

# A REGISTER OF BENEFICIAL OWNERS OF OVERSEAS COMPANIES AND OTHER LEGAL ENTITIES

## DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY CONSULTATION

The International Financial Centres Forum ('the Forum') is a member-funded, private sector, not-for-profit organisation. The Forum advocates responsible cross-border financial intermediation in support of trade and investment as a means of promoting economic growth and enhancing development prospects. Members of the Forum include professional service firms and businesses based in the Cayman Islands, Bermuda, the British Virgin Islands, Gibraltar, Guernsey, the Isle of Man, and Jersey (the 'CDOTs').<sup>1</sup>

The Forum welcomes the opportunity to respond to the call for evidence on the proposal for a register showing who owns and controls overseas legal entities that own UK property or participate in UK government procurement (the 'proposed register'). We understand that there will be many experts responding on technical aspects of the proposed register, so we will keep our comments high-level.

### 1. No emerging standard of public access

1.1. We understand that BEIS has taken political direction from the last government that the proposed register ought to be public. We note that public registers are unusual:

1.1.1. The European Council has withdrawn the proposal in the Fifth Anti-Money Laundering Directive to require public registers of corporate beneficial ownership.<sup>2</sup> This came after the European Data Protection Supervisor's opinion that public registers are a breach of data protection rules.<sup>3</sup> Furthermore, the legal adviser to the Council of the European Union has advised that the EU does not have the power to require Member States to adopt public registers, as they are disproportionate and therefore exceed the competences of the EU.<sup>4</sup> As such, publicly-accessible registers may not become predominant in the EU.

<sup>1</sup> Member firms include international law and professional firms Appleby, Butterfield Group, Conyers Dill & Pearman, Harneys, Hassans, Maples and Calder, Mourant Ozannes, Ogier, Rawlinson & Hunter, Vistra Group, and Walkers. The Forum is advised by Canadian and international lawyers Stikeman Elliott (London) LLP and public affairs agency Lansons.

<sup>2</sup> Alexander Lewis (2 January 2017): "[Beneficial ownership proposal retains 'legitimate interest' rule](#)". *Tax Notes International*.

<sup>3</sup> European Data Protection Supervisor (2 February 2017): "[Opinion 1/2017: EDPS Opinion on a Commission Proposal amending Directive \(EU\) 2015/849 and Directive 2009/101/EC](#)".

<sup>4</sup> Council Legal Service director Hubert Legal's comments to the Economic and Financial Affairs Council public session (8 November 2016). Accessible [here](#).

- 1.1.2. The United States does not have a central register in any of its fifty states. PwC wrote in August 2016, “There are certainly no plans to create a UBO register in the United States.”<sup>5</sup> The prospect of public registers will presumably have receded further with the Trump presidency.
- 1.1.3. The world’s third and fourth-largest financial centres, Hong Kong and Singapore,<sup>6</sup> are both introducing non-public registers, accessible only to domestic law enforcement and tax authorities. The Hong Kong response to a consultation on 13 April 2017 noted that ‘a vast majority of the respondents, including the Privacy Commissioner, considered that the PSC register should be made available for inspection by the competent authorities only’ and that ‘the UK was the only exception of allowing public access’.<sup>7</sup> Singapore’s Companies (Amendment) Act 2017 stipulates that it ‘must not disclose or make available for inspection the central register of controllers ... to any members of the public’.<sup>8</sup>
- 1.2. As Baroness Williams noted in the House of Lords in April 2017, “The UK is the only G20 country to have established a public register.”<sup>9</sup> This positioning could impair the attractiveness of the UK property market and competitiveness of its financial centre.

## **2. Equivalence**

- 2.1. We note and welcome the proposal to exempt companies incorporated in jurisdictions that have equivalent systems. As public registers are unusual, granting exemptions solely to jurisdictions that have adopted public registers will mean that few jurisdictions will be exempt and that significant duplication will occur, further impeding the competitiveness of the UK property market.
- 2.2. The CDOTs have required corporate service providers (‘CSPs’) to collect beneficial ownership information for approximately the last fifteen years. This information is verified by regulated and licensed CSPs, which are subject to serious sanctions for non-compliance. This is demonstrated by all CDOTs having among the highest rates of verification, in line with FATF Recommendations, in the world.<sup>10</sup> The CDOTs will, from July 2017, collect this beneficial ownership information in centralised platforms.

