Article

Commercial registers and transparency

by Maren Heidemann

INTRODUCTION

Commercial registers are a traditional source of information and a service for merchants. They have recently been subject to reform and modernisation and have been joined by additional registers and databases in the pursuit of transparency. This article highlights recent reforms of commercial registers in Europe as well as challenges and opportunities arising from transparency registers and their relationship to the traditional commercial register.

A. COMPARATIVE REGISTER LAW IN EUROPE – MAIN FEATURES AND DIFFERENCES

There are two major types of commercial registers in Europe. Unsurprisingly they can be grouped along the lines of the traditional split between "civil" (or "continental" law) and common law jurisdictions. More technically, the continental register and notary systems follow a self-confessed "Latin" (Roman law) origin while the English system does not. As typical representatives of each type, the German and the English commercial registers can be examined here to set out the major features and differences between these two.

A. 1 German commercial register

Commercial registers in Germany are hosted by the local courts of first instance (*Amtsgerichte*). The law governing the registers is mainly found in the Commercial Code (*Handelsgesetzbuch*, HGB). The traditional *Handelsregister* has been joined by the *Unternehmensregister* ("enterprise register", a database of company information in the context of financial transactions) in 2006 in response to the European Union's reform of companies registers and to improve transparency by way of Directives 2003/58/EC and 2004/109/EC. The implementing federal legislative act in Germany was the *Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister* (EHUG). Sections 8-9b HGB stipulate that both continue to be operated by the local courts. It is obvious that this generally establishes a significant level of fragmentation regarding the information on any corporate entity. Accessing information about any merchant or corporation used to require knowledge of the location of the relevant register court. Even though this would be part of the required information to be published by any merchant and displayed on stationery and official documents, there may be situations where an interested party does not have this information to hand. In a second step, the interested party would then have to contact the relevant register court and request information. This information comprises the name of the company (the firm, *firma*) details of the legal form and nature of a corporate entity, its constituting documents such as the shareholder agreement, its shareholders and their shares, its agents and representatives and in some cases its accounts and annual reports. This information is verified on the part of the merchant by notarisation and formal filing with the registrar. It is not verified as such by the register court. Companies and merchants can be held to account for the facts published in the commercial register. The published information constitutes a non-rebuttable presumption of correctness so that third parties can legally rely on it. This is called the publicity effect (*Publizitaetswirkung*) of the register. This legally binding declaratory effect is derived from the form and procedure vouching for the initial scrutiny of the content being filed.

A. 2 English commercial register

By contrast, the English commercial register is hosted centrally by Companies House, a designated agency which hosts and operates the commercial register and acts as registrar. The registrar and the information required to be kept on file are governed by the Companies Act 2006, Part 34. The best-publicised difference to the continental register system is that the information on file is "not verified by Companies House" (when the difference is much rather that it is not notarised), but instead protected by rules contained in the Companies Act. Filing incorrect information constitutes an offence under the Companies Act (pursuant to Pt 35 of the Act, especially s 1112) and can lead to a company being struck off the register, its directors to be disqualified and even fined (see E below). The actual information to be filed is very similar to that contained in continental registers. However, UK companies are required to report annually on their shareholders and officers as well as on their accounts instead of merely publishing changes as and when they occur, as English company law differs from continental incorporation laws.

A.3 Commonalities, pros and cons

Both register systems share the aim of a declaratory effect of the information filed and published. Both registers also exclusively confer constituting effects for instance in relation to limited liability, fungibility of shares or merchant status. The purpose of the selection of the information to be published is to provide traders and merchants with basic knowledge of each other's business. This serves to provide a basis for decision-making when selecting business partners. Therefore, a degree of reliability has to be achieved and maintained. It is obvious that the English system places more trust into the self-regulatory forces of the merchant community than the continental system which has a more supervisory quality with a kind of guarantee function attributed to the local courts. The information to be published in the commercial registers needs to be authenticated by a notary public even after the reform of 2007 when the filing was taken over by the Federal Gazette (*Bundesanzeiger*) in order to simplify procedures both for the benefit of merchants and the justice system. The continental system is owed to historical development out of a highly fragmented political landscape that existed until deep into the twentieth century and a sense that trading was subject to licensing and privilege rather than an unconditional right and a natural occupation possibly even for the state itself. High aspirations as to the quality of the information are often paired with restrictions to access in this system, for example in land registries. The English system by contrast, fosters accessibility encouraging free flow of information in this sector, treating it as a commodity rather than a privilege.

