Obstacles in Company Law to Anti-Money Laundering International Co-Operation in European Union Member States

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1. Introduction

The misuse of corporate vehicles or entities or structures for money laundering purposes has come to the attention of international organizations and the general public together with the issue of offshore countries. In 2000, Transcrime's Euroshore report pointed out the 'domino effect' of company law on other laws and regulations such as criminal, administrative and banking.[1] Depending on the type of regulation, company law makes a financial system more transparent (or more opaque), thereby influencing other sectors of regulation and the effectiveness of police and judicial co-operation. If company law seeks to maximize anonymity in financial transactions by facilitating the creation of shell or shelf companies whose owners remain largely unknown (because other companies own them), such anonymity could be transferred to other sectors of the law (criminal, banking, tax). Therefore, the names of the real beneficial owners or beneficiaries of financial transactions remain obscured, thwarting criminal investigation and prosecution. This conclusion has produced two consequences. The first is the need for a better understanding of the role played by legal and non-legal structures in facilitating crimes. Furthermore, given that the conclusions of the *Euroshore* report are addressed to European Union Member States, the second need is to better understand which regulation and/or insufficient/absent implementation of regulation, where it exists, obstruct anti-money laundering international co-operation.[2]

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[1] 'Euroshore – Protecting the EU Financial System from the exploitation of Financial Centres and Off-shore facilities by Organised Crime' (Trento Transcrime-University of Trento 2000) at p. 16 (Final Report prepared for the European Commission, Falcone Programme 1998).

[2] The first case is dealt with in the 'OECD Report on the Misuse of Corporate Vehicles for Illicit Purposes, which covers offshore and onshore jurisdictions' 9 May 2001; the second case dealt with in this Report initiated in 2001 (contract JHA b/2000/B2 of 25 January

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The Tampere European Council of October 1999, in agreement with the conclusions of the Euroshore report, considered the role of corporate law to be important and in Recommendation 58 it invited the European Commission '*to draw up a report identifying provisions in national banking, financial and corporate legislation which obstruct international co-operation. The Council is invited to draw necessary conclusions on the basis of this report*'. As a consequence the European Commission launched a tender (JHA B/2000/B2/01 of 20 July 2000) and in January 2001 Transcrime at the University of Trento was awarded the *Study of the regulation and its implementation, in EU Member States, that obstruct anti-money laundering international co-operation (banking/financial and corporate/company regulative fields)*. The Report 'Transparency and Money Laundering' is the result of this study and was presented by the European Commission at the Jumbo Council of 16 October 2001, one month after the events of 11 September.[3] The report does not mention terrorism, but the financial investigations for tracing and stopping the financing of terrorist groups have always come up against the wall of opacity erected by the corporations that deal with the financial transactions of criminals. Terrorists make use of the same instruments as other criminals for their laundering purposes.

The aim of this article is to contribute to the understanding of how corporate law could affect the opacity/transparency of a financial system. It presents, in an abridged version, the second part of the report which covers corporate/company[4] regulation. In this field the report covers 'legal and non-legal structures' that are susceptible to being used in EU Member States in money-laundering operations. Before moving on to the analysis some definitions are necessary:

- Legal and non-legal 'structure' is defined as an 'organization with an economic or patrimonial vocation';[5]
- 'Regulation' is defined as 'the whole group of those laws and provisions in the corporate/company regulative fields relevant to anti-money laundering international co-operation'. In fact, the existence of a legal provision could increase, either directly or indirectly, the effectiveness of the performance of law enforcement, judiciary and financial authorities in the investigation of money-laundering cases. First, it may be carried out directly by encouraging active collaboration in supplying information relevant to criminal investiga-

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2001) the main aim of which is to highlight, in EU Member States, those regulations and or implementations thereof that – in the banking/financial and corporate/company fields – constitute obstacles to anti-money laundering co-operation.

[3] The research carried for the production of the main report was directed by the author, co-ordinated by Sabrina Adamoli with the co-operation of Andrea Di Nicola and Alessandro Scartezzini, all researchers at Transcrime-University of Trento. Eddy Wymeersch professor in Ghent (Belgium) acted as general consultant

[4] The first part of the report refers to the banking/financial field. This part has been excluded from this article.

[5] The term 'patrimonial' is intended as meaning 'relating to somebody's estate'.

tions, and secondly, it may be carried out indirectly by increasing the transparency of a financial system through mechanisms identifying the subjects involved in their operations;

Two types of obstacles are identified:

- '*Obstacles to regulation*' preventing international co-operation in anti-money laundering activities are defined as 'the lack of regulation'. They are explained by the variable 'existence of regulation' (R). The answers follow two modalities: yes or no.
- '*Obstacles to the implementation of regulation*' inhibiting international co-operation in enacting measures against money laundering are defined as 'the incomplete/absent implementation of regulation'. They are explained by the variables: a) existence of structures which enable the implementation (I) (modalities: fully implemented, partially implemented, not implemented); b) existence of controls for the implementation (C) (modalities: yes/no); c) existence of sanctions against non-compliance (S) (modalities: serious sanction, lenient sanction, no sanction).

2. Main assumption

The main assumption is that the less regulation there is at a national level in the corporate/company regulative field, and the lower the implementation of the regulation under consideration, where it exists, the greater the obstacles to anti-money laundering international co-operation. That means that in order to remove these obstacles, countries should be called upon to change their regulation in the field.

Following this assumption, this article intends to answer the following questions:

1. *What regulation and/or implementation thereof, in the corporate/company regulative field, create obstacles to international co-operation between EU Member States to prevent money-laundering?*
2. *What is the dimension of the obstacles in these fields?*

The following steps have been followed:

analysis of the regulation in order to identify which of the specified transparency variables involved in international co-operation for the prevention of money laundering are lacking;

analysis of the implementation of regulation in the corporate/company regulative fields in order to identify which of the transparency variables involved in international co-operation for the prevention of money laundering specified in 1) are lacking;

evaluation of the results of the two analyses of 1) and 2) in order to identify,

quantify and cross-compare obstacles to international co-operation between EU Member States for the prevention of money laundering.

3. Methodology and data collection procedures

In order to identify the transparency variables and obstacles involved in international co-operation for the prevention of money laundering in regulation and/or in its implementation, primary and secondary sources were used:[6]

- the primary sources were:
  - the replies to a questionnaire designed to select the legal and non-legal structures susceptible to being used in money-laundering operations. This questionnaire was sent to experts in the financial police units and the Financial Intelligence Units of the fifteen EU Member States;
  - the replies to a questionnaire designed to study the regulation and its implementation in the corporate/company regulative field and sent to company law experts (professors and auditors), and to members of the IOSCO, in EU Member States.[7]
- secondary sources consisted of a variety of both published and unpublished documents.[8] These sources were utilized for the selection of the transparency variables subsequently used in the analysis.

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[6] Given the complexity of the identified transparency variables, and the necessity to gather information regarding the implementation of regulation in EU Member States, in collecting information, preference was given to the answers of the experts to the questionnaires submitted to them. The criteria used for the choice in case of differing answers by experts of the same country to the same question is explained on page 144 of the methodological appendix to the report.

[7] The list of experts contacted can be found in the acknowledgements at the beginning of the main report. As the results are based on their answers to the submitted questionnaires, some degree of error is due to the opinions expressed by the experts on single transparency variables. The criteria used for the choice in case of differing answers by experts of the same country to the same question is explained in the methodological appendix.

[8] 'Report on the Misuse of Corporate Vehicles for Illicit Purposes' (Paris OECD Steering Group on Corporate Governance 2001); R. Thomas, *Company Law in Europe* (London Butterworths 2001); *Company Law in Europe: Recent Developments* (mimeo) (Manchester CLAB University of Manchester 1999); M.J. Oltmanns, *European Company Structures* (London-The Hague-Boston Kluwer Law International 1998); 'Prevention of Organised Crime: The registration of legal persons and the international exchange of information' final report (T.M.C. Asser Instituut 2000); *Modern Company Law for a Competitive Economy* (mimeo) (London DTI London 1998); A.J. Oakley, *The Modern Law of Trusts* (London Sweet and Maxwell 1998); A. Sydenham, *Trusts* (London Sweet and Maxwell 1997); M. Lupoi, *Trusts* (Milan Giuffrè Editore 1997); D.J. Hayton, *Law Relating to Trusts*

4. Analysis of the corporate/company regulative field

This section describes the model utilized to analyze data collected for the corporate/company regulative field, and sets out the conclusions. The assumption made here was that obstacles to international co-operation in response to money laundering depend either on a lack of regulation in the regulative field considered, or in the incomplete/absent implementation of the regulation where it exists. The purpose of the model is to show where these obstacles are (in which EU Member State, in which thematic area and at which level), to assess the dimensions of these obstacles in order to cross-compare them at an EU level, and to propose remedies that might remove them.

