



Submission to the Special Rapporteur on the independence of judges and lawyers

***In response to call for inputs for thematic
report on undue influence of economic
actors on judicial systems***

June 2024





Financial transparency: the cornerstone of anti-corruption

Corruption and financial misconduct run on the architecture of financial secrecy. As we shall see in following section, however, nefarious litigation initiatives are being used to roll back progress in delivering meaningful financial transparency in Europe. What appears to be a coordinated campaign to push back the tide of transparency represents a serious threat to the autonomy and accountability of those in positions of judicial or political authority, including judges and lawyers. This has centred on efforts to push back advances in the areas of beneficial ownership transparency and automatic exchange of information.

A **beneficial owner** is the real person, made of flesh and blood, who ultimately owns, controls or receives profits from a company or legal vehicle, even when the company legally belongs, on paper, to another person or entity, like an accountant or a shell company. Full public access to beneficial ownership transparency (BOT) is a critical pillar of the fight against illicit financial flows and, concomitantly, of the battle against corruption, including of judges. The Panama Papers leak, along with subsequent leaks such as the Paradise Papers and Pandora Papers, demonstrated BO information must be publicly available if it is to be effective in combatting corruption.

Under **automatic exchange of information**, meanwhile, a country takes the information it has on the bank accounts of individuals and businesses who are operating within its borders but are resident in another country and shares that information with that country.

Nefarious strategic litigation

On 22 November 2022, following a legal challenge brought forward by a Luxembourg businessman with companies in several financial secrecy jurisdictions, the European Court of Justice issued a ruling stating that “the general public’s access to information on beneficial ownership constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data”.¹

The decision effectively undid years of progress in advancing financial transparency – and with it the fight against corruption – at the European level. Given the international nature of financial secrecy, its ramifications will be felt far beyond Europe. Most significantly, it invalidated a 2018 amendment to the EU’s Anti-Money Laundering Directive (AMLD), which required public access to beneficial ownership registries. Almost immediately after

¹ Court of Justice of the European Union, 22 November 2022, Anti-money-laundering directive: the provision whereby the information on the beneficial ownership of companies incorporated within the territory of the Member States is accessible in all cases to any member of the general public is invalid.

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-11/cp220188en.pdf>

the ruling was published a series of European countries - including Austria, Belgium, Cyprus, Finland, Germany, Greece, Ireland, Malta and the Netherlands - shut down their beneficial ownership registries.

The case brought before the ECJ argued that transparency might make individuals more vulnerable to serious crime and, as such, the right to privacy must supersede transparency in the case of beneficial ownership. As shall be demonstrated below, this argument is spurious at best. Indeed, some jurisdictions decided not to implement the ruling, on the grounds that the court's reasoning focused only on the fight against money laundering and terrorist financing, despite the fact that public access to beneficial ownership information is crucial to transparency, democracy, the functioning of markets and the fight against tax abuse. Even the United Kingdom opted to keep its beneficial ownership register in place, stating that it was consistent with privacy rights and data protection because "the intrusions were limited and necessary in a democratic society for the prevention and detection of crime and for the economic well-being of the country".²

The plaintiff who brought the case forward was revealed in the Pandora Papers investigation to own a luxury holding company in the British Virgin Islands with activities in Luxembourg, Cyprus and Russia and assets of over US \$3 million.³ They are also chief executive of the private jet company Luxviation, which they cofounded with former KGB agent Nicolay Bogachev.⁴

Following the ECJ ruling, media reports revealed that the plaintiff was either owner or director of some 117 companies around the world, many of them registered in secrecy jurisdictions, raising suspicions that they might in reality be acting as a proxy for other interests.⁵

Many of the companies the plaintiff directed had Russian owners, including a politician from the country's ruling party, a former Gazprom executive, and the owners of Russia's largest underwater pipeline builders.⁶

In this regard, it is worth remembering that the public availability of beneficial ownership information was key to uncovering the concealed assets of a range of sanctioned Russian

² Government of the UK, 26 October 2023, Supplementary ECHR memorandum: amendments made to parts 1-3 Economic Crime and Corporate Transparency Bill (BEIS measures).

<https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-echr-memoranda/supplementary-echr-memorandum-amendments-made-to-parts-1-3-economic-crime-and-corporate-transparency-bill-beis-measures>

³ ICIJ, Offshore Leaks database. <https://offshoreleaks.icij.org/nodes/240049313>

⁴ LeMonde, 21 February 2023. The hidden life of Patrick Hansen, the man who rolled back financial transparency in Europe. https://www.lemonde.fr/en/les-decodeurs/article/2023/02/21/the-hidden-financial-life-of-patrick-hansen-the-man-who-rolled-back-financial-transparency-in-europe_6016639_8.html

⁵ OCCRP, 10 February 2023, This Luxembourg Businessman Got Europe's Corporate Registries Shut Down. But Whose Privacy Was He Protecting? <https://occrp.org/en/beneficial-ownership-data-is-critical-in-the-fight-against-corruption/this-luxembourg-businessman-got-europes-corporate-registries-shut-down-but-whose-privacy-was-he-protecting>

