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# Beneficial Ownership – Demand for Transparency, Threat to Privacy

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**Abstract:** The basic idea behind establishing the register of beneficial owners is to increase the transparency and accessibility of data on beneficial ownership of companies and other legal entities with the aim of ensuring the public availability of data on domestic and foreign natural and legal persons. However, the possibility of the data being accessible to the general public instead of to persons or organizations that can demonstrate a legitimate interest raised the issue of violating the principles of respect for private or family life and the protection of personal data. Consequently, this raises the question of drawing the line between contributing to the common good and fighting against money laundering and terrorist financing, on the one hand, and protecting personal data, with the possibility of their misuse, on the other. A balance as well as a response to the possibility of setting soft limits of legitimate interest that would result in the achievement of all set goals was sought in the practice of the European Court of Justice. One of the legislative solutions regarding the extent of access to data on beneficial owners for the entire public, along with the establishment of different types of registers in order to prevent money laundering and terrorist financing, is described using the example of Croatia.

## 1. Introduction

In order to achieve effective prevention of money laundering and terrorist financing (hereafter: ML/TF), every obliged entity shall adopt


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policies, controls, and procedures for managing and mitigating the risk of ML/TF. Their application is realized as a measure of the due diligence procedure. One of the essential measures of due diligence is to identify the beneficial owner as well as to verify the person's identity, including legal persons, trusts, companies, foundations, and similar legal arrangements, taking the necessary steps to understand the ownership and control structure of the customer.

Since the adoption of Directive (EU) 2015/849,[1] a range of data on the founders of companies and other legal entities have been available from the court register. When registering, it is mandatory to provide data on the founders of a public company, limited partnership, economic interest association, joint-stock company, limited liability company, or European company, inter alia. Despite the volume of data mandatory during the registration, it was evident that the amount of data collected was not sufficient for beneficial owner identification or prevention of their misuse for ML/TF purposes. In particular, corporations, trusts, foundations, limited partnerships and hybrid business forms, such as limited liability partnerships (LLPs) and limited liability companies (LLCs), are the corporate vehicles most commonly associated with the misuse,[2] which made the request for obtaining additional data even more significant.

With the aim of greater transparency and availability of data on beneficial ownership, Directive (EU) 2015/849 highlights the requirement to establish the register, thus ensuring the availability of data on a domestic and foreign natural and legal person(s) necessary for due diligence and detection of networks of beneficial owners or ultimate beneficiaries of legal entities or legal arrangements. The identification process is necessary,

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1 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L141, June 5, 2015).

2 Erik P.M. Vermeulen, "Beneficial Ownership and Control: A Comparative Study – Disclosure, Information and Enforcement," *OECD Corporate Governance Working Papers*, no. 7 (2013): 39, accessed March 28, 2023, https://www.oecd-ilibrary.org/docserver/5k4dkhwckbzv-en.pdf?expires=1682345213&id=id&accname=guest&checksum=A7E39B2A0AF7BEB1079DD80ED29325CB.

in addition to the prevention of ML/TF, for the general trust of the public and investors in the financial markets, which prompts the demand for the availability of data that ensures transparency regarding beneficial ownership and control structures of companies.

Transparency of data concerning tax evasion and tax fraud was achieved as well, through various mechanisms of efficient administrative cooperation between Member States, allowing tax authorities access to information, procedures, and beneficial owners' documents.

However, it is precisely the extent of the due diligence measures that raises the issue of satisfying the public's interest in relation to the set goal of preventing ML/TF and, on the other hand, the fundamental rights of customers governed by regulations related to the protection of personal data.

## 2. Beneficial Ownership and Establishment of the Register

Although the term "beneficial owner" was introduced by Directive 2005/60/EC,[3] to comprehensively convey its complex nature the definition from Directive 2015/849 (Article 3(6)) is cited:

> beneficial owner means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:
>
> a) in the case of corporate entities:
>
> (i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information (…);
>
> (ii) if, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s); the obliged

[3] Directive (EU) 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L309, November 25, 2005).

entities shall keep records of the actions taken in order to identify the beneficial ownership under point (i) and this point;

b) in the case of trusts: (i) the settlor; (ii) the trustee(s); (iii) the protector; (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;

c) in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point (b).

