



MOMENTUOUS ECJ RULING ON BENEFICIAL OWNER REGISTERS – IMPLICATIONS FOR THE CHANNEL ISLANDS

OVERVIEW

On 22 November 2022, the European Court of Justice (**ECJ**) made a seminal ruling that open public access to the beneficial owner registers of EU member state companies is no longer valid, as it is in violation of articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the **Charter**).

There is a strong implication for legislators in the Channel Islands. The ruling suggests the easing of pressure on Jersey and Guernsey to make beneficial ownership registers publicly open. The official response to this ruling by the States of Jersey and the States of Guernsey will follow early next year.

BACKGROUND

The case was brought about when the Fourth Anti-Money Laundering Directive (**AMLD**) introduced by the Fifth AMLD on 30 May 2018 stated that EU member states were required to make, maintain and make accessible to the public, beneficial owner registers of companies incorporated and registered in their territories. Further amendments to the AMLD then allowed information to be accessible via the internet, rather than only through more secure forms of delivery, such as post upon request. The caveat was that members of the public could only request access to the files if they could show a legitimate public interest in having access. This was a deviation from the norm of similar directives, which had only granted such information upon the request of "competent authorities," such as law enforcement agencies of member states.

In accordance with AMLD, Luxemburg had passed enacting legislation in 2019 (the **Luxemburg Law**). Subsequently, a Luxemburg company and the beneficial owner of said company filed a suit to their highest national court, claiming that both the Luxemburg Law and the AMLD violated the beneficial owner's rights under the Charter, namely:- **Article 7**: Respect for private and family life; and **Article 8**: Protection of personal data, due to the 'disproportionate' access this would allow to the beneficial owner's personal data.

This was argued on the basis that, by the very nature of the AMLD, the register would have access to the beneficial owner's:-

- a) address(es),
- b) date of birth,
- c) occupation and utility bills, and
- d) nationality and identification papers.

These types of documents tend to be given in the trust that they will not be readily accessible to the public. Having these in a public register undermined not only the confidence in which these documents were given but also was not necessary for the purpose of the AMLD, namely, tackling money laundering.

Furthermore, a “*legitimate interest*” test meant that those subject to disclosure were more likely to be related to contentious matters, such as those with relationships to political figures, fossil fuels or connections to foreign states. It was argued publishing personal data to the public of individuals potentially involved in such matters could expose them to harassment, fraud, stalking, and potentially even violence.

Given the significance of the matter to the very integrity of the European wide directive, the Luxemburg District Court referred the matter to the ECJ.

RULING

In its ruling, the ECJ sided with the company, ruling that the provision founded in both the Law and the AMLD; that the personal information of beneficial owners should be available/requested by any member of the general public, was “*invalid*”.

Going further, the ECJ ruled that the AMLD was a “*serious interference with the fundamental rights enshrined in Articles 7 and 8,*” namely as it would not only give unfettered access to said information, but also the dissemination and retention of that information, even if the reason for the “*legitimate interest*” were discharged.

By the very nature of making the information contained on the registry publicly available to everyone upon request, it would be impossible to wield the power in a proportionate, measured or even necessary manner imagined by the Directive, and that required by the Charter.

Moreover, as the general aim of the AMLD was to police, monitor, and tackle the international issue of money laundering, the court determined that the AMLD was insufficiently precise, and that the current wording could allow access to the records, and by extension, a breach of an individual’s Charter rights, under very general circumstances that would be open to abuse.

This was especially the case as there was not a precise definition of a legitimate interest; the central question of any disclosure.

For these reasons, the ECJ argued the Directive also violated two of the key tenets of EU law, namely, Proportionately and Necessity.

As such, the ECJ ruled that the Directive was in contravention of the Charter and has requested that should the European Commission still seek to legislate on these grounds, that they should:

- a) limit access to who can request files and how;
- b) give clearer guidance on what is a legitimate interest, and by extension, who can claim to have a legitimate interest; and
- c) allow entities the ability to apply for an exception, with clear guidance on how they might so and on what grounds.

LOOKING FORWARD

Already, EU States have begun to restrict or outright block access to their beneficial owner registers. It remains to be seen whether the Commission will scrap the Directive, or try and find a way to sail it through guidelines requested by the ECJ. Given the rather damning nature of the ruling, this may not be possible

The UK, no longer being under the direct remit of the ECJ, has not been directly affected. However, the basis of the Charter, the European Convention of Human Rights, remains enshrined in the UK's Constitution via the Human Rights Act 1998 and in Jersey by the Human Rights (Jersey) Law 2000 for the time being. The ECJ's ruling may be considered persuasive should a subject of corporate disclosure invoke Article 8 (Right to a Private and Family Life) of the Convention.

As a global recession looms, it is likely states will continue to try and find ways of gathering information on potential taxpayers. As such, it is likely this ruling is not the last we will hear on this matter. It is likely Jersey and Guernsey legislators will slow down initiatives to make such registers public whilst ensuring they maintain best practices in the further enshrining of the AMLD. In a nutshell, the ECJ judgment is welcoming news for Jersey, and the Government of Jersey should show its mettle.

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