

CJEU invalidates the public access to UBO registers as imposed by the 5th AML Directive

Elvinger Hoss Prussen triggered a landmark preliminary ruling on 22 November 2022, in which the Court of Justice of the European Union (CJEU) has declared the 5th AML Directive (5AMLD) invalid insofar as it imposes a public access regime for national UBO registers.

What is the context and our involvement? In accordance with 5AMLD, the Luxembourg Law of 13 January 2019 establishing the Register of Beneficial Owners, as amended (**RBO Law**) foresees unlimited public access of certain personal data of beneficial owners (**BOs**) registered with the Register of Beneficial Owners (**RBO**). It also provides for the possibility to obtain an exemption from that public access under very strict conditions, proving, in essence, the existence of a disproportionate risk for the BO's personal situation.

Certain Luxembourg companies or their BOs which had unsuccessfully requested the application of the exemption, have launched an appeal before the Luxembourg District Court. In such proceedings, we have asked the District Court to refer to the Court of Justice of the European Union (CJEU) several preliminary questions concerning, in essence, the validity of the public access regime in light of the Charter of Fundamental Rights of the European Union (**Charter**) as well as the interpretation of specific provisions of 5AMLD. The District Court has acceded to such request in one of our cases and stayed the others, pending the outcome of the CJEU proceedings.

Key CJEU findings? In its judgment of 22 November in Joined Cases C-37/20 and C-601/20, the Grand Chamber of the CJEU concludes that the provision of 5AMLD, which requires Member States to 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 CJEU, the general public's access 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, without the interference being limited to what is strictly necessary or proportionate to the objective pursued by 5AMLD. That interference is held to be considerably more serious than the regime under 4AMLD, which provided for access on demonstration of a legitimate interest, without the increased interference being capable of being offset by any additional benefits.

Furthermore, the optional provisions allowing 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, cannot demonstrate a proper balance between the objective of general interest pursued by 5AMLD and the fundamental rights at issue or the existence of sufficient safeguards enabling data subjects to protect their personal data effectively against the risks of abuse.

What does this mean? The general public's access to the RBO without limitation constitutes a unjustified interference with certain fundamental rights, as protected notably by the Charter, and can therefore no longer apply.

The right of access to UBO registers of public authorities and AML professionals is not affected since it is enshrined in other provisions of the AML Directives whose validity is not at issue. However, in practice, the access by AML professionals to the RBO is currently blocked since it was based on the online public access available to the public at large, which is invalid. As indicated in the [press release](#) of the Ministry of Justice of 23 November 2022, a practical solution is currently being sought to that problem.

The CJEU leaves open the possibility to define further which persons or entities can demonstrate a legitimate interest to access BO data. It seems reasonable to expect legislative developments in that area. In the abovementioned press release, the Ministry of Justice indicates in this respect that it is working on a technical and legal solution allowing rapid access to the RBO not only for AML professionals but also *"for the press and civil society organizations with a link to the prevention and fight against money laundering and terrorist financing and which have a legitimate interest in accessing beneficial ownership information"*.

National judges must draw all necessary conclusions from the judgment but it does not give them guidance how to do so with respect to pending appeals regarding exemption requests.

For further questions, please contact the members of our team mentioned below who were involved in the case or any regular contact at our firm.

For any further information please contact us or visit our website at www.elvingerhoss.lu.

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter.