

The challenges of privacy law to corporate transparency and probity

Paul Egan SC

19 October 2023



Agenda

- **Public access**
 - CRO documents and information
 - Company documents and registers
 - RBO information
- **EU rush to concealment of ownership information**
 - CJEU
 - EU agencies
- **Key issues for company law information**
- **Road to a solution**



Access to CRO documents

- **Joint Stock Companies Act 1844, s 18**

[E]very Person shall be at liberty to inspect the Returns, Deeds, Registers, and Indexes which shall be made to or kept by the said Registrar of Joint Stock Companies; and that there shall be paid for such Inspection such Fees as may be appointed by the Commissioners of Her Majesty's Treasury in that Behalf, not exceeding One Shilling for each such Inspection;

[A]ny Person shall be at liberty to require a Copy or Extract of any such Return or Deed, to be certified by the said Registrar; and there shall be paid for such certified Copy or Extract such Fee as the Commissioners of Her Majesty's Treasury may appoint in that Behalf, not exceeding Sixpence for each Folio of such Copy or Extract ...



Access to CRO documents

- **Joint Stock Companies Act 1844, s 18**

- **Companies Act 1856, s 106(5)**

- **Companies Act 1862, s 174(5)**

- **Companies (Consolidation) Act 1908, s 243(6)**

- **Companies Act 1963, s 370(1)**

- **Companies Act 2014, s 891(1)**



- On payment of the prescribed fee, any person may—
 - inspect any document which has been received and recorded by the Registrar in pursuance of this Act,
 - require the Registrar to certify a certificate of incorporation of any company, or
 - require the Registrar to certify a copy of or extract from any other document or any part of any other document kept by the Registrar.



Personal information at the CRO

Information from filed documents

Person	Information	Document
Member	Name, address, shares held	Annual Return (B1) Return of Allotments (B5) Return of Reissue (H5a)
Director	Name, date of birth, residential address, nationality, business occupation, directorships ≤ 5 years	Annual Return (B1) Change of director and/or secretary, or in their particulars (B10, B10a)
Secretary	Name, residential address	
Director	Shares and other securities held at start and end of financial year	Financial statements of large companies
Director, Secretary	Image of signature	Many filed documents



Access to company registers

Rights to inspect and to copies

Document or register	Member	Creditor	Public
Register of members	INSPECTION AND COPIES		INSPECTION AND COPIES
Register of directors and secretary			
Disclosable interests register			
PLC register of debenture holders			
Minutes of general meetings			
Directors' interests declared at meetings	INSPECTION		
Instruments creating charges		INSPECTION	
Directors' service agreements ≥3 years	INSPECTION		
PLC substantial interests register	INSPECTION AND COPIES		INSPECTION AND COPIES
PLC share ownership inspection report			



Personal information on company registers

Information included on registers required to be kept by a company

Person	Information	Register
Member	Name, address, shares held	Register of members
Director	Name, date of birth, residential address, nationality, business occupation, directorships ≤ 5 years	Register of directors and secretaries
Secretary	Name, residential address	
Director and secretary	Personal, family and controlled ≥1% interests in group shares or debentures, purchase, sale prices	Disclosable interests register
Person with interest in ≥3% voting shares in PLC	Name, address, shares in which interest held	Register of substantial interests

Personal information under EU law

Information mandated to be disclosed under company law directives

Person	Information	Original EU Directive
Single member of private company	Name	12 th Directive 89/667/EEC
Person with interest in ≥3% voting shares in PLC traded on regulated market	Name, percentage range in which interest held: 5%, 10%, 15%, 20%, 25%, 30% (or 33½), 50%, (66⅔ or) 75%	Transparency Directive 2004/109/EC
Director	Name	1 st Directive 68/151/EEC
	Emoluments, loans guarantees	4 th Directive 78/660/EEC 7 th Directive 83/349/EEC
	Special arrangements	3 rd Directive 78/855/EEC 6 th Directive 82/891/EEC
Branch representative	Name, signature	11 th Directive 89/666/EEC

