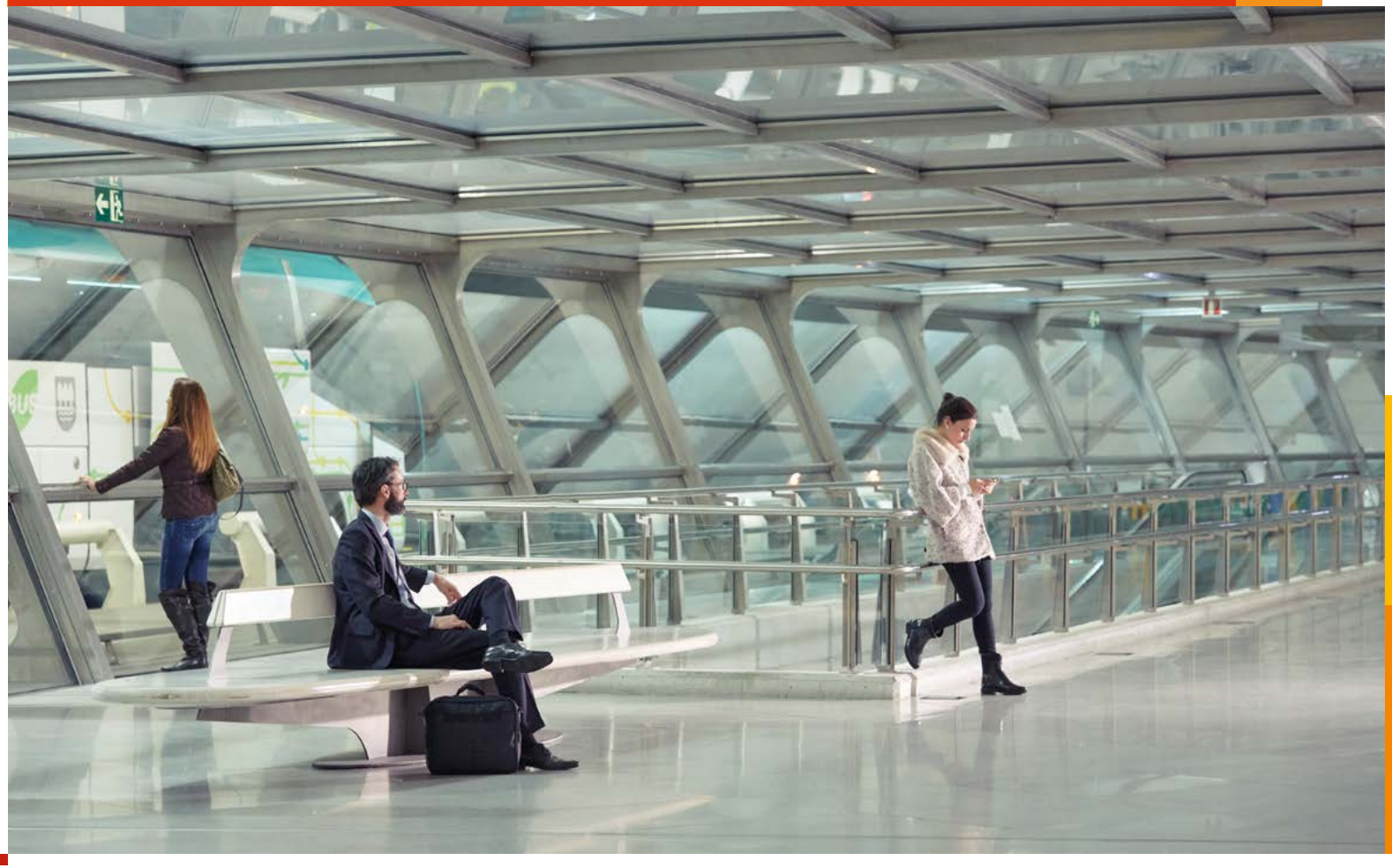
How does privacy fit into a transparent world?

A follow up study of the impact of the UBO register on entrepreneurial and high-net-worth families in fifteen European countries

July 2016



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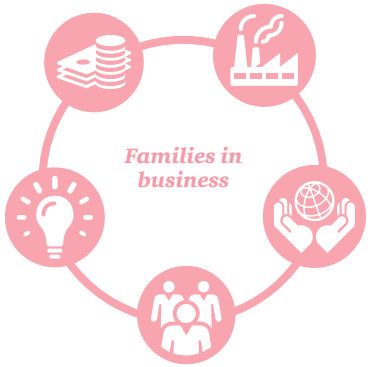
The UBO register at a glance

Although there is still a great deal of uncertainty surrounding the precise details of the UBO register, our study among fifteen countries shows that the introduction of this register will have an impact on the privacy and feelings of security of UBOs. The national legislator must take these concerns into account in the weighing of the individual right to privacy when introducing the register.



1 The fourth Anti-Money Laundering Directive (the Directive) aims to fight tax evasion, money laundering and terrorist financing. More transparency is seen as an important factor in solving this problem and the UBO register as an important instrument, a register for ultimate beneficial owners. EU member states have some room for interpretation on shaping the UBO-register. The deadline for implementation is 27 June 2017.

2 Every natural person who has control over more than 25% of the assets of a legal person or a trust qualifies as a UBO. For trusts (and equivalents), the definition of beneficial owner is much broader and qualifies almost every relevant person as a UBO (the settlor, the trustee(s), the protector (if any), the beneficiaries, or any other natural person exercising ultimate control over the trust).

3 Based on the Directive, the UBO register is accessible to investigative services, specific professional groups and third parties with a legitimate interest. One of the questions is whether investigative journalists have a legitimate interest.
Because trusts fulfill a different function than a company, a third party with a legitimate interest has no access to information about the UBO of a trust. EU member states appear to prefer implement public registers, at the expense of the right to privacy.

4 The UBO register balances between transparency and the right to privacy. It is highly important that a the right balance is found. It remains to be seen whether this balance can be found. The choice for a public register must not be dealt with lightly, it can have a radical impact on the right to privacy.

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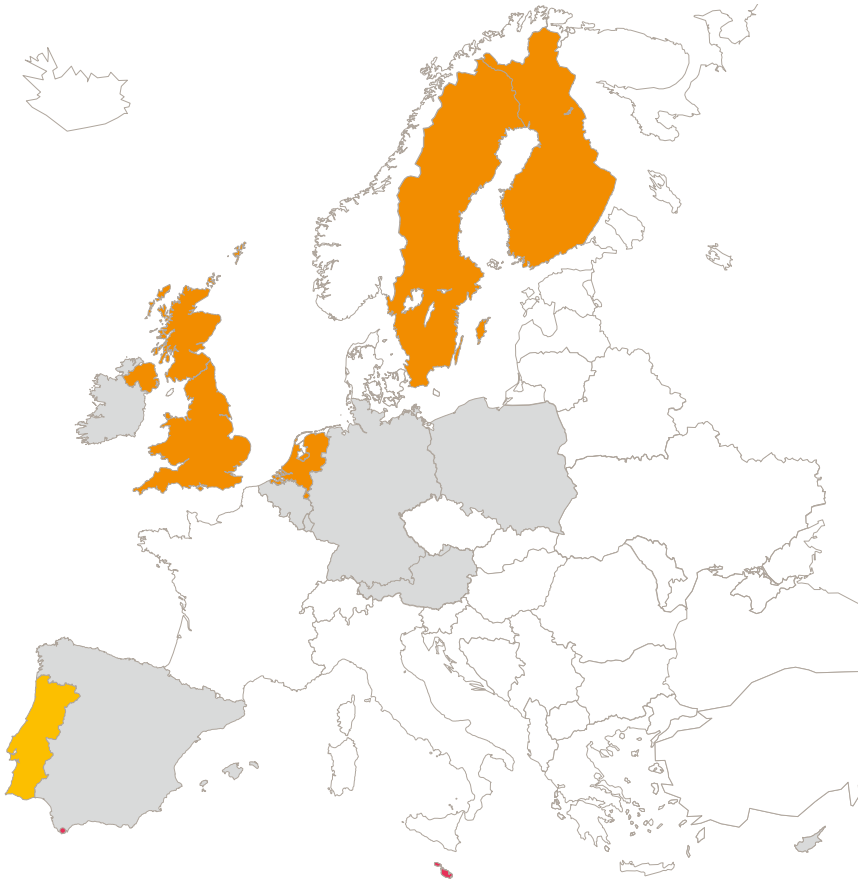
Foreword

This update on the state of affairs concerning the UBO register is an update to our publication 'Finding a balance between transparency and privacy'. It presents the results of our follow-up study on the impact of the UBO register on high-net-worth families and family businesses and the expected design of the UBO registration requirements in fifteen European countries. Family businesses form the backbone of the national economies of all of these countries. Our update also looks at the impact of the fourth Anti-Money Laundering Directive on trusts and how a country such as the United States deals with the issues of transparency and privacy. We hope that it will contribute to a thorough, substantive discussion on the conflict between transparency and privacy.

