

Scrutinising beneficial ownership legislation

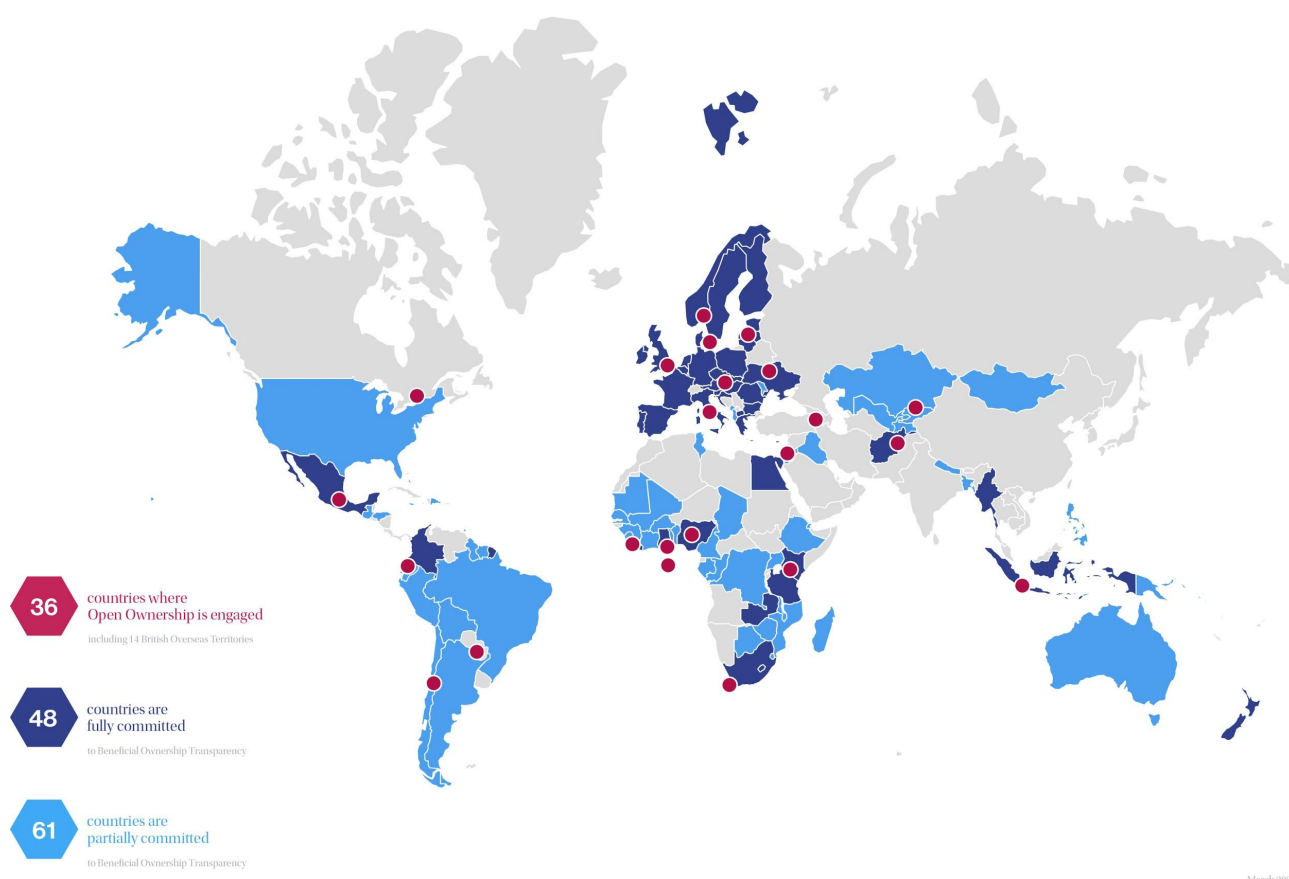
A guide for legislators in the United Kingdom Overseas Territories

Overview: In December 2020, the UK published a draft Order in Council that outlines the minimum standards for the Overseas Territories (OTs) when publishing registers of the real or “beneficial” owners of companies operating in their jurisdiction. When scrutinising relevant draft laws to adapt the provisions of the draft Order and implement public registers, there are several points to consider:

