

Improving transparency in land ownership in Scotland: a consultation on controlling interests in land

RESPONDENT INFORMATION FORM

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Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

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- Yes No

Chapter 1 - Transparency of land ownership and controlling interests in Scotland

QUESTION 1—Do you have any comments about making information about persons with controlling interests in owners and tenants of land available?

Yes No

Comments:

In making this submission Global Witness has engaged with a number of interests in Scotland who share our view of the need for the register, and that declarations of 'controlling interests' in land should be in an open and accessible register, where only in exceptional circumstances should there be any exemptions from the requirement to declare. The organisations Global Witness has engaged with are: Community Land Scotland, the Developments Trusts Association Scotland, the Community Woodlands Association, the Scottish Community Alliance on behalf of its membership networks, and SCVO (the Scottish Council of Voluntary Organisations).

Global Witness fully agrees with the opening statement of the consultation document, namely that *"improving transparency of land ownership in Scotland is an issue that is at the very heart of progressing land reform ... [which] will help communities, tenants and land owners to know and understand more about the people who control land owners and tenants of land in Scotland, and, ultimately, this will help ensure that all of the people of Scotland can benefit from our land, one of our most vital assets."*

Improving transparency of land ownership in Scotland not only supports the enactment and implementation of other areas of Scots Law, but is also in line with moves internationally to improve public disclosure about land ownership, use and management.

Examples of particular rights and opportunities given to citizens in Scottish statutes which, to a significant extent, depend upon having access to full information about who is the beneficial owner of land in which the community(ies) have an interest are as follows:

- the requirement upon a community to show they have not been able to acquire the land (voluntarily) before seeking a Community Right to Buy
- the ability to implement the Land Rights and Responsibilities Statement, as outlined by Part 1 of the Land Reform Act 2016 (hereinafter called "the Act")
- the ability to engage properly with a landowner on land use and management matters as outlined by Part 4 of the Act
- the ability to effectively engage in the mediation enabled by the Community Empowerment (Scotland) Act 2015 and the Land Reform Act 2016.

Response cont. on next page ...

Response to Q1 continued ...

We also fully agree with the importance of transparency of land ownership for law enforcement agencies (as outlined by the consultation document) as well as the recently devolved tax powers relating to land governance and the question of who owns it, particularly the Land and Building Transaction Tax and Landfill Tax. In accordance with the Revenue Scotland and Tax Powers Act 2014 (Part 2, Section 3), one of the functions of Revenue Scotland is “protecting the revenue against tax fraud and tax avoidance”. Enabling proper recording of those who control and / or benefit from land ownership in Scotland in a public register will assist Scottish tax authorities in the effective administration and collection of these taxes, whilst also supporting the enforcement of sanctions and penalties for non-compliance with devolved tax laws. This is further analysed in legal advice obtained by Global Witness in January 2016, available on request.

Although we agree with the Government’s proposal that the Register of Controlling Interests (ROCI) apply to all types of land and land owners (see further details below), it is the ownership of land which is just registered in the name of a “legal person(s)” as the proprietor (in the case of the Land Register) or the grantee (in the case of the Register of Sasines), which are the primary targets for Part 3 of the Act. We are not aware of any cases where there are problems of transparency of ownership, where the land in question is already registered in the name of the “natural person(s)”. It is the use of legal entities, such as companies, trusts and limited partnerships to obscure the identity of those with controlling interests in land (via ownership or leases) which this regulation should be prioritised towards, in our opinion.

Finally, Global Witness believes that the ROCI should be freely accessible, online, to the general public, modelled on the free, public access available to equivalent information in the Crofting Register.

In summary, the most essential elements of the regulation to implement Part 3 of the Act, are, in our opinion the following (this is a summary of responses given below):

- That the ROCI defines “controlling interest” in line with the UK’s Person(s) of Significant Control (PSC) Register, as implemented through the revised 2006 Companies Act
- The all types of land and types of legal and corporate vehicle are required to provide this information to the ROCI, including land owned or held in long-term leases by entities registered overseas
- That the ROCI is administratively linked to the Land Register so as to allow the two registers to be combined in the future, and is also linked to the UK’s PSC Register
- That the ROCI should be freely accessible to the public, via an online database
- That only in limited and exceptional circumstances (a proven serious risk of violence, intimidation or physical harm to the PSC or someone who lives with the PSC) should this information not be required to be provided to the ROCI, or subsequently made public
- That sanctions are in place should the duty to provide this information not be provided in a timely manner or be inaccurate, including restrictions of being able to enter

Chapter 2 - Defining a controlling interest and who is a person with a controlling interest in a land owner or tenant

QUESTION 2: In your view, taking in to consideration the contents of this chapter and the associated annex C, what are the key considerations that Scottish Ministers should take in to account in defining a “controlling interest” or “persons with controlling interests in landowners and tenants” for the purposes of these regulations?

Comments:

We agree that getting the definition of “controlling interests” right is one of the most important parts of the regulations, however believe that the rationale for this is stronger than that outlined in the consultation document: *“Getting the definition right will help to ensure that the objective of increasing transparency in relation to the individuals who are taking decisions in matters relating to land in Scotland can be achieved.”* In our view, if the definition adopted is not fit for purpose, the regulations also risk introducing a number of loopholes which could be exploited by those determined to keep their controlling interest in land secret, thereby undermining the very purpose of the regulations and Part 3 of the Act.

The regulations need to both define what constitutes controlling interest in a land owner or tenant, as well as specify which natural persons are to be treated as a person with a controlling interest.