Considering the complexity and breadth of the beneficial ownership concept, information is expected to be obscured using shell companies, complex ownership, and control structures involving many layers of shares registered in the name of other legal persons, bearer shares and bearer share warrants, unrestricted use of legal persons as directors, formal nominee shareholders and directors where the identity of the nominator is undisclosed, informal nominee shareholders and directors, such as close associates and family. Legal and beneficial ownership information can assist competent authorities, particularly law enforcement authorities and financial intelligence units (hereafter: FIUs), by identifying those natural persons who may be responsible for the underlying activity causing concern or who may have relevant information to further an investigation.[4] Corresponding information will be stored in the register of beneficial owners with the main goal of preventing the misuse of legal entities for the purpose of ML/TF and related predicate criminal offenses – such as corruption, fraud, tax crimes – and strengthening the transparency and availability of data on beneficial ownership.

The Financial Action Task Force (hereafter: FATF) has long indicated the threats of such abuses and, consequently, the need for transparency of beneficial ownership. From this perspective, Recommendations 24 and 25 require countries to provide access to adequate, accurate and up-to-date

4 FATF, "Beneficial Ownership of Legal Persons," Paris, France, 2023, p. 4, accessed April 24, 2023, https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html.

information on beneficial ownership and control of legal persons and arrangements.

Despite the highlighted threats associates with the misuse of legal entities for ML/TF in the period following the revision of the FATF Recommendations (under the Fourth evaluation), the FATF found that a small number of countries had achieved a substantial level of effectiveness in preventing the misuse of legal persons and arrangements. Some specific problems were identified, including:

a) insufficient accuracy and accessibility of basic information relating to company registration;
b) less rigorous implementation of due diligence measures by key gatekeepers such as company formation agents, lawyers, and trust-and-company-service providers;
c) lack of sanctions against companies that fail to update information held by national company registries, or to keep information about their shareholders or members up-to-date;
d) obstacles to information sharing such as data protection and privacy laws, which impede gaining timely access to adequate, accurate and up-to-date basic and beneficial ownership information by competent authorities.[5]

It can be considered that adequacy and accessibility of core information relating to company registration form the basis of the demand for the establishment of the register of beneficial owners while the other established issues represent challenges in the field of application: risk assessment, bearer shares, nominee shareholder arrangements, fines and sanctions, and international co-operation.[6]

The issue of a complex network of beneficial owners can be even more intricate considering the fact that proportionality between corporate ownership and control implies that each shareholder owns the same fraction of

5 FATF, "FATF Report to the G20 Beneficial Ownership," Paris, France, 2016, p. 3, accessed April 18, 2023, https://www.fatf-gafi.org/en/publications/Mutualevaluations/Report-g20-beneficial-ownership-2016.html.

6 FATF, "Best Practices on Beneficial Ownership for Legal Persons," Paris, France, 2019, p. 8, accessed April 24, 2023, https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Methodsandtrends/Best-practices-beneficial-ownership-legal-persons.html.

cash flow rights and voting rights. Security-voting structures that deviate from the principle of proportionality have sometimes caused concern: firstly, discrepancies between ownership and control may exacerbate the misalignment of the incentives for controlling and non-controlling shareholders; secondly, a separation of voting and cash flow rights may compromise the efficiency of markets for corporate ownership and control.[7]

On the issue of control, it is important to note the difference between legal ownership and beneficial ownership over a legal person. A natural person may be considered a beneficial owner due to the fact that is the ultimate owner/controller of a legal person, either through ownership interests or through the exercise of ultimate effective control by other means. While legal ownership and beneficial ownership can overlap, the legal title or controlling shareholding of a company may be in the name of an individual or a legal person other than the beneficial owner who ultimately controls the entity, directly or indirectly. Accordingly, individuals who exercise ultimate control over a legal person should be identified as beneficial owners, regardless of whether they own shares above any specified minimum ownership threshold.[8]