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<sup>5</sup> PwC (2016): “[Navigating a path to trust and transparency: Can Ultimate Beneficial Ownership Registers help prevent financial crime?](#)”

<sup>6</sup> Mark Yeandle (March 2017): “[Global Financial Centres Index 21](#)”. Z/Yen.

<sup>7</sup> Hong Kong Financial Services and the Treasury Bureau. “[Consultations on Legislative Proposals to Enhance Anti-Money Laundering and Counter-Terrorist Financing Regulations in Hong Kong](#)”.

<sup>8</sup> [Companies \(Amendment\) Act 2017](#).

<sup>9</sup> [HL Deb 3 April 2017, vol 782, col 908](#)

<sup>10</sup> See <http://www.globalshellgames.com/results--maps.html>, excerpted from Michael Findley, et al (2014): *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism*. Cambridge: Cambridge University Press.

- 2.3. Verification is vital, as it ensures that registers collecting the information is accurate and be trusted and used in both investigations and courts. Public information that is not verified could be acted upon even when inaccurate. As the Director of the OECD's Centre for Tax Policy & Administration Pascal Saint-Amans told the All-Party Parliamentary Group for Responsible Taxation in June 2016:<sup>11</sup>

"A public registry is not itself a solution if it is not properly fed with information. That can do a lot of damage."

- 2.4. The UK model does not provide for verification of information provided to Companies House and as such is arguably less useful for law enforcement purposes than the CDOT model. FATF Executive Secretary David Lewis noted as follows at the 2016 Commonwealth 'Tackling Corruption Together' summit:<sup>12</sup>

"Incomplete, unverified, out of date information in a public register is not as useful as law enforcement agencies being able to access the right information at the point they need it."

- 2.5. We would recommend that exemption be determined by virtue of the effectiveness of information verification and sharing with law enforcement.

- 2.6. We understand that the United Kingdom may be under an obligation to treat EU Member States' systems as equivalent:

2.6.1. Under the Third Capital Movement Directive (CMD3), Art 1, "Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States".<sup>13</sup> Per Annex I, 'Persons' is defined to include all companies. As CMD3 prohibits barriers to the 'conclusion and performance' of capital movements, including investments in real estate on national territory by non-residents, it would not be lawful for the UK to treat EU Member States' systems as not being equivalent while it remains subject to CMD3, regardless of the regulatory standards in other EU Member States.

2.6.2. Under Article 49 of the Treaty on the Functioning of the European Union, companies established in other EU Member States must be afforded (at least) equal treatment to companies established domestically.<sup>14</sup> This freedom is directly effective,<sup>15</sup> and a lack of mutual equivalence legislation is not a permitted reason not to treat companies established in other Member States as not equivalent.<sup>16</sup> Treating other EU Member States as not being equivalent – even where their standards are not, in actuality, equivalent – would thus be a potential breach of EU law.

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<sup>11</sup> Emma Rumney (15 June 2016): "[Time not right for public registers of beneficial ownership, says OECD tax chief](#)". *Public Finance International*.

<sup>12</sup> David Lewis (11 May 2016): "[Ending Impunity: Creating a level playing field by enforcing the conventions we have](#)." FATF.

<sup>13</sup> [Council Directive 88/361/EEC of 24 June 1988](#).

<sup>14</sup> [Treaty on the Functioning of the European Union](#) [2012] OJ C 326

<sup>15</sup> Case C-2/74 *Reyners v Belgium* [1974] ECR 631

<sup>16</sup> Case C-340/89 *Vlassopoulou v Ministerium für Justiz Baden-Württemberg* [1991] ECR I-2357

As EU Member States will be treated as equivalent, the UK may see it as logically necessary for the regulatory standards required by EU law to be the measure of equivalence for other jurisdictions.

