

What next for public registers of beneficial owners?

Update prepared by Sarah Huelin and Geoff Cook (Jersey)

A recent decision by the Court of Justice of the European Union (CJEU) has intervened in the debate about public registers of beneficial ownership.

The CJEU found that the EU's requirement for Member States to have public registers is invalid. The Channel Islands are not part of the EU, so the CJEU judgment has no direct impact. They should undoubtedly have regard to it, however, when making decisions about the future of their beneficial ownership registers.

The arguments for and against public registers are long established. Supporters make the case that public registers seek to prevent money laundering by creating complete transparency, a powerful deterrent, for those seeking to use opaque structures. Arguments opposed include the principle that the fundamental rights of beneficial owners (including the right to privacy and protection of personal data) should outweigh the public interest in preventing money laundering through public access.

The Channel Islands have carefully monitored these arguments for decades and have a strong history of meeting international standards relating to beneficial ownership. Their registers already hold verified beneficial owner information. Verifying the information, especially by regulated trust and corporate service providers, ensures the accuracy of data that is shared with relevant authorities. In its recent consultation on new Guidance on Beneficial Ownership, the Financial Action Task Force (FATF) has recognised the merit of this effective measure in supporting the fight against financial crime. Interestingly, the draft Guidance provides optionality and does not insist that countries must have public registers of beneficial owners. The FATF's position and the CJEU's recent findings strongly support the view that the Channel Islands' registers represent an appropriate balance between the rights of beneficial owners and the need to prevent money laundering and terrorist financing.

CJEU Findings

In its decision, the CJEU closely examined the fundamental rights guaranteed in light of the Charter of Fundamental Rights of the European Union ('the **Charter**'), including an individual's right to respect for their private and family life and the right to protection of their personal data. The CJEU found that general public access to beneficial ownership information is a serious interference with these fundamental rights and made these observations:

- public registers enable persons, for reasons unrelated to the objective of the public access measure (namely, prevention of money laundering and terrorist financing), to seek and find out the financial situation of a beneficial owner; and
- once data is on a public register, not only can it be freely consulted, but also retained and disseminated, which makes it increasingly difficult, or even illusory, for a beneficial owner to defend themselves against abuse.

Seeking to prevent money laundering by using transparency is an objective of public interest. Public interest objectives can justify serious interference with fundamental rights, but the CJEU was not

satisfied that public registers are so justified. It was noted that the information available on a public register of beneficial ownership is not limited to increasing transparency concerning activities of a public nature, like the use of public funds. Rather, the information concerns the identity of private beneficial owners and the nature and extent of their beneficial interest in private entities.

The CJEU considered whether the serious interference with beneficial owners' fundamental rights caused by public registers is appropriate, necessary, and proportionate. Taking these three aspects in turn, the CJEU concluded that:

- public registers are appropriate for contributing to attaining the anti-money laundering objective by means of increased transparency because they do create an environment that is less likely to be used by money launderers;
- the interference is not, however, limited to what is strictly necessary because access by the general public is not conditional on a person demonstrating a 'legitimate interest'; and
- public registers are not a proportionate response when balancing the seriousness of the interference and the importance of the objective of preventing money laundering and terrorist financing.

Even the ability for Member States to provide that in 'exceptional circumstances' a beneficial owner may be exempt from having their information made public if they would be exposed to 'disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation' was not considered to tip the balance, in support of the view that public registers should be regarded as proportionate.

Channel Islands' Commitment

The Channel Islands have been closely monitoring the progress of public registers in the EU, following a political commitment made in 2019 to:

1. Enable access for financial service businesses and certain other prescribed businesses, all for customer due diligence purposes; and
2. Enable public access aligned to the approach taken in the EU Directive.

In relation to the first part of the commitment to enable access for financial services business, the CJEU judgement is only partially relevant because it focuses on public registers. When balancing the arguments, however, the CJEU did say, 'the fact remains that, first, combatting money laundering and terrorist financing is as a priority a matter 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 this regard'.

The CJEU recognised that this fact supports the parts of the EU Directive that permit access for these parties without restriction. This may encourage a move by the Channel Islands towards enabling access for financial services businesses in connection with completing their customer due diligence obligations. They have recently consulted on making such changes to their registers, but some care is clearly needed before increasing interference with beneficial owners' rights.

As to the second part of the commitment, to enable public access, the approach taken in the EU Directive has now been found to be invalid. The Channel Islands developed their human rights and data protection legislation along the same lines as the EU's Charter and GDPR, so the CJEU's findings ought to be highly persuasive in determining whether a public register would comply with existing Channel Islands' legislation.

What next?

The Channel Islands should pause for thought.

As the international community awaits the next moves concerning EU public registers, countries with similar fundamental rights for individuals must continue to balance the interference with beneficial owners' rights and the anti-money laundering and countering terrorist financing objective.

Timely access for relevant authorities is non-negotiable because it effectively supports the objective, and the Channel Islands' registers already facilitate such access. Any measure to increase access to

beneficial ownership information on their registers, including changes to fulfil their 2019 commitment, must have regard to the balance between the interference and the objective.

In the interim, the Channel Islands should remain confident that their sophisticated approach to identifying beneficial owners, in line with the FATF definition, and holding verified beneficial owner information on their registers, remains at the forefront of evolving best practice.

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