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## European Union

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## UBO Register after ECJ's Preliminary Ruling

On the basis of EU law, each legal entity has one or more ultimate beneficial owners (UBOs). An UBO is always an individual. An individual having more than 25% of the shares, more than 25% of the voting rights more than 25% of the economic benefit or has control in a legal entity, qualifies as UBO. Every EU Member State has its own national UBO register for legal entities. These national UBO registers were open to the public. This article deals with the ruling of the Court of Justice of the European Union (ECJ) to prohibit unrestricted access to the UBO register to the public. EU Member States are obliged to amend national legislation accordingly. This article also provides an overview of the consequences of the ECJ's ruling in France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom.

### 1. Introduction

On 22 November 2022, the Court of Justice of the European Union (ECJ) published its preliminary ruling<sup>[1]</sup> on the ultimate beneficial owner (UBO) register in Member States ("the ECJ ruling").<sup>[2]</sup> The EU provision, laid down in article 30(5) of [5th Anti-Money Laundering Directive \(2018/843\)](#) (ALMD5)<sup>[3]</sup> requiring EU Member States to provide unrestricted public access to the registered data of beneficial owners of entities incorporated within their territory was declared invalid. This article provides an overview on the steps various Member States have taken to comply with the ECJ ruling.

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1. Judgment by the Court (Grand Chamber), 22 Nov. 2022, Joined Cases C-37/20 and C-601/20, *WM (C-37/20)*, *Sovim SA (C-601/20) v. Luxembourg Business Registers, The Court (Grand Chamber)*, ECLI:EU:C:2022:912, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0037> (accessed 7 Nov. 2023).

2. See *Best Friends newsletter – AML for corporates* (Dec. 2022), available at <https://www.debrauw.com/articles/best-friends-aml-newsletter> (accessed 7 Nov. 2023).

3. 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, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0843> (accessed 7 Nov. 2023) [hereinafter *ALMD5*].

## 2. ECJ Ruling

### 2.1. Serious interference with fundamental right to privacy

In its preliminary ruling, the ECJ states that the general public's access to information on beneficial ownership in article 30(5) of the [4th Anti-Money Laundering Directive \(2015/849\)](#) (ALMD4),<sup>[4]</sup> as amended, seriously interferes with the rights guaranteed in articles 7 and 8 of the European Charter of Fundamental Rights ("Charter").<sup>[5]</sup> Article 7 of the Charter states that everyone has the right to respect for their private and family life, home and communications. Article 8 of the Charter aims to protect personal data. To be specific, article 8 reads as follows:

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.

The potential consequences for data subjects resulting from the possible misuse of their personal data are aggravated by the fact that, once the data are available to the general public, the data can be freely consulted, stored and disseminated. In the case of such successive processing, it becomes increasingly difficult, or even illusory, for the data subjects concerned to effectively defend themselves against misuse (paragraph 43 of the ECJ ruling).

### 2.2. Legality is required

Any restriction on the exercise of fundamental rights must be provided for by law. This means that a law authorizing interference with those rights must itself define the scope of the restriction on the exercise of the right in question. The principle of legality is fulfilled since the restriction of the exercise of the fundamentals rights of articles 7 and 8 of the Charter is provided for in articles 30(1) and (5) of AMLD5.

### 2.3. Objective of general interest

The ECJ noted that money laundering and the financing of terrorism is an objective of general interest. To increase transparency, the EU legislature uses the general public's access to UBO-related information to prevent money laundering and terrorist financing. This aim constitutes an objective of general interest that can justify even serious interferences with the fundamental rights of articles 7 and 8 of the Charter (paragraph P 59 of the ECJ ruling).

However, according to the ECJ the principle of transparency stemming from articles 1 and 10 of the Treaty on European Union (TEU) and article 15 of the [Treaty on the Functioning of the European Union](#) (TFEU), cannot be considered an objective of general interest capable of justifying interference with the fundamental rights guaranteed in articles 7 and 8 of the Charter, which interference itself results from the general public's access to information on beneficial ownership (paragraph 62 of the ECJ ruling).

