UBO INFORMATION TRANSPARENCY IN THE CORPORATE REGISTERS AND ITS EFFECT ON PRIVACY PROTECTION FROM AML-CFT PERSPECTIVE

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Abstract. This paper examines the essence of standards set by the European Union legislation, regulating two areas of law which are mutually opposite but vastly interconnected in practice, particularly from the perspective of AML/CFT (Anti-Money Laundering/Combating the Financing of Terrorism). Identifying the exact position of the thin line that distinguishes between the right to free access to information and the right to protect the privacy of personal data is of great importance and has a legitimate purpose because the complexity of schemes aimed at attaining the set goals can easily be misused to conceal the violation of a basic human right in practice. This paper analyses the legitimacy of complete transparency of personal data of the actual (direct or indirect) owner as the basic tool for preventing the abuse of the financial system for money laundering and terrorism financing purposes. This paper attempts to explain and correlate the two aforementioned rights by analysing them from the perspective of the Ultimate Beneficial Owner (UBO).

Key words: AML-CFT, UBO, UBO Register, due diligence, right to be informed, privacy protection, data protection, ECJ, C-37/20, C-601/20

1. INTRODUCTION

Corporate Due Diligence (hereinafter: DD) represents a process laid out as a professional duty that consists of a set of appropriate measures, which are integrated into a corporate strategy of enterprises and carried out by means of correctly identifying their customers/clients prior to entering into a legally binding relationship, with the aim to prevent, mitigate and account for how they address their actual and potential adverse impacts.

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The Organisation for Economic Co-operation and Development (hereinafter: the OECD) has promoted responsible business conduct since the 1970s when the “OECD Guidelines for multinational enterprises” were initially published (Martin-Ortega, 2013:57). The Guidelines are a comprehensive code multilaterally agreed by the adhering governments, which can be described “as the principal intergovernmentally agreed ‘soft law’ tool of corporate accountability” (Ward, 2001: 1). It consists of non-binding principles and standards which define “the responsible business conduct in the global context, consistent with applicable laws and internationally recognized standards” (OECD, 2011: 3). In order to compliment such a merely corporate tool, the OECD additionally adopted the Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones and Due Diligence Guidance for responsible business conduct which presents the first government-backed reference on Due Diligence (hereinafter: DD) that applies to all sectors and all businesses.

The Customer DD (hereinafter: the CDD) is the foundation of the Anti-Money Laundering and Combating the Financing of Terrorism controls (hereinafter: AML-CFT) and compliance for the financial sector (Drezner, 2007). Business entities are free to develop methods in order to comply, which is most commonly achieved by creating and implementing internal AML-CFT policies. Such policies commonly include: (1) integration of appropriate DD standards, (2) monitoring its progress and effectiveness, and (3) communication with relevant national bodies regarding the DD and its outcome.

Following the disclosure of the Panama Papers in 2016 and the Paradise Papers in 2017, the general public gained an insight into the complex organizational structures of corporate legal entities and how they can be used to cover illegal financial income (Daudrikh, 2021: 136). As a consequence, the beneficial ownership transparency agenda (Vali, 2017:136) has gained significant momentum over the past decade and consequently built upon the Financial Action Task Force (hereinafter: the FATF) recommendations (the global standard for anti-money laundering) and action plan principles to prevent the misuse of companies and legal arrangements (Van der Merwe, 2020: 2). As an intergovernmental organisation and a policymaking body for combating money laundering, which sets "standards for the development and support of national and international anti-money laundering and terrorist financing policies" (Korauš, Dobrovič, Polák, Kelemen, 2019: 1272), the FATF called upon its members to further "step up their efforts and focus on increasing the transparency concerning the provision of information on the beneficial ownership of legal entities"(Davila, Barron, Law: 2019: 11).