A thorough, substantive discussion on the interaction between transparency and privacy is of the utmost interest in a world that is constantly evolving. The developments since our first publication in December 2015 show how fast these changes go. The societal pressure for more transparency is increasing. This is illustrated by the extensive coverage of the Panama Papers in the media. These developments led to a discussion at a European level on extending the scope of the UBO register, anticipating the actual introduction of the UBO register. On 5 July 2016, the European Commission submitted a proposal to amend the Anti-Money Laundering Directive. The Commission proposes to make the UBO register mandatory public and to advance the introduction from 27 June 2017 to 1 January 2017.

In Finland, the Netherlands and Sweden, the first outlines of the UBO register have already been sketched: it is to be a public register. In the United Kingdom, a register for 'People with Significant Control' (PSC) has already been set up which ties in with the mandatory UBO register. The Dutch parliament has asked how the countries around us are dealing with the introduction of the UBO register. It was felt that a cross-border study of the approaches and methods used would be beneficial to all EU member states and various additional EU countries have therefore joined in our follow-up study, bringing the total to fifteen.



Member state choices for public or private UBO-register

- Public register
- Probably public register
- Probably private register
- Private register
- No information available

Family businesses are the backbone of the European economy

Family businesses make an extraordinarily significant contribution to the European economy. The vast majority of companies in almost every European country comprise family businesses and, in most countries, this segment contributes 50% or more to the Gross National Product. Although family businesses are, on average, slightly smaller than other businesses, they generate practically half of all jobs.

More information about this can be found in our report on family business succession tax schemes in Western Europe - *"Western Europe aligned on tax treatment of Family Business transfer"*.

The mandatory introduction of the UBO register arises from the Directive, which the European Parliament adopted on 20 May 2015. All EU countries must transpose the Directive into their national legislation by 27 June 2017. The objective of the Directive is - by means of transparency - to fight tax evasion, money laundering and terrorist financing. This is a laudable objective, but the question arises of whether the UBO register, as prescribed in the Directive and subsequently fleshed out by the individual EU member states, is the right instrument to achieve it. How effective is this legislation? Will the UBO register be a blow to the right to privacy? And is adequate attention being paid to the risk that the register will have the opposite effect to what was intended if the right to privacy is not given sufficient weight in the considerations?

The announcement of the obligatory register has caused a great deal of disquiet among high-net-worth individuals and family businesses who, for reasons of security and confidentiality, prefer to remain anonymous. Our study and the response to our earlier report have established that the introduction of the UBO register has or will have impact on the feelings of privacy and security of UBOs. This is understandable, because a readily accessible register containing their personal details could form a threat to their privacy and possibly even their personal security, and that of their children. If, as a result, family businesses adopt a reticent attitude and withdraw into their shells, it is not inconceivable that the legislation will be counterproductive and, ultimately, ineffective.

The national legislator must take these concerns seriously because they are important in the weighing-up of transparency against privacy. The weighing-up of these concerns is not yet evident in the political debate or the UBO register outlined by the Dutch government.

This is why we are urging legislators to base their weighing-up of transparency against privacy on well-considered and proper grounds. This should lead to a good balance between the public desire for transparency and the individual right to privacy. Furthermore, every individual must be certain that his/her personal details will be processed with adequate guarantees.

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Cyprus, Gibraltar and Poland: three new participants

Our previous report discussed the current registration requirements regarding the UBO register in twelve EU member states. Many countries are concerned about privacy and the increasing administrative burden and there is still a great deal of uncertainty about the register. The study has now been expanded to a total of fifteen European countries. This chapter looks at the current registration requirements of the EU member states which have recently joined the study: Cyprus, Gibraltar and Poland.

Our earlier report on the UBO register showed that differences do exist between the registration obligations in the countries involved, as a result of which the impact of the register will equally differ. Limited liability companies and public limited companies in all three of the aforementioned countries are currently obliged to register their details. Pursuant to European regulations, there is also a mandatory obligation to publish annual financial statements in these three member states. Table 1 gives the current registration obligations for limited liability companies and public limited companies in Cyprus, Gibraltar and Poland. Table 2 gives a summary of similar obligations for shareholders.

Table 1: Current registration obligations for limited liability companies and public limited companies

	Corporate name	Legal form	Statutory seat and address	Description of activities	Commercial register number	Date of formation	Shareholder details
Cyprus	x	x	x	x	x	x	x
Gibraltar	x	x	x	x	x	x	x
Polen	x	x	x	x	x	x	x[1]

Table 2: Current registration obligations for shareholders of limited liability companies and public limited companies

	Name	Function / position	Address	Equity (share) interest	Place and date of birth	Tax number
Cyprus	x	-	x	-	x	x
Gibraltar	x	x	x	x	-	-
Polen[1]	x	-	x	x	-	-

x Verplicht

\- Niet verplicht

1. As regards a limited liability company, in the publicly accessible National Court Register (NCR) are revealed details of shareholders who possess independently or jointly with others at least 10% of the share capital. Details of a public limited company shareholders are revealed in the NCR only in case of sole shareholder. Public limited companies only have to register shareholders with registered shares. The data included in the articles of association of a limited liability company and a public limited company are, furthermore, public.

The implementation of the UBO register: an update

The fourth Anti-Money Laundering Directive is clear about the mandatory introduction of the UBO register: it has to be operational in all EU member states by 27 June 2017.[2] The Directive gives member states a degree of freedom in shaping the register, which is used in different ways. As the deadline approaches, the UBO register is taking shape. The impact of the register will therefore be greater than if the decision had been made to keep it private. This chapter looks at the current state of affairs regarding the implementation of the register in various EU member states.

In the United Kingdom, a substantial part of the required UBO register has already been introduced. This register is public. Finland, the Netherlands and Sweden appear to opt for a public register, judging from the published outlines of their UBO-register. Portugal has not yet brought out official communication, but their register is expected to be open as well. Only Malta and Gibraltar expect to introduce a limited accessible UBO register. The preferences of all other Member States are still unknown. This trend seems to come from their struggle with the interpretation of the concept of a 'legitimate interest' (at least in the Netherlands).

However, it remains to be seen whether Member States will be left a choice between public or limited accessible registers. On 5 July 2016, the European Committee proposed an amendment to the Anti-Laundering Directive.[3] Included in this proposal is the obligation to make the UBO registers (more) public.

Legitimate interest

UBO registers must be accessible to three groups 1) authorities and their financial research departments, 2) service providers who are subject to statutory audits and 3) third parties (such as citizens and investigative journalists) with a 'legitimate interest'. This latter category is where the problem lies: it is not yet clear what constitutes a 'legitimate interest' and member states have to interpret this for themselves. From the contours which have been communicated in a number of member states regarding the UBO registers they intend to introduce, we can draw the cautious conclusion that they are struggling with the interpretation of the concept of a 'legitimate interest'. This difficulty in interpretation and the fact that every time a third party requests information the legitimacy of their request needs to be checked, seems to be leading to a predilection for a public register: an easy and practical choice. It will save a great deal of bureaucracy and, thus, costs. Although the wish to save money is understandable, the important consideration that public access will be at the expense of the privacy of the UBOs concerned is missing from the deliberations. At the moment, it looks very much as though those involved are prepared to put up with the invasion of privacy solely to save administrative costs. An alternative would be to interpret the concept of a 'legitimate interest' in such a way that people only have access to the information in question if it is really necessary to trace terrorist financing, money laundering and fraud, and this group does not have to be that big.