The following steps were taken in developing the model for identifying obstacles to anti-money laundering international co-operation and assessing their dimensions:

- STEP 1: selection of the legal and non-legal structures susceptible to being used in money laundering operations;
- STEP 2: Identification of thematic areas and relative transparency variables;
- STEP 3: Analysis of the regulation at the national level;
- STEP 4: Analysis of the implementation of the regulation at the national level;
- STEP 5: Cross-comparative analysis of the results;

4.1 Selection of the legal and non-legal structures susceptible to being used in money laundering operations

The first step of the Study was that of selecting the legal and non-legal structures susceptible to being used in money laundering operations in EU Member States. A questionnaire was drafted, starting with a list of legal and non-legal structures used in an earlier study,[9] and sent to a maximum of three experts from financial police

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and Trustees (London Butterworths 1995); F. Galgano, *Diritto commerciale: le società* (Milano Zanichelli 1999/2000 ed.); *The Opacity Index* (Price Waterhouse-Coopers 2001) available on the Internet at <http://www.opacityindex.com>, last visited on 1 June 2001.

[9] 'Transparence des structures utilisées à des fins économiques et/ou patrimoniales: Présentation succinte de la situation actuelle dans les Etats Membres, document de travail des services de la Commission' of 5 October 2000 EC DOC. 12088/00. The list was comprised of the public limited company, the private limited company, the *société de droit civil* and its equivalents in other EU Member States, the trust, the *società fiduciaria*, the limited partnership on shares, the ordinary partnership, the limited partnership, the co-operation, the association, the foundation, the *association momentanée*, the private limited company with one shareholder, the unlimited company, the European Economic Interest Grouping, the *etablissement public*, the *association internationale*, the *groupement complementaire d'entreprises*, and the *association en participation*.

units and Financial Intelligence Units in the fifteen EU Member States. With the co-operation of Europol, the experts were chosen from units which specifically deal with economic crimes on the basis of their experience and knowledge of money laundering investigations. The experts acted as a virtual panel to whom responsibility was given for the selection of the structures susceptible to being used in money laundering operations.[10]

According to the results of this survey, the structures selected for further analysis were divided into three groups.

Three structures were selected as most susceptible to being used in money laundering operations by at least 30 per cent of the EU Member States. The regulation and its implementation in relation to these structures were, therefore, analyzed in all the EU Member States where they exist. They are:

- the public limited company (reported as susceptible to being used in money laundering operations in 40 per cent of EU Member States and existing in all of them);
- the private limited company (reported as susceptible to being used in money laundering operations in 67 per cent of EU Member States and existing in all of them);
- the *société de droit* civil and its equivalent in other Member States (reported as susceptible to being used in money laundering operations in 37.5 per cent of the EU Member States where it exists).[11]

This article covers only the first two company structures, leaving the third to the main report. Furthermore, the analysis covers the regulation of trusts, selected as susceptible to being used in money-laundering operations by Ireland, and also analyzed in the United Kingdom.

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[10] On the basis of their experience and knowledge of money laundering, experts were asked to select which legal and non-legal structures are susceptible to being used in money-laundering operations in their countries and to weigh up their involvement in such activities using a scale. The structure was selected according to the evaluation of this panel.

[11] For the remaining structures in the list, the regulation and its implementation were only analyzed in the single countries where they were reported as susceptible to being used in money-laundering operations. The following structures are not part of this article but are analyzed in the main report:
trusts in Ireland and United Kingdom;
the *società fiduciaria* was analyzed in Italy, the only country where it exists;
the limited partnership on shares was analyzed in Belgium and Italy;
the ordinary partnership was analyzed in Ireland, the Netherlands and Sweden;
the limited partnership was analyzed in Sweden;
the co-operative was analyzed in Belgium;
the association was analyzed in Ireland and Sweden;
the foundation was analyzed in Austria and the Netherlands;
the association *momentanée* (*unión temporal de empresas*) was analyzed in Spain;
the single member private limited company was analyzed in the Netherlands, Spain and United Kingdom.

4.2 Identification of thematic areas and transparency variables in regulation and in its implementation

The second step of the Study was to identify thematic areas and related transparency variables involved in the regulation and its implementation. The following thematic areas[12] were selected because of their relevance to international co-operation for the prevention of money laundering:

- Incorporation;
- Company activity;
- Identification of the real beneficial owner.

For each thematic area a set of constitutive elements (called 'transparency variables'), involved in the regulation and in its implementation was identified. The existence of each of these variables ensures greater transparency of the corporate/company regulative field. The idea behind this choice is that, in order to prevent and to combat money laundering both nationally and internationally, it is essential to guarantee the transparency of the financial and corporate systems of the EU Member States. The less transparent the national financial and corporate systems are, the less effective and efficient international anti-money laundering regimes become. This is one of the conclusions reached by the *Euroshore* Report,[13] which states that corporate/company law conditions the level of a financial system's transparency/opacity. Depending on the type of regulation, it generates greater/lower transparency of a financial system, thereby influencing the other sectors of regulation and conditioning the effectiveness of international police and judicial co-operation.

Three thematic areas and the relative transparency variables were identified in discussions with company law experts, who advised and co-operated throughout the development of this Study, supplemented by the existing literature on this topic and by the content of the existing European Union instruments.[14]

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[12] Their relevance for anti-money laundering international co-operation is explained in sections from 4.2.1 to 4.2.3 of the main report.

[13] Transcrime – University of Trento, in co-operation with CERTI – Bocconi University (Milan, Italy) and Erasmus University of Rotterdam (The Netherlands), Euroshore; 'Protecting the EU Financial System from the Exploitation of Financial Centres and Off-Shore Facilities by Organised Crime, Final Report Prepared for the European Commission' (Trento Falcone Programme 1998, January 2000) at pp. 75–77.

[14] The most relevant in this context are: First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ 1968 L 65/8; Second Council Directive 77/91/EEC of 13 December 1976 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ 1977 L 26/1; Fourth Council Directive

In each of the three identified thematic areas, the above-mentioned transparency variables were turned into a number of questions, in order to verify the existence of regulation in the area and to evaluate the level of its implementation in the area. The questions were collected in a questionnaire, which was sent to company law experts (professors and auditors) and to members of the IOSCO in all EU Member States.[15]

4.2.1 The thematic area 'Incorporation'

Incorporation is the initial phase of the 'life' of legal and non-legal structures, in which the structure itself is established through a series of acts aimed at making it operational. The relevance of this thematic area for international co-operation for the prevention of money laundering lies in the fact that a lack of scrutiny during the incorporation phase results in greater opacity in company law, which might obstruct the acquisition of information regarding the physical persons participating in its establishment. The less opaque (or the more transparent) the process of incorporation is, the more available the information concerning the incorporation of the structures will be. This facilitates the investigation of their activities and of the persons controlling them at both national and international levels.

In 2000 the FATF stressed the importance of this area for international co-operation for the prevention of money laundering. The existence of '*inadequate commercial law requirements for registration of businesses and legal entities*' is one of the twenty-five criteria used to identify detrimental rules, which impede international co-operation for the prevention of money laundering in non-cooperative countries or territories.[16] Criterion 12 relates to the existence of '*inadequate means for identifying, recording and making available relevant information related to legal and business entities (name, legal form, address, identity of directors, provisions regulating the power to bind the entity)*'.

According to the FATF Report on Money Laundering Typologies, 1999–2000, 'varying company formation procedures, along with a lack of transparency for the process in some jurisdictions, are factors of which the money launderer may take advantage through the company formation agent. The solutions to these problems then, according to the FATF experts, fall into two major areas: increasing

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78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, OJ 1978 L 222/11; Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents, OJ 1984 L 126/20.

[15] The researchers drafted the variables, subsequently turned into questions and sent in the questionnaire, keeping in mind the features of legal structures. The same variables, for analogy, were extended to non-legal structures.

