



# DATA PROTECTION AND PRIVACY IN BENEFICIAL OWNERSHIP DISCLOSURE

**OPEN  
OWNERSHIP**

**THE B TEAM**

**THE ENGINE ROOM**

May 2019

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# EXECUTIVE SUMMARY

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## The growth of a new norm on ownership transparency

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Civil society organizations, businesses and governments across the world are increasingly promoting greater transparency about the ownership of companies as a useful means to stem illicit financial flows and create fairer markets. Yet in many countries, an individual can set up a company anonymously, without having to state who is the ‘real’ (or ‘ultimate beneficial’) owner of that company. This anonymity can lead to complex webs of opaque shell companies and ‘straw persons’, making it almost impossible for anyone – including public authorities – to identify the beneficial owner(s) of a company.

The scale and spread of complex corporate structures and offshore arrangements worldwide have been used to hide illegal activities such as tax evasion, money laundering, and terrorist financing, as demonstrated most visibly by the Panama Papers. In 2013, G8 leaders committed to an action plan addressing the misuse of company arrangements, which included the principle that beneficial ownership (BO) information should be made available to relevant public

authorities, and that some information should be publicly accessible.<sup>1</sup>

Several countries, starting with the UK in 2016, have launched registers of companies’ beneficial ownership, with some making those registers openly accessible to the public. The EU’s adoption of the Fifth Anti-Money Laundering Directive<sup>2</sup> on 30 May 2018 means that all EU Member States are required to pass legislation creating publicly-accessible registers of beneficial ownership information by 10 January 2020. Meanwhile, the Extractive Industries Transparency Initiative (EITI) now requires member countries to publish the beneficial owners of any company that applies for or holds a participating interest in an oil, gas or mining license or contract in their countries by 2020.<sup>3</sup>

Elsewhere, companies are being actively encouraged to disclose beneficial ownership data that they collect as part of due diligence investigations into their supply chain, or as part of Know Your Customer initiatives to comply with Anti-Money Laundering (AML) and terrorism financing regulations.<sup>4</sup> The OpenOwnership initiative seeks to make all this information more useful by collating existing publicly available and voluntarily disclosed ownership data, with the ultimate

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<sup>1</sup> UK Prime Minister’s Office, ‘G8 Action Plan Principles to Prevent the Misuse of Companies and Legal Arrangements,’ 18 June 2013, available at: <https://www.gov.uk/government/publications/g8-action-plan-principles-to-prevent-the-misuse-of-companies-and-legal-arrangements/g8-action-plan-principles-to-prevent-the-misuse-of-companies-and-legal-arrangements>.

<sup>2</sup> Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19 June 2018, pp43-74. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843> [Accessed 10 March 2019].

<sup>3</sup> See EITI, ‘Beneficial Ownership: Revealing Who Stands Behind the Companies’. Available at <https://eiti.org/beneficial-ownership> [Accessed 10 March 2019].

<sup>4</sup> The B Team, 2015. Developing the Business Case for Beneficial Ownership Transparency. Available at: <http://www.bteam.org/announcements/the-business-case-for-beneficial-ownership-transparency/> [Accessed September 20, 2018].

objective of creating a global standard for publicly available ownership data and an information source on ultimate beneficial ownership of corporations across the globe.

## Public disclosure of ownership data – rationales and risks

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Over the past few years, a range of stakeholders, from business to civil society, have promoted public disclosure of beneficial ownership information. The push for public disclosure of beneficial ownership of companies may have many explanations and drivers, but it is founded in great part on a simple proposition: in exchange for the right to a substantial ownership stake in a company – with all the benefits of protection from personal liability that this brings – an owner should reveal their identity. There is nothing inherent to the task of owning a company that would require information about that ownership to be kept private; indeed, there are many proud business owners across the world. Furthermore, because owning a company comes with considerable benefits including limited liability, it is reasonable for authorities to ask for ownership transparency as a *quid pro quo*.

While there is important momentum toward legal frameworks requiring more ownership transparency, the move towards collection and publication of beneficial ownership information – particularly its availability in public registers – has its critics.

One stumbling block which has emerged is the issue of privacy. Because beneficial ownership data includes data about people, the concern is that the publishing of beneficial ownership

information could interfere with or threaten individuals' rights to privacy and the protection of their personal data. This raises strict legal considerations. Do beneficial ownership registers contravene or conflict with data protection and privacy laws? But it also raises broader questions about whether making beneficial ownership information public is necessary to meet policy goals.

This paper sets out and discusses these questions, evaluating them through the perspective of international human rights law.

### Beneficial ownership publication is in compliance with data protection

First, in reviewing beneficial ownership transparency in light of **data protection**, it is clear that the disclosure of beneficial ownership information can comply with data protection and other relevant obligations, as a variety of models worldwide demonstrate. Companies in jurisdictions with data protection obligations will typically be exempt from liability under data protection legislation if there is a statutory requirement for them to disclose beneficial ownership data. If there is no statutory requirement, companies would still be entitled to disclose beneficial data on a voluntary basis, under certain conditions. For jurisdictions with neither beneficial ownership disclosure nor data protection obligations, companies would be entitled to disclose beneficial ownership information on a voluntary basis, provided that it did not violate other legal protections for personal information such as breach of confidence. Companies disclosing information of foreign beneficial owners are still required to comply with their domestic legal standards and are therefore unlikely to face liability under the laws of other states.

## Beneficial ownership disclosure has a purpose in the public interest

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In examining the [necessity and effectiveness of public beneficial ownership registers](#), it is apparent that public registers aim to tackle illicit financial activity and improve commercial transparency. These goals are clearly legitimate and in the public interest. While concerns about the accuracy of data published in public registers are valid, these problems are not unique to a public register – no state registry or financial institution would have the resources or time to comprehensively verify all information provided to them. Moreover, there are convincing arguments for why an open register is uniquely effective: it would allow for greater public oversight and scrutiny and give companies and foreign authorities more efficient, reliable access to beneficial ownership data. While public beneficial ownership registers are not a panacea, even for their strongest supporters, they are nevertheless an important component of a broader strategy to tackle financial crime and improve overall governance.

## Beneficial ownership disclosure must reflect individual privacy protections – but can do so and still serve its purpose

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When evaluating the [privacy and security](#) of registers, it is also important to consider the proportionality of public beneficial ownership registers. Transparency can, in principle, be achieved without endangering the privacy and safety of individuals, but the risks and tensions must be openly discussed and recognized. Striking an appropriate balance will depend on the inclusion and effect of various safeguards, limitations and exceptions. In other words, the debate is not just about why the data is published, but also *what* is published, and *how* it is published. It is impossible to provide one-size-fits-all recommendations on which safeguards and limitations are appropriate in all situations: the approach will depend on a range of contextual factors.

However, a set of key underlying factors need to be considered.

In the interest of striking a fair balance between transparency and privacy, governments and companies should not collect and disclose data beyond the minimum that is necessary to achieve their aim or data that poses a significant risk of harm. Conducting a thorough privacy impact assessment can help to identify potential harms and aid decision-making. What is disclosed to the public can be a subset of the data that is collected and available to public authorities, provided that enough information is made publicly available to allow for meaningful oversight and transparency. A carefully designed and narrowly defined exemption process is important to allow individuals with legitimate security or privacy concerns to request that their details are not published on the open register.

# I.

## INTRODUCTION: BENEFICIAL OWNERSHIP AND PRIVACY

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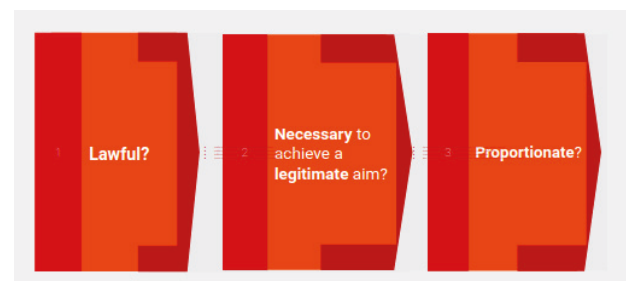
Civil society organizations, civic-minded businesses, and governments across the world are increasingly recognizing the need for greater transparency on the ultimate ownership of corporate entities. However, the move towards collection and publication of beneficial ownership information – particularly in public registers – has also raised criticisms. These include the costs and burden of compliance<sup>5</sup> and uncertainty about what information is needed.

At the same time, some law firms and researchers argue that it is not necessary to publish ownership information in public registers to meet the goal of detecting and deterring illegal activity, or improving the business environment overall. The primary issue they raise is whether the publishing of beneficial ownership information interferes with or threatens individuals' right to privacy and data protection. This question implies both legal considerations – do beneficial ownership registers contravene or conflict with data protection and privacy laws? – as well as broader questions about the broader impacts of beneficial ownership (BO) registers on privacy.

Publishing the names and ages of companies' ultimate beneficial owners in public registers

raises legal implications, both for the companies holding that information and the public authorities requiring it to be disclosed publicly. This research considers each in turn.

Because the legal issues ultimately derive from individuals' human right to privacy as to their personal details, this research adopts the typical structure of legal analysis used in human rights law. First, it considers the legality of collection and transmission of ownership information by companies under data protection and beneficial ownership disclosure laws (where they exist). Second, it considers whether disclosure of private information is justified, in the sense that it is a necessary and effective way of achieving a legitimate aim. Finally, it considers whether the impacts of beneficial ownership disclosure are proportionate to the benefits.

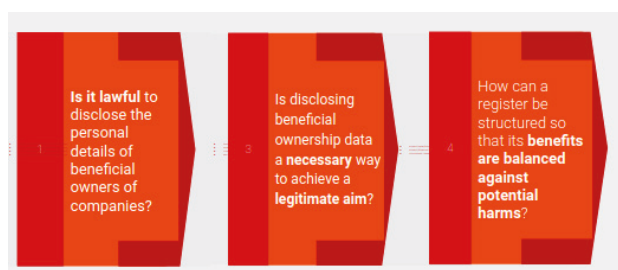


More specifically, section one considers the general principles of data protection law and

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<sup>5</sup> See Greenhalgh, H. 'UK Company Register Criticised as Costly and Bureaucratic,' Financial Times, 5 April 2016. Available at <https://www.ft.com/content/9561cc74-fb2b-11e5-b3f6-11d5706b613b> [Accessed September 20 2018].

assesses the ways in which companies' collection and provision of beneficial ownership information can be reconciled with their data protection obligations. Section two sets out the policy case for and against publicly accessible beneficial ownership registers. Section three explores the features required to ensure that the impact of a regime for the disclosure of beneficial ownership information is proportionate to the benefits.



This research is not intended to constitute detailed legal advice on the laws of any jurisdiction. Instead, it gives a general overview of the acceptable features of a lawful framework of beneficial ownership disclosure, which is sensitive to companies' data protection obligations and governments' privacy obligations.

At the outset, it is important to recognize that the type of personal information published under beneficial ownership disclosure regimes is typically limited to the identity of a company's ultimate beneficial owners. The push for disclosure of beneficial ownership of companies is based on a simple proposition: **In exchange for having the right to a substantial ownership stake in a company, with all the benefits of protection from personal liability that brings, such an owner should reveal their identity.** There is nothing necessary in the structure of a company that requires secrecy as to beneficial ownership, and there are strong arguments in favor of public disclosure.

This paper examines the policy imperatives and implications of beneficial ownership disclosure, and offers questions to consider for advocates, companies working towards increased beneficial ownership transparency, and implementers of beneficial ownership registers, to help them carefully consider privacy-related arguments, mitigate risks where they appear, and strengthen the foundations for responsible disclosure of beneficial ownership data.

## II.

# IS BENEFICIAL OWNERSHIP DISCLOSURE IN PUBLIC REGISTERS LAWFUL?

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- Individual privacy is a fundamental right that must be taken seriously. It protects important values such as autonomy, dignity and security.
- When companies disclose information about their beneficial owners, it may have implications under laws that aim to protect privacy – including data protection legislation.
- Various models worldwide demonstrate that the disclosure of beneficial ownership can readily be accommodated alongside data protection and other relevant obligations.
- Companies disclosing information regarding beneficial owners residing overseas are not likely to face legal liabilities under the law of those overseas states and will only be required to comply with their domestic legal standards. The fact of global reach ought not to prevent companies from providing beneficial ownership disclosure either under a domestic legal obligation or, if the circumstances allow, on a voluntary basis.

### What are the international standards and principles of privacy and data protection law?

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The right to privacy is enshrined in a number of international human rights instruments, including the Universal Declaration of Human Rights,<sup>6</sup> as well as in the constitution of more than 100 countries worldwide. The right to privacy requires that all individuals should be free from arbitrary or unlawful interference with their privacy, home, correspondence and family, and from attacks upon their reputation.

Privacy is closely related to concepts of autonomy and human dignity. It empowers individuals to make decisions free from the influence or interference of public or private actors. Protecting privacy is not necessarily about secrecy or anonymity, but rather about giving individuals control over their lives and decisions. As a result, any policy initiatives which have potential impacts on privacy rights demand careful legal consideration.

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<sup>6</sup> See, for example, the Universal Declaration on Human Rights, Art. 12; the International Covenant on Civil and Political Rights, Art. 17; the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8; and the American Convention on Human Rights, Art. 11.



### The right to privacy typically protects:

- the confidentiality of letters, phone calls, emails, text messages and internet browsing
- the sanctity of the home
- the ability of individuals to make decisions about their lives, including their sexual and reproductive choices
- individuals' control of their personal data

Critically, and especially in the digital age, the right to privacy increasingly includes the right to the protection of personal data and associated obligations if an individual's private information is 'processed' by another entity. Processing can include any act of collecting, using, analyzing, storing and – importantly for the purposes of this paper – publishing an individual's personal data.