Key requirements of the draft Order	Considerations when adopting the requirements at the individual territory-level	Paragraph number(s)
Public data access	<ul style="list-style-type: none"> Beneficial ownership (BO) data must be made available to the public over the internet. Impact will be greater where: the data is searchable by company name and by beneficial owner; where access is free; and where data is available for bulk download. 	3.2–3.4
Accurate and complete data	<ul style="list-style-type: none"> BO data must be accurate and complete; territories will need to decide how to ensure this. This is widely accepted to mean that territories will need to: i) perform at least basic checks on submitted BO information, and ii) create and apply sanctions to those who fail to submit timely, accurate, and complete BO information. 	3.5–3.8
Defining BO in law	<ul style="list-style-type: none"> BO definitions must cover forms of ownership <u>and</u> control of companies. Reporting thresholds must be no higher than 25% of a firm’s shares. Impact will be greater where territories opt for a threshold in the 5–15% range. 	3.9–3.12
What data to include	<ul style="list-style-type: none"> BO data must include, at a minimum, the fields stipulated in the draft Order (see section below). Impact will be greater where data allows for the unique identification of individuals and where it is structured in a machine-readable format to facilitate verification checks and linkages to international datasets. 	3.13–3.15
Possible exemptions	<ul style="list-style-type: none"> The draft Order allows for reporting exemptions for firms that: report in other jurisdictions; are listed on stock exchanges; or where data publication represents a demonstrable threat to an individual’s security. Impact will be greater where exemptions are clearly defined and limited, reducing the risk of creating loopholes that may be exploited for illicit ends. 	4.1–4.7

1. Background on beneficial ownership

1.1. Beneficial ownership transparency (BOT) – that is, revealing the names of the individuals who own or control registered companies – can help achieve a wide variety of policy goals, including promoting investment and reducing due diligence costs, as well as signalling, to both a domestic audience and to international assessors, a clear commitment to combating corruption and other financial crime. The UK OTs have all committed to producing public BO registers. In December 2020, the UK government published a draft Order in Council “in accordance [with] Section 51 of the Sanctions and Anti-Money Laundering Act 2018...[that] sets out the [Government’s expectations](#) of how the Territories will adopt publicly accessible registers”. This reform programme follows a broader international trend with nearly 110 countries worldwide having committed to BOT or with BO data already publicly available via a central register. It also builds upon the Exchange of Notes arrangement which currently applies in some OTs, whereby authorities respond to requests for BO data on an ad hoc basis.



What is beneficial ownership and why is it difficult to capture data accurately?

1.2. Though many companies are owned by other companies, at the end of the chain of ownership there is always a real person (a “natural person”) who receives some kind of benefit from and/or exercises control over these legal structures (or “legal persons”). The beneficial owners will always be natural persons, even where other firms are recorded as the immediate, legal owner of a given entity.

1.3. A simple example of what this looks like in practice is outlined in the diagram below (left). In this example, Person A and Company C comprise the *legal owners* of Company D, whilst Person A and



Person B are its *beneficial owners*. A structure such as this would be relatively easy to represent in a BO register, but, in reality, international corporate structures are often significantly more complex (see below, right). Those engaged in serious financial crimes generally seek to make these structures complex in order to derail international investigative efforts to establish an audit trail between themselves and their illicitly acquired assets.