As discussed with members of the Scottish Government during stages 2 and 3 of the passing of the Act, Global Witness and Community Land Scotland advised against employing the term “controlling interest” in the Act and following regulations, and recommended that the term “persons of significant control” be used instead. The reason for this was that given that both terms are already defined in Law, it was more logical to adopt the term closer to the intention of the Act and subsequent regulation; in our view this was “persons of significant control”. We were particularly concerned about confusion over the definition of “controlling interest” as intended by this Act, and the definition already applied within the Interests of Members of the Scottish Parliament Act 2006. The 2006 Act sets out the requirements for the registration of certain financial interests held by MSPs and defines “controlling interests” in relation to a company as “shares carrying in the aggregate more than half of the voting rights exercisable at general meetings of the company” (Code of Conduct for MSPs, Volume 2, Section 2, Categories of registerable interests, 2.3 Gifts, Schedule, Paragraph 6 (8)).

As a result, we strongly welcome the commitment in the consultation document and other policy statements issued at the time of the Act’s adoption that “controlling interest” shall be defined in a way which enables the purpose underlying the regulations to be achieved, and not be constrained by existing definitions in law.

Response cont. on next page ...

Response to Q2 continued ...

We agree with the two main elements of “controlling interest” in relation to land in Scotland outlined in the consultation document (Chap 2, paragraph 2); control of decision-making and the means to benefit financially (or take financial risks) in relation to the land. We believe they are equally important rationales for transparency.

We recommend that the definition of “controlling interest” used in the regulation be built on concepts already enshrined in UK and EU legislation and therefore already being applied in Scotland. Of the two possible regulatory frameworks suggested within the consultation document, we would recommend that the Scottish Government define “controlling interests” in line with the definition of “persons of significant control” (PSC) for UK companies, as introduced by the UK’s Small Business and Enterprise Act, 2015 (SBEE Act) and amending the Companies Act 2006. Having worked actively with the PSC Register and with the 2007 Anti-Money Laundering Regulation, it is our experience that the definition of beneficial owner applied by the PSC Register is stronger in terms of how control is exerted by means other than shareholdings and voting rights. Furthermore due to policy coherence arguments, we would recommend the ROCI build on only one of the two definitions suggested, not an amalgamation of the two.

However, it is important to remember (as discussed further below) that the scope of Scotland’s ROCI is wider than the PSC Register as it covers all types of corporate vehicle and legal entity, as well as those registered in the UK and those overseas. Subsequently, it is particularly important that the definition of “controlling interests” adopted by the ROCI be robust when it comes to the defining the parameters of the “*right to exercise, or actually exercises, significant influence or control over*” companies, trusts, firms and any of other corporate vehicle which could be involved in complex land ownership structures.

We recognise that there is some hesitation in basing the definition of “controlling interest” on the PSC Register, as this register is connected to money laundering regulations and tax evasion / avoidance measures, both of which are reserved matters. However, despite this historical policy connection, the PSC Register and SBEE Act explicitly identify a public interest argument for all UK companies to disclose their beneficial ownership; the SBEE Act’s long title describes it as “*An Act to ... make provision about regulatory provisions relating to business and certain voluntary and community bodies; ... to make provision about the regulation of companies; ... to make provision about company filing requirements; ...*”. Note 97, Part 7 of the Act’s explanatory notes explain how the Act contains measures which amend UK company law, aiming to increase transparency around who owns and controls UK companies and to deter and sanction those who hide their interest in UK companies to facilitate illegal activities or who otherwise fall short of expected standards of behaviour. In our opinion therefore, basing the definition of “controlling interests” on the PSC Register as equally meets the Scottish Government’s objectives of transparency for public interest and accountability purposes, as it does the UK Government’s objectives of implementing European anti-money laundering legislation and improving tax efficiency.

Response cont. on next page ...

Response to Q2 continued ...

An additional advantage of building on the PSC Register is that concerns about compatibility with Data Protection legislation and protection of privacy rights, as per Article 8 of the European Convention of Human Rights (ECHR), have already been addressed and resolved.

Finally, we strongly agree with the Government's proposal that the ROCI include all types of corporate vehicle used to own or lease land in Scotland. This takes the new register beyond the scope of the PSC Register (currently only publicly disclosing information relating to publicly listed companies), and includes trusts, firms, limited partnerships and all other corporate vehicles which could be created in the future to own land. We'd like to highlight, for example, concerns already expressed by UK authorities about the risks resulting from the lack of scrutiny currently applied to Scottish Limited Partnerships (SLPs), which reduces the ability of law enforcement to make initial enquiries or identify if the structure was being used for illicit activities

(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468210/UK_NRA_October_2015_final_web.pdf). Concerns about the mis-use of SLPs were also raised by Roger Mullins MP during debates October 2016 in Westminster about the Criminal Finances Bill 2016 (<https://hansard.parliament.uk/commons/2016-10-25/debates/9E615B36-9222-45BF-BD9D-46D503D7F591/CriminalFinancesBill>)

Chapter 3 - Scope

QUESTION 3: In your opinion, should the regulations apply to all types of land?
Please give details.

Yes No

Comments:

We believe that all types of land should be covered by these regulations. This is important to ensure no loopholes are included in the regulation which could be exploited in the future by “imaginative” lawyers on behalf of those wishing to remaining anonymous.

QUESTION 4: Do you think that particular categories of land should be exempt?

Yes No

QUESTION 5: If YES, please give details.

Comments:

QUESTION 6: In your view, for the purposes of these regulations, should ‘land’ have the same meaning used for Land Registration purposes (outlined above)?

Yes No

Comments:

Yes, we would agree with the Scottish Government’s rationale that the regulations should use the same meaning of ‘land’ as used in the Land Register, with the expectation that the Land Register and this new register are brought together in the future.

QUESTION 7: In your opinion, should the regulations also apply where the proprietor of land that is not recorded in the Register of Sasines or registered in the Land Register because either:-

- i. The property was acquired prior to the Register of Sasines commencing in 1617;
- ii. They have acquired a personal right to property, but have not yet registered the deed in their favour in the Land Register?

