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The reasons for the rise and fall of Bearer Shares: A
Company Law comparison between the UK and
some offshore jurisdictions

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**THE REASONS FOR THE RISE AND FALL OF BEARER SHARES:
A COMPANY LAW COMPARISON BETWEEN THE UK AND SOME OFFSHORE
JURISDICTIONS**

LLM

**INTERNATIONAL CORPORATE GOVERNANCE FINANCIAL REGULATION
ECONOMIC LAW**

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ABSTRACT

Moving forward for the need for more transparency, the United Kingdom has also established a Beneficial Ownership Register which publicly accessible while the offshore financial centres have refused. Many Offshore Financial Centres are moving toward controlling Bearer Shares in order to keep in line with the Organization for Economic and Cooperative Development's push for more transparency. As of 2015, the United Kingdom has altered its Company Law and has totally abolished bearer shares, However, Offshore Financial Centres such as The Cayman Islands through now immobilised, The British Virgin Islands and more recently the Republic of Panama have found an innovative solution through the immobilisation of bearer shares to protect privacy while still managing to control illegal activities. Over all with the abolishing of bearer shares and the new beneficial ownership register the United Kingdom is moving towards Greater transparency.

Bearer Shares in United Kingdom Company Law.

I would be difficult to consider the rise and fall of Bearer Shares in UK Company Law without having to first briefly discussing shares in general. Giving a definition of a share has been described as a question not easily answered, According to Gower “it is true that the exact nature of this equitable interest was not crystal clear for the members could not, while the firm was a going concern, lay claim to any particular asset or prevent the directors of disposing of it...even with the modern partnership no solution to this problem has been found ...as a result the word share has become a misnomer.”¹ At its simplest, According to Bourne where a Company is limited by shares, this capital is allocated into shares. They are considered units which are allocated a certain amount outlining the opportunity interest in the company for the shareholder. However it would be difficult to not find the eminent quote by

To define a share in United Kingdom Company leads to a quote in the judgment by Farewell J. in *Borland's Trustees v Steel Brothers & Co. Ltd.*:

A share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability I the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all shareholders inter se in accordance with section 16 of the Companies Act 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum on money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a less amount.

According to Gower despite placing appreciable and incommensurate emphasis on shareholder rights contractually, this definition stresses the reality that there is an interest in a company. The belief is held that the nature of the rights are defined by the contract established

¹ Gower pg. 615

by the articles of association, although the rights are not strictly personal, they present a form of proprietary interest in a company but not in their property.²

The main features of a share include a right to dividends declared on the shares; generally (unless it is a non-voting share) a right to vote at general meetings; on the liquidation of the company or on a reduction of capital, the right to receive assets distributed to shareholders of that class; an obligation to subscribe capital of a given amount which will sometimes be the nominal value of the share if the share is issued at par and sometimes will be in excess of this if the share is issued at a premium, rights of membership attached to the shares as defined in the company's memorandum and articles (discussed above in relation to the s 33 membership contract and a right to transfer the share in accordance with the articles of association..³ Usually, there will only be one class of share, called ordinary share or equity of the company, sometimes a company will have more than one type of share, share classes will be distinguished by the rights to a dividend, rights for the repaying of capital and voting rights⁴.

Awaiting the passing of the Companies Act 1862 there was the continuous standard in UK Company Law that shareholders should be “registered with the company and that share certificates must contain the shareholder's name”⁵ This act was responsible for the introduction of share warrants to bearer or bearer shares. Bearer shares also known as Share warrants to bearer are defined in Section 779 and 122 of the Companies Act 2006 where the issuance of stock warrants to bearer or share warrants to bearer are permitted as long as they are allowed by the public or private company's articles of association which prescribe the regulations of the company. Bearer shares provide certification that the bearer of the warrant is entitled to the shares represented and have been described as a class of English shares that are noted as

² P L. Davies Gower 616

³ Bourne pg.51

⁴ Ibid.

⁵A B Levy, *Private Corporations and Their Control*, Part 1 (Routledge 1998).

documentary intangibles.⁶ The general purpose of an issued certificate related to bearer securities is documentation of title, with 'bearer' signifying the value and rights that sit with the bearer as the individual presently in possession. Importantly, bearer shares are similar to title documents for money and instruments and along with debentures or bearer bonds, certificates of deposit, with share warrants to bearer being company undertakings to make payment. Traditionally, acquiring title to a company's shares is effective with entry of the name of a holder's name on the register of shareholdings and shareholders. Bearer Shares present as an exception, as any company limited by shares can if authorized by its articles issue warrants expressing that a bearer is entitled to pay up shares stipulated in them. The entitlement to payment of future share warrant dividends from certificates or coupons resulting in bearer securities. A bearer of a warrant is without question a shareholder, despite their name not being listed on the register of shareholders as the title to the shares are implicit in having control of the warrant physically. According to Sakmann having possession also helps to establish any entitlement and “substitutes for the register as prima facie evidence of title”.⁷

In contrast to bearer shares, registered shareholders are those members of a company who have received legal title to the shares whether through, transfer from a former share or by allotment. The enjoyment of the legal rights of their shareholding can only be obtained from entry in the company's register of members. This registration entry is important because having title to registered shares different from other property is obtained by entry in the shareholder register.

Arguments on Bearer Share Use

⁶Sakmann-Pretto, Arianna, 'Boundaries of Personal Property: Shares and Sub-Shares (Hart Publishing 2005) 74

⁷Supra n 4 75.

A number of reasons have been cited for the utilisation of bearer shares. One such advantage of bearer shares is unquestionably the simplicity of transfer in contrast to the relative complexity concerned in transferring registered shares. They are utilised for the provision of a “fast, easy, cost effective and non-bureaucratic means for the transferability of ownership”.⁸ Keenan also concurs with the ease of transfer of bearer shares stating that warrants can simply be handed to a buyer thereby averting any expenses and formalities in the transfer of a registered share.⁹

The main cited benefits to issuing bearer shares are the ability to be easily transferred and the high level of anonymity “bearer securities are regarded as tangible moveable property and can be transferred simply by delivery”¹⁰ resulting in no record of ownership and any holder of the securities is the legal owner. The law concerning the transfer of bearer and registered securities has been recognized for their dissimilar interests. The priority for registered securities has been the security of title with the firm use of the principle ‘nemo dat quad non hebet or no one can give what he does not have’¹¹ while bearer securities have given priority to security of transfer which reflects the historical concern of law merchant to “facilitate the transfer of rights in the market through negotiability”¹². A number of legitimate uses of bearer shares have been recognised and one of the main advantages of bearer shares is the issue of

⁸ The Control of BVI-Issued Bearer Shares.
<<http://www.bvifsc.vg/News/tabid/160/articleType/ArticleView/articleId/184/language/en-GB/The-Control-of-BVI-Issued-Bearer-Shares.aspx>. Accessed 3 March 2016.

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¹⁰Ian MacNeil, ‘An introduction to the law on Financial Investments’ p 1.23

¹¹ibid

¹²ibid

transferability. They help to provide “fast, easy, cost effective and non-bureaucratic means for the transferability of ownership”¹³ which involves escaping costs associated with transferring registered shares which include the cost of producing new registered share certificates, payments for using a notary and stamp duty, also transferring assets for inheritance.¹⁴ Privacy is another advantage of the use of bearer shares because they facilitate privacy in such instances where corporate secrecy can help restrict sensitive information from being accessed by “inappropriate competitors and potentially hostile buyers”.¹⁵ The level of anonymity of bearer shares also responsible for securing privacy during certain corporate business transactions for areas involving company trademark secrets or intellectual property.¹⁶ Critics of bearer shares have argued that their use are responsible for contributing to a number of complications. Nawrot has indicated that the anonymity brought about by bearer shares makes locating shareholders impracticable, leading to difficulty communicating liquidation rights and dividends.¹⁷ Dascalopoulou also finds that the lack of information regarding shareholder location affects communication which makes notification of shareholders difficult. Articles established by companies frequently involve press notification which is described as quite an

¹³ The Control of BVI-Issued Bearer Shares.

[Http://www.bvifsc.vg/tabid/160/articleType/ArticleView/articleID/184/language/en-GB/The-Control-of-BVI-Issued-Bearer-Shares.aspx](http://www.bvifsc.vg/tabid/160/articleType/ArticleView/articleID/184/language/en-GB/The-Control-of-BVI-Issued-Bearer-Shares.aspx)

¹⁴OECD Report Behind the Corporate Veil using corporate entities for illicit purposes. Pg. 30.

¹⁵The Control of BVI-Issued Bearer Shares.

¹⁶Park, Jai Won, '[Anonymous companies and beneficial ownership – progress for sure, but panacea?](#)

¹⁷NAWROT , L, *Corporations: Bearer Shares in the United States: Civil Law Contrast:*

Connecticut and Montana Statutes Authorizing Issuance volume 48 Cornell L. Q. (1962). At page

ineffective way of connecting because it is not certain that all shareholders would have the opportunity to read any announcements. The way a company chooses to communicate with holders of warrants is left wholly to the company by company law¹⁸ and communication with shareholders is commonly done through advertisements in newspapers, however this method is not considered an completely adequate way of communicating particularly in respect to the exercising of shareholder voting rights.¹⁹ Communication also affects the corporate command by management due to difficulty in maintaining management control through the proxy system as an important way of communicating between a corporations and the presently unknown is through publication.