It is important to clarify that the privacy rights at issue when considering the disclosure of beneficial ownership are those of the beneficial owners, not the companies. That avoids the difficult question as to whether, as a matter of law, companies have privacy rights, something which is a matter of considerable academic debate.<sup>7</sup> Courts have reached different conclusions on the issue. Courts in the US, UK, and Australia have considered whether companies have rights under specific domestic privacy statutes, but none have directly ruled on whether privacy as a constitutional or human right extends to companies. Such an extension was doubted, however,

by both the Australian High Court<sup>8</sup> and the Court of Appeal of England and Wales.<sup>9</sup> The High Court of Ireland, on the other hand, has allowed a company to advance arguments on the right to privacy,<sup>10</sup> and the European Court of Human Rights has held that Article 8 does apply to companies, at least in limited circumstances, such as respect for a company's registered offices.<sup>11</sup> That said, the people behind companies – the beneficial owners – have privacy rights themselves, and they do not lose those rights because of their commercial interests.

### Key concepts: Privacy

Privacy is not an absolute right: it can be limited or restricted under certain circumstances. The basic idea in human rights law is that a law or policy that interferes with a fundamental human right must be justified. To be justified, it must be in accordance with the law, necessary to achieve a legitimate aim, and proportionate to that aim.

To strike this balance, a field of regulation has emerged, known as data protection law.

In the digital age, when considerable personal information is gathered, processed and held externally by new technology, there is a growing consensus about the need for enhanced data protection of individuals. Data protection laws give effect to the government's obligation to respect the privacy rights of individuals, ensuring that there are proper restrictions on how personal data is used and secured. Data protection laws exist in a large majority of countries around

<sup>7</sup> See, for instance: Avi-Yonah, R, 'Country by Country Reporting and Corporate Privacy: Some Unanswered Questions' (2016) 1 Colum. J. Tax L. Tax Matters 8; and D'Avino, R, 'Balancing the public's right to know and corporate privacy rights – safeguarding competition in the era of country-by-country reporting: a response to Reuven S. Avi-Yonah' (2016) 8 Colum. J. Tax L. Tax Matters 5.

<sup>8</sup> ABC v Lenah Game Meats (2001) 185 ALR 1.

<sup>9</sup> R v Broadcasting Standards Commission, ex p BBC [2001] QB 885 (CA); cf R (Amro International SA) v Financial Services Authority [2010] EWCA Civ 123; [2010] 3 All ER 723.

<sup>10</sup> Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources [2010] IEHC 221.

<sup>11</sup> Société Colas Est v France (2004) 39 EHRR 17; [2012] ECHR 421.

the world and are becoming progressively more comprehensive every year.<sup>12</sup>

Generally speaking, these laws seek to balance two things:

1. the interests of individuals in controlling access to, and use of, their personal data (identity details, information on financial and online behavior, etc.)
- and
2. legitimate interests in the use of that data to fulfil various functions, such as customer service, research, marketing or regulatory compliance – especially where the individual in question provides consent or legal obligations require data recording.

Data protection legislation will typically apply to all public and private entities that process data.<sup>13</sup> Processing data can include any act of collecting, using, analyzing, storing and – importantly – publishing an individual's personal data.

Private entities such as companies do not owe human rights or constitutional obligations to individuals. However, they *do* owe individuals obligations under data protection laws that reflect (in substance) the privacy rights of those individuals. The treatment of personal data – including the identity details of beneficial owners (namely, their names and ages) – therefore entails legal obligations for the private companies that collect, hold, and pass on that data. This is the case even though the source of those obligations is in domestic legislation that differs from the privacy obligations of governments establishing beneficial

ownership disclosure regimes. **It is government's work to protect the privacy rights of individuals, but both governments and businesses that collect, hold and pass on data on beneficial ownership need to follow data protection laws.**

#### Key principles: Data protection

There is a considerable degree of convergence between various regimes (both mandatory and advisory) regarding data protection internationally. Beginning with the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data in 1980 ('OECD Guidelines'),<sup>14</sup> there has been widespread international agreement that effective protection of personal data requires compliance with a series of basic principles.

The principles set out in the OECD Guidelines include:

- that collection of data be limited;<sup>15</sup>
- that any collection be for a specific purpose;<sup>16</sup>
- that onward use of data collected requires either the consent of the subject or legal authority;<sup>17</sup>
- and that individuals should have the right to obtain the personal data others hold on them and, with respect to errors or data which is held unlawfully, require amendment, rectification, or erasure.<sup>18</sup>

<sup>12</sup> See, for example, the data protection law recently adopted by Brazil, which echoes the European Union's General Data Protection Regulation, the most rigorous privacy law ever enacted.

<sup>13</sup> See the definition of 'processing' in GDPR, Article 4(2).

<sup>14</sup> OECD, Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, 23 September 1980, Annex ('OECD Guidelines'). Available at <http://www.oecd.org/internet/ieconomy/oecdguidelinesonthe protection of privacy and transborder flows of personal data.htm>. [Accessed on 10 March 2018]. These guidelines were updated in 2013 and in 2019 the OECD is working with countries and experts to scope developments and provide practical recommendations on the implementation of the Guidelines in today's digital environment. Further information is available at <http://www.oecd.org/sti/ieconomy/privacy.htm>.

<sup>15</sup> OECD Guidelines, [7].

<sup>16</sup> OECD Guidelines, [9].

<sup>17</sup> OECD Guidelines, [10].

<sup>18</sup> OECD Guidelines, [13].

Shortly after the development of the OECD Guidelines, the Council of Europe adopted the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data ('Convention 108').<sup>19</sup> Convention 108, Article 5 provides that 'personal data undergoing automatic processing shall be: (a) obtained and processed fairly and lawfully; (b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes; (c) adequate, relevant and not excessive in relation to the purposes for which they are stored; (d) accurate and, where necessary, kept up to date; (e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.'

These key principles have been reiterated in a range of international instruments, including the Organization of American States Principles on Privacy and Personal Data Protection ('OAS Principles')<sup>20</sup> and the Economic Community of West African States ('ECOWAS') Supplementary Act on Personal Data Protection.<sup>21</sup>

The most recent significant international development regarding data protection is the EU's General Data Protection Regulation (GDPR),<sup>22</sup> which came into force in May 2018. Largely in line with the principles found elsewhere, the GDPR sets out mandatory requirements for the

processing of personal data within the EU, including that personal data must be:

- “ a. processed lawfully, fairly and in a transparent manner in relation to the data subject;
- b. collected for specific, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes ...
- c. adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed;
- d. accurate and, where necessary, kept up to date...<sup>23</sup> ”

With respect to the requirement that data be processed 'lawfully,' the GDPR clarifies that processing may be lawful for a variety of reasons, including that the subject of the data has provided consent,<sup>24</sup> that the processing is necessary for the performance of a contract to which the subject is a party,<sup>25</sup> or the processing is necessary for compliance with a legal obligation.<sup>26</sup> The GDPR applies to all EU entities irrespective of whether they are processing data in the EU.<sup>27</sup> It also has a limited extraterritorial extent, applying to entities all over the world processing the data of subjects in the EU where the processing relates to (a) the offering of goods and services to data subjects in the EU, irrespective of whether a payment is required, or (b) the monitoring of the subjects' behavior within the EU (by, for instance, the use of website cookies tracking EU customer behavior).<sup>28</sup>

<sup>19</sup> Council of Europe, Convention for the Protection of Individuals with Regard to the Automatic Processing of Individual Data (adopted 28 January 1981, entered into force 28 January 1981) ETS 108 ('Convention 108').

<sup>20</sup> Inter-American Juridical Committee, OAS Principles on Privacy and Personal Data Protection, OEA/Ser.Q, CJI/doc. 474/15 rev.2, 26 March 2015 ('OAS Principles').

<sup>21</sup> ECOWAS, Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS, 16 February 2010 ('ECOWAS SA').

<sup>22</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('the GDPR').

<sup>23</sup> GDPR, Article 5(1)(a)-(d).

<sup>24</sup> GDPR, Article 6(1)(a).

<sup>25</sup> GDPR, Article 6(1)(b).

<sup>26</sup> GDPR, Article 6(1)(c).

<sup>27</sup> GDPR, Article 3(1).

<sup>28</sup> GDPR, Article 3(2).

It is important to note that the United States is a significant exception to the broad international convergence regarding data protection. US Federal and State data protection legislation does not uniformly reflect the principle that data must only be processed by private entities with a legal basis or the principles of transparency and proportionality in data processing are not uniformly reflected, although a range of individual statutes do contain particular requirements for data security. As for individual rights of access, individuals are entitled to receive copies of the information credit reference companies and health insurers hold, under particular legislative provisions such as the Fair Credit Reporting Act and the Health Insurance Portability and Accountability Act. However, the US has no uniform and broadly applicable set of data access, rectification, and erasure rights, as exist across much of the world.

## How does data protection regulation interact with beneficial ownership registers?

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Jurisdictions worldwide take different approaches to balancing data protection and the disclosure of beneficial ownership, and may be categorized as:

- Jurisdictions in which **both** data protection and the disclosure of beneficial ownership are statutory obligations;
- Jurisdictions in which **data protection** is a **statutory obligation**, but there is **no obligation to disclose beneficial ownership information**, such that disclosure of beneficial ownership information only occurs on a voluntary basis; and
- Jurisdictions in which **neither** data protection **nor** disclosure of beneficial ownership information have any statutory basis.

### Jurisdictions with both data protection and beneficial ownership disclosure obligations

Data protection laws invariably only allow the processing of data where the party processing that data has a proper legal basis for doing so.

Three legal bases, present in all the major data protection regimes, are potentially relevant to the collection and disclosure of beneficial ownership information, namely: the consent of the person concerned; necessity for the performance of a contract; and lawful authority.

- First, with respect to **consent**, data protection regimes specify that such consent needs to be free and informed. Article 4(11) of the GDPR defines consent as ‘any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signified agreement to the processing of personal data relating to him or her.’ The OECD Principles, Convention 108, the OAS Principles, and the ECOWAS Supplementary Act all refer to the consent of the data subject as providing a lawful basis for the processing of personal data.
- Second, data protection law typically recognizes that **contractual agreements** to which the relevant data subject is party may form a lawful basis for the processing of personal data. For instance, if the processing of data is a condition of a contract between the data subject and a company processing data, or it is necessary for the company to process the data to perform its contractual obligations to the subject.
- Third, data processing may be lawful, even in the absence of the subject’s consent or agreement via contract, if the company making the disclosure is specifically required to do so under a **legal obligation**. For EU Member States, Article 6(3) of the GDPR provides that the legal obligation must be laid down in either domestic or EU law. However, recital 41 of the GDPR notes that the obligation does not need to be explicitly set out in statute, so long as the application of the rule is foreseeable for individuals whose data is subject to disclosure. There will be arguments at the margins regarding the foreseeability of certain common law obligations concerning the disclosure of beneficial ownership. But no such complication arises in the countries (led by the UK, and to be followed



by all EU Member States as they implement the Fifth Anti-Money Laundering Directive) where legislation expressly provides for the compulsory registration of information on beneficial owners.

Accordingly, for jurisdictions in which both data protection and the disclosure of beneficial ownership information are statutory obligations, compliance with the obligation of disclosure is consistent with data protection law, as it falls within the ‘lawful authority’ exception.

Once that lawful basis is satisfied, the relevant remaining issues to consider typically include: whether the information disclosed through beneficial ownership registration is limited to that which is relevant and necessary for the lawful purpose; and whether individual data subjects have recourse to access, challenge, and request amendments to, or erasure of, inaccurate or irrelevant information. With respect to the right of erasure, EU jurisdictions go further: reflecting the CJEU’s decision in the seminal *Google Spain* ‘right to be forgotten’ case,<sup>29</sup> data controllers faced with a request for erasure are, under the GDPR, required to take steps to erase not only the collated data itself, but also online links to, or copies of, the data.

Statutory disclosure regimes, such as the UK public register and the public registers due to be implemented across the EU by January 2020, incorporate design features that are compatible with these principles. First, the information required for registration is set out in statute, with the result that the information provided does not go beyond the scope of the lawful purpose. Second, each regime incorporates administrative means to access data and correct minor errors and allows recourse to the courts to raise more substantive challenges. Typically, however, statutory regimes requiring the collection and provision of beneficial ownership data for registers will impose restrictions on the ability of data subjects to demand erasure or a right to

be forgotten. Company information is typically retained for a minimum period: the UK, for instance, is currently reviewing its retention period for company information (currently 6 years of free availability, but up to 20 years with the payment of a fee). The reasons for retention of company information are persuasive, since issues arising from questionable company practices may take a long time to emerge, meaning that research into historic information is required. Indeed, as the Court of Justice of the European Union noted in the *Salvatore Manni* case, ‘questions requiring [company] data may arise many years after a company has ceased to exist.’<sup>30</sup>

### Jurisdictions with data protection obligations but no beneficial ownership disclosure

Even where no statutory obligation exists for companies to disclose their beneficial ownership information, those companies remain entitled to do so on a voluntary basis if the consent of all beneficial owners has been obtained for their information to be disclosed, or those owners are contractually obliged to provide that information.

As already discussed, under data protection laws, consent of the data subject or contractual obligation are invariable exceptions to the prohibition on the processing of personal data. It may be challenging for companies to obtain and trust the authenticity consent in jurisdictions where there is no formal relationship between a company and its beneficial owners. Some jurisdictions mandate company-level registers of BOs to deal with this, but in other cases companies will have to go through legal owners to get information on beneficial ownership and to get consent to share this information. Contractual obligation is less frequently encountered, but could be satisfied where, for instance, a company stipulates that when new company shares are sold the purchasers agree to provide beneficial ownership information to the company for the purposes of onward disclosure.

<sup>29</sup> Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos* ECLI:EU:C:2014:317.

<sup>30</sup> Case C-398/15 *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni* ECLI:EU:C:2017:197, [54].