[16] FATF, 'Report on Non-cooperative Countries and Territories' (Paris FATF 2000) at p. 4.

oversight of company formation agents and insisting on minimum standards for company registry and administration, as well as transparency for the process'.[17]

The FATF also underlines the role played by *company formation agents*,[18] who are the experts or agencies offering consultancy services in the incorporation of legal entities. These experts can advise their clients on the choice of jurisdiction or jurisdictions in which incorporating a legal entity is the cheapest and has the least legal requisites. The FATF in fact states: '*Structures created by company formation agents to facilitate legitimate business activities might also be attractive as a cover for money laundering*'. Consequently '*without the ability to determine the true owner of these companies, government authorities investigating a particular money laundering scheme will be unable to establish the necessary links from the funds to the criminal*'.[19]

The Financial Stability Forum, convened in April 1999 to promote international financial stability through information exchange and international co-operation in financial supervision and surveillance, has also highlighted the importance of scrutiny in the incorporation phase of a legal entity.[20]

Another problem, mentioned by the OECD in its 'Report on the misuse of corporate vehicles for illicit purposes',[21] is related to the creation of 'shelf companies'.[22]

Therefore a policy aimed at reducing opacity in this area should include a series of elements which, in this study, are identified as transparency variables in regulation.

Transparency variable 1 (*existence of legal provisions requiring a statutory authorization to incorporate a company*) makes it more difficult to use a structure for

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[17] FATF, 'Report on Money Laundering Typologies 1999–2000' (Paris FATF 2000) at p. 10 (available on the Internet at <http://www.oecd.org/fatf/pdf/NCCT_en.pdf>).

[18] Ibid. at p. 8.

[19] Ibid. at p. 9.

[20] Specifically, the 'Report of the Working Group on Offshore Centres' highlighted how the integrity of financial systems is hampered by the presence, in offshore financial centres, of opaque regulation concerning the incorporation and activity of legal entities and of insufficient control of them. A '*light and flexible incorporation and licensing regime*' resulting in '*inadequate due diligence in incorporation and licensing of new financial institutions and shell companies*' creates the risk that legal entities are incorporated with illicit proceeds and are subsequently used in money laundering operations. *See* 'Report of the Working Group on Offshore Centres' (Financial Stability Forum 5 April 2000) p. 12, available on the Internet at <http://www.fsforum.org/Reports/RepOFC.pdf>.

[21] 'Report on the misuse of corporate vehicles for illicit purposes' (Paris OECD Steering group on Corporate Governance 2001) at p. 13, available online at <http://www.oecd.org>.

[22] According to the International Narcotics Control Strategy Report 1999, a shelf company is '*a company that has already been incorporated with a standard memorandum and articles of association and has inactive shareholders, directors, and secretary. When a shelf company is subsequently purchased, the inactive shareholders transfer their shares to the purchaser and the directors and secretary submit their resignations. Typically, the authorities need not be notified when a shelf company is sold*'. The end result is that there are companies whose real beneficial owners and directors are unknown and not checked on by the authorities.

illicit purposes, as it makes it mandatory to supply information to a controlling authority, which supervises the process of incorporation.

Transparency variable 2 (*existence of legal provisions requiring background investigations into the founders of a company*) has the aim of requiring checks on all the persons who intend to set up a structure in order to prevent it from being used as a shield for criminal activities.

Transparency variable 3 (*existence of legal provisions setting a minimum company incorporation capital*) increases the costs incurred by criminals when misusing structures for illicit purposes.

Transparency variable 4 (*existence of legal provisions requiring verification of the legal origin of the incorporation capital*) requires verification of the legal origin of the capital invested in the structure in order to avoid illicit proceeds from being introduced into the financial system.

Transparency variable 5 (*existence of legal provisions requiring that the incorporation capital is deposited at a credit institution*) aims to make the control and verification of the origin of the capital easier by making the use of an intermediary obligatory.

Transparency variable 6 (existence of legal provisions requiring a minimum incorporation period, in order to verify the information regarding the founders) makes it possible to accurately investigate the persons incorporating a structure and the documentation involved, in order to detect any anomalies and avoid the structures being misused.

Transparency variable 7 (*existence of legal provisions prohibiting the incorporation of 'shelf companies'*) is aimed at prohibiting the use of structures, which have already been incorporated with a standard memorandum and articles of association and inactive shareholders, directors and secretary. Authorities need not be informed when such structures are sold and their shareholders, directors and secretary are replaced. This makes it more difficult to thoroughly verify the true beneficial owners due to their very flexible incorporation procedures.

Transparency variable 8 (*existence of legal provisions requiring that a registered office/agent is domiciled in the country of incorporation*) has the aim of linking a structure to a physical location, because this makes eventual criminal investigation of its activities more effective and facilitates the acquisition of information.

Transparency variable 9 (*existence of legal provisions requiring that the company be registered in a public register*) makes information concerning the incorporation of structures readily available to third parties and law enforcement agencies by requiring that they are made public.

Transparency variable 10 (existence of legal provisions requiring that a central controlling authority collects, maintains and verifies the information required for registration), is necessary in order to centralize data, quicken access, and verify the accuracy of the documentation presented, thus making it more difficult to misuse structures.

4.2.2 The thematic area 'Company activity'

The 'Company activity' area refers to the activities of an operational legal and non-legal structure aimed at achieving its economic or patrimonial goal.

This area is relevant for international co-operation for the prevention of money laundering because a lack of controls on the activities of the company increases the opacity in company law and makes it difficult to monitor its behaviour and exchange this information with other foreign authorities. The greater the possibility of gaining information about the management and the activities of a structure, the more the names of shareholders are accessible to other parties.

The more closely accounts are audited, and the greater the obligation to disclose relevant information, the more information concerning the activities of structures is available to law enforcement, judiciary and financial authorities and can be exchanged, when necessary, with their counterparts for anti-money laundering purposes.

The International Organization of Securities Commissions (IOSCO)[23] has underlined how harmonized regulation of the operations of legal entities in the securities market is necessary to guarantee the integrity of financial markets, stating that *'accounting principles and auditing standards are necessary safeguards of the reliability of financial information'*.[24]

The importance of scrutiny of company activity has also been emphasized by the OECD in the discussions regarding the creation of a set of corporate governance standards and guidelines. A set of non-binding principles, developed in 1999, covers five areas, one of which is disclosure and transparency, directed at ensuring *'[...] that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company. [...] Information should be prepared, audited, and disclosed in accordance with high quality standards of accounting, financial and non-financial disclosure, and audit. An annual audit should be conducted by an independent auditor in order to provide an external and objective assurance on the way in which financial statements have been prepared and presented. Channels for disseminating information should provide for fair, timely and cost-efficient access to relevant information by users'*.[25]

A policy aimed at reducing opacity in this area, therefore, includes a set of elements, identified as transparency variables of regulation in this study:

Transparency variable 11 (*existence of legal provisions requiring the regular updating of data in the company register*) makes it compulsory to communicate all changes in the structure. This makes it possible to improve knowledge of the structure and more difficult to use it for criminal purposes.

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[23] Available online at <http://www.iosco.org/iosco.html>.

[24] IOSCO, Objectives and principles of securities regulation, p. 4.

[25] 'OECD Principles of Corporate Governance' (OECD *Ad Hoc* Task Force on Corporate Governance 1999) at pp. 19–22, available online at <http://www.oecd.org/daf/governance/principles.pdf>, visited on 25 July 2001.

Transparency variable 12 (existence of legal provisions requiring systematic examination of the data held in the company register in order to detect inconsistent or missing data) requires that the accuracy of the data is checked and possible inaccuracies, anomalies or lack of information identified; this should indicate misuse of the structure.

Transparency variable 13 (*existence of legal provisions requiring the maintenance of a shareholder register*) is a means of making the names of the shareholders public. It includes the names of the shareholders in alphabetical order and information on the shares held. This makes it possible to acquire information on the persons in control of the structure for law enforcement agency investigation.

Transparency variable 14 (*existence of legal provisions requiring the regular updating of information in the shareholders register*) requires that information regarding shareholders is regularly updated in order to detect anomalies and to connect the structure to the physical persons in control.

Transparency variable 15 (*existence of legal provisions requiring the maintenance of a share register*) is aimed at making it compulsory to collect and keep up to date information on share ownership. This makes the activity of the structure more transparent and information readily available to third parties.

Transparency variable 16 (*existence of legal provisions requiring the regular updating of information in the share register*) requires that information concerning shares is updated in order to detect anomalies and to make it possible to connect the structure to the physical persons controlling it.

Transparency variable 17 (*existence of legal provisions requiring the filing of the minutes of the annual meeting*) requires the filing of a formal document summarizing the main decisions taken during the meeting regarding the activities of the structure. This requirement is aimed at facilitating the scrutiny of the activities of a structure, in order to ensure that they are not fictitious and to make its use for illicit purposes more difficult.

Transparency variable 18 (*existence of legal provisions requiring the filing of accounts*) requires further verification as to whether a structure carries out a real economic activity and is not used only for documentary purposes.

Transparency variable 19 (*existence of legal provisions requiring the keeping of accounting records for at least five years*) makes it possible to keep records of the economic activities conducted in order to be able to examine the accounts at a later date.

