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Julien Mousnier – Director (JUST.C)
Florian Geyer – Rule of Law (JUST.C.1)
Ingrid Bellander Todino – Fundamental Rights (JUST.C.2)
Olivier Micol – Data Protection (JUST C.3)

AMLD | BO-Registers – Compromise Text and the *Sovim* judgment
Second Letter to the EU

I write further to my letter dated 9 March 2024 to provide some additional points of a more practical nature relating to the Compromise Text published on 14 January.

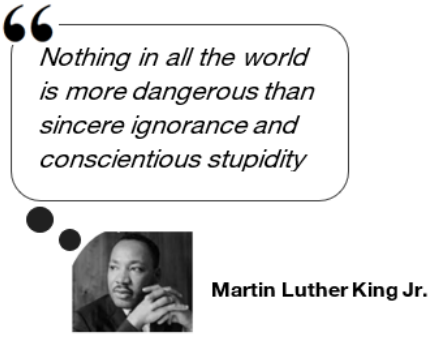
But first a word on the ongoing reverberations of the *Sovim* judgment that was handed down one a half years ago, and which a small number of Member States have refused to implement.

1. **Public registers**

Responding to our GDPR complaint, the Chair of the French data protection authority (CNIL) ordered the French government to take the RBE register offline – see **Annex 1**.

Previously, on 18 Oct 2023, the European Commission refused to consider a parallel complaint against recalcitrant EU Member States on the spurious basis that the complaint was "not filed using the standard form" (see **Annex 2**), which in reality reflected a deliberate decision not to enforce the CJEU judgment against Member States, thus setting a dangerous precedent.

The different approach taken by the CNIL and the Commission in relation to registers of beneficial ownership evokes the words of Martin Luther King Jr. and the Commission should stop playing politics with fundamental rights.



2. **"Legitimate interest" - practical issues**

I have a Twitter account, I hold an academic position, I routinely write on beneficial ownership in academic newspapers and the wider media, and I once contributed to an EU AML/CFT publication on this subject. Does that entitle me to have unfettered access to the beneficial ownership data of 31.5 million EU enterprises for 3 years and more?

Applying the very broad and somewhat woolly definitions included in the Compromise Text[1], that would not be a far-fetched conclusion.

And what if one EU Member State agrees that I have a legitimate interest *"taking into account [my] function or occupation"*[2] and other EU Member States don't? In that case, I would still be "passported" into all 27 central registers[3], with a right to repeat access[4].

Regardless of my own position, many of the people mentioned in the Compromise Text work in an unregulated environment and are not subject to an adequate and effective supervision, let alone a "supervisory college" (another pillar of the recent EU agreement, which applies to "obliged entities", but not other entities). There are simply no guarantees that accessed data may not be used for other purposes or even accessed for purposes that have nothing to do with the fight against money laundering, in the same way as a police officer with access to a sensitive database may abuse his access rights. But a police officer is regulated and subject to rigorous vetting and ongoing supervision by the police force itself and often subject to an independent oversight body (see e.g. here). And police officers who abuse their position may be in serious trouble. Whereas unregulated people can get away with it.

Reading the Compromise Text, one has the feeling that EU institutions treat the data connected to millions of EU businesses as a footnote, almost a nuisance, while protecting their own data very vigorously against intrusions, including from investigative journalists (as discussed on page 3 of my previous letter in relation to the European Parliament's refusal to hand over data to a group of investigative journalists.

3. **Money laundering through EU businesses – a widespread phenomenon?**

Leaving aside the issue of access, there is another important question, notably whether it is really necessary to provide this type of intrusion in relation to businesses based in the EU.

In a report dated 15 May 2018 relating to FATCA, the European Parliament concluded that -

> *"U.S. expatriates generally do not use the EU financial system to engage in offshore tax evasion. Lacking such evidence FATCA restrictions appear to go beyond what is strictly necessary to achieve the goal of fighting against offshore tax evasion."*

[1] See Art.12(2)(a) of the Compromise Text ("*person acting for the purpose of journalism, reporting or any other form of expression in the media that are connected with, the prevention of and combating of money laundering, its predicate offences and terrorist finance");* and Art. 12(2)(b) ("*member of academia*")

[2] See Art. 12a (2) of the Compromise Text.

[3] See Art. 12a (3) of the Compromise Text.

[4] See Art. 12a (3): *"Member states shall ensure that registers have mechanisms in place to allow repeated access to persons with a legitimate interest without the need to assess their function or occupation whenever accessing the information."*

The same applies to the case in hand. There is no evidence that beneficial owners generally use EU businesses to engage in money laundering. Ergo:

➡ Lacking such evidence the restrictions proposed by the Compromise Text appear to go beyond what is strictly necessary to achieve the goal of fighting money laundering.

As to the need to provide evidence, the proposed "access by default" system would affect 31.5 million EU enterprises, including mundane businesses. From your local newsagent to your butcher, from a sensitive family-owned defence business in Germany to a funky fintech start-up in Latvia or an abortion clinic in Ireland, everyone and everything would be susceptible to automatic access.

Properly analysed, the Compromise Text reads like a knee-jerk reaction to recent work carried out by investigative journalists showcasing abuses, the most egregious of which however did not relate to EU enterprises. As regards EU businesses, recent investigative work was not focused on money laundering, but on harmful tax competition. This is a different issue altogether.

4. **Presumption of guilt, or a culture of suspicion**

Supporters of the Compromise Text will say that my references to ordinary businesses (such as local newsagents) are not in point and deflect from the real issue. *"If you've got nothing to hide, you have nothing to fear"* goes the saying in support of transparency (not without critics), whereas the EU is built on democratic principles of people living peacefully together.