With regard to the primary objective of achieving accuracy, access by competent authorities and timeliness of information on beneficial ownership, Directive (EU) 2015/849 lays down comprehensive provisions for obtaining information on beneficial owners, as well as details on the ownership interests they hold. The information must be accurate and up-to-date, while ensuring its availability to competent authorities and FIUs without any restrictions, to obliged entities within the due diligence, and to the general public. The same requirement applies to trusts and other types of legal arrangements, such as *fiducie*, certain types of *Treuhand* or *fideicomiso*,

7 OECD, "Lack of Proportionality Between Ownership and Control: Overview and Issues for Discussion," OECD Steering Group on Corporate Governance, OECD, Paris, France, 2007, p. 4, accessed May 8, 2023, https://www.oecd.org/daf/ca/40038351.pdf.

8 FATF, "Beneficial Ownership of Legal Persons," Paris, France, 2023, p. 16, accessed April 24, 2023, https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html.

funds, foundations and other legal arrangements (life insurance contracts, *escrow* agreements and *nominees*.[9]

## 3. Demand for Greater Data Transparency

Tax evasion is one of the predicate offenses with an increasing threat from ML/TF. Within the value-added tax system, a remarkably generous *carousel fraud* appears as one of the subtypes of missing trader intra-community fraud (MTIC fraud). The effects of tax evasion on national budgets and the budget of the European Union (hereafter: EU) could be described by the estimate of direct damage caused annually by carousel fraud per 100 billion euros,[10] while the Resolution of the European Parliament (2016/2033 INI)[11] estimates its damage at 45–53 billion euros per year (the total loss of VAT revenue caused by fraud is around 170 billion euros per year).

Although value-added tax evasion has significant financial effects on the budget, other forms, which also imply concealing illegal activities and true identities, are also not negligible. Following the *Lux Leaks* and *Panama Papers* scandals, in which the perpetrators used front or shell companies for illegal purposes, the EU is taking more intensive steps to ensure the transparency of beneficial ownership through Directive (EU) 2016/2258[12] amending Directive 2011/16/EU[13] as regards access to anti-money laundering information by tax authorities, and Directive (EU)

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9 European Commission, "Report from the Commission to the European Parliament and the Council assessing whether Member States have duly identified and made subject to the obligations of Directive (EU) 2015/849 all trusts and similar legal arrangements governed under their laws," Brussels, Belgium, 16 September 2020, COM(2020) 560 final, p. 9–10, accessed April 27, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0560.

10 Denis Buterin, Nikolina Blašković, and Aidone Eda Ribarić, "Suzbijanje kružnih prijevara u cilju zaštite javnih financija Hrvatske," *Zbornik Veleučilišta u Rijeci* 2, no. 1 (2014): 91.

11 European Parliament resolution of 24 November 2016 on towards a definitive VAT system and fighting VAT fraud (2016/2033(INI)) (OJ C224, June 27, 2018).

12 Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L342, December 16, 2016).

13 Council Directive (EU) 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L64, March 11, 2011).

2018/843[14] amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of ML/FT.

Given the above, Directive 2011/16/EU reinforced the foundations for preventing tax evasion and increased tax transparency by including incomes generated from performing activities via digital platforms in multiple jurisdictions. Directive 2018/822[15] amended Directive 2011/16/EU concerning the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, while Directive (EU) 2016/2258, prescribing measures for efficient administrative cooperation between Member States and their effective monitoring, takes further steps to prevent tax evasion and fraud on a global level.

According to the provisions of Directive (EU) 2016/2258, the tax authority must have free access to all mechanisms, procedures, documents, and information of entities that carry out due diligence, information about the beneficial owner(s), as well as about protection, records, and statistical data on transactions. The same availability of information applies to direct access to the data found in the register of beneficial owners. The aforementioned changes indicate that by strengthening the provision of administrative cooperation, the efficiency of tax authorities is sought to be increased, with a positive effect on tax security.