EU AML/CFT law

EU law combating money laundering and terrorist financing

- AML Directives (AMLDs or MLDs)
 - 1st - Directive 91/308/EEC – targeted narcotics money
 - 2nd - Directive 2001/97/EC – extended scope of regulated entities
 - 3rd - Directive 2005/60/EC – extended to terrorist financing
 - 4th - Directive (EU) 2015/849
 - Beneficial ownership register, open to designated persons, and **those with a 'legitimate interest'**
 - 5th - Directive (EU) 2018/843
 - Beneficial ownership register open to **'any member of the general public'**
 - Proposed 6th Directive and Regulation



Access to the Central RBO

Directive (EU) 2015/849 Article 30(5) as enacted	Directive (EU) 2018/843 Amendment to Article 30(5)
Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:	Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:
(a) competent authorities and FIUs, without any restriction;	(a) competent authorities and FIUs, without any restriction;
(b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;	(b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;
(c) any person or organisation that can demonstrate a legitimate interest.	(c) any member of the general public.



Transposed by Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, and European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (S.I. No. 110/2019, amended by S.I. No. 308/2023)

Personal information at the Central RBO

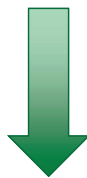
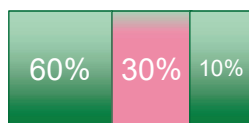
- 'Beneficial owner' means owner or controller of >25%
- Companies and trusts must 'obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held'
- 2018 Directive: members of the public should be permitted to access **'at least'**:

- identity of individual owner or controller of >25%
- month and year of birth
- country of residence
- nationality
- nature of beneficial interest e.g., direct or indirect
- extent of interest

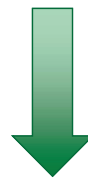
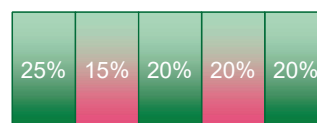
- Where there is no 'beneficial owner', the above particulars for the 'senior managing officials', i.e., the directors



