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A Consultation on a Register of Ultimate Beneficial Ownership of Companies

In his recent Budget speech the Hon. Albert Isola, Minister with responsibility for Financial Services, stated that there was shortly to be a full consultation – open to the general public - on the merits of a central register of beneficial ownership (as has been announced previously by HM Government of Gibraltar and as contained in the Government's published action plan). Such a consultation would also pose the question as to whether such a register should be public or otherwise.

HM Government of Gibraltar has therefore today issued a consultation paper on a register of ultimate beneficial ownership of companies; a copy of which can found on the Government website at <https://www.gibraltar.gov.gi/>. Contributions are most welcome from all sectors in Gibraltar. The closing date for responses to the consultation is the 30th September.



**HM Government
of Gibraltar**

**Minister with Responsibility
for Financial Services
The Hon. A. Isola**

Register of Ultimate Beneficial Owners of Companies

Consultation Paper

July 2014



Abstract

This paper seeks the views of affected stakeholders and the general public on the possible establishment of a central registry of Ultimate Beneficial Owners (UBOs) of Gibraltar companies.

At the UK-chaired G8 Summit in June 2013, the UK committed to introduce new rules requiring companies to obtain and hold information on who owns and controls them and implement a central registry of company beneficial ownership information.

This was followed up at the Overseas Territories Joint Ministerial Council meeting in London, 26 November 2013 where “each of these Territories has published an action plan setting out the steps that they will take to ensure the collection and availability of complete company ownership information and are launching or have launched consultations on the question of establishing a central registry of beneficial ownership and whether this information should be publicly available;”

HM Government of Gibraltar has published its action plan under this initiative and in it has given the following commitment;

“Consider the benefits of setting up a central register of beneficial ownership to be made available to “obliged entities” and competent authorities and commit to delivering if deemed to be more effective than the current regime; assuming that this would also be implemented by G8 members, Crown Dependencies and fellow British Overseas Territories;”

This consultation paper follows a direct and informal consultation process with members of the financial services sector and now seeks to obtain from stakeholders and members of the general public their views as to the establishment of a register of UBOs of corporate vehicles and a number of ancillary issues that would need to be addressed if a decision to establish such a registry is made.



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Introduction

Companies are an integral part of the business landscape. Some companies carry out activities on an ongoing basis – producing goods or providing services. Others are formed for a specific or single purpose and may then be dissolved – for example, to support a particular financial transaction or to hold a particular asset. Some companies will have very simple ownership structures. Others are necessarily more complex.

There will always be those who seek to misuse companies and generally abuse the system. Individuals can use a company to quite legitimately protect their identity and maintain confidentiality and others may use these vehicles to facilitate a range of criminal activity, from money laundering and terrorist financing to sanctions and tax evasion.

In Gibraltar, there are already systems in place to help identify who ultimately owns and controls companies. Law enforcement authorities have statutory powers to require disclosure of information and regulated entities are required to identify the beneficial owners of companies before entering into a business relationship. These systems have worked well in the past and continue to do so.

However, there is growing interest to reduce further the scope for misuse and, where misuse does take place, to improve the ease with which those who break the law can be readily identified and sanctioned.

Gibraltar within the European Union

Gibraltar is completely up to date with its obligations to transpose EU obligations within its internal legal order. It has therefore transposed the EU's 3rd Anti-Money Laundering Directive and is laying the groundwork for the transposition of the 4th Anti-Money Laundering Directive, which is complementary to and further strengthens the revised FATF Recommendations. The EU's 3rd Anti-Money Laundering Directive already goes well beyond financial services institutions and providers and includes a wide range of designated non-financial businesses and professions.

Gibraltar at forefront of anti-money laundering practices

By every reasonable measure, Gibraltar has long been at the forefront of anti-money laundering practices. It was among the first jurisdictions worldwide to criminalise money laundering from all types of criminal activity, not just drugs-related offences, and this was subsequently extended to cover the financing of terrorism. Tax evasion and corruption are also predicate offences for the purposes of money laundering.