⁶ Ibidem.

oligarchs,⁷ along with politically exposed persons in Latin America⁸ and the former Czech Prime Minister's conflicts of interest,⁹

Moreover, it would appear that there is an international campaign underway centred on using non-meritorious strategic litigation in order to impede financial transparency. Over a decade ago the US implemented the Foreign Account Tax Compliance Act (FATCA), which effectively obliged banks around the world to report US citizens' bank accounts to the Internal Revenue Service. This in turn led to the OECD's Common Reporting Standard which, despite several limitations, aims to deliver a similar system of information exchange on citizens' bank accounts on a global multilateral level.¹⁰ A High Court challenge was recently mounted in the UK by one Ms Jennifer Webster, who argued that the requirement her UK accounts be revealed to US authorities was unlawful. As the proceedings unfolded it was discovered that Ms Webster's claim was being funded by an anonymous third party, and when the HMRC obtained a court order demanding she disclose the identity of this benefactor she stated that she could not because she did not know and that only her legal representatives, the firm Mishcon de Reya, had access to that information.¹¹ Notably, Mishcon de Reya was also behind one of the domestic cases in Luxembourg that preceded the ECJ ruling.¹²

Had the Webster case been successful, it would mean a UK court declaring that reporting under FATCA, and by extension the CRS, was effectively unlawful. The High Court's ruling stated "the Claimant's solicitors had stated in correspondence that the claim was brought as part of an international strategic data protection litigation campaign focusing on the implementation of various transparency measures for individuals' fundamental rights".¹³

Worryingly, the Advocate General to the European Court of Justice has now published a legal opinion – following another 'right to privacy' case brought forward by private lawyers from Luxembourg – affirming that lawyers should enjoy legal professional privilege (i.e. a

⁷ OCCRP, Russian Asset Tracker. <https://www.occrp.org/en/asset-tracker/>

⁸ OCCRP, 5 July 2023, The Luxury French Real Estate of Alleged Latin American Money Launderers and Officials Accused of Corruption. <https://www.occrp.org/en/investigations/the-luxury-french-real-estate-of-alleged-latin-american-money-launderers-and-officials-accused-of-corruption>

⁹ Transparency International, 5 June 2019, European Commission confirms Czech Prime Minister Andrej Babis has conflict of interest. <https://www.transparency.org/en/press/european-commission-confirms-czech-prime-minister-andrej-babish-has-conflict>

¹⁰ Tax Justice Network, 1 November 2014, The end of bank secrecy? Bridging the gap to effective automatic information exchange: An Evaluation of OECD's Common Reporting Standard (CRS) and its alternatives. <https://taxjustice.net/reports/the-end-of-bank-secrecy-bridging-the-gap-to-effective-automatic-information-exchange-an-evaluation-of-oecd-s-common-reporting-standard-crs-and-its-alternatives/>

¹¹ Tax Policy Associates, The secret campaign to block international tax transparency initiatives, 8 March 2024. https://taxpolicy.org.uk/2024/03/08/secret_campaign/

¹² Tax Policy Associates, The secret campaign to block international tax transparency initiatives, 8 March 2024. https://taxpolicy.org.uk/2024/03/08/secret_campaign/

¹³ Royal Courts of Justice, 8 March 2024. Case No: KB-2021-003999, Ruling: Ms Jennifer Webster Vs the Commissioners for His Majesty's Revenue and Customs. https://assets.caselaw.nationalarchives.gov.uk/ewhc/kb/2024/530/ewhc_kb_2024_530.pdf

right to secrecy) when hired to create companies and other investment structures.¹⁴

The weaponisation of privacy

It must be emphasised that corporate secrecy is a key component of disguising illicit financial flows, enabling those who engage in corrupt activities to conceal the origin, movement and destination of funds. While most countries maintain a legal register of company owners, many of these owners are not human beings but other legal entities – companies, trusts or foundations – and complex ownership chains are routinely used to conceal the real beneficial owners of assets and wealth.

The lawsuits detailed above suggest opaque economic actors are misusing the right to privacy in order to advance financial secrecy.¹⁵ Although privacy is indeed a fundamental human right, it must be distinguished from forms of secrecy that pose a threat to the public interest. Privacy of personal information is necessary to prevent unjustified intrusions from governments, companies and other individuals, and the protection of personal data has become a ubiquitous and legitimate concern in modern times. Beneficial ownership transparency and automatic exchange of information do not impact on these forms of privacy, however.

The arguments used by those who seek to push back against corporate and financial transparency typically fall into three categories: (i) people's rights to privacy and data protection, (ii), other rights that could be put at risk, and relatedly (iii) increased risk of harm and crime.

The first of these – *the danger to the right to privacy and data protection* – has been grossly exaggerated. Beneficial ownership transparency only provides information about property – individual's interests in legal entities like companies and trusts - and does not include more sensitive issues that should rightly be protected by privacy laws. Personal information like health records, sexual orientation and political affiliation, which are intricately enmeshed with equality, self-determination and dignity, is not compromised. In this regard, it should also be emphasised that information regarding companies is by its very nature part of the public sphere, as doing business involves providing a good or service to others. Moreover, transparency of company ownership has long been considered fundamental to the functioning of markets, as people need to know who they are doing business with.

