

Response to the Department for Business, Energy & Industrial Strategy:

Call for evidence on a register of beneficial owners of overseas companies and other legal entities that own UK property or participate in UK government procurement

By: Rt. Hon. Dame Margaret Hodge

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FOREWORD

The Panama papers confirmed what many of us already suspected: British overseas territories and Crown dependencies have a prominent role in international money-laundering, corruption and tax evasion. As a Member of the House of Commons, I proposed an amendment to the Criminal Finances Bill for requiring the overseas territories to adopt public registers of beneficial owners of companies (similar to the PSC register currently being implemented in the UK). The idea had been previously supported by our former Prime Minister, David Cameron, and gained significant cross-party support in both Houses. A 2016 survey commissioned by Global Witness and Oxfam showed that 79 percent of British voters want the Government to legally oblige the overseas territories to uphold the same transparency standards for companies registered there as the UK.¹

The initiative was not supported by our current Government, which seems satisfied with law enforcement authorities having automatic access to beneficial ownership data pursuant to the ‘exchange of notes’ signed with the overseas territories and Crown dependencies.

I prefer public registers.

Public access to central registers increases scrutiny over private dealings by allowing everyone to know the identity of those benefiting from such deals. Law enforcement and governmental actors are joined by journalists and civil society actors in identifying potential crimes and criminals. This transparency constitutes a strong deterrent against criminal activity and increases public trust in governmental agencies.

Regarding the object of the present public consultation, I believe that the creation of a public register of beneficial owners of overseas legal entities that own UK property or participate in UK government procurement is key for tackling money laundering, corruption and tax evasion in our jurisdiction.

The National Crime Agency observed that the “*UK property market is a preferred destination for criminal proceeds*” by corrupt politically exposed persons.² A report recently published by Transparency International UK and Thomson Reuters shows that “*land and property in London are popular choices for those looking to launder the proceeds of*

¹ Global Witness and Oxfam, ‘Post-Panama Papers survey’ (7th May 2016), available at <http://www.oxfam.org.uk/media-centre/press-releases/2016/05/80-percent-of-uk-voters-think-pm-has-moral-duty-to-ensure-offshore-transparency-says-new-poll> (10.5.2017).

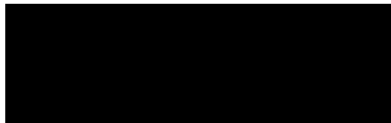
² National Crime Agency, ‘National Strategic Assessment of Serious and Organised Crime 2016’ (9th September 2016), available at <http://www.nationalcrimeagency.gov.uk/publications/731-national-strategic-assessment-of-serious-and-organised-crime-2016/file> (10.5.2017), at 30.

*corruption into the UK.*³ The same report noted that those engaged in money laundering through the acquisition of land and property in London often use legal entities based in jurisdictions which have strong privacy protection rules and where information about companies and their beneficial owners is not available (e.g. British Virgin Islands, Jersey and Panama). The numbers are revealing: 91 percent of overseas companies owning property or land in London (44,022 land titles) are registered in a secrecy jurisdiction; basic details are not available for nearly 50 percent of these overseas companies.⁴ The report concludes that “[w]ithout the introduction of a beneficial ownership register for overseas companies owning land or property in the UK, there will continue to be a blind spot in the UK’s money laundering defenses.”⁵

According to the 2016 Global Witness and Oxfam survey referred above, 85 percent of British voters think that all UK and offshore companies should have to reveal their real owners. The new overseas register discussed in the consultation paper, together with the PSC register, will allow everyone to find out the name of the corporation owning a particular property in the UK (by consulting the Land Registry) and then looking at the company’s beneficial owners (information held by the Companies House), regardless of whether the company is incorporated in the UK (PSC register) or outside the UK (new overseas register).

I believe that this transparency will constitute a strong deterrent against money laundering and tax evasion in the UK and will increase public trust in our Government. For these reasons, I strongly support the creation of the new overseas register.

15th May 2017



(Rt. Hon. Dame Margaret Hodge)

³ Transparency International UK & Thomson Reuters, ‘London Property: A top destination for money launderers’ (December 2016), available at <http://www.transparency.org.uk/publications/london-property-tr-ti-uk/> (10.5.2017), at 3.