RBO Information – Irish private companies



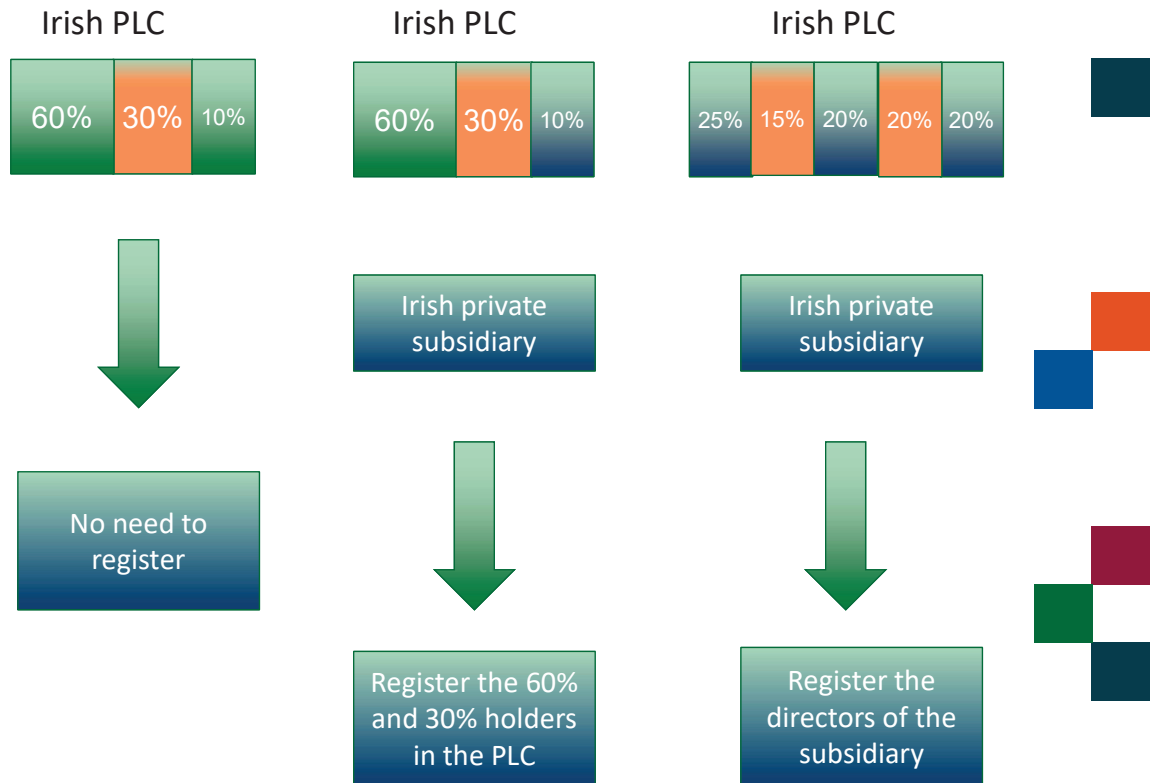
Register the 60%
and 30% holders



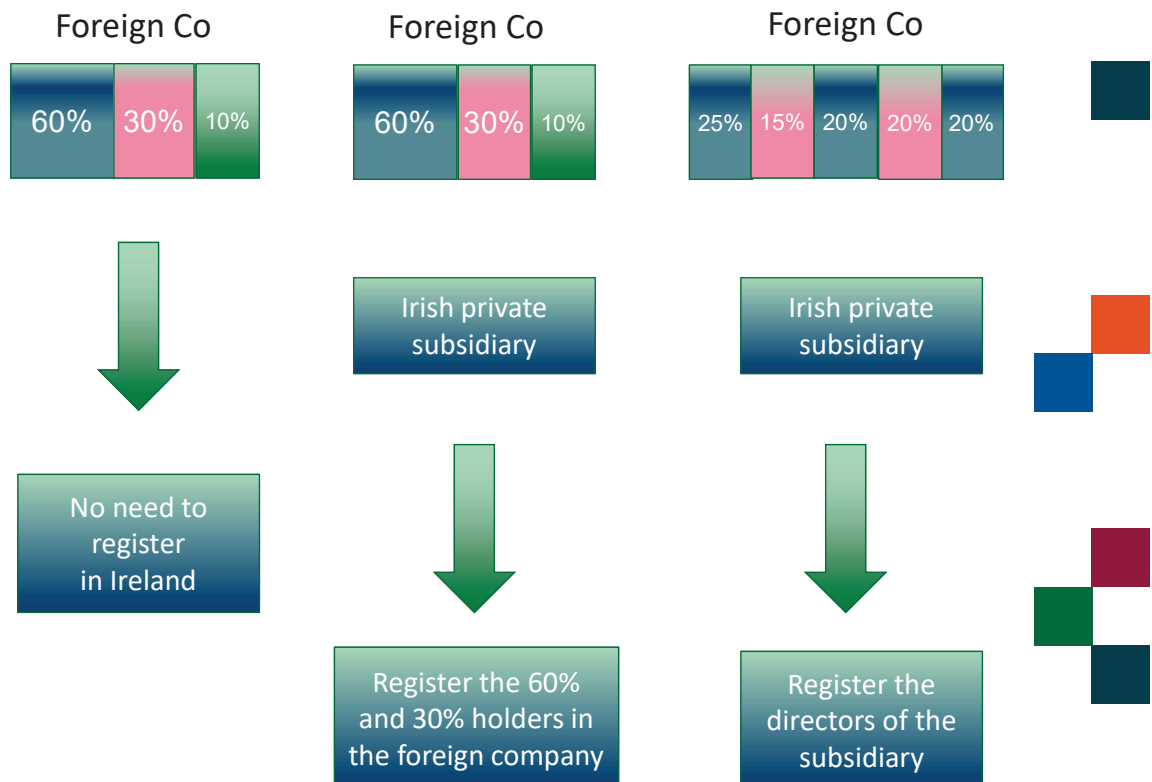
Register the
directors



RBO Information – group structures



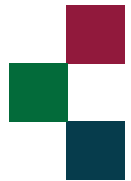
RBO Information – group structures



Privacy law

The trend towards concealment and corporate secrecy

- EU Charter of Fundamental Rights, arts 7, 8, 11
- GDPR
- CJEU rulings and AG's opinions
- EDPS opinions
- European Parliament resolution



Privacy law

The trend towards concealment and corporate secrecy

- **EU Charter of Fundamental Rights, articles 7, 8 and 11**

- **Art 7: Right to respect for private and family life**
- **Art 8: Right to protection of personal data**
 - Data to be processed
 - fairly
 - for specified purposes
 - with consent *or* on a legitimate basis
 - Right of access to and rectification of data
- **Art 11: Right of freedom of expression and information**



