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Central Lancashire**  
UCLan Cyprus

# **Anti-Money Laundering Compliance, Beneficial Ownership Transparency and Fundamental Rights in the Republic of Cyprus and the EU**

**G. Chr. Pelagias**

M.A., LL.M, CAMS

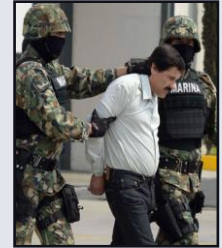
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The British University of Cyprus

# Transparency vs. Privacy

# Transparency vs Privacy

- ❑ **Prohibition Era and the Commission: 1920 – 1933**
- ❑ **War on Drugs: 1980s**
- ❑ **OECD campaign against Money Laundering and Tax Evasion: 1989**
  - *Financial Action Task Force (FATF): Money Laundering: 1989*
- ❑ **1<sup>st</sup> AML Directive: 1991**
- ❑ **War on Terror: 2001**
  - *Financial Action Task Force (FATF): Terrorist Financing: 2001*
- ❑ **2<sup>nd</sup> AML Directive: 2001**
- ❑ **3<sup>rd</sup> AML Directive: 2005**
- ❑ **The global economic meltdown: 2007**
- ❑ **War on Tax Havens: 2009**
- ❑ **The Foreign Account Tax Compliance Act (FATCA): 2010**
- ❑ **G8 Commitment to transparency in the corporate world: 2013**
- ❑ **OECD Common Reporting Standard (CRS): 2014**
- ❑ **4<sup>th</sup> AML Directive: 2015**
- ❑ **Panama Papers: 2016**
- ❑ **5<sup>th</sup> AML Directive: 2018**
- ❑ **EU Mandatory Automatic Exchange of Information (cross-border arrangements): 2019**
- ❑ **6<sup>th</sup> AML Directive: 2020**



# Transparency vs Privacy



## UBO Disclosure

In 2013, G8 leaders committed to an action plan addressing the misuse of company arrangements, which included the principle that BO information should be made available to relevant public authorities, and that some information should be publicly accessible.

The 4<sup>th</sup> AML Directive in 2015 introduced the concept of public UBO registries across the EU. The 5<sup>th</sup> AML Directive in 2018 implemented the UBO registry in all EU Member States.

The main justifications for BO disclosure are to:

- Support law enforcement efforts by making it easier for governments and other authorities to investigate and prevent illicit financial activity;
- Enable better investigation and deterrence of criminal activity by creating additional layers of oversight and scrutiny from civil society and the public;
- Creating and encouraging greater transparency, fairness and confidence both between businesses and in the private sector more generally.

For the benefit of:

- **Government users**, including law enforcement and relevant, competent authorities from other jurisdictions, as well as different departments within the publishing government;
- **Private sector users**, including companies that are obliged entities under AML legislation, non-obliged entities, and BO data providers and re-users;
- **Civil society**, including journalists, researchers, and the general public.

# Transparency vs Privacy

## Article 30(1) and (3) of Directive 2015/849, as amended by Directive 2018/843

‘1. Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold **adequate, accurate** and **current** information on their beneficial ownership, including the details of the beneficial interests held.

...

3. Member States shall ensure that the information referred to in paragraph 1 is held in a central register in each Member State ...

## Article 30(5) of Directive 2015/849 as amended by Directive 2018/843

30(5) Member States shall 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;
- (c) any member of the general public. [requirement to show ‘legitimate interest’ was removed in 2018/843]

The persons referred to in point (c) shall be permitted to access at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held.

Member States may, under conditions to be determined in national law, provide for access to additional information enabling the identification of the beneficial owner. That additional information shall include at least the date of birth or contact details in accordance with data protection rules.

# Transparency vs Privacy

## Article 30(5a) and (9) of Directive 2015/849 as amended by Directive 2018/843

30(5a) Member States may choose to make the information held in their national registers referred to in paragraph 3 available on the condition of online registration and the payment of a fee, which shall not exceed the administrative costs of making the information available, including costs of maintenance and developments of the register.

30(9) In exceptional circumstances to be laid down in national law, where the access referred to Article 30(5) points (b) and (c) 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. Rights to an administrative review of the exemption decision and to an effective judicial remedy shall be guaranteed. A Member State that has granted exemptions shall publish annual statistical data on the number of exemptions granted and reasons stated and report the data to the Commission.

