

# TRANSPARENCY VS PRIVACY

by David Dorgan

On 5 July 2016, the European Commission published proposed amendments to the European Union's 4th Anti-Money Laundering Directive (**4AMLD**). The proposal indicates that the amendments are born out of concerns arising from the recent increased terrorist threats to European states and so seek to strengthen the fight against terrorist financing. By consequence, the proposals increase transparency. Some proposals will affect companies and other legal entities, such as foundations, but the fundamental proposals will affect trusts and the requirement to make public beneficial ownership information in relation to trusts.

## TRUSTS AND OTHER LEGAL ARRANGEMENTS

In June 2015, article 31 of 4AMLD proposed that, where a trust generates tax consequences (undefined), a member state must have in place a register containing the beneficial ownership information which is open to *competent authorities* (e.g. branches of governments and intelligence units) and *obliged entities* (i.e. banks and professionals). Public access for individuals or organisations displaying a *legitimate interest* (undefined but presumably in the context of money laundering, terrorist financing and associated crimes such as fraud, corruption and tax evasion) was not a requirement unlike for legal entities (i.e. companies or foundations). Therefore, public access to trust information was restricted.

However, the recent proposals increase transparency on trusts' beneficial ownership information and amend article 31 of 4AMLD to:

- (i) seemingly remove the requirement for a trust to generate tax consequences before registration is required; and

- (ii) introduce provisions that beneficial ownership information may be accessed by any person or organisation who can demonstrate a *legitimate interest*.

The legitimate interest requirement is unlikely to result in full open public access (albeit certain member states, such as France, apparently wish that to occur), but the extent that public access to such information is limited is currently unclear. Nevertheless the position is less protected than in 2015.

### RIGHT OF PRIVACY VERSUS ACCESS TO REGISTERS

Article 8 of the European Convention on Human rights provides “everyone has the right to respect for his private and family life, his home and his correspondence” and most importantly “there shall be no interference by a public authority.” However, the latter is qualified to allow interference when permitted by law and where necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. It is this exception that governments are using to erode privacy, but they are doing so without public consultation or choice.

A good example of this lack of consultation is the French Public Register of Trusts (**Register**). This went active on 30 June 2016 publishing the names of settlors and beneficiaries with a French nexus who had filed tax information with the French Revenue Authority. Under French tax law, trustees are subject to annual and event-based reporting requirements where the trustee, settlor or a beneficiary are French resident.

However, settlors and beneficiaries filing such tax information did not consent to their information being made openly public in this way. An American French resident citizen has challenged her details being made public on the register, claiming it runs counter to her right to privacy, particularly as she, in good faith, supplied the French government with data for tax purposes and without permission for it to be made public.

Consequently, on 1 August 2016, the French Government suspended the register pending a full hearing at the French Constitutional Court to determine whether public access to the register is a lawful and proportionate measure.

### LEGITIMATE REASONS FOR PRIVACY

A key question is why people need privacy of their financial affairs through trusts or similar structures. For families in many parts of the world, security risks, such as kidnapping, raise questions over public transparency in relation to trusts. In 2013, Mexico’s National Institute of Statistics announced that there are between 1500 and 1700 kidnappings in Mexico per year, but admits this is a small percentage of actual kidnappings, many of which go unreported.

Mexico’s Council for Law and Human Rights put the total kidnappings in 2013 at over 26,000. Kidnapping and ransom is big business in certain parts of the world. Recently, Aparecida Schunck, Bernie Ecclestone’s mother-in-law, was kidnapped from her Sao Paulo home in Brazil and ransomed for \$36.5 million. Before making headlines, her identity is unlikely to have been well known. Likewise, there are many high net worth families who do not have a public profile and very much value their privacy and so structure their affairs by the use of trusts. Trust structures have for many years provided privacy and security.

The EU Commission has recognised this to an extent. It is proposed that member states may in “exceptional circumstances” provide an exception to all or part of the information being accessed where it would expose the beneficial owner to the risk of fraud, kidnap, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable. This restriction would be assessed on a case-by-case basis. However, there is no guidance as to how one might prove such a risk (which might be theoretical until it actually happens) in order to be exempted. Indeed, there might be no risk (theoretical or actual) until names are published on a register which is then accessed via a *legitimate interest*. Therefore, essentially, what the EU is proposing is to put the burden of proof upon the settlor/beneficiaries that privacy is necessary: perhaps similar to the state

requiring those charged with a criminal offence to prove their innocence rather than the state proving their guilt.

The onset of beneficial ownership information of trusts being accessed by the public, subject to the demonstration of a *legitimate interest*, is a significant change of position. As governments push for greater transparency of our affairs, our right to privacy should not be ignored. It is a major issue of our time and very much in the social conscientiousness: it was even a plot feature in this year's Jason Bourne film. Whilst there is a need for financial structuring to be transparent, there needs to be a balance between transparency and privacy with a degree of practical reality applied.

The judgment of the French Constitutional Court in relation to the register will likely be a significant finding in whether trust information should be made fully public, be restricted to legitimate interests or otherwise not be available to the public.

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