

Article

PUBLIC ACCESS TO THE ULTIMATE BENEFICIAL OWNERSHIP (“UBO”) REGISTER IS HELD INVALID

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Introduction

The UBO Register is a product of the fourth anti-money laundering Directive (MLD 4)¹ and the fifth anti-money laundering Directive (MLD 5)² as part of the EU’s legislative programme for combating money laundering and terrorist financing, through the introduction of transparency in the ownership of companies. In addition to the register of UBOs kept by companies themselves, a Central Register was created. Under MLD4 access was granted only to public authorities and those who could demonstrate a “legitimate interest” in combatting money laundering and terrorist financing. Following the adoption of MLD5, access to the UBO Register was unrestricted and public access was granted.

In a recent landmark ruling³ the Court of Justice of the European Union (“CJEU”) held that the granting of public access to information on the beneficial owner is invalid. Although Member States differed as to the extent of the information, at the least the UBO register would contain:

- name, date of birth, nationality and registered address;
- nature and extent of interest held or control exercised by the UBO;
- registered name and number of the entity.

Joined Cases: WM (C-37/20) and Sovim SA (C-601/20)

The cases related to requests for preliminary ruling made with respect to Luxembourg Business Registers (“LBR”) refusal to prevent the general public’s access to information concerning (i) in the case of WM, its status as a beneficial owner of a real estate company and (ii) in the case of Sovim SA, its beneficial owner. The Luxembourg court made the referral to the CJEU for a preliminary ruling on access to beneficial ownership information on the UBO register.

In its judgement the CJEU stated that the preliminary ruling concerned validity of provisions of MLD5 and Regulation (EU) 2016/679 (General Data Protection Regulation or “GDPR”). The questions referred for a preliminary ruling also concerned Article 7 and 8 of the Charter of Fundamental Rights of the European Union (the “Charter”)⁴.

¹ Directive (EU) 2015/849 of European Parliament and the Council of 20 May, 2015.

² Directive (EU) 2018/843 of European Parliament and Council of 30 May, 2018.

³ Joined Cases C-37/20 and C-601/20, 22 November, 2022.

⁴ 2012/c 326/02.

Decision of CJEU

The CJEU ruled clearly and unequivocally that the provisions of MLD5⁵ that permitted information on the beneficial ownership of companies and other legal entities to be made accessible to any member of the general public is invalid.

Although this is the definitive ruling, the legal analysis on the CJEU’s judgement is of interest:

1. Making personal data available to third parties constitutes a serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, whatever the subsequent use of the information. It does not matter whether the information in question relating to private life is sensitive or whether the persons concerned have been inconvenienced in any way on account of that interference. General public access to information on beneficial ownership constitutes an interference with the rights guaranteed by Articles 7 and 8 of the Charter⁶.
2. It is inherent that in making the information available to the general public it is then accessible to a potentially unlimited number of persons which can allow that information to be freely accessed by persons who seek to find out about, *inter alia*, the material and financial situation of the UBO. This is made even easier where the information is made available on the internet.
3. The objective of the MLD5 is recognised, *viz.* “to prevent the use of the EU’s financial system for the purpose of money laundering and terrorist financing... The pursuit of that objective cannot be effective unless the environment is hostile to criminals and that enhancing the overall transparency of the economic and financial environment of the EU could be a powerful deterrent.”⁷ The CJEU concluded however that the objective was not sufficient to permit interference with the rights guaranteed by Articles 7 and 8 of the Charter.
4. Furthermore the CJEU also concluded that permitting public access to the information held on the public register was disproportionate and unnecessary to achieve the objective of the MLD5.

⁵ Article 1(15)(c) of MLD5.

⁶ See Paras. 39 and 40 of the Judgement.

⁷ Para. 55.

Consequences of the Judgement

The immediate consequence is that public access to the UBO register is suspended which has happened throughout the EU. The joined cases only relate to public access and not access by authorities or other bodies conducting due diligence as part of anti-money laundering activities. However, there do remain doubts as to continued use and operation of the UBO register in the context of the stated objective. It is understood that efforts are heavily made to further amend the Directive by, *inter alia*, creating a list of “designated persons” who will have access to the UBO register.

The decision, however, also raises questions under GDPR and the Charter with regard to other registers (for e.g. register of trusts) and automatic exchange of information on tax matters.

In the meantime, however, companies and other entities covered by MLD5 should continue to maintain their beneficial ownership registers and make necessary filings in the UBO register kept by the Registrar of Companies.

The foregoing should not be read or construed or relied upon as legal advice in any specific or individual circumstance.

In the event of any query or need for clarification please contact the undersigned.

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