The use of bearer shares is also connected with the evasion of taxes as the anonymous nature of bearer shares contributes to the difficulty in collecting and assessing income, transferring shares, inheritance taxes and also capital gains. Similarly, Dascalopoulou also recognises the use bearer shares for facilitating the evasion of taxes and adds that shareholders are assisted by anonymity in their attempts to prevent the disclosure of their accumulated dividends.²⁰ Another consequence of using bearer shares is their contribution to the difficulty in the enforcement of statutes concerning areas such as alien property law, anti-trust and also related is the effect of bearer shares on the communicating of corporate ownership. The protection offered by bearer shares to obscure corporate ownership is also important because they hamper the ability to detect any change in ownership or possible intentions of any owners.

¹⁸Keenan Company Law pg. 232

¹⁹Fani Dasacalopoulou, 'Registered and Bearer Shares in England, Other Countries of Europe and the USA' (PhD thesis, City of London Polythenic, 1978). 81

²⁰Ibid 346

In addition the previously mentioned problems associate with the use of bearer shares, there has been renewed interest in bearer shares related to international concerns concerning the 'abuse of corporate vehicles for illicit purposes' '.²¹ Despite difficulty in quantifying the extent of the abuse, reports and surveys have established that they are widely used to enable criminal activity.²²

Various corporate vehicles have been found to be susceptible to being used for illegal purposes and include Foundations, Trusts, and Corporations. Foundations are recognized as being the civil law equal to the trust in Common Law. These entities are made up of property that has been moved to serve a specific purpose and consists of a single legal entity, without any shareholders or owners and normally administered through directors on a board. Foundations in some jurisdictions such as Italy, Denmark, and Germany are restricted to public purposes and in others such as the Netherlands and Panama and the Netherlands Antilles, permit the establishment of foundation for private purposes and even allowing engagement in commercial activities. Registration with authorities, annual filing of financial statements and robust governmental supervision contributes to transparency and extremely regulated vehicles. Misusing Foundations for illegal purposes grows when there is insufficient supervision and regulation or excessive control being employed by the founders. Having prior permission of the government or certification establishing the foundation was not a requirement of the Netherlands, however officials have found that foundations are being use increasingly for

²¹ OECD Report Corporate Vehicles abuse.

²² Transcrime, Euroshore: Protecting the EU financial system from the exploitation of financial centres and off-shore facilities by organised crime, January 2000, <<http://eprints.biblio.unitn.it/191/>> p. 118 accessed 1 May 2016.

criminal purposes.²³ In some Financial Centres with civil laws, supervision of foundations was not required, the need for public disclosures were few, and control over the foundation by founders was allowed with a high degree of anonymity. One example is Panama which did not require approval by the government for establishing a foundation or amending memorandum. There were no governmental agencies with responsibility for the supervision of the foundations. Moreover, documentation identifying the beneficiaries including the founder were not required to be filed publicly along with the non-submission of annual reports which would have contributed to illegal misuse.²⁴

Originating from the English Common Law, the Trust is an indispensable vehicle for the managing and transfer of assets. Widely used in common law jurisdictions the trust allows for the separation between beneficial ownership and legal ownership. In establishing a trust a settlor or creator of the trust shifts legal ownership of property to the trustee, whether a corporate entity or individual. Any property is held and managed by a trustee according to the provisions of the deed, benefiting any beneficiaries that are known and or discoverable from the trust deed. With a validly created trust there the requirement for a settlor to relinquish any assets that have been passed to the trustee. In return, there is the obligation of the trustee to abide by the terms in the trust deed, has a fiduciary responsibility to behave above-board and in a beneficiaries best interest and where there are not beneficiaries named, in the trust's best interest. Usually, there are limits on the duration of trusts, trusts terms are fixed and a legal challenge is needed for the removal of any trustees and where charities and individuals were the only beneficiaries of trusts and couldn't be utilised to slow down, obstruct or contribute to

²³Ibid 19 pg. 27

²⁴Ibid.

the defrauding of creditors. Like other corporate vehicles trusts have also been found to be used for unlawful purposes.²⁵

Trusts are an attractive tool to misuse because they employ a larger degree of privacy and anonymity than other vehicles. Due to the trust's private nature and is basically an agreement contracted between two private persons jurisdictions recognizing trusts have selected regulation that is different from other vehicles. This can include registration requirements differing from corporations with no overseeing authorities or even entry onto a central register. For many jurisdictions the enforcement of trust deeds for charitable trusts are the responsibility of the attorney general or the relevant government agency and there is no revealing to officials on the identities of the beneficiary or a settlor. Like bearer shares, trusts are used for concealing the existence of any holdings from a creditor, tax authorities and to obscure the beneficial owner's identity. The use of trusts for illegal purposes can play an important part in the money laundering process.

The establishing of a trust frequently makes up the last level obscurity for those attempting to hide their identification such as a complicated network of companies established to hide control of property kept collectively by the forming of multiple trusts.²⁶ Trusts are also used to assist in the money laundering process especially during the integration and layering phase and are also used by to commit fraud by settlors seeking to evade taxes by transferring any property into a trust and then later incorrectly assert that control over the property has been surrendered. With impressive changes to trust law in some financial service jurisdictions, the ability of trusts to continue assisting fraudulent activity by concealing identity has been greatly

²⁵Ibid pg. 25

²⁶Ibid pg. 26.

assisted by the changes. This has led to a departure from the usual common law trusts. With some trusts in offshore jurisdictions such as Niue, the Cook Islands and Nevis offering trusts that permit the names of beneficiaries and the settlor to be removed from the trust deed, allow a settlor to have command over a trust. Additional changes also include the recognition of trusts established for non-charitable purposes, non-adherence to the Statute of Elizabeth, permit trusts to progress with a limitless duration in time and are not revocable.²⁷

Even though trusts are considered an appealing instrument for the protection of assets from and possible claimants and creditors, some offshore jurisdictions and American states have gone further with the introduction of asset protection trusts which supply increased asset protection against creditors. As one of the original jurisdictions to establish asset protection trusts, the Cook Islands also allowed trusts with longer time periods, and other trusts that would be otherwise not be valid are considered charitable with the settlor holding positions as both beneficiary and retainer of trust control.²⁸

Corporations play an import part in the functioning of business in a market economy. Companies are generally separated into companies limited by shares or private limited company and public limited company or joint stock companies. The main differentiation between a public limited company and a private limited company is that the amount of public limited company shareholders are not limited and with the free transferability of public limited company shares. These distinctions broadly allow for the offering of shares to the public, trading of shares on the stock exchange and most importantly, the ability to issue registered shares or bearer shares. In order to offer this degree of adaptability public limited companies

²⁷Ibid.

²⁸Ibid

relegate the entity to strict supervision and regulation such as the regular disclosure of particular financial and non-financial information. In comparison private limited companies issued registered, limit the transfer, have a limit on the amount of shareholders and can prevent the issuing of shares to the general public. These limitations result in private limited companies being unable to trade their sales on the stock exchange and are also less heavily regulated and supervised when compared to public limited companies.²⁹

According to the Organization for Economic Cooperation and Development, the misuse of private limited companies in Europe occurs partly due to a lesser share capital requirement and because shareholders of these structures are not of primary relevance. The Performance and Innovation Unit of the United Kingdom Cabinet Office conducted a study and found that shell companies in the United Kingdom have been entangled in many complicated money laundering actions.

The use of non-publicly traded incorporated companies was also identified by the United States Financial Crimes Enforcement Network for their involvement in questionable wire transfer activities. They have also been found to be appealing to money launderers as they allow the use of corporations as directors, the use of nominee shareholders and the availability of officers off the shelf.³⁰ It is also important to note public limited companies with non-stock exchange trading shares are also susceptible to abuse for illegal purposes because in several

²⁹Ibid pg. 22.

³⁰Potential Money Laundering Risks Related to Shell Companies, United States Department of Treasury, And
Financial Crime Network. Guidance. <
https://www.fincen.gov/statutes_regs/guidance/html/AdvisoryOnShells_FINAL.html> accessed 2 April 2016.

jurisdictions, there is the ability to issue bearer shares whilst not being subjected to additional rigorous regulation forced on companies that are publicly traded.³¹

Finally, one of the more popular vehicles used in many offshore financial centres is the International Business Company or IBC. These companies are the main corporate entities utilised by non-residents in offshore financial centres and are used for any number of purposes including owning and operating a business, issuing bonds or shares and for assisting in raising financial capital. They are easily establish and usually have favourable provisions such as being exempt from local capital gains and profits as well as stamp and other gift duties but can also be prohibited from conducting business in the country of incorporation or may also not be permitted to conduct share offerings to the public.

There are several established commercial uses for international business companies, including intellectual property holding, being the holding for property portfolios, engaging in international trade and for taking legal advantage of tax agreements. The danger of international business companies being used for illegal purposes is dependant by a large extent on the degree of anonymity they offer and the amount of regulation they are subjected to. Many Offshore Financial Centres allowed incorporated business companies to issue bearer shares, along with the appointment of nominee directors and nominee shareholders and are used as a way to obscure company control and ownership.³²

³¹Ibid pg. 23.

³²OECD Report beyond the Corporate Veil pg. 23 < <https://www.oecd.org/corporate/ca/43703185.pdf>> accessed June 9 2016.

