

Balancing the fight against corruption and the right to personal data protection - two sides of the same (rule of law) coin

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This brief analyses the need for balancing the fight against corruption in the form of the fight against money laundering and terrorism financing and the right to personal data protection through CJEU's judgment in joined Cases C-37/20 and C-601/20.

While there is no universal agreement on the definition of corruption, it is undoubtedly as old as human history. From the First Dynasty (3,100–2,700 BCE) of ancient Egypt, when corruption in its judiciary was first noted,¹ to major money laundering operations discovered today,² the fight against corruption has been a never-ending one. However, in the twenty-first century, we look at other rights and obligations that counterbalance the fight against corruption, such as the right to personal data protection.

Macedonian legislation

The most recent Law on the Prevention of Money Laundering and Financing of Terrorism was adopted in 2022 and is supposed to be harmonised with Directive (EU) 2018/843 (the 5th EU Anti-Money Laundering Directive). It continues the intent of the previous law³, which introduced the establishment of the Register of Beneficial Ownership. On January 24, 2021, the Central Registry of the Republic of North Macedonia announced that the Register of Beneficial Ownership was used to increase transparency in the ownership structure of legal entities in the country and to meet international and EU standards for combating money laundering and financing of terrorism.⁴ The registration obligation applies to beneficial owners of all legal entities required to register under the Law on Prevention of Money Laundering and Financing of Terrorism. The law defines the term ‘beneficial owner’ as “any natural person who ultimately owns or controls the client and/or the natural person in whose name and on whose behalf the transaction is being conducted.”⁵ Information on beneficial owners is available directly and via electronic access to the Financial Intelligence Office, courts, other institutions under Article 130 paragraph (1) and Article 151 paragraph (1) of the Law, entities from Article 5 of the Law and other legal and natural persons. Thus, all legal and natural persons can access the name and surname, month and year of birth, nationality, country of residence, ownership share or other form and type of beneficial interest held.⁶ Hence, this Law allows the general public to request and access information on beneficial ownership, without demonstrating a legitimate interest, in line with provisions from Directive 2018/843.

1 El-Saady, Hassan. “Considerations on Bribery in Ancient Egypt.” *Studien Zur Altägyptischen Kultur* 25 (1998): 295–304. <http://www.jstor.org/stable/25152765>.

2 “Operation in Italy against Criminal Group under Investigation for Massive VAT Fraud: 12 Arrests, Including Four Public Officials,” March 21, 2023, <https://www.eppo.europa.eu/en/news/operation-italy-against-criminal-group-under-investigation-massive-vat-fraud-12-arrests>.

3 Law on Prevention of Money Laundering and Financing of Terrorism (Закон за спречување перење пари и финансирање на тероризам), Official Gazette of the Republic of Macedonia No. 120/2018 and Official Gazette of the Republic of North Macedonia No. 275/2019 and 317/2020.

4 “Announcement for Launching the Beneficial Ownership Registry,” Official website of the Central Registry of the Republic of North Macedonia, January 24, 2021, <https://www.crm.com.mk/en/vesti/announcement-for-launching-the-beneficial-ownership-registry>.

5 Article 2 paragraph (1) point (37) of the Law on Prevention of Money Laundering and Financing of Terrorism (Закон за спречување перење пари и финансирање на тероризам), Official Gazette of the Republic of North Macedonia No. 151/2022.

6 Article 33 of the Law on Prevention of Money Laundering and Financing of Terrorism.

While the Law is harmonised with the Directive, it does not contain a provision entailing the possibility to restrict access to all or part of the information on the beneficial ownership in exceptional circumstances, such as the one included in the Directive. This means beneficial owners in North Macedonia need a mechanism to protect their personal data in exceptional circumstances, like the one provided for beneficial owners in EU member states.

Various provisions of the Law establish its compliance with data protection regulations, as set out in the Law on Personal Data Protection, which is fully harmonised with the GDPR.⁷ This Law also includes the general principles on personal data protection entailed in the GDPR, such as lawfulness, fairness, transparency, purpose limitation, data minimisation, and integrity and confidentiality.⁸ However, there still seems to be a lack of sufficient protection of personal data of beneficial owners in the country.