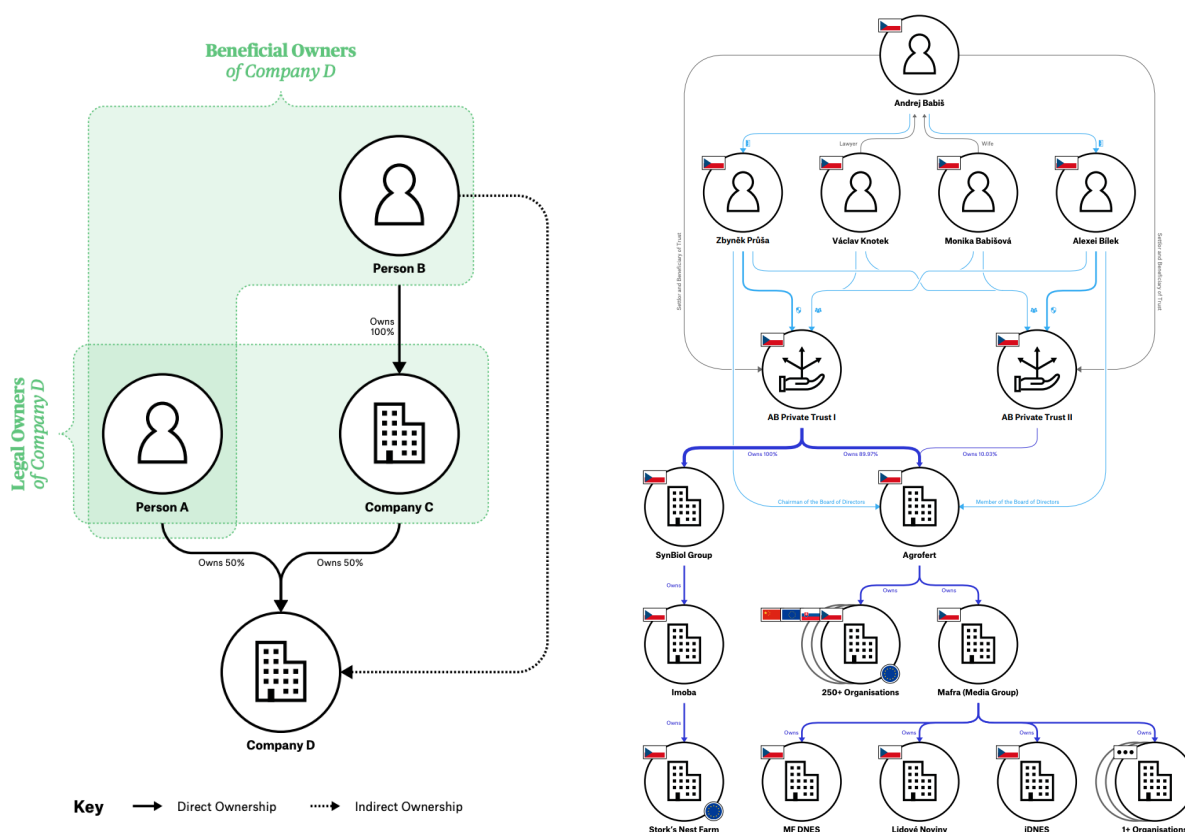


Fig. 2: Sample beneficial and legal ownership corporate structures

How can public beneficial ownership registers help?

1.4 Making BO information on companies available to authorities, businesses, and the public alike can help disrupt the opacity on which criminals rely for perpetrating financial crime. However, public BO registers can also help authorities to further develop a range of other policy goals, such as:

- building business and market confidence by enabling investors to see who is ultimately behind the companies they are dealing with (and reducing associated due diligence costs);
- running effective tax systems by enabling authorities to have access to the full range of individuals' assets and commercial interests;
- improving state procurement and the efficiency of service delivery by reducing possibilities for conflicts of interest or corruption colouring the tendering process;
- improving the performance of a jurisdiction in assessments by the Financial Action Task Force (FATF) and other international bodies that advocate for BOT; and
- helping identify and recover assets that have been gained through theft or with the proceeds of other crimes.

2. Creating robust beneficial ownership legislation

2.1. Crafting robust legislation constitutes the foundation of the reform process and is crucial to its eventual success. Developing a solid legal framework can prove challenging due to the technical complexities of the topic. As BOT is an emerging area of international policy, the implementation lessons gained from countries with millions of registered companies may not be easy to import into those territories that have, for example, only a few hundred.

2.2. In December 2020, the UK published a draft Order in Council that outlines the minimum standards for publishing a register of beneficial owners. Article 4 of the draft Order in Council is the most relevant, as it outlines some specifics on the information, structure, and operation of the availability of BO data that must be included in order to meet minimum standards.

3. Main requirements of article 4 of the draft Order in Council

3.1. Outlined below are the main stipulations of the draft Order related to the minimum standards of functionality and composition for BO registers that the OTs must reach.

Paragraphs 1 and 8: Data should be “publicly accessible”, complete, and accurate

Paragraph 1 of article 4 notes that BO data must be centrally compiled, publicly accessible, and, within reason, accurate and complete. To be deemed “publicly accessible”, paragraph 8 explains, a register must be able to be accessed by any member of the public, including via a request made over the internet. Delays in providing information should be minimal, whilst restrictions on free access can only extend “to those reasonably justifiable in order to ensure the efficient management and maintenance of the register”.