B. REFORMS AT EU LEVEL: IMPROVING ACCESSIBILITY

A look around the world shows the variety of ways of organising commercial registers and of attitudes to accessibility, including the provision of technical facilities such as online access. The internet platform 'wikipedia' offers a list of commercial registers around the world including an indication whether they are publicly accessible or searchable online (https://en.wikipedia.org/wiki/List_of_company_registers). The UK Government also provides a list of and links to foreign registries (https://www.gov.uk/government/publications/overseas-registries/overseas-registries). The criterion of accessibility is the main anchor for a raft of modernisation and recent reform in the area of registers and databases. Closely related to the rather neutral aspect of accessibility is that of "transparency". The latter term carries high aspirations across a range of applications and subject areas. It has been used in social and political debate and processes as well as in business related contexts defining monitoring and reporting standards and denoting access to information generally. It is certainly owed to this aspiration that the EU pushed for a modernisation and uniformisation of accessibility of commercial registers within the EU and the single market. Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 – amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers – has been operational since July 2017. The result is a significant improvement of ease of access and online accessibility of commercial registers throughout Europe. What used to be standard in the UK in terms of online access is now introduced in regard of German registries, too.

In the UK, this may not be news, whereas in Germany, for the first time now, a company can be searched directly online from anywhere in the world. But is it really the same in terms of ease of use and scope of information?

The new German Register Portal (*Gemeinsames Registerportal der Länder*, joint register portal of the German states, English language version accessible at https://www.*Handelsregister*.de/rp_web/welcome.do?language=en) has an English language user interface to initially access information. A simple name search without the actual company number to hand may be a little onerous (A name search can return a huge list of companies with the same initials or in alphabetical order. Furthermore, identical numbers are often assigned to several companies, clubs and associations only distinguished by the place of affiliation, ie the place of the local court, and the letter indicating the relevant section of the register – partnerships, companies, associations, patents – such as A, B, V or P) but will lead the user to the local court where a company or trader is registered where the search can be refined. Some ("published") information is freely downloadable. Other information requires registration of the user and the payment of a small fee – much after the model of the UK Companies House. This is, however, where the difficulty arises for non-German speaking users: they are required to fill in the respective form to request such information in German. Whatever the limitations there, this initiative by the EU to create an EU wide standard for accessing company information online is truly splendid and provides a huge service to the international merchant community as well as to consumers.

C. DIGITAL ACCESSIBILITY: BLESSING OR CURSE?

Information in digital form is certainly a blessing for users and providers of information services and operators of databases because they can catalogue, process, update, organise and distribute data timely and efficiently. It increases autonomy for users who become less dependent on the actual service provider and their opening times as well as postal and telecommunication services and it extends the geographical reach of the service provider as well as the data generally beyond its original jurisdiction into a virtually boundless space. This is certainly commensurate with the global trading space which has been growing through digital technology. At the same time, it can create an appetite for more data to be made accessible in this way. Besides the fact that data is also becoming a traded commodity as such – as commercial register content is being re-sold by third party providers – the idea of collecting

and publishing facts and information about not only relevant themes but about anything at all in the form of registers and databases gains more feasibility with the advent of digitisation and digitalisation. This has most likely supported the creation of further new registers at EU level or at the initiative of the EU. The term transparency has emerged in this context and applies to a range of different subject areas and policies. In view of the general possibilities that digital information offers it is therefore necessary to distinguish by the aims of each transparency initiative, its intended addressees and the content to be made accessible and to whom.