⁴ Ibid, at 8.

⁵ Ibid, at 4.

QUESTIONS

Question 1: *Do you agree that all legal forms that can hold properties should be in the scope of the new register's requirements? If not, what legal forms should we consider an exemption for and why?*

Summary:

The issue is whether the new overseas register is limited to companies limited by shares, or whether it should encompass all types of legal entities.

Suggested solution:

I agree that the new overseas register should apply to all types of legal entities, including companies and partnerships (regardless of their obligations under the Overseas Companies Regulations 2009).⁶ It should also include overseas trusts, foundations, charities and not-for-profit entities. Otherwise, those wishing to hide their identity will be able to choose less transparent entities and arrangements to circumvent the new regime.

If the overall objective of the new overseas register is to promote transparency of property ownership to combat money laundering, corruption and tax evasion, restricting its scope to specific types of entities will restrict its effectiveness in combating money laundering, corruption and tax evasion. The same can be said in regard to the current register of People with Significant Control (PSC register), which restricted scope (companies, limited liability partnerships and Societates Europaeae) will soon be extended to cover new legal entities (according to the requirements of the EU Fourth Money Laundering Directive, to be transposed by June 2017).⁷

The consultation paper does not refer to the definition of 'overseas companies and other legal entities' and whether these include entities formed in the British overseas territories and Crown dependencies. I suggest that the legislation clarifies that it applied to entities formed in the overseas territories and Crown dependencies.

⁶ Andres Knobel, Markus Meinzer and Moran Harari, 'What should be included in Corporate Registries? A Data Checklist' (13th April 2017), available at https://www.taxjustice.net/wp-content/uploads/2017/04/TJN2017_BO-Registry-ChecklistGuidelines-Apr.pdf (8.5.2017), at 18.

⁷ Department for Business, Energy & Industrial Strategy, 'Implementation of the Fourth Money Laundering Directive – Discussion paper on the transposition of Article 30: beneficial ownership of corporate and other legal entities' (November 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565095/beis-16-38-4th-money-laundering-directive-transposition-discussion-paper.pdf (9.5.2017).

Question 2: *Is the suggested definition of leasehold appropriate?*

Summary:

Leases over 7 years are required to be registered in England and Wales, leases over 20 years are required to be registered in Scotland and leases over 21 years are required to be registered in Northern Ireland.

It is proposed that overseas legal entities that are leaseholders of property are required to identify their beneficial owners only if the lease is for more than 21 years. It is explained that only these leaseholds are analogous to freeholds.

Suggested solution:

I suggest that the threshold is reduced from 21 years to 7 years. This would increase transparency and align the new overseas register with the requirements currently in place for England and Wales. The Devolved Administrations should be consulted in this respect.

Regardless of the length of time adopted (21/7 years), it is important that the legislation establishes clear rules for calculating the relevant period. In this regard, the main question is whether registration should be required for leases granted for 21/7 years (as shown in the written agreement), or whether the new regime should take into account the effective duration of the lease (i.e., effective possession)? I suggest that both criteria are adopted. This would reduce opportunities for beneficial owners to hide their identity by breaking long periods of effective possession (over 21/7 years) into short-duration lease agreements (less than 21/7 years).

Another important issue respects the identity of the ultimate beneficial owner. It is possible to circumvent the obligation of registering beneficial owners if a property is leased for 20/6 years to a company owned by the husband and then for another 20/6 years to a company owned by the wife. I suggest that careful consideration is given to the problem of constructive ownership (*see below Question 4*).

Question 3: *Will setting the leasehold definition at leases over 21 years create any unintended consequences?*

Summary:

It is suggested that only leaseholds for more than 21 years are analogous to freeholds.

Suggested solution:

Twenty-one years is a long period. Those engaged in criminal activity will attempt to hide their identity by formally ending the lease before the 21 years. There should be a requirement for considering whether the company party to the lease agreement is related or associated with the previous leaseholder. Again, it is important to establish effective rules of constructive ownership (*see below Question 4*).

Question 4: *Do you agree that the definition of beneficial owner for the new overseas register should be aligned to the definition of PSC in the PSC regime?*

Summary:

It is proposed that the definition of beneficial owner is aligned with the definition of ‘Person of Significant Control’ (PSC) for the purposes of the ‘Register of People with Significant Control’ (PSC register) to avoid mismatches regarding the information on UK companies and prevent manipulation of holding structures.