The OECD has suggested International Business Companies were often the victim of lax formal regulation, with no requirements for yearly accounts or returns disclosure. This is in contrast to other financial centres which prohibit bearer shares such as Bermuda, or if allowed that the requisite information on control and beneficial ownership be disclosed to authorities. Still, among offshore financial centres, the abuse of international business companies and exempt companies is evident. With different requirements for non-resident and local corporations such as such as local companies not allowing bearer shares and requiring stronger regulatory oversight including shareholder, directors and officer information. While exempt companies or international business companies may be able to issue bearer shares and have no requirement for the disclosure of beneficial ownership. The combination of lax or inadequate regulatory supervision and the efficacious use of anonymity allows for the increase susceptibility that exempt companies and international business companies will be used for criminal purposes.³³ The corporation as an legal entity has been described as well placed in efforts to enhance anonymity and According to Pedneaul et al “corporate structure, particularly the existence of the corporation as legal entity, lends its self well to the task of structuring financial transactions to increase anonymity...nowhere is this more evident than through the use of offshore entities knows as IBC's or entities whose ownership is held through bearer shares.”³⁴

It is important to note that the level of anonymity provided by corporate vehicles can be enhanced with the use of several devices including nominee shareholders and nominee directors and bearer shares. Nominee Shareholders are legitimately used in several

³³Ibid pg. 24

³⁴H. Silverstone, M. Sheetz, S. Pedneault, F. Pudewicg, Forensic Accounting and Fraud Investigation for non-Experts. 3 eds (Wiley and Sons; Hoboken NY, 2012) p 66

jurisdictions and are known for helping to assist with the clearing and settling of trades. Disclosure on registers of directors as well as shareholders in annual returns is a requirement in many jurisdictions, however the use of nominees lessens the quality of any shareholder register due to obscuring the true beneficial owner. To discover the identity of the beneficial owner when nominee shareholders are utilised, an investigation is conducted and under section 212 of the Companies Act there was provision for investigatory activity to identify the beneficial owners and a corporate entity can request the disclosure of the beneficial owner. Any refusal is met with sanctions such as the refusal of further registration of share transfers, retention of dividends and the suspension of voting rights.³⁵

Corporate Directors and Nominee Directors also used to hide the identity of a beneficial owner which in turn affects the quality and usefulness of the director information filed on the company registry. Nominee directors are listed on official company documentation and on official registries and are required to transfer all required responsibilities of the director to the ultimate beneficial owner. Nominee Directors, are not recognised in some jurisdictions including the offshore financial centres of Malta, Jersey, Isle of Man, The Netherlands Antilles and Cyprus. Accepting a directorship includes having a fiduciary responsibility and is subjected to the obligations and responsibilities of the director.

To restrict the accessibility and utilization of nominee directorships jurisdictions have sought to restrict the amount of directorships one individual can hold so to avoid possible abuse. The maximum directorships allowed in Ireland is twenty five, while in the United Kingdom the identification of any shadow directors is required by the companies act.³⁶

³⁵Oecd Pg. 32

³⁶Ibid pg. 32

Company Law and Bearer Shares Offshore Finance Centres

The ability to offer a business friendly environment, regulatory flexibility and confidentiality have been selling points in many Offshore Financial Centres. Accordingly, these Offshore Financial Centres have become linked with the use of bearer shares. The issuing of bearer shares was not allowed by company law in all offshore finance jurisdictions. Hong Kong, Guernsey and Bermuda are offshore financial jurisdictions that do not allow the issuing of bearer shares and according to Elcano “the reason of not permitting bearer shares may be attributed to political or economic factors or even legal traditions...the type of services in which OFC’s have their core activity may heavily influence the use of restrictions of bearer shares”.³⁷ Various financial services are offered in OFC’s including banking, aircraft and ship registration, vehicles for investment and also insurance. Despite being widely available in offshore financial centres, specialization is also used to differentiate the various offshore centres.

Bermuda is recognized as a leader in providing Insurance services and which has resulted in bearer shares having little application in the legal structure of Bermuda. Providing Insurance services is a highly regulated activity and adhering to business rules such as

³⁷Navarro Lezcano, JM, "Panamanian Bearer Shares 2: The Immobilisation of Bearer Shares." Available at SSRN<<http://ssrn.com/abstract=2284289>> (2013). accessed April 18 2015. Lezcano pg. 7.

registering shareholders allows for the easy observation of practices to thwart fraudulent activities.³⁸ The Cayman Islands, Panama and the British Virgin Islands are Offshore Financial Centres that permit companies to produce bearer shares and by including bearer shares in their legal structure these jurisdictions are able to complement their main activities.

The Cayman Islands strength involves offerings of its banking sector, Panama is widely known for the registration of ships and the British Virgin Islands is standard for the creation of International Business Companies.

BERMUDA

Insurance is recognised as the most significant financial service activity in Bermuda and there is a wide-ranging international insurance segment, including catastrophic reinsurance and life insurance. It is also the most important Captive Insurance domicile with the largest amount of Captive Insurance companies predominantly involved in assisting companies in the United States “15 of the top re insurers in the world are headquartered in Bermuda... Add to that, the largest number of captive insurance companies in the world supporting primarily Fortune 500 companies in the United States”³⁹ Overall, the insurance industry in Bermuda covers over ‘\$500 billion in net assets according to the 2014 Quarterly Report by the Bermuda Monetary Authority’.⁴⁰ The Companies Act in Bermuda permits the formation the three kinds of companies. These include Unlimited Liability Companies, companies limited by guarantee and Limited Liability Companies. However, in contrast to other offshore financial centres bearer shares are not allowed under section 53 of the Companies Act.

³⁸ DOUGLAS S, Piercing the Corporate Veil in Regulated Industries, Brigham Young University Law Review, Vol. 2008, No. 4, 2008 (2008). at p. 11

³⁹Government of Bermuda ‘Bermuda in the World Economy: Economic Relations with Asia, Canada, Europe and theUnitedStates’http://www.gov.bm/portal/server.pt/gateway/PTARGS_0_2_18757_935_233626_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/ministry_of_finance/new_ministry_of_finance/latest_news/bermuda_and_world_economy_2014.pdf accessed 12 July 2015.

⁴⁰ibid

CAYMAN ISLANDS

The Cayman Islands has established itself as an important provider of cross border financial services especially banking but also structured finance, aircraft and vessel registration. Cayman is also an out sized jurisdiction for investment funds and captive insurance with over fifty percent of gross domestic product generated through financial services while the tourism industry contributes some twenty percent. The current reiteration of Cayman Company Law was originally enacted in the ninety sixties⁴¹ and is the principal piece of statute directing the managing and establishing of corporations in Cayman. 2001 saw substantial legislative adjustment in the Cayman Islands and several amendments were completed to build up regulatory and supervisory framework, to expand the Cayman Islands capability to collaborate on an international level and to develop its anti-money laundering system. Guidance Notes on the Prevention and Detection of Money Laundering were issued by the Cayman Islands in June of 2001 and they were provided to assist with transparency and consistency in interpreting and applying Money Laundering Regulations which were supplied by proceeds of criminal conduct legislation.⁴² The amendment Custody of Bearer Shares law reflected in the companies Law 2001 Second Revision addressed the subject of bearer shares issued by a Cayman company. The supervision of bearer shares in the Cayman Islands is ruled by Part XV of the Companies Law. Part XV (1) states ‘a company incorporated under this law shall not issue bearer shares to any person other than a custodian’ and they should always be in the control of the custodian. The amended law referred to the custody of bearer shares rather

⁴¹Company Law CAP 22- 1st January 1964.

⁴² Cayman Islands Annual Report 2001: Industry Regulatory and Service Agencies. Pg. 58 <http://www.gov.ky/pls/portal/docs/PAGE/CIGHOME/ANNUALREPORT/2001/AR0501.PDF> accessed 4/7/2015.

than immobilising however “This essentially resulted in the immobilization of bearer shares and [was] therefore consistent with international practice”.⁴³ The overall objective of the amendment to the Cayman Islands Company Law was to safeguard entities in the Cayman Islands being utilised for criminal operations.

BRITISH VIRGIN ISLANDS.

