Editorial: The Court of Justice of the European Union and the beginning of the end for corporate transparency?

Abstract

This paper considers an important, recent development in the corporate ultimate beneficial ownership landscape emanating from a decision of the Court of Justice of the European Union in November 2022. This paper explores the impact of this decision in the context of fundamental legal protections and the ongoing debate about public registers.

Introduction

For some time, and particularly since the Panama and Paradise papers, international discourse about ultimate beneficial ownership (UBO) information has been prominent. While, traditionally, authorities may have known little more than a name or address of a company, today, understanding UBO information has become firmly part of the AML/CFT toolkit to disrupt economic crime. The accepted relationship between anonymous entities and facilitating nefarious activity therein is well known. Indeed, the basic rationale for knowing UBO information may appear itself difficult to disagree with – and therefore corporate transparency has proceeded considerably unopposed, with even some of the world's more well-known offshore financial centre jurisdictions like the Cayman Islands and Bermuda previously committing to creating publicly accessible registers. In spite of this, at the international level, we continue to see inconsistency in approach and the question of access to such information remains controversial and undetermined. Transparency arguments have long existed upon a "nothing to hide, nothing to fear" premise, and a recent decision emanating from the Court of Justice of the European Union (CJEU) demonstrates that privacy is not, yet, forgotten in this fast-moving debate. It certainly re-opens the notion of whether this information is of "interest" or simply just "interesting", with the important distinction this carries.

Ultimate beneficial ownership registers and the Court of Justice of the European Union

November 2022 saw an interesting twist to the public versus central register debate. It was interesting given that the European Union (EU), in its successive AML Directives, has for some years been a prominent voice on public register momentum. On 22 November 2022, the CJEU handed down judgment in *WM and Sovim SA* v *Luxembourg Business Registers* [1]. In this case, the court had to consider the validity of the public register provisions of the EU AML Directive which required member states to make their registers of UBO information available and accessible to any member of the general public. The CJEU considered the extent to which this requirement interfered with fundamental freedoms under the Charter of Fundaments Rights of the EU, specifically, the rights to respect for private life and the protection of personal data [2]. In judgment, the Court held that the interference by the provision is not limited to what is strictly necessary, nor proportionate to the objective pursued – the objective being the prevention of money laundering and terrorist financing

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within an environment of increased transparency. Noting the transition from previous Directives, under which data was accessible by competent authorities or other persons capable of demonstrating a legitimate interest, the Court noted that public accessibility to such data now was a considerably serious interference with those Charter rights. As such, the Court's determination of the Directive provisions providing public access to UBO information was that it was invalid and constituted a serious interference with Charter rights.

Beginning of the end for corporate transparency

The decision carries significant and wide impact. In the immediate aftermath of the decision, many country's registers across the EU were taken "offline" [3] or suspended pending consideration of the court's ruling. Many transparency campaigners have pointed to the decision knocking years of momentum off the corporate transparency movement [4]. The notion of privacy as a fundamental freedom is, of course, qualified and often subject to balancing exercises of other rights. For example, courts frequently engage in the balancing of qualified rights (as oppose to absolute rights) such as one's right to privacy versus public interest or another's right to freedom of expression. While there is no right to financial privacy per se, privacy's different manifestations find protection under various areas of law – be that under fundamental freedom legislation, confidentiality provisions, aspects of common law fiduciary duties or data protection regulations.

For UBO information, since the Panama papers, there has been growing international momentum towards complete transparency of registers. Aside from prominence at the EU level, we see it also with the UK's UBO register – operational since 2016, and publicly accessible for other types of information before then. In the wake of the offshore data leaks, the UK legislated [5] to compel its Overseas Territories [6] to implement public registers by the end of 2023. On the other hand, we also have internationally accepted AML/CFT standard bearers such as the Financial Action Task Force (FATF) who, even in their most recent review on beneficial ownership (FATF, 2022), acknowledged that alternative frameworks may be permissible in achieving compliance with its standard.