- 2.7. It is unlikely that EU Member States will mirror the approach for corporate beneficial ownership tracking adopted by the UK's PSC register and the proposed model for the proposed register. As noted at paragraph 36 of the consultation document, AMLD4 may be viewed as a basis for 'equivalence', as it is the basic standard that all EU Member States must abide by. AMLD4 requires:

- 2.7.1. a central register, accessible by law enforcement. This does not need to be a public register; Malta will only allow access to government (as the CDOTs do), while Italy and the Czech Republic will require a court order for others to access it;<sup>17</sup>
- 2.7.2. information to be made available to UK competent authorities in a timely manner;<sup>18</sup> and
- 2.7.3. an assessment to be made of the effectiveness of information exchange between Member States by June 2019.<sup>19</sup>

- 2.8. With regards to beneficial ownership of companies, the CDOTs have committed to:

- 2.8.1. collect beneficial ownership information in central registers from July 2017;
- 2.8.2. provide the information to UK competent authorities within 24 hours (and 1 hour in urgent situations); and
- 2.8.3. be assessed by the UK for the effectiveness of this system by June 2019.<sup>20</sup>

This ensures that UK law enforcement can check both the information and the procedures, so that the CDOTs are not 'marking their own homework'.

- 2.9. Furthermore, the Exchanges of Notes under which the CDOTs committed to adopt their regimes expressly noted that they were being introduced 'in the context of ... the UK Government's decision to establish a public central register'.<sup>21</sup> The Notes introduce commitments from both parties, implying that the regimes introduced by the CDOTs are being introduced as analogues and equivalents. As Baroness Williams noted, "This demonstrates what can be achieved by working consensually with the Overseas Territories and the Crown Dependencies."<sup>22</sup> It would be a strange outcome to not treat these systems as equivalent when they were designed by reference to one another and through consensual agreement.

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<sup>17</sup> Elodie Lamer (6 March 2017): "[EU Puts Public Registers of Beneficial Ownership Back on Table](#)". *Tax Notes International*.

<sup>18</sup> [Directive \(EU\) 2015/849 of 20 May 2015](#), s30(7)

<sup>19</sup> [Directive \(EU\) 2015/849 of 20 May 2015](#), s30(10)

<sup>20</sup> Proceeds of Crime Act 2002, s445A, as inserted by the [Criminal Finances Act 2017](#), s34.

<sup>21</sup> The language is identical in all Exchanges of Notes, but see by way of example para 3 of the Exchange of Notes between the United Kingdom and the British Virgin Islands dated 8 April 2016, accessible [here](#).

<sup>22</sup> [HL Deb 25 April 2017, vol 782, col 1311](#)

- 2.10. The CDOT company registers will therefore meet the obligations imposed on EU Member States by AMLD4, and for this reason, we believe they should be treated as equivalent. Failure to do so would result in exemption for some jurisdictions and non-exemption for others adopting the same approach. This would be a peculiar outcome and deter the creation of a level playing field.

### **3. Procedure for correction**

- 3.1. The PSC public register approach is already operational in the UK. Presumably, BEIS will have regards for any issues posed by the potential functioning of that system in the approach to the proposed register. Our comments below accordingly consider the reliance on the 'many eyes' approach to underpin the accuracy of the PSC register and accordingly whether this approach is suitable for the proposed register.
- 3.2. Both then-Prime Minister David Cameron and current Home Office and Foreign Office ministers have stated that public access to the proposed register is the 'gold standard' on the basis that public examination of the proposed register will improve accuracy.<sup>23</sup> So far as we are aware, there is no recorded, detailed, and publicly-accessible procedure for the correction of errors identified by the public – undermining this claim.
- 3.3. This gap will be problematic in the UK's upcoming FATF and OECD peer reviews. Technical criteria 24.5 and 24.7 and effectiveness criteria 5.4 and 5.5 require UBO information to be 'accurate'. The FATF criteria include examples of behaviour that would indicate adherence to the required Immediate Outcomes; example 8 of behaviour supporting Immediate Outcome 5 is for jurisdictions to ensure that all information is certified or verified.<sup>24</sup> However, without proper verification by CSPs (as in the CDOTs) and without an effective mechanism by which information identified as incorrect is rectified, neither the technical criteria nor the effectiveness criteria would be met. The G20 governments are also committed to require financial institutions and CSPs to 'verify the beneficial ownership of their customers', which does not happen with self-reported data.<sup>25</sup>
- 3.4. If a procedure is adopted, but Companies House does not follow it fully, Companies House may be liable for negligence. In *Sebry v Companies House*,<sup>26</sup> Companies House was held liable for £9m of losses when it processed a request incorrectly, as it was found to owe a duty of care to persons connected to companies on the register. Per *Sebry*,