Privacy law

The trend towards concealment and corporate secrecy

- EU Charter of Fundamental Rights, articles 7 and 8
- **GDPR**

- **‘Personal data’:** ‘any information relating to an identified or identifiable natural person ... such as a name, ... one or more factors specific to the ... economic ... identity of that natural person’

Art 9: Prohibition on processing of personal data

- exception where ‘necessary for reasons of substantial public interest’

Art 14: Right to identity of recipients of personal data

Art 17: Right to be forgotten

- exception for performance of a task carried out in the public interest or in the exercise of official authority



Privacy law

The trend towards concealment and corporate secrecy

- EU Charter of Fundamental Rights, articles 7, 8 and 11
- GDPR
- **CJEU rulings and AG’s opinions**

- **Manni ruling:** Yes to identification of directors
- **W.M./Sovim ruling:** No to identification of >25% beneficial owners



Effect of the W.M. / Sovim Ruling

Directive (EU) 2015/849 Article 30(5) following judgment	Directive (EU) 2018/843 Amendment to Article 30(5)
Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:	Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:
(a) competent authorities and FIUs, without any restriction;	(a) competent authorities and FIUs, without any restriction;
(b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;	(b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;
(c) any person or organisation that can demonstrate a legitimate interest.	(c) any member of the general public.



LinkedIn
16,173 followers · 500+ connections

Nord Stream 2

Flags shown: United Kingdom, Hungary, Russia, Ukraine, Bahamas, Belize, and the coat of arms of the Commonwealth of Independent States.

Social media icons: Twitter, X, Facebook.

CJEU LinkedIn Statement

CJEU “Review Statement” November 2022, appeared on ECJ LinkedIn timeline, following outcry, not available on ECJ website

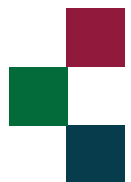
- ‘[I]nformation on beneficial owners must be accessible in all cases to any person or organisation able to demonstrate a legitimate interest.’
- ‘In conclusion, the AML Directive, in its version following the Court’s judgment, still allows access to beneficial owner information for persons and organisations with a legitimate interest, including the press and certain organisations in society.’



Legitimate interests ignored by CJEU

Identification of the following:

- Individuals subject to EU or UN sanctions regimes
- Those profiting or profiteering from public contracts or subventions
- Those behind companies contaminating the environment
- Conflicts of interest in companies
- Interests of politicians in commercial enterprises
- Undesirable counterparties to potential contracts
 - e.g., competitors, those with unsavoury connections or backgrounds
- Desirable counterparties to potential contracts
 - e.g., suppliers owned locally
- Individuals wielding extensive economic power through webs of companies



Legitimate interests ignored by CJEU

Identification of the following:

- Individuals subject to EU or UN sanctions regimes
- The
- Co
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- Un
- Any individual owning or controlling a significant interest in a limited company and therefore enjoying the privilege of limited liability
 - e.g., suppliers owned locally
- Individuals wielding extensive economic power through webs of companies

Any individual owning or controlling a significant interest in a limited company and therefore enjoying the privilege of limited liability

Law not considered by CJEU

EU Charter of Fundamental Rights

Article 11

Freedom of expression and information

1. Everyone has the right to freedom of expression.
This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Privacy law

The trend towards concealment and corporate secrecy

- EU Charter of Fundamental Rights, articles 7, 8 and 11
- GDPR
- **CJEU rulings and AG's opinions**

•	Manni ruling: Yes to identification of directors	W.M./Sovim ruling: No to identification of >25% beneficial owners	Österreichische Post #1 ruling: Identify those who have accessed information
•	Bulgarian Revenue AG: Anxiety about disclosure may ground right to compensation	Österreichische Post #2 ruling: MS cannot specify damage threshold for compensation	Bulgarian Registry referral: Is a signature 'personal data' that should be removed?