Transparency variable 20 (*existence of legal provisions requiring an external auditor*) reduces the risk of fraud and other illicit activities involving the falsification of documents and increases the transparency of corporate/company law by requiring an independent examination of the activities of a structure.

Transparency variable 21 (*existence of legal provisions requiring the depositing of company documents with a competent authority*) makes these documents readily available for investigation of the structure and increases the transparency of the information concerning its activities by making it more difficult to falsify company documents.

Transparency variable 22 (*existence of legal provisions requiring the keeping of tax records*) reduces the risk of fraud and other illicit activities making it possible to exercise checks on the economic activity of the structure.

4.2.3 The thematic area 'Identification of the real beneficial owner'

The area 'Identification of the real beneficial owner' refers to rules aimed at identifying the person or persons who are actually in control of a structure and its activities. In this thematic area, the opacity created by the impossibility of ascertaining the identity of the shareholders and establishing a connection between a structure and the physical person or persons running it obstructs effective investigation at national and transnational levels.

The importance of the introduction of controls in order to ascertain the identity of the real beneficial owner of a structure has recently been emphasized by the OECD in its 'Report on the misuse of corporate vehicles for illicit purposes'. The OECD states that '*any jurisdiction that provides mechanisms enabling individuals to successfully hide their identity behind a corporate vehicle while excessively constraining the capacity of authorities to obtain and share information on beneficial ownership and control for regulatory/supervisory and law enforcement purposes is increasing the vulnerability of its corporate vehicles to misuse*'.[26] However, '*certain jurisdictions [...] allow corporate vehicles incorporated or established in their jurisdictions to employ instruments that can be used to obscure beneficial ownership and control, such as bearer shares, nominee shareholders, and nominee directors, without devising effective mechanisms that would enable the authorities to identify the true owners and controllers when illicit activity is suspected or to fulfil their regulatory/supervisory responsibilities. Some of these jurisdictions further protect anonymity by enacting strict secrecy laws that prohibit company registrars, financial institutions, lawyers, accountants, and others, under the threat of civil and criminal sanctions, from disclosing any information regarding beneficial ownership and control to regulatory/supervisory and law enforcement authorities*'.[27]

Furthermore, the G–7 in July 2000 stressed that 'corporations are sometimes established simply in order to gain access to the financial system. If there is obscurity about their ownership, banks and other financial institutions may not be able to discover the identity of the beneficiary of the account and will be unable to meet their "know your customer" obligation. The combination of market access and obscurity of ownership can facilitate money laundering and market abuse'.[28] Scrutiny during the incorporation phase, therefore, can make it easier to ascertain the identity of the founders and the aims that the structure intends to achieve, thus facilitating international co-operation.

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[26] OECD Steering Group on Corporate Governance, *op. cit.*, p. 2.
[27] OECD Steering Group on Corporate Governance, *op. cit.*, p. 7.
[28] 'Actions against abuse of the global financial system' (Okinawa G-7 Financial Ministers 21 July 2000) available online at < http://www.g7–2001.org/en/okinawaabuse.htm > .

A policy aimed at reducing opacity in this area should, therefore, include a set of elements which in this study are identified as the transparency variables of regulation:

Transparency variable 23 (*existence of legal provisions prohibiting the issuance of bearer shares*) is aimed at making it possible to identify the physical persons who hold shares in the structure itself and possibly in control of it, thus preventing criminals from controlling structures without disclosing their identities.

Transparency variable 24 (existence of legal provisions requiring that participation in a company is communicated if a certain (share) threshold is exceeded) is aimed at making it possible to identify the physical persons with significant shareholdings in a structure and at increasing the transparency of its ownership.

Transparency variable 25 (*existence of legal provisions prohibiting nominee shareholders*) is aimed at preventing a physical person from controlling a structure by means of nominees (e.g. stockbrokers) who appear in the shareholder register but make it difficult to establish the identity of the real beneficial owner of the shares.

Transparency variable 26 (*existence of legal provisions prohibiting nominee directors*) is aimed at making it possible to establish a connection between a structure and the physical person running it by avoiding that the real beneficial owner uses a director for its formal management.

Transparency variable 27 (in case a legal entity is a shareholder, existence of legal provisions requiring that complete information is supplied, so as to identify the real beneficial owner) is aimed at making the ownership of a structure more transparent. When a legal entity holds shares in another legal entity, the chain of corporations thus generated makes it difficult to ascertain the identity of the real beneficial owner.

Transparency variable 28 (*existence of legal provisions prohibiting legal entities from acting as directors*) is aimed at making it easier to understand who holds control of a legal structure. When a legal structure is a director of another legal structure, the chain of corporations thus generated makes it difficult to ascertain the identity of the real and final power-holder.

Transparency variable 29 (existence of legal provisions requiring the disclosure of the identity of the real beneficial owner of a structure to the authorities) is aimed at obtaining the identity of the real beneficial owner of a structure on request, by the public authorities. This makes the ownership of a structure more transparent and harder to hide behind a corporate shield.

4.2.4 The transparency variables involved in the regulation of trusts

In its latest annual report,[29] FATF highlighted how 'trusts, along with various forms of corporate entities, are increasingly perceived as an important element of large-scale or complex money laundering schemes, despite their legitimate use and long tradition in many jurisdictions. [...] the concern for anti-money laundering authorities is the

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[29] 'Annual Report 2000–2001' (Paris 2001) at p. 16.

seemingly impenetrable anonymity which a trust may provide to the true owner or beneficiary. This anonymity is enhanced by the fact that documentation of trusts is not public information. [...]possible solutions range from establishing a strict regulatory regime for trust formation agents (i.e., subject them to licensing, customer identification, record keeping and reporting requirements) to imposing some sort of public or semi-public registration requirement on trust creation'.

The reasons why trusts could be used in the money laundering process was highlighted in the typologies report of February 2001.[30]

In Ireland and the United Kingdom, where trusts exist,[31] the more trust law is transparent, the more it is possible to establish the identity of the parties of the trust and to scrutinize the activity of the trustees. Law enforcement authorities can avert the use of trusts as shields for illegal transactions and exchange significant information at a transnational level.

Given the diversity between trusts and other legal and non-legal structures, appropriate indicators of transparency were selected for the analysis of the regulation of trusts. They were identified by studying the available literature on their regulation.[32] A policy aimed at reducing opacity in the regulation of trusts should contain a set of elements which, in this Study, are identified as indicators of transparency in regulation:

- *Existence of legal provisions requiring written constitution of the trust.* This indicator of transparency has the aim of ensuring the existence of written

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[30] '*It should be pointed out that a trust is not the same as a company or other form of corporate entity. When a company is established, it has its own "legal personality" that is separate and distinct from the natural persons that serve as directors or shareholders. Property held by a company is owned by the company as a legal person and not individually by the company directors or shareholders. Property held in trust, on the other hand, is legally owned by the trustee and no longer by the settlor nor by the beneficiary. Therefore, when dealing with certain trusts, the work of an investigator may be further complicated by the fact that the trustee may be a legal person (a trust company for example), and the beneficiary or beneficiaries may also be trusts (or corporate entities). Establishing whether there are real persons behind the legal arrangement and that the trust is a sham is a difficult if not impossible task. Furthermore, trusts differ from corporate entities in that they generally have no registration requirement or central registry, and there is usually no authority responsible for oversight of such legal arrangements*'. 'Report on Money Laundering Typologies 2000–2001' (Paris FATF 2001) at p. 10.

[31] As already mentioned, in the other EU Member States, trusts are not recognized as a separate legal form, but are recognized if incorporated in accordance with the law of the 'home' country, such as Ireland or the United Kingdom.

[32] A.J. Oakley: *The Modern Law of Trusts*, (London Sweet and Maxwell 1998); A. Sydenham, *Trusts* (London Sweet and Maxwell 1997); M. Lupoi, *Trusts*, (Milan Giuffrè Editore 1997); D.J. Hayton, *Law Relating to Trusts and Trustees*, (London Butterworths 1995); M.R. Sancilio, 'La disciplina del trust', in *Ricerca sul riciclaggio nel contesto dei rapporti tra economia criminale ed economia legale. Rapporto sull'attivita' di ricerca 1 June 1998–31 May 1999* (Rome Ufficio Italiano dei Cambi 2000); S. Gardner, *An Introduction to The Law of Trusts* Oxford Clarendon Law Series Clarendon Press 1990).

evidence that a trust has been set up, granting law enforcement authorities the possibility to obtain information on trusts and their specific features.