The second argument – *that beneficial ownership transparency poses a threat to other rights* – is also flawed. It is a well-established principle that trade-offs exist between different areas of rights, and that these trade-offs have to be negotiated with care.

¹⁴ Opinion of Advocate General Knott, Case C-432/23. 30 May 2024.

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=286580&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=7340756>

¹⁵ Andres Knobel, March 2024, Privacy-Washing & Beneficial Ownership Transparency.

<https://taxjustice.net/reports/privacy-washing-beneficial-ownership-transparency/>

Focusing exclusively on privacy prejudices other rights that are contingent on public access to relevant information, however. Closing down access to beneficial ownership registries directly affects the human right to information, which is enshrined in article 19 of the Universal Declaration of Human Rights.¹⁶

The regression in beneficial ownership transparency resulting from the ECJ ruling also poses a direct threat to the realisation of economic, social and cultural rights. Closing down BO registries or limiting access to them facilitates illicit financial flows which in turn enables abusive tax practices, thereby robbing governments of much-needed tax revenue for the progressive realisation of rights including health care, education, adequate housing and social security.

Increased opacity over beneficial ownership further endangers the right to equality before the law and the right to non-discrimination. Most companies have very simple structures, being directly owned by natural persons. For such entities beneficial ownership information has long been publicly available in commercial registries. Where public access is restricted, the only entities enjoying secrecy are those that engage in complex ownership structures.¹⁷ “Affecting” the secrecy of these powerful individuals may be a reasonable measure to benefit the less powerful by ensuring that everyone is subject to the rule of law.

The third and most emotive argument deployed in the ECJ lawsuit is *that beneficial ownership transparency would bring increased risk of harm and crime*. This argument has been the go-to theme of financial secrecy advocates for many years. It is likewise grossly exaggerated. Free access to beneficial ownership information has already been available in Denmark, Ecuador, the UK and Ukraine for more than seven years and there has not been any evidence of an increased risk of crime or kidnapping, as is so often argued. Importantly, beneficial ownership registers generally do not include information about where an individual lives and they say nothing about an individual’s wealth or net worth. Indeed, the wealth of individuals can far more readily be determined through other publicly available sources such as media ‘rich lists’ or a simple google search.


While personal identity details are frequently stolen for criminal purposes, often through hacking or other online deceptions,¹⁸ beneficial ownership transparency actually counters such illegality by allowing people to check whether their details have been illegally used to set up a company. As explained above, beneficial ownership transparency also allows the media and civil society to more effectively track and uncover illegal activity.

Another argument often made by proponents of financial secrecy is that beneficial ownership should be restricted to certain entities. Restricting access to beneficial ownership information to those with a ‘legitimate interest’ obliges those who are

¹⁶ Universal Declaration of Human Rights. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

¹⁷ Tax Justice Network, February 2022, Complex Ownership Structures: Addressing the Risks for Beneficial Ownership Transparency. <https://taxjustice.net/wp-content/uploads/2022/02/Complex-ownership-chains-Reduced-Andres-Knobel-MB-AK.pdf>

¹⁸ FBI, Money Mules. <https://www.fbi.gov/how-we-can-help-you/safety-resources/scams-and-safety/common-scams-and-crimes/money-mules>



investigating – such as journalists and activists – to reveal their own identities and, as such, can disincentivise them from requesting the necessary information. While public authorities should ultimately be the ones enforcing all relevant laws, the reality is that in many, if not the majority, of contexts such enforcement is lacking. As such, full public access to beneficial ownership information acts as a crucial buffer, enabling the media and civil society to expose both illegal activities and failures of enforcement.

Best practices in beneficial ownership transparency

A multiplicity of stakeholders need and use beneficial ownership data for multiple different purposes. These include the fight against corruption; the fight against money laundering; to tackle tax abuse; to ensure a good business environment; to protect democracy; to measure inequality; as well as to protect against nefarious hiding of assets. As such, beneficial ownership information should be fully publicly available through an online register and access to this information should be free of charge.

Importantly, the imposition of a requirement of ‘legitimate interest’, such as is the case of BO information on trusts in the UK, creates an impediment to this information serving its public interest purpose. Such criteria may give too much discretion to the authority to grant or deny access, as has been the case in the UK¹⁹ and Argentina.²⁰

¹⁹ Parliamentary Questions, 11 September 2023, Foreign Companies: Registration. <https://questions-statements.parliament.uk/written-questions/detail/2023-09-11/HL10013/>

²⁰ Clarin, 18 August 2018, La IGJ, un organismo bajo sospecha desde el caso Ciccone. https://www.clarin.com/politica/caso-hotesur-margarita-stolbizer-inspeccion-general-justicia-igj-cristina-kirchner-cepo-informativo-caso-ciccone_0_HJyl9v4FDXg.html