Editorial

(Where) Have you already been registered?

Johanna Niegel*

Abstract

If one looks for a common thread that spins through the entire Issue, it is Transparency. As a result of the 4th EU Anti-Money-Laundering Directive, Ultimate Beneficial Owner Registers shall be introduced in the Member States by 27 June 2017. Given the cruel terrorist attacks in Brussels on 22 March 2016 as well as in Paris on 13 November 2015 this is a justified and crucial objective that demands and requires full support. However, it remains to be seen, whether the UBO Registers will be the apt means of choice to reach this objective. Finally, it will all boil down to the question of adequacy.

Welcome to Private Foundations 2016! As usual my warmest thanks go to Toby Graham, Tony Molloy, David Russell, Anita Gaspar, Steve Meiklejohn, Clare Taylor, Rebecca Stubbs, and Emma Thomas for their support throughout the production process as well as to all the authors who have yet again contributed extensively. And of course also to you, the loyal readers of this Special Issue.

In the 2016 issue, we warmly welcome Paul Astengo, our first contributor from Gibraltar with an interesting article on the rock-solid Gibraltar Foundation Draft Law.1 In addition, we feature updates on the Russian CFC Regulations,2 as well as on the Czech Republic,3 Germany,4 Hungary,5 Israel,6 Malta,7 Switzerland,8 and Turkey9. I am also very pleased about our ongoing focus on charitable foundations.10

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But if one looks for a common thread that spins through the entire issue, it can be summarized with one single word: Transparency. The discussion is opened by H.S.H. Prince Michael von und zu Liechtenstein in the Jurisdiction-Specific Section with the tale of the 'Big Bad Wolf'. Then, in the General Section, we have Filippo Noseda opening the floor with his article ‘Caught in the Crossfire between Privacy and Transparency’, followed by Robert W. Henoch and Benjamin A. Sauter with ‘The U.S. Government’s Far-Reaching Power Of Civil Asset Forfeiture, And What Innocent Foundations And Other Fiduciaries Need To Know To Prepare’. John Brassey then rounds the picture off in discussing the European version of transparency in his article on ‘Family Foundations: A UK Tax Perspective’. In the Jurisdiction-Specific Section, Dayra Berbey de Rojas examines ‘Transparency & Panama’s, Private Interest Foundations’ (PPIFs). With a view to the practical implementation of the 4th European Union (EU) Anti Money-Laundering Directive Maike Bergervoet and Jeroen Starreveld discuss the ‘Impact of the Introduction of the Ultimate Beneficial Owner (UBO) Register in Europe for Curacao and Bonaire Entities’ and Rick van der Velden and Matthijs Vogel inter alia outline the implementation of the UBO Register in The Netherlands.

For me as an editor, it is always very difficult to choose the articles that I want to mention in my Editorial because they are all excellent, current, and interesting in their own way. But the issue of transparency has caught my particular attention and has provoked my very own thoughts, which I have tried to summarize in this year’s Editorial.

In the 2015 Editorial, I discussed the dangers that the internet poses to the privacy of individuals by registering, storing, and making available all kinds of information to an unknown public. But this year one definitely needs to extend this question by asking ‘(Where) Have You Already Been Registered?’ I hope that you will enjoy Private Foundations 2016!

Last year’s Editorial ended with the following observations:

... Trust in the advantages of transparency will be lost as soon a regulatory framework becomes unpredictable. And such unpredictable regulatory framework for this very reason might sooner or later miss its aim. Transparency in combination with trust in its accurate and purposeful implementation under the guarantee of the legitimate and lawful interests of all parties involved is indeed a solid foundation...

A year has since passed and of main concern to practitioners are the developments brought about by the 4th EU Anti-Money-Laundering Directive which was adopted by the European Parliament on 20 May 2015 and is to be implemented by the EU Member States by 27 June 2017. As a result of the Directive, Ultimate Beneficial Owner Registers, in short ‘UBO Registers’, shall be introduced in the Member States. The corresponding provisions are incorporated in Articles 30 and 31 of the Directive. The Directive aims at two UBO Registers—one for corporate and other legal entities (Article 30) and one for trusts and other types of legal arrangements, having a structure or functions similar to trusts (Article 31). The...
definition of UBOs as set forth by the 3rd Money Laundering Directive\(^1\) has been retained for the purposes of the Registers and consolidated by the 4th Anti-Money Laundering Directive’s own definition of UBOs. For this aim, the 4th Anti-Money Laundering Directive in Article 3 para 6 introduces a tier test in the case of corporate entities: the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity,\(^2\) including through bearer shareholdings, or through control via other means shall be regarded as the UBO of such entity. If, after having exhausted all possible means, and provided there are no grounds for suspicion, no person is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s) shall be regarded as the UBOs of the corporate entity concerned.