Ever since enacting the International Business Companies Act (Cap 291) in 1984, the British Virgin Islands Government has promoted the registration of offshore companies to those wanting to incorporate in the jurisdiction and it has emerged as an important jurisdiction for domiciling offshore companies. By 2008, 823, 502 British Virgin Islands Business Companies were established and in March 2015 478,865 active company incorporations are listed with the Registry of Corporate Affairs.⁴⁴

The most significant piece of legislation regarding company law in the British Virgin Islands is the BVI Business Companies Act 2004. On the first of January 2007 the British Virgin Islands Companies Act 2004 wholly replaced the International Business Companies and two years later it would be the sole corporate statute. While not totally abolished, the British Virgin Islands have sought to restrict the use of Bearer Shares. In Section 12 (1) (j) of the International Business Companies Act, an International Business Company was allowed to issue bearer shares and say in the Memorandum of Association if registered shares could be changed for shares issued to bearer and also the exchange of shares issued to bearer for registered shares. A requirement of the memorandum was the inclusion of a statement on the

⁴³ibid

⁴⁴ BVI Financial Service Commission: Statistical Bulletin Q1 2015, Vol. 38. <http://www.bvifsc.vg/News/tabid/160/articleType/ArticleView/articleId/1493/language/en-US/Q1-2015-BVIFSC-Statistical-Bulletin.aspx> [Accessed 7/6/2015.]

amount of shares that would be issued, whether registered, to a bearer or through the express granting of the power to the directors for issuing registered shares and bearer shares to their preference. Bayles describes the new British Virgin Islands Companies Act regime as limiting “the BVIBC Act is more restrictive, with the provisions relating to the immobilization of bearer shares largely replicating the provisions of the International Business Companies (Amendment) Act, 2003”.⁴⁵

Utilising bearer shares under the Business companies Act is prohibited unless authorized by the Articles of Association or Memorandum. Additionally, there is also the prohibition of converting or exchanging registered shares for bearer shares unless specified in the memorandum and of December 2009 a system of custody has also been established for bearer shares and a requirement that bearer certificates be deposited with a custodian authorised or recognised by the Financial Services Commission. The authorised custodian should be a licensed Virgin Islands service provider or a non-resident, non-British Virgin Islands incorporated company. Recognised custodians include clearing organisations and investment exchanges that run settlement systems and security clearance in jurisdictions with membership of the Financial Action Task Force. For authorised custodians a fit and proper test must be met and the essential arrangements for the safe keeping of the bearer shares have in place. Assisting with opacity any company wanting to issue bearer shares is now responsible for presenting certain information to the custodian including the name of the beneficial owner of the shares, the name of all other persons who have an interest in the share and making a statement confirming that there is no other party with any interest in a share.⁴⁶ The enactment of the British Virgin Islands Business Companies Act created simpler provisions for the transition of companies with bearer shares according to Byles “on December 31st 2009 the memorandum

⁴⁵Paul Byles, ‘BVI Financial Services: A BVI Text.’ (FTS 2014). Pg.69.

⁴⁶ibid.

for all IBCs would automatically amend to prohibit the issuing of bearer shares unless the company specifically does not want the transitioning provision to apply”.⁴⁷ This led to the switching the IBC’s default position, from one capable of issuing bearer shares into non- bearer share companies with a reduced burden administratively.

REPUBLIC OF PANAMA

The Republic of Panama has concerned itself with the establishing the legal structure which enabled the advancement of business, particularly concerning promoting and rendering services. Due to its geographic location amongst South and Central America Panama, government incentives through tax and commercial legislation and the United States dollar as legal tender it has emerged as an international services centre. Panama is also recognised internationally as the leader in ship registration with the largest registry in numbers and gross weight and is the largest banking system in the region providing wealth management services to international and domestic clients and the formation of trusts and companies for controlling and holding assets. The corporate law of Panama offers the formation of several kinds of companies such as *Sociedad Cooperativa* or a cooperative company, *the Sociedad Colectiva* which is a general partnership or collective company, *Sociedad en Comandita por Acciones* or stock-issuing limited partnership, the *Sociedad en Comandita Simple* or simple limited partnership. More importantly there is the *Sociedad de Responsabilidad Limitada* or SRL a limited liability company governed by Law No 4 of 2009 where the liability of members is

⁴⁷Ibid 69.

limited to the amount of capital they contribute and the Sociedad Anonima SA which is a joint stock corporation which consists of shareholders whose liability is restricted their share value.⁴⁸

The Panamanian Law no 32 of 1927 and its amendments manage the formation of Sociedad Anonimas and is the most widely used company by foreign as well as local investors. According to the Organization for Economic Cooperation and Development ‘calculations estimate that it is the home to more than 400,000 corporations and private foundations [resulting] in a significant centre for corporate formation’.⁴⁹ In Panama, Law no. 32 of 1927 allows for the issuing of shares in bearer and registered. With bearer shares there is a requirement of Law no. 32 of 1927 Article 36 for the stock register to include the amount of shares that have been issued, the issuing date and the full payment of shares and non-assessable.⁵⁰ Issuing bearer shares can only be done if they are fully paid and non-assessable.⁵¹ In order to transfer a bearer share only the delivery of the certificate is needed and according to Lezcano “the share certificate can be transferred from one person to another without the formalities that involves the register of members”.⁵² After being issued, an owner of shares issued to bearer or a certificate can exchange them for a certificate with a similar amount of shares issued in their name and “the holder of a certificate of shares issued in the name of the owner can exchange it for a certificate of a like number of shares issued to the bearer”.⁵³

Bearer shares were criticised due to the growing misuse of the Sociedad Anonima or joint stock Corporation, with Panama being classified as a non-cooperative jurisdiction

⁴⁸ROBERT Y. STEBBINGS, *Panama and the Multinational Corporation: Tax Haven and Other Considerations*, (1974) 8 Int'l L vol 3... 626

⁴⁹<http://www.oecd.org/tax/transparency/46103294.pdf>

⁵⁰Ley 32 de 26 Febrero de 1927, article 36.

⁵¹Ibid article 28.

⁵²Navarro Lezcano, JM, ‘Panamanian Bearer Shares: Is it Necessary to Eliminate Them?’ (2012) *International Company and Commercial Law Review* 23 (6) 206-210.Lazcano pg. 9.

⁵³Ibid n9 pg. 23.

regarding financial crimes and money laundering. Along with pressure exerted by the OECD and developed countries, negotiating trade agreements between the United States and Panama proposed the abolition of bearer shares. In October 2011 a Free Trade Agreement was signed after having been negotiated over several years. Nevertheless, acceptance of the agreement was conditional on negotiating a tax information exchange agreement, eliminating bearer shares due to the loss of millions of dollars because of tax evasion and reformation of Panamanian labour law.⁵⁴

Offshore Financial Centres have been pressured to increase cooperation concerning the exchange of information and transparency in an effort to fight tax evasion and are subject to being named on lists as being non cooperative or responsive which is not opportune for providers of financial services. In order to conform to OECD standards, 2011 saw the presentation of a law proposal in the Panamanian Parliament to change the corporate law in Panama. This change included the abolition of the bearer shares which was instantly rejected by various parts of the Panamanian economy and was not allowed to be discussed in Parliament. Another attempt was made in March 2013 where a proposal for the immobilisation of bearer shares was offered. Differing from the previous proposal the proposal for the immobilising of bearer share was allowed to be debated despite robust disagreement by academics and professionals. Lezcano highlights the criticism of the propose change based on the cooperation that has been promoted “arguments have been based on the fact that Panama has introduced regulations against financial crime, a fact that makes the alteration of the Panamanian legal framework for Companies unnecessary”.⁵⁵

⁵⁴ RUNGE D, Don't Make the Perfect the Enemy of the Good: Passing the U.S.-Panama Free Trade Agreement at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1859781. Last visit 6 May 2015] at page 10.

⁵⁵ Jose María Lezcano PANAMANIA BEARER SHARES 2: THE IMMOBILISATION OF BEARER SHARES Lezcano Navarro, Jose Maria. "Panamanian Bearer Shares 2: The Immobilisation of Bearer Shares." Available at SSRN 2284289 (2013).

On August 6 2013 Law No.47 approved a custody system for certificates issued to bearer which was to become effective two years after the law's promulgation date.

Panama has followed other jurisdictions such as the British Virgin Islands and the Cayman Islands in developing a system of custody rather than abolishing bearer shares. The new law allows for a transition period of three years from its entering into force for bearer shares issued before the new law. Law No. 47 also requires the delivery of bearer shares issued after the coming into force of the law to the custodial along with confirmation from the shares owner including certain identifying information. This requirement should also be carried out for bearer shares issued before the law's entry into force but after the stated transition period. Local entities and individuals are also authorised to act as custodians and they include Lawyers registered by the Fourth Chamber of General Affairs of the Supreme Court ,Centrales de Valores -Central Securities Depositories founded in Panama and controlled by the Stock Market Supervisory Authority, Panamanian Trustees regulated by the Stock market Supervising Authority-Superintendencia del Mercado de Valores and Panamanian Banks with a general licence regulated by the Banking Supervisory Authority-Superintendencia de Bancos.⁵⁶ Furthermore, provisions have also been made for authorising foreign custodians including trustees, banks, and financial intermediaries that are appropriately licensed for their

⁵⁶Ernst and Young Panama. 'Panama adopts law creating custody regime for bearer shares' (Global Tax Alert News, Americas Tax Centre, 8 Aug 2013) [<http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--Panama-adopts-law-creating-custody-regime-for-bearer-shares>] accessed 14 June 2015.

activities, formed in jurisdictions with Financial Action Task Force on Money Laundering membership and recorded with the Supervisory Authority of Panama in a special registry.

The main responsibilities established for the custodians include keeping in their possession bearer share certificates and all related documentation of the performance of custodial services at a locally established office or at the address of resident agent of the issuing entity in a foreign custodian case.

