Opinion: Private lives, public registers and the ECJ

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Partners Wayne Atkinson and Ellie Crespi share their views on the Court of Justice of the European Union's (ECJ) judgment on public registers of beneficial ownership and the difference between secrecy and privacy.

On 22 November 2022, the Court of Justice of the European Union released confirmation of its judgment in two conjoined cases related to the anti-money laundering directive ("AML Directive") and public registers of beneficial ownership. As the AML Directive required, a Luxembourg law adopted in 2019 established a Register of Beneficial Ownership with information thereon available to the *general public*. Whilst noting these requirements were aimed at the prevention of money-laundering and terrorist financing and that was a valid aim, the ECJ nevertheless held that in light of the Charter of Fundamental Rights of the European Union ('the Charter') the provision of the AML Directive requiring that the information on the beneficial ownership of entities is accessible to any member of the general public is invalid.

The Court took the view that granting the general public 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. This is a welcome verdict. It also mirrors what those of us working offshore have been saying for years.

Clearly it is of vital importance that offshore financial centres are not used to facilitate money laundering, financing terrorism or other criminal conduct. To this end, all of the major offshore finance centres have signed up to the CRS, FATCA and UK FATCA and a host of TIEAs. Non-public beneficial ownership registers have been established. Notwithstanding this, pressure has continued to mount to make beneficial ownership information public with proponents maintaining that those who use offshore finance centres should have nothing to hide or fear from a public register.

Consider this however. A report in February this year detailed more than 80 of Europe and the UK's top footballers and managers having been the victims of targeted robberies. One court case described "organised crimes carried out by organised criminals". The article goes on to describe "a Premier League player, who wishes to remain anonymous……watching his team-mates play live on TV while his wife was in the bath. The couple were surprised by a gang of masked intruders carrying machetes before being tied up, dragged round the house and robbed…… Two months earlier, the wife and two young children of another former Spurs player, Jan Vertonghen, were held at knifepoint by masked burglars while he was playing abroad in the Champions League. In Amsterdam last year, the wife and four young children of PSV Eindhoven striker Eran Zahavi were tied and gagged during a raid on their home."

Having read that, perhaps we might reconsider what reason anyone would have to want to hide their personal details or their ownership of a particular home. If this seems like a particularly specific example let's perhaps consider circumstances outside our own European experience. A study published by Teresa Romero in August 2022, detailed the scale of kidnapping cases in 2020 in Latin America and the Caribbean. Brazil led the list with a total of 4,390 kidnapping cases. Mexico followed with 1,022 occurrences. Again, what reason could someone have not to want details of their personal wealth to be publicly available?

We've been saying for some time now that there's a fundamental difference between the right to privacy, and secrecy. We are not interested in being the guardians of dirty secrets: all credible offshore finance centres have robust anti money laundering regimes and client due diligence frameworks imposing obligations on service providers to obtain and retain beneficial ownership details. This information simply does not need to be publicly available. Many international finance centres including those jurisdictions Collas Crill works in acknowledge the Convention rights and have established GDPR equivalent privacy legislation and so the ECJ analysis would, we anticipate, logically apply.

Similarly the UK remains a signatory to the Convention and has its own privacy legislation – as such this analysis may also apply to the new UK Register of Overseas Entities. For now the beneficial ownership registers of the European Union are not accessible to the public. The information on the UK Register of Overseas Entities remains accessible and a deadline of 31 January 2023 still applies to the obligation to register. There will doubtless be further developments in this space and we await them eagerly.

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