Yes

No

Comment

Yes, in our opinion the regulations should also apply to any proprietors of land which have not yet been recorded in the Register of Sasines or in the Land Register. There are three reasons for this. Firstly, the rationale for improving transparency of ownership outlined by the Scottish Government applies to all types of proprietorship, not just those which have been included in either register. Secondly, this would ensure that the new register truly represents transparency of ownership for ALL land in Scotland, again eliminating the possibility of loopholes being created which could be exploited. Thirdly, applying this registration requirement to all proprietors of land also ensures non-discrimination, a pre-requisite of this regulation being in compliance with Scottish Law and the ECHR in relation to property rights (Article 1 Protocol 1) (further details of arguments relating to non-discrimination are available in the independent legal memo obtained by Global Witness in January 2016, available on request).

QUESTION 8: In your opinion, should the regulations apply where a tenant in a high value lease that is not a long lease (a lease of 20 years or fewer) falls within the definition of persons with controlling interests in landowners and tenants?

Yes

No

Comment

Yes, again for the same arguments outlined in our response to Q7, namely to ensure that the new register is a truly transparent and non-discriminatory. We would suggest that a lower threshold be set, based on a combination of value and lease length, below which such information should not have to be included in the register. However, again to ensure such a lower threshold doesn't introduce exploitable loopholes, if short-term leases falling below this threshold are renewed, then the duty of registration in the ROCI should fall on the leaseholder.

QUESTION 9: In your opinion, are there instances where natural persons who own land in their own name have an undisclosed relationship with another person who

has a controlling interest in land? For instance if the land in question is an asset of a partnership or trust, or part of a trust arrangement?

Yes No

Comments

Although we are not able to name a specific incidence of the relationship described in this question, we are concerned that such relationships could be exploited as a means for those wishing to keep their controlling interests in land anonymous. Therefore, to close potentially exploitable loopholes, we would recommend that the controlling interests of natural persons in land, other than the natural persons who own the land in their own name, also be required to be included in this register. Such a practice would be in line with our suggested definition of “controlling interests” (see our response to Q2 above) where the general ability to control decision making relating to land is included, whether executed, or not.

We therefore see no purpose in the ROCI’s regulations including any exemptions for any specific types of land owners; such exemptions would simply create potentially exploitable loopholes. Land owners such as local authorities (and any agency of the Scottish Government or Ministry), religious organisations, corporation soles, international organisations etc. would therefore need to register their controlling interests.

QUESTION 10: In light of the contents of this consultation, and this chapter in particular, can you foresee any ways in which the obligations under these regulations could be avoided, and, if so, what could the Scottish Government do to combat this?

Yes No

Comments:

Global Witness is concerned about a number of potential loopholes which could be exploited as a means to avoid meeting the regulatory requirement to register controlling interests of those who own land in Scotland, as follows:

- If the definition of controlling interests is not clearly defined and does not capture all the ways in which people exert control over land and land-related decision making;
- If the scope of the regulations are not clear enough, thereby enabling certain types of corporate vehicles, or certain types of land, to be exempt from the registration requirement;
- If the duties of providing the information about controlling interest to the ROCI are either not clear or difficult to enforce, allowing those who do not want to provide this information to continue to operate anonymously, without sanction.

Response cont on next page ...

Response to Q10 continued ...

The “Panama Papers” exposes earlier in 2016 provide a number of examples of how law firms are already either ignoring international beneficial ownership regulations, or providing explicit services to clients to enable them to continue to hide their beneficial ownership. An article in the BCC described how Mossak Fonseca offered potential clients a “natural person trustee” service which essentially provided a natural person to pose as a beneficial owner of a company, to enable the real beneficial owner(s) of that company to remain anonymous (<http://www.bbc.co.uk/news/35956324>). Whereas a Guardian article describes how the British Virgin Islands authorities continued to license Mossak Fonseca to operate, despite knowing the firm was repeatedly ignoring its legal requirement to find out who owned the companies on its books (<https://www.theguardian.com/news/2016/apr/04/british-virgin-islands-failed-to-crack-down-on-mossack-fonseca-panama-papers>).

We believe the ROCI regulations in Scotland should learn from these examples of how beneficial ownership regulations are avoided and ensure any potential loopholes are closed in Scotland.

Chapter 4 - Where the information should be held and what information should be disclosed

QUESTION 11: In your opinion, should a new register of persons with controlling interests in landowners and tenants be created?

Yes No

QUESTION 12 What would the advantages be?

Comments:

We agree with the advantages outlined in the consultation document of the ROCI operating as a new register, that this means all land titles and properties will be automatically included in the register, not just those within either the Land Register or the Register of Sasines. Operating as a separate register also enables the register to be completed quickly, without it being tied to the existing Government targets to complete the Land Register by 2024. Furthermore, we understand that building the new ROCI into the Land Register would require changing the purpose of the Land Register, as defined by the Land Registration (Scotland) Act 2012.

QUESTION 13 What would the disadvantages be?

Comments:

Notwithstanding our response to Qs 11 and 12, we believe there are significant disadvantages to the having the ROCI operate as a new and independent register, which need to be considered and addressed before the regulations are complete. If someone has to look up a piece of land on two separate registers in order to find out who owns it, then this will not improve overall transparency of ownership, as this regulation and Part 3 of the Act aims to do. In fact, further barriers to transparency will be created if there is additional administrative costs and time required to access the information on this register. Such barriers may also prevent law enforcement agencies and other authorities from easily accessing the information. There are also questions about how the ROCI and Land Register can both be kept up to date and accurate.

We would therefore recommend these disadvantages be overcome in the following ways:

- Designing the ROCI so that it can be accessed directly from the Land Register (and vice versa) and that the reference number of the proprietor and the land in question are the same in both registers;
- Requiring that each person with controlling interests in land in Scotland be given a unique ID number, in order for the Government and both registers to be able to distinguish between different John MacDonalds (eg), and also easily identify when the same natural person has controlling interests in different areas of land;
- Ensuring that changes made in one register are automatically updated in the other;
- Designing the ROCI in a way which facilitates the easy amalgamation (or transfer) of the controlling interests information into the Land Register, at some point in the future, once the recognised technical and legislative barriers have been overcome.

