

TOO MUCH INFORMATION: WHEN THE UK GETS IT WRONG

The constitutional fallout of flawed UK decisions in the area of tax transparency¹

Filippo Nosedà

Two recent articles published in the Jersey and Guernsey Law Review revisited the Crown Dependencies' evolving relationship with the UK Parliament following two Supreme Court decisions in the long-running feud between the Barclay brothers and the Island of Sark in the Bailiwick of Guernsey. Those articles look at the mechanisms for the UK to impose its will on the Dependencies. But what if the UK gets it wrong in an area of central importance for the Islands' economy, such as financial services? The first part of this article discusses recent UK intervention in the Crown Dependencies' affairs in the field of taxation. It then highlights the flaws of the underlying UK policy decisions and asks what the Crown Dependencies should do in these circumstances.

Recent work

1 Over the past two years, I have written a number of articles on the Common Reporting Standard ("CRS") and the EU's Registers of Beneficial Ownership in which I raised a number of concerns on the compatibility of the proposed framework with existing human rights and data protection laws. I was also able to elaborate my concerns before the Council of Europe's consultative committee for the protection of data ("T-PD") and the EU's data protection working party established under art 29 of the EU's data protection directive to advise the EU on data protection issues ("Article 29 Working Party" or "WP 29").

2 That work culminated in December 2016 with a strongly worded letter from the WP 29 to the OECD and the EU in which—

¹ This article had its genesis in a presentation to a conference held on 24 March 2017 entitled "The future of financial law" organised by the Institute of Law.

“the WP 29 reiterates 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. In particular, the WP 29 recommends that the OECD . . . ensure that tax evasion is countered without hampering individuals’ rights”.²

3 Shortly afterwards (on 2 February 2017), the European Data Protection Supervisor (“EDPS”) issued an equally strongly worded opinion on the proposed EU’s public registers of beneficial ownership under the draft 5th EU anti-money-laundering directive.³ In that opinion, the EDPS decried the unclear objectives pursued by the proposal and, more generally, the invasive nature and lack of proportionality of the proposed registers.⁴

² http://ec.europa.eu/newsroom/document.cfm?doc_id=42942 (accessed 17 April 2017).

³ EDPS Opinion 1/2017; Opinion on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC—Access to beneficial ownership information and data protection implications https://edps.europa.eu/sites/edp/files/publication/17-02-02_opinion_aml_en.pdf (accessed 2 April 2017).

⁴ “We are concerned with the fact that the amendments also introduce other policy purposes—other than countering anti-money laundering and terrorism financing—that do not seem clearly identified.

Processing personal data collected for one purpose for another, completely unrelated purpose infringes the data protection principle of purpose limitation and threatens the implementation of the principle of proportionality. The amendments, in particular, raise questions as to why certain forms of invasive personal data processing, acceptable in relation to anti-money laundering and fight against terrorism, are necessary out of those contexts and on whether they are proportionate.

As far as proportionality is concerned, in fact, the amendments depart from the risk-based approach adopted by the current version of the AML Directive, on the basis that the higher risk for anti-money laundering, terrorism financing and associated predicate offences would not allow its timely detection and assessment.

They also remove existing safeguards that would have granted a certain degree of proportionality, for example, in setting the conditions for access to information on financial transactions by Financial Intelligence Units.

Last, and most importantly, the amendments significantly broaden access to beneficial ownership information by both competent authorities and the public, as a policy tool to facilitate and optimise

The importance of history

4 As a Swiss lawyer turned English solicitor some 15 years ago, I have always been deeply fascinated by the Channel Islands' unique constitutional position, an interest that I was able to feed thanks to the copious material published by the *Jersey and Guernsey Law Review*.⁵

5 At the beginning, as a novice and an outsider, my interest was aroused by such pub quiz trivia as to whether the Queen exerts her power *qua* English sovereign or Duke of Normandy.⁶ However, I soon discovered that such questions were capable of influencing modern

enforcement of tax obligations. We see, in the way such solution is implemented, a lack of proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection.”