1 The OECD (fr. Organisation de coopération et de développement économiques) was established as an international organization in 1961, with headquarters in Paris, France. Its mission is to shape policies that foster prosperity, equality, opportunity and well-being for all. For more, see: https://www.oecd.org/ (accessed on 27 December 2022)
2 The OECD guidelines for multinational enterprises, Chapter II – General Policies, para. 10; for more, see: https://www.oecd.org/daf/invest/mne/48004323.pdf
4 The Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones was adopted by the OECD Council 8 June 2006. See: OECD (2006); https://www.oecd.org/daf/corporateresponsibility/36885821.pdf
5 As defined in the OECD Guidelines for Multinational Enterprises (2011), due diligence (DD) is a process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts (OECD, 2011: 20).
2. DD IMPLEMENTATION

The centrepiece of the implementation of such mechanisms is envisaged internally within the entity’s compliance team\(^8\), who are the first line of defence. The compliance team consists of first class professionals specialised in the AML-CFT who are in charge of fulfilling the professional duty of care (hereinafter: the DCA). There are two functions of a compliance team: (1) Know Your Customer (hereinafter: the KYC), and (2) Regulatory function\(^9\). In view of the topic of this paper, only the first function is relevant and appropriate in regard to the DD process. Therefore, upon receiving the initial set of needed information and/or documents, the compliance team is obliged to perform a thorough review and careful consideration of the information obtained, in order to determine the overall risk of cooperation with a specific client.\(^10\) This can be determined based on: (i) the type of client, (ii) the type of the underlying project, and (iii) the geographical location of both. The risk factor can be set as low, medium or high; accordingly, the overall DD process can be simplified (Simplified Due Diligence/ SDD)\(^11\) or enhanced (Enhanced Due Diligence/ EDD)\(^12\), as set out by the AMLD 3\(^13\).

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\(^8\) In the Grand Duchy of Luxembourg, the Financial Sector Supervisory Commission (fr. Commission de Surveillance du Secteur Financier) (hereinafter: the CSSF) is a national body whose statutory mission is to ensure that all the persons subject to its supervision, authorization or registration comply with the professional AML/CFT obligations; for more, see: https://www.cssf.lu/en/anti-money-laundering-and-countering-the-financing-of-terrorism/.

\(^9\) The main purpose of the regulatory compliance is to drive accountability in the legal entity by (1) following the external legal mandates set forth by the state, federal, or international government, and (2) implementing them into internal policy in order to comply.

\(^10\) DD is performed in order to comply with the AML-CFT rules formed by any law, statute, regulation, circular or guidelines applicable from time to time. In Luxembourg, the DD phase starts with obtaining relevant documents and/or information for the purpose of proper initial identification (and maintaining) of the UBOs. The documents may differ depending on whether the UBO is a natural or a legal person. (A) In case the UBO is a natural person, the most common documents required are: (1) valid identification document, such as the ID and/or the passport, (2) proof of personal residence, such as a utility bill (for electricity, gas, landline) or a similar bill (excluding mobile phone, car, or any other bill which is older than 3–6 months), (3) the UBO declaration (stating the source of funds and no PEP status), (4) Structure Chart (containing all entities in the structure from the underlying project to the UBO and percentage of holding), (5) tax/operating memorandum (containing information such as: a) explanation of the structure with the Structure Chart itself on display; b) tax considerations and requirements such as: DAC 6, ATAD, BEPS, MiFID II; c) if this is DAC6 reportable or not; d) impact by ATAD and BEPS; e) tax category and treatment; f) VAT implication; g) reasons for jurisdiction; h) cash repatriation, and i) exit strategy); (6) additionally, the compliance team shall perform World Check and Internet Check internally in order to see if any red flags/hits appear (the World Check procedure is most commonly performed in the database in order to check whether a natural person is charged with the commission of any crimes, or whether there is an ongoing and/or finished court proceeding). (B) In case the UBO is a corporate entity (persona ficta), the most common documents required are: (1) AoA/AoI or LPA, (2) corporate extract/LEI, (3) corporate number or equivalent, such as TIN, (4) proof of shareholder/shareholder register (if the share is 25% or more); in some cases, it is expectable to have the names of minority shareholders struck-out from the shareholder register in order to protect their identity; (5) the UBO declaration signed, (6) proof that it is still an active entity and not liquidated/ negative certificate, (7) Structure Chart, (8) tax memo, and (9) FY statement /AA. This is common market practice in Luxembourg.