A possible interpretation, in concrete terms, of the concept of a 'legitimate interest' is as follows.

A third party has a legitimate interest if this third party is in the exceptional position of researching possible terrorist financing, money laundering or fraud. This will be verified via the national Financial Intelligence Unit (FIU[4]); every member state must, in any case, set up an authority of this kind. The third party reports the information which has led to the suspicion of wrongdoing to the FIU and the FIU subsequently assesses whether this is worth looking into and whether the FIU will do so or the third party in question should be given information from the UBO register to do so itself.

2. Based on the proposed amendment of the Anti-Money Laundering Directive, the effective date would be 1 January 2017.

3. Since the EU Member States involved provided their input prior to the proposed amendment of the European Committee, this (new) information has not been included in the update per Member State.

4. FIU is the organisation to which obliged institutions have to report unusual transactions.

Proposed amendment Anti-Money Laundering Directive

In response to the Panama Papers, the European Committee aims to tighten the regulations on the UBO register. A few of the proposed amendments of the Anti-Money Laundering Directive of 5 July 2016:

- The mandatory introduction of the UBO register in the EU member states is advanced from 26 June 2017 to 1 January 2017.
- For investment vehicles, every natural person with an interest of 10% or more qualifies a UBO.
- UBOs of entities (such as limited liability companies) and UBOs of trusts and foundations (or equivalent thereto) conducting a business will be included in a public UBO register. The public nature of the UBO register is not mandatory, although Finland, the Netherlands and Sweden have already chosen voluntarily for a public register.
- UBOs of trusts and foundations (or equivalent thereto) not conducting a business will be included in an UBO register which is accessible to third parties with a legitimate interest. At this moment, information of UBOs of trusts is not accessible to third parties such as investigative journalists and other citizens.
- UBO registers of the various EU member states will be linked in order to access the UBO information across the EU.

Malta

In Malta, three groups are expected to have access to the UBO register, as described in the Directive. These are the FIU and competent authorities, obliged entities (within the framework of customer due diligence) and third parties who can demonstrate a legitimate interest. It is, however, still unclear precisely what constitutes a 'legitimate interest' in this country. The Registrar of Companies and Registrar of Legal Persons are expected to be responsible for the registration. Trusts and other legal arrangements will probably also have to register, although there has still not been any official confirmation of this. In addition to concerns about the lack of privacy and confidentiality in relation to the UBO register in Malta, a specific discussion has been ongoing regarding whether situations involving usufruct will fall within the scope of the Directive. A situation involving usufruct arises, for example, if someone does not have full ownership of shares, but is entitled to the related benefits, profit distributions and often also to the increase in value of the shares.

Finland

Finland expects to introduce new legislation on 1 January 2017. A public register has been proposed, which will be incorporated in the existing Trade Register, Register of Associations and Register of Foundations: UBO details such as the name, month and year of birth, nationality, state of residence and the nature and extent of UBOs' interests will be accessible to everyone. However, the authorities will have access to more details, such as the identity number or comparable identification and home address of UBOs. The above mentioned registers, of which the UBO register will be a part, are maintained by the Finnish Patent Registration Office. The entities which will have to register will therefore fit in with what is stated in these registers.

The information in the UBO register will not have public reliability; instead, information will be provided for information purposes. Any changes to the UBOs shall be disclosed by the relevant entity without undue delay. In the case of an association, the chairperson will be seen as the UBO, unless someone else is a factual beneficiary, in which case that person will be seen as the UBO. In the case of a foundation, the members of the board will be the UBOs, or, again, the individual(s) who is/are factual beneficiary(ies).

This legislation will not apply to companies whose shares are traded on a regulated market: pursuant to Finnish law, such companies already have a stricter disclosure obligation. Private entrepreneurs (i.e. entrepreneurs without a legal entity) do not fall in this category either. Trustees of foreign trusts or similar constructions will have to register information on the UBOs of such trusts. In Finland, such trustees can, for example, be attorneys. A system of penalty payments and public warnings may be set up for non-compliance with the registration obligation.

Spain

Our previous report indicated that the Association of Registrars will act as the UBO registrar in Spain. There have been no new developments concerning the UBO register in this country.

Portugal

The Portuguese Parliament recently adopted a resolution with a recommendation to the government to transpose the Directive (as well as EU Directive 2015/2376 on mandatory automatic exchange of information in the field of taxation) with effect as from 31 December 2016. Nothing more has as yet been confirmed. Those involved expect that a public register, in which information on the UBO is publicly available, will be set up in Portugal. It is expected that the Portuguese Commercial Register will administer the UBO register. Non-compliance with the registration requirements will probably result in fines. There are, furthermore, concerns in Portugal regarding the register, particularly among family businesses with an extensive (and therefore often complex) network of companies abroad.

Ireland

Little is known about the format of the UBO register in Ireland. A consultation document indicates, apart from other things, that companies and trusts will fall under the regulations. In this document, the Irish Revenue Commissioners state that they are willing to set up and maintain the UBO register as the responsible administrator for trusts. The Irish Companies Registration Office may administer the UBO register for companies.

Finally, there are concerns in Ireland about public access to information, particularly in the case of entities whose UBO information is not currently available.

Belgium

A great deal regarding the implementation of the UBO register is still unclear in Belgium. Minister Van Overtveldt's[5] plans do reveal that third parties will probably have to pay a fee to access the register and that they will have to register to do so. Also, there is a political commitment to advance the implementation of the Directive with a view to render it effective as from 31 December 2016. This is one of the measures against the terrorist attacks in Brussels on 22 March 2016.

Whether the register will actually be public is not yet clear. A public register is, however, expected to increase the risks for UBOs.

5. Plan to fight tax fraud, December 2015.

Sweden

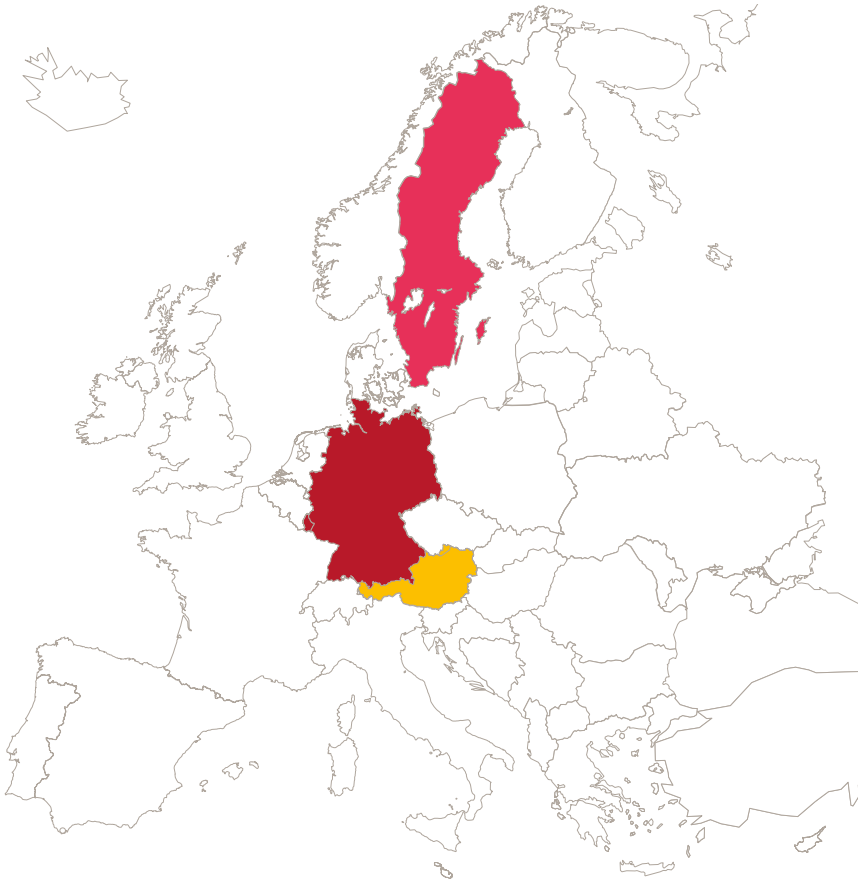
The UBO-register in Sweden will be public, according to the principle of public access to official records. It is however unclear how this will be administered and in what extent the register will be open and accessible to the public. Besides the minimum data prescribed by the Directive, the UBO's Swedish personal identification number will be included and, if applicable, the name or names of the legal entity(ies) with which the UBO in question owns a company. These data will be kept for five years. The address of the UBO and his/her contact details will not be included in the register.