Companies voluntarily disclosing beneficial ownership information on the basis of the subject's consent or contractual obligation must take care not to disclose more information than is necessary to fulfil the legitimate purpose of identifying owners. Residential addresses, for instance, may provide personal information identifying not only beneficial owners, but also their family members, and should not be publicly released. Accordingly, when designing policies for voluntary disclosure of beneficial ownership, companies must ensure that such disclosure is targeted and proportionate. But there is no obstacle in principle to a workable voluntary disclosure system in jurisdictions with data protection obligations but no beneficial ownership disclosure law.

### Jurisdictions with neither data protection nor beneficial ownership laws

Where a jurisdiction imposes no statutory obligations of data protection or disclosure of beneficial ownership, companies are entitled to disclose information held by them, provided that doing so does not violate protections for personal information grounded in the general law (rather than in data protection legislation).

While privacy rights may enjoy constitutional protection, which will restrict the types of legislation the *government* can enact, the key restriction on data collection and disclosure *by the private company itself* would be the risk of liability for breach of confidence. Breach of confidence arises where a party entrusted with confidential information, in circumstances where to disclose that information would be unfair, nonetheless releases the information. Again, the consent or contractual agreement of the beneficial owner themselves would mean that disclosure of that information was not unfair, preventing a breach of confidence. As already discussed, the information disclosed would need to be targeted and proportionate so as to avoid inadvertent publication of information about persons other than the beneficial owner, such as their family.

## Case studies

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Below, we analyze the relationship between data protection laws and beneficial ownership laws or policies in five countries: the United Kingdom, France, Ghana, Brazil, and Singapore.

This selection of countries provides a cross-section of jurisdictions that have both relatively robust data protection legislation as well as beneficial ownership disclosure obligations. Across the five countries, we find examples of mandatory beneficial ownership schemes (the UK, France, Brazil and Singapore) and voluntary ones (Ghana, at least until 2020); schemes that involve public registers (the UK and Ghana) and closed registers (France, Brazil and Singapore); and schemes which involve central registers (the UK, France, Ghana and Brazil) and decentralized registers (Singapore). The case studies demonstrate the various models worldwide for reconciling data protection and beneficial ownership responsibilities.

### United Kingdom

The United Kingdom provides a particularly good insight into the relationship between regimes of beneficial ownership information disclosure and data protection, given that in 2016 the UK was ahead of its G8 and EU peers in implementing mandatory disclosure of beneficial ownership information on UK registered companies.

The mandatory beneficial ownership disclosure obligation was introduced in the UK as part of the Small Business, Enterprise and Employment Act 2015, modifying the Companies Act 2006.<sup>31</sup> The Act established the Persons with Significant Control ('PSC') register, to which UK-registered companies and LLPs are obliged to disclose the identifying details of any person who comes within the relevant definition. That definition includes all persons who hold, directly or indirectly, more than 25% of the shares or voting rights in the company.<sup>32</sup> The information required under

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<sup>31</sup> By inserting a new Part 21A.

<sup>32</sup> Companies Act 2006, Schedule 1A, paras 2 and 3.

section 790K of the Companies Act 2006 includes the person's name, address for service, country of usual residence, nationality, date of birth, usual residential address, and nature of their control over the company,<sup>33</sup> but the information actually published on the PSC register is less extensive: birthdates are not full, and the size of shareholdings is not precisely specified.

Certain publicly-listed companies are exempted from the requirement to provide information for the PSC register if they fall into two categories: companies traded on the London Stock Exchange main market; or companies traded on a regulated market in the European Economic Area or specified international markets with equivalent regulatory frameworks (including major markets in the US, Japan, Switzerland, and Israel).<sup>34</sup> The rationale for those exceptions is that companies traded publicly on those markets are already required, by market rules, to provide detailed information and reporting on their ownership structures.

With respect to data protection, the UK is subject to the GDPR and has also enacted the Data Protection Act 2018, which provides ancillary rules regarding the exemptions which apply to requests for access to personal data; rules for specific categories such as processing for research, public health, journalism, and fraud prevention; and new data protection offences and regulatory sanctions.

In the UK, then, compliance with the beneficial ownership disclosure obligations of the PSC register is entirely consistent with data protection. The explicit statutory basis for the disclosure regime satisfies the GDPR criterion of a lawful basis for processing. Where companies provide the specific list of information set out in section 790K of the Companies Act 2006, they can be sure that in doing so they have provided only the information which is relevant and necessary to

their statutory obligation. In line with data protection rights, the PSC register can be accessed and minor changes can be requested and effected via administrative processes, while more substantial matters will be determined in Court.

Finally, while publicly-listed companies are exempted from the obligation to disclose information for the PSC register, it is worth noting that such companies are required to provide a considerable amount of information on governance and ownership to the market as part of the processes of listing and periodic reporting.

## France

The French regimes for data protection and disclosure of beneficial ownership information derive from and mirror EU law. Following the passage of the Fourth Anti-Money Laundering Directive, France adopted Ordinance no. 2016-1635 of 1 December 2016 reinforcing the French rules against money laundering and terrorist financing, and Decree no. 2017-1094 of 12 June 2017, which require most companies operating in France to register information regarding their beneficial ownership with the Registry of Commerce and Companies of the Commercial Court in the relevant region. Subsequent amendments to the Code Monétaire et Financier have given the changes a clear statutory footing.

The threshold for a registrable beneficial ownership stake is any natural person who either holds, directly or indirectly, more than 25% of the share capital or voting rights of the company, or who exercises, by any other means, a power of control over the management, administration, or executive bodies of the corporation or the general meeting of its shareholders.<sup>35</sup> Amendments to the Code Monétaire et Financier provide that, for new companies, the information on beneficial ownership must be filed together with first registration documents,<sup>36</sup> while existing companies were required to provide current information by

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<sup>33</sup> Companies Act 2006, section 790K(1).

<sup>34</sup> Register of People With Significant Control Regulations 2016, Schedule 1.

<sup>35</sup> Code Monétaire et Financier, Art. R 561-1.

<sup>36</sup> Code Monétaire et Financier, Art. R 561-55.

1 April 2018, and are under a duty to provide any updates within 30 days of the relevant change in beneficial ownership.<sup>37</sup>

The information which must be provided includes the name (including pseudonym, if any), date and place of birth, nationality, and personal address, and the date on which the relevant person became the beneficial owner of the reporting corporation.

Unlike the UK PSC register, the French register of beneficial ownership is not freely accessible by the public: automatic access is limited to judicial authorities and certain public authorities (including tax and customs authorities, and market regulators).<sup>38</sup> Public access is available where a person can establish before a court that they have a legitimate interest in access to the information, and obtain a court order to do so. That limited access regime will need to be expanded by January 2020 when the deadline for full implementation of the Fifth Anti-Money Laundering Directive expires, but there are no current plans for legislative amendments giving effect to that expansion in the near future.

Public registers have a difficult history in France, with a public register of trust beneficiaries having been struck down as unconstitutional by the Supreme Court (Conseil Constitutionnel) in 2016. That decision focused, however, on the fact that public disclosure of the beneficiaries of family trusts breached the privacy rights of persons making wills and seeking to dispose of their assets as they saw fit. The situation of companies is markedly different: the company itself does not have a family life deserving of privacy, and by extension the companies' owners have no 'family' connection with each other, meaning that the arguments raised against the register of trusts are less likely to succeed.

In France, the GDPR has been in force since May 2018 and governs data protection subject to the exemptions already discussed. In addition to the GDPR, in May 2018 France enacted additional domestic legislation that provides for additional conditions on the processing of data.<sup>39</sup> The most significant departure from the GDPR regime relevant to beneficial ownership disclosure is the general extraterritorial extension of the obligation to protect the data of French residents beyond the limited extraterritorial reach of the GDPR.

While the GDPR applies to overseas entities which process EU residents' data as part of offering goods or services to EU residents or monitoring EU residents' behavior (including online behavior), the French legislation is not limited to the contexts of sale of goods and services and monitoring, and applies generally to overseas entities processing French residents' data<sup>40</sup> with the exception of processing carried out for journalistic, academic, literary, or artistic purposes.<sup>41</sup> This law raises the prospect of a company operating entirely outside France being held liable for its processing of data under French law (if a relevant beneficial owner is a French resident). Companies dealing with the personal information of French residents will need to consider their potential exposure carefully. Given that the relevant substantive protections for French residents are those for which the GDPR provides, so long as the company ensures that it acts pursuant to consent, contractual authority, or statutory obligation, it can be confident of complying with its French law obligations.

## Ghana

In Ghana, data protection legislation imposes certain restrictions upon the capacity of companies to provide public disclosure as to their beneficial ownership. The Data Protection Act 2012 stipulates that any entity which possesses

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<sup>37</sup> Code Monétaire et Financier, Art. R 561-55.

<sup>38</sup> Code Monétaire et Financier, Art. R 561-57.

<sup>39</sup> Loi No 113 du 14 mai 2018 relatif à la protection des données personnelles.

<sup>40</sup> Loi No 113 du 14 mai 2018 relatif à la protection des données personnelles, Article 10(2).

<sup>41</sup> Loi No 113 du 14 mai 2018 relatif à la protection des données personnelles, Article 10(3).



personal data must ensure that such data is processed in a lawful and reasonable manner, and without infringing the privacy rights of the individual to whom the data relates.<sup>42</sup>

All entities processing data are obliged to ‘*take into account the privacy of the individual*’ by applying a series of principles including the lawfulness of processing, the specification of purpose, and handling the data in a secure fashion.<sup>43</sup> The ‘*lawfulness of processing*’ in turn depends upon either the consent of the subject or, in the absence of consent, a limited range of circumstances where the processing is:

- “ a. *necessary for the purpose of a contract to which the data subject is a party;*  
b. *authorised or required by law;*  
c. *to protect a legitimate interest of the data subject;*  
d. *necessary for the proper performance of a statutory duty; or*  
e. *necessary to pursue the legitimate interest of the data controller or a third party to whom the data is supplied.*<sup>44</sup> ”

In all circumstances, the processing of personal data is subject to what the Data Protection Act 2012 calls the principle of ‘minimality’: namely that personal data ‘*may only be processed if the purpose for which it is to be processed is necessary, relevant, and not excessive.*’<sup>45</sup>

Individuals have rights to seek access to their data,<sup>46</sup> and to seek amendments or deletions of data which is inaccurate, excessive, or out of date.<sup>47</sup> The Act also established a Data Protection Commission, to which individuals can bring complaints regarding breaches of the Act by entities which hold and process their personal data unlawfully. Those domestic provisions are largely in line with the ECOWAS Supplementary

Act on Personal Data Protection, to which Ghana is subject.

In line with domestic and regional data protection rules, then, companies registered in Ghana would be entitled to disclose the names and other identifying personal data of their beneficial owners, so long as the companies had the consent of those persons and complied at all times with the principle of ‘minimality’ by ensuring that the disclosure went no further than what is necessary, relevant, and not excessive bearing in mind the purpose of transparency as to ownership. Straightforward policies to avoid unlawful disclosure would include companies ensuring that they amend the information made available whenever the beneficial ownership of the company changes so that personal data which is no longer necessary or relevant is no longer shared.

While consensual disclosure is available, the main impetus for disclosure of beneficial ownership data on Ghanaian companies will be the pending introduction of a central register of beneficial ownership mandated by statute. At the UK Prime Minister’s Summit on Tackling Corruption in May 2016, then-President John Dramani Mahama committed Ghana to ‘*preventing the misuse of companies and legal arrangements to hide the proceeds of corruption*’ by using amendments to companies legislation to ensure that central registers are compiled for beneficial information on companies operating in all sectors of the economy, and to ensure that the information is accessible to the public. That announcement came shortly after the Panama Papers, which demonstrated the concentration of opaque ownership structures in the Ghanaian mining and oil sectors.

Accordingly, in August 2016, a statutory framework was created through the Companies

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<sup>42</sup> Data Protection Act 2012, section 18(1).

<sup>43</sup> Data Protection Act 2012, section 17.

<sup>44</sup> Data Protection Act 2012, section 20(1).

<sup>45</sup> Data Protection Act 2012, section 19.

<sup>46</sup> Data Protection Act 2012, section 35.

<sup>47</sup> Data Protection Act 2012, section 33(1).

(Amendments) Act 2016 requiring the Registrar General's Department to collect information on beneficial owners of companies registered in Ghana. That data is to be collected at the time of registration for new companies and as part of the annual filing requirements for existing companies. While now placed on a statutory footing, the regime is not yet mandatory. President Nana Akufo-Addo has made a commitment that the beneficial ownership reporting system will be implemented by 2020, however, in line with the target date promoted by civil society actors in Ghana, including the Extractive Industries Transparency Initiative (EITI).

Under the Ghanaian legislation, a beneficial owner is defined as:

“ *an individual*

- a. Who directly or indirectly ultimately owns or exercises substantial control over a person or company;*
- b. Who has a substantial economic interest in or receives substantial economic benefits from a company whether acting alone or together with other persons;*
- c. On whose behalf a transaction is conducted; or*
- d. Who exercises ultimate effective control over a legal person or legal arrangements.<sup>48</sup> ”*

The information which will be collected in respect of each beneficial owner comprises:

- “ *a. The full name and any former or other name*
- b. The date and place of birth*
  - c. The telephone number*
  - d. The nationality*
  - e. Residential, postal, and email address, if any;*
  - f. Place of work and position held; and*
  - g. The nature of the interest, including the details of the legal arrangement in respect of the beneficial ownership. ”*

One noteworthy aspect of the Ghanaian legislation is that, unlike the UK PSC register or the register requirements of the EU Fifth Anti-Money Laundering Directive, there is no specific threshold set for what amounts to ‘*substantial control*’ of a company. Prior to the implementation of the register and the testing of the meaning of ‘*substantial control*’ in the Ghanaian courts, the scope of disclosure obligations is not certain. That raises a potential challenge for compliance with data protection law: the absence of a minimum threshold is likely to encourage companies to provide information on all beneficial owners, however marginal. Persons with negligible beneficial control of Ghanaian companies may plausibly argue that such disclosure goes beyond the statutory purpose of exposing the people with *substantial control* and so, in the absence of their consent, would constitute a disclosure of personal information without a lawful basis, contrary to data protection law. Companies registered in Ghana will need to consider carefully the appropriate balance to strike between transparency and privacy for negligible beneficial holdings.