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<sup>23</sup> eg [Prime Minister David Cameron's closing remarks to the Anti-Corruption Summit 2016](#) (12 May 2016); Baroness Anelay in [HL Deb 20 April 2016, vol 771, col 625](#); Baroness Williams in [HL Deb 3 April 2017, vol 782, col 905](#); Mark Hayward quoted by BEIS in ["Proposals to introduce transparency to overseas-owned UK property published"](#) (5 April 2017).

<sup>24</sup> FATF (February 2013): ["Methodology for Assessing Technical Compliance with the FATF Recommendations and the effectiveness of AML/CFT systems"](#).

<sup>25</sup> G20 (16 November 2014): ["G20 High-Level Principles on Beneficial Ownership Transparency"](#).

<sup>26</sup> *Sebry v Companies House* [2015] EWHC 115 (QB). In this case, the High Court issued a winding-up order against a company. Companies House's database was updated to show the order against a similarly-named company, leading to creditors withdrawing credit from that company and it going into liquidation. Companies House was found to owe a common law duty of care to registered companies and their beneficial owners to exercise reasonable skill and care when updating the record.

Companies House is not under an obligation to check information that is submitted, but if it holds out that it does correct errors, this could imply a duty of care. This may further be compounded by describing public registers as a 'gold standard', as public statements by ministers can create legally-enforceable legitimate expectations<sup>27</sup> and could create duties of care.<sup>28</sup> Furthermore, in *Sebry*, there was held to be a particular public interest in imposing the duty of care, as penalising Companies House for failures would improve the accuracy of the register. As the accuracy of the PSC register depends on corrections of errors identified by the public, it is likely in the public interest for Companies House to be penalised for failing to correct errors, and thus a duty of care may exist. Parliament could negate potential exposures for Companies House by excluding the Registrar from a duty of care, but that would undermine both the UK's mutual evaluation and the rule of law.

- 3.5. Unlike the PSC register or Companies House's services, which are used predominantly by commercial users, the proposed register is likely to be routinely used by laypersons. It is reasonably foreseeable that laypersons will not differentiate between information that has been verified and information that has not, and may put greater reliance on it than a commercial enterprise would. This may elevate the standard of care for the purposes of negligence.
- 3.6. If no mechanism is put in place, the UK will not meet its FATF and OECD obligations. If mechanisms are put in place and not implemented correctly or fully, this may give rise to liabilities on the part of Companies House. As such, we would suggest that the United Kingdom ensures that a system is adopted that does not rely on the 'many eyes' approach, but rather on the international standard of external verification.
- 3.7. We note the consensus that 'validation' (assumed to be synonymous with 'verification' under the FATF Recommendations) would be required to ensure the proposed register is of use to law enforcement and tax authorities. The consultation document notes that some respondents proposed that lawyers or accountants be held responsible for validating the information on the proposed register. This would be inferior to validation and maintenance of the information by CSPs, who have ongoing relationships with the corporate vehicles and their directing minds. This approach is supported by the World Bank, which stated in *Puppet Masters* that CSPs "have unique insight into the day-to-day operations and the real 'financial life' of the corporate vehicles", and cited the model used in Jersey as an example for the world to adopt.<sup>29</sup>

## **4. Data aggregation**

- 4.1. We endorse the policy intention of allowing for searches against names of properties, to ascertain the beneficial owner, and not against individuals, which would allow people to

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<sup>27</sup> *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755

<sup>28</sup> *San Sebastian v Minister Administering the Environmental Planning and Assessment Act* (1986) 162 CLR 340; *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481 (FC)