The register will be administered by the 'Bolagsverket', the Swedish Companies Registration Office. All Swedish legal entities must register their UBOs. Trusts set up under foreign law must also register their trustees as UBOs, if the trustees are Swedish legal entities or Swedish natural persons. Companies listed on the stock exchange and legal entities in which the public sector has predominant control will not be subject to the registration obligations. Non or partial non-compliance with the obligations will result in costs or possibly fines, unless the omission is permissible due to special circumstances. If a legal entity does not furnish the authorities with its details, the entity in question will be fined.

There are concerns in Sweden with regard to the personal security of UBOs. Knowledge of the UBO's economic circumstances may increase the risk of fraud, kidnapping and robbery in relation to him/her and his/her family.

Austria

Austria expects to implement the Directive in its legislation in the autumn/winter of 2016, with the exception of the UBO register, which will go into force later. It is expected that there will not be a register for trusts, given that Austria does not have a trust regime. Also, it is expected that the Commercial Register at the competent court will be managing the UBO register. At the moment, there are already fines for non-compliance with the registration obligations and these fines will probably also be imposed for the new register. There are concerns about the privacy and security of UBOs in Austria. Details of beneficiaries of foundations which are currently not public may become so as a result of the Directive.



Germany and Luxembourg

There have not been any new developments regarding the UBO register in Germany and Luxembourg so far.

The Netherlands

The Dutch government has outlined the envisaged UBO register, but the picture, as yet, is incomplete. It is therefore not clear precisely which entities will be in the UBO register although only companies and other legal entities will be involved (with as much harmonisation as possible with the entities registered in the Trade Register). Because the Netherlands does not recognise 'express trusts'[6] or similar constructions, there will not be a register for them.

Public register

Another important announcement is that the Netherlands is opting to make the register public. This should be the better option, according to the government, because of the large and diverse group of institutions obliged to trace the identity of their clients (hereinafter referred to as 'obliged parties') and because it will keep down the administrative costs and burdens for both the users and the administrator of the register. This would also be in line with the intention of the government to make the information of the trade register public. Moreover, anonymized information of the trade register will be freely accessible. This data is to be freed for analyses of Dutch businesses.

In theory, the Dutch UBO register will therefore be accessible to everyone. The UBO details which will be available to any user without restriction are the name, month and year of birth, nationality, state of residence and the nature and extent of UBOs' interests. From the government's perspective, four guarantees of privacy should protect the UBOs in question:

- every user will be registered online;
- users will be charged a fee to inspect the records. The Directive prescribes that only the administrative costs may be charged so this fee will not exceed the costs;
- users other than specifically designated authorities and the Financial Intelligence Unit (FIU) will have access to a limited set of UBOs' details; and
- in exceptional circumstances, on exposure of the UBO to the risk of fraud, kidnapping, blackmail, violence or intimidation or in the case of minors or individuals who are unable to manage their own affairs, a detailed assessment will be made of these risks on a case-by-case basis. The situation will then be looked at to see whether (certain) UBO details should be protected.

6. An express trust aims to bring the assets under control of a trustee for the benefit of a beneficiary.

Trust foundations (stichtingen administratiekantoor) and funds on joint account (fondsen voorgemene rekening) fulfil the same function in estate and business succession as trusts and, as such, participate very little in economic transactions. Therefore, it can be considered to make information of an UBO of a trust foundation or a fund on joint account only accessible to 1) authorities and their financial research departments, and 2) service providers who are subject to statutory audits.

Submitting information to the UBO register

Companies and legal entities are themselves obliged to submit UBO information which is adequate, accurate and up to date. UBOs are, in turn, obliged to cooperate. Non-submission or late submission of data, or the submission of incorrect or incomplete data by companies and other legal entities will result in sanctions such as imprisonment of up to six months, a community punishment order or a fine of up to approximately EUR 20,000.

The follow-up

Vennootschappen en juridische entiteiten hebben zelf de verplichting om UBO-informatie aan te leveren die toereikend, accuraat en actueel is. De UBO's hebben dan weer een verplichting tot medewerking. Op niet (op tijd) aanleveren van gegevens, of het onjuist of onvolledig aanleveren door vennootschappen en andere juridische entiteiten komen sancties te staan als een hechtenis van maximaal zes maanden voor de bestuurders, een taakstraf of een boete tot ongeveer 20 duizend euro.

The Dutch government expects to make legislative proposals for consultation in the summer of 2016. The Netherlands plans, furthermore, to make full use of the two years given for the implementation. The Chamber of Commerce will administer the UBO register. Similar requirements will apply to the UBO register as those which currently apply to the Commercial Register. These requirements relate to the accessibility of the data to parties entitled to access to the register and safeguarding data which must be protected.

United Kingdom

Legislation which ties in with the prescribed UBO register has already gone into force in the United Kingdom. As of 6 April 2016, all limited liability companies and public limited companies are obliged to keep their own register of 'People with Significant Control' (PSC). As of 30 June 2016, these companies will be obliged to submit this information annually to Companies House's central public register (along with the annual report). How the United Kingdom will meet the other obligations prescribed by the Directive is not yet clear. For example, it is not yet known whether there will be a separate register for trusts.

Information on PSCs

The information companies must submit annually on their PSCs comprises the following: name, date of birth, nationality, state of residence, postal address, home address, date on which the individual in question was designated PSC and which of the five conditions for designation as PSC are applicable to this individual. An individual is a PSC if one of the following conditions is met:

- Direct or indirect possession of more than 25% of the company shares;
- Direct or indirect possession of more than 25% of the company's voting rights;
- Direct or indirect possession of the right to dismiss or appoint the directors or majority of the directors;
- The right to or actual exercise of substantial influence or control;
- The right to or actual exercise of substantial influence or control over the activities of the trust or company, as a result of which one of the other four conditions is met.

There are specific majority control provisions that apply where the ultimate UK company is held by an overseas company who is in turn ultimately owned by an individual or individuals(s). Care must also be taken where Trusts exist in a corporate structure as trustees are disclosed and potentially beneficiaries in certain circumstances. Depending on the nature of the corporate structure the application of the PSC rules can be complicated.

The information on PSCs submitted will be managed by the Registrar of Companies; all the aforementioned data, with the exception of the date of birth and home address, will be in the public register and accessible to anyone. There are two grounds on which PSCs can request that their data be protected in the PSC Register. They must either show that publication of the information will result in them becoming victims of excessive injustice or substantiate that protection is necessary on the grounds of national economic security. Non-compliance with the requirements of the PSC Register will result in sanctions such as fines and even imprisonment of up to two years for both the company officers and the individual deemed to be the PSC.

Reasons for concern

There are concerns in the United Kingdom about the dangers of, for example, kidnappings. The fact that third parties can access data, even without a legitimate interest, is worrying. It is, moreover, not always very easy to identify the PSC in the first place. Many companies are therefore now diligently trying to determine who he/she is, let alone worrying about how, for example, these data should be registered in a joint scheme.

Cyprus

new

As yet, little is known about the introduction of the UBO register in Cyprus. The Unit for Combating Money Laundering (MOKAS) is still looking into it, with the assistance of the relevant institutions. The risks entailed in an 'open' register, such as public access to UBOs' details, are cause for concern. Anonymity and privacy are important issues, particularly to family businesses.

Gibraltar

new

In Gibraltar, the UBO register will probably be private. Although no official announcement has been made, it would seem that third parties will only have access in so far as they have a 'legitimate interest'. It is expected that directors of companies and trustees, among others, will have to be registered. The administrator of the UBO register for all entities will probably be the Finance Centre Director. The current registration is carried out at the Companies House, Gibraltar.