## Brazil

Brazil has recently taken significant steps to bring its domestic legislation into line with emerging consensus on data protection. In August 2018, the Brazilian Data Privacy Law (‘Lei Geral de Proteção de Dados Pessoais’ or ‘LGPD’) was signed into law, closely mirroring the structure and substance of the GDPR. The law comes into force through a staged implementation period that will last until 2020.

Like the GDPR and also the OAS Principles to which Brazil is a signatory, the LGPD creates a framework for lawful collection of personal data based on consent, and for processing of personal data on the bases of consent, contractual necessity, lawful obligation, and the specific and notified legitimate purposes of the data controller. In addition to those typical grounds for lawful processing, the LGPD also creates specific

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<sup>48</sup> Companies Act 1963, First Schedule, as amended by Companies (Amendments) Act 2016.

exceptions where data is processed for health-care and credit rating purposes.

Under the LGPD, data subjects have the right to information about the data held, and the rights of access, rectification, and erasure. A particular feature of the LGPD is its recognition of an additional right of data portability, which allows a data subject to request an entire copy of their personal data in a transferrable format. The data subject can then take that data record and transfer it as they see fit (passing it to a commercial competitor of the data controller, or another government department), which gives the data subject the benefit of the data compiled by the data controller.

In Brazil, the collection of personal data on ultimate beneficial owners of companies has been required since mid 2017 under the Instrução Normativa RFB No 1.634/2016 ('the Normative'). Most companies incorporated in Brazil were required to report the details of their ultimate beneficial owners to the Brazilian registrar of companies either by the end of 2018 (for companies existing when the law was enacted) or within 90 days of incorporation, although publicly traded companies and certain non-profit entities are exempt. The Normative defines an ultimate beneficial owner as a natural person who significantly influences the entity, with the significant influence threshold being met by either a direct or indirect shareholding of more than 25%, or direct or indirect control of the board of directors.

The Normative thus provides the obligation for collection of beneficial ownership data and disclosure to the registrar for most companies in Brazil and, as an obligation imposed by statute, would fall within the definition of lawful obligation meaning that such collection and disclosure would not contravene the LGPD data protection regime. Brazil does not, however, require that the personal data of beneficial owners be made available to the public at large. For a company to

do so would require that the beneficial owners gave consent or were under a contractual obligation to do so.

## Singapore

In Singapore, the Personal Data Protection Act 2012 ('PDPA') came into force in January 2013 and largely reflects the principles set out in the OECD Guidelines. Under the PDPA, an entity may only collect personal data if: (a) the express prior consent of the individual has been obtained, in light of the specific purpose of collection having been identified and notified; (b) consent has been implied or deemed to have been granted by that individual; or (c) exceptions set out in the Second Schedule to the PDPA apply.

The Second Schedule sets out a range of exceptional circumstances in which data may be collected without consent. Those exceptions are listed by subject matter, such as collection for a life-threatening emergency,<sup>49</sup> for legal investigations,<sup>50</sup> and for credit rating purposes.<sup>51</sup> Exceptions are potentially very broad in reach, such as collection in the national interest,<sup>52</sup> but there is no explicit category of lawful data collection when required by a legal obligation.

That said, since the creation of the Singapore data protection regime, Singapore has, in March 2017, enacted amendments to the Companies Act and Limited Liability Partnerships Act requiring each private company and limited liability partnership registered in Singapore to collect and maintain personal information on all substantial beneficial owners (relating to persons with ownership or voting control of 25% or greater) on a Register of Controllers for that company or partnership, with those Registers made available to law enforcement authorities. Unlike the UK regime, or the regime pending introduction across the EU following the Fifth Anti-Money Laundering Directive, these Registers of Controllers are held by each corporate entity, rather than centralized, and will

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<sup>49</sup> Personal Data Protection Act 2012, Second Schedule, para 1(b).

<sup>50</sup> Personal Data Protection Act 2012, Second Schedule, para 1(e).

<sup>51</sup> Personal Data Protection Act 2012, Second Schedule, para 1(k).

<sup>52</sup> Personal Data Protection Act 2012, Second Schedule, para 1(d).

not be publicly accessible (but may be subject to inspection by public agencies such as the Accounting and Corporate Regulatory Authority).

The beneficial ownership disclosure obligations now set out in the Singapore Companies Act and Limited Liability Partnerships Act do not apply to publicly-listed companies in Singapore, the reason being that (as in the UK) the requirements of listing on public exchanges already impose obligations of data collection with respect to the beneficial ownership of the relevant entity.

As for the relationship between beneficial ownership disclosure and data protection in Singapore, the allowance for data collection on the basis of the consent of the subject provides a clear route to collection and disclosure (even public disclosure) of beneficial ownership on a voluntary basis. The Second Schedule of the PDPA does not expressly refer to collection of data under a legal obligation; but the Fourth Schedule (governing circumstances where disclosure is allowed) authorizes disclosure to a public agency.<sup>53</sup> The doctrine of implied repeal means that the subsequent legal obligation on private companies to collect personal information to create a Register of Controllers takes precedence over the PDPA prohibition on that collection to the extent of any inconsistency. The very limited scope of disclosure (only to public agencies such as the Accounting and Corporate Regulatory Authority) however leaves Singapore as a jurisdiction with limited transparency regarding beneficial ownership.

## Implications for companies with global reach

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The various approaches worldwide to beneficial ownership disclosure and data protection pose questions for companies with global reach. Two points are particularly relevant: first, what legal regime applies to a company which operates across borders; and second, what might be the worldwide legal liabilities of a company with beneficial owners residing overseas.

On the first point, even though a company may have worldwide reach, it will have only one place of registration. In a corporate group, each subsidiary company will be individually registered in the relevant territory. The common feature of all beneficial ownership disclosure laws is that they apply as part of the company regulatory regime, and the relevant data needs to be provided either at initial registration or, for existing companies, by a deadline which normally coincides with the filing of new accounts.

As a result, those disclosure obligations only apply in the jurisdiction where each company is registered, rather than in every jurisdiction in which a company has operations (although, of course, if subsidiaries are formally registered overseas, those subsidiaries will need to comply with their domestic legal obligations). What is important is that each company complies with the legal regime in the country in which it is registered (which, as set out above, will allow voluntary disclosure of proportionate information even if it does not mandate it).

On the second point, given that disclosure of beneficial ownership will likely be accessible worldwide online, companies may be concerned about potential liabilities overseas. Consider a company registered in England which, under the Companies Act 2006, is under an obligation to disclose the personal data of its beneficial owners, but those owners reside in a jurisdiction which has stringent data protection laws but does not clearly authorize public disclosure of

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<sup>53</sup> Personal Data Protection Act 2012, Fourth Schedule, para 1(g).



beneficial ownership information as an exception. As set out above, Singapore is such a jurisdiction. If a beneficial owner of an English company were, say, a politically-connected person in Singapore, the disclosure of their UK interests might raise concerns in Singapore or might affect their reputation. Could they bring litigation against the English company for breach of the Singapore Personal Data Protection Act 2012, or at common law for breach of confidence?

The likelihood is low. As a starting point, under widely-accepted rules of private international law, the English company would typically need to be sued in England,<sup>54</sup> and a court in Singapore would likely decline to hear any claim since England, being the place of the company's registration, is clearly the more appropriate forum.<sup>55</sup> More important than the location of the proceedings, it is unlikely that the actions of the English company would be judged against Singapore law: on the contrary, English law would apply. The complaint by the beneficial owner in Singapore would be characterized under private international law as a non-contractual claim arising out of an alleged violation of privacy.

That type of claim falls outside the formal rules under the Rome II Regulation on choice of law,<sup>56</sup> but the general rules of private international law<sup>57</sup> (reflected in the Private International Law (Miscellaneous Provisions) Act 1995),<sup>58</sup> require that the applicable law will be the law of the country in which the '*most significant element*' of

the events complained of occurred. There are sometimes difficult issues if multiple significant elements occur in different jurisdictions – such as the taking of a photograph in breach of privacy in one country, but the publication and profit from it in another<sup>59</sup> – but in the situation of an English company disclosing beneficial ownership data in England to Companies House, all the significant elements occur within the one jurisdiction.

As a result, the English company would only be subject to English law, which, as already set out, both compels publication of beneficial ownership data and exempts such disclosures from liability for data protection breaches, and the question of liability under Singapore law is unlikely. That same result would be replicated across jurisdictions, and so while the various legal regimes lead to a patchwork of regulation worldwide, companies are not likely to face adverse legal consequences so long as they comply with the laws of the jurisdictions in which they are registered.

For the avoidance of doubt, it is worth noting that the much-publicized extra-territorial reach of the GDPR is limited to those situations where the data controller outside the EU is dealing with an EU subject's data in the course of offering goods or services in the EU<sup>60</sup> or monitoring the subject's behavior in the EU (e.g. using website cookies).<sup>61</sup> That will not apply to the processing of data for the purposes of compliance with beneficial ownership reporting laws.

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<sup>54</sup> This rule is, for EU states, codified in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Recast), OJ L 351, 20 December 2012, pp1-32, Article 4(1). It is also codified in the multi-lateral Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L 339, 21 December 2007, pp3-41, Article 2(1).

<sup>55</sup> Applying the well-known test set out by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL), recently endorsed by the Singapore Court of Appeal in *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265.

<sup>56</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), OJ L, 31 July 2007, pp40-49, Article 1(2)(g).

<sup>57</sup> See: Dicey, Morris & Collins on the Conflict of Laws (15th ed, 2017), Rule 256(6)(c).

<sup>58</sup> Private International Law (Miscellaneous Provisions) Act 1995, s1(2)(c).

<sup>59</sup> As occurred in *Douglas v Hello! Ltd (No 3)* [2006] QB 125 (CA), [97] (Lord Phillips MR, on behalf of the Court).

<sup>60</sup> GDPR, Article 3(2).

<sup>61</sup> GDPR, Article 3(3).

### III.

## IS BENEFICIAL OWNERSHIP DISCLOSURE NECESSARY TO ACHIEVE A LEGITIMATE AIM?

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- **The aims of public registers are clearly legitimate.** More must be done to investi-

gate and hold to account those responsible for illicit financial activity, and there are commercial benefits to greater transparency and openness. The key question is whether, in order to achieve these aims, the company ownership register must be made public. Rules of international law provide that companies disclosing information regarding beneficial owners residing overseas are not likely to face legal liabilities under the law of those overseas states and will only be required to comply with their domestic legal standards. The fact of global reach ought not to prevent companies from providing beneficial ownership disclosure either under a domestic legal obligation or, if the circumstances allow, on a voluntary basis.

- **There are convincing arguments as to why an open ownership register is not only justifiable, but uniquely effective.**

An open register allows for greater oversight and scrutiny from non-governmental stakeholders, including civil society and business, which could improve the overall quality and accuracy of the data. An open register would also help

companies and authorities eliminate some barriers and inefficiencies involved in obtaining timely access to important beneficial ownership data.

- **Concerns about the accuracy of public registers are valid.** False information may be deliberately submitted to registries, and the absence of stringent verification systems makes the publication of errors and misleading information more likely. **However, these problems are not unique to a public register.** The scale of corporate activity means that any register or repository faces the challenge of verification.
- **While there may currently be disagreement about the effectiveness of public registers of beneficial ownership to stem illicit flows, reduce risk and enhance competitive markets, the perceived advantages of introducing such registers are reasonable and rational.** Public authorities have thus far had limited success in stemming the tide of illicit financial flows, even in those jurisdictions that tout the effectiveness of their (closed) company registers. Additional scrutiny of company ownership information could therefore prove invaluable. **Releasing individuals' personal information can be**

justified if proponents can demonstrate that it is a necessary way to achieve a legitimate aim.

- Reasonable people may disagree about how effective public registers will ultimately prove to be, but what is important is that the perceived advantages of introducing them are reasonable and rational – which they certainly are. Public authorities have thus far had limited success in stemming the tide of illicit financial flows; additional scrutiny and oversight that bolsters and complements these efforts could prove invaluable.
- While it may be difficult to argue that open registers are a definitive solution to illicit financial activity, supporters have repeatedly emphasized that **beneficial ownership registers are not a panacea, but a component of a broader strategy to tackle corruption, fraud, organized crime and tax evasion.**

## What are the aims of beneficial ownership disclosure?

This section sets out arguments made by proponents of beneficial ownership disclosure for disclosing this data in open registers, as well as some of the doubts expressed by opponents. Examining the aims of BO disclosure, and to what extent central public registers achieve these aims, can help to determine whether beneficial ownership disclosure can be described as necessary from a human rights perspective, as well as what type of disclosure may be needed to achieve this aim.

The central aims of public BO disclosure can be broadly stated as the following:

- Supporting law enforcement efforts by making it easier for governments and other authorities to investigate and prevent illicit financial activity;
- Enabling better investigation and deterrence of criminal activity by creating additional layers of oversight and scrutiny from civil society and the public;
- Creating and encouraging greater transparency, fairness and confidence both between businesses and in the private sector more generally.

## Why are open, central beneficial ownership registers necessary?

The aims outlined above are clear and appear legitimate. However, merely stating the aims is not sufficient to justify public BO registers: what must be asked is whether and to what extent such registers are actually necessary to achieve these aims. Justifying open registers therefore depends on answering two important questions: first, why is a *central* register necessary, as opposed to company reporting obligations, or trusts and corporate service providers ('TCSP') regulation? Second, why must the central register be publicly accessible, rather than closed or limited-access?

## The case against public registers

Some argue that public registers are *less* effective than the alternatives. The issues they highlight are outlined below.

### Reliance on company self-reporting

Critics of public registers have expressed skepticism about relying 'on the criminal and corrupt to self-report their holdings.'<sup>62</sup> Indeed, in countries that have implemented central registers, there is evidence that hundreds of thousands of companies have failed to identify their beneficial

<sup>62</sup> Sharman, J., 2016. Solving the Beneficial Ownership Conundrum: Central Registries and Licenced Intermediaries, Jersey Finance. Available at: <https://www.jerseyfinance.je/news/solving-the-beneficial-ownership-conundrum-central-registries-and-licenced-intermediaries-academic-paper-published#.W3FkZJMzaHq>.

owners, while some companies have provided information to the UK's register that has clearly been false.<sup>63</sup> A large number of companies in the UK have not disclosed any persons of significant control, while civil society has suggested that a large number of others have been submitting data that is clearly inaccurate.<sup>64</sup>

Because beneficial ownership schemes rely on self-reporting, there is therefore a risk that beneficial ownership data will not be representative either in terms of accuracy or coverage, and thus misrepresent the landscape.

### Inaccurate or unverified information

A related concern is whether state registries – which often have limited capacity – will have the ability to verify that the information provided by companies is accurate and up-to-date. The World Bank's 2011 *Puppet Masters* report concluded that central registers are generally less reliable than requiring TCSPs to collect and verify beneficial ownership information.<sup>65</sup> For example, according to Transparency International UK, as of February 2018 the UK's Companies House had 20 people policing the compliance of four million companies.<sup>66</sup> Critics suggest that this implies that open registers are likely to contain numerous inaccuracies.<sup>67</sup>

There is also skepticism that additional access for NGOs and the media would improve verification. For example, some have raised questions about whether civil society would have, in the absence of a large scandal, the motivation 'to comb through the haystack' of a register, or the capacity and technical expertise to do so.<sup>68</sup>

According to critics, problems with relying on self-reporting are therefore exacerbated where public beneficial ownership registers have weak or non-existent verification systems, which makes it more likely that the registers will be inaccurate and unreliable, and rendering them ineffective.

### Counterproductive

Others claim that companies and owners may be less candid in their disclosure to a public register than they would to law enforcement authorities. Some opponents of public registers have claimed that "tax authorities do not support public registers" for this reason.<sup>69</sup> While individuals and companies might be willing to provide personal details to public enforcement authorities, this argument runs, they would take additional measures to obscure it from the public eye. Even supporters of open registers recognize that they 'may strengthen incentives of certain

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<sup>63</sup> Armitage, J., 2017. Exposed: The Italians making a mockery of UK law. Evening Standard. Available at: <http://www.standard.co.uk/business/occupation-fraudster-address-street-of-40-thieves-how-italians-mocked-uk-company-rules-a3589906.html> [Accessed August 9, 2018].

<sup>64</sup> Maybin, S., 2018. Potters Bar and Ukraine's stolen billions. BBC. Available at: <https://www.bbc.com/news/uk-42950097> [Accessed September 18, 2018].

<sup>65</sup> Van Der Does De Willebois, E. et al., 2011. The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It, World Bank. Available at: <http://documents.worldbank.org/curated/en/784961468152973030/The-puppet-masters-how-the-corrupt-use-legal-structures-to-hide-stolen-assets-and-what-to-do-about-it>.

<sup>66</sup> Transparency International UK, 2018. UK companies set up to launder proceeds of corruption. Available at: <http://www.transparency.org.uk/press-releases/uk-companies-set-up-to-launder-proceeds-of-corruption/> [Accessed September 18, 2018].

<sup>67</sup> Kenney, M., 2018. Open company UBO registers are not the panacea to financial crime. The FCPA Blog. Available at: <http://www.fcpablog.com/blog/2018/5/7/martin-kenney-open-company-ubo-registers-are-not-the-panacea.html> [Accessed September 18, 2018]; Sharman, J., 2016. Solving the Beneficial Ownership Conundrum: Central Registries and Licenced Intermediaries. Available at: [https://www.jerseyfinance.je/news/solving-the-beneficial-ownership-conundrum-central-registries-and-licenced-intermediaries-academic-paper-published#.W6Eq\\_HXwa3S](https://www.jerseyfinance.je/news/solving-the-beneficial-ownership-conundrum-central-registries-and-licenced-intermediaries-academic-paper-published#.W6Eq_HXwa3S) [Accessed September 18, 2018].

<sup>68</sup> Forstater, M. 2018. Beneficial Openness: Is More Transparency Always Better? Center For Global Development. Available at: <https://www.cgdev.org/blog/beneficial-openness-more-transparency-always-better> [Accessed September 18, 2018].

<sup>69</sup> Burggraf, H., 2018. House of Lords rejects public beneficial ownership registers for six overseas territories. International Investment. Available at: <http://www.internationalinvestment.net/products/house-lords-rejects-public-beneficial-ownership-registers-overseas-entities/> [Accessed August 10, 2018].

individuals to try harder to find creative ways to avoid disclosure.<sup>70</sup>

Some argue that a public register may also prove counterproductive if some jurisdictions that provide anonymity continue to exist, meaning that those wishing to hide their identity will simply choose to incorporate their companies there.<sup>71</sup> The result may then be the funneling of high-risk owners into more secretive jurisdictions and the absence of their personal details from registers entirely. According to this argument, public registers risk damaging efforts to tackle financial crime by providing greater incentives for criminals to withhold their information.

## The case for open registers

Despite these concerns, there are convincing arguments as to why an open register is not only justifiable, but uniquely effective. The key potential benefits include the following.

### The role of civil society and the public

There is a stark contrast between the estimated scale of financial crime and the (relatively small) number of high-profile investigations and prosecutions. Public authorities and financial institutions are clearly failing to catch the bulk of criminal activity or doing little to bring it to the public's attention. As Jason Sharman points out, many states have small central registries that have "a largely passive, archival function revolving around

receiving and filing documents".<sup>72</sup> Furthermore, relying on financial service providers to highlight misdemeanors is not the whole answer, given the number of documented instances where these actors have helped their clients evade the rules (one well-reported example being HSBC, which paid a \$1.9bn fine in 2012 for helping drug cartels launder money).<sup>73</sup>

A key benefit of an open register, therefore, is that it would allow for greater oversight and scrutiny from civil society and the public. While the Financial Action Task Force ('FATF') established by the G7 nations does not require public registers, it has endorsed them as a means to 'increase transparency by allowing greater scrutiny of information.'<sup>74</sup>

NGOs, journalists and researchers do not just provide additional sets of eyes – they may have specialized knowledge that allows them to analyze information or spot suspicious activities that government authorities might miss. Moreover, when data is published according to common open data standards, it can be compared across jurisdictions more easily.<sup>75</sup> Should public registers be fully taken advantage of by civil society and others to regularly conduct additional analysis and checks for errors and inconsistencies, this could improve the overall quality, accuracy and effectiveness of registers.<sup>76</sup>

And there are additional benefits beyond criminal justice. The ability of civil society and the public to combat social or environmental harms

<sup>70</sup> Stephenson, M., 2018. Public Beneficial Ownership Registries: A Response To Recent Criticisms. GAB Blog. Available at: <https://globalanticorruptionblog.com/2018/05/15/public-beneficial-ownership-registries-a-response-to-recent-criticisms> [Accessed August 10, 2018].

<sup>71</sup> Kenney, M., 2018. Open company UBO registers are not the panacea to financial crime.

<sup>72</sup> Sharman, J., 2016. Solving the Beneficial Ownership Conundrum: Central Registries and Licenced Intermediaries, Jersey Finance. Available at: <https://www.jerseyfinance.je/news/solving-the-beneficial-ownership-conundrum-central-registries-and-licenced-intermediaries-academic-paper-published#W3FkZJMzaHq>.

<sup>73</sup> Viswanatha, A. & Wolf, B., 2012. HSBC to pay \$1.9 billion U.S. fine in money-laundering case. Reuters. Available at: <https://www.reuters.com/article/us-hsbc-probe/hsbc-to-announce-1-8-billion-settlement-in-u-s-money-laundering-probe-sources-idUSBRE8BA05M20121211> [Accessed September 20, 2018].

<sup>74</sup> FATF – Egmont Group, 2018. Concealment of Beneficial Ownership, Available at: <http://www.fatf-gafi.org/publications/methodsandtrends/documents/concealment-beneficial-ownership.html>. [Accessed August 13, 2018].

<sup>75</sup> Russell-Prywata, L., 2018. To Be Effective, Public Company Ownership Registries Must Be Linked. Available at: <https://globalanticorruptionblog.com/2018/11/01/guest-post-to-be-effective-public-company-ownership-registries-must-be-linked/> [Accessed November 4, 2018].

<sup>76</sup> Leon, S., 2016. A First Look at the UK Beneficial Ownership Data. Global Witness. Available at: <https://www.globalwitness.org/en/blog/first-look-uk-beneficial-ownership-data> [Accessed August 6, 2018].



caused by corporate practices often depends on litigation or direct pressure, both of which are significantly more difficult when the beneficial owners of companies remain unknown.<sup>77</sup> Further, many of the crimes that registers seek to deter and punish – particularly terrorist financing and corruption – are major causes of instability. Disclosing beneficial ownership data therefore complements broader efforts to improve corporate responsibility and political accountability.

## Deterrence

Although criminals often lie, they may also disclose incriminating information in error.<sup>78</sup> And for those who do lie, a public register can make the lie less likely to go unnoticed. Greater scrutiny may discourage the ‘straw person’ from putting their name to cover for the true owner and risking punishment – a criminal might be happy to lie, but their straw person may not be. Similarly, individuals and companies in jurisdictions with weak government oversight, who may have previously turned a blind eye to suspicious financial activity, might be more cautious in the knowledge that resourceful journalists or NGOs now have access to the register.

In the UK, there is evidence that the requirement to publicly disclose beneficial ownership information has led to behavior change: following the requirement to disclose beneficial ownership information for Scottish Limited Partnerships (SLPs) – a prominent feature in several large grand corruption cases – the number of new incorporations fell dramatically.<sup>79</sup>

Others also point out that, while the accuracy of what is reported to a register cannot be guaranteed, the data still provides crucial leads and ‘red flags’<sup>80</sup> – such as a company appearing to suppress information about who controls it. In other words, even if an open register does not show when people are lying, it might make it easier to tell if a person or company is hiding something.

## Better access for authorities

One of the key FATF standards<sup>81</sup> for beneficial ownership disclosure is that there must be timely access to beneficial ownership data. Relying on company service providers (‘CSPs’) to produce beneficial ownership data on request may be problematic in this regard, as such institutions may be slow to cooperate. Moreover, if authorities are required to request information, it is possible that companies may be tipped off that an investigation is taking place.

Further, government authorities will need cooperation mechanisms should they wish to obtain beneficial ownership information held by other states, which adds additional bureaucracy and time to investigations. Other countries will not always be cooperative: the UK recently expressed frustration at the lack of cooperation from the Cayman Islands in combating money laundering.<sup>82</sup> The core crimes of concern – tax evasion, money laundering, terrorist financing – are global problems that cannot be solved by a handful of countries. Public registers, allowing authorities to easily access information from other jurisdictions, could therefore significantly facilitate national investigations with a cross-border

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<sup>77</sup> Sharpe, R., 2016. Eight Reasons Why Everybody Needs to be Able to See Company Ownership Information (not just the Police). Global Witness. Available at: <https://www.globalwitness.org/en/blog/eight-reasons-why-we-all-need-be-able-see-beneficial-ownership-information-rather-just-police/> [Accessed August 6, 2018].

<sup>78</sup> Messick, R., 2018. Public Disclosure of Beneficial Ownership: Do the Naysayers Have a Point? GAB Blog. Available at: <https://globalanti-corruptionblog.com/2018/05/09/public-disclosure-of-beneficial-ownership-do-the-naysayers-have-a-point> [Accessed August 10, 2018].

<sup>79</sup> <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/companies-we-keep/>.

<sup>80</sup> Szytkowski, Z., 2018. What we really mean when we talk about verification: Truth verification (part 4 of 4). Available at: <https://openownership.org/news/what-we-really-mean-when-we-talk-about-verification-truth-verification-part-4-of-4> [Accessed August 13, 2018].

<sup>81</sup> <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>, p.14.

<sup>82</sup> Caribbean News Now Staff, 2018. UK frustrated by Cayman Islands lack of cooperation on money laundering. Caribbean News Now. Available at: <https://www.caribbeannewsnow.com/2018/09/16/uk-frustrated-by-cayman-islands-lack-of-cooperation-on-money-laundering/> [Accessed September 18, 2018].

element and global efforts to tackle these crimes more generally.

An open register that acts as a central, directly accessible repository of this data would help to eliminate some of the barriers and inefficiencies, and therefore facilitate timely access to important beneficial ownership data. This could help both law enforcement and financial institutions to carry out checks quicker and at less cost.<sup>83</sup>

### Benefits to companies and the private sector

Advocates for public registers see specific benefits for companies and the financial sector too.

First, greater transparency allows for greater confidence in commercial relationships and trades: Businesses generally want to know with whom they are doing business – it is key to their ability to assess the risk of a particular transaction or commercial relationship. Yet their ability to do so has become increasingly difficult with the ‘complex ownership trails that cross geographical and legal boundaries.’<sup>84</sup> EY’s 2016 Global Fraud Survey indicated that 91% of senior executives surveyed worldwide believed it was important for them to know the beneficial owner of the entities with which they do business.<sup>85</sup>

This greater transparency and openness can foster confidence in the private sector both from investors and the general public, a benefit explicitly recognized in the EU’s 5th Anti Money-Laundering Directive.<sup>86</sup> It could similarly help

rebuild the public’s trust in the commitment of governments and companies to combat corruption and tax evasion.