Gibraltar was among the first jurisdictions, as from 1989, to regulate the providers of fiduciary services i.e. company management and formation as well as professional trustees and to apply the provisions of the anti-money laundering regime to this sector.

Beneficial ownership information

Ownership and identity information on legal persons and legal arrangements in Gibraltar is made available through the requirements imposed on the entities to maintain information or to submit information to the authorities as part of registration obligations.



The Companies, Partnerships and Trusts (Miscellaneous Amendments) Act 2012, which came into force on 21 March 2013, amended Gibraltar's Companies Act, Trustees Act and Partnership Act to make provision for the maintenance of records identifying settlors, trustees and beneficiaries of all trusts without exception, the abolition of share warrants to bearer, and the enhanced keeping of full books of accounts including underlying documents such as invoices and contracts for a minimum of five years. These provisions cover partnerships and companies as well as trusts.

This is supported by obligations on service providers to maintain information in accordance with anti-money laundering legislation. These requirements have associated enforcement provisions.

Gibraltar therefore complies with FATF Recommendation 33 'Transparency of legal persons and arrangements', which requires countries to "ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities".

Similarly, trustees are additionally bound to hold information on the settlors and beneficiaries of trusts under the provisions of common law, supported by case law.

The recent visit by the OECD in their Peer II Review further examined the effectiveness of exchange of information processes and the ability of the authorities to obtain information on beneficial owners following request from other countries.

Establishing a Register of Ultimate Beneficial Owners

The Financial Action Task Force (FATF) is the international body that sets the global standards to combat money laundering and terrorist financing. It revised these standards in 2012. The new standard on beneficial ownership says that: "Competent authorities should be able to obtain, or have access in a timely fashion to, adequate, accurate and current information on the beneficial ownership and control of companies and other legal persons".

Investigations into abuses of company structures will often cross borders and so coordinated international action is necessary. In February 2013 the European Commission published proposals for its 4th Money Laundering Directive to implement the new FATF standards, including the standard on beneficial ownership. This means that beneficial ownership reform may need to take place in order to comply with this Directive as currently drafted.

A central registry may give law enforcement and tax authorities a first port of call to identify information that may be of assistance to their investigations, without risking tipping-off the company or beneficial owner that they are under investigation. It should also help these authorities to carry out more effective and efficient investigations and proceedings.

We welcome your views on;

1. Whether you consider that the establishment of a Register of UBOs would be, in general terms, a positive measure to reduce financial crime and increase transparency of companies?



Defining the Ultimate Beneficial Owner

In a narrow sense, beneficial ownership refers to the individuals who ultimately own or control the shares in a company limited by shares. An individual might directly own shares in the company, i.e. in their own name and not on behalf of anyone else. Here there is no distinction between the legal and beneficial owner. Alternatively, another individual or organisation might own shares in the company on their behalf. Here the legal and beneficial owners are two separate people.

In its broadest sense, beneficial ownership also includes the concept of control of the company and its activities. The beneficial owners are the individuals that ultimately control the way the company is run – whether or not they are named in the actual shares of the company. Throughout this paper we will use ‘beneficial ownership’ and ‘beneficial owner’ in the broadest sense. This is in line with the definition used in international standards and the anti-money laundering context as used by the FATF, as applied in the EU Third Money Laundering Directive and the Crime (Money Laundering and Proceeds) Act. These provide that the beneficial owner(s) of a company is any individual who has an interest in more than 25% of the shares or voting rights of the company, or who otherwise exercises control over the management of the company. This would include where a person’s interest is held jointly with another individual or as a result of various shareholdings in the company, such that they can control more than 25% of the company’s shares or voting rights.

For the purposes of this consultation we propose to use the existing definition of beneficial ownership, as applied in the anti-money laundering context, as the basis for our statutory definition of ‘beneficial ownership’. This means that information on individuals who ultimately own or control more than 25% of a company’s shares or voting rights, or who otherwise exercise control over a company or its management, will need to be obtained and held by the company and provided to the central registry.