Foreign custodians are also responsible for providing the resident agent of the company issuing shares identification data about the owner of the bearer shares. However, foreign custodians that produce a performance bond worth \$25,000 issued by a Panama licensed insurance company or bank are exempted from this requirement. Local custodians are also obligated to give identifying information on the bearer share owners when requested by a competent authority such as a tax authority and most important of all custodians must “hold physical custody of bearer share certificates and protect the confidentiality of the information when received”.⁵⁷ The new regime also provides for sanctions for failure to give over the share certificates that have been issued and once issued after the new regime is in force “the company will void the issuance of bearer shares if the owner of the shares does not appoint a custodian within 20 days from the issuance approval thereof”.⁵⁸ For bearer share certificates issued before the law coming into effect, if the shares are not put into custody through the transition period voting and economic rights of the shares will not be able to be exercised. The new

⁵⁷ibid

⁵⁸ibid

bearer share regime has been described as an improvement in helping to prevent financial crimes. However there have been suggestions that anonymity could be maintained with the creation of a non-charitable purpose trust where owners of bearer shares can establish a STAR or Special Trust Alternative Regime in the Cayman Islands.⁵⁹ This would involve transferring bearer shares to a STAR which would become the registered beneficial owner in the custodian's records "as far as the custodian is concerned, the trust is the beneficiary owner...confidentiality is kept because there is no requirement to register the beneficiary of the STAR trust."⁶⁰ Lezcano while recognising the effectiveness of the STAR Trust suggests its use would not be practical "to use a STAR TRUST in CI in order to hold bearer shares in a Panamanian Corporation is not practical due to the expenses incurred...however it is an effective means to keep anonymity".⁶¹ Recognising the need for Panama to adhere to international transparency standards the Panamanian authorities have amended the law on the custody of bearer shares and have brought forward the timeline for its implementation. Law No 18-2015 amends the regulation which created the custodial regime for Panamanian bearer shares⁶² and fast-tracks the implementation of the law. The new date for compliance has been changed to December 31 2015, rather than August 2018. Therefore, these bearer certificates will require delivery to the custodian or be changed to registered shares. The amendment also deals with boards of directors and incorporations of companies, requiring "the authorization of the board of directors or the shareholders for the company to be subject to the customary regime for bearer shares and that authorization must be registered in Panama's public registry".⁶³ With

⁵⁹ "The Immobilisation of Bearer Shares in Panama - retaining confidentiality in ownership" available at <http://www.lexology.com/library/detail.aspx?g=03379419-73f7-487f-9d8e-b751214758ec> [last visit May 18 2015]

Navarro Lezcano, JM, 'Panamanian Bearer Shares: Is it Necessary to Eliminate Them?' (2012) *International Company and Commercial Law Review* 23 (6) 206-210.⁶⁰ Lezcano n 15 pg8

⁶¹ *ibid*

⁶² Law 47-2013 of 6 August 2013.

⁶³ Ernst and Young Panama 'Panama amends Law on the Custody of Bearer Shares and accelerates its implementation timeline' (Global Tax Alert News from Americas Tax Centre) 27 April 2015.

incorporations, not registering the related corporate resolution in the Public Registry by December 31 2015 will be seen to have been changed to outlaw the issuing of bearer shares.

[<http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--Panama-amends-Law-on-the-Custody-of-Bearer-Shares-and-accelerates-its-implementation-timeline>] accessed 12 June 2015.

THE FALL OF BEARER SECURITIES IN UK COMPANY LAW

There has been renewed attention regarding the beneficial ownership of corporate entities by the international community in order to combat money laundering, tax evasion and avoidance, corruption and other financial crimes. In June 2013 at the Lorne Summit held in Ireland with the United Kingdom assuming the presidency, G8 member countries recommended several core principles that are essential to the transparency of the control and ownership of companies. Some of the core principles agreed to by the G8 Member States included⁶⁴:

Companies should know who owns and controls them and their beneficial ownership and basic information should be adequate, accurate, and current. As such, companies should be required to obtain and hold their beneficial ownership and basic information, and ensure documentation of this information is accurate.

Beneficial ownership information on companies should be accessible onshore to law enforcement, tax administrations and other relevant authorities including, as appropriate, financial intelligence units. This could be achieved through central registries of company beneficial ownership and basic information at national or state level. Countries should consider measures to facilitate access to company beneficial ownership information by financial institutions and other regulated businesses. Some basic company information should be publicly accessible.

National authorities should cooperate effectively domestically and across borders to combat the abuse of companies and legal arrangements for illicit activity. Countries should ensure that their relevant authorities can rapidly, constructively, and effectively

⁶⁴G8 Action Plan Principles to Prevent the Misuse of Companies and Legal Arrangements. 2013 Lough Erne Summit Lough Erne, Northern Ireland, United Kingdom, June 18, 2013. <<http://www.g8.utoronto.ca/summit/2013lougherne/lough-erne-misuse.html>> accessed July 12 2015.

provide basic company and beneficial ownership information upon request from foreign counterparts.

The misuse of financial instruments and of certain shareholding structures which may obstruct transparency, such as bearer shares and nominee shareholders and directors, should be prevented.

In a published discussion paper ‘Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business’⁶⁵ the government outlined a series of proposals to improve the transparency in company ownership and increase trust in business. These proposals included the requirement that companies get and make available, information on the beneficial owner and have the information accessible to tax officials and law enforcement through a central register. Other related issues were considered and included nominee directors and bearer shares which were highlighted in the G8 principles for stopping the misuse of companies and the significance of inhibiting “the misuse of financial instruments and shareholding structures which may obstruct transparency, such as bearer shares and nominee directors”.⁶⁶

Companies may be used to assist in a variety of illegal activities including terrorist financing, corruption, tax evasion and money laundering. With the increase in transparency it is hoped that these activities would become more difficult and provide a deterrent to crime. In the United Kingdom the possibility exists for finding the legal owners of UK companies because names of the legal owners appear on the company share register which is available to

⁶⁵UK Discussion Paper: Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212079/bis-13-959-transparency-and-trust-enhancing-the-transparency-ofuk-Company-ownership-and-increaing-trust-in-uk-business.pdf> accessed June 11 2015.

⁶⁶ ‘Common principles on misuse of companies and legal arrangements’, June 2013: <<https://www.gov.uk/government/publications/common-principles-on-misuse-of-companies-and-legal-arrangements>> accessed June 19 2015.

the public. However, in order to determine true ownership and control then the identification of beneficial owners is necessary. Beneficial owners eventually control or own companies by holding over twenty five percent of the shares or voting rights of the company or by controlling company management in a different way. Due to the level of control or interest, corporate choices can be significantly influenced which allows the probability of misuse. There was no obligation for information to be held by companies on beneficial ownership, which resulted in the concealing of ownership or control allowing usage of the company to assist in carrying out a variety of illegal actions. The difficulty in linking individuals to companies reduces the possibility of a positive result for tax authorities and law enforcement.⁶⁷ It has been suggested that there is a strong relationship concerning illegal activity and the absence of transparency in the control and ownership of companies. The World Bank-UN Office for Drugs and Crime Stolen Asset Recovery Initiative conveyed that a large number of the cases of corruption investigated include using corporate vehicles to obscure the actual funding source and beneficial ownership. From these cases the overall takings of corruption amounted to some 56.4 billion dollars.⁶⁸

The UK Government proposed a central registry of company beneficial ownership information in its Action Plan stating it will “require companies to obtain and hold information on their beneficial ownership and make this information available to law enforcement and tax authorities through a central registry maintained by the Registrar of Companies”.⁶⁹ An important consideration for the proposed register was the ability of the public to access the information. Additional areas needing attention in preventing the misuse of companies are

⁶⁷ibid n36 pg. 10.

⁶⁸ ‘Barriers to Asset Recovery’, 2011: <http://star.worldbank.org/star/publication/barriers-asset-recovery> <accessed June8 2015>

⁶⁹ ‘UK action plan to prevent misuse of companies and legal arrangements’, June 2013: <https://www.gov.uk/government/publications/uk-action-plan-to-prevent-misuse-of-companies-and-legal-arrangements> <accessed May 9 2015>.

nominees and bearer shares. Nominee and corporate directors can be similarly used to hide the control of a corporation. The directors of companies are recorded at Companies House, however persons who would utilise a company to engage in criminality are not likely to want themselves registered and could well appoint a nominee director. This nominee is listed on the register of directors but goes along with the instructions of the true beneficial owner “in some cases the nominee will have no involvement in the management of the company at all, the beneficial owner can simply rubber stamp company documents with the nominee’s signature”.⁷⁰ Acknowledging the possibility for misuse, the Government in effort to improve transparency proposed requiring a director with total responsibility for company management handing over responsibility to another individual to make a disclosure of this action, including the identification of the person the appoint was made on behalf resulting in the use of nominees as a lesser attractive way of concealing corporate control. Criminals wanting to exploit companies will want the company ownership structure to be as difficult and unclear as can be.

As previously mentioned, the company legal owners are documented on the register of members of a company. However, Bearer Shares delivers a method to escape having their identification discovered on the register “A company can issue ‘bearer shares’ which belong to whoever holds the physical share warrant - the company’s register will simply record that the shares are held by the bearer of that warrant”.⁷¹ While recognising the legitimate uses of bearer shares and recognising the potential for misuse, the Government proposed a bar on bearer shares “bearer shares also permit a level of opacity which is incompatible with the principles of our ambitions to know who really owns and controls UK companies...we therefore consider that it may be appropriate to prohibit the creation of new bearer shares to prevent the potential for misuse”.⁷² For those existing bearer shares, a phase of time was proposed for holders of

⁷⁰Ibid n 36. Pg. 13.

⁷¹Ibid.