Directive (EU) 2018/843 recognizes the specific role of tax authorities in cooperation, coordination, access, and exchange of information at the national level to develop and implement policies and activities to combat ML/TF, especially the detection, assessment, understanding, and mitigation of the risk of ML/TF.

Intending to achieve effective implementation of the above, Directive (EU) 2018/843 ensures that Member States report on the institutional structure and general procedures within their ML/TF prevention regime, including on tax authorities; ensure that tax authorities have timely and

14 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L156, June 19, 2018).

15 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. (OJ L139, June 5, 2018).

unrestricted access to all information kept in the central register, access to information on beneficial ownership of trusts; provide effective mechanisms that enable them to cooperate and coordinate at national level regarding the development and implementation of policies and activities to combat ML/TF; do not prohibit or impose unreasonable or unduly restrictive conditions on the exchange of information or assistance between competent authorities; and, in particular, that competent authorities do not refuse a request for assistance due to the fact that it is considered to involve tax matters.

## 4. European Court of Justice – Two Steps Forward, One Step Back

Efficient due diligence procedures are an essential step for any entity obliged to implement ML/TF prevention measures. Pioneering efforts to achieve this goal are manifested in the first two EU Directives (91/308/EEC[16] and 2001/97/EC[17]), reducing such procedures to customer identification and verification of collected data.

Directive 2005/60/EC contains more detailed provisions initiated by the need to identify the beneficial owner. The identification includes trusts and other legal arrangements and is based on the principle of risk assessment and other appropriate measures necessary to understand the ownership and control structure of the customer.

Even then, it was doubtful that the procedure for determining beneficial ownership is very complex due to the complex structure of business relationships and business ventures within the company itself. The difficulties of tracing ultimate beneficial ownership and, even more importantly, control, make it onerous for minority investors and other stakeholders to discover and curtail self-dealing, such as asset stripping, related party transactions and share dilutions by the ultimate controlling beneficial owners.[18]

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16 Council Directive (EU) 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L166, June 28, 1991).

17 Council Directive (EU) 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L344, December 28, 2001).

18 Erik P.M. Vermeulen, "Beneficial Ownership and Control: A Comparative Study – Disclosure, Information and Enforcement," *OECD Corporate Governance Working Papers*,

Aiming to increase transparency and prevent abuse of legal entities and tax evasion, Directive 2015/849 requires the consolidation of data on beneficial owners within the register. Directive (EU) 2018/843 goes a step further and proposes the interconnection of registers, allowing access to the collected information to all Member States. Beyond any doubt, the interconnection of Member States' central registers holding beneficial ownership information through the European Central Platform established by Directive (EU) 2017/1132[19] necessitates the coordination of national systems which have varying technical characteristics.

Regardless of the stated efforts to prevent ML/TF in the context of companies and other legal entities, as well as trusts and similar legal arrangements, additional consideration should be given to personal data protection. This matter is regulated by Regulation (EU) 2016/679[20] on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and Directive (EU) 2016/680,[21] applied to the processing of personal data within the register of beneficial owners. Only personal data that is up-to-date and relates to beneficial owners should be made available, while beneficial owners should be informed of their rights in accordance with the current EU legal data protection framework.

In this respect, Directive (EU) 2018/843 expresses the attitude that, in order to ensure a proportionate approach and to guarantee the rights to private life and personal data protection, Member States should have the possibility to provide for exemptions to the disclosure through the registers

no. 7 (2013): 16, accessed March 28, 2023, https://www.oecd-ilibrary.org/docserver/5k4dkhwckbzv-en.pdf?expires=1682345213&id=id&accname=guest&checksum=A7E39B2A0AF7BEB1079DD80ED29325CB.

19 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L169, June 30, 2017).

20 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L119, May 4, 2016).

21 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L119, May 4, 2016).

of beneficial ownership information and to access to such information, in exceptional circumstances, where that information would expose the beneficial owner to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation.