In spite of the basic premise of transparency sounding uncontroversial, over-reliance on the "nothing to hide" argument risks undermining fundamental safeguards, or at least oversimplifying things. The rapid and at times belligerent push towards complete transparency has not only scratched the surface of this complex subject in this regard, leaving questions of privacy, but also practice, unresolved. A former Economic Secretary to the Treasury, Simon Kirby MP, said that "People with nothing to hide have nothing to fear" in relation to increased transparency requirements [7]. Similarly, Global Witness (2018) argued that "[Many] companies registered in UK tax havens, many of which are not vehicles for crime or corruption and have nothing to fear from greater transparency." I have long argued that the approach requires greater caution [8], as it risks undermining fundamental legal safeguards at any cost. As Nakajima (2017) considered, "[a question] we might ask ourselves is that even if we have nothing to hide, do we not wish to retain a certain level of confidentiality?"

Over-reliance on a narrow view of transparency – being a benefit in and of itself – has led to the movement proceeding without much thought as to the mechanics of transparency or, even, whether alternative frameworks might comply with global standards, at least as defined by FATF. It has led to questionable policy in respect of UK Overseas Territories – many of which are at fundamentally different levels of development and which operate considerably different financial marketplaces. Furthermore, it has caused confusion in terms of international standards. Even the UK Government in 2022 acknowledged the many

challenges its own register faces (DBEIS, 2022) relating to verification and erroneous data, with tabled reforms forthcoming. Concerningly, it admitted that Companies House had become a "passive recipient of data". It is clear that for transparency to have any chance of effectiveness, serious thinking about the accuracy and verification of data is needed.

Outlook and concluding thoughts

Quite aside from the practical challenges referred to regarding public, or indeed central registers, the CJEU has brought privacy and data protection back into the debate at an indelibly high level. It is little surprise that transparency campaigners have argued the decision undermines years of progress. Indeed, the UK Foreign Affairs Committee as recently as in 2019 went as far as claiming that "The public in the UK and elsewhere have a right to see beneficial ownership information" (House of Commons, Foreign Affairs Committee, 2019). Given Brexit, the CJEU's decision at EU level does not bind the UK. The UK has its own public register and will likely continue to. It has also legislated to compel its Overseas Territories to create them by the end of 2023. However, the right to private life protected by the EU Charter, and for which the CJEU held that public registers undermine this freedom, is equally found enshrined within Article 8 of the UK Human Rights Act 1998. It will therefore be interesting to monitor the extent to which this decision, while not binding in the UK context, will add to the debate domestically and internationally moving forwards. At the very least, the decision perhaps returns greater relevance to the FATF standard, which focuses on accurate UBO information being accessible to competent authorities through a register of BO or an alternative mechanism. With the tunnel vision on public registers getting weaker with the CJEU's decision, the distinction between information which is of "legitimate interest" and information which is simply "interesting" becomes more clearly demarcated.

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Notes

1. Joined Cases C037/20 | Luxembourg Business Registers and C-601/20 | Sovim.
2. Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.
3. For further discussion, see: Transparency International (2023).
4. Transparency International, 22.11.2022 "EU Court of Justice delivers blow to beneficial ownership transparency". Therein, they state "the fight against cross-border corruption set back by years".
5. Section 51, Sanctions and Anti-Money Laundering Act 2018 (UK).
6. The UK has 14 Overseas Territories; seven of which operate financial centres comprising some of the more well-known financial-centre jurisdictions including Bermuda, the British Virgin Islands and the Cayman Islands.
7. HC Deb (21 March 2017) Vol 623, Col 790.
8. See, for background, Thomas-James (2021), in particular Ch. 7 "Privacy and Increasing Transparency: What does it mean for the future of offshore financial centres", pp. 153-176.

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House of Commons, Foreign Affairs Committee (2019), "Global Britain and the Overseas Territories: resetting the relationship", [3]".

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