

BENEFICIAL OWNERS REGISTER: THE EU COURT OF JUSTICE BLOCKS PUBLIC ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

In its judgment of 22 November 2022, the EU Court of Justice declared article 1(15)(c) of directive (EU) 2018/843 (hereinafter, the "**V AML Directive**") invalid "in so far as it amended point (c) of the first subparagraph of Article 30(5) of directive (EU) 2015/849 [...] (hereinafter, the "**IV AML Directive**")", in such a way that point (c) of the first subparagraph of Article 30(5), as thus amended, provides that Member States must ensure that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible in all cases to any member of the general public". ⁽¹⁾

⁽¹⁾ Article 1(15)(c), (d) and (g) of the V AML Directive respectively amended paragraph 5, inserted paragraph 5a and amended paragraph 9, of article 30, of the IV AML Directive. Article 30(5), (5a) and (9) of the IV AML Directive states that:

"5. Member States shall ensure that information on beneficial ownership is accessible in all cases to:

- a) competent authorities and FIUs, without any restriction;
- b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;
- c) any member of the general public.

The persons referred to in point (c) shall be permitted to access at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held.

Member States may, under conditions to be determined in national law, provide for access to additional information enabling the identification of the beneficial owner. That additional information shall include at least the date of birth or contact details in accordance with data protection rules.

5a. Member States may choose to make the information held in their national registers referred to in paragraph 3 available on the condition of online registration and the payment of a fee, which shall not exceed the administrative costs of making the information available, including costs of maintenance and developments of the register. (...)

9. In exceptional circumstances to be laid down in national law, where the access referred to in points (b) and (c) of the first subparagraph of paragraph 5 would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable, Member States may provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis. Member States shall ensure that these exemptions are granted upon a detailed evaluation of the exceptional nature of the circumstances. Rights to

According to the Court, public access to information on beneficial ownership constitutes a serious interference with the fundamental rights concerning the respect for private life and the protection of personal data, respectively enshrined in articles 7 and 8 of the Charter of Fundamental Rights of the European Union (hereinafter, the "**Charter**").

1. The case

The Grand Chamber of the EU Court of Justice has dealt with the joined cases C-37/20 and C-601/20 concerning two references for a preliminary ruling submitted to the Court - pursuant to article 267 of the Treaty on the Functioning of the European Union (TFEU) - by the *Tribunal d'arrondissement de Luxembourg* (Luxembourg District Court), which considered that the public's right of access to the data of beneficial owners contained in the Luxembourg Business Register (hereinafter, the "**LBR**") was capable of entailing a disproportionate risk of violation of the fundamental rights of the beneficial owners concerned.

These references were made in the context of two disputes *(i)* between WM and LBR (Case C 37/20) and *(ii)* between Sovim SA and LBR itself (Case C 601/20), concerning the latter's refusal to prevent public access to information relating, on the one hand, to WM's status as the beneficial owner of a real estate management company and, on the other hand, to the beneficial owner of Sovim SA.

2. The judgment of the Court

As mentioned in the introduction, the UE Court of Justice sitting in Grand Chamber, in its judgment of 22 November 2022, declared article 1(15)(c) of the V AML Directive invalid, under the Charter, as it amends article 30(5)(1)(c) of the IV AML Directive since, according to the Court, public access to beneficial ownership information constitutes a serious interference with the fundamental rights concerning the respect for private life and the protection of personal data, respectively enshrined in articles 7 and 8 of the Charter.

In fact, the information disclosed allows a potentially unlimited number of persons to find out about the beneficial owner's material and financial situation even for reasons unrelated to the objectives pursued by the anti-money laundering legislation. Furthermore, the potential consequences for the data subjects resulting from possible abuse of their personal data are exacerbated by the fact that, once those data have been made available to the general public, they can not only be freely consulted, but also retained and disseminated.

According to settled case-law, the proportionality of the measures which result in interference with the rights guaranteed in articles 7 and 8 of the Charter requires compliance not only with the requirements of appropriateness and of necessity but also with that of the proportionate nature of those measures in relation to the objective pursued. More specifically, derogations from and limitations on the

an administrative review of the exemption decision and to an effective judicial remedy shall be guaranteed. A Member State that has granted exemptions shall publish annual statistical data on the number of exemptions granted and reasons stated and report the data to the Commission. (...)".

protection of personal data should apply only in so far as is strictly necessary, it being understood that where there is a choice between several measures appropriate to meeting the legitimate objectives pursued, recourse must be had to the least onerous. In addition, an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure, by properly balancing the objective of general interest against the rights at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued.

That being so, the Court observes that public access to information on beneficial ownership is capable of contributing to the attainment of the general interest objective of preventing money laundering and terrorist financing, since the public nature of that access and the increased transparency resulting from it contribute to the creation of an environment less likely to be used for those purposes.

Nevertheless, the Court finds that the interference resulting from such a measure is neither limited to what is strictly necessary nor proportionate to the objective pursued. The regime introduced by the IV AML Directive (as amended) represents, in the Court's view, a considerably more serious infringement of the fundamental rights guaranteed by articles 7 and 8 of the Charter than the previous regime (which provided for access not only by the competent authorities and certain entities, but also by any person or organization which could demonstrate a *legitimate interest*), without that aggravation being offset by any benefits which might be derived from the new regime as compared with the previous one, from the point of view of the prevention of money laundering and the financing of terrorism.

The Court adds that the optional provisions of the IV AML Directive which allow Member States to make information on beneficial ownership available on condition of online registration and to provide, in exceptional circumstances, for an exemption from access to that information by the general public are not, in themselves, capable of demonstrating either a proper balance between the objective of general interest pursued and the fundamental rights enshrined in articles 7 and 8 of the Charter, or the existence of sufficient safeguards enabling data subjects to protect their personal data effectively against the risks of abuse.

3. Effects of the judgment

Immediately after the ruling of the EU Court of Justice, Luxembourg provisionally suspended the online public consultation of the beneficial owners register.

Inevitably, this case will also have an impact on our system, which, however, is not yet operational.

We recall, in fact, that the last step needed to enforce the provisions of article 21(1) of Legislative Decree No. 231 of 21 November 2007, which requires companies with legal personality and private legal persons, as well as trusts, to telematically communicate to the companies register office the information relating to their beneficial owner, is currently pending. The first operational aspects have already been defined by the Decree of the Ministry of Economy and Finance No. 55 of 11 March 2022, which, however, in turn, has delegated to further implementing decrees of the Ministry of Economic Development the definition of the details related to the aforementioned communications.

It will therefore be necessary to await the next developments in the national context in order to ascertain the impact that the principles set out by the EU Court of Justice in this judgment will have on the issue in question.

The text of the judgment is accessible at the following link: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0037&from=it>

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