- *Existence of legal provisions requiring registration of the trust deed in a public register.* This indicator of transparency requires that data regarding the main features of a trust be centrally registered and publicly accessible. This would make information about the trust easier to access by the general public and law enforcement, judiciary and financial authorities, and easier to exchange at a transnational level.
- *Existence of legal provisions requiring that the personal particulars of the settler be included in a public document.* This indicator of transparency is aimed at avoiding the possibility that the settler remains anonymous, by supplying the general public and law enforcement, judiciary and financial authorities with information regarding the identity of the original owner of the capital held in trust. Consequently, this diminishes the anonymity surrounding the trust.
- *Existence of legal provisions requiring that the personal particulars of the beneficiary be included in a public document.* This indicator of transparency is aimed at avoiding the possibility that the beneficiary remains anonymous by supplying the general public and law enforcement agencies with information regarding the identity of the person entitled to the benefits derived from the investments of the trust fund. Consequently, this diminishes the anonymity surrounding the trust.
- *Existence of legal provisions prohibiting the settler from also being the beneficiary of the same trust.* This indicator of transparency is aimed at preventing criminals from exploiting the possibility of formally separating themselves from the ownership of the proceeds of crime by conferring the goods to a trust, and receiving the profits thereof by nominating themselves as the beneficiaries of the same trust.
- *Existence of legal provisions prohibiting the beneficiary of a trust from being another trust.* This indicator of transparency is aimed at prohibiting the beneficiary of a trust from being another trust, thus preventing a supplementary layer of secrecy from being added to the trust and enhancing the possibility of detecting the identity of the beneficiary.
- *Existence of legal provisions requiring a public register of trustees.* This indicator of transparency requires that data regarding the identity of trustees be registered and publicly accessible, thereby making trustee information available to both the general public and law enforcement agencies.
- *Existence of legal provisions requiring an authority to supervise the activity of trustees.* This indicator of transparency grants the possibility of scrutinizing the activities of the persons and companies managing the trust fund and so making it easier to detect any criminal misuse.

5. Analysis of the regulation and its implementation in the corporate/company regulative field

The aim of the data analysis is to understand what are the obstacles to international co-operation for the prevention of money laundering, where these obstacles are to be found and at what level (regulation and/or implementation), and what are their dimensions.

Separate analysis was carried out for each of the structures in EU Member States identified as being susceptible to use as money laundering operations.

The analyzed regulation and its implementation are summarized in a series of synoptic tables available in annex B of this report. The tables outline the obstacles to international co-operation for the prevention of money laundering present in each EU Member State.[33]

For each of the structures selected for further analysis and for each variable of transparency, an index of obstacles to regulation and the implementation of regulation was calculated, with a view to understanding in which thematic area obstacles to international co-operation on anti-money-laundering activity are to be found.[34] These indexes represent, on a scale from 0 to 100, the dimensions of the obstacles created by the absence of regulation and by their incomplete or absent implementation where the regulation under consideration exists. *The higher this index, the higher the obstacles to international co-operation for the prevention of money laundering.* For each thematic area, these indexes have been subsequently aggregated in a **'General index of Obstacles to Regulation'** (*GOR index*) and in a **'General index of Obstacles to the Implementation of Regulation'** (*GOI index*). They are a quantitative expression of the obstacles created, in each thematic area and in each EU Member State, by the absence of regulation and the incomplete or absent implementation of the regulation under consideration, where it exists.

5.1 Results of the analysis: the regulation and its implementation for the legal and non-legal structures analyzed in all countries where they exist

5.1.1. Public limited company

The above-mentioned Indexes, related to the obstacles to regulation and to its implementation, are summarized in the following table (Table 1).

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[33] The answers given by the experts used for the analysis have not been systematically crosschecked.

[34] For an explanation of the process of calculating these indexes, see section B of the methodological appendix (step 6).

Table 1. Public limited company Obstacles in regulation and in its implementation (EU Member States)

PUBLIC LIMITED COMPANY	Thematic areas					
	Incorporation		Company activity		Identification of the real beneficial owner	
	GOR Index	GOI Index	GOR Index	GOI Index	GOR Index	GOI Index
Austria	70.0	8.3	36.4	10.0	85.7	-
Belgium	50.0	12.5	16.7	55.0	100.0	n.a.
Denmark	60.0	15.6	0.0	21.5	57.1	16.7
Finland	40.0	2.1	0.0	6.3	28.6	2.5
France	44.4	5.0	0.0	4.2	33.3	12.5
Germany	30.0	3.6	16.7	3.8	28.6	0.0
Greece	40.0	0.0	0.0	11.5	100.0	n.a.
Ireland	40.0	0.0	8.3	0.0	57.1	0.0
Italy	60.0	9.4	18.2	16.7	57.1	16.7
Luxembourg	40.0	0.0	16.7	0.0	57.1	0.0
the Netherlands	22.2	0.0	16.7	0.0	85.7	0.0
Portugal	50.0	0.0	8.3	14.6	85.7	50.0
Spain	40.0	4.2	18.2	8.3	71.4	6.3
Sweden	20.0	3.1	8.3	3.4	0.0	5.4
United Kingdom	50.0	0.0	0.0	2.1	85.7	0.0
European Union average	*43.8*	*4.3*	*11.0*	*10.5*	*62.2*	*9.2*

Legend
-: data not available
n.a.: not applicable because no regulation exists (i.e. GOR 100)
0.0: no obstacles for anti-money laundering international co-operation
100.0: maximum obstacles for anti-money laundering international co-operation

The EU average Indexes of Obstacles to regulation and to its implementation set out in Table 1 are graphically represented in Figure 1.

As can be seen from this figure, the greatest obstacles to international co-operation for the prevention of money laundering seem to be found in the lack of regulation in the three identified thematic areas rather than in its implementation. Where regulation exists, it seems to show a high implementation level. The thematic area 'Identification of the true beneficial owner' is where obstacles to regulation are the most significant (GOR 62.2). The second area where obstacles to regulation are to be found is 'Incorporation' (GOR 43.8). The analysis conducted by applying the model shows which of the single transparency variables, in each thematic area, are the most problematic in terms of obstacles to international co-operation for the prevention of money laundering.

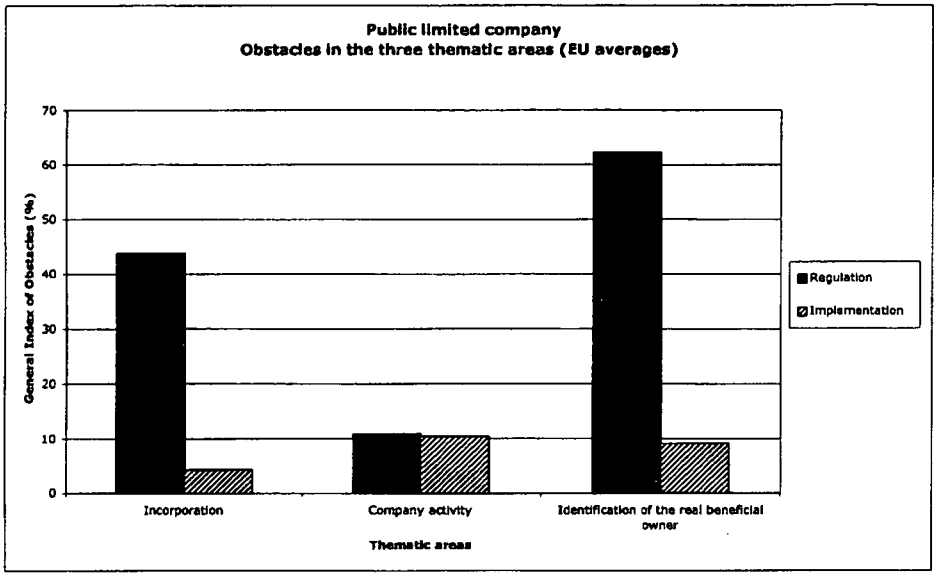

Figure 1: Public limited company

1. OBSTACLES IN THE THEMATIC AREA 'INCORPORATION'

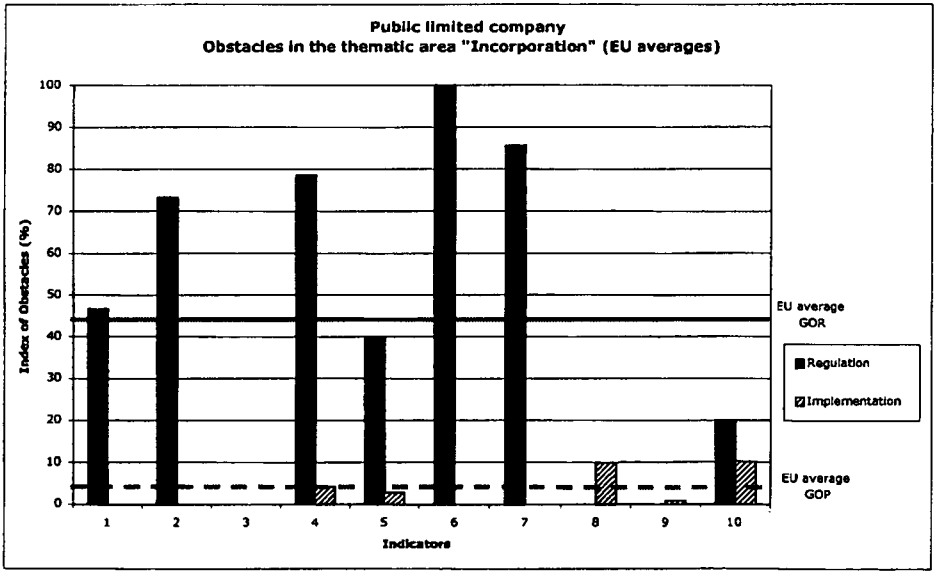

Figure 2

[The list of transparency variables from 1 to 10 can be found above at pp. 8–9.
These Indexes of Obstacles are aggregate values calculated from the average of the values attributed to each EU Member State. See annex B for the answers from the individual EU Member States.]