⁵ Notable articles and other publications include (in chronological order): Matthews, “Lé Rouai, Nouot’ Duc”, JGLR, 1999; Jowell, “The Scope of Guernsey’s Autonomy: a Brief Rejoinder”, JGLR, 2001; Falle, “Jersey and the United Kingdom: a Choice of Destiny”, JGLR 2002; van Leuven, “Constitutional Relationships within the Bailiwick of Guernsey”, JGLR 2004; Jowell, “The UK’s Power of Jersey’s Domestic Affairs”, in *A Celebration of Autonomy 1204–2004: 800 Years of Channel Islands’ Law* (2005); Dawes, “A 16th-century View of Terrien”, JGLR 2008; Nicolle, *The Origin and Development of Jersey Law. An Outline Guide* (5th ed, 2009); Bailhache, “One or Two Steps from Sovereignty”, JGLR 2009; Conference Proceedings, “Dependency or Sovereignty? Time to Take Stock”, JGLR 2010; Johnson, “Orders in Council and the Extension of Acts of Parliament to the Channel Islands”, JGLR 2012; Mariani, “Jersey and the Public International Law Dimension of Sovereignty”, JGLR 2013; Conference Proceedings, “Confederation of the Channel Islands? Next Steps”, JGLR 2013; Kelleher, “Introduction to the Report of the Royal Commissioners, 1811”, JGLR 2014; Carey, “The Abandonment of the Grand Principles of Norman Custom in the Law of Succession of the Bailiwick of Guernsey”, JGLR 2014; Vincent, “Magna Carta (1215) and the Charte aux Normands (1315): Some Anglo-Norman Connections and Correspondence”, JGLR 2015; Dixon, “Jersey and the European Convention on Human Rights—Options should the United Kingdom Denounce the Convention”, JGLR 2015; Pullum and Titterington, “From Sark to the Supreme Court”, JGLR 2015; Dawes, “Documents of Constitutional Importance for the Channel Islands: Reflections on a *Rencontre*”, JGLR 2015; Bailhache, “The Royal Charter of Elizabeth I of 27 June 1562”, JGLR 2016; Jowell, Steele and Pobjoy, “The *Barclay* Cases: Beyond Kilbrandon”, JGLR 2017; Dixon, “Jersey’s Relationship with the UK Parliament”, JGLR 2017.

⁶ See Matthews, “Lé Rouai, Nouot’ Duc” —*supra* n 4.

legal history, as evidenced by the 1950s dispute between the UK and France over the islets and rocks of the Ecrehos and the Minquiers groups (mainly, about fishing rights).⁷

6 More recently, the relevance of history for the outcome of a modern case was brought home to me by the long-running dispute between the Barclay brothers and the government of Sark.⁸ At one point (when they were disputing Sark's inheritance law of primogeniture), the brothers claimed that the Island of Brecqhou may not be part of Sark at all,

⁷ *France v UK*, [1953] ICJ Rep 47 (<http://www.icj-cij.org/docket/index.php?sum=88&p1=3&p2=3&case=17&p3=5>). For a discussion see Roche, *The Minquiers and Ecrehos Case (An Analysis of the Decision of the International Court of Justice)*, University of Geneva, 1959 (partly available online via Google Books).

⁸ The Barclay brothers bought the island of Brecqhou in 1993, paying the traditional *treizième* (one thirteenth) of the purchase price to Sark's lord, Seigneur Michael Beaumont. However, relations between the brothers and the *seigneur* soon soured over such trivial issues as the local ban on motor cars as well as a proposals by Sark to extend its formal control over Brecqhou's shoreline. The dispute escalated when the Barclay brothers challenged the local inheritance law; this mandated a devolution of property to the eldest son, whereas Sir David and Sir Frederick wished to leave Brecqhou equally to their children. The dispute took on a constitutional dimension when the brothers claimed that Brecqhou may not be part of Sark at all. They also claimed that the existing laws violated the European Convention on Human Rights and threatened litigation before the European Court of Human Rights in Strasbourg. That case settled in 2008 when Sark agreed to change its inheritance laws. However, new contentions soon arose and the Barclay brothers mounted a number of challenges which sought to overturn the existing feudal system, which included a government (Chief Pleas) made up primarily of inherited tenants (landowners), a *Sénéchal* and a hereditary *Seigneur*. The feud reached the UK Supreme Court on two separate occasions (in 2009 and then again in 2014), forcing a discussion on the UK's relationship with the Channel Islands and the role of the courts of England and Wales (including the UK Supreme Court) in the legislative process of the island of Sark. In terms of substance, the Barclay brothers claimed that the reforms violated a number of rights under the European Convention of Human Rights. Perhaps unsurprisingly, three British nationals living in Sark launched a separate challenge against Sark's reform law before the European Court of Human Rights. That challenge, however was held inadmissible by the judges in Strasbourg (see *Le Lievre v UK*, App No 36522/15, decision of 1 March 2016, accessible online at: <http://hudoc.echr.coe.int/eng?i=001-161891>).

because Brecqhou was not mentioned in Sark's earliest constitutional documents (including the letters patent issued by Queen Elizabeth I in 1565 granting perpetual lease of the Island of Sark to the first *seigneur*).

