

A Register of Beneficial Owners of Overseas Companies and Other Legal Entities

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I support the principle of establishing such a register. These comments draw on my research into company ownership and control undertaken over the last 40 years. I concentrate on issues relevant to Questions 4, 5, 6, 16, and 17 in the Consultation document, though the points have implications for some other questions. The relevant questions are those concerned with the collection and recording of shareholder information:

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?

Question 5: Do you agree that entities that are not similar to UK companies limited by shares should use these adaptations to identify their beneficial owners?

Question 6: Do these adaptations provide sufficient flexibility in the beneficial owner conditions to apply to most legal entities? If not, what additional adaptations should there be?

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?

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

The cut-off for defining a PSC.

1. There are great advantages in using the existing definition of PSC, at least in the first instance. This will allow evolving measures and data collection methods to be applied in the new context. Any change to definition should be undertaken for both matters after experience of the system and awareness of any problems have been gained.

2. The one area where I think that change is required is in the percentage cut-off used for identifying a PSC, which is set at 25% (paragraph 32). The proposed cut-off level is too high and will not capture many situations where there is a significant controlling interest. The rationale behind this recommendation is set out at length in my book *Capitalist Property and Financial Power* (Harvester Press, 1986), which reviewed international data on the distribution of share ownership and the implications for control. The clear conclusion was that no arbitrary figure for control can be set as the percentage shareholding required depends upon the overall distribution of voting share capital in the company. In broad terms, the greater the dispersal of the share capital, the lower the percentage required for control. Where there are large blocks of shares, 25%, 30%, or more may be required. However, when the bulk of the shares are held in small blocks of less than 1%, significant control is possible with a holding of 10%.

3. Evidence reported in the book already mentioned and in *Corporate Business and Capitalist Classes* (Oxford University Press, 1997) shows that the most significant companies in Britain (and elsewhere) are those in which shares are dispersed among numerous financial institutions and custodian holdings. In these companies, an interest can acquire control by building up a 10% holding as there are no rival blocks of shares or coalitions of shareholders. While control may be possible with even less than this, I suggest that a 10% cut-off is likely to capture most cases of significant control. A cut-off of 25% will miss a significant number of cases of genuine control and predominating influence.

Control over blocks of votes by fund managers.

4. Attention has to be given to the discovery of voting blocks. The Consultation document discusses the case of beneficial trusts and of custodian holdings, but does not consider the implications of the ways in which voting control over shares is actually managed today.

5. Among the most significant shareholders today are pension funds, unit trusts, and similar bodies, where share are held for the benefit of large numbers of individuals. Such holdings are not, in themselves, bases of control (and are often, individually, below the cut-off threshold). However, the beneficiaries are rarely those who exercise the voting rights attached to the shares. The research that I have undertaken, reported in the books above, shows that the voting rights are generally held by the fund managers who operate the nominee accounts or work through the custodians.

6. Typically, the shares held by, for example, a pension fund will be divided among two or three fund managers. These fund managers will also act on behalf of other pension funds and unit trusts. Even allowing for the 'Chinese walls' that exist between the businesses of various clients and the fund manager's own business holdings, it is the case that large blocks of votes are effectively exercised by large fund managers.

7. There is, therefore, no direct mapping between the distribution of trust and custodian holdings in a register, on the one hand, and the distribution of voting powers on the other. The distribution of voting power can be discovered only by direct investigation into the detailed management of each nominee and custodian holding on the register and obtaining responses in detail from all fund managers involved.

8. This mobilisation of voting blocks is typically the case in the largest companies and allows fund managers who do not appear in the share register to accumulate blocks of, typically, 3%-6% of votes. It is possible, however, for those seeking control to acquire larger blocks that put them above the cut-off threshold for control. The proposals as currently set out would not capture these cases.

Problems of enforcement over disclosure.

9. Particular problems arise in tracking back the ultimate beneficiary or controller of overseas companies. The use of chains of intermediaries and of the dispersal of voting blocks makes identification problematic. It also means that legal compulsion to disclose information cannot easily operate. British companies can be compelled by law, but those who operate overseas, with bases often in special fiscal jurisdictions, cannot be so compelled – and if their control is not identified there cannot even be any attempt at enforcement. These issues are well-explored in research by academics such as Prem Sikka of Essex University (*No Accounting for Tax Havens*, with Austin Mitchell and others, 2002; and other publications).

10. A specific issue arises for those countries where bearer shares are common. In these cases, voting and beneficial rights are held by the actual holder and no name is registered with the company. Identifying the PSC in foreign companies with bearer share capital is likely to be impossible. Such shares are, of course, especially likely to be used where there is a covert attempt to build up control.