Main obstacles in the thematic area 'Incorporation'

- Transparency variable 6 (Existence of legal provisions requiring a minimum period for incorporation, in order to scrutinize the information regarding the founders) – index of obstacles to regulation 100.0;
- Transparency variable 7 (Existence of legal provisions prohibiting the incorporation of 'shelf' companies) – index of obstacles to regulation 85.7;
- Transparency variable 4 (Existence of legal provisions requiring verification of the legal origin of the incorporation capital) – index of obstacles to regulation 78.6;
- Transparency variable 2 (Existence of legal provisions requiring background investigations on the founders of a company) – index of obstacles to regulation 73.3;
- Transparency variable 1 (Existence of legal provisions requiring statutory authorization to incorporate a company) – index of obstacles to regulation 46.7.

2. OBSTACLES IN THE THEMATIC AREA 'COMPANY ACTIVITY'

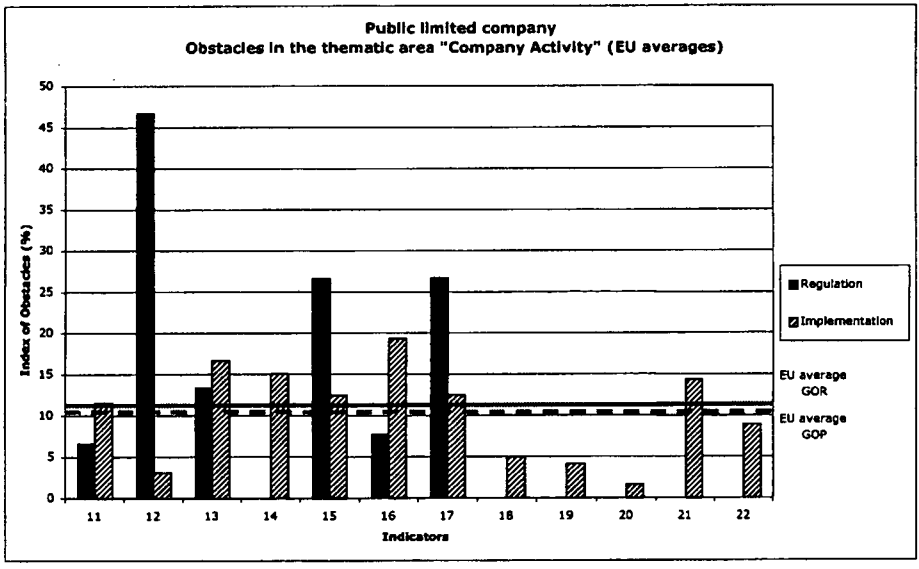

Figure 3

[The list of transparency variables from 11 to 22 can be found on pp. 9–10.
These indexes of obstacles are aggregate values calculated by taking the average of the values attributed to each EU Member State. See annex B for the answers from the individual EU Member States.]

Main obstacles in the thematic area 'Company activity'

- Transparency variable 12 (Existence of legal provisions requiring systematic

examination of the data held in the company register in order to detect inconsistent or missing data) – index of obstacles to regulation 46.7;
- Transparency variable 15 (Existence of legal provisions requiring the maintenance of a share register) – index of obstacles to the implementation of regulation 26.7;
- Transparency variable 17 (Existence of legal provisions requiring the filing of the minutes of the annual meeting) – index of obstacles to the implementation of regulation 26.7.

3. OBSTACLES IN THE THEMATIC AREA 'IDENTIFICATION OF THE REAL BENEFICIAL OWNER'

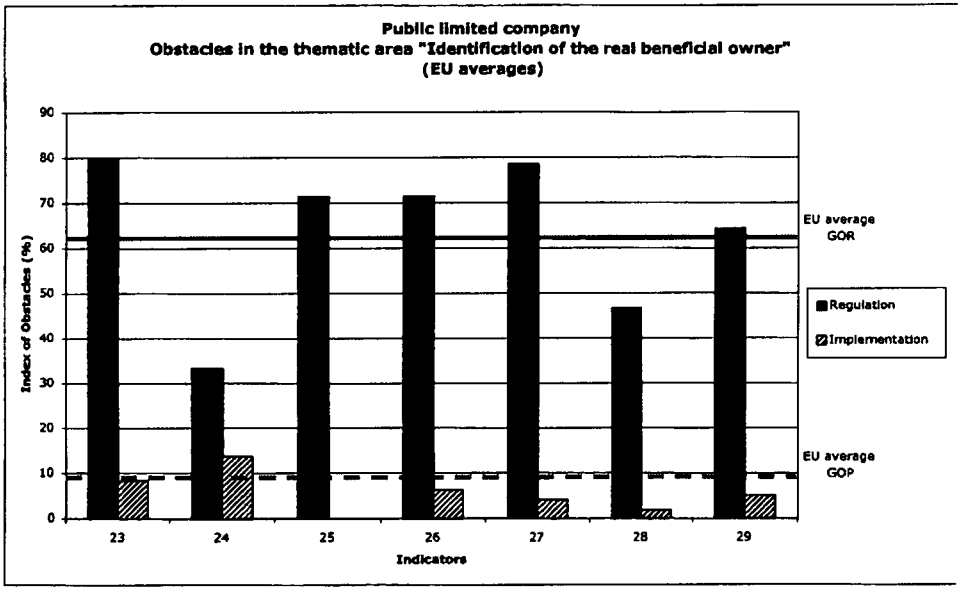

Figure 4

[The list of transparency variables from 23 to 29 can be found on p. 11–12.
These indexes of obstacles are aggregate values calculated by taking the average of the values attributed to each EU Member State. See annex B for the answers from the individual EU Member States.]

Main obstacles in the thematic area 'Identification of the real beneficial owner'

- Transparency variable 23 (Existence of legal provisions prohibiting the issuance of bearer shares) – index of obstacles to regulation 80.0;
- Transparency variable 27 (In case a legal entity is a shareholder, existence of legal provisions requiring that complete information is supplied in order to identify the true beneficial owner) – index of obstacles to regulation 78.6;
- Transparency variable 25 (Existence of legal provisions prohibiting nominee shareholders) – index of obstacles to regulation 71.4;

- Transparency variable 26 (Existence of legal provisions prohibiting nominee directors) – index of obstacles to regulation 71.4;
- Transparency variable 29 (Existence of legal provisions requiring the disclosure of the identity of the true beneficial owner of a company to the authorities) – index of obstacles to regulation 64.3;
- Transparency variable 28 (Existence of legal provisions prohibiting legal entities from acting as directors) – index of obstacles to regulation 46.7.

5.1.2 Private limited company

The indexes, relative to the obstacles to regulation and its implementation, are summarized in the following table (Table 2).

