

# Offshore Regulators Are Increasing Their Enforcement Powers



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## Introduction

The global view on offshore financial centres remains as volatile as ever. With a seemingly growing concern on the legitimacy of previously accepted tax avoidance measures/schemes across the EU and US, as well as the introduction of requirements to maintain directories of beneficial owners for corporate entities incorporated within the EU<sup>1</sup> expected to come into force by the end of June 2017 (and the subsequent extension of such to the UK Overseas Territories and Crown Dependencies<sup>2</sup>), there is a renewed interest to see what the impact of these requirements will be in practice – particularly insofar as it relates to offshore financial centres.

The recent so-called ‘Malta Files’ leak in May 2017 is a further reminder of the vulnerability to criticism that offshore financial centres face. In this most recent attack, Malta is being accused of functioning as a ‘pirate base for tax avoidance inside the EU’<sup>3</sup> following the release of a critical report by a group of investigative journalists who obtained access to

over 150,000 documents showing how companies are taking advantage of the Maltese tax regime.

In order to help promote a positive outlook on the use of offshore financial centres, it is paramount that relevant authorities are seen to be effectively regulating and monitoring their jurisdictions and market participants (both as a legal entity, as well as private individual level). Against this backdrop, we highlight some recent enforcement approaches and activities offshore centres have taken to combat the negative perceptions faced.

## Change in Approach and Increase of Enforcement Powers

Since our last GER review in 2016, there have been a few noticeable changes implemented by offshore centres. For example, the Bermuda Monetary Authority (BMA) has commenced publishing its enforcement actions as a way of increasing transparency. The BMA sees this as being critical to its reputation as it demonstrates that it does hold firms accountable for regulatory breaches.

1 As part of the 4th Money Laundering Directive

2 <https://www.gov.uk/government/collections/beneficial-ownership-uk-overseas-territories-and-crown-dependencies>

3 <https://eic.network/projects/malta-files>



In the BVI, there appears to be a renewed vigour by the BVI Financial Services Commission (BVI FSC) whose Enforcement Committee in 2016 reviewed more than double the amount of enforcement cases brought before it in 2015. That being said, this did not translate to additional actions being taken against firms, with nearly the same amount of actions being taken year on year.

Guernsey's regulator is in the process of gaining approval to have the limits on financial penalties it can impose increased (representing a potentially significant change in the amounts of individual fines that will be issued, with limits being increased from £200,000 to £4 million for licensees and an increase from £200,000 to £400,000 for relevant officers and personal fiduciary licensees).

In the Cayman Islands, the authority is seeking to gain the ability to issue administrative fines, recognising that the potential for fines will act as a deterrent for non-compliant behaviour. The level of fine that can be imposed will vary dependent upon the nature of the breach involved, ranging from CI\$5,000 per breach up to CI\$1 million.

Whilst the above developments should be closely followed given their potential implications for firms and individuals affected, it is worth noting that the relevant regulatory authorities will not want to be seen to be abusing their 'new powers' and will therefore only seek to use these in a proportionate and well-thought-out manner, and therefore minimise any potential for damaging their respective reputations. By way of example, the JFSC was granted similar powers to impose financial penalties on registered businesses of up to £4 million for significant and material breaches in 2015, however it is yet to impose its first civil penalty under this new regime.

#### **Increased Fines**

There have been a few notable fines, both at an individual amount and cumulative level. Specifically, in one of two of its only published enforcement actions, the BMA has fined a firm \$1.5 million and restricted its investment business licence for AML failings. For a regulator that has only previously worked behind closed doors, the message being sent out to its regulated entities (and keen global observers) is clear.

The Commission de Surveillance du Secteur Financier (CSSF) too has had a year to note. In its 2015 Annual Report, it was indicated that total fines of EUR 1,335,000 were issued. This total has now been dwarfed by two fines issued against separate banks in 2017 – circa EUR 3.8 million and EUR 9 million respectively. For a regulator that has had a reputation of being quite secretive with its enforcement activity, these latest fines could represent a significant change in approach.

### Potential Future Focus Points

Outside of the usual statements in annual reports indicating that AML is to be an area of focus for the year ahead, an additional area of potential interest to note relates to the development of beneficial ownership registers. The governments of the United Kingdom, Overseas Territories and Crown Dependencies signed agreements in April 2016 regarding the sharing of information in relation to beneficial ownership.

The arrangement requires each jurisdiction to establish (if not already in place) and maintain a central register containing accurate and current information on beneficial ownership for all incorporated legal and corporate entities. This information must be accessible to all other jurisdictions' law enforcement and tax authorities. The arrangement applies to the following jurisdictions (many of which are considered key offshore financial centres):

- Alderney
- Anguilla
- Bermuda
- British Virgin Islands
- Cayman Islands
- Gibraltar
- Guernsey
- Isle of Man
- Jersey
- Turks and Caicos Islands

The deadline for submission is approaching and all jurisdictions have until 30 June 2017 to make this information available. As such, the governing bodies

within each jurisdiction have requested corporations acting as registered office for these entities to submit beneficial ownership information prior to the June deadline. There will also be a requirement to maintain these registers on an ongoing basis. Given the above, there is a real risk that corporations may not meet this deadline, or subsequent filing requirements for any changes. As such, there is a possibility that governing bodies will begin to impose fines for late submissions and take enforcement action against those with substantial failings.