“Publicly accessible”

3.2. Meeting the conditions of the draft Order on public accessibility will require territories to make BO data available online for any member of the public to consult. Legislators can strengthen the impact of their laws and the usability of the data in their registers by ensuring that users can search by both the name of the reporting company and the name of an individual beneficial owner.

3.3. Whilst the levying of fees on users accessing BO data is probably permissible within the terms of the draft Order, data access fees generally represent a false economy, as many of the benefits of BO registers accrue from enabling as broad a use of the data as possible. A [UK government review](#) found that the freely accessible data from the Persons with Significant Control (PSC) register represented somewhere between 4% and 13% of the total annual value of Companies House data of GBP 1–3 billion per year. In effect, this means that public BO data in the UK is worth between GBP 40 million and GBP

390 million annually. Charging for access would restrict usage of the data, reducing its overall value. BO registers that lie behind paywalls are also more costly to implement given the need for more sophisticated systems to handle payment processing and the associated security infrastructure.

3.4. A final way to improve usability and access to BO data is to enable data to be downloaded “in bulk” rather than restricting access to only one record at a time. This aids criminal investigations by helping link the data to that published in other jurisdictions, as well helping with the identification of suspicious data by the public, business, and civil society. It can also enable third party commercial intelligence providers to integrate the data with their own tooling and analysis products to help create additional economic value and encourage investment.

“Accurate and complete”

3.5. Legislators in the territories have significant discretion in developing systems to ensure data is accurate and complete, as the draft Order contains no specific stipulations on this. Ensuring that BO data is accurate, adequate, and timely is, moreover, a requirement of the FATF – the global body that sets standards and monitors international implementation of measures intended to prevent, detect, or help prosecute financial crime. Ensuring data is “accurate and complete” is widely accepted to mean that jurisdictions must verify the data and ensure compliance with reporting requirements.

3.6. To help improve the quality and accuracy of BO data, it is sensible to conduct checks on the information submitted to verify that it is disclosed in the correct format, is plausible, and, ideally, is cross-referenced with other data sources. These [verification checks](#) can entail varying degrees of sophistication, but at their simplest, regulations in the smaller OTs could provide for manual checks performed on a sample of high risk submissions (e.g. those from companies with ownership structures that appear unnecessarily complex). Publishing BO data in open data format can also help by enabling the public, business, and civil society organisations to perform their own checks on the data.

3.7. Another key legislative component of helping ensure data is accurate and complete is to introduce an effective sanctions regime for non-compliance. No direct guidelines for sanctions are provided in the draft Order, but in the UK, companies [can be sanctioned](#) for failure to request information from potential beneficial owners or failure to provide information on its beneficial owners to the central register. Beneficial owners, meanwhile, can be sanctioned for failure to report their status as a beneficial owner, or for knowingly or recklessly making a false statement.

3.8. For all of these offences, both the company and every officer of the company that has failed to comply are liable for sanction, including up to 12 months’ imprisonment, a fine, or the removal of the firm from the companies registry. These should apply both to the initial failure to report BO information and for failures to keep this up to date (for instance, by informing authorities within 14 days of any change). Historical BO data for each company should be retained to assist with the application of sanctions in the case of wrongdoing and to assist the work of criminal investigators and other data users.

Paragraphs 3 and 4: Defining beneficial ownership and control

According to paragraphs 3 and 4, the available BO information for companies must include all those who have a significant degree of control over a company. This includes instances where control is exercised either directly or indirectly, including via an ownership or voting stake of 25% or more, the ability to appoint/remove a majority of directors, or any other relevant means.

3.9. Creating a robust definition of precisely what constitutes BO will be a central task for the legislative process. Definitions that meet the highest [international standards and best practices](#) will:

1. state that the beneficial owner must be a **natural person**;
2. cover **both ownership and control** interests;
3. encompass both **indirect and direct** interests;
4. contain a single and **unified definition** of BO (preferably in primary legislation); and
5. not attempt to explicitly list all the individual ways in which BO may be held (as this will change frequently), but rather provide a broad **catch-all definition of what constitutes BO together with some illustrative examples**.

