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**CRS | French trust register declared unconstitutional ---
- Things are about to change!**

Dear All

I should like to appraise you of a couple of recent developments that confirm the validity of my concerns about the legality of the Common Reporting Standard ('CRS') and the EU registers of beneficial ownership.

The first development relates to a two-days' old French decision concerning the French trust registers, which has direct implications for the UK 'PSC' registers and the EU registers of beneficial ownership.

The second development concerns a letter sent by Yahoo! to the US authorities, which would suggest that the US government continues to harvest vast amount of information from internet service providers, which questions the '*culture of care*' to which the OECD proudly refers to in its CRS commentary.

With just under two months to go before the CRS and the EU's registers of beneficial ownership are due to go live, things are getting interesting!

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A. French trust register declared unconstitutional

I am pleased to report that the French '*Conseil Constitutionnel*' held yesterday that the public register on trusts represent an unconstitutional violation of the right to privacy.

1. Background

The French trust register was introduced as part of the 'Law of 6 December 2013 on the Fight Against Tax Fraud and Substantial Economic and Financial Crime'¹

A reading of the parliamentary Hansard shows that the provision stemmed from an amendment tabled by senator Éric Alauzet who stated before parliament that '*the establishment of trusts gives rise to an extraordinary phenomenon of tax evasion. According to*

¹ *Loi du 6 décembre 2013 Lutte contre la fraude fiscale et la grande délinquance économique et financière*, available online : <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028278976&categorieLien=id>.

*Transparency International France, 80% of the global proceeds of tax evasion transit via trusts.*²

2. The Judgment

In its Judgment of 21 October 2016, the Constitutional Council held that *'the provisions challenged restrict the right to privacy in a way that is manifestly disproportionate to the objective pursued'*³,

The Court considered that, *'by introducing transparency in relation to trusts, the French legislator had intended to prevent their use for the purpose of tax evasion and money laundering'*. Accordingly, the Court held that *'the legislator was pursuing a constitutional objective, notably the fight against fraud and tax evasion'*⁴

The Court then referred to *'the freedoms proclaimed by Art. 2 of the French Declaration of the Rights of Man and of the Citizen of 1789, which entail a right to respect for private life. Accordingly, the collection, registration, retention, consultation and communication of personal data must be justified on the basis of a public interest and must be carried out in a manner that is adequate and proportionate to the achievement of such objective.'*⁵

Applying these principles to the public register of trusts, the French Constitutional Court held that *'the mention, in a publicly accessible register, of the names of the settlor, the beneficiaries and the trustees provide information on the manner in which a person intends to dispose of his or her assets. This affects the right to the respect of private life. Now, the legislator did not define the reasons that justify a consultation of the register, nor did he limit the circle of people who have access to the data held on the register, which is kept under the authority of the tax authorities.'*⁶

² *'La constitution de trusts donne lieu à des phénomènes massifs d'évasion fiscale. Selon Transparency International France, 80 % des flux illicites mondiaux liés à l'évasion fiscale transiteraient par les trusts— see <http://www.assemblee-nationale.fr/14/pdf/cr/2012-2013/20130279.pdf>.'*

³ *'Les dispositions contestées portent au droit au respect de la vie privée une atteinte manifestement disproportionnée au regard de l'objectif poursuivi'.*

⁴ *'En favorisant, par les dispositions contestées, la transparence sur les trusts, le législateur a entendu éviter leur utilisation à des fins d'évasion fiscale et de blanchiment des capitaux. Il a ainsi poursuivi l'objectif de valeur constitutionnelle de lutte contre la fraude et l'évasion fiscales'.*

⁵ *'La constitution de trusts donne lieu à des phénomènes massifs d'évasion fiscale. Selon Transparency International France, 80 % des flux illicites mondiaux liés à l'évasion fiscale transiteraient par les trusts— see <http://www.assemblee-nationale.fr/14/pdf/cr/2012-2013/20130279.pdf>.'*

⁶ *'La mention, dans un registre accessible au public, des noms du constituant, des bénéficiaires et de l'administrateur d'un trust fournit des informations sur la manière dont une personne entend disposer de son patrimoine. Il en résulte une atteinte au droit au respect de la vie privée. Or, le législateur, qui n'a pas précisé la qualité ni les motifs justifiant la consultation du registre, n'a pas limité le cercle des personnes ayant accès aux données de ce registre, placé sous la responsabilité de l'administration fiscale.'*

B. Implications for the PSC Registers in the UK

As is well known, on 6 April 2016 the UK government introduced rules which require companies and limited liability partnerships to hold a register of so-called 'PSCs' ('Persons with Significant Control')⁷

Under the UK rules, the information contained on 'PSC registers' will be fully accessible by the public⁸

Although Art. 2 French Declaration of the Rights of Man and of the Citizen of 1789 does not have any legal relevance in the UK, Art. 8 of the European Convention of Human Rights ('ECHR') contains an almost identical provision:

'Article 8 – Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.*

There is no doubt in my mind that the PSC registers represent an excessive violation of the fundamental right to privacy contained in Art. 8 ECHR and the French decision is a clear indication that the wind is about to change in the current trend towards total transparency.

C. Yahoo's letter to the US authorities | Fresh data protection concerns

⁷ See Para 5.2.2 of the UK guidance issued on 11 April 2016: 'Almost all of the information about the PSC will be available on the central public register at Companies House. The only information that will not be is (a) The PSC's usual residential address (unless a residential address has been provided as a service address); and (b) The day of the PSC's date of birth' – see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515720/Non-statutory_guidance_for_companies_LLPs_and_SEsv4.pdf

⁸ See Para 5.2.2 of the UK guidance issued on 11 April 2016: 'Almost all of the information about the PSC will be available on the central public register at Companies House. The only information that will not be is (a) The PSC's usual residential address (unless a residential address has been provided as a service address); and (b) The day of the PSC's date of birth' – see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515720/Non-statutory_guidance_for_companies_LLPs_and_SEsv4.pdf

The CRS commentary boasts that '*confidentiality of taxpayer information has always been a fundamental cornerstone of tax systems*' and that '*the ability to protect the confidentiality of tax information is also the result of a "culture of care" within a tax administration*' (<http://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf>).

With this in mind, it would be interesting to see how the OECD might comment on past data protection scandals – such as the online publication of every Italian's declared earnings and tax contributions in 2008 (see news.bbc.co.uk/2/hi/europe/7376608.stm). Perhaps more worrying is the letter sent yesterday by Yahoo! to the office of the US Director of National Intelligence, in which it would appear that the US government is continuing to use anti-terror legislation to collect vast amount of data, and the web company is challenging government orders for Yahoo's data (<http://www.bbc.co.uk/news/business-37710736>).

There is a direct link between the CRS and the approach adopted by governments in the fight against terrorism, in that they are both indicative of a disproportionate invasion of the right to privacy to pursue a legitimate interest.

As is well known, the European Court of Justice has already considered the issue in the so-called Facebook case, in which the EU's highest court held that '*legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life*'.

In light of the OECD's approach to the issue of confidentiality under the CRS, a judicial review of the new rules appears inevitable.

I hope that you will find the information contained in this email useful. For further reading, please check out the articles published on my LinkedIn page and on my firm's website (<http://www.withersworldwide.com/people/filippo-nosedad-2>).

Best regards

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