

CRS and beneficial ownership registers—a call to action

Filippo Nosedà



Abstract

Building on two articles published in the last two issues of *Trusts & Trustees*, the author looks back at the last 12 months and considers the timid positive responses in the campaign for a balanced approach to the issue of transparency. A recent change in the UK tax authorities' Common Reporting Standard (CRS) guidance is a sign of things to come. Campaigners should take comfort from a growing number of court decisions reaffirming the fundamental value of the right to privacy in a democratic society. The same goes for the increasing number of distress signals sent out by data protection authorities, including an opinion released on 2 February 2017 on the proportionality of the EU beneficial ownership registers and a letter dated 12 December 2016 to the EU and the OECD. However, positive cries of 'I have a dream' need to be assessed against reality. It will take someone with the courage to sacrifice their individual privacy in order to assert the right to privacy of society as a whole before the courts. Fortunately, collective support is on hand, but practitioners need to take a more activist approach before lives are endangered.

Overview

This article starts with a short description of the main content of the CRS and the EU rules concerning public registers on beneficial ownership. It then considers why public opposition to the idea of public registers is gaining traction (the European Data Protection Supervisor (EDPS) has just issued a damning opinion which comes hot on the heels of a French decision against public trust registers), whereas the CRS (which has already entered into force) appears to be a more difficult beast to tackle.

The article argues that this is down to the complexity of the CRS and that once the complexities are peeled off, the underlying issues are identical.

The author then reflects on the first timid successes of the CRS campaign (which include a change of heart by the UK tax authorities) and raises the question of Brexit and Theresa May's attitude towards the European Convention on Human Rights. Are we heading towards a continental bust-up in the area of privacy?

sensitive information about their clients. This information includes their name, place and date of birth, tax identification number, the name of their bank/branch, account number, account balance and income, and withdrawals during the fiscal period.

In the case of trusts and foundations, banks have to look through the structure and report any 'Controlling Person' whereas self-reporting trusts and foundations (ie those trusts and foundations that satisfy the definition of 'Reporting Financial Institution') will have to report anyone who has an 'Equity Interest' in the structure.

The formal definitions of 'Controlling Persons' and 'Equity Interest' holders contained in the CRS are almost identical and are based entirely on antimoney laundering (AML) concepts (basically, 'if it moves you must report'), rather than on the existence of an actual tax liability.¹ However, the OECD's commentary² embarks on a confusing analysis concerning discretionary beneficiaries—basically, no disclosure in the case of self-reporting

Once the complexities are peeled off, the underlying issues of the CRS and the beneficial ownership registers are identical. This has already been recognised by data protection authorities. It is now time for activists to act on those concerns

CRS in 30 seconds

Most readers will be familiar with the details of the CRS. However, here is a brief summary: The CRS provides for a generalised disclosure of sensitive information concerning wide categories of persons. There is no direct link between the CRS definitions and domestic tax laws. Thus, information exchange is independent of any actual tax liability.

Under the CRS, banks and other 'financial institutions' (which include most professionally managed trusts and foundations) have to disclose

trusts and foundations³ and an 'up to you' approach in the case of trusts and foundations that are not reportable financial institutions.⁴

Since the publication of the CRS, the OECD has touched on the status under CRS of protectors,⁵ Private Trust Companies and even dead settlors.⁶ However, while the CRS treatment of flying saucers is still unclear, the initiative has now passed to national governments, with subtle differences arising under local legislation and guidance. The devil, as they say, is in the detail.

Beneficial ownership registers in 20 seconds

The CRS concerns itself with the exchange of data between tax authorities. In addition, on 20 May 2015 the EU introduced the idea of public registers listing the beneficial ownership of corporate and other legal entities, as well as trusts.⁷ The beneficial registers provide for access to authorities and the public. Again, the definitions used are very wide and this has already met with stark warnings from data protection authorities. However, the definition of ‘beneficial owner’ contained in the new rules is almost identical to the CRS definitions of ‘Controlling Person’ and ‘Equity Interest’ holder under the CRS, reflecting the AML (rather than tax) nature of the directive.⁸

Under the 4th EU AML directive trusts are only subject to reporting ‘where the trust generates tax consequences’. In addition, access by the public at large requires ‘the demonstration of a public interest’.

The 4th EU AML Directive is yet to be fully implemented (the deadline is 26 June 2017). However, following the publication of the Panama Papers on 3 April 2016, some governments saw an opportunity to widen the scope of the new rules. Other governments were wrong-footed, prompting them into a state of political hyperactivity.

Following a personal attack in the press on the then Prime Minister David Cameron,⁹ the UK government had strong-armed the CDOTs (Crown Dependencies and the UK’s Overseas Territories) into signing Memoranda of Understanding paving the way for the exchange of beneficial information on request (within one hour) concerning all sorts of legal structures (including trusts).¹⁰ The following day, George Osborne wrote a letter on behalf of the G-5¹¹ and addressed to the G-20 and the EU calling both for the:

collective action on increasing beneficial ownership transparency’ and ‘the development of a system of interlinked registries containing full beneficial ownership information and [a] mandate [to] the OECD, in cooperation with FATF, to develop common international standards for these registries and their interlinking.

Since then, the EU has been locked in negotiations for the creation of fully public registers that would also extend to trusts.

However, a French decision dated 21 October 2016 (by which the French Constitutional Council declared that a public trust register introduced in 2013 violated the legitimate right to privacy of citizens)¹² has thrown the so-called 5th EU AML Directive into disarray.

The latest shot across the EU’s bow was fired by the EDPS, who on 2 February 2017 published an opinion¹³ in which the EDPS criticized the lack of clarity on the nature of the public objective

being pursued and ‘a lack of proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection’.

A deafening silence

Everyone seems to agree on the shaky legal basis and perilous nature of the proposed beneficial ownership registers.

However, there is a deafening silence surrounding the legality of the CRS. I would go further and say that there is a supine acceptance everywhere of the CRS.

Indeed, when I first started my campaign in May June 2015, people—even those in the highest echelons of prestigious professional organizations—told me that I was fighting a lost battle, even a dangerous battle (because of the risk of being seen as a defender of tax evaders).

This is baffling, as the CRS and interlinked/public registers raise the same issues, notably the proportionality between the public objective pursued (notably the legitimate fight against tax evasion) and the right of compliant taxpayers to preserve a sphere of confidentiality and protect their data from hacking.

It’s the complexity, stupid!

I thought long and hard about the reason for this dual approach and it finally hit me that the explanation rests in the complexity of the CRS.

I remember the advice that was given to me by an experienced lawyer at the beginning of my career. Faced with a barrage of compelling legal arguments from the other side in a complex piece of litigation, and clearly in difficulty, I asked him for advice. He told me that if I could not make a simple argument, the way to win the day was to make up a complex case and bury the other side under a mountain of paper. (Readers should note that the principles of disclosure and discovery are unknown in Switzerland, where it is up to the parties to make and prove their case.)

That’s it—everyone understands the concept of ‘beneficial ownership’, and anyone who has ever bought or sold a house or set up a company understands how a register operates.

Therefore, everyone understands the dangers posed by a public or interlinked register to the right to privacy of compliant individuals.

By contrast, the CRS requires one to navigate through complex definitions, seemingly meaningless cross-references (‘The term “Passive NFE” means any NFE that is not an Active NFE’), exceptions and exceptions to the exception.

There are, in the CRS, 47 defined terms in total.¹⁴ Some of these terms are self-explanatory (eg ‘Governmental Entity’), while others are gibberish

and read like a mathematical formula spanning several pages (see eg the definition of ‘Active NFE’).¹⁵ Finally, some of the defined terms assume a different meaning according to whether one is looking at the Organisation for Economic Co-operation and Development (OECD) Commentary, the OECD Handbook and/or one of the OECD published FAQs, leaving practitioners utterly confused (as well as depressed) and clients exposed to the risk of wrong reporting.

Cutting across complexities

Essentially, the problem with the CRS is that it borrows heavily from a piece of US legislation (the Foreign Accounts Tax Compliance Act) which has been drafted with complex US tax laws in mind, thus importing US jargon into European law and imposing US drafting techniques on hapless European practitioners and hapless compliance officers tasked with policing a system and interpreting jargon they hardly have a chance of understanding.