The current definition of PSC is set out in Part 1 of Schedule 1A to the Companies Act 2006, according to which a person is a PSC if they meet one of the following conditions in respect of a UK company:

- (i) Directly or indirectly holds more than 25% of the shares in the company;
- (ii) Directly or indirectly holds more than 25% of the voting rights in the company;
- (iii) Directly or indirectly holds the power to appoint or remove a majority of the board of directors of the company;
- (iv) Otherwise has the right to exercise or actually exercises significant influence or control over the company (‘significant control’ is set out in the statutory guidance);⁸
or
- (v) Has the right to exercise or actually exercises significant influence or control over a trust or firm that is not a legal entity, which meets one or more of conditions (i) to (iv).

Suggested solution:

I agree that the definition of beneficial owner for the purposes of the new register should be aligned with the definition of PSC for the purposes of the PSC register.

My concern is the definition of PSC for the purposes of the PSC register. I suggest that the Government takes into consideration the following two circumstances.

Firstly, the amendments to the Fourth Money Laundering Directive that are being discussed presently and which lower the threshold of ownership from 25% to 10% in relation to ‘Passive Non-Financial Entities’ (intermediaries). This might require changing the definition of PSC in the future. It is worth noting that lower ownership thresholds have been supported by several authors.⁹

Second, the absence of a comprehensive definition of ‘constructive ownership’ in the PSC regime. In law, there are three main types of ownership:

- (a) direct ownership means that an individual is the legal owner;

⁸ Department for Business Innovation & Skills, ‘Statutory Guidance on the meaning of “significant influence or control” over companies in the context of the Register of People with Significant Control’ (April 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523120/PSC_statutory_guidance_companies.pdf (8.5.2017).

⁹ Andres Knobel, Markus Meinzer and Moran Harari, ‘What should be included in Corporate Registries? A Data Checklist’ (13th April 2017), available at https://www.taxjustice.net/wp-content/uploads/2017/04/TJN2017_BO-Registry-ChecklistGuidelines-Apr.pdf (8.5.2017), at 20.

- (b) indirect ownership means that an individual holds his rights through another company (or legal entity);
- (c) constructive ownership means that an individual is so closely related to the individual that owns (directly or indirectly) that he should be treated like an owner.

Constructive ownership constitutes an important tool to ensure that both the PSC register and the new overseas register accurately show who benefits from the legal entity and who exercises control over it. For instance, it would allow to treat an individual as the constructive owner of his spouse's property.

I suggest that both the definitions of PSC for the purposes of the PSC register and of beneficial owner for the purposes of the new overseas register should be considered together and reviewed to deal with the circumstances referred above.

For purposes of clarity and certainty, I also suggest that all relevant rules are gathered in one piece of legislation, instead of being dispersed by several legislative acts, regulations and *ad hoc* documents containing 'statutory guidance'.

Question 10: *Do you agree that the duration of the period given to overseas entities to comply with the new requirements should be one year?*

Summary:

Overseas entities that already own property will be given a year to comply with the new requirements and apply for a registration number. The Government aims that, before the law comes into force, all overseas entities that own UK property will be written to setting out the requirements and the consequences of not complying.

Suggested solution:

I agree with the timeframe proposed by the Government.

Question 11: *Is a system of statutory restrictions and putting notes on the register, backed up by criminal offences, a comprehensive way to ensure compliance?*

Summary:

Overseas legal entities that wish to buy property will have to apply to register their beneficial ownership information with Companies House to obtain an 'overseas registration number'. The Government proposes the following measures:

- Statutory restrictions: The 'overseas registration number' is required for (a) the contract to be valid, and (b) the transfer to be registered with the Land Registry (transfer of title). The Land Registry will use the 'overseas registration number' supplied on the form to check that the overseas entity has indeed provided its beneficial ownership information to Companies House (and that this information has been updated as required). This means that if the entity is not fully compliant with

the new overseas register's requirements, it will not be able to sell property, let property for a long period or use property as security for a loan.