### 4.1. Legitimate Interest v General Public

The European Court of Justice (hereafter: ECJ) expressed its position in the judgment on the joined cases C-37/20 C-601/20, WM (C-37/20), Sovim SA (C-601/20) v Luxembourg Business Registers.[22] In particular, the ECJ evaluated the validity of Article 1(15)(c) of Directive (EU) 2018/843, in so far as Article 1(15)(c) amended point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849, and the interpretation of Article 30(9) of Directive 2015/849, and of Article 5(1)(a) to (c) and (f), Article 25(2) and Articles 44 to 50 of Regulation (EU) 2016/679.

One of the disputed points considered by the judgment refers to the availability of information from the Register. Namely, amendments to Article 30 of Directive (EU) 2015/849 indicate that Directive (EU) 2018/843 intends to expand the scope of available information about the beneficial owner, binding Member States to ensure the accessibility of information in all cases to competent authorities and FIUs, without any restriction, to obliged entities, within the framework of due diligence, and any member of the general public.

Before the amendment, the aforementioned provision in Directive (EU) 2015/849 allowed access to information to any person or organization that could demonstrate a legitimate interest. The lack of a uniform definition of the term "legitimate interest" had given rise to practical difficulties, thus the European Commission considered removal of this condition as an appropriate solution. This is because, if a definition of "legitimate interest" had been proposed, it could have been expected to be applied differently in the Member States, which would have consequently lead to arbitrary decisions. Consequently, Directive (EU) 2018/843 allowed access to information about the beneficial owner to any member of the general public.

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22 CJEU Judgment of 22 November 2022, WM, Sovim SA v. Luxembourg Business Registers, Cases C-37/20 and C-601/20, ECLI: ECLI:EU:C:2022:912.

The scope of information available to the general public included the name, the month and year of birth, country of residence, and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held. Directive (EU) 2018/843 went a step further and stipulated that Member States can provide access to additional information, including at least the date of birth or contact details, in accordance with data protection rules. There is another crucial amendment to Directive (EU) 2015/849 which states that in exceptional circumstances to be laid down in national law, where the access referred to in points (b) and (c) of the first subparagraph of paragraph 5 would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable, Member States may provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis. Member States shall ensure that these exemptions are granted upon a detailed evaluation of the exceptional nature of the circumstances.

### 4.2. Transparency v Personal Data Protection

In this regard, the ECJ was asked to interpret the justification of access by the entire public (with no requirement for a legitimate interest) to the data contained in the register of beneficial owners from Article 30(5) of the amended Directive 2015/849, as well as the terms "exceptional circumstances," "risk" and "disproportionate risk" as stated in Article 30(9) of the same Directive.

According to the above, the aforementioned amendments to Directive (EU) 2015/849 collide with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (hereafter: Charter) and Article 8 of the European Convention on Human Rights, which guarantee respect for private and family life, home and communication, and protection of personal data. Under the Charter, such data must be processed fairly, for specified purposes, and based on the consent of the person concerned or on some other legitimate basis established by law.

The ECJ points out that the access by any member of the general public to the established data concerning the identity of beneficial owners effects the fundamental right to respect for private life, guaranteed by Article 7

of the Charter, it being irrelevant in this respect that the data concerned may relate to activities of a professional nature. In addition, making such data available to the general public in this manner constitutes the processing of personal data falling under Article 8 of the Charter. It should also be noted that making personal data available to third parties constitutes an interference with the fundamental rights, irrespective of the subsequent use of the information communicated. In that connection, it does not matter whether the private life-related information in question is sensitive or whether the persons concerned have been inconvenienced in any way on account of that interference.

Thereby, an unlimited number of people have the opportunity to create a profile on the material and financial situation of the beneficial owner that refers to certain personal identification data, property status, and their investments. The data can be collected, stored and distributed for any purpose, consequently creating a possibility of their misuse.

Improving the overall transparency of the economic and financial environment in the EU is conducive to the prevention of the use of the EU financial system for ML/TF. However, the proportionality of measures resulting from interference with the right to the protection of private and family life and the right to the protection of personal data requires compliance not only with the requirements of appropriateness and necessity, but also the proportionality of these measures in relation to the given purpose.

