

## Food for Thought

March 2023 / Issue 1



Muja Law brings you the latest issue of *Food for Thought*.

Recently the European Court of Justice has put a stop to a publicly accessible Ultimate Beneficiary Owner (UBO) register.

On 22 November 2022, the European Court of Justice (ECJ) rendered its judgement on the compatibility of public access to UBO information with the fundamental right to protection of private life and the right to protection of personal data. This judgement was issued in response to preliminary questions raised by the Luxembourg court.

The ECJ declared the currently prescribed public accessibility of UBO information in the UBO register invalid.

*Some of the most important aspects of such decision of ECJ are as follows:*

### ➤ Decision of ECJ

In accordance with the anti-money-laundering directive<sup>1</sup>, a Luxembourg law

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<sup>1</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73), as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 (OJ 2018 L 156, p. 43).

adopted in 2019<sup>2</sup> established a Register of Beneficial Ownership and provides that a whole series of information on the beneficial owners of registered entities must be entered and retained in that register, similar to the legal provisions of Albania in this regard.

Some of that information is accessible to the general public, in particular through the

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<sup>2</sup> Loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs (mémorial A 15) (Law of 13 January 2019 establishing a Register of Beneficial Ownership).

Internet. That law also provides that a beneficial owner may request Luxembourg Business Registers (*LBR*), the administrator of the Register, to restrict access to such information in certain cases.

In that context, the tribunal d'arrondissement de Luxembourg (*Luxembourg District Court, Luxembourg*) was seised of two actions, brought by a Luxembourgish company and by the beneficial owner of such a company, respectively, which had previously unsuccessfully requested LBR to restrict the general public's access to information concerning them.

Since that court considered that the disclosure of such information is capable of entailing a disproportionate risk of interference with the fundamental rights of the beneficial owners concerned, it referred a series of questions to the Court of Justice for a preliminary ruling concerning the interpretation of certain provisions of the anti-money-laundering directive and the validity of those provisions in the light of the Charter of Fundamental Rights of the European Union (*'the Charter'*).



The Court, sitting as the Grand Chamber, holds that, in light of the Charter, the provision of the anti-money-laundering

directive whereby Member States must ensure that the information on the beneficial ownership of corporate and other legal entities incorporated within their territory is accessible in all cases to any member of the general public *is invalid*.

According to the Court, the general public's access to information on beneficial ownership *constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data*, enshrined in Articles 7 and 8 of the Charter, respectively.

Indeed, the information disclosed enables a potentially unlimited number of persons to find out about the material and financial situation of a beneficial owner. 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.

That said, the Court finds that, by the measure at issue, the EU legislature seeks to prevent money laundering and terrorist financing by creating, by means of increased transparency, an environment less likely to be used for those purposes. It holds that the legislature thereby pursues an objective of general interest capable of justifying even serious interferences with the fundamental rights enshrined in Articles 7 and 8 of the Charter, and that the general public's access to information on beneficial ownership is appropriate for contributing to the attainment of that objective.

The Court holds, however, that the interference entailed by that measure is neither limited to what is strictly necessary nor proportionate to the objective pursued. In addition to the fact that the provisions at issue allow for data to be made available to

the public which are not sufficiently defined and identifiable, the regime introduced by the anti-money-laundering directive amounts to a considerably more serious interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter than the former regime (*which provided, as well as access by the competent authorities and certain entities, for access by any person or organization capable of demonstrating a legitimate interest*), without that increased interference being capable of being offset by any benefits which might result from the new regime as compared against the former regime, in terms of combating money laundering and terrorist financing.

In particular, the fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which such a legitimate interest exists, relied upon by the Commission, is no reason for the EU legislature to provide for the general public to access the information in question. The Court adds that the optional provisions 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, respectively, 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<sup>3</sup>.

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<sup>3</sup> A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.



### ➤ Summary

The ECJ decision has declared the prescribed public accessibility to the UBO register invalid. The ECJ has found that the public access to UBO information constitutes a serious interference with the fundamental rights to respect private and family life and the right to protection of personal data, which is not limited to what is strictly necessary and disproportionate to the objective pursued.

A restriction of fundamental rights can be justified if the measure concerned pursues an objective of general interest and the measure is limited to what is strictly necessary and is not disproportionate.

Therefore, the ECJ has found that the restriction of fundamental rights due to the public accessibility of UBO information goes beyond what is necessary and proportionate in view of the objectives pursued. The public access to information in the UBO register makes it for instance possible to draft a profile, which can be used for purposes other than the objective of the Directive.

The fact that mandatory public accessibility was introduced because the European Commission found it difficult to determine what should be considered a “legitimate interest” in case of an alternative approach to

allowing insight in UBO information is, according to the ECJ, insufficient to justify public accessibility.

The judgement of the ECJ may also have implications for other European regulations that provide for public disclosure of certain (*personal*) data. What the scope of the judgement will be for those regulations is not yet clear at this time.

### ➤ Similarities with Albania

Following numerous recommendations from the Committee of Experts on the Evaluation of Anti - Money Laundering Measures and the Financing of Terrorism - MONEYVAL- of the Council of Europe with regard to the establishment of a centralized register, the Albanian Parliament enacted Law 112/2020 “*On the Register of Beneficial Owners*” (the “*UBO Law*”), as amended.

UBO Law provides, among other, that the Register of Beneficiary Owners (“*RBO*”) consists of an electronic database held by the National Business Center (“*NBC*”) which contains data on the beneficial owners of the reporting entities identified by UBO Law.

In virtue of the law, the RBO makes available online to the public the following set of data regarding the beneficial owners: name and surname, nationality, year and month of birth, date of determination of the individual as beneficial owner, the percentage of ownership and if the ownership is direct or indirect.

The other data entered in the RBO are freely accessible only to the authorized persons of the reporting entity (exclusively in relation to the data provided with respect to that

reporting entity) and to competent public authorities.

Other persons that require RBO data, which is not freely accessible, must submit a written request to the NBC and prove that they have a legitimate interest in the required data.



It is important to highlight the fact that UBO Law has been partly approximated with the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 “*On the prevention of the use of the financial system for the purposes of money laundering or terrorist financing*”, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, as amended.

However, now, also in light of the most recent decision of the ECJ in this regard, it remains to be seen *how* the Albanian local legislation on ultimate beneficiary owners will be affected.

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[contact@mujalaw.com](mailto:contact@mujalaw.com)

## **Muja Law Office**

Rr. "Ibrahim Tukiqi", Nr.2

1057 Tirana

Albania

Mob: +355 69 28 28 562

Web: [www.mujalaw.com](http://www.mujalaw.com)

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While we have grown over the past 20 years and become recognized as one of Albania's leading law offices, we are grounded in the essence of "who" we are and "where" we started. We understand the importance of family, hard-work, and dedication.

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