Closely related to this is of course the area of data protection and privacy as bastion of civil liberty or even a human right. Self-determination is probably one of the key criteria by which to measure the quality of data protection initiatives. Technical data safety has to be accompanied by a strong commitment to the protection of individual persons' and companies' right to "informational self-determination" (*informationelle Selbstbestimmung*) recognising the legal position of the data owner. Whether the EU has done enough in this respect with its latest General Data Protection Regulation (EU) 2016/679 (GDPR) is doubtful, given the strong interest in the generation of databases as described in this paper. This interest is shared by the state along with commercial enterprises and constitutes a pull factor into the opposite direction. Prioritising correctly within this conflict of interest is a central and indispensable task of the legislature and judicial organs (see further D.2 below).

D. TRANSPARENCY REGISTERS AND RELATED ONLINE DATABASES

One of the so-called transparency registers was established in the course of the European Transparency Initiative and aims to provide transparency in the area of political lobbying of the EU organs. The register is freely accessible and searchable by everyone and contains the details of organisations and individuals who aim at influencing law-making in the EU. Official lobbying meetings where stakeholders can explain their views and interests with EU policy makers can only take place with registered parties. This is to serve the public's interest to remain involved as much as possible in the selection of policies and legal instruments prior to the formal legislative process which is public. It also serves to counteract an impression of behind the scenes manipulation of the political process by powerful economic interests and therefore maintain the trust of the public in the integrity of the process of lawmaking and governing, or even reinforcing a sense of being in control. Critique of the new register has included the fact that registration was voluntary which has now been counteracted by a requirement that official lobbying meetings can only take place with registered persons or entities. Another point of criticism was the lack of control regarding the figures given by lobbyists about the budget which they allocate to their activities (on the evolution of the EU transparency register see Godowska, Magdalena, Y B Polish Eur Stud 2011 (14):181-200; Milicevic, Aleksandra, 2017; the Mandatory Transparency Register Initiative – Towards a Better Governance of Lobbying in the EU, Revija za evropsko pravo 19 (1):71-113.). Whether this register really eliminated any "behind the scenes" activity must remain doubtful, therefore. It is certainly a welcome innovation and a step into the right direction.

D.1 Transparency in relation to private corporate entities

Using the same term, transparency, a new type of register has arrived on the scene in recent years in relation to the registration of information relating to private corporate entities. Germany has introduced the so called "transparency register" in respect of those entities which are not already obliged to register with the commercial register, *Handelsregister*. This new database is called the *Transparenzregister*. It has been made operational and searchable as of July 2017 and can be consulted by visiting the website https://www.*Transparenzregister*.de. This register is not searchable by everyone but only by certain specified persons and entities for specified reasons upon formal registration of their own details with the registry (according to s 23 of the German federal money laundering act (*Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten (Geldwäschegesetz* - GwG) and the regulation *Transparenzregistereinsichtnahmeverordnung* of 19 Dezember 2017, *Official Bulletin* (BGBl) I p 3984). It can be said that it effectively functions as a residual or fall-back register in relation to the obligation to provide the relevant data. It may be understood to make up for the "deficiency" of the commercial register of not being mandatory and comprehensive in relation to all corporate entities. The register was prompted by the obligation of the Federal Republic of Germany to implement the so-called Fourth Money Laundering Directive (Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) as well as the Directive regarding financial transactions (Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds). A similar register was introduced in the UK, of course relying on the identical EU Directives. In the UK, the respective data collection is called the "Persons with Significant Control" register (PSC register). This "register" has to be kept and publicised by each company according to Part 21A (section 790M) of and Schedules 1A and 1B to the Companies Act 2006 as well as the Small Business Enterprise and Employment Act 2015, Part 7 and Schedule 3 (See also https://www.gov.uk/government/news/people-with-significant-control-companies-house-register-goes-live.). Number 64 of the Explanatory Notes to the 2015 Act reads:

> *At the G8 summit in Lough Erne in June 2013 the UK, alongside the rest of the G8 [n: now G7], committed to a number of measures to enhance corporate transparency in order to tackle the misuse of companies. The Government published a discussion paper on these proposals in July 2013, and published the Government response to the views received on the discussion paper in April 2014. The measures included in Part 7 of the Act (linked to measures in Parts 8 and 9) are intended to deliver*

these commitments. These include the commitment to introduce a register of individuals who exercise significant control over a company; the removal and prohibition of the use of bearer shares; the prohibition of corporate directors, except in certain circumstances and measures to deter opaque arrangements involving directors and make individual controlling directors more accountable.

