

GDPR & AML: no longer public access to UBO data without legitimate interest

On 22 November 2022, the Court of Justice of the European Union (the "CJEU") struck down the provision of the 5th AML Directive 2018/843 (AML V) which provided that EU member states must ensure that information on the beneficial ownership of companies within their territories is accessible in all cases to any member of the general public.

In Luxembourg, the invalidated provision served as a legal basis to allow the public at large to access personal data of ultimate beneficial owners (UBOs) contained in the UBO register. Such general accessibility (i.e. in all cases to any member of the general public) has been considered by the CJEU to constitute a serious interference with the fundamental rights to privacy and the protection of personal data.

Topic of controversy

The CNPD, the Luxembourg data protection authority, as well as privacy advocates, had previously raised questions on the accessibility by the general public without the need for a legitimate interest of the person accessing the data (see for example "UBO register: a data privacy no man's land?" in Agefi February 2019). Indeed, since the effective implementation of the AML V, any member of the general public had free access to certain personal information of UBOs registered with the Luxembourg Trade and Companies Register (the "LBR").

As a reminder, the beneficial owner is any natural person who ultimately owns or controls the customer or any natural person on whose behalf a transaction or activity is being conducted. In the case of corporate entities, the threshold of more than 25% shareholding/ownership interest held by a natural person is considered an indication of direct ownership.

While under the 4th AML Directive 2015/849 (AML IV), the UBO register was accessible to "any person or organisation that can demonstrate a legitimate in-

terest", such legitimate interest requirement had disappeared in the AML V.

The Luxembourg law of 13 January 2019 establishing a Register of Beneficial Ownership (the "Luxembourg UBO Register Act") even extended the scope of personal data contained in the UBO register – a possibility that the AML V allowed for. The Luxembourg legislator took this freedom to add the date and place of birth of beneficial owners being available in the UBO register. However, it did not follow the CNPD's suggestion to subject access to the UBO register to the fulfilment of security measures, an online registration as well as the payment of a fee.

Consequently, beneficial owners saw several of their personal data disclosed to the public at large as from the availability of the UBO register: their name, nationality, birth information (including place, year, month and date), country of residence, as well as the nature and extent of the beneficial interest held.

Invalidation by the CJEU

In both cases that the Luxembourg District Court referred to the CJEU, it had been requested to impose an injunction requiring the LBR to restrict access to certain information on the beneficial owners. The LBR had previously refused such restriction requests of the relevant companies. The LBR argued that the requests did not meet the requirements of exceptional circumstances or any of the risks referred to in the Luxembourg UBO Register Act, such as disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation.

Upon the Luxembourg District Court's requests for a preliminary ruling, the CJEU ruled on 22 November 2022 that access by the general public to information on beneficial ownership as provided in Article 1(15)(c) of AML V, and thus by a potentially unlimited number of persons, constitutes a **serious interference with the fundamental rights to privacy and the protection of personal data** enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of

the European Union. It held that the potential consequences for data subjects resulting from a possible abuse of their personal data are exacerbated by the fact that the data cannot only be freely consulted, but also retained and disseminated so that it becomes increasingly difficult, if not illusory, for them to defend themselves effectively against abuse.

The EU Council's and Commission's argument that the previous condition requiring a legitimate interest of the person accessing the data resulted in practical difficulties as a uniform definition of such legitimate interest was lacking was countered by the CJEU that the difficulty to provide a detailed definition of the circumstances and conditions under which the public may have access to information on beneficial ownership cannot justify providing access for the general public to that information.

Therefore, the CJEU declared Article 1(15)(c) of AML V invalid in so far as it amended Article 30(5)(1)(c) of AML IV in such a way that it provides that Member States must ensure that information on the beneficial ownership of companies and other legal entities incorporated within their territory is accessible in all cases to any member of the general public.

The CJEU's judgment is not open to appeal. Both cases in which preliminary rulings were requested on this topic have been referred back to the Luxembourg District Court to continue the domestic proceedings.

The fate of similar or related data processing activities

Comparing such disclosure to the mandatory disclosure of the legal representatives of companies, such as foreseen in Directive (EU) 2017/1132 as amended (see CJEU case C-398/15 *Manni*), the CJEU held that those mandatory disclosures differ both in purpose and scope in terms of personal data covered which could justify a different approach.

Meanwhile, UBO data has been collected and processed by data brokers. Is the collection and the further processing of the UBO data by the public at large and, for example, by data brokers illegal *per se*? For the future collection of UBO data in any event yes, but for UBO data that have been collected before the CJEU's judgment, the same probably applies as well since Article 1(5)(c) of Directive 2018/843 is deemed to have never existed as a result of its invalidation.

Consequences

Once the CJEU's judgment was published on 22 November 2022, the Luxembourg UBO register has blocked public access to UBO data.

Since 6 December 2022, access to the register has been restored for certain professionals that previously had an identified access. The Ministry of Justice announced that in the days following 6 December 2022 access will be restored for (i) press representatives that have a legitimate interest to consult the register in the context of their journalistic research, and (ii) professionals within the meaning of the Luxembourg AML Law of 12 November 2004 as amended. In a later phase, access will also be restored for other actors with a legitimate interest and with a link to the fight against money laundering and terrorism financing¹.

The invalidation of Article 1(15)(c) of the AML V results in principle in the revival of the initial text of Article 30(5)(c) of AML IV and must thus be read as it existed before the amendment by the AML V: "to any person or organisation able to demonstrate a **legitimate interest**".

It is now up to the Luxembourg legislator to amend the Luxembourg UBO Register Act in order to bring it in line with EU law once more. For now at least, that means Luxembourg law will have to be aligned with the initial text of Article 30(5)(c) AML IV and to reintroduce the requirement of "legitimate interest". As long as the Luxembourg UBO register has not been amended by the Luxembourg legislator, we take the view Luxembourg courts and authorities will have to leave Article 12 of the Luxembourg UBO Register Act non-applied in all pending and possible future cases.

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1) Communiqué du ministère de la Justice du 6 décembre 2022, "Accès au RBE: Accès rétabli en faveur de certains professionnels et de la presse".