\(^11\) In case SDD may be performed in a branch (if allowed by the entity’s internal policy), they may request an AML (reliance) letter from their branch located in a different jurisdiction, or (if regulated) from another fiduciary which provides services to such a client.

\(^12\) Such a division was introduced by the AMLD 3.

Depending on the current standards set out by the EU\textsuperscript{14}, the internal entities’ (i) Preferred Risk Appetite (hereinafter: the PRA), (ii) the Risk Assessment (hereinafter: the RA) and (iii) the Risk Based Approach (hereinafter: the RBA), the outcome may differ per the Business Risk Committee (BRC) of each complying entity.\textsuperscript{15}

3. UBO AND THE IMPORTANCE OF UBO IDENTIFICATION

The ownership in the structure can be defined as a control-enhancing mechanisms, for which two prominent examples are significant: voting rights and economic ownership (Vermeulen, 2012: 11). On the one hand, one can hold more votes than economic ownership ("empty voting") and consequently have the control (Mitić, 2021:92) in the sense that the Corporate Law generally makes voting power proportional to economic ownership (Hu, Black, 2005:811). On the other hand, one can hold undisclosed economic ownership without votes, but often with the \textit{de facto} ability to acquire votes if needed (a situation termed "hidden ownership") (Hu, Black, 2007: 1).

In Europe, the Beneficial Owner (hereinafter: the BO) is one of the most important concepts used in tax treaties (Lì, 2012: 187). It was introduced in double tax treaties in the 1966 protocol to the then-existing 1945 US-UK double tax treaty\textsuperscript{16} (Collier, 2011:686), where the BO was presented as a resident who acquired shares” for \textit{bona fide} commercial reasons and not primarily for the purposes of securing the benefits” (Turksen, Abukari, 2021: 406). The broad definitions have led to divergent interpretations (Bergstrom, 2018: 2015) of the BO. Thus, one can assume that a unique definition could efficiently prevent individuals from hiding behind opaque structures and nominees from engaging in AML-CFT (Knobel, Meinzer, Harari, 2017: 2).

As a consequence of the 1968–1970 discussions, the BO was introduced by the OECD in the Model draft issued in 1974 and this became the revised 1977 OECD Model (Collier, 2011: 687), named “OECD Model Tax Convention on Income and Capital” (Bundgaard, Sørensen, 2018: 590), where the concept was based on ownership of income (Vasović, 2020: 218). The European Union (hereinafter: the EU) Transparency Directive\textsuperscript{17} of 1988 initially required disclosure of shareholdings above 5% \textit{(major or significant holding)} in listed companies (Kleimeier, Whidbee, 2000: 95). In the EU legislation, the Ultimate Beneficial Owner (hereinafter: the UBO) was further instigated by the legislation of the

\textsuperscript{14} For example: (1) the EU Regulation in regards to the High risk Country List, which was initially set as a legal requirement by the AMLD 4 “Commission Delegated Regulation (EU) 2023/410 of 19 December 2022 amending Delegated Regulation (EU) 2016/1675 as regards adding the Democratic Republic of the Congo, Gibraltar, Mozambique, Tanzania and the United Arab Emirates to Table I of the Annex to Delegated Regulation (EU) 2016/1675 and deleting Nicaragua, Pakistan and Zimbabwe”, and (2) Revised EU methodology for identifying high-risk third countries under Directive (EU) 2015/849, SWD(2020), which followed the adoption of the “FATF Roadmap” (2017) which describes the main steps, assessment criteria and follow-up by taking the FATF list as a starting point (See: https://data.consilium.europa.eu/doc/document/ST-11189-2017-INIT/en/pdf),


\textsuperscript{16} United States-United Kingdom Income Tax Convention (1975); see: https://www.irs.gov/pub/irs-tyr/uk.pdf

European Parliament and of the Council in its AMLD 4, which increased the overall transparency and the access to beneficial ownership information (Mitsilegas, Vavoula, 2016: 264). As defined by AMLD 4, the UBO is a natural/physical person who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted and includes at least 25 % plus one share or an ownership interest of more than 25 % in the customer (Daudrikh, 2021: 137).

In the Republic of Serbia (hereinafter: the RS), the UBO is defined in the Act on the Central Register of Beneficial Owners as follows: “the beneficial owner of the Registered Entity is: (1) a natural person who is directly or indirectly the owner of 25% or more of shares, holding voting rights or other rights, on the basis of which he participates in the management of the registered entity with 25% or more shares; (2) a natural person who directly or indirectly has a predominant influence on business management and decision-making; (3) a natural person who indirectly provides the funds to the registered entity and, on that basis, significantly influences the decision-making of the management body of the registered entity when deciding on financing and operations; (4) a natural person who is the founder, trustee, protector, or beneficiary if designated, as well as the person who has a dominant position in the management of the trust; (5) a natural person who is registered for the representation of cooperatives, associations, foundations, endowments and institutions, if the authorized person for representation has not registered another natural person as the real owner.” In the RS, the BO was initially introduced by the Serbian Corporate Income Tax Act (hereinafter: the CIT) (Vasović, 2020: 219).

4. EU AML LAW

Money laundering (hereinafter: ML) is the disguising the origins of illegally obtained proceeds so that they appear to have originated from legitimate sources (McCarthya, Santenb, 2014: 2). In practice, this process is most commonly divided into three stages: (1) placement, (2) structuring or layering, and (3) integration, which are aimed at releasing laundered funds (cash or assets) into the legal financial system, and ultimately ensure turnover of funds as if they were obtained through a legitimate source (Singha, Best, 2017: 2). In the context of

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16 In the Grand Duchy of Luxembourg, the UBO is defined by and in accordance with the amended AML Act. In the Republic of Serbia, the UBO is defined in the Act on the Central Registration of Beneficial Owners of the RS.
17 Article 3 of the Act on Central Registration of Beneficial Owners (Zakon o centralnoj evidenciji stvarnih vlasnika, Sl. glasnik RS, br. 41/2018, 91/2019 i 105/2021).
19 Article 40a of the Corporate Income Tax Act RS.
20 The money laundering process is initiated by moving the money/funds which are obtained through criminal activity and placing the proceeds into a legitimate source of income.
21 The structuring phase involves breaking down large bulk funds into a series of smaller transactions, with the goal of falling under the threshold of AML regulations.
22 Layering or structuring often takes place across borders to make it more difficult for national AML authorities to detect foul play. Tactics may include trading in foreign currencies in international markets, purchasing foreign money orders, and selling luxury assets.
23 Integration takes place once the funds are integrated back into the legitimate financial accounts, which is typically done by involving a series of smaller transactions in order not to get detected and caught.
sophisticated and constantly evolving ML and Terrorism Financing (hereinafter: TF) operations (FATF, 2019), criminals and organized crime networks (including terrorist groups) on a daily basis attempt to sabotage financial investigations conducted by the authorised national and international bodies, by rapidly transferring their assets between different bank accounts, currencies and jurisdictions (Pavlidis, 2020: 369). Thus, large and complex organisations can be suitable for providing a cover-up for corporate and financial crimes (Lord, van Wingerde, Campbell, 2018:15). In order to prevent such conduct, legal entities are obliged to adopt and implement appropriate internal AML/CFT policies which allow them to both detect and prevent this type of unwanted activities (Hampton, Levi, 1999: 653).