The PSC register consists of additional information to be filed with the regular Companies House returns. Other than the German counterpart, it is not a separate register, and the information is accessible (for a fee) to all who search the Companies House records.

D.2. Transparency in relation to taxation – country-by-country reporting

Another recent arrival on the scene of registers and databases professing to enhance transparency is the so-called country-by-country reporting devised by the Organisation for Economic Cooperation and Development (OECD) through their so-called Base Erosion and Profit Shifting (BEPS) Action Plan, Action 13 (Published as OECD 2015, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13* - 2015 Final Report OECD/G20 Base Erosion and Profit Shifting Project (Paris, OECD)). The OECD introduce their report with reference to transparency efforts:

The Base Erosion and Profit Shifting (BEPS) Action Plan adopted by the OECD and G20 countries in 2013 recognised that enhancing transparency for tax administrations by providing them with adequate information to assess high-level transfer pricing and other BEPS-related risks is a crucial aspect for tackling the BEPS problem (see http://www.oecd.org/tax/beps/country-by-country-reporting.htm).

This database will collate information regarding the amount of tax paid by multinational enterprises, so-called MNE groups, in each of their countries of operation by way of a report to be filed by MNE groups to the national tax authorities who are then entitled to exchange this information according to the recently entered into force Multilateral Convention on Administrative Assistance in Tax Matters as well as Tax Information Exchange Agreements (TIEAs) and so-called Model Competent Authority Agreements (MCCAs). Based on this legal framework, the OECD reports:

As of September 2018, there are over 1800 bilateral exchange relationships activated with respect to jurisdictions committed to exchanging CbC reports, and the first automatic exchanges of CbC reports took place in June 2018. These include exchanges between the 72 signatories to the CbC Multilateral Competent Authority Agreement, between EU Member States under EU Council Directive 2016/881/EU and between signatories to bilateral competent authority agreements for exchanges under Double Tax Conventions or Tax Information Exchange Agreements, including over 35 bilateral agreements with the United States. Jurisdictions continue to negotiate arrangements for the exchange of CbC reports and the OECD will publish regular updates, to provide clarity for MNE Groups and tax administrations

These requirements far exceed previous entitlements of the tax authorities. As for Germany, the courts had strictly rejected this type of "fishing expedition" in earlier case law. In the case decided in 2016 by the tax court in Cologne (*Finanzgericht Köln*), 2 V 1375/15, the tax authorities of the E6 group exchanged information to create a "case profile" about the W group, their corporate structure and business model in order to derive information about similar cases and how to adapt laws and practices accordingly. BEPS was said to be the basis for this. The court barred the German fiscal authority from sharing this profile because there was no concrete reason for this and hence no legal basis, it was a fishing expedition. In a case decided by the FG Baden-Württemberg (Tax Court Baden-Wuerttemberg) on 25 June 2015 (3 K 2419/14) a German tax authority sought to gather information from a German company about its Italian business partners on behalf of the Italian tax authority (*Guardia di Finanza*). The court barred this enquiry due to the lack of relevance of the requested information for the taxation of the German company as well as due to the availability of the requested information in the public domain. The enquiry by the tax office was based on the EU Directives 2011/16/EU and 2014/107/EU (Revised Directive on Administrative Cooperation, DAC). On successful revision, the Federal Tax Court, *Bundesfinanzhof*, reversed the decision (judgment of 12 September 2017, I R 97/15) and reverted to the state tax court for reconsideration, albeit purely on procedural grounds rather than deciding on the merits of the case. (The case has not be re-decided yet.) The new laws emanating from international platforms like the OECD may be understood to provide enabling norms for the very action barred by the courts earlier. As I have explained elsewhere (Heidemann, Maren, 2017, "Is Internationalisation Going Too Far? – Constitutional Challenges of International Data Exchange Programmes", EBLR 28 (5):847-78), there is little or no constitutional evaluation of the legitimacy of this recent campaign to order comprehensive reporting duties on the part of enterprises which enable general fishing expeditions by tax authorities. The aim of these enquiries is to gather information to be able to discern 'patterns' which might indicate unlawful behaviour (eg incorrect transfer pricing) as a prompt for official investigations. This has been criticised as inviting error and unfounded suspicion (Borges, Alexandre Siciliano, and Caio Augusto Takano, 2017, "The Improper Use of Country-by-Country Reports: Some Concerns on the Brazilian Approach to BEPS Action 13", Intertax 45 (12):841-51; Grotherr, Siegfried, 2017, Automatischer Informationsaustausch im Steuerrecht ueber laenderbezogene Berichte von Konzernunternehmen–Rechtsgrundlagen, Inhalt, Datenschutz und Probleme beim CbC-Reporting, RIW 63 (1-2):1-17).