# Transparency vs Privacy



## The Right to Privacy

Because BO data includes data about people, the concern is that the publishing of BO information could interfere with or threaten individuals' rights to privacy and the protection of their personal data.

Do BO registers contravene or conflict with data protection and privacy laws?

Is the making of BO information public necessary to meet policy goals?

Protecting privacy is not necessarily about secrecy or anonymity, but rather about giving individuals control over their lives and decisions. As a result, any policy initiatives which have potential impacts on privacy rights demand careful legal consideration.

It is not necessary to publish ownership information in public registers to meet the goal of detecting and deterring illegal activity, or improving the business environment overall.

# Transparency vs Privacy

## The Right to Privacy

Privacy is not an absolute right!

Law or policy that interferes with a fundamental human right must be justified. To be justified, it must be:

- a) in accordance with the law;
- b) necessary to achieve a legitimate aim; and
- c) proportionate to that aim.

Data protection laws give effect to the government's obligation to respect the privacy rights of individuals, ensuring that there are proper restrictions on how personal data is used and secured.



# Transparency vs Privacy

## Charter of Fundamental Rights of the European Union

### **Article 7** - *Respect for private and family life*

Everyone has the right to respect for his or her private and family life, home and communications.

### **Article 8** - *Protection of personal data*

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

## European Convention on Human Rights

### **Article 8** - Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

# Transparency vs Privacy

**Public Disclosure of UBO Information**

**VS**

**Making UBO Information Public**

# C-601/20 SOVIM and C-37/20 WM

# Case C-37/20 - Background



In 2019 YO, a real estate company lodged an application with Luxembourg Business Registry (LBR), pursuant to Article 15 of the Law of 13 January 2019 (Article 30 of the AML Directive), requesting that access to the information concerning its UBO, WM, contained in the Register of Beneficial Ownership (RBO), be restricted on the ground that WM and his family would be exposed to a disproportionate risk and risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation. The LBR rejected the application.

On 5 December 2019, WM brought an action before the Luxembourg District Court, maintaining that his position as executive officer and BO of YO, and of a number of commercial companies, required him to travel to countries where he would be at risk of being kidnapped, abducted, subjected to violence or even killed.

LBR disputed that argument and contended that WM's situation did not meet the requirements under the law, since WM could not rely either on 'exceptional circumstances' or on any of the risks referred to in that article.

# C-601/20 SOVIM - Background



In 2020, SOVIM submitted an application with LBR, requesting that the access to the UBO information contained in the RBO be restricted under the exemption under Article 15 of the Law. The application was rejected by the RBO on 6 February 2020.

On 24 February 2020, SOVIM brought an action before the Luxembourg District Court requesting that the decision of the RBO be overturned, and that the UBO information should be restricted. The main arguments for the appeal by SOVIM were:

- 1) That granting public access to the identity and personal data of its UBO would infringe the right to respect for private and family life and the right to the protection of personal data under Articles 7 and 8.

That while the aims of the AML Directive was to identify the UBOs of companies used for the purposes of ML or TF, as well as to ensure certainty in commercial relationships and market confidence, it has not been shown how granting the public entirely unrestricted access to the data held in the RBO enable those aims to be attained.

- 2) That public access to personal data contained in the RBO constituted an infringement of several provisions of the GDPR, in particular a number of fundamental principles set out in Article 5(1) of the GDPR.

# Case C-37/20 & Case C-37/20 – Questions Raised

## Question 1 (C-37/20)

Related to the concept of ‘*exceptional circumstances*’, under Article 30(9)

## Question 2 (C-37/20)

Related to the concept of ‘*risk*’, under Article 30(9)

## Question 3 (C-37/20)

Related to the concept ‘*disproportionate risk*’, under Article 30(9)

## Question 1 (C-601/20)

Related to the validity of making BO information accessible to the general public in all cases, with no requirement for a legitimate interest to be shown, as per the amended wording of Article 30(5)

## Question 2 (C-601/20)

Related to the interpretation of the definitions of “*disproportionate risk*”, as a requirement for exemption under Article 30(9)

## Question 3 (C-601/20)

Related to the interaction between the GDPR and the 2015/849, in particular Article 30

# C-601/20 – Questions Raised

## Question 1 (C-601/20)

- Is Article 1(15)(c) of Directive 2018/843, amending the first subparagraph of **Article 30(5)** of Directive (EU) 2015/849, in so far as it requires Member States to make information on BOs accessible to the general public *in all cases, with no requirement for a legitimate interest to be shown, a valid provision:*
- a) in the light of the right to respect for private and family life guaranteed by Article 7 of the Charter, interpreted in accordance with Article 8 of the European Convention on Human Rights, taking into account the objectives stated inter alia in recitals 30 and 31 of Directive 2018/843 relating, in particular, to efforts to combat ML and TF; and
  - b) in the light of the right to protection of personal data guaranteed by Article 8 of the Charter, in so far as it is intended, inter alia, to guarantee that personal data are processed lawfully, fairly and in a transparent manner in relation to the data subject, that the purposes for which such data are collected are limited, and that the data are minimised?