Should a Registry be incorporated it would hold information on individuals with a cumulative interest in more than 25% of the company’s shares or voting rights – including where this interest was held through dispersed shareholdings or through an agreement to act in concert with another individual or individuals.

The registry would hold information on individuals who ‘otherwise exercise control’ over the company - irrespective of whether or how many shares they hold. At a minimum, this would include any individual who had at least as much influence as an individual owning more than 25% of the shares or voting rights in the company.

We welcome your views on;

2. Whether you consider that the definition of UBO based on the definition above would be appropriate?



Trusts as UBOs

We have given particular consideration to the application of the definition above where an interest in more than 25% of a company's shares or voting rights is held through a trust, or where an individual is otherwise able to control the management of the company through a trust.

Where more than 25% of a company's shares or voting rights are held in a trust; or where a trust arrangement provides an individual(s) with control over the company or its management, the individuals who control the activities of the trust (the Trustees) are recorded as the beneficial owners of the company.

We would therefore intend to require the trustee(s) or any individual(s) who exercise effective control over the trust's activities to be disclosed on the company's register of beneficial owners. In most cases this will require only the trustee(s) to be registered. In some it might however be another individual such as the settlor, beneficiary or protector of the trust.

It should be borne in mind that this will likely be coupled with EU proposals which would require the trustees of express trusts to hold information on the settlor, trustee, protector and beneficiaries, as well as any other individual effectively controlling the trust as well as establishing a mechanism for exchange of this information to be in place. If this was to be the case Gibraltar is well placed as we have had such requirements for the regulated sector since the early 1990's in relation to holding such information and the existing mechanisms to obtain and share this has also been very effective to date.

We welcome your views on:

3. Whether the disclosure of the trustee as a UBO alone would adversely affect or impact on the workings of a Trust relationship?
4. If this approach is adopted do stakeholders consider any exceptions or exemptions should apply?



Scope of the Registry

FATF requires competent authorities to be able to access beneficial ownership information in relation to legal entities, such as companies; and legal arrangements, such as trusts. Gibraltar is committed to the full implementation of this requirement.

We think that a registry should hold information on companies incorporated in Gibraltar.

We welcome your views on:

5. Whether there are other legal entities which should also be in scope (e.g. partnerships, Limited Liability Companies)?

We have considered whether some companies should be exempt from the requirement to provide this information to a registry. Public companies listed on a regulated market are subject to stringent disclosure rules by their listing authority. They are therefore exempt from current EU proposals on beneficial ownership. Our provisional view is that there would not be added value in additional information about the beneficial ownership of these listed companies being held in a central registry. There may also be other types of companies that should be exempt.

We welcome your views on:

6. Whether there are other legal entities or persons that should be exempted from the scope?
7. Do you agree that companies listed in a regulated market should also be exempted from the scope?



Obtaining Information on UBOs

Requiring companies to establish their beneficial ownership

In order to ensure that beneficial ownership information is actually obtained and held by companies, companies would be required to identify the beneficial owners of any block of shares representing more than 25% of the voting rights or shares in the company; or of any block of shares which would give the beneficial owner equivalent control over the company in any other way. Consideration will need to be given as to what statutory tools companies will be given to help them identify their beneficial owners

Consideration is also being given as to who should be held liable for the provision of false beneficial ownership information to Companies House where they did not and could not reasonably have been expected to know that this was the case at the time of the declaration, having carried out all appropriate diligence and due process.

Requiring beneficial owners to disclose their interest

Placing the above requirement on companies may not be sufficient to identify all the beneficial owners of every company. For example, an individual might hold a cumulative interest in more than 25% of the company's shares because they have a number of interests held through a number of legal owners. But this might not be apparent to the company just from identifying who has beneficial ownership of significant blocks of shares. Similarly, without the company knowing, a group of individuals might decide to act together in a way that would bring their combined beneficial holding to above 25%.