E. EVALUATION

The legal initiatives and registers described above provide a whole cluster of sources of information. Does the accumulation of these sources equal an increase in transparency, though? And

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what ends would this transparency serve? Are the intended aims achieved by the traditional and more recent registers and reporting duties mentioned above?

There are two distinctions to be made in an evaluation of the new facilities: whose transparency do they serve; and what are the legal consequences of non-compliance?

First, the mission of traditional commercial registers is to enable traders to make prima facie judgments about their potential business partners and monitor existing business partners. They collate and publish selected key information which indicates basic facts about the commercial standing of the business partner, such as companies and partnerships as well as their individual officers. It indicates the size of the business, its success or failure, its compliance standard, whether it is in administration or a director is suspended. While this information is not exhaustive and cannot replace further research and an individual risk assessment for any business partners or investors, it is primarily directed towards the merchant community and the markets. It wants to ensure a minimum standard of transparency and integrity in the marketplace. To achieve this, the information has to be accurate and up to date. Annual reporting and enforcement rules serve this aim.

In line with this, the mission behind the digitisation of commercial registers, or company registers as they may be referred to, is aimed at improving access to this relevant information to merchants across a larger geographical area by creating registers which reach in fact across borders, so in a way these registers are now transnational without adding to the administrative burden for companies.

By contrast, the mission behind creating transparency registers seems somewhat different. Beneficiaries of the EU transparency register of lobbyists can be said to be the general public or the integrity of a political process in general. The mission can be described as signalling to the EU public that efforts are made to disclose the economic interests being "peddled" at EU decision-making bodies and to enforce certain guidelines and red tape in order to prevent undue influence on any holders of public office. Due to the weaknesses that remain in this system as sketched above this mission may not be accomplished just yet.

A mission of similar nature can be discerned in the further registers and databases created under the heading of transparency register registering 'beneficial ownership' and 'CbC' reporting. The public interest that seems to be served here consists of a rather suggestive understanding of crime prevention. It also serves the day to day business of the national tax authorities in helping to compile a global mosaic of information provided by multi-national enterprises which combined may reveal patterns which may indicate illegal behaviour. It is submitted here that the latter type of database lacks relevancy and exceeds any justifiable public interest. The former 'register' of beneficial ownership conflates legal and factual relationships of individuals with their businesses and corporate entities and may therefore lead users without legal training to conclusions which are unjustified and legally wrong. The interest in some of this information seems to lack relevancy to the merchant community and remains of a purely anecdotal quality to the general public if disclosed.