In order to reduce the risk of duplicate reporting for UK companies owning or leasing land in Scotland who have already filed their beneficial ownership information with Companies House (in the PSC Register), then it is also important to ensure that this register and the ROCI are directly linked, use the same reference numbers (ie. the company number in Companies House) and that updates on one are automatically updated on the other.

QUESTION 14: In your view, in addition to the names of “persons with controlling interests in landowners and tenants” should other information about them be disclosed?.

Yes

No

QUESTION 15: If YES, how would disclosure of that information fulfil the regulations' aim(s) (as per Chapter 1 and your answer to question 1)?

Comments:

We agree with the Scottish Government's proposal (as per the consultation document, chapter 4, para 8) that the same information relating to the named person with controlling interest be required by this register, as is currently required by the PSC register. We also agree that the "usual residential address" of this named person not be required to be publicly disclosed (but still collected by the ROCI), if different from the service address.

This additional information (as is already required by the PSC Register) should be disclosed by the ROCI because such information is required in order for the local communities, the general public and law enforcement agencies to be able to directly contact those with controlling interests, one of the key objectives of this regulation. Furthermore, as we have outlined in our response to Q2, this would also ensure that the new register is in line with and implemented in coordination with the UK's PSC register, thereby avoiding double-reporting.

QUESTION 16: If NO, why not?

Comments:

QUESTION 17: In your view, should information about the nature and extent of a person's "controlling interest" be disclosed?

Yes No

QUESTION 18: In your views, should the nature and extent of a person's "controlling interest" be disclosed on a public register?

Yes No

Comments:

The information about the nature and extent of a person's "controlling interest" should be disclosed by the ROCI in order for third parties accessing that information to have the granular level of detail about how those with controlling interests actually influence decision-making about land. This means two things:

A) Legal persons owning land should provide precise figures for the ownership share owned/controlled by each person with controlling interests:

- Providing exact percentage figures is important to understand the means through which those with controlling interest exercise that control. There is a significant difference between owning 25% or 49% of a company (for example), a distinction that will be obscured by the government's proposals;
- In our opinion, the system of bands adopted by the UK Government for their PSC Register imposes the same administrative burden on companies as providing the exact figure, as companies would have to calculate the exact ownership share in order to determine in which band a PSC should be placed, but it does not provide enough detailed information to truly understand both the "nature and extent" of control exerted;
- The vast majority of companies, trusts and other legal entities covered by the ROCI have straightforward corporate structures that rarely change. Large legal entities with complicated structures already have systems in place to track and monitor their corporate networks, for example to determine appropriate dividend payments.

Response continued on next page

Continuation of response to Q18

B) Legal entities need to record the details of the full chain of ownership or control. This is especially important when such chains lead offshore:

- It is important for third parties to properly understand how those with controlling interest exercise control, and for the data to be verified and thus provide a disincentive to companies and others from providing false information (one of the core rationales for making the register public);
- Having the full chain of ownership / control will provide sufficient details to enable authorities to request further information about anyone along that chain, vital to enable proper investigations, and criminal cases to be brought;
- The minority of legal entities with complex structures will almost certainly have been set up by a lawyer, accountant or other professional, who should be able to supply the entity with information on its overall structure.

QUESTION 19: If YES, how would this information fulfil the purpose of the regulations' aims?

Comments:

Please see our response to Q18 above

QUESTION 20: If NO – why not? Please give details

Comments:

QUESTION 21: Thinking about the information which in your view should be disclosed, are you aware of any potential sensitivities relating to this? Please give details.

Yes

No

Comments:

The only legitimate sensitivities and need for privacy relating to the information disclosed by the ROCI are circumstances where there is evidence of risks of violence, intimidation and / or physical harm to the named person with controlling interests. In these exceptional and limited circumstances, we suggest that the ROCI regulations follow the model protection regime adopted by the PSC Register: *“Protection will only be granted if your application contains evidence proving a serious risk of violence, intimidation or physical harm to the PSC or someone who lives with the PSC”*(provision 790ZG of the Act). Annex 1 of the UK Government’s draft Guide for Companies and LLPs on the PSC register contains further information on the *“Regime for suppressing PSC information in exceptional circumstances”* (available from Global Witness on request).

Of note, only 30 individuals so far have requested their information be with-held from the PSC Register, see further details in blog recently published by Global Witness (<https://www.globalwitness.org/en-gb/blog/what-does-uk-beneficial-ownership-data-show-us/>)

Our response to this question is also related to how rights to privacy can be protected, which is further discussed in our response to Q55 below.

QUESTION 22: If YES – in your view what are the advantages of keeping this information up to date?

Comments:

In Global Witness’ opinion, Q23 and Q22 are not related, as in our view it is important to ensure that the register is kept up to date, regardless of how it manages recognised and limited potential sensitivities about what information is disclosed.

As has been widely stated by the Scottish Government and other researchers, if information on land ownership is not kept up to date and accurate, then local communities, government enforcement agencies and other stakeholders can be severely challenged when trying to identify and contact the land owner. This would fundamentally undermine the aims of this regulation and the ROCI. We suggest the best way to do this would be including a requirement that every time there is a change in circumstances of any persons with controlling interests. Were the ROCI to follow the model of the PSC Register then legal entities would have to update their own register of those with controlling interests within 30 days of the change taking place, and this would then have to be updated to the ROCI annually. However, the updated 4th Anti-Money Laundering Directive requires beneficial ownership registers to be kept *“current”* and therefore the UK Government is proposing to require the PSC Register to be updated more frequently, every 6 months. Other *“trigger”* events which require changes to be made to the Land Register, for example registering land and making other changes to the status of the land ownership (such as re-mortgaging a property), should also be used as mandatory opportunities to update information registered about those with controlling interests in the land. A penalty regime would apply if this information is not kept accurate or up to date (see details in our response to Qs 45-49 below).

QUESTION 23: If NO – why not? Please give details.

