

Do UK Territories Need Beneficial Ownership Info Registers?

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Within its 65 sections, the Sanctions and Anti-Money Laundering Act, or SAMLA, covers two subjects: All but three sections provide for a framework of sanctions implementation in the United Kingdom following Brexit. The remaining three sections, precisely sections 49 to 51, deal with discrete anti-money laundering, or AML, issues, most controversially including the proposed introduction of publicly accessible registers of beneficial ownership information on companies (public UBO registers) in the U.K. overseas territories, or UKOTs.



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Whilst the departure of the U.K. from the [European Union](#) may, in time, have profound implications on the sanctions policy to be adopted in the UKOTs, we instead focus in this article on the more immediate consequence of the act: the intended introduction of public UBO registers in the UKOTs (principally the British Virgin Islands, Bermuda and the Cayman Islands) by the U.K.

Why Has the U.K. Legislated for the UKOTs?

First, some background: the UKOTs are the last remnants of those "pink bits" on historic maps otherwise known as the British Empire. As such the U.K., more precisely Her Majesty the Queen in Council, maintains reserved constitutional and prerogative powers to legislate for the "peace, order and good government of" the UKOTs. Legislation issued by Her Majesty in this way is termed an order in council. In practice, this power is very rarely used, an important fact considering that all UKOTs with sizable populations have "responsible government" comprising constitutional democracies.

Overuse would, indeed, run entirely contrary to the founding principle of modern U.K.-UKOT relations: namely, internal self-government of the UKOTs subject to periodic constitutional review but without day-to-day U.K. intervention. Overuse also runs the risk of disenfranchising local populations within the UKOTs from the democratic process and

drives independence movements. Despite this, the use of such powers is, in broad terms, welcomed in certain limited areas, specifically in the context of sanctions and human rights implementation in the UKOTs: here U.K. assistance ensures that measures fundamental to British (in a broad sense) values and foreign policy are uniformly implemented and administered among the UKOTs.

In the context of SAMLA itself, the three short sections dealing with AML issues, hint at the U.K.'s underlying intention — to target foreign actors who are perceived to be using companies and other undertakings in the UKOTs for illegitimate purposes including money laundering and terrorist financing. Two of those three sections, 50 and 51, deal exclusively with the introduction of public UBO registers in the UKOTs.

Requirements for a Public UBO Register: Sections 50 and 51 of SAMLA

The provisions mandating public UBO registers in the UKOTs are expressly stated as being for the purposes of investigating and preventing money laundering. Within this the U.K.'s secretary of state must provide reasonable assistance to the UKOTs to establish public UBO registers for companies. Following such, the secretary of state must lay before the U.K. Parliament, and no later than Dec. 31, 2020, a draft order in council providing for the creation and establishment of a public UBO register in the relevant UKOTs, where they have not introduced a public UBO register of companies themselves.

The order will set out the form that public UBO register will take, though it is expected to be largely similar to the U.K.'s own public UBO register, known as the person of significant control, or PSC, register administered by U.K. Companies House.

Of course, the introduction of an order in parliament by December 2020 is not the same as ensuring the establishment of public UBO registers in the UKOTs at that time. On this there has been some apparent acknowledgement by the U.K. government in recent discussions with the UKOTs in their recent Joint Ministerial Council Meeting (on Dec. 6, 2018). The Cayman Premier's Office has reported:

- Although the order would need to be presented to Parliament by December 2020, fully functioning public UBO registers may not need to be operational in the UKOTs until some years later, likely by 2023.

- The date of 2023 reflects the U.K.'s ambition to make the imposition of public UBO registers the "global standard" by then. Such moves could be strengthened through recent EU measures under the Fifth AML Directive and future revisions to FATF Recommendations. Such a position is unlikely to meet resistance in the UKOTs based on current pronouncements.[1]
- It has also been reported that there is a desire on the part of the U.K. government to ensure that the UKOTs should not be required to establish public UBO registers prior to the Crown Dependencies.

Politics and an 11th Hour U-Turn in Westminster

Unsurprisingly the enactment of sections 50 and 51 of SAMLA was highly politicized at the time of passing. The U.K. government was initially against implementation of these sections (which were added to the bill that became SAMLA and known as "Amendment 22") owing to fears, in the words of Rt. Hon Sir Alan Duncan — Minister for Europe and the Americas, that such provisions risked "legislating for [the UKOTs] without their consent [which] effectively disenfranchises their elected representatives." [2] The U.K. government's plan was to tie the requirement to introduce public UBO registers to a requirement that such registers would be the "global norm." Such position was, and continues to be, largely consistent with that of, for example, the BVI government. However, parliamentary arithmetic and the risk of a U.K. government defeat in the [House of Commons](#) meant that Amendment 22 passed and sections 50 and 51, in turn, became law under SAMLA.

Up until the last moments, however, the requirement for public UBO registers under SAMLA had been intended to be imposed additionally on the crown dependencies, or CDs, of Jersey, Guernsey and the Isle of Man in a similar way to the UKOTs, i.e. by implementation of order in council. Following 11th-hour meetings between the CD governments and the U.K. on the eve of SAMLA's enactment, the U.K. agreed that the requirement on the CDs would be excluded from the remit of the SAMLA as it was broadly, and correctly, determined that orders in council could not constitutionally legislate for CDs (in contrast to UKOTs). Nevertheless, the perception from the Caribbean to the CDs exclusion at the last minute was one of dismay with the Organisation of Eastern Caribbean States (OECS) calling the move "discriminatory" .[3]

What Happens Next?