# Case C-37/20 & Case C-37/20 – ECJ Judgement

*Article 1(15)(c) of Directive (EU) 2018/843, amending Directive (EU) 2015/849, is invalid in so far as it amended point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849, in such a way that point (c) of the first subparagraph of Article 30(5), as thus amended, provides that Member States must ensure that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible in all cases to any member of the general public.*



# *The first question referred in Case C-601/20*

*The interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, resulting from the general public's access to information on beneficial ownership*

Since the data referred to in Article 30(5) include information on the BOs of corporate and other legal entities in a Members State, the access of any member of the general public to those data affects the fundamental right to respect for private life guaranteed in Article 7, it being of no relevance in that the data concerned may relate to activities of a professional nature. In addition, making the data available to the general public constitutes the processing of personal data falling under Article 8.

As is apparent from the Court's settled case-law, making personal data available to third parties constitutes an interference with the fundamental rights enshrined in Articles 7 and 8, whatever the subsequent use of the information communicated. It does not matter whether the information in question relating to private life is sensitive or whether the persons concerned have been inconvenienced in any way.

Consequently, the general public's access to information on BO, provided for in Article 30(5) of Directive 2015/849 as amended, ***constitutes an interference with the rights guaranteed in Articles 7 and 8.***

# *The first question referred in Case C-601/20*

*The interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, resulting from the general public's access to information on beneficial ownership*

As regards the seriousness of that interference, it should be noted that by making the BO information available to the public, that information enables a profile to be drawn up concerning certain personal identifying data which can be extensive in nature.

By making such information available to the general public in a manner that would be accessible to a potentially unlimited number of persons [via the internet], such processing of personal data would be freely accessed by persons who, for reasons unrelated to the objective of the measure, seek to obtain material and financial information of the BO.

The potential consequences for the BO, resulting from the abuse of their personal data, becomes more severe by the fact that, once the information has been made available to the general public, such information can be freely consulted, retained, and disseminated, with the result that it becomes increasingly difficult, or even illusory, for those data subjects to defend themselves effectively against abuse.

Accordingly, the general public's access to information on BO, provided for in point (c) of the first subparagraph of Article 30(5) of Directive 2015/849 as amended, constitutes a serious interference with the fundamental rights enshrined in Articles 7 and 8..

# *The first question referred in Case C-601/20*

*The justification for the interference resulting from the general public's access to information on beneficial ownership*

*The fundamental rights enshrined in Articles 7 and 8 are not absolute, but must be considered in relation to their function in society.*

Under Article 52(1) of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms.

Under Article 52(1) of the Charter, subject to the principle of proportionality, limitations may be made on those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

In that connection, Article 8(2) of the Charter states that personal data must, inter alia, be processed 'for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'.

# *The first question referred in Case C-601/20*

## *– Observance of the principle of legality*

As regards the requirement that any limitation on the exercise of fundamental rights must be provided for by law, this implies that the act which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned.

In addition, Article 30(1) and (5) of that directive provides:

- a) for access by the general public to data relating to the identification of the BO and the beneficial interest which they hold, specifying that those data must be adequate, accurate and current, and expressly listing certain of those data to which any member of the general public must be allowed access; and
- b) b) Article 30(9) of Directive 2015/849 as amended lays down the conditions under which Member States may provide for exemptions from such access.

In those circumstances, the *principle of legality must be considered to have been fulfilled*.

# *The first question referred in Case C-601/20*

## *– Respect for the essence of the fundamental rights guaranteed in Articles 7 and 8 of the Charter*

As regards respect for the essence of the fundamental rights enshrined in Articles 7 and 8, it should be noted that the information referred to in Article 30(5) of the AML Directive, may be classified into two distinct categories of data: a) data relating to the identity of the BO (name, month and year of birth, and nationality); and b) economic data (nature and extent of the beneficial interest held).