This might become a problem, considering the country's candidate status for accession to the EU. As the screening process is coming, we must consider the commitment to harmonise Macedonian legislation with the EU acquis. On the other hand, Chapter 23 and Chapter 24 of the Fundamentals cluster sometimes have different tendencies and move in opposite directions. Such is the case of balancing the fight against money laundering and terrorism financing with the right to personal data protection. In that context, EU member states and candidate countries often require guidance in interpreting EU law. The Court of Justice of the EU (CJEU) significantly impacts the developing EU legislation with doctrine developed through its case law. Such an example is joined cases C-37/20 and C-601/20 (WM and Sovim SA versus Luxembourg Business Registers),⁹ where the CJEU had to decide whether the right to personal data protection covered in Chapter 23 is prevalent over the need for transparency in the fight against corruption, as regulated in Chapter 24.

Facts of the cases and questions referred

In case C-37/20, a real estate company applied to the Luxembourg Business Registers (LBR), pursuant to Article 15 of the Luxembourg Law establishing a Register of Beneficial Ownership, with a request that access to the information concerning its beneficial owner, contained in the Register of Beneficial Ownership, be subject to the restrictions entailed in that provision. The reasoning behind this request was that the general public's access to such information would seriously, actually, and immediately expose the beneficial owner and his family to a disproportionate risk and risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation. The LBR rejected such a request, and subsequently, the beneficial owner brought an action before the Luxembourg District Court (LDC). The LDC then asked the CJEU for a preliminary ruling on the concepts of "exceptional circumstances", "risk", and "disproportionate risk", which constitute conditions for applying the restriction of access to all or part of the information on beneficial ownership on a case-by-case basis, as entailed in Article 30 (9) of the 5th EU Anti-Money Laundering Directive.

In the second case, C-601/20, another company made the same request to restrict access to information concerning its beneficial owner on the same legal basis. The LBR also rejected such a request. Following the rejection, the company brought an action before the LDC, arguing that granting public access to the identity and personal data of its beneficial owner would infringe the right to respect for private and family life and the right to personal data protection, enshrined respectively in Articles 7 and 8 of the Charter of Fundamental Rights of the EU. Furthermore, the company argued that public access to personal data contained in the Register of Beneficial Ownership constitutes an infringement of the fundamental principles of the GDPR.¹⁰ Thus, the LDC asked the CJEU to interpret the 5th EU Anti-Money Laundering Directive in light of the right to respect for private and family life guaranteed in Article 7 and in light of the right to personal data protection guaranteed by Article 8 of the Charter, as well as to interpret the 5th EU Anti-Money Laundering Directive in light of the right to personal data protection as envisaged in the GDPR.

⁷ Law on Personal Data Protection (Закон за заштита на личните податоци), Official Gazette of the Republic of North Macedonia No. 42/2020 and 294/2021.

⁸ Article 9 of the Law on Personal Data Protection.

⁹ WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers, C-37/20, ECLI:EU:C:2022:912, 22 November 2022.

¹⁰ Article 5 paragraph (1) of 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 (General Data Protection Regulation), CELEX 32016R0679, OJ L 119, 4.5.2016, p. 1–88.

Legal context

Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directive 2018/843 amending it (5th EU Anti-Money Laundering Directive).

The 5th EU Anti-Money Laundering Directive aims to detect and investigate money laundering and prevent it from occurring, thus aiming to increase transparency as a threat to criminal activities. It begins with the premise that *“public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system”*.¹¹ At the same time, it emphasises that a balance should be sought between the general public’s interest in the prevention of money laundering and terrorist financing and the data subject’s fundamental rights. In that context, the Directive entails that EU member states can provide for exemptions to the disclosure through the registers of beneficial ownership information and to access to such information in exceptional circumstances and that the GDPR applies to the processing of personal data under this Directive.

The Directive defines ‘beneficial owner’ as *“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”*.¹²

In Directive 2015/849, before the entry into force of Directive 2018/843, the disputed Article 30 paragraph (5) provided that EU member states should ensure that the information on the beneficial ownership is accessible in all cases to (a) competent authorities and Financial Intelligence Units, without any restriction; (b) obliged entities, within the framework of customer due diligence in accordance with Chapter II of the Directive; and (c) any person or organisation that can demonstrate a legitimate interest (these persons or organisations could access at least the name, the month and year of birth, the nationality and the country of residence of the beneficial owner, as well as, the nature and extent of the beneficial interest held). Directive 2018/843 amended paragraph (5) point (c), removing the condition to demonstrate a legitimate interest, thus allowing access to information on the beneficial ownership to any member of the general public.¹³ Directive 2018/843 also amended paragraph (9) of the disputed Article 30, entailing that in exceptional circumstances where access to information on the beneficial owner would expose them to disproportionate risks, such as fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable, EU member states could provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis. This restriction should be granted upon a detailed evaluation of the exceptional nature of the circumstances and rights to an administrative review of such a decision. An effective judicial remedy should be guaranteed.¹⁴