Poland

new

As yet, there is not much officially known about the UBO register in Poland either. It is likely that the UBO register will be incorporated in the National Court Register. This register will then be managed by either the local courts or the General Inspector for Financial Information. The consequences of non-compliance with the registration obligation will probably be in line with current measures: seven days to rectify the omission subject to fines or the appointment of an administrator for up to a year. The possibility that the register will be made public also raises concerns, particularly due to the impact on privacy. Anonymization will no longer be an option.

EU vs. US, a world apart

In many ways, the EU and the US are culturally and economically comparable. However, both take a different approach to how they fight money laundering, terrorist financing and tax avoidance. Currently, the US government does not have the intention to centrally document any ownership information like the EU UBO register. Part of the explanation is in the historical background of the US. This historical background leads to a reserved position towards their government. In general, EU citizens have more confidence in their privacy laws governing how personal data can be used and shared nationwide, including by their government. Another important factor is that US citizens – more than EU citizens – regard being successful and wealthy as more of a virtue and the right to freedom from government interference as sacrosanct.

Similarities

There are – of course – also similarities between the EU and the US. For example, when it comes to the monitoring of financial transactions, both in the EU and US financial institutions are required to identify their beneficial owner and report suspicious transactions. Also within EU and US banks, statistical research is undertaken to pinpoint whether there is any money laundering happening. However, in the US more than in the EU such monitoring is privately driven and carried out by the banks themselves. Respective regulators may audit the banks, but the responsibilities fully lie with the private companies design and demonstrate adequate monitoring procedures.

Fighting terrorism and crime

As a response to the terrorist attack on 9/11, the powers of federal (investigating) institutions in the US has been enhanced, e.g. with the introduction of the Patriot act. This act enables federal institutions to more easily share information with each other and it also created the means for federal institutions to retrieve information from companies that might be related to terrorist activities. The required national security letters for obtaining this information are issued after a case by case assessment.

Also NSA surveillance has been intensified after 9/11, with an expansion of scanning the internet for terrorist related activities. However, the CIA and NSA are only authorised to go after people outside of the US. The FBI needs a court warrant to investigate someone within the US. Warrants are provided only on a case by case basis. In the US, there is no legal basis for a permanent register containing data like the UBO register. As a rule, information can only be kept temporarily, for as long as the individual involved is a suspect. If the latter is no longer the case, the information should be deleted.

Investigating authorities have databases with personal information, but there is no register where people have to deposit and disclose their details.

Protection of wealth

In the US it is quite common for wealthy individuals to set up corporations to protect their wealth from public scrutiny on how they are using their money. This is more acceptable to the public opinion considering that the right to freedom from government interference is sacrosanct in the US. It is embodied particularly in various constitutional amendments (Bill of Rights), e.g. the Second and Fourth Amendments.[7]

Sometimes the comparison is made between FATCA and the UBO register. The data collection for FATCA is all about Americans living overseas, to make sure that they pay their taxes, whereas the UBO register regards UBOs of all nationalities and all countries of residence (both abroad and domestic). FATCA accomplishes a narrow purpose: to have foreign based Americans file their foreign assets. The FATCA information is not any different from the information filed with a (regular) tax return of US based Americans. Furthermore, the Internal Revenue Service (IRS) keeps this information private, whereas the UBO register(s) are accessible to a wider group (possibly even public).

Is a register feasible in the US?

The only government institution holding information on financials of US people is the IRS, but only on income for taxation purposes. Also, it is not going to be publically available. The main reason is that Americans are mostly against keeping information permanently on files. Due to past law enforcement violations of US Fourth Amendment rights which protect against unreasonable searches and seizures (e.g. FBI surveillance during the McCarthy administration), the US public is predominantly adverse to this type of information keeping because of the risk of misuse it imposes.

7. The Second Amendment to the United States Constitution protects the right of the people to keep and bear arms. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and requires any warrant to be judicially sanctioned and supported by probable cause.

There are legislative initiatives in progress in the US, to improve UBO transparency and 'Know Your Client' requirements, such as a proposal to have companies disclose their beneficial owner at their incorporation. However, the UBO information would not be publically available and most likely not be kept indefinitely, the legislative steps would not achieve anything like the transparency of EU UBO register. In general in can be said that the kind of registration with a government institution comparable to the EU UBO register would - at least on short term - not be feasible. Furthermore, registration of any kind is not likely to be voluntary. The US public would most likely not be against a publicly accessible register, but it would have to be hosted by a non-government public entity. There are some private initiatives that could eventually lead to such a register. For instance, a register build by journalists would not go against the US sentiment. Such a register could be built using big-data analysis and data-visualisation technologies, and used to expose individuals or entities that profit by exploitation, corruption or manipulative practices. It could be a register held by investigative journalists in line with the First Amendment or an independent, non-government entity, e.g. the Federal Trade Commission.[8] Americans could very well be in favour of such a register for public transparency, to track potentially inappropriate influence of wealthy people. But again, it is not very likely that the government would be trusted with this kind of information.

Would registering all the companies that you own in a Chamber of Commerce be possible? The position of a Chamber of Commerce is to lobby for companies, not to register and disclose information on companies and their UBO's. A publicly available register that is trusted is privately held: Dun and Bradstreet. Registration with Dun and Bradstreet is voluntarily and is disclosed for payment. The most important factor is that this is a privately held register, not in the hands of a governmental institution.

Invasion of privacy

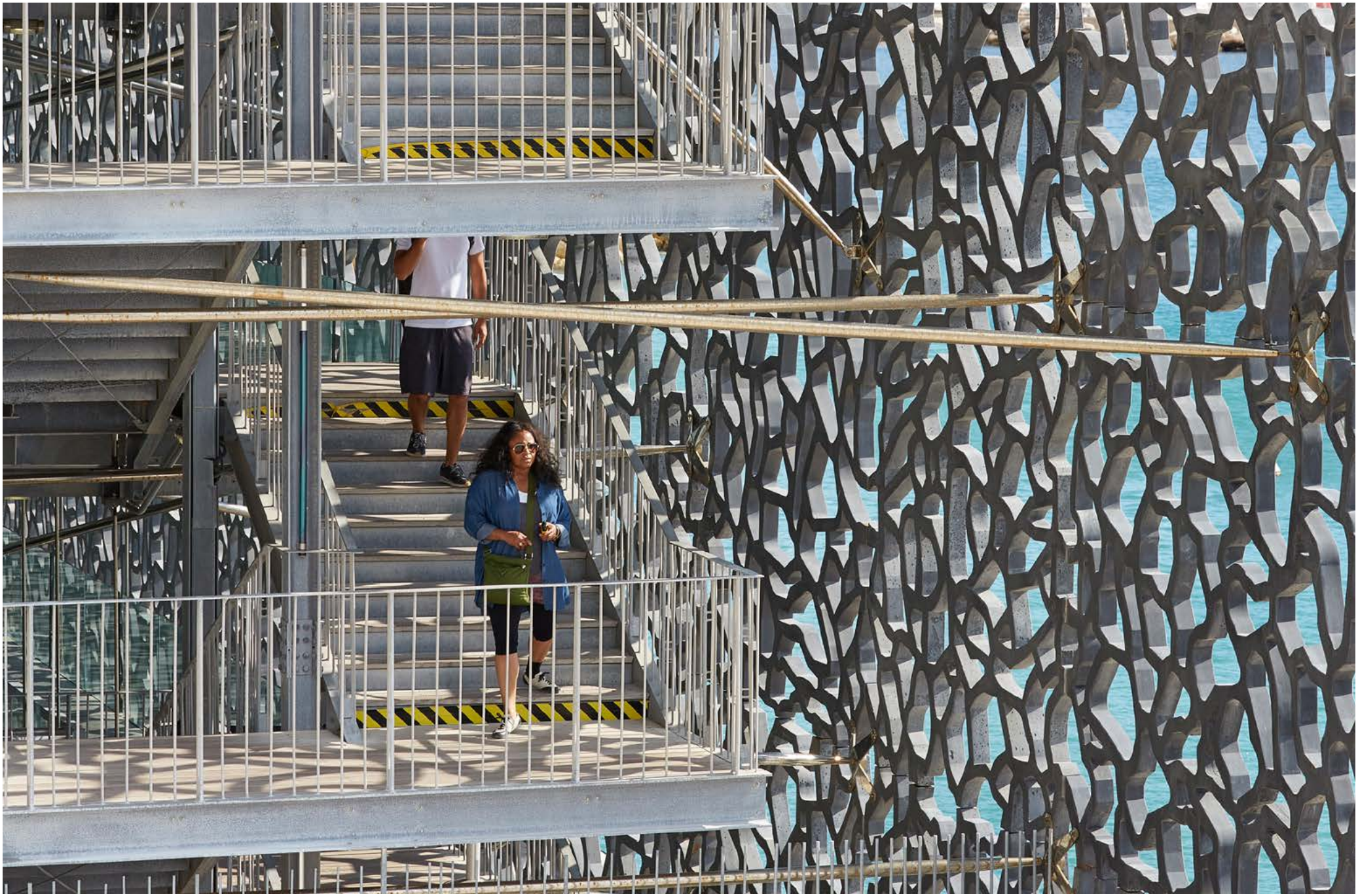
A registration as with the UBO register seems to be very invasive under the Data Protection Directive and the General Data Protection Regulation.[9] The lack of trust in their government by Americans makes it unlikely that this type of information that might be used for enforcement, can be maintained. It would be hard to find a single public agency with enough public trust to store this type of information. Legislatively, it does not exist and there is currently no ground for it.