Keeping up with modernity

7 On the other hand, the feud between the Barclay brothers and Sark is also a clear indication of the need for local legal systems—no matter how old and steeped in history they might be—to adapt to modernity. Indeed, the main tactic deployed by the Barclay brothers has been to claim that the laws of Sark (in their existing and reformed shape) were in breach of a number of fundamental rights enshrined in the European Convention on Human Rights (ECHR). These have been incorporated in the domestic laws of the Channel Islands by the Human Rights (Jersey) Law 2000 and the Human Rights (Bailiwick of Guernsey) Law 2000 respectively. In a nutshell, these laws (a) require all local legislation to be interpreted as far as possible in a way which is compatible with the ECHR; and (b) require public authorities not to act in any way which is not compatible with the ECHR.

The deep reach of modernity—impact on constitutional relations

8 The relationship between the Crown Dependencies and the UK is not immune from the clutches of modernity, at least in the eyes of the judiciary. My reading of the recent articles on the *Barclay* cases⁹ is that of a shift from the traditional orthodoxy of Parliamentary Supremacy (espoused by the Royal Commission Report of 1973) to a more modern approach based on consent on domestic matters, and consultation in international matters.

9 From the uninformed perspective of a practitioner of continental European origins (and putting aside technicalities for a moment), the judicial approach taken by the highest judges in the land (by which I mean the UK) reflects the predominant post-colonial sentiment that permeates 21st century society.

10 Of course, the Crown Dependencies have never been colonies—as Lady Hale succinctly pointed out in *Barclay (No 2)*¹⁰—and the

⁹ Jowell, Steele and Pobjoy, “The *Barclay* Cases: Beyond Kilbrandon”, and Dixon, “Jersey’s Relationship with the UK Parliament Revisited”—*supra* n 4.

¹⁰ *R (Barclay) v Justice Secy (No. 2)* 2014 GLR 201, at para 8—
“the bailiwicks . . . were not settled by, or conquered by, or ceded to the United Kingdom as colonies. Their link with the United Kingdom . . . is

relationship between the Crown Dependencies and the UK has very different roots. However, to paraphrase the House of Commons Justice Committee,¹¹ in the absence of any “extreme circumstances” or a “fundamental breakdown in public order or endemic corruption” of the kind that led to direct rule in the Turks & Caicos Islands in 2009,¹² it is difficult to envisage a situation in which a modern government elected somewhere else can legitimately impose its will on a separate territory without obtaining the consent of, or at the very least consulting with, the local authorities.

11 It is therefore unsurprising that illustrious authors writing for this review have already downgraded the UK’s relationship with the Crown Dependencies as a matter of “practical power”, i.e. not something that rests on a legitimate source of law, but rather on the fact that the Crown acts on the advice of ministers sitting in the UK cabinet.

12 One should be pleased with the Supreme Court’s approach which is in line with modernity whilst recognising the Crown Dependencies’ unique history.

Really?

13 In light of the most recent case law, the approach taken by the UK government (as well as the opposition) in relation to the whole business of tax transparency leaves one speechless. The same applies to the reaction (or lack thereof) of the governments of the Crown Dependencies.

14 It all started, of course, with the “Panama Papers”, a scandal exploded at the beginning of 2016 that reached the doorstep of Downing Street because of allegations concerning the late father of the then Prime Minister, David Cameron. It turned out that Mr Cameron did nothing wrong but in the class-ridden society that is Britain, the accusation that the Prime Minister might be “a bit of a rich toff”¹³ is

through the Crown, not in the sense of the ultimate executive authority in the United Kingdom, but in the sense of the person of the Sovereign.”

¹¹ See Jowell, Steele and Pobjoy, *supra* n 4, para 17.

¹² See http://news.bbc.co.uk/1/hi/uk_politics/8202339.stm.

