Editorial: Interdicting economic crime through beneficial ownership: an international standard at last?

Introduction

The global anti-money laundering (AML) regime presupposes a significant degree of compliance with minimum standards. Experience has shown that this is easier to achieve in some areas, than others. One of the problems of the global approach to the interdiction of economic crime and the rules based approach to financial regulation is that minimum benchmarking often creates tension between some countries that consider they are compliant, with those who regard their technical compliance with circumspection. Simply put, for all the advantages of harmonisation, a one-size-fits-all approach is not always the most suitable depending on jurisdiction. Other issues include the fact that some standards presuppose significant human and capital resources, which may be at odds with development-related priorities or other challenges that some states face. Regardless, the international AML standard bearer, the Financial Action Task Force (FATF), and its recommendations have manifested as non-optional soft law. It is non-optional not in the strictly legal sense, but rather that non-compliance is simply not an option for states seeking to secure their place in the international community and avoid ending up on influential black or greylists – the effects of which are self-evident in terms of de-risking. Offshore financial centres have long been suspected to be the weak links in the global financial system. However, as shall be considered in this briefing, compliance commitments made by certain of their number certainly align with the spirit of international standards. It considers the recent amendments to FATF recommendation 24 on beneficial ownership, alongside commitments made by certain offshore jurisdictions thus far.

Offshore, the overseas territories and beneficial ownership standards

Within the broad and complex area of offshore finance, a subject with which there continues to be relatively little meaningful research, there is a group of jurisdictions which receive a disproportionate level of attention: the British Overseas Territories (OTs) (and, for that matter, Crown Dependencies – albeit their relationship with the UK is different than the OTs). Allegations emanating from successive ICIJ offshore data leaks, such as the Panama, Paradise and, most recently, Pandora papers, have thrust the OTs under the transparency spotlight. Notwithstanding that many of these jurisdictions have micro-population and are relatively remote island nations in the Caribbean and North Atlantic, their development as offshore markets has led to their being held to the same high standards as larger, metropolitan jurisdictions [1]. Criticisms internationally pertain to facilitating aggressive tax avoidance of large multinational corporates, to facilitate criminality through various vehicles, services and professionals. Thus, there has been a longstanding and powerful anti-tax haven campaign.

In the aftermath of the Panama and Paradise papers data leaks, legislation was enacted in the UK Parliament under section 51 of the Sanctions and Anti-Money Laundering Act (SAMLA), to compel the OTs to implement public registers of beneficial ownership information by the end of 2023, else face having them imposed via Orders in Council. Many of the territories are, largely, self-governing – with constitutions recognised by UK Acts of

Journal of Money Laundering Control
Vol. 25 No. 3, 2022
pp. 489-492

1368-5201
DOI 10.1108/JMLC-05-2022-150

Parliament and democratically elected legislatures. Matters relating to their good governance, defence and national security fall under the UK's responsibilities, and the relationship purports to be based on the notion of partnership (UK Foreign Affairs Committee, 2018). The relationship is subject to the territories' inalienable right to self-determination. While the non-optional nature of the legislative ultimatum for public registers unsurprisingly triggered tensions between the OTs and the UK and notwithstanding the argument that such could fall into domestic company law and regulation, they have committed to implementing public registers by the appointed time under the SAMLA.

Transparency, particularly in offshore financial centres, is a topical issue in the wake of the aforesaid data leaks. The well-accepted nexus between money laundering and anonymous shell companies [2], for example, provides the justification for ultimate beneficial ownership information forming part of the risk-based approach to global AML. However, transparency is a concept which sounds straightforward, but in reality is more complex. Specifically in the context of beneficial ownership registers, something could be transparent and remain only accessible to the state; whereas something could be public and transparent, yet riddled with errors thereby undermining its transparent effect. In the area of corporate ownership transparency, the UK government's policy leans towards an expectation that by the end of 2023, public registers of beneficial ownership will be a global norm [3]. Indeed, the UK's register of persons with significant control is world-leading in the sense of it being freely and publicly accessible. In reality, however, given that the USA only recently legislated to create a central, rather than public, register of beneficial ownership under the US Corporate Transparency Act, such a tight timetable seems optimistic at best.

At the time of writing, international standards on this matter remain muddied, with some jurisdictions opting for "full" transparency with open public registers, others doing it for a fee, with others opting for "controlled" transparency by making the information available to competent investigative authorities. There are, of course, numerous jurisdictions which are still further behind the curve on even centrally held, rather than public, registers. Until quite recently, under the 4th EU AML Directive, European Union Member States had the choice to implement public or central registers. Yet, under the 5th AML Directive, making available this information to the general public is now the desired standard at EU level.

The FATF standard on beneficial ownership under its Recommendation 24 was recently subject to revision (FATF, 2022). The nature of the revisions certainly move the recommendation towards a central register framework, in spite of stopping short of specifically mandating the particular register format. Some commentators have argued that such a framework would be difficult to achieve without implementing central registers [4]. While the amendments further strengthen FATF's underlying principles regarding the access of information and importantly its verification, the revisions do include a provision for alternative mechanisms than central registers to be used, as well as advocating a multi-layered approach to the collection of beneficial ownership information.