- Notes on the register: At the end of the first year, all overseas entities that own property in the UK will have a note on their title (visible to prospective buyers) that will reflect the general prohibition from selling, leasing or mortgaging their property, unless they are fully compliant with the new requirements.
- Criminal offences

Suggested solution:

In my opinion, the proposed approach is not comprehensive. It will be fairly easy for individuals to avoid the regime by acquiring or transferring the overseas entity that owns property in the UK (indirect acquisitions and transfers). The statutory restrictions described above only address overseas entities that acquire or transfer the property (direct acquisitions and transfers). An individual wanting to acquire property in the UK without disclosing his identity may achieve this goal by performing the following steps:

- 1) Having somebody else to set up an overseas company;
- 2) The overseas company obtains an 'overseas registration number';
- 3) The overseas company acquires property in the UK;
- 4) The individual wanting to hide his identity acquires the shares of the overseas company that owns property in the UK (but does not update the new overseas register);
- 5) The individual may (indirectly) sell property, let it and use it as security for a loan without restriction because the company has an 'overseas registration number'.

Except if the Land Registry (or other competent entity) checks the accuracy of the new overseas register, it will be easy for individuals to sell property, let it and use it as security for a loan, while hiding their identity.

Contract between the non-compliant overseas entity and a *bona fide* third party will be valid (because the overseas entity provided an 'overseas registration number' and the third party was not aware of the malfeasance) and the *bona fide* third party will be able to register the transfer with Land Registry.

For these reasons, I do not think that the measures proposed by the Government are comprehensive and I suggest that it adopts additional measures (*see Question 13 below*).

Question 12: *Do you agree that we should prevent any beneficial interest in the property passing to an overseas legal entity that does not have a valid registration number at completion or settlement?*

Summary:

See Question 11 above.

Suggested solution:

I agree but see *Question 11 above*.

Question 13: *Do you agree that the most appropriate way to do this would be to void the transfer document?*

Summary:

See Question 11 above.

Suggested solution:

I agree but, in my opinion, voiding the transfer document will not be enough for the new regime to be effective (see *Question 11 above*).

Question 14: *Is there another way that we could achieve this result?*

Summary:

(The Government did not indicate alternative suggestions).

Suggested solution:

It is important that the Government defines clear obligations (and corresponding sanctions) for overseas companies, and managing officers and beneficial owners.

Overseas entities should have the following obligations:

- | | |
|-------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Information</i> | <ol style="list-style-type: none">1) Identify their beneficial owners and contact them to confirm the relevant information;2) Notify the competent enforcement authorities, if beneficial owners do not respond or provide false information. |
| <i>Private register</i> | <ol style="list-style-type: none">3) Keep an updated register of their beneficial owners, or explain why there are no registered beneficial owners;4) Provide copy of a list of their beneficial owners (including the relevant information) to anyone who requests it (within 5 working days). |
| <i>Public register</i> | <ol style="list-style-type: none">5) File the relevant information at Companies House (central public register), and keep an ‘overseas registration number’;6) Update the information with the Companies House frequently (e.g. notification within 15 days).¹⁰ |

In terms of sanctions, I think it would be important to freeze (and eventually withhold) the property rights held by non-compliant overseas companies. This would mean not only that the property could not be transferred, or mortgaged, but also that companies would not be able to exercise any right or derive any benefit.

¹⁰ Andres Knobel, Markus Meinzer and Moran Harari, ‘What should be included in Corporate Registries? A Data Checklist’ (13th April 2017), available at https://www.taxjustice.net/wp-content/uploads/2017/04/TJN2017_BO-Registry-ChecklistGuidelines-Apr.pdf (8.5.2017), at 4.

Regarding managing officers (responsible for ensuring that the overseas company complies with the new regime), it would be important that the Government establishes criminal offences and make them personally liable for damages that the overseas company and *bona fide* third parties might suffer.

Regarding beneficial owners, they should have the obligation to provide accurate information to the overseas company and inform the company of any change (within one month). In terms of sanctions, one effective measure would be freezing (and eventually withhold) their rights regarding the overseas company. It is worth noting that criminal sanctions are difficult to enforce if individuals that reside abroad.