¹³ See *The Financial Times*, 7 March 2016—

“The biggest ever leak of secret documents this week sensationally exposed David Cameron as a bit of a rich toff. Even more embarrassing is the revelation that he is the son of an even richer toff, who may have used some of his riches to provide a rich toff lifestyle for his family. Readers of British news sites and papers could be forgiven for thinking

an accusation that needs shaking off immediately. The extent of the crisis for Mr Cameron's reputation was exemplified by the *Daily Mirror*, who on 5 April 2016 ran a full-page cover story entitled "Questions Cam must answer: so do you STILL have family money stashed in a secret offshore tax haven, Prime Minister?"¹⁴

15 Even serious newspapers questioned the Prime Minister's stance on tax transparency. Thus, on 6 April 2016, the *Financial Times* ran a first-page story entitled "David Cameron's EU intervention on trust set up tax loophole"¹⁵ that inferred that the then Prime Minister might have had something to gain from allegedly pulling punches in relation to the registration of trusts. The *Financial Times* article referred to an old (and very public)¹⁶ letter that the then UK Prime Minister sent to the President of the European Council in relation to the proposed EU registers of beneficial ownership on the basis that trusts were different from companies.¹⁷ The newspaper's innuendo was abundantly clear—

"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."

Other serious newspapers and news outlets in the UK ran similar stories¹⁸, adding to the pressure on Mr Cameron.

this the central narrative of the Panama Papers leak. Teams of investigative journalists who spent months ploughing through the millions of documents have now proved that the British prime minister's late father, Ian, ran an offshore investment fund that seemingly did nothing illegal. Even more serious for Mr Cameron is the revelation that his father had been doing nothing seemingly illegal without his son's direct involvement." (<https://www.ft.com/content/c24a9e60-fcb0-11e5-b3f6-11d5706b613b>.)

¹⁴ See <https://twitter.com/dailymirror/status/717104650567213057>.

¹⁵ See <https://www.ft.com/content/0e7c0a20-fc17-11e5-b5f5-070dca6d0a0d>.

¹⁶ The letter was published on the UK government's website (<https://www.gov.uk/government/publications/pm-letter-on-beneficial-ownership>).

¹⁷ In his letter to the EU, the then Prime Minister wrote that it was—

"clearly important we recognise the important differences between companies and trusts . . . This means that the solution for addressing the potential misuse of companies, such as central public registries, may well not be appropriate generally."

¹⁸ E.g. *The Guardian*, 7 April 2016: "Cameron stepped in to shield offshore trusts from EU tax crackdown in 2013"; *The Telegraph*, 7 April 2016: "David Cameron 'argued to water down transparency rules over trusts'"; the

16 Smelling blood, the leader of the opposition (Jeremy Corbyn) said that Mr Cameron “should stop ‘pussyfooting’ on tax havens” and called for the imposition of direct rule over the Crown Dependencies and Overseas Territories.¹⁹

17 Instead of reminding Mr Corbyn of the modern approach to the issue of Parliament’s intervention in the affairs of the Crown Dependencies, David Cameron used the pulpit of Prime Minister’s Question Time (“PMQ”) to launch the following message²⁰—

“We should bring some consensus to this issue. For years in this country, Labour governments and Conservative governments had an attitude to the Crown Dependencies and the Overseas Territories that their tax affairs were a matter for them and their compliance affairs were a matter for them, and that their transparency was a matter for them. This government has changed that! We got the Overseas Territories, we got the Crown Dependencies round the table. We said you’ve got to have registers of ownership, you’ve got to collaborate with the UK government, you’ve got to make sure people don’t hide their taxes, and it’s happening. So when he [Corbyn] gets to his feet he should welcome the fact that huge progress has been made, raising taxes, sorting out the Overseas Territories and Crown Dependencies, closing the tax gap, getting businesses to pay more, giving international leadership to this whole issue, all of which has never happened under Labour.”

18 Compare and contrast this language with that contained in the *Barclay (No 2)* decision a year earlier and one wonders whether the UK’s judiciary and the UK’s government live on the same constitutional planet. However, when it comes to tax transparency, there is nothing like a good dose of bullying to get things done, never mind the constitution.

Gunboat diplomacy

19 Charged with saving the then Prime Minister’s reputation at home, the UK government went on the offensive. In the space of a single week, the UK government managed to strong-arm the Crown

BBC, also on 7 April 2016: “Panama Papers: Cameron faces questions over trust letter”.

¹⁹BBC News, 5 April 2016 (<https://twitter.com/VictoriaLIVE/status/717284211162353666>). See also <https://www.theguardian.com/news/2016/apr/05/uk-could-impose-direct-rule-on-tax-havens-says-jeremy-corbyn-panama-papers>.