**The Directive aims at two UBO Registers—one for corporate and other legal entities (Article 30) and one for trusts and other types of legal arrangements, having a structure or functions similar to trusts (Article 31).**

As for trusts, the 4th Anti-Money Laundering Directive includes the settlor, the trustee(s), the protector, if any, the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates and any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means, as falling under the definition of a UBO. The latter also applies *mutatis mutandis* to foundations and legal arrangements similar to trusts. A Report by the European Commission, however, reveals that in practice there is a great deal of uncertainty about the designation and identification of UBOs.\(^2\)

Article 30 of the 4th Anti-Money Laundering Directive obliges corporate and legal entities incorporated in a Member State to obtain and hold adequate, accurate, and current information on their beneficial ownership, including the details of the beneficial interests held. In addition, this information is to be held in each Member State in a central register, for example, a commercial register, companies register, or a public register. The information on the beneficial ownership will be accessible to competent authorities and Financial Intelligence Units (FIUs) without restriction and without alerting the entity concerned, to obliged entities within the framework of customer due diligence (‘Obliged Entities’) and any person that can demonstrate a legitimate interest, whereby the latter may only access the name, the month and year of birth, the nationality and the country of residence of the beneficial owner, as well as the nature and extent of the beneficial interest held. The Member States shall ensure that the FIUs and competent authorities are able to provide the information to the competent authorities and FIUs of other Member States. The Member States may also provide for an exemption to the access to all or part of the beneficial ownership information on a case by case basis in exceptional circumstances, where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable.

Likewise, according to Article 31, the trustees of any express trusts (and other types of legal arrangements having a structure or function similar to trusts) governed under the law of a Member State, are required

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2. A shareholding of 25% plus one share or an ownership interest of more than 25% in the entity held by a natural person shall be an indication of direct ownership. A shareholding of 25% plus one share or an ownership interest of more than 25% in the entity held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership. This applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control.
to obtain and hold adequate, accurate, and up-to-date information on beneficial ownership regarding the trust, which includes the identity of the settlor, the trustees, any protector, the beneficiaries or class or beneficiaries, and any other natural person exercising effective control over the trust. The information on trusts shall also be held in a central register but only if a trust generates tax consequences. This trust register will grant unrestricted access to competent authorities and FIUs without alerting the parties to the trust concerned. Also the Trust Register may allow access to Obliged Entities within the framework of customer due diligence and the Member States shall ensure that the competent authorities and FIUs of a Member State are able to provide the information to the competent authorities and FIUs of other Member States.

In the final text of the 4th Anti-Money Laundering Directive, a clear distinction is now being made between legal entities that engage in business and interact with third parties and trusts which are regarded as a private planning tool. Despite their legal personality, one may argue that foundations will be subsumed under Article 31 like trusts, as they fulfil functions similar to trusts.

Consequently, there is a general obligation to place the information on legal persons in the public domain, whereas the access to the beneficial ownership information of trusts is more restricted. Also this wording deviates from the original intention. In a first Position on the 4th Anti-Money Laundering Directive, the EU Parliament had originally insisted on publicly accessible ownership registers for both companies and trusts, which went far beyond the original recommendation of the EU Commission and the position taken by the EU Member States. But especially with regard to the family nature of trusts, which primarily serve private aims such as estate and succession planning, the introduction of registers generally seems problematic. In this respect, John Riches correctly raises the question whether the impact of the EU public corporate register will in many cases result in a ‘back door’ trust register through ownership or influence of a corporate entity by a trust. To him it also seems likely, that the EU will look to ‘export’ a requirement for beneficial ownership information on public registered companies to be incorporated in many of the international financial centres.

The 4th Anti-Money Laundering Directive needs now to be implemented by the Member States which requires them to interpret the scope that was given to them in Articles 30 and 31. The deadline for implementation given to the Member States is 27 June 2017. It is to be seen whether the Member States will adopt the provisions in a timely as well as similar manner. As Edward Buckland points out with a view to the implementation of the FATF Recommendations, many countries have in fact opted to go further than the Recommendations actually require. This might also be the case with the implementation of the UBO Registers.