Second, as described above, accuracy of the information published in commercial registers is monitored and enforced differently in different jurisdictions. Information may be actively verified by a notary or the official registry or accuracy may be protected by corresponding offences contained in the law. In the UK, Part 36 of the 2006 Act contains a list of offences, breach of which can lead to convictions including imprisonment and the payment of fines. The "first ever" case of such a conviction of a persistent offender was reported in March this year: businessman Kevin Brewer was fined £12,000 upon repeated fraudulent incorporation of companies and registering prominent figures of pubic life as directors and shareholders without their knowledge, thereby breaching section 1112 of the Companies Act 2006 (see https://www.gov.uk/government/news/uks-first-ever-successful-prosecution-for-false-company-information). The declaratory function of the information is also primarily utilised as evidence within private enforcement mechanisms, for instance by precluding a defence in civil proceedings against an innocent creditor who acts in reliance on the information published.

Similarly, the EU lobbyists' transparency register has a conditional gateway function if and when lobbying is undertaken.

By contrast, in the case of the transparency registers and CbC reporting providing the information is mandatory and not directed at business partners or serving civil enforcement of private claims as described above. It is part of internal public administration and an end in itself.

F. CONCLUSIONS

The traditional commercial registers have been joined over the past decade by a number of additional registers and databases to be populated by information about companies, merchants and private individuals. Adding to the traditional function of providing information and a level playing field in the market place, new functions are being performed by these. In addition to increasing the range of users of commercial registers by making them electronically accessible across the EU, electronic accessibility is used to provide transparency for a number of objectives. Transparency is not always that of the general public, investors or potential trading partners, though. Some of the new registers are register in name only; they are either databases collated by the authorities to whom the respective information is disclosed, or just additional content in regular reports or constituting documents. The EU lobbyists' transparency register for instance could be called a freely searchable public database with information more of an informational nature rather than a legal basis for further action or decision making. The CbC reporting at the

other end of the spectrum by contrast could be said to form a register in the hands of the fiscal authorities who collate the information covertly by way of international data exchanges. It is not as such freely accessible by the public, in fact it remains hidden from the public, and therefore contributes little to transparency in this respect, but rather to the authorities' transparency only. Finally, the so-called transparency register listing "beneficial owners" of companies and other corporate entities in Germany is also not freely accessible and so cannot contribute to transparency as may be desired by the general public, but provides a rather elusive basis for consideration to those authorities who are entitled to refer to it. As regards the information collated, this is to a great extent already in the public domain. As far as it imposes duties and obligations on persons who were not previously required to be listed in this way, it may lack a constitutional basis for this duty. Scrutiny has not yet been exercised in regard of these registers. It is assumed that "transparency" is desirable and prevents crime, presupposing that there is crime on a level that justifies and necessitates the imposition of mandatory disclosure of this nature.

By way of example, one detail may illustrate the legal problem that the new "register" poses: in Germany charitable foundations are private non-commercial corporate entities. They do not have members and they have no beneficiaries in a strict legal sense. The volunteer directors of German charitable foundations are now required to be listed in the new German transparency register as "beneficial owners" (*wirtschaftlich Berechtigte*). This is not helpful at all for German charitable foundations who already suffer from the very weak infrastructure that German law provides for them. Not only are foundations creatures of state law rather than federal law, there is also no register for them as there is for commercial entities (which would be comparable to the UK register of charitable bodies). This makes it very hard for foundations to deal outside their state of incorporation (their seat) and specifically abroad where they lack a presentable means of identification such as a registration number. Foundations are listed by their regulatory bodies, but even if this is in electronic form, these lists are not proper registers but mere databases. The advent of the transparency register may be seen to help this situation. The classification of boards of directors of charitable foundations as beneficial owners, though, can be misleading – it can induce the erroneous belief that directors are members of the corporate entity or have any financial entitlements or interests in it. This is not the case under the German law of incorporation of private charitable foundations. The notion of "persons with significant control" is not used in the German terminology. It can therefore be said that the German transparency register creates false impressions rather than transparency. In the UK, the requirement for example to list shadow directors as "beneficial owners" or persons of significant control poses a similar problem in that relationships between individuals and businesses or corporate entities are created which have no precise legal description. Percentages in shareholdings are often used to describe the notion of significant control. It is, however, a well-known problem that in the context of large scale professional asset management, persons (clients) are not always aware of their ownership at any given moment and so rather large grey areas are left by the legislation. It creates the illusion of simplicity where there is none. This is even more so in the description of a shadow director whose role may manifest gradually over a long period of time and the threshold for triggering the registration duty may be unclear especially for legally untrained persons who after all constitute the majority of the business community.