### 2.4. Appropriate, but not necessary and proportionate

According to the ECJ, the general public's access to information on UBOs is appropriate in how it contributes to attaining the general interest objective of seeking to prevent money laundering and terrorist financing. This is so because the public nature of that access and the resulting increased transparency contribute towards creating an environment that is less likely to be used for such purposes (paragraph 67 of the ECJ ruling). However, as stated by the ECJ, the difficulty of providing a detailed definition of the circumstances and conditions of when the public may access UBO information is not reason enough for the EU legislature to provide public access to that information (paragraph 72 of the ECJ ruling).

The fact that public access can contribute toward combatting money laundering and the financing of terrorism or other related offences and that "it would also help" criminal investigations, taken together, do *not* demonstrate that the measure is strictly necessary to prevent money laundering or the financing of terrorism as set out by the ECJ. The interference is also not strictly necessary (paragraph 73 of the ECJ ruling).

In all situations, information on beneficial ownership must be accessible to competent authorities and financial intelligence units (FIUs), without restriction, as well as to AML/CFT-regulated institutions within the framework of customer due diligence (CDD) (paragraph 84 of the ECJ ruling). Authorities and AML/CFT-regulated institutions must have access to this information to enable those institutions to perform their role as gatekeeper in the financial system and is therefore proportionate.

4. 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, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849> (accessed 7 Nov. 2023).

5. Charter of Fundamental Rights of the European Union, (2012/C 326/02) Official Journal of the European Union, C 326/391, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_3690](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3690) (accessed 9 Nov. 2023).

## 2.5. New European legislation

The ECJ's ruling has consequences for European and national legislation. From a European perspective, the text of AMLD5 was found to conflict with privacy law as included in General Data Protection Regulation (GDPR) and additional national legislation. The relevant text of AMLD5 (article 30(5)) reads as follows:

Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:

- (a) competent authorities and FIUs, without any restrictions;
- (b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;
- (c) any member of the general public.

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.

The critical text falls under subparagraph (c): “any member of the general public”. The fact that public access can contribute toward combatting money laundering and the financing of terrorism and that “it would also help” criminal investigations, taken together, do not demonstrate that the measure is strictly necessary to prevent money laundering and the financing of terrorism. The interference is also not strictly necessary.<sup>[6]</sup> This means that subparagraph (c) is invalid and must be replaced.

Article 1(15)(c) of AMLD5 is invalid where it amends article 30(5) of AMLD4 in such a way that Member States must now ensure public access to information on the UBOs of companies and of other legal entities incorporated within their territory.

New European legislation was proposed in 2021.<sup>[7]</sup> This is an ambitious package of legislative proposals to strengthen EU rules on anti-money laundering and financing of terrorism. In the draft version, article 12 states that “any member of the general public” must have access to the information as set out in AMLD5. This provision must be replaced as well in order to comply with the ECJ ruling.<sup>[8]</sup>

The original text under (c) (in article 30 of AMLD5) as included in AMLD4 was as follows: “any person or organization than can demonstrate a legitimate interest.”

This restricted public access seems to comply with the ECJ ruling. The next question is how to define a person or organization with a legitimate interest.

## 2.6. Legitimate interest

It is not easy to define who has a legitimate interest. For this reason, the wording in AMLD4 has been replaced in AMLD5 by allowing *any* member of the general public to have access to the UBO register.

The first step in defining who has a legitimate interest is by figuring out who is included by the words “a person or organization”. The authors assume that this means any individual and any other entity, such as legal entities, partnerships, public bodies, religious institutions and trusts, and similar arrangements.

The authors expect there to be different categories of persons or organizations with a legitimate interest:

- The first category is the organization itself, as it will have a legitimate interest in applying for registration in the UBO register. This will also be necessary because the entity must keep the UBO register up to date.
- The second category of persons or organizations with a legitimate interest is journalists. Not all journalists will have a legitimate interest. It seems necessary for journalists to be able to demonstrate that their research is related to, or connected with, anti-money laundering or preventing the financing of terrorism.
- The third category is non-governmental organizations (NGOs). Only NGOs with activities in the field of anti-money laundering and countering the financing of terrorism will have a legitimate interest.
- The fourth, and final, category relates to other individuals or organizations with a legitimate interest.

