

Money laundering

Too much publicity invades privacy

Par Célian Hirsch le 26 November 2022

How can the fight against money laundering and the principle of transparency be reconciled with the right to privacy and data protection ?

The European legislator has failed to strike the right balance in allowing any person access to the register of beneficial owners of companies, according to the European Court of Justice's (CJEU) ruling C-37/20 and C-601/20 of November 22, 2022.

In May 2018, the European legislator adopted its 5th Money Laundering Directive (Directive 2015/849 as amended) to make information on the beneficial owners of companies accessible to "any member of the general public", unless there is an exceptional derogation (art. 30 par. 4 let. c directive 2015/849 as amended).

Luxembourg is implementing this directive, making its register of beneficial owners public on the Internet. A Luxembourg company is challenging the validity of this transparency on the grounds that it would violate the right to privacy and the right to protection of personal data, rights guaranteed by articles 7 and 8 of the EU Charter of Fundamental Rights.

Referred to the CJEU for a preliminary ruling, the Court recalls that any interference with fundamental rights must (1) have a legal basis, (2) not undermine the "essential content" of the fundamental right, (3) pursue an objective of general interest and, finally, (4) be proportionate to the aim pursued.

In the present case, making information on the beneficial owners of a company available to the general public constitutes a serious infringement of the right to privacy and the protection of personal data. Indeed, once data is made available to the general public, it is illusory for the persons concerned to defend themselves effectively against abuse.

With regard to the first two conditions, the CJEU found that the interference had a legal basis and did not undermine the essential content of fundamental rights.

The general interest objective is the prevention of money laundering. The Council of the EU argues that the principle of transparency is also an objective of general interest pursued by this regulation. The CJEU retorts that this principle only applies to activities of a public nature. It cannot therefore be invoked to give the general public access to the identity of private beneficial owners.

Finally, although public access is apt to prevent money laundering, such access is not necessary (condition of proportionality). Indeed, the draft amendment to the directive limited access to beneficial owner information to the existence of a “legitimate interest”. This requirement would have posed practical difficulties, so it was simply dropped by the legislator. The CJEU held that the practical difficulty of the notion of legitimate interest could not justify public access to such information. Typically, the press and civil society organizations involved in the fight against money laundering have such a legitimate interest. The same applies to financial institutions and individuals likely to enter into transactions with the company.

If the condition of necessity is not met, public access to information on beneficial owners is invalid.

In a final step, the CJEU weighs up the interests at stake (proportionality in the narrow sense). In particular, it stresses that the fight against money laundering is the responsibility of public authorities and financial institutions. Making information on beneficial owners accessible to the public is therefore not justified by a balanced weighing of the general interest objective pursued and the fundamental rights attained.

This judgment contrasts with the conclusions of the Advocate General. In particular, the latter had held that the principle of transparency can be applied to private individuals, and not just in the public sector. This reasoning enabled him to hold that access by the general public was necessary to enhance transparency, without the interested party having to demonstrate a legitimate interest. Finally, in order to achieve a balanced balance of interests, the Advocate General proposed that public access should be conditional on registration. The CJEU was clearly unconvinced by this reasoning, expressly limiting the scope of the principle of transparency to the public sector and pointing out that it is not for the general public to combat money laundering.

At international level, FATF Recommendation 24 on transparency and identification of beneficial owners of legal entities is currently under review. The draft provides that states may facilitate access to such information by the general public, provided that they weigh up the interests of combating money laundering against the protection of fundamental rights. Now that the CJEU has done so, the FATF will probably have to reconsider its position.

What about Swiss law ?

As recently reported, the Federal Council wishes to strengthen the transparency of legal entities. On October 12, 2022, it instructed the Federal Department of Finance to draw up a bill aimed at increasing transparency and facilitating the identification of the beneficial owners of legal entities. The central register for the identification of beneficial owners will be accessible to the competent authorities, but not to the general public. The European problem will therefore not arise in Switzerland.

<https://cdbf.ch/en/1259/>