Individuals with a qualifying beneficial interest in a company will be obliged to inform the company and consequently the Registry of that fact.

We welcome your views on:

8. Whether the obligation to obtain UBO information should rest with (a) the company (b) the UBO or (c) as proposed, with both?
9. Whether you believe the establishment of a Register of UBOs under the Companies Act which is required to be maintained as part of the statutory requirements of all companies is the best manner in which to deal with the provision of UBO information?
10. Whether the UBO register maintained at the registered office should be available for public inspection in the same manner as the register of Members currently is?



The Central Registry

In the published Action Plan, Government has not stated who would be responsible for the maintenance of the Central Registry of UBO information. There are arguments that this could be best suited to be located within the Tax Authorities, The Registrar of Companies or Companies House.

We welcome your views on:

11. Where you believe the Central Registry would be best accommodated?

Companies must already hold, at their registered office, information on the legal owners of their shares, including their name, address and the shares that they own. This information forms the company's register of members.

Companies must also provide some of this information to Companies House. They must provide a full list of their members, including their name, address and information on the shares that they hold, on incorporation. On its first return after incorporation and subsequently thereafter, the company must provide a full list of the names of its members. A company must also inform Companies House of any changes to their members' shareholdings.

It may be possible to use this as the model for the provision of beneficial ownership information. This would mean that companies would be required to hold details of the names and addresses of their beneficial owners; as well as details of the shares in which they have an interest. The company's own register would need to be kept up to date as changes to beneficial ownership occurred. Companies would be required to provide the names of their beneficial owners to the Central Registry on incorporation and periodically thereafter. This would ensure consistency with the regime that applies in respect of legal ownership. This would be proportionate.

If the company was unable to identify any of its beneficial owners, it might be required to declare that fact to the Central Registry and to Companies House. We will consider further what action might be taken in relation to such declarations.

We welcome your views on:

12. Whether using the analogy of legal ownership be applied to UBO information but in a manner that is more consistent with the information already held on Directors?

We seek to maximise the utility of the central registry for law enforcement and tax authorities and others, whilst minimising any additional burden on business. Enforcement agencies have outlined the need for information to be held such that they can clearly identify the individual(s) recorded as the beneficial owner. This requires more than just a name and an address.



We therefore propose that the company will be required to obtain and hold details of its beneficial owners':

- full name;
- date of birth;
- nationality;
- country or state of usual residence;
- residential address;
- a service address; and
- the date on which the beneficial owner acquired the beneficial interest (and ceased to hold it, where applicable); and details of the beneficial interest and how it is held.

This is consistent with the information held on company directors.

This information would be maintained in a register held by the company. Like other registers required to be held by the company, the register of beneficial owners would be maintained at the company's registered office kept available for public inspection (i.e. accessible on request).

The company would then be required to provide all of the information held to Companies House.

13. We welcome views on this proposal, and specifically the proposed data fields required to be held.

With the same aim of minimising duplicative reporting and burdens on business, we also intend to provide that where a company (A) is owned by a company (B), and B is exempted from the requirements as set out above, or is a Gibraltar company and already maintains a register of beneficial ownership information, company A need only provide relevant details about company B, rather than about B's beneficial owners. This will still allow the full ownership chain of A to be traced.

Accuracy of information

It will be important that information obtained by the company and provided to the registry is as accurate as possible. The new Companies Act provides that it is an offence for a person to knowingly or recklessly provide false or misleading information to Companies House. This means that if the company provided beneficial ownership information that it knew to be false, or which was patently false, the company could be sanctioned.

It is important to remember that regulated entities would still be obliged to carry out checks into beneficial ownership before entering into a business relationship with a company. In addition, law enforcement agencies would be able to use their statutory powers of investigation if they had significant concerns about any information held by a company or provided to Companies House.

As part of this the requirements of the company, we are considering, is to list all changes that have occurred to its beneficial information in-year. For example, if the beneficial ownership of a certain block of shares changed three times in the 12 month period, each change should be recorded as part of the confirmation process.