The EU’s initial efforts to regulate this matter date back to 1990, when the EU adopted its First Anti-money Laundering Directive (AMLD 1)\(^{27}\); the second one was adopted in 2001 (AMLD 2)\(^{28}\), the third one in 2005 (AMLD 3)\(^{29}\), the fourth one in 2015 (AMLD 4)\(^{30}\), the fifth one in 2018 (AMLD 5)\(^{31}\) and the sixth one in 2021 (AMLD 6)\(^{32}\). The aim was to align the EU’s anti-money laundering framework with that of international organisations such as the FATF, considering that the crime of ML threatens the core of the financial system (Zoppe, 2015 :131).

5. LUXEMBOURG AML ACT

The EU Member States (hereinafter: the MSs) are obliged to harmonize their legislative framework with the EU law and introduce the concept of AML set out by the EU standards into their national legislation\(^{34}\). This is most commonly accomplished by enacting a subject-specific legislative act (Lex specialis) which is explicitly regulating this area. For example, on 12 November 2004, the Grand Duchy of Luxembourg adopted its national lex specialis - the Anti-Money Laundering Act (the AML Act) regulating the area of AML/CFT at the domestic level (\textit{Law of 12 November 2004 on the fight against money laundering and terrorist financing}).


\(^{32}\) In the EU, another angle of combating ML was tackled by adopting the AML Criminal Law Directive (Directive (EU) 2018/1073 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law), which presents a critical perspective on the use of criminal law to tackle economic problems. This Directive was amended, consolidated, supplemented, repealed, replaced or restated several times. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.284.01.0022.01.ENG


\(^{34}\) In Luxembourg, provisions were included in: (1) Article 506-1 of the Criminal Code (\textit{Code pénal Luxembourg}); and (2) AML/FT Act of 12 November 2004 on the fight against money laundering and terrorist financing.
terrorist financing). By comparison, in the Republic of Serbia, AML is not regulated by the Corporate Code but only by the Criminal Code of the RS (Jovašević, 2004: 47).

This legislative act of Luxembourg has not only implemented the mandatory rules of AMLDs but also (1) extended the definition of the UBO, and (2) introduced new institutions in charge of ensuring control and compliance: (a) a Compliance Officer at the appropriate hierarchical level who is a qualified person responsible for the control of AML/CFT (AML compliance officer, fr. Responsable du Contrôle - RC)\(^{37}\), and (b) a responsible person among the members of their management bodies who is in charge of compliance with the applicable professional obligations in the fight against money laundering and terrorist financing (fr. Responsable du respect des obligations - RR)\(^{38}\). The DD process which is to be performed by the legal entities on their customers is regulated by the Article 3 of the AML Act, which describes the main steps, assessment criteria and follow-up.

6. **UBO REGISTERS**

In the 1970s, the OECD raised interest in creating an adequate register which would implement the mechanisms envisaged within the Guidelines, by instituting a network of National Contact Points (the NCPs)\(^{39}\) within adhering countries, with the aim of ensuring that they observe internationally agreed standards of DCA in order to prevent the adverse impacts of their activities and contribute to sustainable development (OECD, 2018:93). Governments could partner up with the private sector to ensure that the proposed sophisticated verification system will implement the technology and best practices already available in the financial and consumer industry (Knobel, 2019: 5).

At the EU level, the goal of the legislative framework regulating the AML-CFT is to ensure that the appropriate measures shall be properly implemented by each MS (Nestorova, 2019: 91). With the aim of achieving this goal, the AMLD 4 introduced the register of beneficial owners as a mechanism to combat money laundering (Harari, Knobel, Meinzer, Palanský, 2020, 8). At the EU level, a central register named the Beneficial Ownership Register Interconnection System (the BORIS)\(^{40}\) was introduced with the aim to gather all information in the national UBO registers. At the national level, MSs were obliged to ensure the implementation of the AMLD 4 and establishment of national UBO

