Transparency of beneficial ownership

Synopsis: Recent developments including the 2022 CJEU decision and the subsequent statement from the EU Council clarifying their approach to the rules on access to the registers of beneficial owners.

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The Anti-Money Laundering Directives (4MLD and 5MLD) established the concept of registers of beneficial ownership. All EU member states have implemented legislation establishing such registers but the approach to transparency has not been uniform.

In the UK we have the Money Laundering Regulations 2017 as amended. All limited companies (and limited liability partnerships) have to maintain a register of persons with significant control (PSCs) which is filed in the Companies House and available to the public. Beneficial owners of trusts have to be registered with HMRC using the Trust Registration Service (TRS).

Access to beneficial ownership on the UK TRS is limited to those with legitimate interests such as law enforcement agencies investigating money laundering - unlike the PSC register, the TRS is not freely available to the public.

There has been a legal challenge in relation to the publication of personal data on the Luxembourg Business Register (LBR). The individual concerned alleged that the 'indiscriminate and generalised' publication of personal details of individuals connected to family enterprises breaches their fundamental rights to data protection and privacy and exposed them to 'unnecessary and disproportionate' risks.

In the Joined Cases C-37/20 and C-601/20 – WM and Sovim SA v Luxembourg Business Register brought by registered beneficial owners of these two Luxembourg-based companies the argument was that granting public access to the identity and personal data of the registered "ultimate beneficial owners" would infringe the right to respect for private and family life and the right to the protection of personal data, enshrined respectively in Articles 7 and 8 of the EU Charter. Initially the Luxembourg authority responsible for the registrations denied their request to limit public access. The claimants appealed.

There was also the question of the validity and interpretation of Art. 30 of the 5 MLD. This article regulates which information on beneficial ownership must be collected and registered in central registers of the EU Member States. According to Art. 30(5), Member States must ensure that certain data on beneficial owners are accessible in all cases, inter alia, to any member of the general public. (this amended the equivalent 4MLD provisions which required registers to be open only to those with legitimate interests, a test that still applies to trusts).

The Luxembourg District Court stayed proceedings and referred this and other questions to the CJEU for a preliminary ruling.

- Article 7 of the EU Charter concerns the right to privacy and family life and is in the following terms: *"Everyone has the right to respect for his or her private and family life, home and communications."*

- Article 8 of the EU Charter relates to the right to protection of personal data.

Last November The CJEU issued a preliminary judgment ruling that the measure in the 5MLD goes beyond what is strictly necessary and is disproportionate to the AML objective.

According to the CJEU, the provision, whereby the information on the beneficial ownership of companies incorporated within the territory of the member states is accessible in all cases to any member of the general public, is invalid.

The information disclosed on the register enables a potentially unlimited number of persons to find out about the material and financial situation of a beneficial owner, and that information can never be recalled from the register, said the CJEU. Making the register fully open to the public thus violates individuals' privacy, it said, concluding that *"Member States must put appropriate safeguards in place to protect privacy in accordance with articles 7 and 8 of the Charter of Fundamental Rights of the European Union".* These safeguards were already present in the 4MLD.

Based on this decision, member states may have to reintroduce a limitation on the access to information on beneficial owners.

The Luxembourg government decided to temporarily suspend public access to its Register via the internet portal and has stated that it will closely liaise with the EU Commission to discuss the consequences of the decision and the solutions that may be envisaged at the EU level.

Following the CJEU ruling, the Council of the European Union has recently issued a statement that registers should not be open to the public without restriction. Instead, the registers should be open to anyone who can demonstrate a 'legitimate interest' in the personal data they contain and that this should include journalists and civil society organisations that are 'connected with' the prevention and combating of money laundering.

'Public access to beneficial ownership information can allow greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of the financial system', says the EU Council's statement. *'It can contribute to combating the misuse of corporate and other legal entities and legal arrangements for the purposes of money laundering or terrorist financing.'*

The matter will now go to the EU Parliament where the concept of beneficial ownership is also to be clarified, by separating the two components of ownership and control and analysing them separately to identify and verify the identity of beneficial owners across types of entities.

Comment

While the UK is out of the EU, the rules on transparency and reporting of beneficial owners remain in force although the decision of the CJEU is not legally binding on the UK.

However, the decision and the subsequent EU Council's statement are relevant to the UK, as they highlight the tension between transparency on the one hand and an individual's right to privacy and data protection on the other, and they may well impact the UK's policy in this area. It is also possible that some PSCs may challenge the UK requirement to disclose their details and have those available to the public.