²⁰ PMQ, 13 April 2016 (<https://www.youtube.com/watch?v=rIHD7g1Q3U>).

Dependencies and a number of Overseas Territories into signing a series of exchanges of notes in respect of the sharing of beneficial information.²¹ These exchanges of notes entered into effect on 13 April 2016, in time for PMQ, thus enabling Mr Cameron to boast before a packed Parliament that he had “sorted out” the Crown Dependencies and the Overseas Territories.

20 And what a splendid job the UK government did in “getting the Crown Dependencies and the Overseas Territories round the table”. Thus, the exchange of notes between the UK and Jersey, which entered into force on 13 April 2016, provides *inter alia* that—

“6. The Participants will hold adequate, accurate and current beneficial ownership information for corporate and legal entities incorporated in their own jurisdictions . . .

7. Law enforcement authorities of the Participants will have the automatic right to the provision of unrestricted and timely (where urgently required, within one hour) beneficial ownership information held in the other jurisdiction for the law enforcement purposes set out in Paragraph 2 above [that is, the prevention and detection of corruption, money laundering, terrorism financing, financing of the proliferation of weapons of mass destruction and other serious and organised crime].

8. The Participant in whose jurisdiction the requested beneficial ownership information is held will be responsible for . . . ensuring that those interested in or otherwise connected to the corporate and legal entities concerned are not informed that a search is in progress or has been conducted.”

21 Readers in the UK might be surprised to learn that Jersey has had a central register of current beneficial ownership in relation to companies since 1989, long before such a concept had been dreamed of in the UK, which provides a measure of the debate between the UK and the Crown Dependencies. Incidentally, similar considerations apply to some Overseas Territories.²²

²¹ <https://www.gov.uk/government/collections/beneficial-ownership-uk-overseas-territories-and-crown-dependencies>

²² In Bermuda, both the Companies Act 1981 and the Exchange Control Act 1972 require the disclosure of the beneficial ownership of any new company or partnership. In the past, Bermuda applied a very stringent 5% threshold, since relaxed to 10% in 2013 (see <http://www.bma.bm/BMANEW%20Refines%20Disclosure%20Requirements%20for%20Company%20Formations.pdf>).

22 The day after the various exchanges of notes entered into force on 13 April 2016, George Osborne penned a letter on behalf of the G-5²³ addressed to the G-20 and the EU calling both for “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.”

23 The reply from the EU’s Presidency arrived a few days later, in a letter to EU Member States dated 22 April 2016 from the incoming Dutch Presidency²⁴—

“We welcome the fact that all member states will enter into a pilot project for the automatic exchange of information on ultimate beneficial owners. Furthermore the Netherlands Presidency will take forward the work on the amendment to the 4th Anti-Money Laundering Directive which, as the Commission announced, will be submitted to the European Parliament and the Council in June. We want to advance on this legislative proposal as far as we can before we hand it over to our Slovak colleagues who, as I understand, also see it as one of their priorities.

Ministers are of the opinion that the upcoming revision should go beyond amendments announced by the Commission in February, which are largely geared towards tackling terrorist financing. We therefore invited the Commission to consider improvements to address certain issues linked specifically to money laundering, in particular to enhance accessibility of beneficial ownership registers on corporate and other legal entities, as well as on trusts and similar legal arrangements, to clarify the registration requirements for trusts, to speed up the interconnection of national beneficial ownership registers, promote automatic exchange of information on beneficial ownership between authorities, and strengthen customer due diligence rules.”

24 Since then, the EU has been locked in negotiations for the creation of fully public registers that would also extend to trusts. The latest draft of the so-called 5th Anti-Money-Laundering Directive was approved by

²³ See <https://www.gov.uk/government/publications/g5-letter-to-g20-counterparts-regarding-action-on-beneficial-ownership> (last accessed on 7 February 2017).

²⁴ “Informal ECOFIN—Line to take NL Presidency” (see <https://english.eu2016.nl/documents/publications/2016/04/22/informal-ecofin-line-to-take-nl-presidency>).

the European Parliament on 28 February 2017 with the following commentary²⁵—

“EU citizens could access registers of beneficial owners of companies without having to demonstrate a ‘legitimate interest’, and trusts would have to meet the same transparency requirements as firms, under amendments.”