Privacy law

The trend towards concealment and corporate secrecy

- EU Charter of Fundamental Rights, articles 7, 8 and 11
- GDPR
- CJEU rulings and AG's opinions
- **EDPS opinions**

•	4/2023: Sceptical of need for public knowledge of significant shareholders in publicly traded companies Recommends restricting disclosure to those with 'investment related purposes'.	19/2023 Directive should specify: - public interest objectives justifying disclosure of personal data - categories of personal data to be made publicly available.
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Privacy law

The trend towards concealment and corporate secrecy

- EU Charter of Fundamental Rights, articles 7, 8 and 11
- GDPR
- CJEU rulings and AG's opinions
- EDPS opinions
- **European Parliament resolution**

28 March 2023

Embeds the W.M. / Sovim Ruling into 6th AML Directive.

Restricts RBO access to 'persons with legitimate interest, ... journalists, reporters, any other medias, civil society organisations, higher education institutions'

Access right for 2½ years, subject to renewal.

Subject to revocation or suspension 'if it is abused'.

Attempted Irish Fix

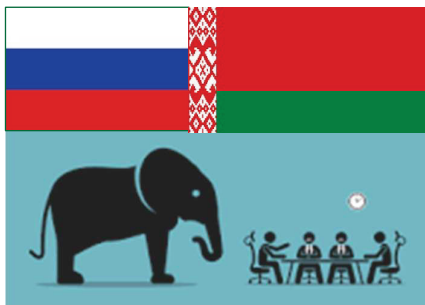
European Union (Anti-Money Laundering: Beneficial Ownership Of Corporate Entities) (Amendment) Regulations 2019 (S.I. No 308/2023)

- **A person may inspect RBO information about a company by satisfying 3 conditions:**
 1. 'The person is engaged in the prevention, detection or investigation of money laundering or terrorist financing offences.'
 2. 'The person is seeking to inspect the information .. for the purposes of [the] activity [in condition 1]'
 3. The company
 - '(i) is connected with persons convicted (whether in the State or elsewhere) of an offence consisting of money laundering or terrorist financing, or
 - (ii) holds assets in a high-risk third country.'

Attempted Irish Fix

Shortcomings

High Risk Third Countries	
Afghanistan	Myanmar
Barbados	Panama
Burkina Faso	North Korea
Cambodia	Philippines
Cayman Islands	Senegal
DR Congo	South Sudan
Gibraltar	Syria
Haiti	Tanzania
Iran	Trinidad Tobago
Jamaica	Uganda
Jordan	UAE
Mali	Vanuatu
Morocco	Yemen
Mozambique	



- **'Convicted** of an offence consisting of **money laundering or terrorist financing'**

- Suspected
- Arrested
- Charged
- Prosecuted
- Arraigned
- Bailed
- Remanded
- Indicted
- Extradited
- Tried
- Theft
- Fraud
- Bribery
- Extortion
- Corruption
- Blackmail
- Intimidation
- Cybercrime
- Sanctions busting
- Offences against the person

Key issues

Availability of company law information is under threat for these reasons:

- Lack of a reasoned principle underpinning disclosure
- Member State discretion as to disclosure of further information
- Disclosure of unnecessary gratuitous information
- Classes of persons with rights of inspection
- Potential for misuse of copies of information published

Key issues

Road to a solution

- **Lack of a reasoned principle underpinning disclosure**
 - Member State discretion as to disclosure of further information
 - Disclosure of unnecessary gratuitous information
 - Classes of persons with rights of inspection
 - Potential for misuse of copies of information published
- Adopt and accept a principle, grounded on the EUCFR right to information, that everyone in society has a legitimate interest to know the identity of:
 - significant – e.g., 10%+ – shareholders in limited companies, who benefit from limited liability
 - significant – e.g., 10%+ – shareholders in all unlimited companies that wield extensive economic power
 - holders of voting shares in PLCs at 3%+, as at present



Key issues

Road to a solution

- Lack of a reasoned principle underpinning disclosure
 - **Member State discretion as to disclosure of further information**
 - Disclosure of unnecessary gratuitous information
 - Classes of persons with rights of inspection
 - Potential for misuse of copies of information published
- Have an EU measure – preferably a directly applicable Regulation:
 - stating the information about companies which must be made available
 - articulating the reasoning for the public accessibility to the information
 - restricting Member States from requiring supplemental disclosures



Key issues

Road to a solution

- Lack of a reasoned principle underpinning disclosure
- Member State discretion as to disclosure of further information
- **Disclosure of unnecessary gratuitous information**
- Classes of persons with rights of inspection
- Potential for misuse of copies of information published
- Remove the requirement for publication of:
 - residential address
 - signature
 - date of birth
- Instead, require publication of:
 - nationality and country of residence
 - year and month of birth



Amended public information at the CRO?