This follows also from members of the European Parliament (MEPs). They also state that the access right of the second third and fourth category will be valid for at least two and a half years. EU Member States will automatically renew access or revoke or suspend access if it is abused. Members of the European Parliament also state that the legitimate interest should apply without discrimination based on

6. Para. 73.

7. European Commission, *Beating financial crime: Commission overhauls anti-money laundering and countering the financing of terrorism rules* (20 July 2021), available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_3690](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3690) (accessed 7 Nov. 2023).

8. Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0423> (accessed 7 Nov. 2023).

nationality, country of residence or establishment. The authors assume this includes discrimination on other grounds (such as religion) as well.

The European legislature must take the first step to meet the requirements as set out in the ECJ ruling. And as the wording of AMLD4 is expected to be implemented, national legislatures will have to prepare more detailed legislation based on the definition of “legitimate interest”.

## 2.7. UBO registers

European law requires a UBO register for companies on the basis of article 30 of AMLD4 and a UBO register for trusts on the basis of article 31 of AMLD5. Some Member States have one UBO register for both companies and trusts, while other Member States have two separate UBO registers. It is important to note that the UBO definition of a company differs from the UBO definition of a trust. The UBO definition of a company relates to “more than 25%” of the shares, voting rights, ownership interest or control.<sup>[9]</sup> The threshold for shares, voting rights and economic benefit in AMLD5 is 25% plus one share, which in practice is implemented in the Member States as “more than 25%”. Member States may adopt a lower threshold. According to members of the European Parliament, this threshold will be lowered to 15% plus one share.<sup>[10]</sup>

The UBO definition of a trust relates to each of the settlors, trustees, protectors, beneficiaries and individuals exercising control, and is broader in context. In some Member States, a foundation is considered to be a company, while in other Member States it is an entity similar to a trust.

## 3. Practical Changes for Various Countries

### 3.1. Introduction

In section 3. the authors provide an overview of the consequences of the ECJ ruling in France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom. In countries where AMLD5 was already introduced (access to the public) national legislation must be amended.

### 3.2. France

The Register of Beneficial Ownership (RBO) has been operational in France since 1 August 2017. It complements the Trade and Companies Register (RCS), which is also maintained by the clerks of the commercial courts.

Access to information on beneficial owners is an important part of the French financial transparency system. At first, the right of public access to the RBO was subject to demonstrating a *legitimate reason*. Since 2020, to comply with AMLD5, an ordinance<sup>[11]</sup> amended article L. 561(46) of the Monetary and Financial Code, allowing *the public* to access certain information relating to beneficial owners, without any conditions. However, only general information is freely accessible to the public (first name, last name, pseudonym, year of birth, country of residence, nationality and the nature and extent of the beneficial interest in the company or entity), while the most sensitive data (date and place of birth, personal address, control arrangements in the company or entity) are restricted with access limited to authorized entities (magistrates, customs officers, TRACFIN,<sup>[12]</sup> and representatives of professional bodies subject to AML/CFT legislation).

Following the ECJ ruling, many Member States have closed public access to beneficial owner registers, but not France. In a press release dated 19 January 2023, Bruno Le Maire, the French Minister for the Economy, Finance and Industrial and Digital Sovereignty, indicated that public access to the register of beneficial owners would be maintained “pending the full consequences of the Court of Justice’s ruling”.<sup>[13]</sup>

Bruno Le Maire also indicated that the sixth anti-money laundering directive<sup>[14]</sup> will have to take the ECJ decision into account.

9. Art. 3(6)(a) AMLD5.

10. See <https://www.europarl.europa.eu/news/en/press-room/202303271PR78511/new-eu-measures-against-money-laundering-and-terrorist-financing> (accessed 7 Nov. 2023).

11. Ordinance 2020-115 of 12 Feb. 2020.

12. TRACFIN is an intelligence service under the authority of the Ministry of the Economy, Finance and Industrial and Digital Sovereignty. It contributes to the development of a healthy economy by combating clandestine financial circuits, money laundering and the financing of terrorism, see <https://www.economie.gouv.fr/tracfin> (accessed 10 Nov. 2023).