<sup>29</sup> Van der Does de Willebois, Emile et al (2011) : ["The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It"](#). Washington DC: World Bank.

be targeted or allow personal financial information to be collated. We are concerned by the prospect of data crawling, whereby a software program automatically collates information from publicly-accessible databases. If the proposed register follows the PSC public register model, this would allow data aggregators to turn a database searchable only by address into a database searchable by an individual's name, and combine it with vast amounts of other financial data, now to include their residential address. We believe mechanisms must be adopted to prevent this, as we understand that such 'reverse searches' are not within the policy intent of this legislation.

- 4.2. These mechanisms, such as requiring payment of a small fee to access each Companies House-allocated ID, would reduce the scope for data crawling. Alternatively, one could allow the notice on the Land Registry to be accessed only upon payment of a fee, or only in a physical hard copy, either option of which would ensure Companies House's service remains free for users and the database search function is less likely to be reversed. This is not without precedent; one of the few jurisdictions to commit to a public register, the Netherlands, will keep a record of all persons accessing the register and require payment of a fee for access, too, much like the Land Registry does for access to documents.<sup>30</sup> AMLD4 also envisages charging a fee for access.<sup>31</sup>
- 4.3. Furthermore, we note that Companies House's public automatic programming interface has been used by a number of services, include Encompass, to automate KYC.<sup>32</sup> However, under the Fourth Anti-Money Laundering Directive, obliged entities are not permitted to rely exclusively on central registers to perform KYC,<sup>33</sup> and excessive reliance on a register that is not systematically verified could replace the risk-based approach mandated by the Directive and by FATF with complacency and a tick-box approach. We believe that further extending this would harm the implementation of AMLD4, so would caution against mechanisms that allow for undue reliance on unverified information on the proposed register, including data aggregation.

## **5. Why overseas companies are used**

- 5.1. We note the significant confusion about why companies based in the CDOTS might be used to purchase UK real estate. Residential properties are now unlikely to be purchased by overseas companies for UK tax reasons, as this incurs the Annual Tax on Enveloped Dwellings, introduced in 2013. Instead, CDOT companies are used to purchase property due to other factors:
  - 5.1.1. Ownership of diversified international assets portfolios. UK residential or commercial real estate is often owned via CDOT holding companies as part of a diversified portfolio, including UK real estate. Companies incorporated in the

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<sup>30</sup> Government of the Netherlands (6 March 2017): "[Memorie van Toelichting](#)" (in Dutch), p16  
ThomsonReuters (10 April 2017): "[The Netherlands Issues Proposed Beneficial Ownership Register Legislation](#)"

<sup>31</sup> [Directive \(EU\) 2015/849 of 20 May 2015](#), s30(5)

<sup>32</sup> Jac Bond (12 January 2017): "[Using Companies House data: Encompass](#)". Companies House.

<sup>33</sup> [Directive \(EU\) 2015/849 of 20 May 2015](#), s30(8)

CDOTs – and especially the British Virgin Islands (**BVI**) – are often used for cross-border asset purchases, including real estate, to allow the pooling of investments via a neutral jurisdiction. Removing this real estate from the portfolio and holding it in an individual's name would undermine the ability to balance it against assets with other risk profiles. If the holding of UK real estate in such portfolios is discouraged, it will reduce the attractiveness of the UK property market to professional investors.