Comments:

QUESTION 24: In your view, are there instances in which the information about the nature and extent of a person’s “controlling interest” is commercially sensitive and should not be revealed?

Yes No

QUESTION 25: If YES, please explain why you think that this information should not be revealed?

Comments:

QUESTION 26: If NO – why not? Please give details.

Comments

Global Witness does not believe there are any circumstances in which the nature and extent of a person’s “controlling interest” could be considered commercially sensitive and meriting protection from disclosure. Of note, the UK Government did not consider any of information proposed to be disclosed via the PSC Register to constitute sensitive personal data, under the Data Protection Act 1998 or the European Convention on Human Rights (ECHR). (According to the Department of Business, Innovation and Skill’s Privacy Impact Assessment, June 2014, available for download at: <https://www.gov.uk/government/publications/company-ownership-transparency-and-trust-impact-assessments>.) Should the Scottish Government adopt the same model as the PSC Register in terms of the disclosing information about the nature and extent of a person’s “controlling interest”, then legal advice on compatibility with Data Protection and ECHR is likely to reach the same conclusion.

Further details on how the ROCI should deal with protection of privacy rights is given in our response to Q55 below.

Chapter 5 - The duty to provide the information

QUESTION 27: In your view, should a duty to provide information about persons with controlling interests in landowners and tenants apply to landowners and tenants with titles in the Land Register or Register of Sasines and:

- I. Land owners and tenants where the property was acquired prior to the Register of Sasines commencing in 1617;
- II. Land owners or tenants who have acquired a personal right to property, but have not yet registered the deed in their favour in the Land Register; or
- III. Tenants in a high value lease that is not a long lease (a lease of 20 years or fewer)?

Yes No

QUESTION 28: If NO, why not?

Comments:

QUESTION 29: If YES, in your view what are the advantages of this arrangement?

Comments:

It is our view that all of those with controlling interests in landowners and tenants (as described in Q27) should have a duty to provide this information to the register, as this is the only way in which exploitable loopholes can be avoided. As such this duty should fall on all types of natural persons with any type of controlling interest, regardless of the complexity of structure or corporate vehicle, including those offshore, through which such controlling interest is exerted. We therefore believe it is essential that the new register go beyond the UK's PSC register and apply to companies, trusts, SLPs and any other types of vehicle which land and tenancies ownership may be registered in the future.

QUESTION 30: If YES, in your view what are the disadvantages of this arrangement?

Comments:

We see no disadvantages from this arrangement

QUESTION 31: In your view, should a duty to provide information apply to the "person with the controlling interest"?

Yes No

If no, why not?

Comments:

QUESTION 32: If NO, why not?

Comments:

QUESTION 33: If YES, in your view what are the advantages of this arrangement?

Comments:

The application of the duty to provide this information is related to the application of sanctions (covered in our response to Qs 45-49 below) and therefore our responses to these questions should be considered together.

Yes, a duty to provide this information should apply to the person with the controlling interest. However, in the case of complex ownership structures (particularly including corporate vehicles registered off-shore) then the duty (and subsequent sanctions) in practical terms must apply to the legal person(s) that are the registered land owner or long-term lease holder.

In a “key points on transparency” memo submitted to the Scottish Government in January 2016, Megan MacInnes outlined the challenges of obtaining information from and enforcing duties upon legal entities registered off shore (available on request). These challenges are twofold – that such overseas jurisdictions do not collect information on “controlling interests” and that even if they do have the information, they are under no obligation to share it with authorities in Scotland.

Many tax havens and secrecy jurisdictions where complex corporate structures owning land in Scotland ultimately are registered simply do not maintain records or registers of “controlling interests”, or so-called beneficial ownership. Of the 102 jurisdictions covered by the Financial Secrecy Index’s 2015 assessment, not a single one had a central registry of beneficial ownership for companies, let alone for other types of legal entities (trust, foundation, partnerships etc.) (<http://www.financialsecrecyindex.com/PDF/FSI-Methodology.pdf>). Andy Wightman’s research (<http://www.andywightman.com>) has highlighted the extent to which large estates in Scotland are ultimately owned by entities registered in secrecy jurisdictions, some of which fail to collect information on persons with controlling interests:

- Jersey has failed to create a public register of beneficial ownership (<http://www.financialsecrecyindex.com/PDF/Jersey.pdf>). It does participate in automatic information exchange agreements and signed one with the UK in 2009, but this is limited to tax purposes and information exchanged is considered confidential and can only be shared between tax-competent authorities in the UK (http://www.eoi-tax.org/agreements/GB_JE_TIEA_13#default).
- Panama does not maintain company ownership details in official records, nor does it require that company ownership details nor company accounts are available online. It also does not participate in Automatic Information Exchange (<http://www.financialsecrecyindex.com/PDF/Panama.pdf>);
- Guernsey does not maintain company ownership details in official records, nor does it require that company ownership details nor company accounts are available online (<http://www.financialsecrecyindex.com/PDF/Guernsey.pdf>). It does participate in automatic information exchange agreements and signed one with the UK in 2009, but this is limited to tax purposes and information exchanged is considered confidential and can only be shared between tax-competent authorities in the UK (http://www.eoi-tax.org/agreements/GB_GG_TIEA_16#default).

Response continues on next page

Response to Q33 continued

- The Turks and Caicos does not maintain company ownership details in official records, nor does it require that company ownership details nor company accounts are available online (<http://www.financialsecrecyindex.com/PDF/TurksCaicosIslands.pdf>). It signed an information exchange agreement with the UK in 2011, but this is limited to tax purposes and information exchanged is considered confidential and can only be shared between tax-competent authorities in the UK (http://www.eoi-tax.org/agreements/GB_TC_TIEA_2#default).