13. See <https://presse.economie.gouv.fr/19012023/> (accessed 7 Nov. 2023).

14. Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purpose of money laundering or terrorist financing and repealing Directive (EU) 2015/849. See [https://finance.ec.europa.eu/publications/anti-money-laundering-and-counteracting-financing-terrorism-legislative-package\\_en#amla](https://finance.ec.europa.eu/publications/anti-money-laundering-and-counteracting-financing-terrorism-legislative-package_en#amla) (accessed 16 Nov. 2023).

### 3.3. Germany

Germany has established one single UBO register (*Transparenzregister*)<sup>[15]</sup> for all entities subject to a registration requirement. In accordance with AMLD5, access to the German UBO register was broadened to include the general public with effect as of 1 January 2020. The legislative change deleted the requirement of having a legitimate interest to inspect the UBO register.

Immediately following the ECJ's ruling, the operator of the German UBO register in November 2022 suspended requests by the public to inspect the UBO register, irrespective of whether a legitimate interest could be found. In practice, the register's operator's actions went beyond the ECJ's ruling. In December 2022, the register's operator released information on its website referring to the legal framework that applied before the ECJ declared the implementation of the provisions of AMLD5 invalid.<sup>[16]</sup> Currently, for parties that are not relevant authorities and obliged entities, the register's operator only grants access if there is a legitimate interest. In essence, the situation is how it used to under AMLD4 before the 2018 amendments.

The register's operator will find a legitimate interest whenever there is an inquiry by an entity relating to its own entry on the UBO register and for research by journalists or NGOs that relates to money laundering or terrorist financing.

### 3.4. Italy

#### 3.4.1. Background

Regulations governing the access to UBO data and information are set out under:

- (1) legislative decree 231 of 21 November 2007, which contains the guidelines on anti-money laundering and anti-terrorism matters (AML/CFT Decree);
- (2) Ministry of Enterprises and Made in Italy's decree 55 of 11 March 2022, which governs communication, access and consultation of data and information on the UBOs of companies, private legal entities, trusts and similar entities (UBO Decree); and
- (3) additional technical decrees issued by the Ministry of Enterprises and Made in Italy between 20 April and 29 September 2023.

The UBO register, in force since 9 October 2023, is held by the Company Register's office at the Chamber of Commerce of the city where the companies and other entities involved (see section 3.4.2.) have their registered seat/incorporation.

#### 3.4.2. Sections of the UBO register

The UBO register, which is split into two sections (an "autonomous section", listing companies and private legal entities, and a "special section", listing trusts and similar entities<sup>[17]</sup>), can be made available to:

- public authorities – for example, the Bank of Italy, the Italian FIU, *Antimafia* and Antiterrorism National Headquarters (Public Authorities);
- addressees of the AML/CFT Decree – for example, financial institutions, professionals and auditing companies (Addressees); and
- the public, subject to specific restrictions.<sup>[18]</sup>

#### 3.4.3. Access to the UBO register

Public authorities can access the UBO register subject to an agreement between *Unioncamere* (the association of Italian Company Registers) and InfoCamere S.C.p.A. (the body managing the Chambers of Commerce's national IT system<sup>[19]</sup>).

Addressees can access the UBO register subject by applying to the Company Register's office at the Chamber of Commerce and paying an access fee.<sup>[20]</sup> The public can access the register by paying an administrative fee.

Depending on the applicant, the type of available information about the UBO varies:

- (1) Authorities and AML/CFT Decree addressees have full access to UBO information, as long as it enables them to carry out their institutional duties (authorities) and comply with the UBO's identification duties (addressees). AML/CFT Decree addressees must also report to the Companies Register any mismatch between the UBO information acquired from the UBO register and the UBO information that they autonomously collect from the client in performing their customer due-diligence duties.<sup>[21]</sup>

15. See <https://www.transparenzregister.de/treg/de/start;jsessionid=3CDF7A7D595CFAC994C29D6285571AB8.app11?0> (accessed 10 Nov. 2023).