The problem could not be simpler

Once one cuts across the drafting complexities of the CRS, its underlying problem is disarmingly simple—the CRS requires the exchange of sensitive personal and financial information to foreign tax authorities on a generalized basis.

As such, the fundamental issues are the same as those posed by interlinked/public registers.

It was left to data protection bodies to understand the dangers to the right to privacy and data protection. The problem was stated in simple terms in the EDPS’s opinion on the Swiss-EU CRS Agreement dated 8 July 2015 (ie over one and half years ago!)¹⁶:

The exchange of information on a certain number of accounts on an annual basis confirms our view that the information exchange is independent of the detection of any actual risk of tax evasion, thus questioning the proportionality of the measure itself. . . .

Any [such] agreement or future implementing measure should:

- ensure proportionality of the data processing, by making the collection and exchange of tax information conditional on the effective risk of tax evasion and by implementing criteria to exempt low-risk accounts from reporting;

- limit the purpose of data processing to the pursuit of a legitimate policy goal and prevent use for additional purposes without informing data subjects;

- provide for proper information of the data subjects (pursuant to Article 10 of the Data Protection Directive) as to the purpose and modalities of processing of their financial data, including the recipients of their data;

- et forth explicit security and data protection standards to be complied with by private and public authorities engaging in the collection and exchange of tax information (privacy-by-design). It should also provide for sanctions in case of breach of such provisions;

- provide for an explicit retention period applicable to the tax information exchanged and mandate for its deletion, once such information is no longer processed for the purpose of countering tax evasion.

The EU’s independent data protection working party (WP29) and the Council of Europe’s consultative committee on privacy and data protection issues (T-PD) have issued equally stark warnings.

The last warning in order of time was issued by WP29 in a letter to the OECD and the EU dated 12 December 2016 in which the EU’s data protection experts lamented the lack of attention given by the OECD and policymakers to privacy and data protection concerns:

the WP 29 wishes to reiterate its strong concerns regarding the repercussions on fundamental rights of mechanisms entailing major data processing and exchange operations such as those envisaged by the CRS.

Additional concerns in relation to the security of massive automatic data processing have been raised by recent reports in the media of high-profile cyber attacks.

The WP . . . recalls that the entire range of data protection principles . . . require full compliance. Compliance with data protection principles is moreover important to reduce the risk of negative court decisions which may jeopardize the anti-evasion instruments at stake.

In particular the WP29 recommends that the OECD . . . ensure that tax evasion is countered without hampering individuals’ rights.

Nevertheless, the international community did not take heed of his warnings shot from the EU’s highest data protection officer, as well as other data protection bodies.¹⁷ This was not because they were wrong, but because no-one outside the data protection community seems to have understood the issue and felt the need to take governments to task.

The problem is that the CRS is already a reality

Unlike the embattled EU registers on beneficial ownership, the CRS is already a reality, having entered into force in the EU¹⁸ and across a vast number of Early Adopters on 1 January 2017. This means that, unless action is taken swiftly, sensitive personal and financial information will be exchanged in summer 2017.

Practical data protection issues

The CRS Commentary states that ‘Confidentiality of taxpayer information has always been a fundamental cornerstone of tax systems’ and praises the ‘culture of care within tax administrations’.¹⁹

However, if recent experience is anything to go by, the OECD statement merely pays lip-service to the right to privacy.

How could one otherwise explain the revelation by the Canadian government (just a few days ago) that the Canadian tax authorities lost a DVD containing encrypted taxpayer information which contained the tax information of approximately 28,000 taxpayers?²⁰

It beggars belief that nine years after the UK lost two CDs containing personal details of 25 million people, tax authorities²¹ are still sending data in the same way. Be that as it may, this latest incident shows very clearly that tax authorities are not to be trusted with sensitive data.

Sceptics will also recall 2008, when the outgoing Italian government released the tax returns of Italian citizens on the Internet as part of a crackdown on tax evasion.²²

But there are also more sinister incidents that cast a long shadow on the idea that governments should receive sensitive personal and financial data concerning all their citizens.

In the EU:

Poland is under formal investigation by the European Commission which believes that there is a systemic threat to the rule of law in Poland with concerns extending to the protection of the right to privacy²³; Romania showed the level of corruption that pervades the state machine when the government tried to pass a law at the beginning of February 2017 that would have protected many politicians from being prosecuted for corruption.²⁴

Outside the EU, corruption appears to be not only endemic, but also an asset for politicians. Statements like the one made by David Cameron about ‘fantastically corrupt countries’ and statistics showing the level of corruption and cronyism in countries that have adopted the CRS are well known.²⁵ In a recent article, The Economist has tracked ‘the remarkable political success of India’s accused murderers, blackmailers, thieves and kidnappers’, suggesting that Indian politicians who have been charged with or convicted of serious misdeeds are three times as likely to win parliamentary seats.²⁶ In another recent article (published on 6 February) the Financial Times ran a column entitled ‘Modi’s clean-up of electoral funding risks leaving bad smell’,²⁷ showing the systemic risks faced by ordinary and compliant citizens. The same applies to citizens who live in CRS countries engulfed by corruption scandals (eg Argentina, Brazil, China, Russia to name just

a few). All this exposes the naïve (and dangerous) nature of the OECD’s idea of a global transparent world as the answer to the evil of tax evasion.

First tentative successes of CRS campaign

The practical issues mentioned above have not gone unnoticed in Whitehall. Following an active campaign which took me to Strasbourg and Brussels,²⁸ as well as representation from charities, the UK tax authorities have revised their CRS guidance,²⁹ accepting that:

in some cases, the activities or background of the individual [subject to information exchange] may mean that supplying data to the other jurisdiction will place them at risk. The types of risks individuals face are numerous. HMRC recognises that there may be cases where the threat to individuals as a result of their information being exchanged may warrant information being redacted from that transmitted.

The problem with HMRC’s belated admission and extra-statutory approach is that it covers only charities. However, the protection of human rights is a universal principle. The tax authorities know this. However, they bank on the lack of opposition to force through the CRS in its current form.

Proportionate solutions – PayPal?

The inadequacy of the CRS is evidenced by the possibility of achieving the same objective of fighting tax evasion through alternative means that are more respectful of the right of compliant citizens to privacy. These alternative systems have been discussed in other articles and remain viable alternatives. An idea that was discussed before the European data protection authorities (where I appeared as an expert) entailed the creation of a clearing house funded by governments and the banking sectors which could be used by financial institutions for the purpose of calculating and settling any tax liability without sending personal data outside the relevant financial institution. This ‘PayPal’ idea is an evolution of the withholding tax system elaborated by Switzerland under the name of ‘Rubik’. Such a system would centralize compliance (thus relieving banks from the burden of calculating taxes for all those clients who opted to maintain confidentiality) without compromising either the right to privacy, or data protection. Another alternative, of course, would be to go back to the system of tax exchange enshrined under Article 26 of the OECD Model, which was never allowed to work after countries such as Switzerland withdrew their reservation to the Article 26 of the Model Double Tax Convention based on banking secrecy arguments.

If men were angels

A person once told me that the CRS is only a problem for those who have something to hide.

The reality could not be more different. It is about the role of privacy and data protection in the modern world.

The issue was summarized in the most recent EJC case³⁰ decided on 21 December 2016 concerning the illegality of data retention laws enacted by the UK and Sweden as follows (Attorney General’s opinion):

In 1788, James Madison, one of the authors of the United States Constitution, wrote: ‘If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. The retention of communications data enables ‘the government to control the governed’ by providing the competent authorities with a means of investigation that may prove useful in fighting serious crime . . . However, on the other hand, it is imperative to ‘oblige [the government] to control itself’, with respect to both the retention of data and access to the data retained, given the grave risks engendered by the existence of databases which encompass all communications made within the national territory.