We welcome your views on:

14. Whether the offences and annual confirmation of UBO information together with the annual filing of UBO information will be sufficient to ensure the accuracy of the data?



15. Whether the Central Registry of UBO should be notified after each change in ownership or on an annual basis showing all changes to the ownership structure in the past 12 months?

A Public or Private Registry?

The key issue for any UBO registry is whether the information on UBOs should be available publicly or only to select users of the system?

In April 2014, the UK Government's view on the same issue fell squarely on the public disclosure argument and it is the policy that the UK Government will pursue for its own Central Registry. HM Government of Gibraltar has not given any undertaking as to whether any such registry would be subject to public scrutiny or not and this is one of the key issues that this paper wants to obtain from stakeholders.

The UK's arguments in favour of a public register of UBOs centres on openness, transparency, trust and attracting inwards investment. Gibraltar's position may be different as the majority of the companies formed and used by the fiduciary sector in Gibraltar are not generally used for the same entrepreneurial uses as those in the UK but rather form part of a considered and planned financial transaction. It may be that the same arguments do apply as for the UK.

We welcome your views on:

16. Whether the UBO information on the Central Registry should;

- a) be available for public inspection (subject to some restrictions as discussed below); or
- b) only be available to law enforcement agencies, tax authorities, regulators and other similar types of domestic as well overseas authorities?

17. Whether the UBO information on the Central Registry should also be available to regulated financial services providers (i.e. those holding a licence or authorisation from the Financial Services Commission) to assist in the Customer Due Diligence processes under the AML/CFT requirements?

If the register of UBOs is to be a public one we must ensure that information made available publicly does not expose individuals to the risk of identity theft or fraud. We will need to carefully consider the balance between ensuring that information on the public register at Companies House is of real, practical use whilst ensuring that it does not become a tool for abuse.

Any public register will therefore have to limit disclosure of a person's residential address and full date of birth to protect any individuals from abuse. A public register will therefore contain the following information on the beneficial owners':

- full name;
- month and year of birth;
- nationality;
- country or state of usual residence;
- a service address; and
- date on which they acquired the beneficial interest in the company and details of that interest and how it is held.



The registry will also hold a residential address and a full date of birth for the beneficial owner. This information will however only be accessible to specified authorities. We will need to give consideration as to which authorities should have access to this protected information, and how. Gibraltar authorities will need to be able to make full use of the data. In addition, we also want overseas enforcement agencies to be able to access this information easily and cheaply – provided we can be satisfied that data shared in this way will be used and stored appropriately.

We welcome your views on:

18. Whether the reduced data set proposed for a public register would sufficiently safeguard an individual from identity fraud and other abuse?
19. Whether there should be grounds from exempting an individual from being disclosed in a public register and what circumstances would give rise to such an exemption?

Impact Assessment

HM Government of Gibraltar is of the view that in the majority of cases UBO information is already held and kept up to date. Statistics provided by the Financial Services Commission indicate that for end March 2013 there were over 20K companies for whom registered office facilities were being provided and 30K companies for which managerial services were being provided (many of these are not Gibraltar based companies).

The companies providing these managerial services are already required to hold UBO information as part of the Customer Due Diligence requirements under the Crime (Money Laundering and Proceeds) Act. The formalisation of a UBO Register under the Companies Act would therefore put into place a standardised approach for the recording of this information.

Admittedly the proposed requirements to have to notify Companies House of changes and the extension of the annual return to cater for UBO information will have a limited administrative cost once the initial data capture has been effected.

On the other side of the equation would be reduced compliance costs in responding to requests by law enforcement agencies and the like dealing with information requests on UBOs and making Customer Due Diligence take on a more efficient process than is currently the case.

We welcome your views on:

20. Whether stakeholders agree with Government's impact assessment of the proposals?



The Consultation

HM Government of Gibraltar is keen to ascertain the views of all interested parties on this subject matter and is inviting comments on the questions above as well as more generally. Submissions should be made in writing by no later than 30th September 2014 to;

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