Question 15: *Which is your preferred option for procurement and why?*

Summary:

The Government proposed the following three options for entities involved in government procurement:

- 1) Requiring the preferred supplier to provide its beneficial ownership information as a condition of being awarded the contract.
- 2) Excluding bids from entities that have not provided beneficial ownership information (Under procurement rules this could result in a three-year exclusion from bidding for that contracting authority's contracts).
- 3) Treating bids without specified beneficial ownership information as incomplete or non-compliant and rejecting them on these grounds (This exclusion would apply only to the procurement exercise in question and would not result in a three-year exclusion.)

Suggested solution:

I think that option 3 would be the most appropriate as it prevents the Government from wasting time and resources with bids that do not fulfill the requirements (option 1), and has a low impact burden on the Government (option 2).

I would like to point out two weaknesses in the Government's approach to procurement:

- a) It seems that the obligation to identify beneficial owners only refers to contractors. I suggest that it is extended to sub-contractors and suppliers that collaborate with the main contractors.
- b) The regime is only compulsory to central government. I suggest that it is extended to the wider public sector (including Local Authorities).

Question 16: *Do you agree that the information on the new register for overseas entities should be the same as the information required under the PSC regime?*

Summary:

The Government suggests that, in relation to the beneficial owners, the same information should be required for both the new overseas register and the PSC register. Under section 790K of the Companies Act 2006, companies are required to provide the following information with regard to their beneficial owners:

- The individual's name;
- Their date of birth (only month and year public);
- Their nationality;
- The country or state (or part of the United Kingdom) where they usually reside;
- A service address for them;
- Their usual residential address (not publicly accessible);
- The nature of his or her control over the company;
- The date on which that person became a person with significant control over the company;
- If there are any restrictions in place on using or disclosing any of the individual's PSC particulars (this is in cases where the individual's details are not made publicly accessible due to that person having made a successful application for protection under the protection regime).

In relation to the overseas companies, the Government proposes that the following information should be required:

- The entity's name and legal form;
- The name and contact details of the person completing the application form;
- The address of the entity's registered office or if none is available, another contact address;
- A contact email address;
- The entity's country of incorporation and any other national registration number allocated to that entity.

Suggested solution:

In relation to beneficial owners, I agree that the information on the new overseas register should be the same as the information required under the PSC regime. I think that both registers should include the taxpayer number in the country of residence.¹¹

I suggest that the registers contains historical data about all past beneficial owners, and the relevant period, instead of only containing information regarding current beneficial owners.¹²

¹¹ Andres Knobel, Markus Meinzer and Moran Harari, 'What should be included in Corporate Registries? A Data Checklist' (13th April 2017), available at https://www.taxjustice.net/wp-content/uploads/2017/04/TJN2017_BO-Registry-ChecklistGuidelines-Apr.pdf (8.5.2017), at 10.

¹² Ibid, at 4.

Question 17: *Do you agree that entities unable to give information about beneficial owners should be asked to provide information about their managing officers?*

Summary:

It is proposed that when overseas entities cannot get information about their beneficial owners (after taking ‘reasonable steps’), and when no owner meets the conditions for being a beneficial owner, the overseas entity is required to identify and provide the following information about individuals responsible for managing the day-to-day activities of the company (managing officers):

- Name and any former names;
- A service address;
- Usual residential address (this will not be made public);
- The country or state (or part of the United Kingdom) in which they are usually resident;
- Nationality;
- Business occupation (if any);
- Date of birth (only month and year of birth will be publicly available).

Where the managing officer is a legal entity:

- Corporate or firm name;
- Registered or principal office;
- The legal form of the company and law by which it is governed;
- The register in which it is entered (including details of the state) and its registration number in that register.

Suggested solution:

I agree that managing officers should be identified when entities do not give information about beneficial owners.¹³

Question 18: *Is there any additional information that we should ask for from entities that are unable to give information about their beneficial owners?*

Summary:

(The Government makes no suggestions in this respect).

¹³ Ibid, at 8.

Suggested solution:

When entities do not give information about beneficial owners, I suggest that the top five owners are identified.¹⁴ This would ensure that, even if no individual passes the ownership tests, at least the most relevant owners are identified.

Question 19: *Is a requirement for an update every two years appropriate?*

Summary:

The government proposes that the information on the new overseas register should be updated at least once every two years.