Additionally, these agreements will allow the timely, safe and secure access for tax and law enforcement authorities to beneficial ownership information, providing greater transparency between jurisdictions. This could, in turn, lead to greater AML and CTF investigations by relevant enforcement authorities who may now have quick and transparent access to important ownership data that was not previously available.

### The Way Forward

As part of the work we carry out at Duff & Phelps, we have seen a shift in the attitudes of not only the relevant authorities and their regulated entities, but also the underlying clients of these regulated entities. For example, clients of Trust and Corporate Service Providers are taking extra time to consider the global footprint of their corporate structures, with a view of moving operations to 'better quality' jurisdictions and those which have strong, yet pragmatic regulators. Even where there are particularly complex client structures involved, there is an averseness to the potential risk of setting up a business in a weaker regulated jurisdiction which could be the subject of unwarranted negative publicity and scrutiny by the world's regulatory superpowers who have combatting tax avoidance and wider financial crime clearly in their sights. The enhanced pressures that offshore centres face is likely to continue in the future, particularly amidst the elevated risk of terrorist financing facing the globe.



# Key Offshore Financial Centres

Jurisdiction and Regulator	Characteristics and Insights	Recent Key Enforcement Activities
<p><b>Bermuda</b> Bermuda Monetary Authority (BMA)</p>	<ul style="list-style-type: none"> <li>BMA is to continue its renewed focus on enforcement activity for 2017 (particularly in areas of AML and sanctions compliance) and on increased transparency by starting to publish enforcement actions taken.</li> <li>Bermuda will be preparing for the upcoming Caribbean Financial Action Task Force (CFATF) review in 2018. It will also be undertaking several key initiatives to further strengthen its AML/CTF framework which could subsequently lead to further enforcement action being taken.</li> <li>Finally, it is noted that corporate services providers are to be a focus point for 2017, with the BMA developing a supervisory regime for these businesses. This may in turn lead to further enforcement activity in the future.</li> </ul>	<ul style="list-style-type: none"> <li>BMA has only published two enforcement actions since adopting its transparent approach.</li> <li>Enforcement action published includes:               <ul style="list-style-type: none"> <li>\$50,000 fine and restriction of licence against one entity in 2016 for regulatory breaches.</li> <li>\$1,500,000 fine and restriction of licence against one entity in 2017 for AML failings.</li> </ul> </li> <li>The above is a clear message to the industry that the BMA will not simply adopt an approach of issuing 'administrative fines' and will be attempting to establish its enforcement capabilities where it feels it is appropriate to do so.</li> </ul>
<p><b>British Virgin Islands (BVI)</b> British Virgin Islands Financial Services Commission (BVIFSC)</p>	<ul style="list-style-type: none"> <li>Enforcement action is published and often takes the form of lower value fines for less material breaches.</li> <li>All actions taken in 2016 have been imposed against firms, not individuals.</li> <li>BVIFSC's Enforcement Committee reviewed 229 enforcement cases brought before it in 2016, versus 91 in 2015.<sup>4</sup></li> <li>Nevertheless, the number of enforcement actions published in 2016 is only 52, versus 58 in 2015 (indicating that whilst more cases are being reviewed, this has not resulted in an automatic increase in number of enforcement actions).</li> </ul>	<ul style="list-style-type: none"> <li>Administrative penalty of \$440,000 for AML/CTF failures represents the highest single penalty issued by the BVIFSC since it started publishing its enforcement actions in 2008.</li> <li>BVIFSC published 52 separate enforcement actions in 2016, consisting of:               <ul style="list-style-type: none"> <li>37 administrative penalties.</li> <li>6 warning letters.</li> <li>6 lifting of restrictions previously imposed on firms.</li> <li>2 firms were issued with directives, placing restrictions on their business/licence.</li> <li>1 appointment of joint liquidators.</li> </ul> </li> </ul>

<sup>4</sup> As per the BVIFSC's Statistical Bulletins issued in 2015 and 2016.

