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RE: In Search for the Current International Standard for Registries of Ultimate Beneficial Owners Accessible to the General Public.

The issue of beneficial ownership transparency has garnered heightened attention in recent years, as stakeholders across the globe seek to combat illicit financial activities, money laundering, and the misuse of corporate structures for unlawful purposes. In addressing this, it is equally imperative to recognise the delicate balance between transparency and individual privacy rights. Striking this balance is crucial for ensuring that efforts to enhance transparency do not infringe unreasonably on the legitimate rights of individuals and entities.

This report represents a dedicated effort to explore, analyse, and evaluate the global landscape of Registries of Ultimate Beneficial Owners (“**UBOs**”) and their accessibility to the public, with a specific focus on the best practices and emerging standards that we understand will govern the access to this vital information.

Our main objective, when producing it, was to provide the government of the British Virgin Islands with a nuanced understanding of the prevailing international norms, regulations, and frameworks pertaining to UBO registries, thereby facilitating informed decision-making and policy formulation in alignment with global best practices.

1. Balancing Transparency and Privacy: The Risks of Unrestricted Access to Information on Beneficial Owners

In our increasingly interconnected world, calls for transparency and accountability have gained significant traction. An area where such demands are particularly pronounced is the realm of *beneficial ownership*—an expression used to define the individuals who ultimately own or control a company or a legal entity. Despite the unquestioned significance of promoting transparency, unrestricted public access to information on beneficial owners might entail risks for individuals, besides contravening privacy rights.

Transparency initiatives aim at combatting issues that thrive in the shadows of complex corporate structures, like money laundering, corruption, and tax evasion. Shedding light on beneficial owners is meant to hinder illicit activities and foster a more equitable and accountable business environment. Nevertheless, we must admit that unrestricted access to such information may yield unsought consequences. Additionally, access by third parties who do not play any role in fighting those crimes, appears as totally unnecessary. One can even argue that it would also be unnecessary give access to this information to tax authorities with FATCA, CRS and a vast network of information exchange treaties currently in force and effect.

Primary concerns in this respect are the potential misuse and abuse of personal data. Publicly accessible databases on beneficial ownership are at risk of becoming a target for cybercriminals and identity thieves. Sensitive information -including names, addresses and financial details- could be exploited for fraudulent purposes, implying financial losses and the reputational damage of innocent individuals. Striking the right balance between transparency and privacy is crucial in preventing such risks.

Furthermore, unrestricted public access to beneficial ownership information could jeopardize the safety and security of individuals. In contexts such as politically unstable regions, or in areas where crime rates are high, individuals may become the target of kidnapping, extortion, theft, and even more severe crimes when they are associated with a particular company or asset and that turns public. This is a risk to their own lives and the lives of their families and loved ones as well. Protecting privacy is therefore essential to safeguard the well-being of individuals in vulnerable situations.

We should bear in mind that privacy rights are enshrined in various legal frameworks worldwide, and individuals have a legitimate expectation for their personal information to be carefully managed, with no exposure to undue risks. To maintain the reliability that the success of transparency initiatives calls for, the respect of privacy is an aspect of the essence.

In sum, the conclusion is that, while transparency in beneficial ownership is a laudable goal, unrestricted public access to that information implies risks to individuals and might violate privacy rights. The necessary balance between transparency and privacy imposes restricted access to information and the need for robust security measures, as well as the consideration of contextual factors, and the respect for privacy rights.

Now let's look at what regulators are doing about this in different countries or regions.

2. The Situation in the European Union

In Europe, the landscape of beneficial ownership transparency varies from one country to another. While some jurisdictions have made significant progress in enhancing transparency and accessibility to beneficial ownership information, in most cases, unrestricted access is fortunately far from being the norm.

The European Union's 5th Anti-Money Laundering Directive ("**AMLD5**") introduced the requirement for member States to have centralized registers of beneficial ownership information. Even when public access is allowed, member States can impose restrictions or allow limited access upon legitimate reasons alleging privacy and security protection.

As a result, several countries had established registers of beneficial owners with very little or virtually no restrictions at all. Among them, Luxembourg.

On 22 November 2022, in its judgment regarding joint cases WM (C-37/20) and Sovim SA (C-601/20) versus Luxembourg Business Registers, the Court of Justice of the European Union ruled the non-validity of the requirement introduced by Directive 2018/843, amending Directive 2015/849, whereby Member States must allow access -in all cases, and to all public- to information on the beneficial ownership of legal entities included in Central Registers.

The Court deemed such indiscriminate public access neither strictly necessary to prevent money laundering and terrorist financing, nor proportionate, and therefore considered it an unjustified serious interference with fundamental rights, namely the right to respect for private life and the protection of personal data enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. Following this judgment, the access to the Register of Beneficial Owners was first blocked and then restricted to specific categories of persons.

The Government of Spain, by means of Royal Decree 609/2023 dated 11 July 2023, approved the creation and operating regulation of the Ultimate Beneficial Ownership Registry, though including from its inception some very important restrictions concerning the right to access the information registered.