Provisions in Scottish Law to obtain such “beneficial ownership” information for the ROCI and enforce such duties overseas would rely on the cooperation of those competent authorities, but such authorities in, for example, the British Virgin Islands and Cayman Islands, are under no obligation to provide any information:

- 1) There are effectively only two legal bases for the exchange of information on the beneficial owners of legal entities between different jurisdictions – criminal proceedings and / or investigations (Here is an example of the law in the British Virgin Islands allowing exchange of information for criminal proceedings or investigations: http://www.andywightman.com/docs/BVI_CJICA_1993.pdf), and tax purposes (under so-called “automatic information exchange agreements”). In terms of criminal investigations, requests for information have to be dealt with by law enforcement agencies and there has to be an active criminal investigation to justify the request. In terms of tax purposes, only competent tax authorities are able to make such a request and therefore the agency administering the ROCI would have to ask the relevant UK level authority (assuming the tax-related issue was still reserved) to make such a request on their behalf. Furthermore, requests for such information have to meet thresholds of being determined ‘valid’ within other jurisdictions and the more secretive the jurisdiction the higher the threshold;
- 2) Even if the case could be made the request for controlling interest information was valid, there would have to be a further agreement with the authorities of that jurisdiction that the information could be shared publicly via the ROCI. Many jurisdictions would determine that it would be in breach of confidentiality guarantees in the tax treaties to disclose the information to the ROCI, given that it would then be made public, and therefore refuse to provide the information;

Based on these challenges, Global Witness recommends that the duties and sanctions associated with the regulations to implement the ROCI be applied to the legal entity registered as owning the land or the lease, in Scotland. This can be done by starting with the owners and / or proprietors named in Land Register and the Register of Sasines. We recognise that there are a very small number of land titles which are not yet included in either register, but reflect that on balance, this number is not significant enough to prevent applying the duties and sanctions of the ROCI through this, the most practicable way.

QUESTION 34: If YES, in your view what are the disadvantages of this arrangement?

Comments:

Nothing further than already included in our response to Question 33.

QUESTION 35: In your view or experience, are there parties who serve as intermediaries between registered proprietors and persons with a controlling interest in land?

Yes

No

QUESTION 36: If YES to Q35, in what scenarios do you think that there are parties who serve as intermediaries between registered proprietors and persons with a controlling interest in land?

Comments:

We would agree with the examples given in the consultation document of solicitors and accountants who act as intermediaries between persons with controlling interests in land and third parties, such as local communities and enforcement agencies. Importantly, such parties play the role of intermediaries for those with controlling interests in land, who are resident or registered off-shore. We are also aware anecdotally of other types of parties who serve such intermediary roles and therefore recommend that the ROCI regulations cover all types of parties serving as intermediaries.

QUESTION 37: If YES, in what capacity are there parties who serve as intermediaries between registered proprietors and persons with a controlling interest in land?

Comments:

See details in our response to Q36

QUESTION 38: In your view, should a duty to provide information apply to such intermediaries?

Yes No

QUESTION 39: If NO, why not?

Comments:

QUESTION 40: If YES, in your view what are the advantages of this arrangement?

Comments:

It is the view of Global Witness that the duty to provide information to the ROCI should particularly apply to such intermediaries in the case where those with controlling interests are resident and / or registered off-shore. This is for a number of reasons. Primarily it helps overcome the potential challenges identified accessing this information directly from those with controlling interests off those, or the competent authorities in such jurisdictions, as is outlined further in our response to Q33 above.

Furthermore, this would match the existing requirements for third parties to accurately provide information on their clients to the Scottish Government, as is currently required for information being entered into the Land Register (as already noted by the consultation document). This would also be in line with requirements already in place for lawyers and accountants to collect information on those with controlling interests in their clients, in anti-money laundering regulations.

Global Witness has made a similar recommendation to the UK Government in relation to their consultation on improving beneficial ownership in land and property in England and Wales; that all companies wishing to own property there should be required to appoint a professional such as a solicitor, bank or accountant (or any professional accredited by the Financial Conduct Authority) who will be responsible for verifying the beneficial ownership of that company. The name of that professional should be publicly declared on the register, along with the company's beneficial ownership information. In the event that the commercial relationship is ongoing, that professional would also be responsible for being vigilant against suspicious behaviour (such as unexplained corporate restructuring or the use of nominees) and submitting a SAR if they have reason to suspect that a company is using the proceeds of crime to purchase property or is seeking to avoid the new beneficial ownership regime. This will act as a means of verifying the beneficial ownership information that is provided by non-UK companies to the UK government, and will provide a point of contact in the UK that law enforcement can take action against in the event that incorrect or false information has been provided to the government. Further information available from Global Witness on request.

QUESTION 41: If YES, in your view what are the disadvantages of this arrangement?

Comments:

We don't see any significant disadvantages to this arrangement

QUESTION 42: In your view, should the duty to disclose information about any person with a controlling interest in a landowner or tenant apply either when a person is a person with a controlling interest in a landowner or tenant when the regulations come into force, or becomes a person with a controlling interest in a landowner or tenant when the regulations are in force?

Yes No

Comments:

QUESTION 43: If NO, why not?

Comments:

QUESTION 44: If YES, in your view what are the advantages of this arrangement?

Comments:

We believe that this duty should apply in all the circumstances outlined in the consultation document, and more, namely:

- Should apply to all those natural persons who already have controlling interests in a legal entity owning or leasing land from the date the regulations come in to force;
- Should apply to all those who become a natural person with controlling interest in a legal entity owning or leasing land after the regulations have come in to force, whether or not the land is already included in the Land Register or the Register of Sasines;
- As outlined above in response to Q22, certain "trigger" events such as the transfer of land (requiring it to be added to the Land Register) and changes to the title (such as re-mortgaging) also provide an opportunity to apply the duty to either provide information about all those with controlling interests, or make sure this information is correct.

QUESTION 45: In your view, should a civil penalty be imposed for failure to comply with any of the duties contained in the regulations? YES/NO. Please give details.

Yes No

Comments:

Yes, we agree with the arguments for civil penalties imposed, which are outlined in the consultation document.

QUESTION 46: In your view, should failure to comply with any of the duties contained in the regulations be a criminal offence? YES/NO. Please give details.

