

ECJ decision: Beneficial owners in the spotlight

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After long discussions on the notification of universal beneficial owners (Rom. *beneficiari reali*) and the establishment of the relevant registers, the ECJ ruled by a judgment of 22.11.2022 that public access to these registers without proof of a legitimate interest is unlawful.

The judgment in Cases C-37/20 and C-601/20 caused much uproar throughout the EU. Several countries, such as Austria, Belgium, Luxembourg and the Netherlands, immediately denied public access to the registers until the implications of this judgment are legislated in the respective countries. No official statement has been published in Romania, but the same development is to be expected in the context of the digitization of commercial registers.

Many voices hold the opinion that this ruling represents a severe setback against the fight against money laundering and corruption, as it protects potential criminals from the public eye.

Background

Within the framework of the money laundering directives issued to date, the EU has endeavored to create an efficient legal framework for the transparency of companies and an environment that is unfavorable to fraudsters. The 4th EU-Money-Laundering-Directive stipulated in Art. 30 para. 5 that individual countries had to create transparent access to the personal data and control relationships of beneficial owners.

Beneficial owners were those natural persons who directly or indirectly controlled companies, even if they did not hold an official function as their shareholders or managing directors. These individuals were to be listed in specific registers (e.g., beneficial ownership registers) so that financial institutions and authorities could quickly check financial situations and respond to suspicious facts. Natural persons or legal entities were only granted access if they could prove a legitimate interest.

This requirement was abolished by the 5th EU-Money-Laundering-Directive: as of 2020, any natural person could obtain information on the control of beneficial owners over companies (and thus their material situation) without restriction. In some countries, such as Luxembourg, access was even guaranteed online free of charge and without prior notification for anyone.

Subject matter of the ECJ judgment

The two plaintiffs (one of them a beneficial owner) complained to the Luxembourg courts that unrestricted public access to personal data of a beneficial owner would expose the latter and his family to a disproportionate risk of fraud, harassment, extortion, violence, and others.

This view was shared by the ECJ, which affirmed a serious interference with fundamental rights under Articles 7 and 8 of the Charter of Fundamental Rights (respect for private and family life and protection of personal data) and thus declared the disputed provisions of the 5th Money-Laundering-Directive invalid. The ECJ also found a disregard for data protection provisions if all members of the public can view such data and even retain or disseminate it.

Consequences at EU and national level

Due to the ECJ ruling, access to these registers must be reconsidered. It is now a matter of amending the provisions of the EU Money Laundering Directive and adapting national implementation. It can be assumed that the 6th EU Money Laundering Directive currently under discussion will return to the requirement of proof of a legitimate interest. Until then, access will

probably be blocked for natural and legal persons who are not public authorities, financial institutions or other professionals with certain due diligence obligations.

The Luxembourg transparency model, through which information could be accessed on the Internet without prior notification and free of charge, will probably no longer be applied. Conceivable are models that ensure an examination of the applicant and its justification.

Romania has transposed the Directive by Law No. 129/2019 and adopted the disputed provision in Art. 19(8). The question now is how the definition of legitimate interest will be formulated and implemented in practice throughout the EU. Interests to keep the group of shareholders secret are undisputed for strategic or competition- related reasons. Specifically for Romania, there is also the question of whether the obligation to state the beneficial owners in the company's certificate of incorporation, which has been introduced since 26.11.2022 and is open to public inspection, will be waived for the same reasons. It remains open where the line between private life and disclosure obligations is drawn.

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