The impact of Brexit on the privacy debate

In practice, there seems to be not one but two different concepts of privacy in Europe, neatly divided along the common law–civil law divide. This was summarized in a recent report on the UK Investigatory Powers Bill³¹:

I think we are right to be concerned that there are differences in the way our judges look at these issues. On the retention of DNA . . . for example, all our judges. . . said that it was fine to retain indefinitely the data of people who had been arrested but not charged. Seventeen judges in Strasbourg to nil took the opposite view, and there are judges from Germany and countries of Eastern Europe who had a rather different experience in the 20th century and who are more privacy-minded and less inclined to tolerate these powers than people are here. I hope we are not heading for a bust-up on that, but from the lawyers’ point of view that remains a major issue.

Thus, it is perhaps not surprising that in a recent decision on the legality of the Foreign Account Tax Compliance Act (FATCA) a US court (citing the US Supreme Court) stated that there is, under US law ‘no reasonable expectation of privacy’ in ‘information kept in bank records’.³²

Less surprising still is that the European Court of Justice cited the inadequate level of privacy in the landmark decision of 6 October 2015 by which the EU’s highest court declared that the existing US–EU safe harbour arrangement for the exchange of Internet data between the EU and the US violated the fundamental right to privacy enshrined under EU law.

Possibly, this might also explain the lack of outrage in the UK when suggestions that the current UK Prime Minister, Theresa May, might take Britain out of European Convention on Human Rights once Brexit is completed keep resurfacing.³³

Finally, given my continental European background, the different approach to the issue of privacy might explain why fellow practitioners in the UK kept telling me in the past to let this one go, only for me to keep fighting on.

But as the fight over the EU registers of beneficial ownership intensifies, our paths might finally cross.

What we need now is a pilot case to bring before the courts. No more waiting. Now is the time for action to bring the discussion about transparency and privacy back from the brink.

©The Author (2017). Published by Oxford University Press. All rights reserved.

1. See sVIII, definition C(4): ‘The term “Equity Interest” means, in the case of a partnership that is a Financial Institution, either a capital or profits interest in the partnership. In the case of a trust that is a Financial Institution, an Equity Interest is considered to be held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. A Reportable Person will be treated as being a beneficiary of a trust if such Reportable Person has the right to receive directly or indirectly (for example, through a nominee) a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust’ (emphasis added). Compare and contrast with the definition of ‘Controlling Person’ contained in subpara D(6): ‘The term “Controlling Persons” means the natural persons who exercise control over an Entity. In the case of a trust, such term means the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions. The term “Controlling Persons” must be interpreted in a manner consistent with the Financial Action Task Force Recommendations’ (emphasis added).
2. <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>(accessed 29 March 2017).
3. See para 70 of the Commentary: ‘The definition of the term “Equity Interest” specifically addresses interests in partnerships and trusts. Under subparagraph C(4), a Reportable Person will be treated as being a beneficiary of a trust if such Reportable Person has the right to receive, directly or indirectly (for example, through a nominee), a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust. For these purposes, a beneficiary who may receive a discretionary distribution from the trust only will be treated as a beneficiary of a trust if such person receives a distribution in the calendar year or other appropriate reporting period (i.e. either the distribution has been paid or made payable). The same is applicable with respect to the treatment of a Reportable Person as a beneficiary of a legal arrangement that is equivalent or similar to a trust, or foundation’ (emphasis added).
4. See para 133 of the Commentary: ‘The settlor(s), the trustee(s), the protector(s) (if any), and the beneficiary(ies) or class(es) of beneficiaries, must always be treated as Controlling Persons of a trust, regardless of whether or not any of them exercises control over the trust. . . [However], when implementing the Common Reporting Standard, a jurisdiction may allow Reporting Financial Institutions to align the scope of the beneficiary of a trust [or foundation] treated as Controlling Person of the trust [or foundation] with the scope of the beneficiary [who is treated as having an Equity Interest] in a trust [or foundation] that is a Financial Institution’ (emphasis added).
5. Protectors are not expressly mentioned in the formal definition of ‘Equity Interest’ holder. Unsurprisingly, the OECD stuck to its expansive approach <https://www.oecd.org/tax/automatic-exchange/common.../CRS-related-FAQs.pdf>(accessed 29 March 2017).
6. See <www.step.org/sites/default/files/Policy/Guidance_Note_CRS.pdf>accessed 7 February 2017.
7. Directive (EU) 2015/849, aka as the 4th EU AML Directive.
8. art 3(6)(b): “‘beneficial owner’ means any natural person(s) who ultimately owns or controls the customer . . . and [in the case of a trust] includes at least i. the settlor; ii. the trustee(s); iii. the protector, if any; iv. 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; v. (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means; (c) in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point (b);’
9. Three days after the Panama Papers scandal broke out, the Financial Times ran a front page story entitled ‘David Cameron’s EU intervention on trusts set up tax loophole’ in which the FT stated that ‘David Cameron personally intervened in 2013 to weaken an EU drive to reveal the beneficiaries of trusts.’ The newspaper further commented that ‘the disclosure of the prime minister’s resistance to opening up trusts to full scrutiny comes as he faces