Second, companies and other financial institutions are subject to various anti-money laundering and terrorism financing regulations that require them to monitor and disclose suspicious activity. These obligations of due diligence can be costly and difficult when companies have no way to verify the information provided to them. This can leave companies exposed to corruption, bribery or terrorist activities, and potential regulatory consequences of large fines or even prosecutions. Public BO information provides an additional dataset against which companies can check the information provided to them, which allows companies to more easily and reliably conduct due diligence at lower cost, as well as flag up any inaccuracies or inconsistencies they find.<sup>87</sup>

Lastly, the benefits to companies go beyond risk reduction. Openness can improve a company’s reputation with investors, employees and the public. Tullow Oil, for example, welcomes the publishing of production-sharing contracts with governments “because it will show how [the contracts] are weighted, which contrary to common perception is usually in the government’s favor”.<sup>88</sup> And, in any case, some companies see the move towards transparency as inevitable, and choose to embrace it so that they will be better placed to shape standards.<sup>89</sup>

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<sup>83</sup> Department for Business, Innovation and Skills, 2013. Company ownership: transparency and trust discussion paper. Available at: <https://www.gov.uk/government/consultations/company-ownership-transparency-and-trust-discussion-paper> [Accessed August 13, 2018].

<sup>84</sup> LexisNexis, The Hidden World of Beneficial Ownership: a Due Diligence Challenge for too Long, Available at: [https://www.lexisnexis.nl/\\_data/assets/pdf\\_file/0010/256717/LxNx\\_BeneficialOwnership\\_NL.pdf](https://www.lexisnexis.nl/_data/assets/pdf_file/0010/256717/LxNx_BeneficialOwnership_NL.pdf).

<sup>85</sup> EY, 2016. Global Fraud Survey 2016. Available at: <https://webforms.ey.com/gl/en/services/assurance/fraud-investigation--dispute-services/ey-global-fraud-survey-2016> [Accessed September 18, 2018].

<sup>86</sup> Paragraphs 31 and 32 of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843>. [Accessed 10 March 2019].

<sup>87</sup> See: Ross, A., 2016. No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts, Transparency International Canada. Available at: <http://www.transparencycanada.ca/wp-content/uploads/2017/05/TIC-BeneficialOwnershipReport-Interactive.pdf>; Department for Business, Innovation and Skills, 2013. Company ownership: transparency and trust discussion paper. Available at: <https://www.gov.uk/government/consultations/company-ownership-transparency-and-trust-discussion-paper> [Accessed August 13, 2018].

<sup>88</sup> The Economist, 2014. The Openness Revolution. Available at: <https://www.economist.com/business/2014/12/11/the-openness-revolution>.

<sup>89</sup> *Ibid.*

## Economic benefits

Some governments and commentators believe that the implementation of a public register would in fact boost countries' economies by increasing tax revenue, curbing illicit flows out of the country and increasing the economy's attractiveness to foreign investors (a potential benefit cited explicitly by countries including Nigeria).<sup>90</sup> Transparency International Canada noted that the US Treasury supported legislation for BO disclosure because '[a]nonymous companies and trusts deprive treasuries of billions of dollars in tax revenues each year, add considerable cost to law enforcement, and hinder asset recovery.'<sup>91</sup>

## Evidence that public registers work

World Bank studies have found evidence of lower levels of corruption in countries with more transparent procurement processes.<sup>92</sup> Meanwhile, Global Witness has demonstrated that civil society can use open beneficial ownership registers to uncover leads for further investigation through its 2018 *Companies We Keep* project, which analyzed the UK PSC register for inconsistencies and irregularities.<sup>93</sup>

And, while it may be difficult to argue that open registers are a definitive solution to illicit financial activity, few would even make such a claim. Supporters have repeatedly emphasized that beneficial ownership registers are not 'a panacea or a cure-all'<sup>94</sup> but that they form an incremental step in a broader strategy. The Global Legal Research Center's report to Congress found that 'most of the countries that have beneficial ownership registration laws in place view public beneficial ownership registration as an anti-money laundering tool that works in alignment with other legal mechanisms, such as access to company information, risk assessment, government monitoring, and law enforcement.'<sup>95</sup> Further, the European Court of Human Rights has emphasized that 'necessary' does not mean 'indispensable,'<sup>96</sup> and other courts have taken necessary to mean 'adequate' or 'appropriate,' rather than wholly successful.<sup>97</sup> In this respect, and in light of the arguments examined above, there is a strong case to be made for open registers.

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<sup>90</sup> Ukwu, J., 2017. Buhari's government begins move to end secret company ownership in Nigeria to fight corruption. Naija.ng. Available at: <https://www.naija.ng/1124014-federal-government-moves-uncover-beneficial-owners.html> [Accessed September 18, 2018].

<sup>91</sup> Ross, A., 2016. No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts, Transparency International Canada. Available at: <http://www.transparencycanada.ca/wp-content/uploads/2017/05/TIC-BeneficialOwnershipReport-Interactive.pdf> [Accessed August 13, 2018].

<sup>92</sup> Knack, S., Biletska, N. & Kacker, K., 2017. Deterring kickbacks and encouraging entry in public procurement markets : evidence from firm surveys in 88 developing countries, The World Bank. Available at: <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/> [Accessed September 20, 2018].

<sup>93</sup> Global Witness, 2018. The Companies We Keep.. Available at: <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/companies-we-keep/#chapter-0/section-0> [Accessed September 18, 2018].

<sup>94</sup> Stephenson, M., 2018. Public Beneficial Ownership Registries: A Response To Recent Criticisms. GAB Blog.

<sup>95</sup> Global Legal Research Center, 2017. Disclosure of Beneficial Ownership in Selected Countries, The Law Library of Congress. Available at: <https://www.loc.gov/law/help/reports/pdf/2017-015244.pdf>.

<sup>96</sup> Handyside v. the United Kingdom no. 5493/72, 7 December 1976.

<sup>97</sup> Privacy International et al, 2016. Necessary and Proportionate: Global Legal Analysis. Available at: <https://necessaryandproportionate.org/global-legal-analysis> [Accessed September 18, 2018].

## IV.

# HOW CAN WE BALANCE BENEFICIAL OWNERSHIP AND PRIVACY CONCERNS?

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- Privacy and data protection are important rights that may be balanced, in some circumstances, against legitimate public aims. Few rights are absolute and their limitation is not inherently unlawful or unethical. The difficulty lies in identifying the appropriate balance.
- To increase transparency without endangering individuals' privacy and security, risks and tensions must be openly discussed and recognized. Even if documented instances of harm have so far proven rare, any risk to individuals must be taken seriously and proactively minimized.
- Striking an appropriate balance will depend on the inclusion and effect of various safeguards, limitations and exceptions to publishing ownership data. In other words, the debate is not just about why the data is published, but also *what* is published, and *how* it is published.
- It would be impossible to provide a one-size-fits-all answer to such a complex and nuanced balancing exercise, and the appropriate approach for different countries and companies will depend on a range of contextual factors. But there are a set of key underlying factors to be considered:
  - *What is published*

Governments and companies should not collect and disclose data beyond the minimum that is necessary to achieve their aim, or data that poses a significant risk of harm. The risk associated with different types of information will depend on the context of both the individual and the country where they reside. This highlights the need for carefully designed exceptions regimes tailored to risks in that context.
  - *Whose data is published*

Although there are strong arguments that disclosure should only apply to certain high-risk individuals, entities or sectors, it is impossible to predict which of the thousands of trusts and companies in existence may be of interest for investigators. Investigating and identifying financial crime is not as straightforward as monitoring high-risk sectors and persons – combing through the entire haystack may often be necessary.
  - *How it is published*

Limiting access to beneficial ownership data to those who can

demonstrate a ‘legitimate interest’ is being mooted in some areas, but this interest is difficult to define. **A more practical approach is to allow public access but to disclose to the public only a subset of the data that is collected and available to public authorities.** In this way, a balance can be sought between providing enough information to the public to allow for meaningful additional oversight, while not disclosing those details that significantly increase the risks to privacy (but which are still justifiably available to public authorities).

– *Exemptions*

**One way to guard against the risks to individuals is to create narrowly-defined exemptions that allow those who can demonstrate a serious risk of harm to be exempted from disclosure requirements.** The definition and operation of these exemptions may prove to be the crucial element to

achieving proportionality. While it may be a difficult line to draw, it is fair and sensible to carve out a clearly defined exemption regime for those with legitimate safety concerns.

- At a minimum, those considering disclosing beneficial ownership data should ensure that:
  - No more information should be published publicly than is necessary to achieve the aims of beneficial ownership transparency. Registers should share enough data with the public to allow them to participate in oversight such as red-flagging suspicious patterns that law enforcement officials can take forward), but no more.
  - A carefully designed and narrowly defined exemption process is created to allow individuals with legitimate security or privacy concerns to request that their details are not published on the open register.

Beyond understanding whether beneficial ownership disclosure is lawful and effective, policy-makers and companies must be convinced that it is proportionate. In other words, this requires that it strikes the right balance between reducing corruption and increasing transparency in the private sector, on the one hand, and protecting individuals’ right to privacy and data protection, on the other.

## Balancing privacy rights and beneficial ownership

Few rights are absolute and limiting them is not inherently unlawful or unethical. This is true of privacy: it is an important right that may nonetheless be balanced against legitimate public aims.

For example, the majority of countries require political parties and candidates to publicly disclose their campaign finances, and require these reports to include personal details, such as the full name and address, of the donors who made contributions above a certain amount (for example \$200 in the US and Canada).<sup>98</sup> Some governments make this information publicly searchable as an online database of donors.<sup>99</sup>

<sup>98</sup> International IDEA has created a database of the various political finance laws and requirements in each country: <https://www.idea.int/data-tools/data/political-finance-database>.

<sup>99</sup> See, for example, <https://www.fec.gov/data/>.



Numerous states also require politicians to declare their own financial interests publicly. In the UK, for example, MPs must declare any financial interest, such as jobs or gifts, ‘which others might reasonably consider to influence his or her actions or words as a Member of Parliament.’<sup>100</sup>

Arguments that we are ‘all entitled to protection of private data unless we are doing something wrong’<sup>101</sup> are therefore overly simplistic.

The difficulty, however, lies in identifying the appropriate balance, and it is on this point that the opinions on public registers diverge. While many commentators acknowledge the aims and potential benefits of registers, they believe the potential negative impacts of a public register – either to companies or individuals – are too high, and the reach too broad. In other words, critics consider it to be an approach that is ‘disproportionately intrusive.’<sup>102</sup>

## What are the potential negative impacts of beneficial ownership disclosure?

This section examines risks to individuals that may have a bearing on whether the obligation to disclosure beneficial ownership data (in a public register or otherwise) may be too onerous to be considered proportionate. It does not focus on legal obstacles to publishing ownership data (examined above), or concerns specific to

companies, such as confidentiality, reputation, cost of compliance, and the complexity of navigating the differing laws across different countries.

Publicly available records (such as beneficial ownership data) can facilitate re-identification when combined with de-identified or otherwise anonymized data from other sources.<sup>103</sup> The ability to identify an individual by combining data from a range of sources is known as the “mosaic effect,”<sup>104</sup> the likelihood of which grows as the amount of data online increases. Data brokers (which collect data about individuals and then sell it to other brokers, companies or individuals) can also play a key role in this process.<sup>105</sup>

This identification data could be used to target individuals in phishing attacks or identity fraud. A group of researchers demonstrated the mosaic effect by combining information available from an online list of persons hired by the Greek government with data from other government websites, such as the voter registration website, to eventually “create a complete profile” of identifying information.<sup>106</sup>

More common is combining the data with further information from social media, which may provide a person’s name and where they work; geo-tagged photos and posts can reveal their location to kidnappers and extortionists.<sup>107</sup>

Further risks may arise if data that appears neutral on its face may actually have identifying information embedded in it. For example, the US Social

<sup>100</sup> UK Parliament Register of Members’ Financial Interests: <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/registers-of-interests/register-of-members-financial-interests/>.

<sup>101</sup> Kenney, M., 2018. Open company UBO registers are not the panacea to financial crime, The FCPA Blog.

<sup>102</sup> Cook, G., 2018. Just Because UBO Data Isn’t Available for Everyone to See, It Doesn’t Make It Secret. GAB Blog. Available at: <https://globalanticorruptionblog.com/2018/05/24/guest-post-just-because-ubo-data-isnt-available-for-everyone-to-see-it-doesnt-make-it-secret/> [Accessed August 10, 2018]; Forstater, M. 2018. Beneficial Openness: Is More Transparency Always Better? Center For Global Development.

<sup>103</sup> Center for Democracy & Technology, 2009. Data.gov and Deidentification Considerations for the Open Government Directive. Available at: <https://cdt.org/press/report-examines-privacy-implications-of-data-gov/> [Accessed September 21, 2018].

<sup>104</sup> Breeden, J., 2014. Worried about security? Beware the mosaic effect. GCN. Available at: <https://gcn.com/articles/2014/05/14/fose-mosaic-effect.aspx> [Accessed September 21, 2018].

<sup>105</sup> Grauer, Y., 2018. What Are “Data Brokers,” and Why Are They Scooping Up Information About You? Motherboard. Available at: [https://motherboard.vice.com/en\\_us/article/bjpx3w/what-are-data-brokers-and-how-to-stop-my-private-data-collection](https://motherboard.vice.com/en_us/article/bjpx3w/what-are-data-brokers-and-how-to-stop-my-private-data-collection) [Accessed September 21, 2018].

<sup>106</sup> Tzermias, Z. et al., 2017. Privacy Risks from Public Data Sources. arXiv [cs.CY]. Available at: <http://arxiv.org/abs/1711.09260>.

<sup>107</sup> Woody, C., 2018. Drug cartels have turned social-media sites like Facebook into one of their most potent weapons, (Business Insider 2016) available at: <http://uk.businessinsider.com/drug-cartels-using-social-media-sites-for-crime-extortion-2016-4>; see also Campden FB, 2016. Market Insight – Critical Risk. Available at: <http://www.campdenfb.com/article/market-insight-critical-risk-extortion-blackmail-and-kidnap-ransom>.