3.10. The draft Order follows common international practice in advocating use of a threshold for share ownership at which it becomes a legal requirement for a BO relationship to be disclosed (e.g. by stating in law that any individual who ultimately owns more than a 5% share in a given legal entity would qualify as one of its beneficial owners). The UK's [draft Order in Council](#) states that the “maximum percentage [for the threshold] must be set at no higher than 25%”. This is based on the UK system, adopted in 2015, but now sits towards the higher end of thresholds used globally.

3.11. A 25% threshold is relatively easy to evade (a criminal working with just four allies can easily avoid disclosure requirements), so many jurisdictions now opt for lower thresholds. In 2020, this included Argentina (1 share or above), Senegal (2%), Nigeria (5%), Paraguay (10%), and Kenya (10%). To close loopholes and bring thresholds in line with evolving international standards, a threshold in the region of 5%–15% would be more effective. A lower level – or even a 0% – threshold for those holding political office (“politically exposed persons” (PEPs)) can often be justified due to the higher level of corruption risk associated with these individuals.

3.12. Analysis of data from Nigeria's extractive industry disclosures illustrates how [different thresholds may alter the number of BO interests that are publicly revealed](#). Nigeria effectively had no ownership threshold for its initial BO disclosures in this sector. Had they adopted a 25% threshold, only 40% of the total BO interests that were eventually reported would have been disclosed (approximately 154 instead of 384). This would have had corresponding detrimental effects for the prevention and investigation of corruption in the country's mining sector.

Paragraphs 6 and 7: Minimum data fields on individuals and companies

Paragraphs 6 and 7 outline the minimum fields of data on beneficial owners and the reporting companies that must be included in the register. For individuals, the fields required by the draft Order are their name, country of residence, nationality, date of birth, and the nature of their control over the reporting company. Companies, by contrast, must report: the company name, registered address, legal structure and jurisdiction, and the nature of its control over the company concerned; if applicable, the register in which the company is entered and the company's reference number in that register must also be reported.

3.13. The fields provided in the draft Order are a useful basis for the disclosures, however, the OTs will likely have to produce additional regulations and guidance for some fields (especially on how to calculate ownership percentages for BO held through a series of firms in complicated ownership structures).

3.14. To further improve the robustness of the BO disclosure regime, additional fields could be added to those detailed in the draft Order. In particular, international best practice suggests it would be advantageous to also collect clear, unique identifiers, such as registration numbers for companies and taxpayer numbers for people, as this would make it possible to link together different disclosures involving the same people or companies, as well as to distinguish between those with similar details.

3.15. In the detailed regulations accompanying BO legislation, it is advisable to include phrasing to the effect that "the data must uniquely identify a natural person and allow for any user to successfully disambiguate one natural person from another" and that "data must be published in a structured, machine-readable format" (such as the [Beneficial Ownership Data Standard](#)). This latter aspect helps when attempting to verify the data or link it to other international datasets. In these same regulations, it would also be beneficial to require that PEPs are identified as such in the published data, given that they may present a higher corruption risk.

4. Allowable exemptions under article 4

4.1. The draft Order also outlines some circumstances in which territories may exclude certain people or entities from requirements to disclose their beneficial owners or from the publication of this data. Legislating for exemptions should be done carefully to ensure that laws do not contain inadvertent disclosure loopholes that illicit actors may then exploit. In this section, we outline some ways to navigate these risks for the allowable exemptions under article 4. In general terms, we suggest that any exemptions from the disclosure requirements should be clearly defined, limited, justified, and reassessed on a periodic basis.

Paragraphs 2 and 5: For companies where BO information has already been disclosed elsewhere

Paragraph 2 states that a register can still be deemed as compliant if exemptions from disclosure requirements are allowed for firms registered on EU/UK stock exchanges or firms that are subject to BO disclosure requirements in other countries.

Paragraph 5 enables firms not to report those beneficial owners who exercise control indirectly through a secondary company if this secondary company: i) exercises significant control over the primary entity; and ii) if its information is already in the register or is excluded under the terms of paragraph 2. In such cases, the primary reporting firm is able to include the name of this secondary company in its declaration rather than the full details of the ultimate beneficial owner.