intense pressure to make clear whether his family stands to benefit from offshore assets linked to his late father'.

10. See <<https://www.gov.uk/government/collections/beneficial-ownership-uk-overseas-territories-and-crown-dependencies>> (accessed 7 February 2017).

11. See <<https://www.gov.uk/government/publications/g5-letter-to-g20-counterparts-regarding-action-on-beneficial-ownership>> (accessed 7 February 2017).

12. De'cision no 2016-591 QPC du 21 octobre 2016; for a discussion, see F Nosedá, *The Times* (21 November 2016) <<http://nuk-tnl-deck-email.s3.amazonaws.com/11/03b2ceb73723f8b53cd533e4fba898ee.html4>> accessed 7 February 2017.

13. EDPS Opinion 1/2017 on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC—Access to beneficial ownership information and data protection implications <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2017/17-02-02_Opinion_AML_EN.pdf> accessed 7 February 2017.

14. 'Financial Institution'; 'Reporting Financial Institution'; 'Non-Reporting Financial Institution'; 'Participating Jurisdiction Financial Institution'; 'Custodial Institution'; 'Investment Entity'; 'Financial Asset'; 'Specified Insurance Company'; 'Governmental Entity'; 'International Organisation'; 'Central Bank'; 'Broad Participation Retirement Fund'; 'Narrow Participation Retirement Fund'; 'Pension Fund of a Governmental Entity, International Organisation or Central Bank'; 'Qualified Credit Card Issuer'; 'Exempt Collective Investment Vehicle'; 'Financial Account'; 'Depository Account'; 'Custodial Account'; 'Equity Interest'; 'Insurance Contract'; 'Annuity Contract'; 'Cash Value Insurance Contract'; 'Cash Value'; 'Preexisting Account'; 'New Account'; 'Preexisting Individual Account'; 'New Individual Account'; 'Preexisting Entity Account'; 'Lower Value Account'; 'High Value Account'; 'The term 'New Entity Account'; 'Excluded Account'; 'Reportable Account'; 'Reportable Person'; 'Reportable Jurisdiction Person'; 'Reportable Jurisdiction'; 'Participating Jurisdiction'; 'The term 'Controlling Persons'; 'NFE'; 'Passive NFE'; 'Active NFE'; 'Account Holder'; 'AML/KYC Procedures'; 'Entity'; 'Related Entity'; 'TIN'; and 'Documentary Evidence'.

15. The term 'Active NFE' means any NFE that meets any of the following criteria:

a. less than 50% of the NFE's gross income for the preceding calendar year or other appropriate reporting period is passive income and less than 50% of the assets held by the NFE during the preceding calendar year or other appropriate reporting period are assets that produce or are held for the production of passive income;

b. the stock of the NFE is regularly traded on an established securities market or the NFE is a Related Entity of an Entity the stock of which is regularly traded on an established securities market;

c. the NFE is a Governmental Entity, an International Organisation, a Central Bank, or an Entity wholly owned by one or more of the foregoing;

d. substantially all of the activities of the NFE consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a Financial Institution, except that an Entity does not qualify for this status if the Entity functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund, or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes;

e. the NFE is not yet operating a business and has no prior operating history, but is investing capital into assets with the intent to operate a business other than that of a Financial Institution, provided that the NFE does not qualify for this exception after the date that is 24 months after the date of the initial organisation of the NFE;

f. the NFE was not a Financial Institution in the past five years, and is in the process of liquidating its assets or is reorganising with the intent to continue or recommence Institution;