These restrictions are as follows:

- Prior identification of the applicant for information is required, as well as accreditation of the condition in which access is requested and evidence of a legitimate interest. Such legitimate interest shall be presumed in the case of (i) the media, (ii) civil society organisations involved in the prevention and combating of money laundering and terrorist financing, (iii) the legal person (trust or similar entity) concerned and (iv) the beneficial owner.
- Only current information can be accessed (therefore excluding historical data on beneficial ownership).
- Only the name, surname, month and year of birth, country of residence and nationality of the beneficial owners, as well as the nature of the beneficial ownership can be accessed.
- Access to the information may be refused on grounds when it may expose the beneficial owner to a disproportionate risk, or to a risk of fraud, kidnapping,

extortion, harassment, violence or intimidation, or others of similar seriousness, or if the beneficial owner is a minor or a person with limited capacity or subject to special protection measures. For these purposes, the interested party must previously request the restriction of access to its information from the person in charge of the UBO Registry.

Another country that provides a good example of the current trends in this field against full access to UBO information by the public is Italy.

In Italy, the Register of Beneficial Owners was first created by Decree 55/2022 enacted on 11 March 2022. Another Decree, in this case dated on 29 September 2022, determined that the deadline for the filing of the information on UBOs was 11 December 2023.

Following the decision of the European Court above mentioned, the Government of Italy decided that access to the information by the general public was not going to be allowed, but that access would be rather granted to the authorities as well as to other companies with a relevant interest.

Two days ago, on 7 December 2023, a local Court temporarily suspended the Decree which established the 11 December deadline. The Court determined that forcing individuals to file this information without a more in-depth analysis of the situation may cause irreparable damages and call for a public audience on 27 March, 2024.

3. The case of the UK and the British Overseas Territories

Following the enactment of AMLD5 above mentioned, the United Kingdom ("UK"), which at the time was still a member of the European Union, became one of the first countries to ever establish a public registry system of beneficial owners, under the name of "Persons with Significant Control (PSC) Register". This was back in 2016.

One year later, the British Virgin Islands ("BVI") implemented the non-public platform "BOSS" (Beneficial Ownership Safe Search System) to share beneficial ownership information with the UK as well as with certain enforcement agencies.

BOSS, which still in 2023 is one of the best systems in terms of the balance it offers between transparency and privacy, requires all resident agents in the BVI to maintain a database of all companies and other legal entities for which they act as resident agent.

Although private, BOSS allows the BVI government agencies to search the database for information on any specific entity.

A couple of year later, with the UK already out of the European Union, the UK Parliament has established that all British Overseas Territories (the “OTs”) must have public company registers established by 2023.

The BVI challenged this decision from day one.

According to the BVI's former Premier Orlando Smith, the law "raises serious constitutional and human rights issues" and this is why "the British Virgin Islands will not establish a public registry until that becomes a standard throughout the world". On another occasion, Smith commented that "there is no global standard for accessible public records and such measures are not required by international regulators. The BVI is willing to adopt appropriate global standards because it is committed to eradicating illicit financial activity, but there must be an equal playing field for all. The BVI cannot accept attempts to impose disproportionate measures without considering its relative constitutional status."

During the Covid-19 pandemic, the subsequent Premier of the BVI, Andrew Fahie, expressed the Territorial Government's support for working with the UK Government in implementing a public register of beneficial owners for companies that would be accessible in accordance with established international standards and best practices as they become available, but with certain reservations.

The questions that remain unanswered, and that we will try to respond in this report, which are the current international standards and best practices.

4. Conclusions

We have always defended the BOSS adopted by the BVI as a solution for both protecting the privacy of the beneficial owners of entities established in the jurisdiction, while also allowing law enforcers to fight money laundering and the financing of terrorism. It was a well-balanced great compromise.

We have always pointed out that creating public registries of beneficial owners would unnecessarily tip the balance in favour of law enforcement. This, in turn, leads to enormous risks for private citizens, and especially for those living in countries with weak rules of law and high crime. It should also be noted that these are the individuals who most commonly resort to offshore centres.

There will be some very serious privacy issues that every HNW and UHNW client would encounter if a public registry of UBOs were to become a mandate in the OTs.

As mentioned before in this report, our comment on privacy does not relate to the human rights component of this issue, but rather to the on-going safety of clients who would be exposed to a myriad of threats -from kidnapping to robbery, to extortion- if their personal details were to be included in a public registry.

This is especially relevant in the case of clients in third world countries, where violence has become part of their everyday life.

In this context, our position remains unchanged: BVI has a great tool to fight financial crime and no changes are needed in registries of members or in the information relative to beneficial owners of BVI entities, with the only exception, perhaps, of companies with assets in the UK.

Our argument is that there are sufficient mechanisms already in place to ensure the balance between the fight against crime and corruption and every individual's right to privacy and safety in the jurisdiction. Authorities already have systems in place to request and receive information on individuals when they are suspected of criminal activity.