Internationally reporting entities

4.2. Enabling exemptions for companies that have already disclosed their BO information in a third country, as permitted under paragraph 2, can prove problematic. Many jurisdictions choose not to introduce such exemptions. Definitions of what precisely constitutes a beneficial owner vary significantly between countries, and thus many relevant individuals may be excluded from the register if this exemption is allowed. Globally, there are benefits for each jurisdiction requiring all beneficial owners of their companies to be disclosed, as it would allow for better linking and cross-checking of

data submitted across different states. This would help identify the types of suspicious activities and inaccuracies associated with the misuse of corporate structures for illicit ends.

Publicly listed companies

4.3. Exemptions for publicly listed companies (PLCs) are more common, but need to be treated carefully to avoid creating loopholes in legislation. Because of this, it is advisable to avoid blanket exemptions for firms listed on any stock exchange, and to instead apply this only to those stock markets where adequate BO disclosure requirements exist and are enforced. There is no definitive international list of which markets meet this criteria, though [guidance](#) on how to make such assessments is available. Requirements for reporting beneficial owners will vary significantly between exchanges, and some will fall below the level of reporting required for the central register. In the UK, for example, rules for the main London Stock Exchange are notably more stringent than those for the Alternative Investment Market.

Secondary companies

4.4. Applying exemptions for secondary companies, as per paragraph 5, is not in line with current international best practice as it does not allow for the capture of BO interests held across different intermediaries. For example, if an individual holds a 5% stake in Company X via Intermediary A and another 12% stake via Intermediary B, then that person would cross the threshold for reporting (assuming a 15% threshold; see 3.10–3.11) and should be declared as a beneficial owner of Company X. However, under this approach, that individual would evade all reporting since they do not count as a beneficial owner of either Intermediary A or B. As a result, this system could encourage the creation of nominee companies to bring together unrelated holdings, with the express aim of enabling individuals to avoid reporting requirements (by reducing their direct ownership below the threshold level).

4.5. An additional problem is that this system makes the entire ownership chain dependent on the compliance of the company at the top of the chain. If that firm fails to submit a declaration, or submits one that is wrong or false, then the BO data on the entire chain will be adversely affected. In the UK, many companies disclose other companies as owners that do not meet the legal requirements outlined in paragraph 5. Whilst a legislative framework that provided for this exemption would still likely be deemed compliant under the terms of the draft Order, requiring companies to report a natural person rather than a legal vehicle would bring laws closer to the [FATF guidelines](#).

Paragraph 9: Data publication and security

Provisions for publication exemptions on the basis of security concerns are outlined in paragraph 9. The draft Order enables exemptions to apply to minors, or where an individual reasonably believes that disclosure would place them at “serious risk of fraud, kidnapping, blackmail, extortion, harassment, violence, intimidation or other similar harm”.

4.6. The inclusion in legislation of a mechanism that allows for publication exemptions in cases of real security risk is sensible. Generally, BOT can be achieved without endangering the safety of individuals, but such a mechanism can limit what risks do exist. The criteria for allowing exemptions should be narrowly defined. Broad categories of allowable exemptions – e.g. around threats to safety due to wealth and power – could exclude a large number of beneficial owners and exempt precisely those who would be of greatest interest to investigators. The UK has created a more restrictive mechanism

for publication exemptions, under which only a comparatively small number of such claims have been made. Information on individuals who successfully apply for publication exemptions would generally still be collected so it would be accessible in cases of authorised requests from tax authorities and criminal investigators.

4.7. To further minimise the risk of harm, it is also good practice to withhold certain personal information from public disclosures (so, for example, a beneficial owner's registered or business address should be published, but their personal email, phone number, home address, and any related documentation should be kept for official access only). At the same time, however, it is important to disclose sufficient information to ensure that BOT can fulfil a government's policy intent. Placing excessive restrictions on fields for disclosure may, for example, make it difficult for registry users to confirm the identity of beneficial owners or to confidently distinguish between the identities of beneficial owners with similar names or personal details.

5. Further reading and assistance

A summary of what a gold standard BO register would look like is outlined in the [Open Ownership Principles](#), whilst more detailed, practical advice on how to implement BOT in the OTs is available in [our full implementation guide](#). To discuss any aspect of your legislation or disclosure regime, please contact Open Ownership (OO)'s special helpdesk facility (via support@openownership.org). Officials from the OTs can access our helpdesk for the duration of OO's funded support from the UK Foreign, Commonwealth and Development Office.