Security Number is nine seemingly random digits. However, the first three numbers are an area number that can potentially reveal the previous or current residence of the person. Furthermore, researchers have shown how Malaysian National

Registration Identification Card numbers could be collected from certain Malaysian government websites and then used as an input to retrieve the person's name, birth date, gender, voting district, and state.<sup>108</sup>

### Reasons why beneficial owners may wish to keep their information private

Some value anonymity because it allows them to conduct their affairs without being watched and harassed. This is particularly true of celebrities, who may be looking to hide from the gaze of the media or overzealous fans. For others – especially public figures and the wealthy – their desire for privacy is a matter of safety: they are concerned that public access to their information may make them the target of crimes such as identity theft, kidnapping and blackmail.<sup>109</sup> In fact, of the concerns expressed about beneficial ownership registers, it is the danger of identity theft, kidnapping, fraud and blackmail that has been raised most frequently.<sup>110</sup> Security is also a particular concern for family trusts,

which may include children or vulnerable beneficiaries.

There are also commercial reasons for anonymity and discretion. Some examples cited by Alan Westin include 'the protection of organisational autonomy, gathering of information and advice, preparations of positions, internal decision-making, inter-organisational negotiations, and timing of disclosure.'<sup>111</sup> Requiring companies to reveal ownership information might discourage investment and damage legitimate businesses.<sup>112</sup> Some overseas territories such as Jersey and the British Virgin Islands argue that they will lose cross-border financial service business to rival jurisdictions such as the US, Hong Kong and Singapore if they chose to implement a public register.<sup>113</sup>

### Are these harms only hypothetical?

This research has been unable to identify documented examples of harms that have arisen from the publication of beneficial ownership data in open registers.

There is some concern that publishing beneficial ownership data increases the risk of identity theft:

LexisNexis research suggests that company directors are disproportionately likely to be victims of ID fraud, making up roughly 9% of the population but 19% of impersonation victims.<sup>114</sup> However, the same research also highlights that this risk is most serious when information about them has already been published online, such as in government datasets or on social media. In the

<sup>108</sup> Tzermias, Z. et al., 2017. Privacy Risks from Public Data Sources. arXiv [cs.CY]. Available at: <http://arxiv.org/abs/1711.09260>.

<sup>109</sup> Saul, H., 2016. Emma Watson named in Panama Papers database. The Independent. Available at: <http://www.independent.co.uk/news/people/emma-watson-named-in-panama-papers-database-a7023126.html> [Accessed August 15, 2018].

<sup>110</sup> Interview (permission to name pending).

<sup>111</sup> Westin, A. 1967. Privacy and Freedom, Scribner.

<sup>112</sup> Guider, I., 2018. Privacy issues and public registers of beneficial ownership. ACCA. Available at: <https://www.accaglobal.com/us/en/member/member/accounting-business/2018/06/in-focus/privacy-issues.html> [Accessed August 9, 2018].

<sup>113</sup> Sharman, J., 2016. Solving the Beneficial Ownership Conundrum: Central Registries and Licenced Intermediaries, Jersey Finance. Available at: <https://www.jerseyfinance.je/news/solving-the-beneficial-ownership-conundrum-central-registries-and-licenced-intermediaries-academic-paper-published#W3FkZJMzaHq>.

<sup>114</sup> LexisNexis Risk Solutions, 2016. Who are the victims of identity fraud? Available at: <https://risk.lexisnexis.co.uk/insights-resources/White-Paper/who-are-the-victims-of-identity-fraud-wp-uk> [Accessed August 13, 2018].

UK, the government has been urged to prevent Companies House from publishing former names of transgender people in the PSC register due to concerns expressed by trans people that the requirement would effectively ‘out’ them.<sup>115</sup>

In the context of public procurement disclosure, research by Open Contracting Partnership ‘found remarkably little evidence of harm’ directly resulting from the public disclosure of contracts. Nevertheless, they provide examples of the kinds of threats that have arisen in related areas, including: the harassment of a New Orleans contractor hired to remove a confederate monument; the use of leaked tax returns for kidnapping in Colombia; and the defrauding of the NHS by fake contractors.<sup>116</sup>

The risks will differ depending on the country and context. There are relatively high rates of kidnapping in South and Central America, for example, and in some autocratic regimes even the knowledge that a person works on controversial issues could be problematic.<sup>117</sup> The strength of data protection – and therefore the risk of massive data theft or unauthorized access – also varies significantly between states.

No matter the context, and even if instances of harm have so far proven rare, any risk to individuals must be taken seriously and proactively minimized because the ‘consequences are disproportionately far-reaching.’<sup>118</sup>

Conducting a thorough privacy impact assessment can help to identify potential harms and aid decision-making. What is disclosed to the public at large can be a subset of the data that is collected by authorities, provided that enough information is made publicly available to allow for

meaningful oversight. In addition, a carefully designed and narrowly defined exemption process is important to allow individuals with legitimate security or privacy concerns to request that their details are not published on the open register.

Transparency can be achieved without endangering the privacy and safety of individuals, but the risks must be openly discussed, recognized and mitigated.

## Are there other ways to achieve the same goals?

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A key question under human rights law in assessing proportionality is always whether the same goal could be achieved through less intrusive means. That is, could these legitimate aims be achieved through some other means that is less invasive of privacy and data protection, or that better minimizes the potential negative effects for individuals and companies, but is just as effective? This is precisely the argument made by certain jurisdictions such as Jersey and Guernsey.

What might be considered an ‘effective’ register is open to interpretation, but a useful starting point are Financial Action Task Force (FATF) recommendations 24 and 25: these require countries to ensure ‘adequate, accurate and timely information on the beneficial ownership of corporate vehicles’ (emphasis added). As is often pointed out, the FATF does not advocate public registers as the only means to achieve this standard.

There are generally two alternative models to a public central register: strict regulation of CSPs or a closed central register (or a combination of the two).

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<sup>115</sup> Companies House and Transgender Persons, HC Deb 15 November 2017, vol 631, c827. Available at <https://hansard.parliament.uk/Commons/2017-11-20/debates/45F8123F-2D20-4B15-9EEC-322D320C866F/CompaniesHouseAndTransgenderPersons>. Duffy, N., 2017. Government urged to change law that “outs” transgender business people. Pink News. Available at: <https://www.pinknews.co.uk/2017/11/21/government-urged-to-change-law-that-outs-transgender-business-people/>.

<sup>116</sup> Open Contracting Partnership, 2018. Mythbusting Confidentiality in Public Contracting. Available at: <http://mythbusting.open-contracting.org/> [Accessed August 9, 2018].

<sup>117</sup> Whitehead, H., 2016. Beneficial ownership: A new era of openness? International Compliance Association. Available at: <https://www.int-comp.org/insight/2016/september/27/beneficial-ownership-a-new-era-of-openness-united-arab-emirates/> [Accessed September 10, 2018].

<sup>118</sup> PwC, 2015. Finding a balance between transparency and privacy, Available at: <https://www.pwc.nl/en/publicaties/finding-a-balance-between-transparency-and-privacy.html> [Accessed August 9, 2018].

An alternative often referenced is the ‘Jersey Model’, which constitutes the following:

- Jersey companies can only be incorporated with consent of the Jersey Financial Services Commission (JFSC) – this requires an application from a regulated TCSP or a Jersey resident.
- During the incorporation process, BO information is collected and verified. This is held in a central register, but not made public.
- TCSPs are also required to continually monitor BO and submit changes to the JFSC within 21 days of knowledge.
- If the register proves insufficient for investigative purposes, further information can be obtained from the TCSP.<sup>119</sup>

This model has been lauded by Geoff Cook as ‘a system that prevents the misuse of companies, identifies and verifies owners, promotes quality data and yet minimizes concerns regarding privacy and personal safety.’<sup>120</sup> The World Bank’s *Puppet Masters* report highlighted three elements of the Jersey Model that maximize the effectiveness of central registries: the active verification of beneficial owners’ identities at the time of registration; close coordination with CSPs to ensure information is up to date; and making registration subject to the registry staff being confident that they have correctly identified the beneficial owner.<sup>121</sup>

More generally, several reports have concluded that regulated CSPs are a more effective means of collecting and verifying beneficial ownership data. Compared to government registries, CSPs often have more capacity to carry out rigorous

checks and, arguably, a greater incentive to do so due to the risk of large fines or deregistration.<sup>122</sup>

There are three main counter arguments to relying on CSP regulation:

- first, there is no reason why public registers cannot sit alongside and be complementary to robust CSP regulation;
- second, CSPs may have an incentive to promote the interests of the companies they are charged with monitoring and reporting on (i.e. their clients); and
- third, there are certain advantages to public registers (as outlined above) that do not apply to CSP regulation, namely the additional oversight from civil society, better access for public authorities, and the commercial and market advantages of a more open and transparent market.

## How could the interference occasioned by beneficial ownership be minimized?

Even if, having considered the alternatives, public registers are determined to be the only effective means to achieve the aims outlined above, there remains the vital question of how they can operate in a way that is proportionate. Striking an appropriate balance will depend on the inclusion and effect of various safeguards, limitations and exceptions to publishing ownership data. In other words, the debate is not just about why the data is published, but also *what* is published, and *how* it is published.

The European Data Protection Supervisor in 2017 criticized public registers for ‘a lack of

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<sup>119</sup> Jersey Finance Limited, 2017. Public Registers of Beneficial Ownership, Available at: <https://www.jerseyfinance.je/media/PDF-Reports/Report%20on%20Beneficial%20Ownership%20-%20Jersey%20Finance%20Limited.pdf>.

<sup>120</sup> Cook, G., 2018. Just Because UBO Data Isn’t Available for Everyone to See, It Doesn’t Make It Secret. GAB Blog. Available at: <https://globalanticorruptionblog.com/2018/05/24/guest-post-just-because-ubo-data-isnt-available-for-everyone-to-see-it-doesnt-make-it-secret> [Accessed August 10, 2018].

<sup>121</sup> Sharman, J., 2016. Solving the Beneficial Ownership Conundrum: Central Registries and Licenced Intermediaries. Available at: [https://www.jerseyfinance.je/news/solving-the-beneficial-ownership-conundrum-central-registries-and-licenced-intermediaries-academic-paper-published#.W6Eq\\_HXwa3S](https://www.jerseyfinance.je/news/solving-the-beneficial-ownership-conundrum-central-registries-and-licenced-intermediaries-academic-paper-published#.W6Eq_HXwa3S) [Accessed September 18, 2018].

<sup>122</sup> Interview.

proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection.<sup>123</sup> The French Constitutional Court reached a similar view in 2016, finding that a public trust register disproportionately interfered

with rights to privacy and ‘entrepreneurial freedom.’<sup>124</sup> More recently, there have been legal challenges to the legality of beneficial ownership registers and the Common Reporting Standard (see text box below).<sup>125</sup>

### **Mishcon de Reya’s challenge to the lawfulness of the CRS and beneficial ownership registers**

On 1 August 2018, the law firm Mishcon de Reya announced that it was acting in legal proceedings to challenge the lawfulness of the Common Reporting Standard (‘CRS’) and beneficial ownership registers.<sup>126</sup> While the full details are not public, the proceedings appear to be in the form of a complaint brought on behalf of an EU citizen formerly resident in the UK, but now living in Italy, to the UK’s Information Commissioner’s Office (‘ICO’). Publicly-available information suggests that the substance of the complaint is that the CRS regime – an agreement between OECD countries for tax authorities, including HMRC, to share certain information to ensure that the right tax is being paid – violates individual rights under the GDPR.<sup>127</sup> It is not clear how the beneficial ownership register regime is connected to that challenge, although it is theoretically possible that the tax affairs of the individual complainant have only come to the notice of HMRC by virtue of his ownership being disclosed on the register.

The Mishcon de Reya press release refers to the rights of privacy and data protection, and states that the firm contends that the sharing of information under the CRS and the publication of beneficial ownership information are inconsistent with protection of those rights under the European Convention on Human Rights and the EU Charter of Fundamental Rights. According to Mishcon de Reya, information sharing and publication are not justified in service of a legitimate public interest. That suggests that Mishcon de Reya seeks to attack the statutory provisions implementing the CRS and the beneficial ownership registers. The ICO cannot strike down the provisions of primary legislation for inconsistency with the European Convention. But under the legal doctrine of supremacy, a provision of UK law which is inconsistent with EU law must be disapplied.<sup>128</sup>

The first difficulty for the argument being advanced by Mishcon de Reya is that the EU provides both for the protection of privacy and data protection and also recognizes, under the GDPR, exceptions where disclosure is lawful. Those exceptions include

<sup>123</sup> European Data Protection Supervisor, 2017. EDPS Opinion on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC. Available at: [https://edps.europa.eu/data-protection/our-work/publications/opinions/anti-money-laundering\\_en](https://edps.europa.eu/data-protection/our-work/publications/opinions/anti-money-laundering_en) [Accessed September 18, 2018].

<sup>124</sup> Appleby, 2016. Secrecy, Privacy and a French Legal Case. Appleby. Available at: <https://www.applebyglobal.com/insights/insights-2016/secrecy-privacy-and-a-french-legal-case-september-2016.aspx> [Accessed August 2, 2018].

<sup>125</sup> Mishcon de Reya, 2018. Legal challenge to Common Reporting Standard (CRS) and Beneficial Ownership (BO) registers. Available at: [https://www.mishcon.com/news/firm\\_news/legal-challenge-to-common-reporting-standard-crs-and-beneficial-ownership-bo-registers](https://www.mishcon.com/news/firm_news/legal-challenge-to-common-reporting-standard-crs-and-beneficial-ownership-bo-registers) [Accessed August 13, 2018].

<sup>126</sup> Mishcon de Reya, 2018. Legal challenge to Common Reporting Standard (CRS) and Beneficial Ownership (BO) registers. Available at: [https://www.mishcon.com/news/firm\\_news/legal-challenge-to-common-reporting-standard-crs-and-beneficial-ownership-bo-registers](https://www.mishcon.com/news/firm_news/legal-challenge-to-common-reporting-standard-crs-and-beneficial-ownership-bo-registers) [Accessed September 20, 2018].