While Article 30(5) does not contain an exhaustive list of the data which any member of the general public must be permitted to access, and Article 30(5) also states that Member States are entitled to provide for access to additional information, the fact remains that, in accordance with Article 30(1), only 'adequate' information on BOs and beneficial interests held may be obtained, held and, therefore, potentially made accessible to the public, which excludes, inter alia, information which is not adequately related to the purposes of that directive.

As it is, it does not appear that making available to the general public information which is so related would in any way undermine the essence of the fundamental rights guaranteed in Articles 7 and 8.

In that context, it should also be noted that Article 41(1) of the AML Directive expressly provides that the processing of personal data under that directive is subject to the GDPR. It is, therefore, established that any collection, storage and making available of information under the AML Directive must fully meet the requirements arising from the GDPR.

In those circumstances, the interference entailed by the general public's access to information on BO provided for in point (c) of the first subparagraph of Article 30(5) does not undermine the essence of the fundamental rights enshrined in Articles 7 and 8.

# The first question referred in Case C-601/20

## – The objective of general interest recognized by the European Union

The AML Directive aims to prevent the use of the EU’s financial system for the purposes of ML and TF. In that regard, recital 4 of Directive 2018/843 states that the pursuit of that objective cannot be effective unless the environment is hostile to criminals and that enhancing the overall transparency of the economic and financial environment of the EU could be a powerful deterrent.

As regards, more specifically, the objective of the general public’s access to information on BO, introduced by Article 1(15)(c) of Directive 2018/843, recital 30 of that directive states that such access, first of all:

- ‘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’.
- ‘can contribute to combating the misuse of corporate and other legal entities and legal arrangements for the purposes of ML and TF, both by helping investigations and through reputational effects, given that anyone who could enter into transactions is aware of the identity of the BOs’
- that access ‘also facilitates the timely and efficient availability of information for financial institutions as well as authorities, including authorities of third countries, involved in combating such offences’ and ‘would also help investigations on ML, associated predicate offences and TF’.

Furthermore, recital 31 of Directive 2018/843 states that ‘the potential increase in confidence in financial markets should be regarded as a positive side effect and not the purpose of increasing transparency, which is to create an environment less likely to be used for the purposes of ML and TF’.

# *The first question referred in Case C-601/20*

## *– The objective of general interest recognized by the European Union*

By providing for the general public's access to information on BO, the EU legislature seeks to prevent ML and TF by creating, by means of increased transparency, an environment less likely to be used for those purposes.

That aim constitutes an objective of general interest that is capable of justifying even serious interferences with the fundamental rights enshrined in Articles 7 and 8 of the Charter.

In so far as the Council of the European Union also refers, in that context, expressly to *the principle of transparency*, as follows from Articles 1 and 10 Treaty of the European Union (TEU) and from Article 15 of the Treaty on the Functioning of the European Union (TFEU), it should be noted that that principle enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

The *principle of transparency* is given concrete expression primarily in the requirements of *institutional and procedural transparency covering activities of a public nature*, such a link with public institutions is lacking where, as in the present case, the measure at issue is intended to make available to the general public data concerning the identity of private BOs and the nature and extent of their beneficial interests held in companies or other legal entities.

Accordingly, the *principle of transparency*, as it results from Articles 1 and 10 TEU and from Article 15 TFEU, cannot be considered as an objective of general interest capable of justifying the interference with the fundamental rights guaranteed in Articles 7 and 8, which results from the general public's access to information on BO.

# *The first question referred in Case C-601/20*

## *– Whether the interference at issue is appropriate, necessary and proportionate*

The question whether a limitation on Articles 7 and 8 may be justified must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness.

In accordance with case-law, it is necessary to ascertain:

- a) whether the general public's access to information on BO is appropriate for attaining the objective of general interest pursued;
- b) whether the interference with the rights in Articles 7 and 8 which results from such access is limited to what is strictly necessary, in the sense that the objective could not reasonably be achieved in an equally effective manner by other means less prejudicial to those fundamental rights of the data subjects, and,
- c) whether that interference is not disproportionate to that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference.