Would a UBO register fit culturally?

Would a UBO register be culturally achievable? If so, it would have to be a non-governmental institution. Because of the government distrust by US citizens, it is questionable whether the government in general is trusted enough to maintain the type of permanent registered information that is contemplated by the UBO registers. A clear example is the way gun owners are being registered. Gun owners in the US are not centrally registered. There are state-registers and there are local records held by gun shops. If the FBI wants this information, they need a warrant to retrieve the records at the shop.

In conclusion, in the short term, a register requiring voluntary registration is not likely. At the moment, there would not be a political party supporting such disclosure managed by the government.

8. https://www.ftc.gov/
9. General explanation of the Data Protection Directive the General Data Protection Regulation: http://ec.europa.eu/justice/data-protection/



In confidentiality we trust?

The requirements in the Fourth EU Money Laundering Directive ('the Directive') expressly apply to trusts and other legal entities rather than simply companies.

We understand that the Directive's obligations around the retention and disclosure of beneficial information relating to such ownership structures have proved to be one of the most difficult areas for the European Parliament and the Council of Ministers to agree on during negotiations.

In this chapter we introduce the basic principles of trusts, as well as some the advantages they provide, and we explore the potential application of the beneficial ownership register for trusts under the Directive.

Reactions

Bodies such as the Society of Trusts and Estates Practitioners ('STEP') have raised particular concerns in relation to the rules around trusts.
STEP has pointed out that trusts in common law countries are frequently used in order to protect vulnerable beneficiaries, some of whom could be at significant risk if their identities were published.
The agreed texts of the Directive conclude that the whilst the mandatory register of beneficial ownership information on corporates and other legal structures (such as foundations) will be publically available to those with a "legitimate interest", the mandatory register for trusts will only apply to express trusts and will not be publically available.
This was a welcome development for STEP and other trust professionals.
On 10 May 2016 France announced its intention to open its Trust Register to public scrutiny. It remains to be seen whether others may follow suit.

Overview of trust

Basisprinciples

The concept of a trust originated in England in the 12th century, when soldiers with minor children needed somebody to look after their assets when they went overseas.

They gave the assets to a trusted third party, who dealt with the assets as owner but on the condition that they were holding them for the benefit of the soldier (if he returned from war) or the soldier's children (if he did not). This division of ownership, between the legal owner and the ultimate beneficiaries, remains the basis of the trust concept.

The trust is the most typical form of wealth structure in common law jurisdictions such as England and Wales.

An individual, known as a 'settlor' transfers assets to a third party known as a 'trustee' who is often a professional external company or individual.

Unlike a company, a trust does not have legal personality and is not able to hold and deal with assets in its own name. Instead, the trustees are the legal owners of the assets, and hold and administer them, not for themselves but for the benefit of the 'beneficiaries' in accordance with the terms of a trust deed.

Trustees must act in the best interests of the beneficiaries when administering the trust assets.

The settlor can appoint a 'protector' who is usually a trusted friend or advisor. The protector's role is to protect the interests of the beneficiaries. The trust arrangement is formed under the trust law of a selected country, often a tax neutral jurisdiction with robust asset protection laws.

A typical trust structure

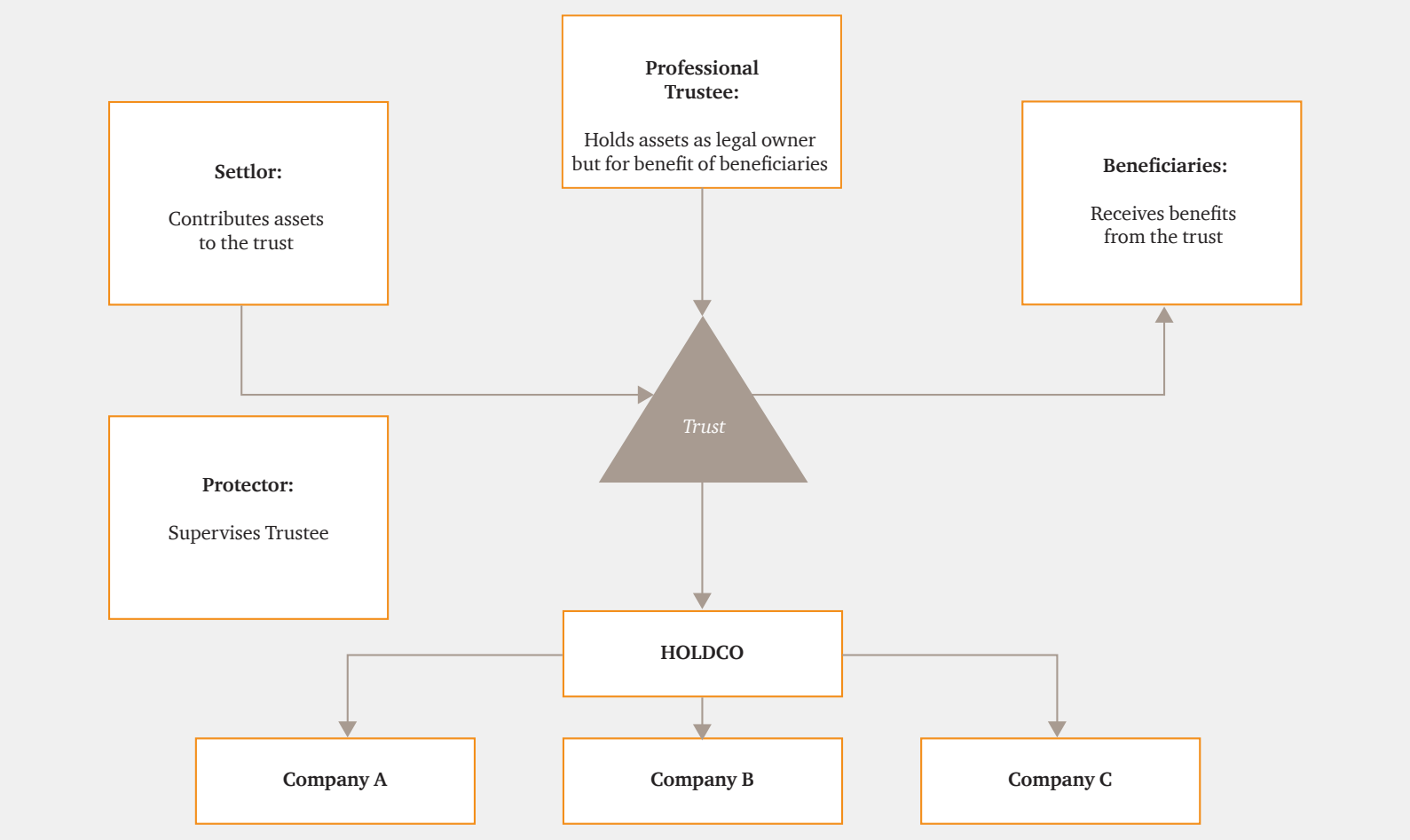
Key trust documents

The trust deed is the formal document that sets out the terms on which the trustees hold the assets and their administrative powers. It also sets out who the beneficiaries are and the terms on which the trustees can provide them with benefits.