g. the NFE primarily engages in financing and hedging transactions with, or for, Related Entities that are not Financial Institutions, and does not provide financing or hedging services to any Entity that is not a Related Entity, provided that the group of any such Related Entities is primarily engaged in a business other than that of a Financial Institution; or

h. the NFE meets all of the following requirements:

i. it is established and operated in its jurisdiction of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or it is established and operated in its jurisdiction of residence and it is a professional organisation, business league, chamber of commerce, labour organisation, agricultural or horticultural organisation, civic league or an organisation operated exclusively for the promotion of social welfare;

ii. it is exempt from income tax in its jurisdiction of residence;

iii. it has no shareholders or members who have a proprietary or beneficial interest in its income or assets;

iv. the applicable laws of the NFE's jurisdiction of residence or the NFE's formation documents do not permit any income or assets of the NFE to be distributed to, or applied for the benefit of, a private person or noncharitable Entity other than pursuant to the conduct of the NFE's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFE has purchased; and

v. the applicable laws of the NFE's jurisdiction of residence or the NFE's formation documents require that, upon the NFE's liquidation or dissolution, all of its assets be distributed to a Governmental Entity or other non-profit organisation, or escheat to the government of the NFE's jurisdiction of residence or any political subdivision thereof.

16. Opinion 2/2015 of the EDPS on the EU–Switzerland agreement on the automatic exchange of tax information dated 8 July 2015 <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2017/17-02-02_Opinion_AML_EN.pdf> accessed 7 February 2017.

17. For a summary, see F Nosedá, 'Trusts And Privacy: A New Battle Front' and 'Common Reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection of Privacy and Data Protection', both published in *Trusts & Trustees*, (2016) 22 (6): 599-604. 18. Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. (OJ L 342, 16.12.2016, p. 1).

19. Commentary on s 5 concerning Confidentiality and Data Safeguards.

20. Canada Revenue Agency launching info line after loss of encrypted data DVD by private courier service <<http://news.gc.ca/web/article-en.do?nid=11858094>> (accessed 7 February 2017).

21. <<http://news.bbc.co.uk/2/hi/7104368.stm>> (accessed 30 March 2017).

22. <www.nytimes.com/2008/05/01/world/europe/01iht-01italy.12490611.html> (accessed 30 March 2017).

23. <europa.eu/rapid/press-release_IP-16-2643_en.htm4> (accessed 30 March 2017).

24. <www.cnn.com/2017/02/05/europe/romania-protests-corruption/> (accessed 30 March 2017).

25. See eg the Transparency International Corruption Perception Index, the Economist Crony-Capitalism Index.

26. *The Economist* – India, Conviction Politicians (4 February 2017); see <<http://www.economist.com/news/books-and-arts/21716019-penchant-criminalityelectoral-asset-india-worlds-biggest>> (accessed 30 March 2017).

27. See <<https://www.ft.com/content/639e1d60-e9f9-11e6-893c-082c54a7f539>> (accessed 7 February 2017).

28. See <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId%09000016806b6e84>> and <<http://www.coe.int/en/web/dataprotection/agenda-39th-t-pd-bureau-meeting>> (accessed 30 March 2017).

29. <<https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim406010>> (accessed 30 March 2017).

30. Tele 2 Sverige and Tom Watson – Joined cases C-203/15 and C-698/15 <<http://curia.europa.eu/juris/liste.jsf?num%2FC-203/154>> (accessed 30 March 2017).

31. House of Lords, House of Commons and Joint Committee on Human Rights, *Legislative Scrutiny: Investigatory Powers Bill* (First Report of Session 2016–17) <www.publications.parliament.uk/pa/ft201617/jtselect/jtrights/104/104.pdf> accessed 7 February 2017.

32. Crawford et al v United States Department of the Treasury et al, No 3:2015cv00250, see <<http://law.justia.com/cases/federal/district-courts/ohio/ohsdce/3:2015cv00250/185901/30/>> (accessed 30 March 2017).

33. <www.telegraph.co.uk/news/2016/11/28/theresa-may-fight-2020-election-plans-take-britain-european/> (accessed 30 March 2017).