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28. E Buckland (n 22).
A study conducted by Price Waterhouse Coopers Netherlands in December 2015, which *inter alia* examines the current registration requirements in 12 EU Member States, comes to the conclusion that as of today, none of the examined Member States currently register UBOs in the way prescribed by the 4th Anti-Money Laundering Directive. The Study, furthermore, correctly points out that the cross-border nature of anti-money laundering practices will require international cooperation by the EU Member States and will also most likely trigger substantial system reforms for which the majority of the countries are not yet prepared. In addition to these arguments, one must not forget that the EU unites Member States of a common as well as civil law background. Not only that every Member State has its own legal forms, but some of them, like for example Austria, know foundations, but not the common law trust. In Austria, foundations are registered in the ordinary corporate register. Consequently, it is not clear, whether Austria will set up a separate UBO Register for trusts, or establish a separate UBO Register for trusts and foundations, or continue to register foundations in the ordinary corporate register. Hungary on the other hand knows both private foundations and trusts. But, as we can see from the article from our Hungarian author, Ákos Menyhei, the very nature of a trust may even raise discussions within one and the same country.

The cross-border nature of anti-money laundering practices will require international cooperation by the EU Member States and will also most likely trigger substantial system reforms for which the majority of the countries are not yet prepared.

Furthermore, from a mere implementation point of view, it will also be of interest how the 4th Anti-Money Laundering Directive will be implemented in the European Economic Area (EEA) Member States. Besides, upon implementation of the 4th Anti-Money Laundering Directive, the Common Reporting Standard (CRS) will have come into effect which will already cover many of the issues addressed by the UBO Registers. Also in this respect, it is to be seen how the UBO Registers as envisaged by the 4th Anti-Money Laundering Directive will correlate with the Automatic Exchange of Information.

Apart from the mere technicalities, Articles 30 and 31 also pose serious concerns regarding their material provisions. The objective of the 4th Anti-Money Laundering Directive is to prevent the use of the Union’s financial system for the purposes of money laundering and terrorist financing by enhancing transparency to combat the misuse of legal entities. Given the cruel terrorist attacks in Brussels on 22 March 2016 as well as in Paris on 13 November 2015 this is a justified and crucial objective that demands and requires full support. However, it yet remains to be seen, whether the UBO Registers will be the apt means of choice to reach this objective.

With a view to the cruel terrorist attacks in Brussels on 22 March 2016 as well as in Paris on 13 November 2015 this is a justified and crucial objective that demands and requires full support.

Like with so many things, each coin has two sides. On the one hand, such UBO Registers, by creating transparency will surely help to fight money laundering and terrorist financing. On the other hand, it must not be overlooked, that these UBO Registers will be a restriction on legitimate privacy and may in some cases—despite the fact that the Directive makes an explicit reference to data protection rules—also conflict with national data protection

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29. R de Lange-Snijders and H Welbers (n 21) 8.
30. ibid, 11 and 12.
32. A Menyhei (n 5).
33. Iceland, Liechtenstein, and Norway.
34. R Frimston (n 27).
laws. As we have seen above, the UBO Registers will primarily be accessible to national FIUs as well as competent authorities. In addition, the so-called Obliged Entities likewise have access to the registers to fulfil their Know Your Customer (KYC) obligations. What is worrisome is the access by third parties.

Third parties only have access to the Register under Article 30 and need to demonstrate a legitimate interest. If such interest can be demonstrated, these third parties can access the name, the month and year of birth, the nationality and the country of residence of the beneficial owner, as well as the nature and interest held. As the above-mentioned study points out, one might argue that the UBO Register does not contain more information than is currently already available because most of the owners of large companies and the members of their families are already known. The Register will not include private addresses but only contact information relating to the companies and basic identity information. Ownership percentages for the identification of UBOs are furthermore not easy to convert to a monetary value because information about that is not available to the public.

If we take into account the aims of the Directive, such ‘legitimate interest’ of a third party must primarily be linked to the prevention of money laundering and terrorist financing. But also tax crimes relating to direct and indirect taxes are included in the broad definition of ‘criminal activity’ of the Directive. Access by FIUs and competent authorities is justified, but already the access by entities obliged by KYC and third parties significantly widens the group. Finally, the access by the third parties will depend how restrictively or extensively the term ‘legitimate interest’ will be interpreted and it might well be that the Member States interpret this term differently.

In any case the interpretation of the term will need to involve a balancing of interests between the legitimate interest of the person requesting information and the legitimate interest for privacy of the UBO. In a Press Release of 17 December 2014, the European Parliament clarified that ‘any person or organisation who can demonstrate a ‘legitimate interest’, such as investigative journalists and other concerned citizens, would also be able to access beneficial ownership information . . .’.37

It needs to be seen what the Member States will legally make of terms such as “investigative journalists” or “other concerned citizens”.