A letter of wishes is also normally provided to the trustees. This will contain non-legally binding guidance from the settlor to the trustees, setting out how he would like them to exercise their powers both during and after his lifetime.

Key roles/parties

- **Settlor** – Person who establishes the trust
- **Trustee** – Often a professional external trustee or can be an individual known to the settlor
- **Protectors** – supervise the trustee, providing additional comfort to the beneficiaries that the trust assets are being properly managed
- **Beneficiaries** – People who benefit from the trust – often the settlor and their family



Why establish a trust?

There are a number of non-tax related benefits to establishing a trust:

Confidentiality

Different holding companies can be used to hold different assets/asset classes within the trust and it is the Trustees who are the legal shareholders of such holding companies which gives the beneficiaries an extra layer of protection and confidentiality.
This is particularly relevant for vulnerable beneficiaries, the disclosure of whose identity could lead to threats to their person or to the safety of their family for example.

Succession Planning

A trust is a flexible arrangement allowing for different provisions dealing with trust assets both during and after the Settlor's lifetime, for example, distributions can be made to children at predetermined ages, or for specific purposes such as funding education.
A trust can provide full flexibility to determine how assets will be distributed to the Settlor's family after his/her lifetime. If structured correctly, the assets should not be subject to forced heirship laws.

Business succession

Since a trust can continue to exist and control the distribution of assets to family members after a settlor's lifetime, this reduces the risk of the ownership of business assets becoming fragmented, which would have a detrimental impact on the business.

Estate planning

A trust can help avoid costs, delay, legal problems, publicity and unwanted procedures on death.

Asset protection

Since assets held by trusts are legally owned by trustees, not the beneficiaries, the assets will generally be better protected from the claims of creditors of the settlor or of the beneficiaries and other external parties, such as former spouses, than assets held outright.
The trust can be located in a jurisdiction with favourable laws on asset protection.

It is important to note that the more settlor control within a trust, the less robust it can be from an asset protection perspective. A careful balance would therefore need to be struck between the level of control a settlor would like to exercise versus the level of asset protection a settlor would wish to achieve to ensure that the structure provides adequate asset protection.

Potential features of the beneficial ownership register relating to trusts

Under Article 31(1) of the Directive, each member state must ensure that trustees of any express trust governed under that member state's national law obtain and hold adequate, accurate and up-to-date information (to include the identity of any beneficial owner) regarding the trust.

In the context of trusts, the definition of beneficial owner includes:

- The settlor;
- The trustee(s);
- The protector (if any);
- The beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; and
- Any other natural person exercising ultimate control over the trust by means of direct or indirect ownership, or by other means.

Trustees must disclose their status and provide their beneficial ownership information, in a timely manner, to firms when they form a business relationship or carry out an occasional transaction that either:

- Amounts to EUR 15,000 or more, whether the transaction is carried out in a single operation or in several operations that appear to be linked; or
- Constitutes a transfer of funds (as defined in Article 3(a) of the revised Wire Transfer Regulation (EU) 2015/847) (WTR)) exceeding EUR 1,000.

Each member state must ensure that the information on beneficial ownership relating to trusts is held in a central register when the trust 'generates tax consequences' and must notify the Commission of the characteristics of their national systems. Information held in the central register must be adequate, accurate and up-to-date.

The central register:

- Shall ensure timely and unrestricted access to beneficial ownership information by Competent Authorities ('NCAs') and Financial Intelligence Units ('FIUs'), without alerting the parties to the trust concerned. Member states must ensure that NCAs and FIUs are able to provide the information to NCAs and FIUs of other member states in a timely manner.
- May also allow timely access by firms when they are carrying out Customer Due Diligence ('CDD') measures. However, the Directive is clear that firms are not to rely exclusively on the central register to fulfil their CDD obligations, as a risk-based approach is to be taken.

How could a trust be affected in practice?

Example one

A Discretionary Trust governed by UK law is settled by Mr Smith who lives the UK. The trust has a class of beneficiaries including Mr Smith, his wife, their two children, their grandchildren and an animal welfare charity. Mr Smith's friend, Mr Jones is the Protector of the Trust. The trustees are Mr Smith and his UK solicitor, Mr Law.

The trustee would need to ensure that it holds up to date information on the identity of the following persons:

- Mr Smith as settlor;
- Mr Smith's friend as protector;
- Mr Smith, his wife, their two children, their grandchildren and the animal welfare charity as potential beneficiaries of the trust; and
- Mr Smith and Mr Law in their capacity as trustees.

Example two

The trustees of the same trust sell a painting for EUR1m. The trustees make a large profit on the sale which is subject to UK capital gains tax. After the sale the trustees open a bank account in Jersey and deposit the sale proceeds in the account.

As trustees, Mr Smith and Mr Law would need to provide the beneficial ownership information outlined above to the Jersey bank when they open the trust account and deposit the sale proceeds.

On realisation of the taxable profit from the sale, the beneficial ownership information would need to be supplied to the central register which would be accessible by NCAs, FIUs and firms when they are carrying out their CDD measures.

Example three

The trustees of the same trust are Cypriot but the trust is governed by New Zealand law.

There is a level of uncertainty around whether the Directive's reference to governing laws is misleading as in these circumstances, a trustee would be able to avoid reporting obligations by indicating that as New Zealand is not subject to the Directive, they have no obligation to provide the relevant information.[10]

Given that a trust lacks legal personality, there is a query as to whether such obligations are only, practically, enforceable by reference to trustees resident in a jurisdiction rather than by reference to governing law.

If this interpretation is correct, in this example, since the Cypriot trustees are resident in a relevant EU jurisdiction, the obligations under the Directive would apply.

Conclusion

Although the Directive came into force on 25 June 2015, as yet we do not believe any member state has implemented the provisions around trusts and the beneficial ownership register into national law.

Whilst in the UK a requirement for UK companies to maintain a register of person with significant control has been in force since April 2016, this legislation only impacts trusts in ownership chains. The legislation does not extend to the trust beneficial ownership register.

It therefore remains to be seen how this element of the Directive will be implemented in practice and how it will impact individuals and families in each territory. The UK, for example, has many trusts for families who will be affected by the Directive in spite of having no international links.

With the 2017 deadline for implementation drawing closer, it will be interesting to see how each territory ensures the trustees' obligations under the Directive are enforceable under their domestic law.

10. Based on the proposed amendment to the fourth Anti-Money Laundering Directive, the law applicable to the trust prevails.

Conclusion

The date by which every EU member state must have a UBO register is steadily approaching. These UBO registers have to be operational on 27 June 2017, based on the fourth Anti-Money Laundering Directive. A number of members states have revealed the contours of their versions of the UBO register. In the United Kingdom the obligatory UBO register is, to a large extent, already in force. From 6 April 2016, companies in the United Kingdom must submit details on their UBOs (the term 'Persons with Significant Control' is used here) along with their annual reports and accounts. Before the UBO has been implemented everywhere, the European Commission already proposed to advance the introduction to 1 January 2017 and make the UBO register mandatory public. With the creation of the register and now again with this proposed amendment, the right to privacy of UBOs is strongly underexposed. A good balance between transparency and privacy remains an important factor in the further process of implementing the UBO registers.

It is clear that there is a predilection for a public register. This appears to be the result of the struggle member states are having with the interpretation of the term 'legitimate interest'. It is easy and practical to opt for a public register, but to do so is to ignore the important consideration that the public nature of such a register will be detrimental to the privacy of the UBOs in question. At the moment, it looks very much as though those involved are prepared to put up with the invasion of privacy solely to save administrative costs. With a public register, there is a risk that third parties will use the information for the wrong purposes.
The privacy guarantees which are, for example, being built into the Dutch UBO register are not very convincing and will, in most cases, not provide any real protection.