Under the Compromise Text, a business / business owner may only object to access of his data *"in exceptional circumstances"*[5]. By introducing an "access by default system", the Compromise Text builds on the presumption of *"guilty unless proven innocent"* and reflects a culture of suspicion towards EU businesses and their beneficial owners.

It is difficult to see how this dystopian vision of EU businesses is compatible with the democratic values on which the EU is built:

(a) the European Convention on Human Rights makes reference to limitations that are necessary "in a democratic society"; and

(b) the EU Charter makes reference to limitations that *"are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"*.

Privacy is a cornerstone of a democratic society and an objective of general interest recognised by EU law (it's a fundamental right), whereas transparency is not. Critics should read the *Sovim* judgment, at paragraphs [60]-[62]

> *"The principle of transparency cannot be considered, as such, an objective of general interest capable of justifying the interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter".*

[5] "*In exceptional circumstances, where the access to the register would expose the beneficial owner to disproportionate risk… Member States shall provide an exemption*" – Art. 13.

5. **What about Access to Justice?**

An "access by default" regime removes a business/business owner's right to a judicial remedy against abusive intrusions, which is enshrined in Art. 47 of the EU Charter:

> *Everyone whose fundamental rights and freedoms are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

The issue, fundamentally, is about Access to Justice and the Rule of Law (for a discussion, see the handbook on EU law relating to access to justice issued jointly by the EU Agency for Fundamental Rights, the European Court of Human Rights and the Council of Europe).

To add insult to injury, the Compromise Text confers a right to judicial remedy on people seeking to access the register (if their application is refused)[6], but no remedy for beneficial owners whose data is accessed under the deeming provisions[7].

I should like to end this letter by renewing my call to ensure that the compromise text is not put to a vote without a prior analysis of the proportionality and necessity of such extension, as well as its impact on fundamental rights and data protection.

Best regards,

Filippo Noseda
Partner

31 March 2024

Annex 1 – Commission response to Art. 258 TFEU complaint
Annex 2 – CNIL response to GDPR complaint

[6] Art. 12a (9) : "Member States shall ensure that there are judicial or administrative remedies for challenging the refusal or revocation of access pursuant to this paragraph".
[7] Art. 12a (7) of the Compromised Text: *"Member states shall ensure that registers may only refuse a request to access information on one of the following grounds (…)".*

Annex 1 | Commission reply to Art. 258 TFEU complaint

Ref. Ares(2023)7087256 - 18/10/2023

EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Banking, Insurance and Financial Crime
Financial crime

Brussels
Fisma.d.2(2023)11070215/JAS

Mr Filippo NOSEDA
Mishcon de Reya
70 Kingsway
London WC2B 6AH

Filippo.Noseda@Mishcon.com

Subject: Sovim judgment (C-601/20)

Dear Mr Noseda,

I refer to your letters of 21 July, 6 and 14 September, and to your messages dated 8, 14, and 22 August and 2 September 2023, in which you raise the attention of the Commission to alleged breaches of EU law in relation to the judgement of the Court in Case C-601/20 ("Sovim").

As already explained in my previous reply dated 14 September 2023, the Commission follows a structured process for handling complaints. As explained in Communication C(2016)8600[1], to improve the basis for assessing the merits of a complaint and facilitate better handling and response, complainants should use the standard complaint form, except where the complainant's inability to use the form is apparent. Unfortunately, your submission was not in compliance with these prerequisites. Given the fact that you did not submit your complaint by using the standard complaint form within the time limit of 4 weeks (stipulated in our above-said letter from 14 September) and given that your inability to use the form is not apparent, your complaint is deemed to have been withdrawn as from 15 September 2023. Consequently, we are unable to examine your complaint

We encourage you to reconsider the Commission's official channels and guidelines for submitting complaints, including the guidance sent to you. Should you choose to proceed, kindly adhere to the established procedures and submit your complaint form using the standard complaint form. This ensures that your concerns are appropriately documented and can be processed in accordance with our standard practice.

Yours sincerely,

Electronically signed

Raluca PRUNĂ
Head of Unit

[1] Communication from the Commission — EU law: Better results through better application, C/2016/8600.

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Annex 2 | CNIL reply to GDPR complaint

From: cnil.fr>
Sent: Friday, March 29, 2024 14:24
To: Filippo Noseda
Subject: Saisine CNIL n°23000220 - Registre des Bénéficiaires Effectifs (RBE)

Maître,

Nous faisons suite à votre plainte déposée auprès de la Commission nationale de l'informatique et des libertés (CNIL) à l'encontre du Ministère de l'économie des finances et de la souveraineté industrielle et numérique relative au registre des bénéficiaires effectifs (RBE).

Nous vous informons que la Présidente de la CNIL a mis en demeure le ministère de mettre en conformité le traitement relatif au registre des bénéficiaires effectifs avec l'arrêt de la Cour de justice de l'Union européenne du 22 novembre 2022 ((WM et Sovim SA c/ Luxembourg Business Registers - affaires jointes C-37/20 et C-601/20)).

Le ministère dispose d'un délai de quatre (4) mois pour se conformer à cette décision.

Les services de la CNIL ne manqueront pas de vous tenir informé des suites qui y seront apportées.

Je vous prie d'agréer, Maître, mes salutations distinguées.

[Signature]

Service de l'exercice des droits et des plaintes 2

CNIL.
COMMISSION NATIONALE INFORMATIQUE & LIBERTÉS

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