In an effort to satisfy the proportionality requirement, the ECJ considered that the access of the general public to information about beneficial owners is appropriate to contribute to the prevention of ML/TF, due to the fact that the public nature of the access and the increased transparency contribute to the establishment of an environment which is less likely to be used for the stated purposes. However, the difficulties in precise definition of the cases and conditions under which the public can access information about beneficial owners (the existence of legitimate interest), cannot justify the fact that the EU legislator foresees the access of the general public to this information.

Difficulties arise due to the exception from Article 1(15)(c) of Directive (EU) 2018/843, which allows the general public access to at least information on the name, the month and year of birth, country of residence and nationality of the beneficial owner, as well as the nature and extent of

the beneficial interest held. The ECJ considers it apparent from the use of the expression "at least" that those provisions allow for data to be made available to the public which are not sufficiently defined and identifiable. Therefore, the substantive rules governing interference with the rights guaranteed in Articles 7 and 8 of the Charter do not meet the stated requirement of clarity and precision.

Apropos the matter of concern, it can be concluded that Directive (EU) 2018/843 went one step too far. By providing access to data on real owners to the entire public, the Directive violated the principle of respect for private and family life and the protection of personal data guaranteed by the Charter and the Convention for the Protection of Human Rights and Fundamental Freedoms. However, one can only speculate about the consequences of the opinion stated by the ECJ on increasing data transparency as a basis for protecting legal entities from their abuse, as the basic mantra of Directive (EU) 2018/843.

## 5. Registers of Beneficial Owners in the Republic of Croatia

The Republic of Croatia imposed the obligation to establish a Register of Beneficial Owners (hereafter: Register) under the new Anti-Money Laundering and Terrorist Financing Law (2017)[23] (hereafter: AML/FT Law). The Register is a central electronic database that contains data on the beneficial owners of legal entities established on the territory of the Republic of Croatia (companies, branches of foreign companies, associations, foundations, and institutions), as well as trusts and entities equal to them, incorporated under foreign law. The Republic of Croatia or a local and regional self-government unit must not be the only founder of the aforementioned legal entities. Data from the Register are available to authorized officers of the Anti-Money Laundering Office, authorized persons in the state authorities referred to in Article 120 of the AML/FT Law, the authorized person (and deputy) of the obliged entity, as well as domestic or foreign natural and legal persons.

[23] Anti-Money Laundering and Terrorist Financing Law of 8 November 2017, Journal of Laws of 2017, item 2488.

The Ordinance on the Register of Beneficial Owners (hereafter: the Ordinance)[24] stipulates that data on the beneficial owner shall include the personal identification number of a natural person; name and surname; day, month, and year of birth; country of residence, citizenship; data on the nature and extent of beneficial ownership. Of the above data, only the name and surname, country of residence, month and year of birth, citizenship, and the nature and extent of beneficial ownership are available to the entire public (over the *e-Građani*).[25]

With regard to data availability, it is also important to point out that, under exceptional circumstances, upon the justified and substantiated requirement of a legal entity or competent authority, it is possible to restrict access to data or to a part of data on beneficial ownership if access to such data would expose the beneficial owner to a disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, abuse, violence or intimidation, or if the beneficial owner is underage or has been deprived of their business capacity.

### 5.1. Connection Between the Register and Risk Assessment

The importance of the Register is described by the risk assessment procedure, including an assessment of the risk factors of a country or geographical area. In accordance with the Ordinance on the process for assessing the risk of ML/TF and the method of implementing measures of simplified and enhanced due diligence,[26] one of the risk factors that the obliged entity is required to consider relates to the establishment of reliable and accessible registers of beneficial ownership.

The Register is also connected with the application of enhanced due diligence. The obliged entity should take appropriate measures regarding the higher risk associated with the business relationship. When the risk is notably high, or the obliged entity suspects that the funds do not come

[24] Ordinance on the Register of Beneficial Owners of 24 May 2019, Journal of Laws of 2019, item 1016.

[25] Ordinance on the Register of Beneficial Owners of 2 January 2020, Journal of Laws of 2020, item 11, as amended.