16. See <https://www.transparenzregister.de/treg/de/aktuell;jsessionid=132645BEBE3B7941D402BF32E172D404.app51?0#N13> (accessed 10 Nov. 2023).

17. Arts. 3(2)(l) and (m) UBO Decree.

18. Art. 21 AML Decree.

19. Art. 3 UBO Decree.

20. Art. 3 UBO Decree.

21. Arts. 3 and 4 UBO Decree and 21 AML/CFT Decree.

(2) The public has access to UBO information under both the “autonomous” and the “special” sections if they prove a material and qualified legal interest (*interesse giuridico rilevante e differenziato*). This interest occurs when:

- knowledge of the UBO is necessary to defend a legally recognized interest (an interest recognized and protected by local laws and regulations); and/or
- applicants have proof (for example, certified documents) of the mismatch between the UBO and the legal owner of the trust/similar trust. The Chamber of Commerce is required to grant access or notify the applicant of a denial within 20 days of the request.<sup>[22]</sup>

### 3.4.4. Timing of UBO reporting

Companies, private entities, trusts and similar entities have to notify the competent Company Register's office at the Chamber of Commerce of the city where they have their registered seat/incorporation by 11 December 2023, or 30 calendar days if incorporation takes place after the UBO register's implementation.<sup>[23]</sup>

Additional UBO register reporting requirements include: (i) notification of any changes in the information and documentation filed within 30 calendar days; and (ii) confirmation of the information and documentation previously filed within 12 months from the previous notice/ the last change.<sup>[24]</sup>

## 3.5. The Netherlands

### 3.5.1. Consequences

The UBO register for companies and businesses was introduced on 27 September 2022 on the basis of the text of AMLD5. This means that as of that date, the UBO register became open to the public. Legal entities had to register their UBOs in the UBO register for companies by 27 March 2022.

As of November 2023, supervisory authorities have access to the UBO register for companies, but AML/CFT-regulated institutions do not have access to this UBO register. The Dutch Minister of Finance is reviewing access to this UBO register for AML/CFT-regulated institutions.

Until the supervisory authorities have access to the UBO register for companies, there are consequences for AML/CFT-regulated institutions. First, they are not required to apply for an extract from the UBO register for companies (as required under article 4(2) of the Dutch AML/CFT Act<sup>[25]</sup>). Second, a company must provide the AML/CFT-regulated entity with a photocopy of the application to access the UBO register, together with the information that will be disclosed to AML/CFT-regulated institutions. Third, while there is no obligation to report *discrepancies* to the UBO register (article 10c(1) of the Dutch AML/CFT Act), companies are still required to register any *changes* in the UBO register for companies within one week.<sup>[26]</sup>

### 3.5.2. UBO register for companies

The Netherlands closed its UBO register for companies on 23 November 2022, after the ECJ's ruling. The Minister of Finance<sup>[27]</sup> stated that new draft legislation would be submitted to the Dutch Parliament in 2023.<sup>[28]</sup> For the Netherlands, the Dutch Trade Register Act<sup>[29]</sup> and the Implementation Act on UBOs for trusts and funds for joint account<sup>[30]</sup> will be amended. Article 21(1) of the Dutch Trade Register Act states that every individual has access to public information of the UBO register for companies. This article has to be amended in a way that only individuals and organizations with a legitimate interest have access to the public information on the UBO register for companies.<sup>[31]</sup> However, more regulation is expected to be laid down in a ministerial decree. The authors suggest that the ministerial decree will categorize the individuals and organizations with a legitimate interest. Those falling into the “legitimate interest” category include the organization itself, journalists working on a publication about AML/CFT, municipalities, provinces and organizations whose objects clause includes AML/CFT.<sup>[32]</sup>

If there are other organizations that need access to the UBO register for companies for specific reasons (in the field of AML/CFT or related offences), an individual request to the Chamber of Commerce, for example, could ensure access to individuals and organizations with a legitimate interest. The authors do not believe that being a counterparty to a legal entity is in itself a legitimate interest. An additional

22. Art. 7(2) UBO Decree and Art. 21(4)(d-bis) AML Decree.

23. Art. 3(7) UBO Decree.

24. Art. 3(3) UBO Decree.

25. Wet ter voorkoming van witwassen en financieren van terrorisme.

26. Arts. 21, 22, 22a and 28 Dutch Trade Register Act (Handelsregisterwet 2007).

27. See <https://www.tweedekamer.nl/kamerstukken/detail?id=2023Z07114&did=2023D16717> (accessed 16 Nov. 2023).

28. The consultation started on 30 May 2023 and ended on 28 June 2023; see <https://www.internetconsultatie.nl/bepervingtoeganguboregisters/b1> (accessed 7 Nov. 2023).