<sup>127</sup> Data IQ, 2018. Top law firm challenges ICO to probe HMRC data sharing. Available at: <https://www.dataiq.co.uk/news/top-law-firm-challenges-ico-probe-hmrc-data-sharing> [Accessed September 20, 2018].

<sup>128</sup> R v Secretary of State for Transport, ex parte Factortame Ltd and ors (No 2)[1991] 1 AC 603 (HL).



precisely the sort of limited public disclosure under specific statutory obligation (or voluntary efforts) which the UK legislation establishes. Further, with the passage of the 5th Anti Money-Laundering Directive, EU law itself now specifically provides for public disclosure of beneficial ownership information. The safeguards in the UK regime – including the exemptions where safety concerns are established – provide a further layer of protection, indicating that the regime is likely to be held by a Court to take a proportionate and targeted approach. As a result, it appears unlikely that the complaint made to the ICO will successfully disrupt the UK regime, or the regime being implemented across the EU under the 5th Anti Money-Laundering Directive.

Despite these challenges, several commentators and states have adopted the position that the careful collection and publishing of limited types of data, combined with clearly defined exemptions for particular individuals, strikes the right balance between transparency, accountability, safety and privacy.

The UK government conducted a Privacy Impact Assessment (PIA) of its decision to adopt a centralized, public BO register. The PIA identifies the risks that could arise, such as fraud and identity theft, and the measures taken to minimize them. It is a detailed examination of how the conflicting risks and benefits can be balanced, and ultimately concludes that the UK's approach is both necessary and proportionate.<sup>129</sup>

As useful as the UK's PIA is, it would be impossible to provide a one-size-fits-all answer to such a complex and nuanced balancing exercise, and the appropriate approach for different countries and companies will depend on a range of contextual factors. What follows is instead a set of relevant factors and examples that may inform

the approach of both companies and countries planning to publish ownership data.

### Distinguishing between different types of data

As a basic principle, no more information should be collected for beneficial ownership registers than is necessary to fulfil the aims outlined above. Necessary data would include the basic information needed to adequately identify the individual, such as their name and date of birth. Public authorities will also need sufficient information to contact or locate the person, such as a service address.

But a careful distinction must be made between data that is essential and data that, while helpful or interesting, is not strictly necessary. For example, data on beneficial ownership is best-suited for use in analysis when each individual is linked to a unique identifier. However, some jurisdictions have reportedly considered publicly linking beneficial ownership data registers to existing public identification systems to accomplish this; doing so could increase interference with privacy beyond the level necessary to fulfil the aims of beneficial ownership registers. Consideration should be given to whether seemingly neutral or harmless data could reveal more sensitive information, or be pieced together with other datasets, as outlined in the examples above.

It is also crucial to recognize that the risk associated with different types of information will depend on the context of both the individual and the country where they reside.

Governments and companies should therefore consider carefully whether they require the disclosure of information that, while low risk in one country, would be more sensitive in another.

### Scope of the data collected and published

A separate issue is whether transparency and public access is more justifiable for specific subsets of corporate entities – for example, only

<sup>129</sup> Department for Business, Innovation and Skills, 2014. Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business, Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/324742/bis-14-884-transparency-and-trust-company-ownership-privacy-impact-assessments.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324742/bis-14-884-transparency-and-trust-company-ownership-privacy-impact-assessments.pdf).

requiring individuals such as Politically Exposed Persons (PEPs) and entities involved in activities such as public procurement and extractives to disclose data.

For some, the actions of a small number of criminals do not justify the publishing of all beneficial owners' data: why should thousands of innocent company owners and directors have to reveal personal information in the hope of catching a small number of criminals? Proponents of this argument suggest that beneficial ownership disclosure targeting high-risk sectors and individuals would be more fair, effective and feasible than blanket disclosure requirements.<sup>130</sup>

Although there is an intuitive logic to linking disclosure with risk, it is impossible to predict which, among the thousands of trusts and companies, may be of interest in future investigations. Illicit financial activity has proven so difficult to combat in part because much of it involves complex webs of companies; some may be criminal entities, others may be perfectly legitimate. While one company or owner may themselves be seemingly innocuous, they may in reality be an important piece of a puzzle: research by the Natural Resource Governance Institute (NRGI) on corruption cases in the extractives sector highlights how illicit funds are often funneled through complex networks or chains of shell companies with unclear beneficiaries.<sup>131</sup> Investigating and identifying financial crime is therefore not as straightforward as monitoring high-risk sectors and persons – combing through the haystack is to some degree inevitable.

It is also wrong to suggest that combating crime is the sole purpose of making all BO data public. As outlined above, there are broader benefits to be had from a more open, transparent market in which businesses know who they are dealing with, and in which both investors and the general public can have greater confidence.

How wide the net is cast will also depend to a large extent on how beneficial owners are defined – in particular the thresholds used to define 'ultimate' control or ownership of a company – which is itself a controversial matter.<sup>132</sup>

### The scope and conditions of access

A key plank of the French Court's decision regarding the public register of trust beneficiaries was that the register created a disproportionate interference with the right to privacy because it allowed unlimited access by the public. And the Court of Justice of the European Union (CJEU) has previously held<sup>133</sup> that general access to electronic communication content without any limits or exceptions was a violation of privacy and data protection.<sup>134</sup>

The solution adopted by many EU states (the 4th Anti Money-Laundering Directive) was to limit access by requiring that members of the public must demonstrate a 'legitimate interest' in the company information they request. However, this approach has flaws that could limit the effectiveness of beneficial ownership registers. First, states may define 'legitimate interest' so narrowly as to exclude many activists, journalists and researchers, removing the potential benefit of

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<sup>130</sup> Emmen, M.B., 2015. When Transparency Isn't the Answer: Beneficial Ownership in High-End Real Estate. GAB | The Global Anticorruption Blog. Available at: <https://globalanticorruptionblog.com/2015/03/23/when-transparency-isnt-the-answer-beneficial-ownership-in-high-end-real-estate> [Accessed August 9, 2018].

<sup>131</sup> Sayne, A., Gillies, A. & Watkins, A., 2017. Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts, NRGI. Available at: <https://resourcegovernance.org/sites/default/files/documents/corruption-risks-in-the-award-of-extractive-sector-licenses-and-contracts.pdf>.

<sup>132</sup> Sayne, A., Westenberg, E. & Shafaie, A., 2015. Owning Up: Options for Disclosing the Identities of Beneficial Owners of Extractive Companies, NRGI. Available at: <https://resourcegovernance.org/analysis-tools/publications/owning-options-disclosing-identities-beneficial-owners-extractive>; Dun & Bradstreet, 2016. Beneficial Ownership: Why the Devil Really is in the Detail, Available at: <https://www.dnb.co.uk/content/dam/english/business-trends/db-4981-beneficial-ownership-whitepaper.pdf>.

<sup>133</sup> Schrems vs Data Protection Commissioner, 6 Oct 2015, Available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2393>.

<sup>134</sup> Nosedá, F., Common Reporting Standard and EU beneficial ownership registers: inadequate protection of privacy and data protection. Mishcon Academy. Available at: <https://academy.mishcon.com/standard-and-eu-beneficial-ownership-registers-inadequate-protection-of-privacy-and-data-protection> [Accessed August 9, 2018].

additional scrutiny outlined above. On the other hand, it could be defined so broadly as to effectively allow unlimited access, just with added bureaucracy.

An alternative approach is to allow public access but disclose to the public only a subset of the data that is collected and available to public authorities. In this way, a balance can be sought between providing enough information to the public to allow for meaningful additional oversight, while not disclosing those details that significantly increase the risks to privacy (but which are still justifiably available to public authorities). This approach is taken by, for example, the UK and Denmark.

Here, there is a balance to be struck; protecting individuals' privacy while retaining its usefulness for tackling tax evasion and organized crime. For example, if a register only publishes a beneficial owner's name and their month and year of birth (as the UK PSC register does), then people with common names may still be difficult to track down.

### UK's exemption regime

The UK's People with Significant Control (PSC) register is public and free to search online. However, certain exemptions are allowed. These exemptions are specifically designed to mitigate some of the risks of public disclosure, as noted in the UK government's Privacy Impact Assessment.<sup>135</sup>

First, residential addresses and the day of the date of birth are not made publicly available. The precise size of the person's shareholdings is also not published.

Second, directors or PSCs can apply to Companies House (the UK's registrar of companies) to prevent their information being disclosed on the public register or shared with credit reference agencies (it

will still be available to certain public authorities). The applicant must provide evidence to show that their association with a company poses a **'serious risk of violence or intimidation'** to them or someone they live with.<sup>136</sup>

Some examples provided by Companies House include those working in the animal testing or defense industry, or a member of a particular religion whose association with a company conflicts with the principles of that religion. However, there is no definitive list or criteria – each application will depend on the individual circumstances.

It is important to note that the risk must come from the activities of the company or the person's association with it. An individual cannot make an application on the grounds that they generally face risks due to their status or personal circumstances.

When an application is made, Companies House will not disclose the information publicly until the application has been determined. If the application is denied, the person has a right to apply to court for permission to appeal.

## Exemptions

One way to guard against the risks to individuals is to create narrowly-defined exemptions that allow those who can demonstrate a serious risk of harm to be exempted from the disclosure requirements.

The EU's 5th Anti Money-Laundering Directive, for example, allows for exemptions to be granted in cases where access to the data would expose the beneficial owner to risks such as fraud or

<sup>135</sup> Department for Business, Innovation and Skills, 2014. Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business, Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/324742/bis-14-884-transparency-and-trust-company-ownership-privacy-impact-assessments.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324742/bis-14-884-transparency-and-trust-company-ownership-privacy-impact-assessments.pdf).

<sup>136</sup> Companies House Guidance, Restricting the disclosure of your information, updated 27 April 2018. Available at: <https://www.gov.uk/government/publications/restricting-the-disclosure-of-your-psc-information/restricting-the-disclosure-of-your-information>.

kidnapping. The UK exempts from company ownership data individuals who can demonstrate a ‘serious risk of violence or intimidation.’ That exemption is tightly controlled: according to a Freedom of Information request by Global Witness in 2017, of more than one million companies that provided beneficial ownership information in the six months following the UK PSC register’s initiation, only 270 individuals applied to have their information withheld on the basis that it would put them at risk, and of these only five were granted.<sup>137</sup> The definition and operation of these exceptions may prove to be the crucial element to achieving proportionality. But it is, again, a difficult line to draw. Some beneficial owners face a constant low-level threat to their safety due to their wealth or power. To define the exception too broadly could exclude a large number of beneficial owners and exempt precisely those who would be of greatest interest to investigators. On the other hand, a definition that is inflexible and defined too narrowly may fail to capture the different types of unforeseeable harms that could arise in novel situations.

There are additional practical considerations about the operation of exceptions. If the process for applying to be exempted is long and bureaucratic, should individuals be presumed to fall within the exception during the decision period (as is the approach of the UK)? If they are, then repeated applications for exemption could be used by beneficial owners to hide their data; if not, then individuals facing serious risk of harm have their details in the public domain while waiting for a decision.

Notwithstanding these difficulties, it is fair and sensible to carve out some form of a clearly-defined exemption regime for those with legitimate safety concerns.

### Denmark’s exemption regime

Danish companies must collect information on their beneficial owners and register the information with the Danish Business Authority (Erhvervsstyrelsen). This data is made public and freely searchable on the Central Business Register (CVR).

The information about BOs that must be collected by companies are the name, address and identification number (either a Danish CPR number or foreign equivalent, such as a passport). However, the personal identification number is not made public.<sup>138</sup>

In exceptional cases, the Danish Business Authority can exclude information from publication in the CVR. To have their information exempted from publication, a person must provide evidence to show that there are **special protection considerations**. This is a broad test that could be satisfied if, for example, the person provides a statement from the police that the person would be at risk if their name and address was published.

However, the Danish Business Authority explicitly states that special protection considerations do not include a person concerned about inquiries from unsatisfied customers or creditors. People cannot have their information exempt based solely on their employment in certain industries or areas of work.<sup>139</sup>

<sup>137</sup> Palstra, N., 2018. 10 lessons from the UK’s public register of the real owners of companies | Global Witness. Global Witness. Available at: <https://www.globalwitness.org/en/blog/10-lessons-uks-public-register-real-owners-companies/> [Accessed August 13, 2018].

<sup>138</sup> Guidance on ownership registration, virk website: [https://indberet.virk.dk/myndigheder/stat/ERST/Det\\_Offentlige\\_Ejerregister#tab2](https://indberet.virk.dk/myndigheder/stat/ERST/Det_Offentlige_Ejerregister#tab2).

<sup>139</sup> Erhvervsstyrelsen, Questions and answers about real owners, available at: <https://erhvervsstyrelsen.dk/hjaelp-til-registrering-af-ejere-2>.





## Going for good, going for public

By applying a legal analysis used in human rights law to beneficial ownership transparency, we find:

- Disclosure of beneficial ownership can readily be accommodated alongside data protection and other relevant obligations.
- While the body of evidence supporting the effectiveness of public registers over non-public data sources is still emerging, the aims of the public disclosure of beneficial ownership data are without doubt legitimate. It is reasonable and rational for policymakers to act on the understanding that a public register will contribute to stopping illicit financial flows and serve other public interest needs.
- While there is no existing evidence of harm caused by public registers, governments should conduct privacy impact assessments and create appropriate exemption regimes designed to protect the vulnerable.

This research report, commissioned by OpenOwnership and The B Team, was conducted by The Engine Room from July to December 2018.

The content of this report does not reflect the official opinion of OpenOwnership. Responsibility for the information and views expressed in the report lies entirely with The Engine Room.

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The Engine Room requests due acknowledgement and quotes from this publication to be referenced as:

The Engine Room, OpenOwnership and The B Team (2019). *Data Protection and Privacy in Beneficial Ownership Disclosure*.



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Partially funded by DFID