Yes No

Comments:

Yes, we agree with the arguments for failure to comply with the duties in the ROCI regulations being a criminal offence, as outlined in the consultation document.

QUESTION 47: In your view, should an application for land registration be rejected if the applicant fails to supply information about any “person with controlling interest”? Please give details

Yes No

Comments:

Yes, it is Global Witness’ opinion that one of the most effective ways of making sure the information on controlling interests is provided is to require this information as part of the application for land registration, and rejecting such applications if the information is not provided or accurate.

During the consideration of the Bill, it was raised that applying such a condition on land registration was not in compliance with property rights, outlined in Article 1, Protocol 1, of ECHR, and the EU Treaty. Independent legal analysis obtained by Global Witness (available on request) concluded that such a condition on land registration was compatible with both ECHR and the EU Treaty.

Response continued to next page ...

Response to Q47 continued

This topic is also analysed in more depth in the aforementioned transparency memo prepared by Megan MacInnes in January 2016, available on request. In summary:

- Case law pertaining to Article 1, Protocol 1 has established that “*The right to dispose of one’s property constitutes a traditional and fundamental aspect of the right of property*” (*Marckx v Belgium* (1980) 2 EHRR 30), but that does not always mean you can transfer land to any entity you want to. Scots law is already perfectly comfortable with the idea of restricting this: consider Part 2 of the Land Reform (Scotland) Act 2003 and the stronger right in Part 3 of that legislation, the latter of which has survived a human rights challenge in the Court of Session in the *Pairc* litigation ([2012] CSIH 96, at <https://www.scotcourts.gov.uk/search-judgments/judgment?id=dc7586a6-8980-69d2-b500-ff0000d74aa7>). Pre-emptions (that is to say, a right of first-refusal on the proposed transfer of an asset) can stand in the face of a human rights challenge; subject of course to the fact the interference is lawful, pursues a legitimate aim and achieves a fair balance (*Beyeler v. Italy* 05/01/2000, (Application no. 33202/96);
- The Council of Europe has stated that “*The protection of Article 1 of Protocol No. 1 only applies when it is possible to lay claim to the relevant property. Article 1 does not protect the right to acquire property*”, which has been further elaborated in case law, one of which related to inheritable property (<http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-04%282003%29.pdf>).

We do not believe that the alternative proposal under consideration, placing a charge or note on the title sheet in the Land Register or Register of Sasines (as outlined in Chap 5, para 17) would be effective or achieve the aims of this regulation, as stated by the Government. A charge or note which came into effect only when the current owner / lease holder (who had failed to provide their information on those with controlling interest) wanted to sell the land, would fail to achieve transparency of current ownership of land. It also introduces a significant loophole through which those who want to remain anonymous could continue to hide their identities.

QUESTION 48: In your view, should an application for land registration be rejected if the applicant fails to certify that no such “person with controlling interest” exists? Please give details.

Yes No

Comments:

Yes. The requirement to certify if person(s) with controlling interests do or do not exist must be part of the duties associated with the ROCI. If not, then a large loophole in the regulations may be introduced.

QUESTION 49: In your view, taking in to consideration all of the sanctions and enforcement options set out in this chapter, what mechanisms would be most appropriate to enforce the duty to provide information? Please explain your answer.

Comments:

We believe the most appropriate sanctions and enforcement options are a series of measures, moving from measures which initially incentivise the completion of the ROCI and then introduce stricter measures if the registration requirements are not being met, as follows:

- a) Administrative triggers – a number of administrative triggers could be used to encourage people to complete the ROCI:
 - i. Voluntary registration
 - ii. Registration being a condition of land registration
 - iii. Registration being a condition for any changes being made to the register, such as changes to the parcel boundary, re-mortgaging etc.
 - iv. Other administrative triggers could also be used which are independent from the Land Registry – such as companies which own land having to provide evidence of their completion of the ROCI as part of the filing of annual accounts etc; charitable trusts owning land likewise having to provide evidence to OSCR annually that they have fulfilled their requirements under the ROCI regulations
- b) Civil offences – as outlined in the consultation document
- c) Criminal offences – as outlined in the consultation document

QUESTION 50: In your view, are there instances in which there should be exemptions?

Yes

No

Comments:

QUESTION 51: If NO, why not?

Comments:

We do not see any evidence-based reason for why exemptions should be introduced and see their introduction as risking loopholes which could be exploited by those wishing to have their controlling interests in land remain anonymous.

QUESTION 52: If YES, in your view what is the justification for such exemptions?

Comments:

Chapter 6 - Assessing impact

QUESTION 53: Please tell us about any potential impacts, either positive or negative, that you consider that the proposals in this consultation may have in respect of equality issues. Please be as specific as possible.

Comments:

We agree with the Scottish Government's policy position which links improved transparency of land ownership with large aims associated with social justice and reducing inequalities. We would also like to note that a similar approach has been taken by the new Mayor of London, who has just launched an inquiry into foreign investment in property and the challenges of the housing crisis and associated inequality issues (<https://www.theguardian.com/cities/2016/sep/29/london-mayor-sadiq-khan-inquiry-foreign-property-ownership>).

QUESTION 54: Please tell us about any potential costs and burdens that may arise as a result of the proposals within this consultation, and any increase or reduction in the burden of regulation for any sector. Please be as specific as possible.

Comments:

There are recognisable costs to those the legal persons and natural persons with controlling interests in the land in question in providing this information, but Global Witness considers them to be proportionate and not overly onerous as this is information which the majority of legal entities and intermediaries will already have access to. This position is supported by some owners of large estates; John Glen from Buccleuch Estates testified to the RACCE hearing on 7th September 2015 that he didn't think anyone with a genuine interest in owning land in Scotland would be put off by the requirement to register their legal entity in Europe. In their response to the RACCE Stage 1 report, Scottish Land and Estates supported the Committee's suggestions on transparency (http://www.scottishlandandestates.co.uk/index.php?option=com_content&view=article&id=4741:landowners-statement-on-stage-one-report-on-land-reform-bill&catid=71:national&Itemid=107). Furthermore, their spokesperson Doug McAdam has been reported in the media as describing transparency of land ownership in Scotland as *"it's crucial there is a clear point of contact and face of the trust or company is identified and ideally also the beneficial owner, if there is one behind that"* (Quoted directly by Graeme Dey MSP (a member of RACCE) during the 16th December 2015 Parliamentary Debate on the Land Reform (Scotland) Bill, at approximately 45 minutes into the debate).