Table 2. Private limited company
Obstacles in regulation and its implementation (EU Member States)

PRIVATE LIMITED COMPANY	Thematic areas					
	Incorporation		Company activity		Identification of the real beneficial owner	
	GOR index	GOI index	GOR index	GOI index	GOR index	GOI index
Austria	60.0	6.3	40.0	12.5	57.1	0.0
Belgium	50.0	12.5	16.7	53.8	71.4	37.5
Denmark	60.0	15.6	0.0	21.5	57.1	16.7
Finland	40.0	2.1	0.0	6.3	42.9	3.1
France	44.4	0.0	8.3	26.9	66.7	0.0
Germany	30.0	5.4	25.0	6.9	42.9	14.6
Greece	50.0	0.0	16.7	5.0	85.7	33.3
Ireland	40.0	0.0	8.3	0.0	57.1	0.0
Italy	60.0	9.4	27.3	14.1	57.1	8.3
Luxembourg	40.0	0.0	16.7	0.0	42.9	0.0
the Netherlands	22.2	0.0	16.7	0.0	60.0	0.0
Portugal	50.0	0.0	8.3	14.6	50.0	22.2
Spain	40.0	4.2	8.3	4.5	71.4	0.0
Sweden	20.0	3.1	8.3	3.4	0.0	3.6
United Kingdom	60.0	0.0	0.0	2.1	85.7	-
European Union average	*44.4*	*3.9*	*13.4*	*11.4*	*56.5*	*10.0*

Legend
-: data not available
n.a.: not applicable because no regulation exists (i.e. GOR 100)
0.0: no obstacles to international co-operation for the prevention of money laundering
100.0: maximum obstacles to international co-operation for the prevention of money laundering

The EU average indexes of obstacles to regulation and its implementation set out in Table 15 are graphically represented in Figure 5.

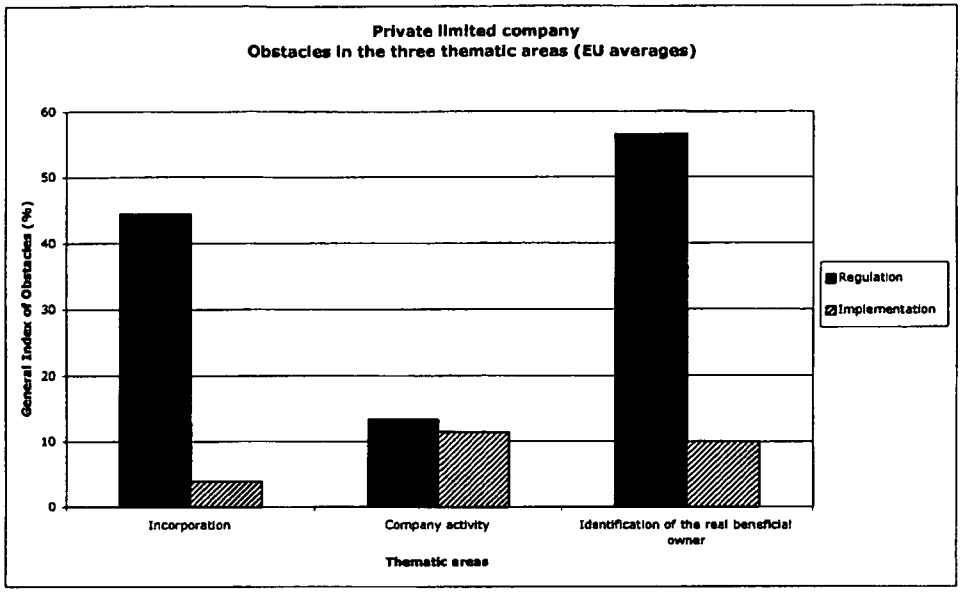

Figure 5. Private limited company

As in the case of the public limited company, the greatest obstacles to international co-operation for the prevention of money laundering seem to be found in the lack of regulation in the three identified thematic areas rather than in its implementation. Where the regulation exists, it seems to show a high implementation level. The thematic area 'Identification of the real beneficial owner' is where obstacles to regulation are the most significant (GOR 56.5), while the second area where obstacles to regulation are to be found is 'Incorporation' (GOR 44.4).

The analysis conducted applying the model shows which of the single transparency variables in each thematic area are the most problematic in terms of obstacles to international co-operation for the prevention of money laundering.

1. OBSTACLES IN THE THEMATIC AREA 'INCORPORATION'

Main obstacles in the thematic area 'Incorporation'

- Transparency variable 6 (Existence of legal provisions requiring a minimum incorporation period) – index of obstacles to regulation 100.0;
- Transparency variable 7 (Existence of legal provisions prohibiting the incorporation of 'shelf companies') – index of obstacles to regulation 85.7;
- Transparency variable 2 (Existence of legal provisions requiring background

investigations into the founders of a company) – index of obstacles to regulation 73.3;
- Transparency variable 4 (Existence of legal provisions requiring verification of the legal origin of the incorporation capital) – index of obstacles to regulation 71.4;
- Transparency variable 1 (Existence of legal provisions requiring statutory authorization to incorporate a company) – index of obstacles to regulation 46.7.

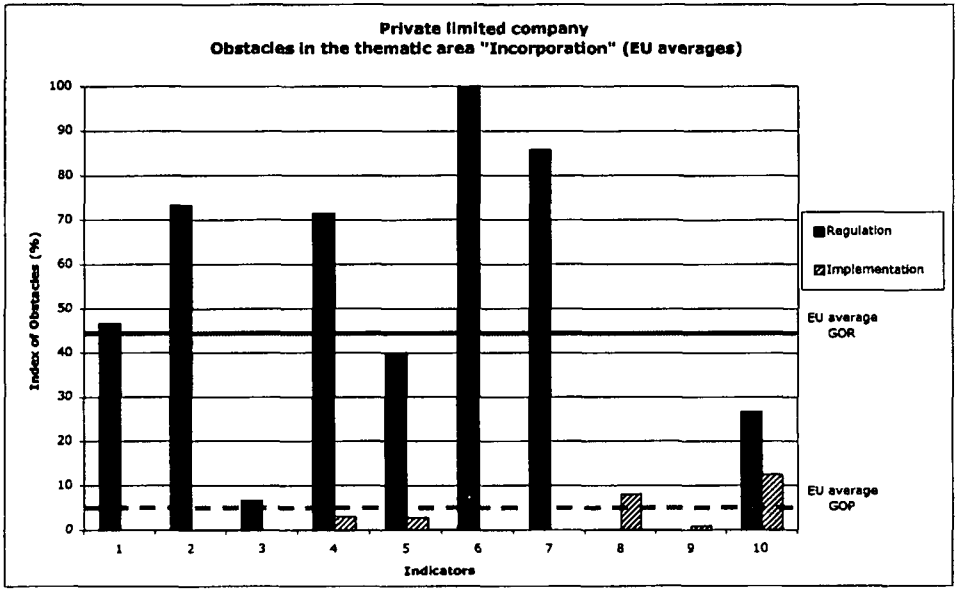

Figure 6

[The list of transparency variables from 1 to 10 can be found at pp. 8–9.
These indexes of obstacles are aggregate values calculated by taking the average from the values attributed to each EU Member State. See Annex B for the answers from the individual EU Member States.]

2. OBSTACLES IN THE THEMATIC AREA 'COMPANY ACTIVITY'

Main obstacles in the thematic area 'Company activity'

- Transparency variable 12 (Existence of legal provisions requiring systematic examination of the data held in the company register in order to detect inconsistent or missing data) – index of obstacles to regulation 60.0;
- Transparency variable 17 (Existence of legal provisions requiring the filing of minutes of the annual meeting) – index of obstacles to regulation 40.0;
- Transparency variable 15 (Existence of legal provisions requiring the maintenance of a share register) – index of obstacles to regulation 26.7.

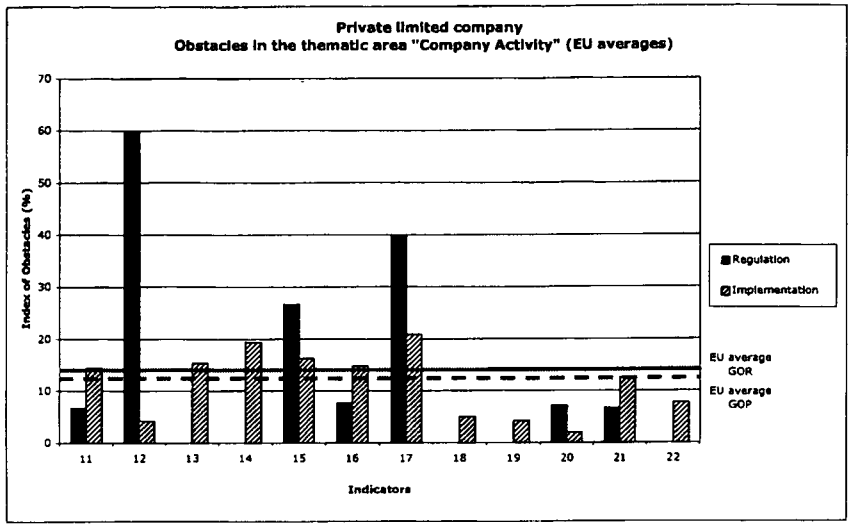

Figure 7

[The list of transparency variables from 11 to 22 can be found at pp. 10–11.
These indexes of obstacles are aggregate values calculated by taking the average of the values attributed to each EU Member State. See annex B for the answers from the individual EU Member States.]