The framework continues to function satisfactorily, and we see no valid reasons to change it. In our opinion, the downside could in fact prove significant, depriving in this case the BVI from its rank as leading international finance centre.

In other words, another reason to consider not implementing this solution (a Register of UBOs publicly accessible by any third party), would be a loss of business and the migration of trust and wealth planning companies out of BVI.

The fear here would be that companies doing business in the BVI would be forced to move our operations and our clients to safer jurisdictions such as the USA, the UAE, Nevis or the Bahamas to maintain some sense of privacy for their clients.

In fact, a poll we recently conducted through our social media showed that 93% of all users will simply stop using an offshore jurisdiction if they establish a registry with public access showing company ownership.

A more specific one carried out by Zac Lucas, from Spencer West LLP, showed that 68% of the owners of BVI entities would relocate their entities to another jurisdiction, 21% will transfer the assets to a different structure (such as a PPLI policy) and 7% would close the company. If we add all these numbers, the result is even worse than in ours: 96% of the users will stop using the BVI one way or the other.

The loss of ownership privacy is simply not good for the jurisdiction, and it is a major issue that we need to face, discuss, and sort out in the most expeditious manner.

The good part in all this is that there have been two relevant developments that support our long-standing position:

- a) the enactment of the Corporate Transparency Act in the US, which does not create a registry of UBOs and to that end is quite like the BOSS; and
- b) the fact that registries of beneficial owners with public access were declared invalid by the Court of Justice of the European Union.

5. The Way Forward

There are currently four different approaches towards the issues discussed in this article. They are, from the worst to the best option, the following:

- 1) The first option, which in our view excessively and unnecessarily prioritises transparency over privacy -and thus constitutes bad practice-, is the establishment of publicly accessible registers of beneficial owners with no restrictions in terms of who could access the information contained therein.

This has been the UK's standpoint, which might have had some logic when they adopted it back in 2016. However, it lost all sense once the Court of Justice of the European Union clarified the scope of AMLD5, on which the UK had based its anti-money laundering laws enacted in 2018.

- 2) The second option consists of establishing registries of beneficial owners with public access, while also limiting access to the information by people who have a relevant interest in it, by allowing third parties to only access current information and by providing that further limitations are allowed if a UBO requests privacy by reason of being exposed to a disproportionate risk.

This is what Spain did just recently, and what is expected from registries in countries of the European Union. Whether this option is a good one or not will ultimately depend on what is deemed a legitimate interest.

- 3) The third option is to create a database of beneficial owners rather than a registry with access restricted to law enforcement. This is not only what the BVI has done with the BOSS, but more importantly what the U.S. is doing right now with its Corporate Transparency Act ("**CTA**"). In a nutshell, the CTA will create, for the first time, a robust and comprehensive database of beneficial ownership information of U.S. entities as well as foreign entities doing business in the U.S. which is expected to provide essential information to law enforcement agencies with the purpose of preventing corrupt business practices, such as money laundering and the financing of terrorism.



As from 1 January 2024, the CTA will require, that certain entities file a report identifying those who own, control and incorporated the company, must be filed at the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("**FinCEN**").

The information filed with FinCEN will not be accessible to the public and will not be subject to requests under the Freedom of Information Act.

In fact, only the following government agencies will have access to this information:

- federal agencies engaged in national security, intelligence, and civil and criminal law enforcement;
- the Department of the Treasury in connection with its official duties, including tax administration; and/or
- State and local law enforcement agencies in connection with criminal or civil investigations.

All in, option 1 is a terrible one, option 2 might be a good solution depending on the fine print, and options 3 is the right one unless a jurisdiction can avoid creating this registry or database for good (this would be option 4). At the end of the day, and as mentioned at the beginning, the best registry of beneficial owners is the one that does not exist.

Independently of what we can think is best considering the rights and risks at stake, clearly not having a registry at all, or having one with unrestricted access will not be the international standard on the matter going forward.

It is noteworthy that, in March 2023, the Financial Action Task Force released its guidance on beneficial ownership of legal entities. In the section "Access to Information", the FATF mentioned that, while countries may consider facilitating public access to basic and beneficial ownership information, they should also consider data protection rules and other privacy concerns as well as considering limiting which basic and beneficial ownership information is made publicly available or applying a tiered approach to information disclosure based on legitimate interest.

It seems clear now that having a database of UBOs with access to law enforcement and having a registry of UBOs that can be access only when a legitimate interest arise would be acceptable solutions going forward and therefore will become the international standard.

Hopefully, international agencies or groups such as the European Union, the OECD, the G-20, and the United Nations will allow jurisdictions to freely decide which option fits netter their interests.



We are of course at your disposal to discuss any of the points we raised in this report and/or to cooperate with the jurisdiction in any shape or form.

We firmly believe that the British Virgin Islands should not rush into adopting a Register of UBOs with access to the General Public when the international standards have started to move in the opposite, or at least in a different, direction.

Yours sincerely,

A handwritten signature in black ink that reads "Martin Litwak".

Martin Litwak
Founder and Chairman