with Significant Control" of more than 6,000 companies.
- Problems with inputting data: Global Witness identified 500 different ways the register records an individual as "British", including 10 entries that a person was "Cornish" [7].
- A high threshold to be a "beneficial owner": a beneficial owner must own more than 25% of a company, which means that just under 10% of companies are recorded as having no beneficial owner.
- Lack of unique identifiers: unless an individual or a company has an unusual name, it can be difficult to search the PSC Register.

A significant issue for the PSC Register's ability to tackle anti-money laundering and financial crime is that it relies on the honesty of individuals submitting information to the register. If opaque corporate structures are used to hide criminal activity, it is unlikely that these people will also submit accurate information to the register.

WHAT ELSE IS CHANGING?

In addition to extending the requirement to publish registers to British Overseas Territories and Crown Dependencies, the UK Government has also committed to creating a new register for overseas companies. [8] The register will prohibit overseas companies from buying property in the UK or securing UK Government contracts without submitting information on beneficial ownership.

The consequences of not carrying out effective customer due diligence are also the subject of change. Failing to prevent money laundering, including by failing to carry out effective customer due diligence, already has serious consequences such as personal criminal liability. Ineffective customer due diligence can also result in further "failure to prevent" offences, including:

- Failure to prevent tax evasion: the Criminal Finances Act 2017 widened the net as to who can be held accountable for failing to prevent tax evasion (in the UK or overseas), so that corporate entities can be held accountable for the acts of their associates [9] when those associates facilitate tax evasion. An entity can be subject to an unlimited fine unless it can show that reasonable prevention procedures were in place.
- Failing to prevent other economic crime: the UK Government is considering whether to extend the criminal offence of a failure to prevent bribery [10] to apply to other economic crimes. [11] Adequate procedures can act as a defence for an entity.

WHAT CAN I DO?

- Review and update information on your own beneficial owners, particularly in jurisdictions which are due to publish registers.
- Periodically review and update information on customers' beneficial owners.
- Revise anti-money laundering systems and procedures to ensure that a robust due diligence process is in place taking into account public registers.

NOTES

[1] The International Monetary Fund estimates that money laundering represents between 2-5% of GDP globally.
[2] Sir Alan Duncan (FCO), Sanctions and Anti-Money Laundering Bill [Lords] debate, 20 February 2018, Volume 636
[3] The "People with Significant Control" register records individuals who own or control more than 25% of UK companies, Societates Europaeae and limited liability partnerships.
[4] For a list of British Overseas Territories: click here
For a list of Crown Dependencies: click here
[5] Gibraltar has committed to implementing the EU's fifth anti-money laundering directive, which includes provisions for public registers of beneficial ownership, by 2020.
[6] https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8259
[7] The Cornish people are a group native to, or associated with, the county of Cornwall in South West England, and a recognised national minority in the United Kingdom.
[8] A non-UK registered body with legal personality that can own property in its own right.
[9] "Associated person" is defined to include employees, agents and those providing a service for the firm or on its behalf whether in the UK or overseas.
[10] Section 7 of the Bribery Act 2010.

[11] In March 2019, the House of Lords' Select Committee on the Bribery Act 2010 called on the Government to not delay in analysing whether to extend the "failure to prevent" offence to other economic crimes. (pages 66 - 67)

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