Changes to consider to avoid an adverse Court privacy ruling

Person	Information	Change
Member	Name, address , country of residence , [n%+] shares held	Disclose country of residence, not address Consider a % threshold
Director	Name, date month/year of birth, residential address , country of residence , nationality, business occupation, directorships ≤ 5 years	Disclose month/year of birth, not date of birth Disclose country of residence, not address
Secretary	Name, residential address , country of residence	
Director	Shares and other securities held at start and end of financial year	Financial statements of large companies
Director, Secretary	Image of signature	Do not display signature pages



Amended public information at the company?

Changes to consider to avoid an adverse Court privacy ruling

Person	Information	Change
Member	Name, address , <u>country of residence</u> , [n%+] shares held	Disclose country of residence, not address Consider a % threshold
Director	Name, date <u>month/year</u> of birth, residential address , <u>country of residence</u> , nationality, business occupation, directorships ≤ 5 years	Disclose month/year of birth, not date of birth Disclose country of residence, not address
Secretary	Name, residential address , <u>country of residence</u>	
Director and secretary	Personal, family and controlled ≥1% interests in group shares or debentures, purchase, sale prices	Remove requirement for sale and purchase prices
Person with interest in ≥3% voting shares in PLC	Name, address <u>country of residence</u> , shares in which interest held	Disclose country of residence, not address

Key issues

Road to a solution

- Lack of a reasoned principle underpinning disclosure
- Member State discretion as to disclosure of further information
- Disclosure of unnecessary gratuitous information
- **Classes of persons with rights of inspection**
- Potential for misuse of copies of information published
- Nuance who can see what, in order to forestall a privacy action:
 - preserve members' rights to inspect full registers of members, directors, disclosable interests
 - allow public access to
 - significant shareholders
 - directors and secretary
 - allow access to other registers to those with a (broadly defined) legitimate interest

Key issues

Road to a solution

- Lack of a reasoned principle underpinning disclosure
- Member State discretion as to disclosure of further information
- Disclosure of unnecessary gratuitous information
- Classes of persons with rights of inspection
- **Potential for misuse of copies of information published**
- Consider adopting UK model for copies of the register of members, requiring a “proper purpose”
- See ISCA / CGI list of proper and improper purposes



Further reading

- **‘Personal data protection has a sole purpose, and shielding corporate structures from sunlight isn’t it’**, Ádám Földes. Transparency International blog, September 2023 at www.transparency.org
- **‘Subject matters. Three recent CJEU rulings will require substantial modernisation and reform of many of Ireland’s public register digital portals’**, Duncan Grehan. Law Society of Ireland Gazette, July 2023
- **‘Who are you? The encroachment of privacy law on corporate transparency’**, Paul Egan. Law Society of Ireland Gazette, June 2023
- **‘Amendment needed following ECJ’s ruling on corporate transparency’**, Paul Egan. Irish Times, 9 January 2023
- **‘Balancing rights in a digital age’**, Síofra O’Leary. Irish Jurist Vol. 59 (2018)
- **‘Four fundamental rights: finding the balance’**, Christopher Docksey. International Data Privacy Law, Vol. 6 No. 3 (2016)
- **‘Access to documents and data protection in the European Union: on the public nature of personal data’**, Herke Kranenborg. Common Market Law Review Vol. 45 (2008)



Right to privacy / The duty of publicity

Mr Justice Louis Brandeis

- *‘If the broad light of day could be let in upon men’s actions, it would purify them as the sun disinfects.’*



United States
Supreme Court
1916-1939



Thank you

The challenges of privacy law to corporate transparency and probity

PAUL EGAN SC
MASON HAYES & CURRAN LLP
SOUTH BANK HOUSE, BARROW STREET
DUBLIN 4, D04 TR29
01 614 5021 – 086 244 7171
pegan@mhc.ie