⁷²Ibid.

bearer shares to exchange their bearer shares into registered shares. The fall of bearer securities in the company law of the United Kingdom occurred when the Small Business Enterprises and Employment Act 2015 was given the Royal Assent on 26 of March 2015. After this passing, no company is allowed to issue more bearer shares, irrespective of a company's articles of association and certain measures needed to be done for the conversion of outstanding bearer shares in shares provided for in the share warrants. The Act gave a nine month relinquishing process for converting and cancelling of any existing bearer shares with the process continuing by June 26 2015. Companies were then required to give notice to bearer share holders informing them of their rights to give up the shares and any consequences for not doing so by the prescribed time. If they were not surrender by designated time, assets were too paid by the company into a separate account and a second notice sent. According to Thumbadoo after the nine month period has terminated if any bearer shares are left “SBEEA 2015 specifies the court process companies need to through to cancels those outstanding bearer shares and the process former holders can follow to claim any sum paid into court by the company in respect of their cancelled shares”.⁷³

It is curious to note that Offshore Financial Centres such as the British Virgin Islands Cayman Islands and Bermuda had addressed the issue of bearer shares in their company law before the United Kingdom and their existence until fairly recently was puzzling even with the previous announcement that information from Companies House showed 0.04% of registered companies issuing bearer shares. Sharman questioned the assertion of United Kingdom authorities that the issuing and use of bearer shares was infrequent and was not at risk of assisting financial crime. How was it possible for the United Kingdom to permit companies

⁷³ Janisa, Thumbadoo, Company Law after SEEBAA 2015, Lexis Nexis Corporate Law. <<http://blogs.lexisnexis.co.uk/corporate/company-law-after-sbeea-2015/>> Accessed 8 May 2016.

with bearer shares, while not being at risk of money laundering also as “it is unclear why any other country could not offer the same service in a fairly risk free manner.”⁷⁴ He also suggested that the declaration in UK evaluation report highlighting the rarity of companies offering bearer shares was not based on evidence and was weakened by marketing efforts of some Company Service Providers.⁷⁵ With international pressure from the OECD and FATF a large portion of Offshore Financial Centres had their bearer shares immobilized and placed in the custody of a registered or authorised custodian⁷⁶, and according to Hatler and other numerous countries have seen these shares being immobilized in effect rendering turning them to registered shares and not interrupting lawful business.⁷⁷ According to Murry, Richard Murphy, the director of Tax Research UK “considers it “shocking” that the UK still [had] bearer shares...they just need to be banned.”⁷⁸ Rosdol also acknowledges that Offshore Financial Centres are leaders in the

⁷⁴Sharman, Jason, Panama's Corporation System and Bearer Shares in Comparative Perspective' A Brief for the Law Faculty of Law and Political Science of the University of Panama (2012) http://www.eduardomorgan.com/blog/wp-content/uploads/2012/09/Sharman_Panama_brief-FDUP.pdf accessed 9 June 20 15.

⁷⁵ Ibid.

⁷⁶ Adam Graycar, Russel Smith, Handbook of Global Research and Practice in practice in corruption' (Edgar Publishing 2011) pg. 207.

⁷⁷ B Emile van der Does de Willebois, J.C. Sharman, Robert Harrison, Ji Won Park, Emily Halter, The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It. (World Bank Publications, Washington DC) p 8.

⁷⁸K, Murray Walking the Walk: Practical Measures to Undermine the Business of Organized Crime. Journal of Financial Crime 22 (2) 199-207.

area of regulation and states that OFC's are out front of other onshore jurisdictions and also those who set international standards.⁷⁹

Despite

. Along with the proposals by the United Kingdom Government, the European Union also began negotiations on beneficial ownership suggestions for the Fourth Money Laundering Directive that would be applicable to European Union Member States. With terrorist financing arrangements changing, the overall regulation environment needed adapting. One of the key reasons for the Directive concerned the revised anti money laundering and financial crime recommendations given by FATF. After an assessment of the application and implementation of the Third Money Laundering Directive over the European Union, the European Community embraced a report recommending further development of the legislation. This new directive suggests the belief that the previous one was not implemented consistently across the European Union and could be problematic for businesses operating across borders.⁸⁰ The effects of the modifications on United Kingdom regulated firms are not likely to be considerable because the anti-money laundering system in the United Kingdom already includes most of the rules. However the largest effect will be felt in the transparency of beneficial owners. The Directive helps to increase transparency concerning beneficial ownership of trusts and companies. The beneficial ownership level remains the same for anyone in control of twenty five percent or

⁷⁹Rosdol, A, 'Are OFC's Leading the fight against money laundering? Journal of Money Laundering control Vol 10 (3) (2007) 337 351.

⁸⁰ Cheryl Jones, The five things you need to know about the Fourth Money Laundering Directive. Lexis Nexis Financial Services. 2014. <http://blogs.lexisnexis.co.uk/fs/the-five-things-you-need-to-know-about-the-fourth-money-laundering-directive/> accessed April 4 2016.

more of a business. Companies will also be required to preserve records substantiating beneficial ownership. There are other changes that are to be employed by the directive and they include an increased emphasis on the risk based approach, the acknowledgement that procedures ought to be attuned depending on the amount of risk occurring in a particular sector or jurisdiction and provides clarity when simpler customer due diligence is applicable, as some financial institutions have taken streamlined customer due diligence in conditions wherever additional comprehensive customer due diligence was suitable. The Directive also includes endorsements concerning politically exposed persons and expands the meaning of politically exposed persons to comprise local persons in important locations in a country.⁸¹

Responding to growing concern about trust in business and to enhance the overall reputation of United Kingdom as a transparent place to do business. The UK has become one of the first countries to have rules concerning the disclosure of corporate ownership. From April 6 2016 Societates Europaeae, limited liability partnerships and companies were required to retain a register of individuals or ‘legal entities that have control over them.’⁸² a register of directors and a registered of members’. After June 30th 2016 limited liability partnerships, companies and Societates Europaeae will have to forward this information yearly to Companies House where the public register is located if producing a confirmation statement. Importantly from June 30th 2016 forward those seeking to incorporate a new company, societates europaeae and limited liability parterships will need to forward a statement of ‘initial significant control

⁸¹ Ibid.

⁸²HM Department of Business Innovation and Skills. Register of People with Significant Control Guidance for Companies, Societates Europaeae and Limited Liability Partnerships. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515720/Non-statutory_guidance_for_companies__LLPs_and_SEsv4.pdf>

to company house with other documentation that is required for an application to incorporate.’

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The requirements to keep a PSC register are set out in Part 21A of the Companies Act 2006 (as inserted by the Small Business Enterprise and Employment Act 2015 and the following regulations: The Register of People with Significant Control Regulations 2016, The European Public Limited Liability Company (Register of People with Significant Control) Regulations 2016; and The Limited Liability Partnerships (Register of People with Significant Control).⁸⁴

A Person with significant control is a legal person with significant control over that company. The Small Business Enterprise Employment Act 2015 defines ‘significant control’ as,

direct or indirect ownership of more than 25% of the shares in the company, direct or indirect control of more than 25% of the voting rights in the company, direct or indirect right to appoint or remove or appoint a majority of the directors of the company, the exercise or right exercise significant influence over the company, or the exercise or right to exercise significant influence or control over the activities of a trust or firm which itself meets one of or more of the first four conditions.⁸⁵ Despite the efforts to improve information about the ultimate beneficial owners of entities some have argued that a central register is of unconvincing value, according to Cook a United Kingdom register would provide data of dubious value, as the criminal fraternity and individuals misusing companies to launder money are unlikely to comply with the self-reporting requirements. This data is likely to be unreliable as there are unlikely to be any meaningful checks in place on the quality of information being captured. In addition, those looking to get around the rules, or those who simply wish not to disclose their information, could simply incorporate non-United Kingdom companies which

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid 79.

would not be covered...”⁸⁶ He also highlights the possibility of the reduction of inward investment in to a country “Making the information public could and would drive investment away from the United Kingdom. Our research indicates that should a public register of beneficial ownership be introduced in Jersey our membership base would expect to see a reduction in business of, on average, 27%. This could reduce the amount being invested in the UK via Jersey by as much as £150bn based on Capital Economics estimates of the total UK inward investment flows intermediated via Jersey.”⁸⁷

In Jersey beneficial ownership information has been available since the 1990’s and has been readily available to law enforcement sources as well as investigative partners helping to create an effective beneficial ownership system “In addition, Jersey is also expanding its tax agreements with numerous developing countries, including Botswana, Ghana, Kenya and Nigeria, where the offshore centre does not have specific information exchange agreements in place, the Joint Financial Crimes Unit participates internationally as a member of the Egmont Group of Financial Intelligence Units and the Camden Asset Recovery Inter-Agency Network Given there is ready access and availability of beneficial ownership information to foreign fiscal and investigative authorities, there appears little further benefit in pursuing a public register..”⁸⁸

Highlighting the association between the United Kingdom and the European Union in their participation in the worldwide struggle for a reduction in corporate secrecy, however the efforts of the UK have been heavily criticised for the negative effect on investors, According to Ward having a public beneficial ownership registry would send business elsewhere “there is no doubt that such an approach will set the UK apart, either as leading the global transparency

⁸⁶ Geoff Cook, Cook: the case against a beneficial ownership registry.<<https://www.cchdaily.co.uk/cook-case-against-beneficial-ownership-registry>>

⁸⁷ Ibid.