[26] Ordinance on the process for assessing the risk of money laundering and terrorist financing and the method of implementing measures of simplified and enhanced due diligence of 6 November 2019, Journal of Laws of 2019, item 2121.

from a legal source, the best approach to reduce the established risk is a comprehensive source analysis. The results can be verified, inter alia, by searching the company registers online to confirm the company's sales data. Enhanced due diligence measures may include analyzing all parties during the transaction, including parties that participate indirectly, and the transaction itself. Intending to analyze all parties involved in the transaction, a better understanding of their ownership structure is also necessary, particularly when their country of residence is associated with a higher risk of ML/TF or dealing with high-risk goods. The required information can be obtained from registers of beneficial owners or by searching other sources available to the public.

### 5.2. Peculiarities of Registers Intended for the Non-Financial Sector

In addition to the growing demand for monitoring and registering information on the beneficial ownership of companies, branches of foreign companies, associations, foundations, institutions, as well as trusts and similar legal arrangements, the Republic of Croatia has decided to respond to the need to register certain entities of the non-financial sector. The new amendments to the AML/TF Law stipulates the obligation to register and maintain its data in the Register of legal and natural persons engaged in the provision of services related to trusts and trading companies and the trade of precious metals and precious stones. Information on registration in the mentioned Register is published on the website of the Ministry of Finance, where the Register is located.

Another novelty is the Register of virtual asset service providers. A legal entity or a craftsman based in the Republic of Croatia who intends to perform some of the activities related to the provision of virtual property services must, before starting to perform these activities, be entered in the Register of virtual asset service providers maintained by the Croatian Financial Services Supervisory Agency (HANFA). The legal entity should first enter the register, whereupon the activity related to the provision of virtual property services can be registered in the Court register and the craftsman in the Crafts register.

One of the conditions for registration in the above registers is the fulfillment of the *good reputation* condition, which is one of the significant

innovations brought by the latest amendments to the AML/TF Law (2022)[27] and intends to fulfill the requirements of the *fit and proper* regime. Good reputation refers to a natural person against whom no criminal proceedings are being conducted and who has not been convicted of the criminal offenses listed in Article 9(e) of the AML/TF Law; against whom no criminal proceedings are being conducted and who has not been convicted of any of the criminal offenses under the laws of other Member States and third countries which correspond to those criminal offenses; who, as a legal representative, has not seriously or systematically violated the provisions of the AML/TF Law; and who is not an associate of a person convicted of the offence of ML/FT. If the above conditions are not met, the competent authority will reject the request for registration.

## 6. Conclusion

The concept of beneficial ownership as a significant factor in the fight against ML/TF is complex. It improves in parallel with the development of the ML/TF prevention system, with numerous possibilities for providing accuracy, adequacy, and accessibility of core information relating to company registration. In addition to the undoubted advantages of access to the required information in order to conduct due diligence, there is the need to limit their availability to a specific audience of the general public.

The judgment of the ECJ in the joined cases WM and Sovim SA v. Luxembourg Business Registers testifies that unrestricted access by the general public is neither a necessary measure to prevent ML/TF nor a proportionate one. Therefore, it cannot justify a serious interference with the right to respect for private life and the protection of personal data. In other words, any exceptional provision of access to information on beneficial ownership to the general public raises the question of harmony between, on the one hand, the requirements for data transparency in the general interest and, on the other hand, the protection of fundamental human rights and personal data from the risk of abuse. Therefore, the advantages of the beneficial owners' register, in an unlimited form, will primarily benefit the public authorities and credit or financial institutions, which are essential for

[27] Anti-Money Laundering and Terrorist Financing Law of 22 December 2022, Journal of Laws of 2022, item 2335.

preventing illegal activities – money laundering, terrorist financing, and other forms of financial fraud.

Although the register opened a Pandora's box of violations of certain principles whereon the Community acquis rests, Croatia welcomed its establishment with long-awaited longing. Particularly significant is the provision that defines the criteria of *good reputation* as a condition for inclusion in the register of beneficial owners, as well as in the new types of registers introduced by the latest amendments to the Croatian legislation, with the aim to fulfill the role of Gatekeeper of their credibility.

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