25 Supporters of the UK’s power to intervene in the Crown Dependencies’ affairs will no doubt feel that the actions of the UK government in relation to the issue of transparency were appropriate. Supporters may even argue that the imposition of the Common Reporting Standard (CRS) and inter-linked registers holding beneficial ownership falls in the category of “public interest” and “good government” which are accepted grounds for the UK to impose its will on the Dependencies. Supporters of UK interventionism will also point out the fact that the Crown Dependencies were consulted on these issues, and that the changes came about with their full consent, as evidenced by the exchanges of notes.

26 In terms of consultation and consent, it is noteworthy that the exchange of notes stand in open contrast with previous pronouncements by local governments, see *e.g.* the polite rebuke from the Chief Executive of Guernsey Finance²⁶ to another letter from David Cameron on beneficial ownership which was sent to all British Overseas Territories and Crown Dependencies on 25 April 2014²⁷—

“Guernsey is ahead of the curve and we look forward to other jurisdictions stepping up to the mark so that we can help create a level playing field on beneficial ownership. Whether that will include a truly public register remains to be seen given the significant implications, for example in respect of data privacy and human rights as well as the potential negative impact on inward investment for any jurisdictions which adopt measures that are not global in reach.”

27 One can only speculate as to what led the Crown Dependencies to waive their concerns and bend to the will of the UK government, although the EU presidency’s reply to Mr Osborne’s letter on beneficial ownership registers may provide some useful clues—

²⁵ See <http://www.europarl.europa.eu/news/en/news-room/20170227IPR64164/citizens-should-get-access-to-data-on-firm-owners-to-fight-money-laundering>

²⁶ <https://www.weareguernsey.com/news/2014/guernsey-responds-to-pms-letter-on-beneficial-ownership/>.

²⁷ <https://www.gov.uk/government/publications/prime-ministers-letter-on-beneficial-ownership>

“It emerged from the discussion that ministers support the establishment of an EU list of noncooperative jurisdictions and coordinated defensive measures to be defined by the Council, working closely and in parallel with the OECD to draw the international criteria in this area. The Presidency aims for consensus on the method for setting up such listing and will propose conclusions to be adopted at the May Ecofin.”

What if the UK gets it wrong?

28 Diplomacy is the art of persuasion and if “gentle massaging” is what it takes for the UK to impose its will on the Crown Dependencies whilst staying within the constitutional parameters laid out in the *Barclay* cases, then what is the problem?

29 The answer may depend on whether policies pursued by the UK in its interaction with the Crown Dependencies are clearly flawed. Consider this. Ever since the *Conseil Constitutionnel* (the highest constitutional authority in France) declared (a few months after David Cameron’s well-documented change of direction) that a public trust register introduced in 2013 violated the legitimate right to privacy of citizens,²⁸ the 5th EU anti-money-laundering directive has been in disarray.

On the issue of public registers

30 As mentioned above, the European Data Protection Supervisor issued an opinion as recently as 2 February 2017²⁹ in which it criticised 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”. Interestingly, this opinion was published before the European Parliament voted for a wider access to public registers (this happened on 28 February), showing a clear disdain for, or sheer ignorance of, data protection issues.

31 I have seen the minutes of a meeting between the European Commission, the European Parliament and the European Council dated 21 March 2017 in which—

²⁸*Décision n 2016-591 QPC du 21 octobre 2016*; For a discussion, see Nosedá, *The Times*, 21 November 2016 (available online at: <http://nuk-tnl-deck-email.s3.amazonaws.com/11/03b2ceb73723f8b53cd533e4fba898ee.html>).

²⁹ *Supra* n 2.

“The Commission pointed to the need to avoid that the Directive be annulled by the ECJ should a case be brought to the court on grounds of non-respect of the data protection principles.”

32 And in a strongly worded note dated 17 March 2017, a copy of which I have also seen, the Commission went further and stated that—

“The Commission cannot, at this stage, accept the amendments proposing wider transparency and access to the beneficial ownership registers without a prior analysis of the proportionality and necessity of such extension, as well as its impact on fundamental rights and data protection.”

33 The exchange of notes between the UK and the Crown Dependencies stops short of introducing a system of wholly public registers. Therefore, some of the concerns that attach to the EU registers of beneficial ownership do not apply to the system introduced by the Crown Dependencies at the behest of the UK. However, it is quite clear that the notes raise complex legal issues, not only in relation to data protection, but also in relation to fair trial—*e.g.* because of the prohibition to inform the party subject to the request or the speed of the exchange of information procedure (possibly as short as an hour!) which makes it arduous or even practically impossible to carry out a proper review of the request to ensure that it meets the statutory requirements.