⁸⁸ Ibid.

drive identified as a priority at the Lough Erne G8 summit in June 2013 or by putting the UK at a unique disadvantage by driving investors to form companies elsewhere.”⁸⁹ With the introduction of the register it is also believed that an extreme desire for privacy and confidentiality making it more difficult to be identified “ more complex corporate structures are likely to emerge making CDD checks for regulated business more complex, time consuming and expensive.

The push for increased transparency was also directed to the United Kingdom Overseas Territories informing them of the proposals for change “On 22nd April 2014, Prime Minister Cameron wrote to the Chief Ministers of the Crown Dependencies confirming that the establishment of a publicly accessible central registry of company beneficial ownership information would form a key pillar of UK policy in the future and that, following the consultation, legislation would be introduced in the UK Parliament as soon as possible”.⁹⁰ With notification on the United Kingdom proposal for a central Registry of beneficial ownership some overseas territories had consultations on the issue. In the Cayman Islands the majority of respondents were not in support of a central registry of beneficial ownership information or its accessibility to the public. The respondents have also highlighted that Cayman laws have required beneficial ownership information to be held locally in line with international standards “regarding a central registry that is publically accessible, all of the 81% said it would create a significant financial burden for the Cayman Islands Government, raise issues such as the violation of privacy and that information security, accuracy and integrity that would need to be

⁸⁹ A, Ward, ‘Why we might not benefit from naming beneficial owners. Compliance Monitor, 2013. <<https://www.i-law.com/ilaw/doc/view.htm?id=331174>> accessed 9 July 2016.

⁹⁰ Isle of Man consultation. <<https://www.gov.im/lib/docs/co/consultations/BeneficialOwnership/governmentresponsetotheconsultat.pdf>> accessed 4 March 2016.

addressed prior to any possible implementation of such a registry.”⁹¹ The government of the Cayman Islands in making a decision about the central beneficial register believed it was best to test their program with FATF standards for accessibility. Importantly, recommendation 24 from FATF regarding beneficial ownership has three ways in which compliance can be achieved. These include the central register and utilising data gathered from regulated and licensed service providers. It should be noted that for over a decade the Cayman Islands has demanded regulated and licensed corporate service providers to gather, maintain and bring up-to-date beneficial ownership information. The Cayman’s stand has also been influenced by the lack of a global standard on the issue and states “until such time as there is a global agreement on appropriate exemptions and safeguards, and this becomes the internationally practice standard the Cayman Islands will continue to follow it CSP regime.”⁹² The demise of bearer shares in the United Kingdom has also been followed by the Cayman Islands even though bearer shares have been immobilised in the Cayman Islands since 2001. The government in its report on beneficial ownership stated that the government would no longer permit the issuing of bearer shares “the government will implement the abolishment of the bearer share regime in the Cayman Islands in accordance with FATF recommendation 24.”⁹³ The Companies (Amendment) Law 2016 came in to effect on May 13 2016 and has eliminated the ability of exempt companies in the Cayman Islands from issuing new bearer shares. Section 31 A of the Company Law states that exempt companies were not permitted to issue new bearer shares after the 13th of May. By the 13th July 2016 existing bearer shares should have been transferred into registered shares after which they would be void.⁹⁴ The British Virgin Islands Government

⁹¹ Government of the Cayman Islands: Consultation Report on maintenance of Legal and Beneficial Information. <http://www.gov.ky/portal/page/portal/cighome/mfs/pressroom/2014/government-issues-beneficial-ownership-report> accessed 22 May 2015.

⁹² Ibid pg.9

⁹³ Ibid pg. 10.

⁹⁴ Companies (Amendment) Law, 2016 pg.1-7.< <http://www.gov.ky/portal/pls/portal/docs/1/12294432.PDF> > accessed 4 July 2016.

has also carried out a consultation on the push for a register of beneficial owners which is publicly accessible. The consultation was carried out during November 2013 to March 2014 and received responses from various companies, financial services trade bodies and non-governmental organizations “ over 81 percent of respondents did not support the introduction of a central register preferring the existing architecture”⁹⁵ There various reasons for not supporting the establishment of a central register for beneficial ownership including, a rise in the costs for compliance which could lead to a loss of an edge competitively, data security concerns, potential for increased fraud and the infringement of rights to privacy with a publicly accessible register. The government has suggested that the current regulatory frame work is robust “ The British Virgin Islands legislative regime requires the keeping and maintaining of beneficial ownership...such information is available for local regulatory and law enforcement purposes and is also accessible for legitimate mutual assistance requests from foreign law enforcement and tax authorities.”⁹⁶ The BVI government concluded that the current regime is robust and additional resources should be added for reform...

⁹⁵ BVI Government Beneficial Ownership Consultation.
<<http://www.bvifsc.vg/Portals/2/Consultation%20Paper%20on%20Beneficial%20Ownership%20Information.pdf>>

⁹⁶ Ibid pg. 4.

ARGUMENTS FOR CONTINUED CONFIDENTIALITY

Despite the push for increased transparency to combat the misuse of corporate entities to prevent various financial crimes, various arguments have been advanced for the retention of confidentiality. Before discussing the acceptability of Offshore Financial Centre's secrecy it is important to feature some of the historical justifications for confidentiality. It has been suggested by Campbell that the notion of confidentiality in banking might have been in existence in Babylon as far as 5000 years ago.⁹⁷ According to Antione, it proceeded to the

⁹⁷A Campbell, 'Bank Confidentiality and the Consumer in the United Kingdom in P. Cartwright (ed.), *Consumer protection in Financial Services*. Great Britain; Kluwer Law International, 1999, p78.

Civil Codes and merchants customary laws, confidentiality was protected in 1765 by King Frederick the Great of Prussia:

“ we forbid, at Our Royal Disgrace, all and everybody to search into what should stand in the folio to the credit of another person, and none of the bank clerks shall dare to disclose such, whether by words, signs or in writing, or suffer loss of their employment and the penalty expecting a perjurer”⁹⁸

Young suggests that one of the arguments for the retention of confidentiality is the historical association with the protection of assets for individuals escaping political and religious persecution. The Banking Act of 1934 in Switzerland has been described as a good example of this protection association. In his analysis of banking secrecy, Campbell suggests that secrecy in banking was created by the Swiss Act and is now a model that is generally established in banking in both onshore and offshore financial centres. In 1935 the Act came into force after the political and economic turmoil after behind World War I and organised the lawful customs which banks earlier depend on for the protection of client confidentiality. Even though the defence of the privacy of the client wasn't initially the driving force of the Swiss Banking Act, it later came to be the instrument which allowed banks in Switzerland to safeguard their clients' privacy despite the input of distant informers against the foreign clientele of Swiss Banks.

The Act has been underscored as important to individuals victimized during Nazi Germany and according to Young “the German Left was able to save some of its assets by hiding them in Switzerland, after trade unions were broken up on Hitler's orders...and

⁹⁸Schneider, M. (1979) 'Bank Secrecy', International Business Law, Vol 7, p 230.

Switzerland became a safe haven for the persecuted people of political regimes to hide their money”.⁹⁹

It is also submitted that privacy in banking is now even officially included in human rights legislation “the specific right of a persecuted person or refugee to client privacy in private banking is now formally recognised by Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, which goes some way in offering a defence for the use of strong banking confidentiality laws”.¹⁰⁰ Offshore Financial Centres are regularly described as secrecy jurisdictions offering solid confidentiality in international finance which attracts a significant and wide-ranging clientele with various reasons for utilising Offshore Financial Centres. Another reason for the retention of confidentiality in Offshore Financial Centres is that without the availability of privacy, locations could miss out on their financial necessity which could result in political as well as economic destabilization. The potential for economical destabilization is not only for the jurisdiction concerned but similarly the international community.¹⁰¹

Hampton and Christensen¹⁰² have recognized that western countries originally encouraged their ex colonies to diversify their economies by offering various financial services. The Offshore Financial Centre model has been around since the late nineteenth century when companies established in the State of New Jersey paid a lesser state rate of tax provided they also operated commercial activities in different states.

⁹⁹ Young, M, ‘The exploitation of Offshore Financial Centres’ *Journal of Money Laundering*. 2013 16 (3) 198-208. Young, Banking Secrecy. Pg. 135.

¹⁰⁰ *Ibid* n 46 139.

¹⁰¹ *Ibid*.

¹⁰² M.P. Hampton and J. Christensen. ‘Offshore pariahs? Small island economies, tax havens and the re-configuration of global finance’, *World Development* 30, 9, 2002, 1657-73.

In many of the Offshore Financial Centres in the Caribbean, including British Overseas Territories, the start of the growing offshore financial services sector was beckoned by the ending of colonialism in the middle twentieth century. These small states expanded into financial centres when developing from colonialism due to “a path of dependence applicable to them”¹⁰³ Path dependence has been explained as “a system in which past choices or actions restrict the possibilities of the exploration of future outcomes”.¹⁰⁴ Hampton and Christiansen suggest financial choices and movements through critical times during history assisted in constructing offshore financial centres.¹⁰⁵ This is especially the case with the invitation to foreign investors by the Cayman Islands after the failure of the turtle farming industry in the 1960’s the road to becoming a finance centre was advanced particularly when improvements were made to key infrastructure. The business and Governmental assistance offshore financial centres received from western countries as they diversified their economies is best demonstrated by their decisions to locate bank branches in those countries. The first Barclay's Bank was established in 1953 and would be followed by Royal Bank Canada and Canadian Imperial Bank of Commerce ten years later.