As for the value of the information logged, a word of caution may also be in order. Much of the information in the PSC or transparency registers will be in the public domain, so that bundling the information in a different format may lead to confusion rather than clarification as adding more layers of the same thing is not normally a recipe for simplification. This approach may create the impression of added disclosure and hence greater transparency. In order to understand and use the information properly the user needs some basic knowledge of the law or business practice. To users without such a minimum level of experience the registers may once again be misleading, especially because they were promoted as having been prompted by crime committed, for instance by the owners of so-called letter box companies. It has to be asked whether there is added value in relation to ordinary electronic freely searchable commercial registers or rather an increased compliance burden and significant defaulting risk for the obligated parties with the registers stating the obvious or lacking relevancy. On the one hand investors and potential business partners would certainly benefit from information for instance about shadow directors. Information about ultimate beneficial owners would save the user researching potentially across a multitude of registers globally some of which may not be freely and remotely searchable. This should be considered to be a service, though, rather than an act of crime prevention. Ownership and entitlement as such are no crime. The onus of detection investigation and legal evaluation of criminal activity remains with the public authorities. A certain preventive effect may be assumed. It is questionable though, whether the above described corresponding risk (reputational, compliance risks) has been scrutinised sufficiently prior to enacting the new mandatory and rather harsh legislation in terms of relevancy, effectiveness, proportionality, due process and other constitutional values. In case of the CbC reporting, the desired effect is only achieved by way of the international data exchange agreements as proposed and headed by the OECD.

The quality of the collated data described above resembles that of the transparency registers and PSC register in terms of availability in the public domain and indicator function for criminal or non-compliant behaviour. While the users of CbC reports may always be professionals in fiscal authorities around the world, this does not resolve the risk (involuntarily) undertaken by the owners of the data as to misuse and misunderstanding owed to the nature of electronic data as well as the discrepancy between where the likely damage is to arise and where the benefit is expected to materialise. The compliance risk on the part of the users, ie the tax authorities,

is particularly high due to an inherent conflict of interest caused by a discrepancy between infringement and damage: monitoring and enforcing compliance is in the interest of the data owners but not controlled by them whereas the same is not necessarily in the interest of those who actually control and enforce.

In conclusion it can therefore be said that the combination of instantaneous worldwide electronic accessibility and the widening of data to be provided to registers in connection with commercial acting poses as yet unresolved legal risks to the data owners and even to the integrity of the market place, for instance by lowering thresholds and pushing more participants into niches and even illegality. The boundaries between mere additional content, databases and registers are blurred by the use of ambitious terminology in this field and by responding to expectations which have been extensively promoted to the public by way of news reporting ("Panama papers") and in some cases activism in the form of Parliamentary scrutiny committees (most prominently, Dame Margaret Hodge led the public enquiry as chair of the Commons Public Accounts Committee into the tax affairs on multinational enterprises, MNEs, which led to reputational losses and in some cases voluntary and random tax payments, see for instance "Starbucks, Google and Amazon Grilled over Tax Avoidance," BBC News website, 12 November 2012, Business) but which may much rather be prompted by long standing desires for more competences of the fiscal authorities to collate information which they were previously prevented from by the courts as well as by a vague expectation of an increase in tax revenue. There is a regrettable lack of judicial review in this area of legislative activity, in particular that originating from the OECD which lacks democratic oversight and a rule of law-based infrastructure comparable to that of the EU. So, despite a welcome innovative progress in this area of law, caution should be exercised in extending reporting duties and registration facilities without corresponding safeguards for the benefit of both users and data owners. Innovation should benefit the data owners as much as the users of the data and must take issues of privacy and due process into account.

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