Suggested solution:

I disagree that the period of two years is appropriate. At the moment, UK companies have to update the PSC register yearly, and the Government is consulting on the possibility of reducing this period to six months to ensure that the PSC regime is aligned with the Fourth Money Laundering Directive.

I suggest that overseas companies are required to update the information with the Companies House frequently (e.g. notification within 15 days). *See Question 14 above.*

Question 20: *Would a criminal offence be an appropriate way of enforcing the requirement to update information?*

Summary:

(The Government makes no further suggestions in this respect).

Suggested solution:

I agree that criminal offenses are appropriate. *See Question 14 above.*

Question 21: *Do our proposals achieve the right balance between ensuring compliance and enabling overseas entities to maintain existing assets?*

Summary:

The Government is considering making it an offence if entities fail to keep their information updated, similar to section 1112 of the Companies Act 2006. The latter states that it is a criminal offence for a person to knowingly or recklessly provide false or misleading

¹⁴ Ibid, at 8.

information to the registrar at Companies House in purported compliance with a company filing obligation.

It is suggested that the new overseas register could deter investment in the UK and hinder economic growth, and that, for this reason, it would be important to strike the right balance between (a) countering corruption and money laundry and (b) promoting investment and economic growth.

Suggested solution:

As I mentioned above, I believe that our Government should define clear obligations (and corresponding sanctions) for overseas companies, managing officers and beneficial owners. *See Question 14 above.*

I do not think that the regime proposed would deter investment that benefits our economy. Not all foreign investment benefits the UK economy. Proceeds from corruption and criminal activity that are invested in UK property do not create jobs or contribute to economic growth of our economy.

I seriously doubt that investment that benefits the UK economy will be deterred by the creation of the new overseas register since it is not likely that this register would not deter good, clean investment, from individuals that have nothing to hide. Transparency deters criminal and corrupt individuals from using companies (or other legal entities) to hide the proceeds of corruption and organized crime.

Question 22: *Are these mechanisms enough to deal with situations where bidders provide false beneficial ownership information or do not keep their information up to date?*

Summary:

The Government suggests that overseas entities that have been awarded a contract have the obligation to keep their information about beneficial owners updated and that the Government may terminate the contract in two situations:

- a) Where a bidder provides false or inaccurate beneficial ownership information;
- b) Where a bidder does not keep its beneficial ownership information updated during a contract.

Suggested solution:

In my opinion, overseas entities that have been awarded a contract should be obliged to inform directly the Government of any changes, to update the overseas register during the contractual period and to provide information to anyone who requests it.

I also suggest that overseas entities contracting with the UK Government and not complying with their obligations should be liable for any damages caused by the termination of the contract by the Government on the grounds that they provided false or inaccurate information, or failed to update that information.

Question 23: *Do you think that this provides the correct balance between protecting individuals from harm and ensuring transparency of how properties are owned?*

Summary:

The Government proposed a protection regime which allows a company or individual to apply to have information about a beneficial owner or managing officer suppressed if the individual is at risk of violence or intimidation as a result of that information being made public. It proposes enabling individuals to apply for their information to be suppressed based on four criteria:

- 1) The individual is at risk of violence or intimidation due to the activities of the entity, or the way the property is being used;
- 2) Certain characteristics or attributes of that individual when associated with that entity or property could put them or someone who lives with them at risk of violence or intimidation;
- 3) Publicly linking the property or entity to the individual will lead to an elevated public safety risk;
- 4) Protection for minors or people with diminished capacity.

Applications for information to be suppressed will be assessed by an appropriate enforcement agency to ensure that information is only suppressed where the risk is credible and verifiable.

Suggested solution:

I agree with the Government's proposal. I suggest that the Government defines credible and verifiable risk.

Question 24: *Are there additional situations we should consider where protections should be granted?*

Summary:

(The Government makes no further suggestions in this respect).

Suggested solution:

I think that the enforcement agency should have some discretion to make sure that beneficial owners or managing officers are not put at risk.

I suggest that, when the circumstances referred above are verified, the Government could request the information regarding beneficial owners and managing directors to be communicated to Companies House and kept confidential. I think it is important that companies are not exempted to provide information regarding their beneficial owners. Confidential information would only be accessible to enforcement agencies.