The risk of duplicate reporting requirements between the ROCI and UK's PSC Register (which are already applied to UK companies in Scotland), can be significantly reduced if the ROCI adopts a definition of controlling interests and model of registration requirements which builds on the PSC Register. As discussed in our response to Q13 above, the risks and costs of duplicate reporting can also be reduced if the ROCI and PSC Register can be directly linked and use compatible reference numbers, so that updates made to one register are automatically updated on the other.

QUESTION 55: Please tell us about any potential impacts, either positive or negative, upon the privacy of individuals that may arise as a result of any of the proposals contained in this consultation. Please be as specific as possible.

Comments:

We touch on some issues relating to privacy rights and commercial sensitivities in our response to Q26 above.

Global Witness obtained independent legal advice in January 2016 which analysed the proposed public register of controlling interests in terms of compliance with ECHR, particularly focusing on Article 8 – the right to privacy (available on request). We believe that the transparency proposal analysed by the lawyers is close enough to the ROCI regulations as introduced by the Act itself, so that the independent legal advice is still relevant to this consultation.

The legal advice concluded that although the proposed public register of controlling interests would interfere with rights to property within ECHR, because all rights within the ECHR are qualified (and not absolute) this interference was both justified and proportional. Their analysis covered three areas:

a) Article 1 Protocol 1 requires that the property owner does not bear ‘an individual and excessive burden’ through the interference. The legal advice concluded that it could be argued that it is a legitimate requirement of government to impose such administrative burdens as the ROCI introduces, for the public good purposes of land registration. The legal advice did raise the question of whether the transparency objectives achieved by the ROCI registration requirement could be achieved through less restrictive means. However, Global Witness believes these concerns have already been addressed during the passage of the Bill and furthermore, the introduction of safeguards, such as the right to appeal, further support arguments of proportionality.

b) The legal advice concluded that the public register of controlling interests could justifiably interfere with Article 8 rights, as long as the measure met an exhaustive list of ‘legitimate aims’:

- If access to certain person data helps achieved another public interest (as identified by para 95 of the Policy Memorandum accompanying the Bill) and said disclosure is proportionate (see below), then it can be justified;
- If it improved the efficiency of devolved tax powers;
- If it supported economic activity – as identified in the memorandum on the Small Business Enterprise and Employment Act 2015 compliance with ECHR;
- If it supported the prevention of disorder or crime – such as the prevention of use of land for criminal purposes; the identification of persons responsible for delicts and crimes committed on the land; and enforcement of environmental law, regulation and policy;
- If it supported protections of the rights of others – for example without greater transparency of land ownership and long-leases, the effective enforcement of the rights of other individuals living, working or otherwise utilising the land may be frustrated.

Response continues on next page ...

Response to Q55 continued ...

c) Interference with Article 8's privacy rights were seen as proportional because of the following:

- Safeguards are required (such as ensuring that personal information, eg. date of birth, are not publicly accessible, and providing the right to appeal) and recommended adopting the approach used the SBEE Act PSC register;
- Information on companies with controlling interests are likely to already be in the public domain through companies house or alternative international company registers;
- The measures are restricted to those with controlling interests and does not encompass a wider group, for example company directors.

It is worth highlighting the importance of the right to appeal for all requirements in the ROCI regulations, to provide a safeguard by enabling those with specific concerns about protection of privacy. Such appeal rights are an intrinsic part of ensuring the regulations are compatible with the ECHR in terms of proportionality and answering concerns about whether or not the same policy result could have been achieved via less restrictive means (see full version of "Key Transparency Points ..." memo submitted by Megan MacInnes to the Scottish Government on 11th January 2016).

Global Witness would also like to draw attention to changes which were made to the Crofting Register through the 2010 Crofting Reform Act which introduced similar amendments to how the details of crofters were registered and disclosed, as are introduced for land owners and lease holders by the ROCI. The new Crofting Register replaced provisions requiring the (then) Crofters Commission to maintain a Register (including the 1955, 1993 and 2007 Acts). The 2010 Act made registering a croft binding and required that the name of the crofter was included on a publicly available register, managed by RoS. The December 2009 Policy Memorandum accompanying the Act states: *"The purpose of Part 2 of the Bill is to establish a map-based Crofting Register that will: a) provide crofters with confidence and legal certainty over the extent of, and interests in, their croft; and b) better support the successful administration of crofting regulation by the Commission"*. Such changes to the crofting registration requirements were not considered to have any impact on human rights (para 90).

It is of note that at the time, the Scottish Government was entirely comfortable introducing such changes to the way information on crofters is disclosed to the public from a human rights perspective, this includes similar types of information which the ROCI is proposed to collate and disclose. We believe that the privacy rights of crofters and the privacy rights of land owners and long-term lease holders deserve equal treatment.

QUESTION 56: Please tell us about any potential impacts, either positive or negative, that any of the proposals in this consultation may have on the environment. Please be as specific as possible.

Comments:

We believe that, as stated by the Government in terms of the aims of the ROCI regulation, this public register of controlling interests in land will have potentially positive impacts on the environment. The reason for this is that one of the areas of concern raised during the negotiation of the Bill over the lack of transparency of land ownership, was land owners not being held accountable for poor environmental stewardship of their land. Concerns were also raised by those involved in enforcement of wildlife protection laws, that their inability to identify and contact those with controlling interests in land was inhibiting the investigation of crimes.