



Euro Tax Flash from KPMG's EU Tax Centre

[Background](#)

[The CJEU decision](#)

[EU Tax Centre comment](#)

The CJEU invalidates certain transparency obligations under AMLD

CJEU – Transparency – Anti-Money Laundering Directive – Beneficial owner – Beneficial ownership register – Charter of Fundamental Rights

On November 22, 2022, the Court of Justice of the European Union (CJEU or the Court) gave its [decision](#) in the joined cases C-37/20 and C-601/20. The cases concern the validity of conditions for allowing access to beneficial ownership information under Directive (EU) 2015/849 Anti-Money Laundering Directive (AMLD 4) and the subsequent amendments introduced by Directive (EU) 2018/843 Anti-Money Laundering Directive (AMLD 5).

The CJEU held that, in light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union (the Charter), the AMLD 5 provision requiring Member States to provide access to beneficial ownership data to any member of the general public was invalid.

Background

Under AMLD 4 Member States were required to collect and hold information in respect to the beneficial owners of companies in a central register. Such information had to be made available to any person or organization able to demonstrate a legitimate interest for accessing the data. AMLD 5 extended the transparency requirements by allowing access to information to any member of the general public. Member States were allowed to exceptionally limit access to this data, on a case-by-case basis, if access to the information “would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation”.

Following proceedings raised by two Luxembourg taxpayers, whose request for limited access was denied by the Luxembourg Business Registers, the Luxembourg District Court logged requests for preliminary rulings with the CJEU. The referring court sought clarifications on the

validity of the system of public access to information on beneficial owners and the scope of its derogations, as well as on the interpretation of certain concepts – i.e. “exceptional circumstances”, “risk” and “disproportionate risk”. The referring court also sought to understand the compatibility of the rules under dispute with the protection of fundamental rights guaranteed by the Charter – specifically the rights to respect for private and family life (Article 7) and the protection of personal data (Article 8), as well as with the EU General Data Protection Regulation (GDPR).

On January 20, 2021, AG Giovanni Pitruzzella recommended that the CJEU finds the AMLD 5 provision granting access to beneficial ownership data to the general public as being invalid – see E-news [Issues 147](#) for further details.

The CJEU decision

The CJEU first noted that public access to data concerning beneficial ownership seriously interferes with the fundamental rights guaranteed by the Charter. In the Court’s view, the serious character of the interference derives from the fact that any person would be able to find out the material and financial situation of a beneficial owner. Moreover, in the particular case of Luxembourg, such information would be available online and could be easily retained and further distributed by any person, outside the Beneficial Owner register.

The Court continued by analyzing if such serious interference can be justified. In this respect, the CJEU noted that the objective of AMLD 5 is to prevent money laundering and terrorist financing, by means of increased transparency. In the Court’s view, this represents an objective of general nature capable of justifying the interference with fundamental rights. Moreover, providing general access to beneficial ownership data seemed appropriate for the purpose of achieving this objective.

The CJEU continued by observing that, however, the measure under dispute was not strictly necessary and was not proportionate to the objective pursued. In this respect, the Court noted that under AMLD 4 and AMLD 5 Member States have the option to go beyond the minimum standard prescribed and require additional data. Therefore, in the Court’s view, the EU legislator did not define in a clear and precise manner the scope and nature of the personal data collected and disclosed to the public, as required by the substantive rules governing the interference with the rights guaranteed by the Charter.

Moreover, combating money laundering and terrorist financing represented a priority matter for public authorities and specific entities (e.g. credit or financial institutions). The Court then recalled that under the AMLD 4 regime the information was made available to these stakeholders, and the general public needed to demonstrate the existence of a legitimate interest in order to access the data. In the CJEU’s view, the increased transparency requirements under AMLD 5 triggered a “considerably more serious interference” with the fundamental rights, without offering increased benefits.

The Court concluded by noting the additional provisions of AMLD 5 – under which Member States have the option to make access to the information subject to a condition of online registration and to exceptionally limit the access to information, are not in themselves sufficient safeguards that would allow beneficial owners to protect their personal data effectively against risks of abuse. In the absence of appropriate safeguards and given the perceived lack of balance between the

objective of general interest pursued and the fundamental rights guaranteed by the Charter, the CJEU held that the provision under dispute was invalid.

EU Tax Centre comment

The ruling would significantly impact how beneficial ownership data would be made available to the public. It is unclear whether this would mean a return to the AMLD 4 provision, where a case-by-case assessment was required in order to obtain access.

The case could impact other legislation in the field of transparency, including the recently adopted EU Public Country-by-Country Directive. In particular it would be interesting to see how the CJEU would interpret the compatibility of the Charter with opt-in provisions such as the 'safeguard clause' under which Member States can allow in-scope groups to defer the disclosure of commercially sensitive information for up to 5 years, and where no clear definition was provided.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



Robert van der Jagt
Chairman, KPMG's EU
Tax Centre and
Partner, Meijburg & Co



Ana Puscas
Manager
KPMG's EU Tax Centre

kpmg.com/socialmedia



[Privacy](#) | [Legal](#)

You have received this message from KPMG's EU Tax Centre. If you wish to unsubscribe, please send an Email to eutax@kpmg.com.

If you have any questions, please send an email to eutax@kpmg.com

You have received this message from KPMG International Limited in collaboration with the EU Tax Centre. Its content should be viewed only as a general guide and should not be relied on without consulting your local KPMG tax adviser for the specific application of a country's tax rules to your own situation. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

To unsubscribe from the Euro Tax Flash mailing list, please e-mail KPMG's EU Tax Centre mailbox (eutax@kpmg.com) with "Unsubscribe Euro Tax Flash" as the subject line. For non-KPMG parties – please indicate in the message field your name, company and country, as well as the name of your local KPMG contact.

KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands

© 2022 Copyright owned by one or more of the KPMG International entities. KPMG International entities provide no services to clients. All rights reserved.

KPMG refers to the global organization or to one or more of the member firms of KPMG International Limited ("KPMG International"), each of which is a separate legal entity. KPMG International Limited is a private English company limited by guarantee and does not provide services to clients. For more detail about our structure please visit home.kpmg/governance.