Creating certainty in the context of international standards is important, and it is problematic if some constituent members of the international community, when going further, create different compliance norms in the process. This landscape could create challenges for those OTs that, while making commitments to go "public", have done so on the basis that they become global norms by the appointed date in line with the UK's policy on this, or that alternative frameworks might be feasible (Virgin Islands Government, 2020). The fact that FATF has not mandated public registers as a global standard and retains an alternative framework option indicates that this so-called global norm is, in fact, rather some way off. There is also the issue as to whether alternative frameworks already exist in the OTs,

particularly in relation to central registers and bilateral information exchange mechanisms that have been entered into with overseas jurisdictions.

Other related developments: economic substance laws

Alongside transparency commitments, many OTs have recently implemented legislation aimed at enhancing their tax cooperation efforts. Economic substance laws are designed to subvert the idea of form over substance when it comes to commercial presence in a jurisdiction. Economic substance legislation moves to increase momentum against aggressive tax avoidance and profit shifting, things the offshore world are routinely criticised as being facilitators of. The notion of paper companies has plagued offshore jurisdictions for years. Economic substance is firmly part of the global AML framework, which formed part of the EU Code of Conduct Group for business taxation's recent investigation into its tax policies of EU and third countries. Examples of the OTs that have implemented such laws include Bermuda via the Economic Substance Act 2018, the Cayman Islands via the International Tax Cooperation (Economic Substance) Act 2021, Anguilla via the Companies (Economic Substance) Regulations 2019 and Companies (Amendment) Act 2019 (Economic Substance), the BVI via the Economic Substance (Companies and Limited Partnerships) Act 2018 and the Turks and Caicos Islands via the Companies and Limited Partnerships (Economic Substance) Ordinance 2018. Under economic substance provisions, the relevant entity designed under the legislation must maintain substantial economic presence in the jurisdiction, which includes having its core income-generating activities in the jurisdiction, full time employees which are suitably qualified and operational expenditure at adequate levels incurred in the jurisdiction relating to the activity.

Conclusion

It is clear and evidenced by FATF's 2022 revisions to Recommendation 24 that public registers are far from being a global norm. The public register provisions of SAMLA regarding the OTs do not exhibit a basic awareness that the territories are each very different in terms of their financial service markets (in the sense that some have significant incorporation markets, whereas others have less prominent ones) and that they are each at very different stages of their legal and economic development. For example, requiring Anguilla (that has yet to establish a functioning central register) to comply to the same standard in the same timeframe as Bermuda (whose functioning central register has existed for decades) is problematic if the UK Government is serious about achieving unified compliance with its policy of public registers becoming a global norm. After all, the entire basis of the global AML regime cannot rest on technical compliance alone (in other words, laws on the books). It goes much further in terms of assessing implementation effectiveness – which is what the FATF process is designed to achieve. It is further unclear whether public registers, rather than central ones, will interdict economic crime and tax misconduct in the way many legislators and campaigners advance. Relying on successive, questionable leaks of data from the offshore world as benchmarks to reforming the law in this area may be convenient, yet it is highly problematic. Limitations with verification and accuracy in other public registers, like the UK's, which are yet to be resolved, raises important questions – which FATF, in their re-sharpening of Recommendation 24, take aim at.

Dominic Thomas-James
Fitzwilliam College, Cambridge, UK

Notes

1. See, for background, (Thomas-James 2021), in particular chapters 1 and 3.
2. See, for background on shell companies, (Nielson *et al.* 2014).
3. See: Hansard, 28/1/2019, UIN 211611, Rt. Hon. Sir Alan Duncan MP, available at: https://questions-statements.parliament.uk/written-questions/detail/2019-01-23/211611# (accessed 10 March 2022).
4. See: Open Ownership "FATF Recommendation 24: Global Standards on Beneficial Ownership are Rising", available at: www.openownership.org/en/blog/fatf-recommendation-24-global-standards-on-beneficial-ownership-are-rising/ (accessed 20 March 2022).

References

FATF (2022), "Public statement on revisions to recommendation 24", 4 March, available at: www.fatf-gafi.org/publications/fatfrecommendations/documents/r24-statement-march-2022.html (accessed 10 March 2022)

Nielson, D., Findley, M. and Sharman, J.C. (2014), *Global Shell Games*, CUP, Cambridge.

Thomas-James, D. (2021), *Offshore Financial Centres and the Law: Suspect Wealth in British Overseas Territories*, Routledge.

UK Foreign Affairs Committee (2018), "Global Britain and its overseas territories: resetting the relationship".

Virgin Islands Government (2020), "BVI premier reiterates territory's commitment to an appropriate framework for publicly accessible registers", 22 September, available at: https://bvi.gov.vg/media-centre/bvi-premier-reiterates-territory-s-commitment-appropriate-framework-publicly-accessible (accessed 10 March 2022).