Jurisdiction and Regulator	Characteristics and Insights	Recent Key Enforcement Activities
<p><b>Cayman Islands</b> Cayman Islands Monetary Authority (CIMA)</p>	<ul style="list-style-type: none"> <li>• CIMA does not normally disclose details of the information received or the findings or recommendations made during an investigation.</li> <li>• The Cayman Islands is preparing for the upcoming CFATF review later this year, which will assess the AML regime across the jurisdiction. Dependent upon the results, this may lead to further regulatory scrutiny and action taken against firms/ individuals if required.</li> <li>• The recent introduction of the Monetary Authority (Amendment) Law, 2016, will allow CIMA to impose administrative fines for breaches for non-compliance with laws, regulation and rules. Once enacted, there is a likelihood that CIMA will begin to impose and publish fines relating to its use of this new power.</li> </ul>	<ul style="list-style-type: none"> <li>• Enforcement activity primarily relates to cancellation/suspension of an entity's licence or an individual's ability to act as a director.</li> </ul>
<p><b>Guernsey</b> Guernsey Financial Services Regulator (GFSC)</p>	<ul style="list-style-type: none"> <li>• GFSC's 2015 Annual Report stated that it takes 'great care to ensure that only serious enforcement cases are progressed. We have little appetite and lack the resources to take forward cases relating to minor things'.<sup>5</sup></li> <li>• In the Annual Report, it was further stated that there remains a concern over trust structures in addition to concerns over the conduct of insurance intermediaries, trust companies, fund administrators and managers in respect of the protection of investors.</li> <li>• In response to a MONEYVAL finding, the Bailiwick of Guernsey has approved proposals to increase the maximum level of fines available to the GFSC from £200,000 to £4,000,000 for licensees and an increase from £200,000 to £400,000 for relevant officers and personal fiduciary licensees (not yet passed into law).</li> </ul>	<ul style="list-style-type: none"> <li>• Settlement agreed and penalties totalling £77,000 imposed upon a registered funds service provider and two directors after an investigation by the GFSC revealed that the firm had failed to provide its services with appropriate soundness of judgement and diligence in respect of an authorised collective investment scheme that was being administered by the firm.</li> <li>• GFSC took enforcement action against a registered trust company and two principals who it determined lacked probity, competence and soundness of judgement after an investigation revealed weaknesses in the systems and controls to ensure compliance with the AML Regime in Guernsey. Penalties totalling £70,875 were imposed on the firm and the two individuals.</li> </ul>

<sup>5</sup> <https://www.gfsc.gg/sites/default/files/2015-Annual-Report-and-Financial-Statements.pdf>

Jurisdiction and Regulator	Characteristics and Insights	Recent Key Enforcement Activities
<p><b>Jersey</b> Jersey Financial Services Commission (JFSC)</p>	<ul style="list-style-type: none"> <li>• JFSC is yet to impose its first civil penalty under the new regime, which came into force in 2015. The JFSC has the power to impose financial penalties on registered businesses of up to £4 million for significant and material breaches.</li> <li>• Whilst several enforcement cases arose during 2016, the JFSC expects that in 2017, investigation and litigation costs will remain the same as the previous years based on the level of enforcement activity.</li> <li>• The JFSC is focussed on cyber crime and its 2017 Business Plan states that cyber crime and attempts to gain unauthorised access to the JFSC information systems and data pose a significant risk and are expected to do so for 'the foreseeable future'.</li> </ul>	<ul style="list-style-type: none"> <li>• Three individuals were deemed not fit and proper by the JFSC and restrictions were placed upon their employment in Jersey's finance industry.</li> <li>• JFSC issued a public statement in relation to a regulated trust company business for corporate governance failings, resulting in a failure to have the highest regards for the interests of customers and a failure to maintain adequate systems and controls. In the same case, the JFSC imposed restrictions on the former partners of the company.</li> </ul>
<p><b>Luxembourg</b> Commission de Surveillance du Secteur Financier (CSSF)</p>	<ul style="list-style-type: none"> <li>• CSSF's 2015 Annual Report stated that their on-site inspection department was strengthened during the year. This trend was reinforced during 2016 and is likely to continue in 2017.</li> <li>• The CSSF was involved in coordinated investigations involving other regulators as part of the SSM with the ECB.</li> <li>• The CSSF has the power to impose administrative sanctions (most common practice) which includes issuing warning or administrative fines. Where the CSSF is aware of facts which are likely to constitute crimes or offences or where the CSSF suspects acts of money laundering or terrorist financing, it can and does refer these matters to the State Prosecutor (the CSSF made eight such referrals in 2015).</li> </ul>	<ul style="list-style-type: none"> <li>• Limited information on enforcement action is made public.</li> <li>• CSSF's 2015 annual report indicates the largest single administrative fine issued was EUR 250,000 on an investment firm, and EUR 15,000 against a private individual.</li> <li>• In aggregate in 2015, the CSSF imposed an overall amount of EUR 1,335,000 of administrative fines versus 722,250 in 2014.</li> <li>• By marked contrast, recently announced enforcement activity in March and June 2017 have resulted in two significant fines being issued by the CSSF against two banking institutions, predominantly as a result AML failures. The fines amounted to circa EUR 3.8 million and EUR 9 million respectively.</li> </ul>
<p><b>Mauritius</b> Financial Services Commission Mauritius (FSC Mauritius)</p>	<ul style="list-style-type: none"> <li>• FSC Mauritius takes a preventative approach to enforcement, attempting to identify issues early in the regulatory process.</li> <li>• FSC Mauritius continues to place focus on suspension, revocation and termination of licences.</li> <li>• It is worth noting that the FSC Mauritius has not issued any fines in relation to action taken against firms and individuals.</li> </ul>	<ul style="list-style-type: none"> <li>• While the suspension and revocation of licences is down from 2015 (27 to nine), there has been an increase in the disqualification of directors (five to 10), indicating a focus on individual accountability.</li> <li>• For the first time since the FSC Mauritius commenced publishing its enforcement actions in 2010, it has used its powers to terminate licences (six in 2016).</li> </ul>