34 Contrast this approach with the procedure contained in the various Tax Information Exchange Agreements (“TIEAs”)³⁰ which have already been the subject-matter of court proceedings in Jersey,³¹ but also in the Cayman Islands³² and Bermuda.³³ Those proceedings raised complex legal issues, including the interaction of information requests with fundamental human rights. Thus, for example, in the Cayman case mentioned above,³⁴ the Court of Appeal pointed out that in the light of the Cayman Islands Bill of Rights, the court should apply “a more anxious level of scrutiny and standard of review, just as the

³⁰ For a discussion of the TIEAs entered into by the Crown Dependencies, see Jones and Brown, “Will it all end in TIEAs? Tax Information Exchange Agreements: an Introduction to the Channel Islands Context”, (2014) 18 Jersey and Guernsey Law Review 239.

³¹ *Volaw Trust & Corp Servs v Comptroller of Taxes* 2013 (2) JLR 499; see also *APEF Management Co 5 Ltd v Comptroller of Taxes* 2014 (1) JLR 100.

³² *MH Invs and JA Invs v Cayman Islands Tax Information Authority CICA* No 31 of 2013; G391/2012.

³³ *Minister of Finance v Bunge Ltd* [2013] Bda LR 83.

³⁴ *Supra*, n 30.

Human Rights Act influenced the approach adopted by the Courts in England and Wales”.

35 Speaking of the Human Rights Act, it is common knowledge that the current UK Prime Minister has indicated on several occasions her intention to denounce the European Convention on Human Rights.³⁵ The potential repercussions for the Crown Dependencies should not be underestimated and were aptly discussed in a previous article in this *Review*.³⁶ In any event, the unilateral introduction, by the UK, of a public register of “Persons with Significant Control” (“PSC”) is a clear indication of the diverging path taken by the UK and the rest of Europe (including the Crown Dependencies), when it comes to human rights and data protection. This does not appear to be an isolated case, as the Independent Reviewer of Terrorism Legislation pointed out in a recent report prepared by the UK Parliament Joint Human Rights Committee in relation to the new Investigatory Powers Bill (now the Investigatory Powers Act 2016)³⁷—

“I think we are right to be concerned that there are differences in the way our judges look at [security] issues. On the retention of DNA . . . for example, all our judges in three courts . . . 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.”

³⁵ “UK must leave European convention on human rights, says Theresa May”, *The Guardian*, 25 April 2016; and “Theresa May ‘will campaign to leave European Convention on Human Rights in 2020 election’”, *The Independent*, 29 December 2016 (<https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> and <http://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html>).

³⁶ Dixon, “Jersey and the European Convention on Human Rights—options should the United Kingdom denounce the Convention”, *supra*, n. 4.

³⁷ UK Parliament Joint Committee on Human Rights Legislative Scrutiny: “Investigatory Powers Bill, First Report of Session 2016–17”, para 2.3 (see <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/104/104.pdf>).

36 It follows from the above that there is an abundance of evidence that the UK did not get the balance right in relation to public registers or the protection of confidentiality more generally. Worse still, the evidence indicates very clearly that the UK government changed its approach in relation to the registration of trusts as a result of *domestic politics* (notably the need to extricate the then UK Prime Minister Cameron from a great deal of embarrassment following personal revelations in the midst of the “Panama Papers” scandal and the EU referendum campaign).

Common Reporting Standard—what if the UK got it wrong here too?

37 The UK has been a champion of tax information exchange ever since the G-20 organised in 2009 by the then UK Prime Minister Gordon Brown. Those were difficult days for the world economy and the heads of state of the world’s biggest economies flocked to London to resolve the crisis ignited by the “credit crunch”. Unsurprisingly, the final communiqué contained very strong messages aimed at restoring confidence, as well as refilling depleted treasury coffers following a prolonged period of “quantitative easing”³⁸—

“13 Major failures in the financial sector and in financial regulation and supervision were fundamental causes of the crisis. Confidence will not be restored until we rebuild trust in our financial system . . .

15 To this end we are implementing the Action Plan agreed at our last meeting . . . In particular we agree . . . to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information.”

38 I have written a number of technical articles that show the deficiencies of the Common Reporting Standard developed by the OECD.³⁹ Whilst the policy objective (the fight against tax evasion) is

³⁸ See https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf.