3. OBSTACLES IN THE THEMATIC AREA 'IDENTIFICATION OF THE REAL BENEFICIAL OWNER'

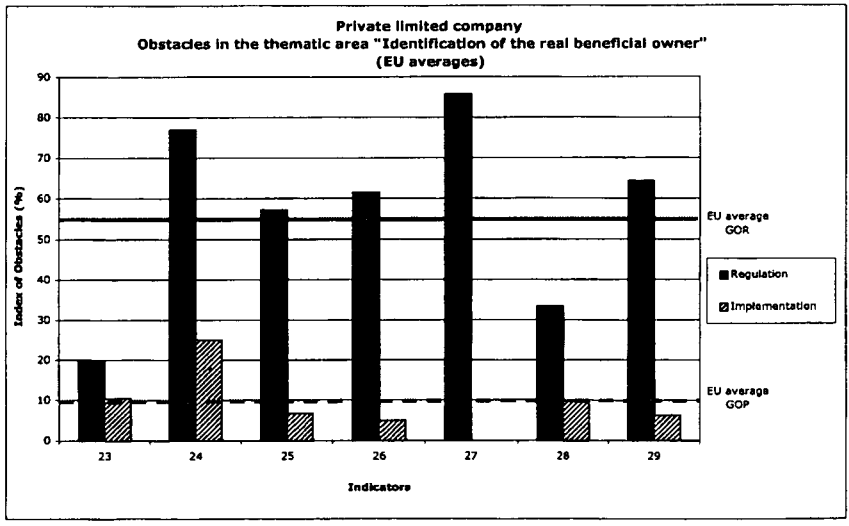

Figure 8

[The list of transparency variables from 23 to 29 can be found at pp. 11–12.
These indexes of obstacles are aggregate values calculated by taking the average of the values attributed to each EU Member State. See annex B for the answers from the individual EU Member States.]

Main obstacles in the thematic area 'Identification of the real beneficial owner'

- Transparency variable 27 (In case a legal entity is a shareholder, existence of legal provisions requiring that complete information is supplied, so as to identify the real beneficial owner) – index of obstacles to regulation 85.7;
- Transparency variable 24 (Existence of legal provisions requiring that participation in a company is communicated, if a certain (share) threshold is exceeded) – index of obstacles to regulation 76.9;
- Transparency variable 29 (Existence of legal provisions requiring the disclosure of the identity of the real beneficial owner of a company to the authorities) – index of obstacles to regulation 64.3;
- Transparency variable 26 (Existence of legal provisions prohibiting nominee directors) – index of obstacles to regulation 61.5;
- Transparency variable 25 (Existence of legal provisions prohibiting nominee shareholders) – index of obstacles to regulation 57.1.

5.1.3 Trust

The regulation of trusts was analyzed in Ireland (which mentioned them as susceptible to being used in money laundering operations) and the United Kingdom. In order to analyze the regulation of trusts, which differ from all the forms studied in this report, appropriate indicators of transparency were selected. Their relevance for international co-operation for the prevention of money laundering is explained in section 8.2.4.

The following table highlights the results of the analysis in relation to the existence of legal provisions, which should ensure transparency of trusts.

Table 3 Obstacles in the regulation of trusts

Indicators of transparency	**Ireland**	**United Kingdom**
Existence of legal provisions requiring written constitution of the trust	No	No
Existence of legal provisions requiring registration of the trust deed in a public register	No	No
Existence of legal provisions requiring that the personal particulars of the settler be included in a public document	No	No
Existence of legal provisions requiring that the personal particulars of the beneficiary be included in a public document	No	No
Existence of legal provisions prohibiting the settlor from also being the beneficiary of the same trust	No	No
Existence of legal provisions prohibiting the beneficiary of a trust from being another trust	No	No
Existence of a public register of trustees	No	No
Existence of an authority that supervises the activities of trustees	No	No

As can be seen in this table, the regulation of trusts allows for a high level of opacity.

The basic rule is that no formalities are required, and so a trust can be constituted orally. The decision depends on the importance that the parties attribute to having written evidence of the transaction, and what is entailed. Even though the possibility of constituting trusts orally attributes flexibility to the instrument (allowing the creation of a trust whenever two subjects – the settlor and the trustee – voluntarily agree to create one), this might obstruct investigations into money laundering by the authorities. Official trust registers for registering trust deeds do not exist, even where trusts are incorporated in writing and the identities of the parties, therefore, remain unclear. Furthermore, there are no restrictions on who can be a trustee nor is there a register of the details of the identity of the trustees, and this makes tracing them very difficult. The same obstacles to identification appear to apply to the settlor, whose identity does not need to appear on any document. The beneficiary of a trust may be a company or another trust, not only a physical person or several persons. In the former case, there is an additional layer of confidentiality regarding the beneficiary.

There is some opacity in the management of the trust as well. There is no authority that supervises the activity of trustees. The latter only have general limitations as regards the administration of the trust fund, but there is no actual examination of single investments by any person or authority.

This difficulty in detecting the existence of a trust and the identity of its parties, together with the absence of supervision of the trustees and the possibility that the settlor or another trust might be the beneficiary, can be misused by criminals. In fact, money launderers can invest the proceeds from crime in a trust thereby formally separating themselves from the ownership of the money and assets, and exploit the confidentiality surrounding the trust to reduce the risk of being identified. Where a criminal is both the settlor and the beneficiary, he will formally separate himself from the ownership of the dirty proceeds by attributing them to a trustee, but actually obtain the benefits from the investment himself.

6. Conclusions

The results illustrate that, as far as the public and private limited companies are concerned, the greatest obstacles to international co-operation for the prevention of money laundering are to be found in the thematic area 'Identification of the real beneficial owner'.[35] The main obstacle is a lack of regulation requiring full information regarding the real beneficial owner of a public or private limited company, especially when a legal entity is a shareholder or director, or the issuance

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[35] The relevance of this area for anti-money laundering international co-operation is outlined at section 9.2.3 of the report.

of bearer shares is permitted. Furthermore, some problems seem to arise from the fact that, in some EU countries, the regulation allows for nominee shareholders and directors.

The thematic area 'Incorporation' also presents obstacles to international co-operation for the prevention of money laundering, even though to a lesser degree than the former. Lack of regulation in this area makes it more difficult to acquire information about the physical persons party to the creation of legal structures and increases the possibility that these might be used for criminal purposes. Scrutiny in this area would raise the costs incurred by criminals when using legal structures for money laundering and increase the amount of information available to law enforcement, judicial and financial authorities, thereby facilitating national and international investigation of the operations of those companies. Some EU Member States permit shelf companies, that is, previously incorporated companies with a standard memorandum and articles of association with inactive shareholders, directors and secretary. Often, authorities do not need to be informed when such companies are sold and their secretary, directors or shareholders are replaced. This makes it more difficult to thoroughly investigate the real beneficial owner, given that shelf companies are incorporated with a very flexible procedure. Furthermore, many EU Member States do not investigate the founders of a company or ascertain the legal origin of the incorporation capital.

The European Commission might, therefore, consider taking action to define more specific and stringent guidelines for EU Member States in the thematic areas mentioned above, relevant to anti-money laundering international co-operation. This would increase transparency of the whole corporate/company regulative field and make information available to law enforcement, judiciary and financial authorities dealing with national money laundering cases, thus facilitating international co-operation for the prevention of money laundering.

The analysis of regulation covering trusts has shown it as being characterized by great opacity and absence of all those provisions relevant for international co-operation for the prevention of money laundering. Their regulation and the confidentiality of their constitution hinder the gathering of information about the people setting them up and their management structure. This opacity creates obstacles to international co-operation for the prevention of money laundering because of the lengthy process in getting information.

Corporate and/or company regulation, which today is undergoing extensive reforms in the area of corporate governance in the EU Member States, should pay more attention to the benefits that transparency would bring to international co-operation for the prevention of money laundering. The *Euroshore* report highlighted the strategic importance of this area for international co-operation for the prevention of money laundering and this article illustrates the associated obstacles and their dimensions. Until now, questions relating to corporate governance have mainly been restricted to the national level. It appears however that the European Commission launched a study in December 2000 on codes of corporate governance in the EU. A final report is expected by the end of 2001. In addition, the Commission

has announced the setting up of a high level group of experts in corporate law who will produce a report by June 2002. There may be scope within these initiatives to tackle the issue of transparency as defined in the main report and in this article. Having a European Directive on banking and financial regulation, without a set of European standards on key issues in corporate governance, makes the whole anti-money laundering regime unbalanced and weak.