Is a public register so important that we are willing to accept this risk? Are the administrative costs so high that we are prepared, knowingly and wilfully, to expose UBOs to the possible consequences?

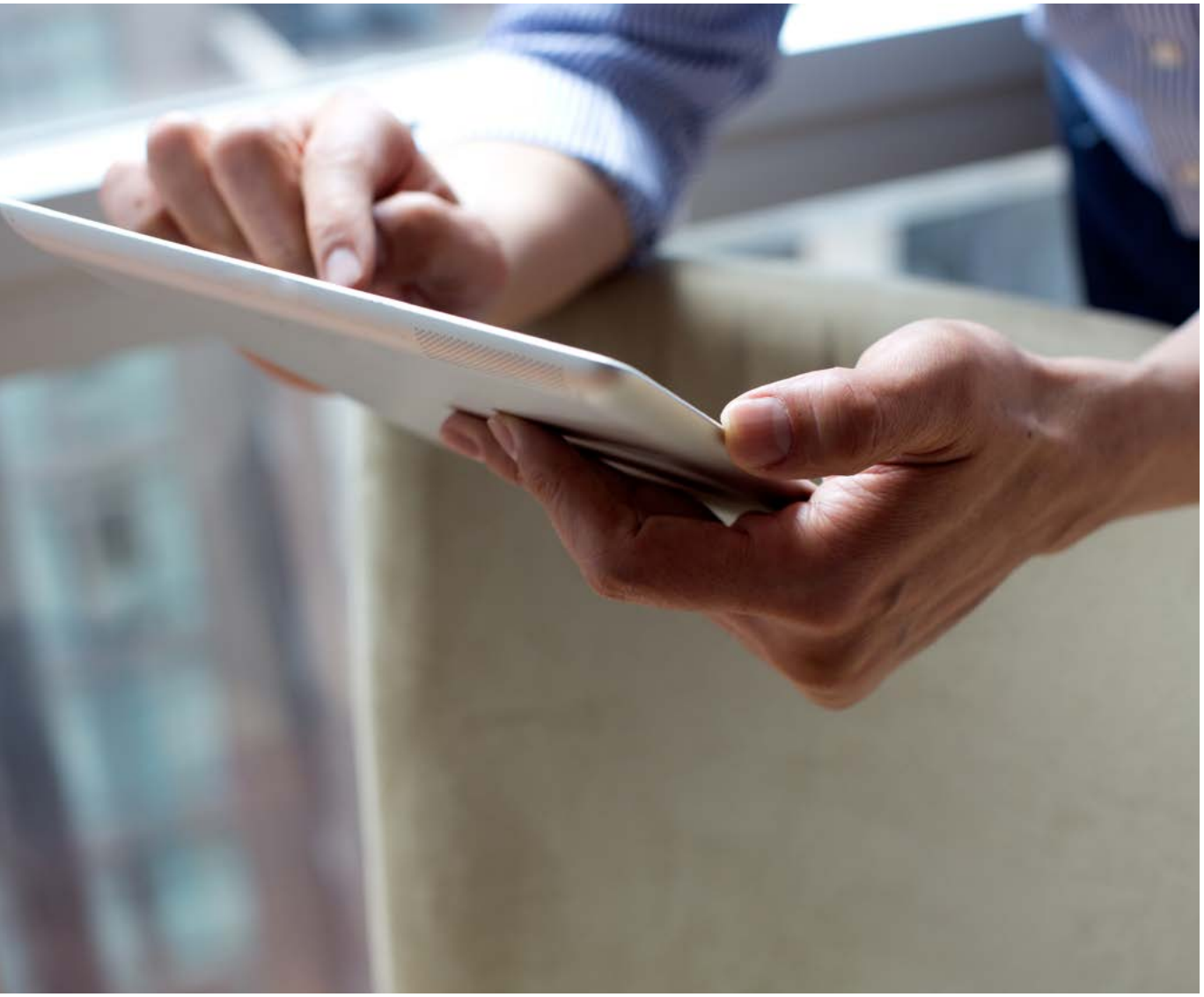
US

In the US, the role of the government is looked at very differently and, as a result, the government is not likely to set up similar UBO registers. The American community is relatively cautious about providing the government with sensitive information, and particularly privacy-sensitive information and, therefore, also about creating an obligation for private individuals and companies to provide such information. As far as that goes, it will be interesting to see how companies which are based in the EU and have American UBOs (or in general UBOs who are not EU residents) will deal with the imminent obligation to disclose information about their UBOs. The introduction of these registers in the EU will have far-reaching and radical consequences; UBOs all over the world will be affected.

Trusts

The obligation to provide information about UBOs also applies to trusts. This information only has to be made accessible to two of the three groups of interested parties: 1) authorities and their financial research departments and 2) service providers who are subject to statutory audits. The third group, the third parties (such as ordinary citizens and investigative journalists) with a 'legitimate interest', will not have access. This special treatment corresponds with the position held by trusts, which is very different from that of companies. A trust traditionally stands for the provision of protection for vulnerable people and of confidentiality, the detailing of inheritance of property and family businesses and the protection of specific assets.

There are legal forms in Europe which have identical functions to those of trusts (such as Truehand, fiducies, foundation, stichting administratiekantoor and anstalt). These are, for example, used for estate and business succession and, as such, participate very little in economic transactions. The AMLD does not stipulate that all these legal forms and structures also disclose information about their UBOs in a UBO register which is accessible for all three groups. The information about these legal forms' UBOs could be made accessible to the first two groups of interested parties only, as is the case with trusts, and under the same conditions. This would be in line with the confidential character of these legal forms, making the UBO register into an even more effective resource. On the one hand, the privacy of those involved would be more respected and, on the other, more information would be available for the supervisory authorities and service providers who are subject to statutory audits. After all, the definition of a UBO is much broader for trusts than for companies, which is, 'any natural person who has control over more than 25% of the assets'. In the case of trusts, almost all of those involved are designated UBOs (the settlor, the trustee(s), the protector, the beneficiaries and any other natural person with ultimate control over the trust). By handling legal forms and structures with identical functions as trusts in the same way, more justice will, in every respect, be done to the legal positions of UBOs and to the objective of the UBO register.



Concluding

UBOs' right to privacy has so far received very little exposure in the discussions on how to format the UBO register. Privacy is a fundamental right which, at the very least, deserves serious attention. We have been able to find very little research on how effective a UBO register and, more specifically, a public UBO register, will be in fighting terrorist financing, money laundering and fraud. And yet it seems to be acceptable for this fundamental right to be violated this way.

We call upon all EU member states to give more attention to finding a good balance between transparency and privacy in the remaining process of implementing the UBO registers!

Retrospect

*In the first publication on the UBO register: "**Finding a balance between transparency and privacy**", we informed you about the consequences of the UBO register for you and your (family) business and about the broad European context. For this we enlisted our PwC family business specialists from twelve countries, to investigate the impact of the UBO register for wealthy families and family business owners. – December 2015*

www.pwc.nl

Families in business

Finding a balance between transparency and privacy

A study of the impact of the UBO register on high-net-worth families and family businesses in twelve European countries

December 2015

pwc

Clarification

For this study, we enlisted our PwC family business specialists from fifteen countries: Austria, Belgium, Cyprus, Finland, Germany, Gibraltar, Ireland, Luxembourg, Malta, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom. In this appendix, we explain the design of our study and our approach.

Research question

Our principle research question is:

'What is the impact of the UBO- register that is introduced by the fourth anti-money laundering directive, on Family business owners and their family in the EU?'

To answer the question, we drew up the following sub-questions:

1. How is the UBO register implemented in the various EU Member States?
2. What does the current political and societal debate on this issue focus on?
3. How does the UBO register compare to anti-money laundering regulations in another jurisdiction, i.e. the US?
4. Is the introduction of the UBO- register a proportional measure?

Study method

We submitted a questionnaire containing 10 questions based on the above sub-questions to our family business specialists in the subject countries. We produced a summary of the answers to the questionnaire, processed the answers into the report and then submitted this report to the subject countries for comment. Based on the responses, we requested answers to specific follow-up questions where necessary.

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This publication was finalised on 6 July 2016. It does not take subsequent developments into account.

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