³⁹ Published articles include “CRS and Beneficial Ownership Registers—A Call to Action”, *Trusts & Trustees*, January 2017; “Trusts and Privacy—A New Battle Front”, *Trusts & Trustees*, April 2017; “Common Reporting Standard and EU Beneficial Ownership Registers: Inadequate Protection of Privacy and Data Protection”, *Trusts & Trustees*, January 2017; “Caught in

to be applauded, the mechanics of achieving information exchange raise serious questions concerning the proportionality of the CRS and, therefore, its compatibility with art 8(2) of the ECHR, which provides clear requirements for, and limitations to, the intrusion in any individual's private sphere (*italics mine*):

“There shall be no interference by a public authority with the exercise of the [right to respect for private and family life] except such as is in accordance with the law and is *necessary* in a democratic society . . . for the prevention of disorder or crime . . .”

39 There are many issues relating to the proportionality of the CRS, which include the disclosure of the identity of settlors (in many countries, trusts are taxed as separate tax subjects), protectors (irrelevant for the tax treatment of trusts in many countries), beneficiaries of discretionary trusts (clearly covered by the definition of “Controlling Persons” and “Equity Interest” holders, although in its commentary the OECD provides for a let out in certain circumstances) and charities.

40 The privacy and data protection concerns connected with the CRS have been highlighted by a number of European data protection authorities, including the EDPS, the Council of Europe's T-PD and the WP29. In particular, the EDPS⁴⁰ lamented that—

“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. On the other hand, we note that nothing is said of what happens once tax information is collected and exchanged, namely there is no mention of any retention period.”

41 More recently, the WP 29 reiterated—

the Crossfire between Privacy and Transparency”, *Trusts & Trustees*, June 2016: “Trusts under Threat—The Impact of the OECD's Common Reporting Standard on Trusts at a Time when they are under threat in a number of continental European jurisdictions” (*Trust Quarterly Review*, TQR, STEP, September 2015); “War on Trusts—Where do we Stand?” in *Trusts in Prime Jurisdictions*, 4th ed, STEP (2016); “Erosion of the Right to Keep our Finances Private is a Step too Far”, *Financial Times* (22 March 2016).

⁴⁰ Opinion of the EDPS on the EU–Switzerland agreement on the automatic exchange of tax information, Opinion 2/2015.

“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.”⁴¹

When the UK gets it wrong, the Crown Dependencies should stand their ground.

42 There is no doubt that the Crown Dependencies have been subjected to a great deal of pressure by the UK to ensure that they comply with the will of the UK government. However, a careful analysis of the underlying issues shows that the UK government was pursuing *its own* interests, based on a *domestic agenda* and the *personal problems* of its leaders. Strictly from a legal perspective, there is an abundance of evidence to support the contention that the UK government got it wrong both in relation to public registers and the mechanics of the automatic exchange of information.

43 Far from serving a “public interest” or ensuring “peace, order and good governance”, the UK government has shown a disdain for the constitutional position of the Crown Dependencies. Disparaging remarks used by a UK Prime Minister to appease his domestic audience (“sorting out the Crown Dependencies” and “getting them round the table”) are at odds with the restraint advocated by constitutional experts from the publication of the Kilbrandon Report in 1973 all the way to the Supreme Court’s judgment in the *Barclay* cases.⁴²

44 UK governments that wish to pay no attention to the wider constitutional context in their dealings with the Crown Dependencies do so at their own peril, especially as Channel Islands ponder their future after Brexit. By the same token, the evolving nature of the constitutional relationship between the Crown Dependencies and the UK is likely to affect the approach of local politicians in the Channel Islands, who should not feel exposed to the whims of the UK government. Instead, the *Barclay* cases remind us that the assertion of the UK’s will over the Crown Dependencies is subject to a number of requirements in constant evolution, and that UK governments should work hard in order to obtain the consent required to extend the UK’s practical power over the Crown Dependencies. This also means that local politicians should feel emboldened to adopt a firmer stance in their dealings with their UK counterparts when there is strong evidence suggesting that Whitehall and Downing Street got it wrong. In the area

⁴¹ *Supra*, n 1.

⁴² [2017] UKSC 5; and see Jowell, Steele and Pobjoy, *supra*, n 4, para 2.

of tax transparency, the same applies to the OECD, which, it would now seem, does not have the gift of infallibility.

Filippo Nosedà is Joint Head of the Private Client and Tax Department at Withers LLP in London. Any views expressed herein are the author's personal views.