# *The first question referred in Case C-601/20*

## *– Whether the interference at issue is appropriate, necessary and proportionate*

To the extent that recital 30 states that the general public's access to BO information allows greater scrutiny of information by civil society, and that express reference is made in that regard to the press and to civil society organisations, it should be found that both the press and civil society organisations that are connected with the prevention and combating of ML and TF have a legitimate interest in accessing information on BO. The same is true of the persons, also mentioned in that recital, who wish to know the identity of the BOs because they are likely to enter into transactions with them, or of the financial institutions and authorities involved in combating offences of ML or TF, in so far as those entities do not already have access to the information in question on the basis of points (a) and (b) of the first subparagraph of Article 30(5) of the Directive.

Although it is stated in recital 30 of Directive 2018/843 that the general public's access to information on BO 'can contribute' to combating the misuse of corporate and other legal entities and that it 'would also help' criminal investigations, it must be found that such considerations are not such as to demonstrate that that measure is strictly necessary to prevent ML and TF.

***It cannot be considered that the interference with the rights guaranteed in Articles 7 and 8, which results from the general public's access to information on BO, is limited to what is strictly necessary.***

# *The first question referred in Case C-601/20*

## *– Whether the interference at issue is appropriate, necessary and proportionate x*

The Parliament, the Council and the Commission state that the principle that the general public should have access to information on BO may be derogated from, since Article 30(9) of Directive 2015/849 as amended provides that in ‘exceptional circumstances’, ‘Member States may provide for an exemption from such access to all or part of the information on the BO on a case-by-case basis’ where the general public’s access to that information ‘would expose the BO to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the BO is a minor or otherwise legally incapable’.

Both the Parliament and the Commission observe that, as is apparent from Article 30(5a) of Directive 2015/849 as amended, read in conjunction with recital 36 of Directive 2018/843, Member States may make the information on BO available on condition of online registration in order to identify the person requesting that information. In addition, in accordance with recital 38 of Directive 2018/843, in order to prevent the abuse of the information on BO, Member States might make information relating to the requesting person along with the legal basis for their request available to the BO.

# The first question referred in Case C-601/20

## – Whether the interference at issue is appropriate, necessary and proportionate

As regards the balancing of the seriousness of that interference, against the importance of the objective of general interest of preventing ML and TF, it must be held that although in view of its importance that objective is, capable of justifying even serious interferences with the fundamental rights enshrined in Articles 7 and 8, the fact remains that combating ML and TF is as a priority for the public authorities and for entities such as credit or financial institutions, which, by reason of their activities, are subject to specific obligations in that regard.

It is for that reason that points (a) and (b) of the first subparagraph of Article 30(5) of Directive 2015/849 as amended provide that information on BO must be accessible, in all cases, to competent authorities and FIUs, without any restriction, as well as to obliged entities, within the framework of customer due diligence.

The regime introduced by Directive 2018/843, replacing the requirement for legitimate interest, providing for the general public's access to information on BO, amounts to a considerably more serious interference with the fundamental rights guaranteed in Articles 7 and 8, without that increased interference being capable of being offset by any benefits which might result from the latter regime as compared against the former regime, in terms of combating ML and TF.

The optional provisions of Article 30(5a) and (9) of Directive 2015/849 as amended, which allow Member States to make information on BO available on condition of online registration and to provide, in exceptional circumstances, for an exemption from access to that information by the general public, respectively, are not, in themselves, capable of demonstrating either a proper balance between the objective of general interest pursued and the fundamental rights enshrined in Articles 7 and 8, or the existence of sufficient safeguards enabling data subjects to protect their personal data effectively against the risks of abuse.

# The second and third questions referred in Case C-601/20 and the questions referred in Case C-37/20



The second question referred in Case C-601/20 and the questions referred in Case C-37/20 are based on the premises that Article 30(5) of Directive 2015/849 as amended is valid, in so far as it provides for public access to information on BO.

However, in view of the answer to the first question referred in Case C-601/20, there is no need to examine those questions.

Furthermore, in the light of that same answer, there is also no need to adjudicate on the third question referred in Case C-601/20

# Concluding Remarks

# Concluding Remarks

**Public Disclosure of UBO Information vs Making UBO Information Public – Public disclosure is acceptable, making UBO information public is not.**

**The ‘general public interest’ of preventing money laundering and/or terrorist financing, is not sufficient to restrict individual right to privacy.**

**The ECJ Case shows that the AML Directive(s) have problems that are being overshadowed by the need to achieve (draconian) policies.**

**Are there more cases to be expected, and what will the effect be on future AML legislation?**

- Privacy First Case – Netherlands
- - Case C-694/20 – Belgium