Some UKOT governments, the BVI and the Cayman Islands included, are looking to judicially review the lawfulness of any eventual order in council issued under SAMLA. The grounds considered may include:

- Perceived unlawful trespass on devolved powers;
- The status of most UKOTs as having elected, “responsible government,” i.e. elected parliamentary style democracies;
- The risk that public UBO registers may not equate to “good governance” absent international recognition; and
- Possible breach of the right to privacy, a right guaranteed by prior constitutional orders.

Any judicial review proceedings is likely to test the relationship between the U.K. and the UKOTs to the core. At a more practical level however, and assuming hostility to the idea continues, it is not entirely clear how the U.K. will operationally create public UBO registers for the UKOTs without the cooperation or "buy in" of the local governments.

With this in mind, and taking account of the recent reported movements on the part of the U.K. government in December’s Joint Ministerial Council, it is entirely possible that a political solution, otherwise known as "kicking the can down the road," will be found that meets the requirements of both SAMLA and the UKOTs: postponement of operation until 2023 and once the occurrence of such registers become a global standard.

Is It Worth It?

The UKOTs which host international financial centers, including Bermuda, the BVI and the Cayman Islands, have robust AML regimes in place which are policed by trust and corporate service providers, or TCSPs, which are themselves subject to extensive regulation and licensing. Unlike the U.K.’s own public UBO register, the register of people with significant control, or PSC, KYC information transferred to and stored in the UKOTs by TCSPs is extensively vetted and updated by professionals at such organisations.

In addition under the U.K.’s Exchange of Notes and Technical Protocols relating to beneficial ownership of companies, or EoN, agreed by all key UKOTs and CDs, the U.K.

National Crime Agency is entitled to access beneficial ownership on companies in the UKOTs within 24 hours (or 1 hour in the case of an emergency). The EoN system came into being in June 2017 and has been operational for more than a year. In effect, the EoN arrangement created a "private" UBO register in the UKOTs. The private UBO registers introduced in the UKOTs involved extensive "buy in" by the UKOT governments. There is a risk therefore that the public UBO register may undo the good operational work that has occurred up to now under the EoN arrangement.

Finally, there is a risk that the registers in the UKOTs may in due course more closely mirror the U.K. PSC register which, arguably, is less useful to law enforcement authorities than the current arrangements.

Criticism of the U.K. PSC Regime by FATF

Many in the UKOTs continue to see the U.K.'s PSC regime as a second best approach driven by a lack of effective regulation of TCSPs within the U.K. and, while accepting that if this approach becomes a global standard they would adopt it, some in the UKOTs are left bemused by the suggestions in the U.K. Parliament that it is a superior tool to the regimes that the U.K. and UKOTs worked together collaboratively on during David Cameron's tenure in Downing Street, i.e. the UBO regimes established under the EoN arrangement.

More recently the Financial Action Task Force, or FATF, undertook its periodic mutual evaluation report of the U.K. AML regime.[4] In most instances the U.K. AML regime was rated with top marks by FATF. However one rare area that was criticized was the U.K. PSC regime. FATF noted various deficiencies:

- “[W]hile the information in the register is subject to basic checks it remains largely unverified” (paragraph 31);
- The U.K. must work to “improve the quality of information available on the PSC register to ensure that the information is accurate and up-to-date” (priority action (c) following paragraph 33).
- U.K. Companies House should “continue to improve the register’s functionality (facilitate searching) [and] where appropriate and well-founded, clearly flag in the register any discrepancies reported by [financial institutions and similar]” (as above).

- “Although in theory, the public PSC register should facilitate the U.K.’s ability to respond to international requests for beneficial ownership information on legal persons, international counterparts are usually referred to the registry without being alerted to the issues concerning the accuracy of the information” (paragraph 33).

The lack of oversight of data contained in the PSC regime has caused other less measured commentators to remark that “Britain's Companies House is just an 'honesty box' exploited by the dishonest.”[5]

It begs the question — whether having public UBO register in the UKOTs is really necessary?

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[1] Press release of the Office of Premier of the Cayman Islands: <http://www.gov.ky/portal/page/portal/otphome/announcements/premier-concludes-jmc-meetings-in-london>

[2] Hansard, House of Commons debate 1 May 2018: <https://hansard.parliament.uk/commons/2018-05-01/debates/9BE03BAC-2539-4951-88A2-9A8A20D7A1A3/SanctionsAndAnti-MoneyLaunderingBill> <https://hansard.parliament.uk/commons/2018-05-01/debates/9BE03BAC-2539-4951-88A2-9A8A20D7A1A3/SanctionsAndAnti-MoneyLaunderingBill>(Lords)

[3] <https://pressroom.oecs.org/oecs-urges-uk-parliament-to-reject-discriminatory-amendment-proposal-to-new-bill>

[4] Published 7 December 2018: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-Kingdom-2018.pdf>

[5] <https://www.heraldscotland.com/news/15526317.whys-britains-companies-house-is-just-an-honesty-box-exploited-by-the-dishonest/>