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\(^{35}\) Luxembourg AML/CFT Act of 12 November 2004 (updated version from 12 August 2022); see: https://www.cssf.lu/wp-content/uploads/L_121104_AML.pdf (last accessed on 27th December 2022)


\(^{37}\) Article 4 (1) of the AML Act (updated in 2022)

\(^{38}\) In its FAQ of 25 November 2019, the CSSF reiterated that every Luxembourg investment fund and investment fund manager shall be legally obliged to appoint such an officer, in order to cover the ML/FT risk exposure in the National Risk Assessment of the investments sector (CSSF, 2021). In 2012, the CSSF brought Regulation No. 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing.

\(^{39}\) As stated in the OECD Guide for National Contact Points on Structures and Activities, the NCP may be senior government officials or a government office headed by a senior official, an interagency group or one that contains independent experts, or it may be established on a multi-stakeholder basis as a cooperative body including representatives of the business community, employee organisations and others (OECD, 2019:18). See: https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Structures-and-Activities.pdf

\(^{40}\) BORIS (2022), https://e-justice.europa.eu/38590/EN/beneficial_ownership_registers_interconnection_system_boris
registers, and to enforce a high level of transparency which would also allow a proper approach to identifying individuals who are UBOs (Sepp, 2017: 157).

For example, in the Grand Duchy of Luxembourg, the UBO register (fr. Registre des Bénéficiaires Effectifs, RBE Register[^41]) was introduced by means of the national Law of 13 January 2019 (the RBE Law[^42]). It was enforced in the year of 2019, when Luxembourg’s Trade and Companies Register of Luxembourg (the LBR[^43]) introduced a special section. The UBO register was internally organised in line with its procedure guide[^44] ("RBE User’s Guide") which was initially functioning in line with the high transparency standards set out by the AMLD 4 and operating on the open-access basis (fr. libre accès[^45]). The UBO register was fully transparent until November 2022, when the accessibility rules were changed by the ECJ decision (joint cases C-37/20 and C-601/20).

The Republic of Serbia took an approach similar to Luxembourg’s approach. The Company Act of the RS and the Corporate Registers Act[^47] as a lex specialis have set out a number of provisions which regulate the operation of the Serbian Agency for Business Registers[^48] (hereinafter: the ABR). The ABR is also a web-based data-base that contains UBO data, and is fully transparent via open-access, which, considering the outcome of the recent ECJ case, consequently may need to be further adjusted in order to comply with data protection regulations.

7. ECJ CASES C-37/20 AND C-601/20

The RBE Register in Luxembourg operated in line with the principle of complete transparency (En. open access, Fr. libre accès) from the time when it was established in 2019 up until November 2022, which was changed by the decision of the European Court of Justice (the ECJ) in joint cases C-37/20 and C-601/20. The District Court in Luxembourg (fr. Tribunal d’arrondissement de et à Luxembourg[^49]) submitted two references to the ECJ regarding the protection of the right to privacy of UBOs and the review of the validity of fully transparent and publicly available personal data. The initial case (C-37/20) was initiated before the District Court in Luxembourg by a natural person and in connection with the protection of the right to privacy of the real owners, on the grounds that the publication of personal data exposed the applicant and his family to a disproportionately high risk of fraud, kidnapping, blackmail, extortion, harassment, violence and/or intimidation[^50]. The next proceeding (C-601/20) was

[^41]: Luxembourg register of the Beneficial Owners: https://www.lbr.lu/mjrcs/rbe/_legal.html?pageTitle=footer.legalaspect (last assessed on 27th December 2022)


[^43]: Luxembourg Business Register (2022): https://www.lbr.lu (last assessed on 27th December 2022)


[^45]: RBE Declaration of Beneficial Owners, Explanatory Guide, 2020

[^46]: Thus, free access to information has been made available not only to users that are entitled to introduce new information in the system/register and create modifications and/or other input in relation to the UBOs but also to other anonymous users. Yet, the issue was that the information contained private data and were of sensitive nature.