Overall, the realization of these financial centres surpassed all anticipations as the Cayman islands is estimated to be one of the world’s largest financial centres which attracts a substantial percent share of the total global market of international banking liabilities.¹⁰⁶ For British Overseas Territories, it has been suggested that their overall success is the result perceptions of being safer jurisdictions for non-residents to place resources when contrasted with other offshore finance centres. Palan¹⁰⁷ asserts this is due to British Overseas Territories

¹⁰³Young, M, ‘The exploitation of Offshore Financial Centres’ *Journal of Money Laundering*. 2013 16 (3) 198-208.

¹⁰⁴Young, *Banking Secrecy* pg. 136.

¹⁰⁵M. Hampton and J. Christensen, *opsit.* pp. 4, 5.

¹⁰⁶R. Palan, ‘International Financial centres: the British-Empire, city states and commercially oriented politics’ *Theoretical inquiries in law* 11, 2010, 150.

¹⁰⁷R. Palan, ‘International Financial centres: the British-Empire, city states and commercially oriented politics’ *Theoretical inquiries in law* 11, 2010, 150.

retaining the colonial connexions of economics, politics and language connected to the British Empire providing an indication of stability. Importantly, Young suggests that information has shown that genuine private client and commercial businesses select particular countries including British Overseas Territories due to their Britishness.¹⁰⁸

A number of reasons in defence of the principle of offshore confidentiality have been advanced by Antoine. One modern reasoning for financial confidentiality is believed to be the protection provided to individuals with the desire to protect information from possible rivals and for the safeguarding of secrets in business. It is also argued that banking confidentiality is viewed as a 'professional privilege' that warrants similar legal safeguard as an attorney client privilege or the confidentiality that exists concerning a doctor and patient. Some additional reasons for justifying financial confidentiality include the movement of capital from the dangers associated with war or repressive governments, liberty from unwanted admiration, exchange controls, reputational threats, and legal judgment protection and from growing threats of blackmail and robbery.¹⁰⁹ It may also be argued that confidentiality in financial activities is a significant aspect in their business existence.

This is especially the case regarding the client banker relationship. In Swiss law the relationship is viewed more than an everyday business relationship, but take on a fiduciary quality. The idea of a fiduciary relationship appears to be robust in offshore financial groups, where investments are made with the agreement of the importance given to confidentiality. Evidence of confidentiality being viewed as an ordinary and desired aspect of relationships of a financial nature was shown in 1982 in a Swiss referendum on the need to change confidentiality laws here the public voted devastatingly against a proposal and in support of

¹⁰⁸Ibid n 50 137

¹⁰⁹Antoine, Marie-Rose, 'the Protection of Offshore Confidentiality: Policy implications and Legal Trends'. *Journal of Financial Crime*, vol 7, (1) 13.

retaining confidentiality. In an OECD Report Issues in International Taxation-Four Related Studies an explanation is taken of genuine motives for protection of financial confidentiality from regular third parties, which included competitiveness, commercial expediency and the desire to protect privacy.¹¹⁰ There is also recognition that the public interest is important in preserving confidentiality. This is a wide interest and is not only limited to the Tournier principle on confidentiality. Lord Keith of Kimmell has stated on the public interest issue:

“A general rule it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself”¹¹¹

Young also asserts that having confidentiality is important for western countries due the benefits they get from these jurisdictions. For Young even though the more developed countries are dedicated to anti money laundering and other crimes, there is no uncertainty that there are substantial benefits to be obtained “ it is a political and economic reality that the west benefits from offshore financial centres because non domiciled private clients and businesses utilize the financial tools that these financial hot spots have to offer” with Sharman¹¹² suggesting that “there may also be utilitarian, social arguments for preserving financial privacy.”¹¹³

¹¹⁰ibid

¹¹¹AG v Guardian Newspapers Ltd (No.2) [1998]3 WLR 776 at 782.

¹¹² Sharman, J.'Privacy as Roguery: Personal financial Information in An Age of Transparency', Public Administration, (2009) Vol 87 (2). 2.

¹¹³M, Young, Banking Secrecy and Offshore Financial Centres: Money laundering and offshore banking (Routledge Research in Finance and Banking Law 2013).
Author Mary Alice Young Bank Secrecy pg. 138.

While there is continued movements towards more disclosure of information, it is also true that there has been provision for data protection and according to Antoine, offshore financial centres did not make the principle of confidentiality due to greed and irresponsibility, instead, the widely held view that offshore financial centres are havens for criminal actions is overstated “the popular argument that an important rationale for undermining confidentiality laws is to enable law enforcement authorities to fight international crime is therefore suspect, particularly as mechanisms already exist within offshore legal systems to do so[as] anonymity is an acceptable business objective”.¹¹⁴

Notwithstanding efforts by offshore financial centres to solidify and ingrain the financial confidentiality principle, there has been the steady erosion over time. A determined focus designed to undermine or end confidentiality in offshore jurisdictions has begun onshore and according to Antoine the confidentiality principle has been limited to some degree “judicial and legislative developments have to some extent, contained the principle...these successful challenges have also questioned the *raison de’etre* of offshore confidentiality”.¹¹⁵ This wearing a way of offshore confidentiality is predominantly being achieved due to the passing of regulations that try to encourage the helpful information exchanges, or to force disclosing of financial information in particular cases. The passing of these laws has been done both offshore and onshore at the international as well as domestic level, these laws predominantly involve increased reporting of tax obligations and criminal law enforcement and are a straight forward reaction to the misuse of confidentiality customs for the evasion of tax responsibilities and facilitating financial crime. Importantly, several offshore financial centres have entered into Tax Information Exchange Agreements-TIEAs offering mutual assistance on tax matters. The United States by 2001 only signed TIEAs with a few offshore financial centres

¹¹⁴Antoine banking Secrecy and Offshore Financial Centres pg. 14.

¹¹⁵Ibid 16.

including Bermuda, Barbados, St Lucia, Grenada and Trinidad and Tobago, which were the result of the Caribbean Basin Initiative¹¹⁶ involving the United States. After November 2001 more TIEAs were entered into, including with the United Kingdom for the Cayman Islands on November 27, 2001 and the British Virgin Islands on April 3, 2002, Guernsey on September 23 2002.

¹¹⁶Caribbean Basin Economic Recovery Act, Pub L, No 98-67, Stat 384

CONCLUSION

Bearer Shares provide certification that the bearer of the warrant is entitled to the shares it represents. With these shares, ownership can be easily transferred by passing the physical warrant from one individual and are used for various legitimate reasons. They provide a “fast, easy, cost effective and non-bureaucratic means for the transferability of ownership”¹¹⁷ Privacy is another advantage of the use of Bearer Shares because they facilitate privacy in instances where corporate secrecy can help to restrict sensitive information from being accessed by “inappropriate competitors and potentially hostile buyers”¹¹⁸ These shares are also used for the provision of asset protection in securities deals where security is needed by financiers. Companies House data has shown that bearer shares have been issued by some twelve hundred companies, the majority being small private companies which represent a 00.4% total of UK companies.

Unfortunately, the use of bearer shares have attracted concern from financial regulators and law enforcement. Illegal activity is believed to be facilitated by corporate opacity such as money launder laundering, tax evasion, and even terrorist financing. In 2013 at the G8 Summit, the leaders recognised that corporate opacity is problematic and made agreements on publishing National Action Plans to address the issue.

¹¹⁷ The Control of BVI-Issued Bearer Shares. <http://www.bvifsc.vg/News/tabid/160/articleType/ArticleView/articleId/184/language/en-GB/The-Control-of-BVI-Issued-Bearer-Shares.aspx> > [Accessed 28 March 2016].

¹¹⁸ Ibid.

The United Kingdom's Action Plan 'Transparency and Trust' made several commitments including those related to the use of bearer shares. Additionally the Financial Action Task Force and the Global Forum on Transparency and Exchange of information for tax Purposes have identified bearer shares as high risk. In its report 'Transparency and Trust, the UK highlighted the policy objectives of improving the business environment leading to an increase in economic growth. Meeting the FAFT and Global Forum standards on bearer shares and corporate opacity is fundamental to this policy. The policy includes: Prohibiting the creation of new bearer shares, provide a nine month period for conversion of existing bearer shares to be registered shares. The nine month period balances the need for swift action with a reasonable period for. Require companies, after a nine month period, to apply to court to cancel any remaining shares.”¹¹⁹ Moving forward for the need for more transparency, the United Kingdom has also established a Beneficial Ownership Register which publicly accessible while the offshore financial centres have refused. Many Offshore Financial Centres are moving toward controlling Bearer Shares in order to keep in line with the Organization for Economic and Cooperative Development’s push for more transparency. As of 2015, the United Kingdom has altered its Company Law and has totally abolished bearer shares, However, Offshore Financial Centres such as The Cayman Islands through now immobilised, The British Virgin Islands and more recently the Republic of Panama have found an innovative solution through the immobilisation of bearer shares to protect privacy while still managing to control illegal activities. Over all with the abolishing of bearer shares and the new beneficial ownership register the United Kingdom is moving towards Greater transparency.

¹¹⁹ Transparency and Trust
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324725/bis-14-883-transparency-and-trust-company-ownership-equality-impact-assessments.pdf < 11 July 2016.