- 5.1.2. Familiarity of international banks with lending to, and getting credit support from, CDOT companies. BVI has a public security registration regime not dissimilar to the UK, which confers statutory priority under BVI law. Banks that have taken a charge over the shares in a BVI company to credit support a property financing will have rights that are similar to the rights of secured creditors under English law. That gives the banks a great deal of comfort with the BVI as a creditor-friendly jurisdiction.<sup>34</sup>
- 5.1.3. Familiarity with corporate governance structures. CDOT companies have standardised and internationally-familiar corporate governance structures that are often used to invest into China, Latin America, Africa, or other jurisdictions with poor corporate governance and rule of law. This has meant international investors are familiar with how they operate and makes it more cost-effective to invest via a CDOT company than purchasing a UK company.
- 5.1.4. Legitimate privacy concerns. UK residential property is held by many high-profile people for whom privacy and security is a concern. The fact that the information of BVI companies is not publicly available has been attractive and valued by high-profile individuals and families, many of whom would not want their personal UK home address to be a matter of public record for safety/security reasons. For example, UK-resident Emma Watson held her UK real estate through a BVI company to protect her from stalkers,<sup>35</sup> even though this incurs additional UK taxation.
- 5.1.5. Flexibility afforded by English law, eg avoiding restrictions on dispositive or testamentary freedom. Many investors are based in jurisdictions with Sharia law or other legal systems with limitations on disposal of property that English law does not provide. Investing via a CDOT company allows management of family affairs under English law, allowing families to manage their affairs by British social norms.

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<sup>34</sup> For more details on this, see Matthew Gilbert and Joanna Russell (1 October 2016): "[Cross border: the legal and practical advantages of incorporating a real estate holding company in the British Virgin Islands \(BVI\)](#)". Practical Law.

<sup>35</sup> Heather Saul (12 May 2016): "[Emma Watson used Panama Papers company to purchase property](#)." *The Independent*.

## **6. Industry survey**

- 6.1. We are pleased that BEIS has commissioned an industry survey on the impact of the proposed register. We would welcome the inclusion of a question to determine whether industry considers the proposed register and public access to be an effective means to achieve the government's policy objective. We note that the industry survey conducted prior to the introduction of the PSC register showed 82% of firms believed there would be no benefits to the PSC register or that they did not know of any.<sup>36</sup> It would be advantageous to assess whether perceptions have changed since 2014.
- 6.2. It would be further advantageous to ascertain the costs that private sector actors have faced due to the PSC register. The final Impact Assessment for the policy estimated that the net cost to business would be £97.5m a year.<sup>37</sup> It is unclear whether this was an accurate assessment of costs, and evaluating this would help inform on the impact of the proposed register.

## **7. Conclusion**

- 7.1. We accordingly recommend that:
  - 7.1.1. Equivalence of foreign jurisdictions should be assessed on an equal basis, with the criteria laid down by AMLD4 the basic standard for equivalence. As the CDOTs will, from July 2017, have central registers or platforms or verified information, to which UK law enforcement will have same-day access, their systems should be considered equivalent.
  - 7.1.2. The UK should either adopt a codified and publicly-accessible procedure to correct errors on its PSC register, and afford sufficient resources to correct clear errors and independently investigate verify information where it is contested, or else issue disclaimers that the information cannot be relied upon and cease referring to public registers as the 'gold standard', as this may create legal liability.
  - 7.1.3. Validation or verification should be done by the CSP or other incorporator in the overseas jurisdiction, to avoid duplication and to ensure that the professionals closest to the everyday life of the companies are responsible for monitoring them. If incorporation is done without a CSP, that may be grounds for the refusal of equivalence.
  - 7.1.4. If the proposed register is to be public, the freely-available information should not facilitate data-crawling that could allow the creation of a database searchable by the name of the beneficial owner. This could include imposing a fee on searches, as the Land Registry already charges for access to property

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<sup>36</sup> IFF Research (February 2014): "[Trust and Transparency Survey](#)".

<sup>37</sup> Department for Business, Innovation & Skills (25 June 2014): "[Transparency & Trust – Enhanced Transparency of Company Beneficial Ownership](#)".

documents. Given the policy intent, the size of the fee should be such that it does not deter people engaged in actual property disputes or investigations, but sufficient that it prevents data aggregators co-opting the content of the land register to facilitate reverse searches by subscribers to their databases.

7.1.5. The UK should survey industry for feedback on the benefits of public access, to assess whether support for it has grown after exposure to the PSC register, and on the costs to businesses of complying with the PSC register.

7.2. We hope that this submission is helpful and would be happy to provide additional comments on any of these points or to meet with the Department for Business, Energy & Industrial Strategy if invited to do so. Please do not hesitate to contact IFC Forum's chairman [REDACTED] or IFC Forum's legal counsel [REDACTED]