[^48]: The Agency for Business Registers (Serb. Agencija za privredne registre, APR), see: https://www.apr.gov.rs/


initiated before the District Court in Luxembourg by a legal entity (SOVIM SA) for the purpose of obtaining adequate protection of personal data, based on public access to the register of beneficial owners; the main argument was based on the justification and merit of the transparency of UBO personal and private information/data (Chevalier & Sciales, 2022).

In addition to the practical challenges, the ECJ has brought privacy and data protection back into the debate at an indelibly high level (Thomas-James, 2023:307). According to the opinion of the ECJ, which was presented in the court decision of 22 November 2022 (ECLI:EU:C:2022:912), public access to information on UBOs represents a serious interference with the fundamental rights to respect for private life and protection of personal data, guaranteed in Articles 7 and 8 of the EU Charter (en. Charter of Fundamental Rights of the European Union, the CFR).

At the time of writing this paper, negotiations on further actions which are to be taken by the register of beneficial owners are underway. As open access is no longer an option, an adequate protection mechanism must be implemented. Currently, in addition to the public prosecutor, authorised third parties (e.g. Law Offices) may request the UBO extract containing the information which was available online prior to the judgment. By adopting such an approach, the open-access was modified into limited-access.

8. RIGHT TO BE INFORMED V. DATA PROTECTION

In the context of financial investigations, it is necessary to develop proper methods that serve as the basis for creating software for systematic detection of unusual business operations (Koraš, Dobrovič, Polák, Kelemen, 2019: 1271). With the aim of being compliant with the legislature, an issue may arise in the context of the efficiency of financial investigations in the exchange of private information collected from the UBOs (Pavlidis, 2020: 370). Over the years, the UBO data transparency has become one of the leading tools to tackle illicit financial flows related to AML-CFT (Knobel, Harari, Meinzer, 2018: 2); nevertheless, it has raised issues in the sphere of proper data protection. Gathering, safekeeping and maintaining of personal UBO data should have been done in compliance with the General Data Protection Regulation (hereinafter: the GDPR). The GDPR includes both the public interest as legitimate interest justifications for the right to be informed and the right of data protection (Phillips, 2018: 576). Considering these rights, it was of great importance to determine the fine line between them, in order to avoid the inconsistency concerning the object and purpose of the data protection mechanisms.

51 The collected data (which is made public) consist of: full first, middle (if any) and last name, age, nationality, ID and residential address.
55 Art. 13 – 14 of the General Data Protection Regulation (the GDPR)
56 The GDPR has six general data protection principles (fairness and lawfulness, purpose limitation, data minimization, accuracy, storage limitation, and integrity and confidentiality) but data protection by design and default is at the core of the GDPR (Goddard, 2017: 703).
Similarly to the RBE register in Luxembourg, the Serbian ABR has made such data publically available to the extent permitted by the Corporate Registers Act. However, the data protection framework is still not implemented in a proper way that would sufficiently ensure the exercise of the UBOs right to data protection, which is also regulated at a national level by means of the Personal Data Protection Act.

9. DISCUSSION AND CONCLUSION

Therefore, one can conclude that the issue lays in the fact that the collected private data is commonly not only registered and maintained but also made publically available on the official website of the Corporate Registers, based on which it was not subject to any proper data protection, confidentiality and/or non-disclosure obligations. The previous lack of case law and uncertainty in data protection in general made the EU AML-CFT provisions easily interpreted in a way that the publication of certain personal data is justified if full transparency of such information is provided with the aim of ensuring protection against the ML-FT.