General Data Protection Regulation

Within its principles, the GDPR provides that personal data should be: processed lawfully, fairly and in a transparent manner about the data subject; it should be collected for specified, explicit and legitimate purposes and not further processed in a way that is incompatible with those purposes; it should be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed and should be processed in a manner that ensures appropriate security of the personal data.¹⁵

11 Recital 30 of 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, CELEX 32018L0843, OJ L 156, 19.6.2018, p. 43–74.

12 Article 3 paragraph (6) of 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, CELEX 32015L0849, OJ L 141, 5.6.2015, p. 73–117.

13 Article 1 paragraph (15) point (c) of Directive (EU) 2018/843.

14 Article 1 paragraph (15) point (g) of Directive (EU) 2018/843.

15 Article 5 paragraph (1) of Regulation (EU) 2016/679.

Luxembourg law

Since both cases were referred to the CJEU by the LDC, the Court also analysed the Luxembourg Law establishing a Register of Beneficial Ownership. Namely, the Law stipulates that access to the following information on beneficial owners shall be open to any person: surname, forename, nationality (or nationalities), date and place of birth, country of residence and the nature and extent of the beneficial interests held.¹⁶ However, an exemption is also provided: *“a registered entity or a beneficial owner may request, on a case-by-case basis and in the following exceptional circumstances, by way of a duly reasoned application addressed to the Administrator, that access to the information listed in Article 3 be restricted to national authorities, credit institutions, financial institutions, bailiffs and notaries acting in their capacity as public officers, where access to that information 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.”*¹⁷

CJEU’s reasoning

Based on the questions referred to by the LDC, the CJEU weighed in on whether Directive 2018/843 introduces an imbalance between the fight against money laundering (and terrorist funding) and sufficient protection of personal data.

Firstly, the Court decided that since the data referred to in Article 30 paragraph (5) includes information on identified individuals, the access of the general public to such data affects the fundamental right to respect for private life, guaranteed in Article 7 of the Charter and that making available such data to the general public in that manner constitutes processing of personal data falling under Article 8 of the Charter.¹⁸

Furthermore, the Court established that the general public’s access to information on beneficial ownership constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. Such interference is considered serious because the beneficial owners’ data is accessible to a potentially unlimited number of persons, including those seeking to learn about the beneficial owners’ material and financial situation. Hence, they are unable to defend themselves effectively against personal data abuse.¹⁹

Finally, while respecting the principle of transparency is important for the fight against corruption, it cannot be considered an objective of general interest capable of justifying the interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, which results from the general public’s access to information on beneficial ownership.²⁰ Therefore, a logical termination of the court proceedings entailed the CJEU’s invalidation of Article 1 paragraph (15) item(c) of Directive (EU) 2018/843, which amended point (c) of Article 30 paragraph (5) of Directive (EU) 2015/849 in such a way that all members of the general public could access information on the beneficial ownership of legal entities.

In conclusion, this judgment could present a necessity for all EU member states to revise their implementation of the 5th EU Anti-Money Laundering Directive to prevent similar cases for violation of the right to personal data protection before their courts and candidate countries, such as North Macedonia, do not fall short of this expectation. If the CJEU’s reasoning in joined cases C-37/20 and C-601/20 were applied to examine the regulation of the Register of Beneficial Ownership in North Macedonia and the accessibility of personal data of beneficial owners, the country’s legislation would not pass the Court’s test for balancing between the fight against money laundering and the protection of personal data.

16 Article 3 paragraph (1) and Article 12 of the Law of 13 January 2019 establishing a Register of Beneficial Ownership (Loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs) (Mémorial A 2019, No 15).

17 Article 15 paragraph (1) of the Law establishing a Register of Beneficial Ownership.

18 WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers, C-37/20, ECLI:EU:C:2022:912, 22 November 2022, par. 38.

19 WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers, C-37/20, ECLI:EU:C:2022:912, 22 November 2022, par. 43.

20 WM (C-37/20) and Sovim SA (C-601/20) v Luxembourg Business Registers, C-37/20, ECLI:EU:C:2022:912, 22 November 2022, par.62.