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Recent events have once more raised the question of whether information really should be regarded as a ‘res communis omnium’, a thing of the entire community, and through that also a matter of universal competence. And as we have discussed last year, where does the right to know and to use information end and where does the ‘appropriation’ of information, its abuse to be exact, begin? After all, it might well be that the institution of such UBO Registers, in particular the corporate register, will entail criminal behaviour when criminals try to access these data to abuse them for criminal conduct. The Register even with restricted information might provide an incentive for ‘further research’. With the fast and easy dissemination of such information via the Internet, even an innocent list of millionaires might serve as an incentive for committing a crime such as kidnapping, other acts of violence or blackmailing, especially if the public is being made aware of what a particular

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35. R de Lange-Snijders and H Welbers (n 21) 18.
38. J Niegel (n 17) 582.
39. Ibid 583.
40. R de Lange-Snijders and H Welbers (n 21) 16.
person might be ‘worth’\textsuperscript{41} or how he/she is inter-linked. Already upon publication of information on the Internet, one has lost control on where this information ends up. And due to the fact that the individual users are anonymous, one is not able to develop a concise idea of the concrete circle of people to whom the electronic information is in fact being made available, nor how this information will actually be used by these people.\textsuperscript{42} As H.S.H. Prince Michael von und zu Liechtenstein\textsuperscript{43} has pointed out in his article in the 2015 issue of ‘Private Foundations: A World Review’, the view of ‘I don’t mind people knowing because I have done nothing wrong and have nothing to hide’ in itself constitutes a great danger.

Recent events have once more raised the question of whether information really should be regarded as a ‘res communis omnium’, a thing of the entire community, and through that also as matter of universal competence.

The Directive itself in Article 30 paragraph 9 contains an exemption to the access to all or part of the beneficial ownership information on a case by case basis in exceptional circumstances by Obliged Entities and persons with a legitimate interest, where such access would expose the beneficial owner to certain risks. But how would a beneficial owner be able to actually prove an exposure to a risk of fraud, kidnapping, blackmail, violence, or intimidation?\textsuperscript{44}

With the fast and easy dissemination of such information via the Internet, even an innocent list of millionaires might serve as an inventive for committing a crime such as kidnapping, other acts of violence or blackmailing, especially if the public is being made aware of what a particular person might be ‘worth’.

With a view to the above balancing of interests, lawmakers will thus not only need to provide effective checks and balances but also to clearly define the scope of the terms ‘legitimate’, as well as ‘interest’ of all the parties concerned, taking into account that these may be based on very subjective interpretations. Such concise legal definitions will finally allow for drawing the line between the legitimate and lawful use and the abuse of private information.\textsuperscript{45}

If one closely monitors the developments in particular with a view to Foreign Account Tax Compliance Act, the automatic exchange of information, and now also with a view to the UBO Registers, one somehow gets the impression that both private foundations and trusts in their entirety are beginning to be regarded by many as generally unlawful. But as Filippo Noseda\textsuperscript{46} puts it, these are unprecedented times for private clients as FATCA and Common Reporting Standard are certainly here to stay, and thus also innocent trust and foundations are likewise required to comply with the rules.\textsuperscript{47}

To sum up, with the increasing threat of terrorism, the approach followed by the EU with the introduction for UBO Registers is certainly a valid one. Yet, their success will depend on the effective as well as uniform implementation by the Member States to avoid ‘register-shopping’ practices.\textsuperscript{48} The costs, herein also included the weighing of public versus private interests, as the introduction of the registers will certainly have an impact on the privacy and feelings of security of UBOs,\textsuperscript{49} must correlate to the actual achievement.

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\begin{enumerate}
\item ibid 19.
\item J Niegel (n 39).
\item R de Lange-Snijders and H Welbers (n 41).
\item J Niegel (n 39).
\item cf RW Henoch and BJA Sauter (n 13).
\item R de Lange-Snijders and H Welbers (n 41).
\item R de Lange-Snijders and H Welbers (n 41) 2 and 16.
\end{enumerate}
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Finally, it will all boil down to the question of adequacy. Because trust in the advantages of transparency will be lost as soon a regulatory framework becomes unpredictable. And such unpredictable regulatory framework for this very reason might sooner or later miss its aim.

Transparency in combination with trust in its accurate and purposeful implementation under the guarantee of the legitimate and lawful interests of all parties involved is indeed a solid foundation.50

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50. Niegel (n 39).