Arguably, in relation to combating against ML-FT, the general rule for the successful implementation of both the right to be informed and privacy protection regulations should be bound by statutory secrecy obligations or confidentiality undertakings equal to those (but not limited to) determined by the GDPR. In view of securing a proper approach to this matter, any electronic government system should rely on the ability of the system to ensure the confidentiality, integrity, truthfulness and accuracy of registered ownership information and proper and justified access to records. In that context, any document which contains personal data should be adequately stored in the server and the authorised bodies shall exert their best efforts to ensure safe data processing in order to prevent and combat the ML-FT. Without prejudice to the above and, the author can conclude that the concept has diverse application in different jurisdictions. Despite the ECJ opinion, its interpretation is commonly vague and ambiguous, which leads to breaches and inadequate implementations of the data protection rights.

Abbreviations
AA – Annual Accounts
AML – Anti Money Laundering
AML-CFT – Anti Money Laundering / Combating the Financing of Terrorism
AMLD – Anti Money Laundering Directive of the EU
AoA/ Aol – Articles of Association / Articles of Incorporation
BO – Beneficial Owner
BRC – Business Risk Committee

57 Unlike in RS where the register itself is uploading the information in the data-base, in the RBE Register the authorised entities such as law offices or regulated fiduciaries, which hold a licenced and activated biometrical card named „Lux trust“ can submit a request in the system with sufficient proof of identity and residence.


59 The Personal Data Protection Act RS (Zakon o zaštiti podataka o ličnosti, Sl. glasnik RS, br. 87/2018).
UBO Information Transparency in the Corporate Registers

CDD – Client Due Diligence
CFR – The Charter of Fundamental Rights of the European Union
CFT – Combating the Financing of Terrorism
CITA – Serbian Corporate Income Tax Act
CSSF – Commission de Surveillance du Secteur Financier
dCA – Duty of Care
DOB – Date of Birth
DD – Due Diligence
ECJ – European Court of Justice
EDD – Enhanced Due diligence
EU – European Union
FATF – Financial Action Task Force
FT – Financing of Terrorism
FY – Financial Year
GDPR – General Data Protection Regulation
ID – Identity document
LBR – Luxembourg Business Register
LEI – Legal Entity Identifier
LPA – Limited Partnership Agreement
ML – Money Laundering
MS – Member State
OECD – Organization for Economic Co-operation and Development
PEP – Politically Exposed Person
PRA – Preferred Risk Appetite
RA – Risk Assessment
RBA – Risk Based Approach
RBE – Registre des Bénéficiaires Effectifs
RBO – Register of Beneficial Owners
RS – Republic of Serbia
SDD – Simplified Due Diligence
TIN – Tax Identification Number
UB – Utility Bill
UBO – Ultimate Beneficial Owner
WC – World Check

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Legal Documents


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TRANSPARENTNOST INFORMACIJA O STVARNOM VLASNIKU U PRIVREDNIM REGISTRIMA I NJIHOV UTICAJ NA ZAŠTITU PRAVA NA PRIVATNOST IZ UGLA BORBE PROTIV PRANJA NOVCA

U ovom radu se ispituje suština standarda postavljenih zakonodavstvom Evropske unije, koji reguša dve oblasti prava, koje su, iako međusobno suprotna, u praksi međusobno povezane, u smislu borbe protiv pranja novca i finansiranja terorizma. Otkrivanje i postavljanje na valjanom mestu linije koja razgraničava pravo na slobodan pristup informacijama i prava na zaštitu privatnosti ličnih podataka je od velike važnosti iz razloga što se neređeno u praksi vrši kršenje osnovnog ljudskog prava, u svrhu ispunjenja postavljenog cilja. U ovom radu se analiza legitičnosti potpune transparentnosti ličnih podataka stvarnog vlasnika kao osnovnog mehanizma za sprečavanje zloupotrebe finansijskog sistema u svrhe pranja novca i finansiranja terorizma. Ovaj rad pokušava da objasni i poveže dva prethodno navedena prava, analizirajući ih iz ugla stvarnog vlasnika.

Ključne reči: zaštita prava na privatnost, pravo na privatnost podataka, zaštita podataka o ličnosti, APR, stvarni vlasnik, zakonski zastupnik, Evropski sud pravde.