29. Dutch Trade Register Act (Handelsregisterwet 2007).

30. Arts. 7, 8, 10, 11, 15, 16 and 25 Implementation Act on UBOs for trusts and funds for joint account.

31. Access to the UBO register will be included in the Dutch Trade Register Act as a new art. 22a.

32. For example, based on the objects clause of a foundation.

requirement is that the activities relate to AML/CFT or a related offence. The authors suggest that the legal entity itself may always provide an extract from the UBO register to a counterparty.

### 3.5.3. UBO register for trusts and funds for joint account

There is a separate UBO register for trusts and funds for joint account (*fondsen voor gemene rekening*). The Netherlands has decided that funds for joint account should be regarded as a legal arrangement similar to a trust.<sup>[33]</sup>

Trusts with a trustee located in the Netherlands must register their UBOs in this Dutch UBO register. If a trust located outside the European Union enters into a business relationship (such as the opening of a bank account) or acquires real estate in the Netherlands, the trustee must register the trust and the UBOs of the trust with the Dutch UBO Register. Funds for joint account created under Dutch law must also enter their UBOs in this register.

This second UBO register was introduced on 1 November 2022, while registration must have been completed by 1 April 2023.<sup>[34]</sup> This UBO register is only open for registration purposes to the trustee (for registration of a trust) or to the manager (*beheerder*, for registration of a fund for joint account). This UBO register is not open for inspection by public authorities, AML/CFT-regulated institutions or other entities.

## 3.6. Portugal

An UBO register was introduced in Portugal by Law 89/217 of 21 August with effect on 31 October 2019. Currently, the UBO register is regulated by Decree 233/2018 of 21 August 2018 and Decree 200/2019 of 18 June 2019.<sup>[35]</sup>

All entities operating in Portugal with operations requiring a Portuguese tax number must register with the UBO register, including trusts and entities with no legal personality. In principle, listed companies and joint ventures are not subject to the UBO register obligations.

Entities which are required to be on the UBO register must update the UBO register information within 30 days of any modification. This obligation does not include board member and shareholder modifications, as this information is no longer required by the UBO register. If no modifications took place during the year, the entity must expressly confirm the UBO register data by 31 December or when submitting its annual accounts.

The following information in the UBO register is publicly accessible, including for AML/CFT-regulated entities, and available online free of charge: (i) the entity's tax number, name, form, headquarters address, email and legal identifier; and (ii) the UBO's name, year and month of birth, nationality, country of residence and corresponding ownership interest. This information is still available to the public regardless of the ECJ's ruling.

The judicial, regulatory and tax authorities may access all data in the UBO register for AML/CFT purposes.

The access to the UBO register information by the public may be limited if: (i) publication of such information could create a risk of fraud, threat, duress, harassment, kidnapping, extortion or any other form of violence to the UBO; or (ii) the UBO is a minor or without legal capacity.

## 3.7. Spain

### 3.7.1. Background

In Spain, even though a strict and centralized UBO register was pending when the ECJ issued its ruling, Spanish regulations recognizes two different registers.

The first register – created by the General Council of Notaries – grants access to obliged entities if they sign a corresponding agreement and pay a fee. According to Spanish AML/CFT law, access to this register is considered valid for purposes of complying with due diligence on the UBO (apart from complementary due diligence required in high-risk cases). The second register is similar to the first UBO register in terms of access and is overseen by the Commercial Registry. Consequently, neither of these UBO registers is accessible to the public on a general basis, which is why Spain's registers do not have the privacy issues as identified by the ECJ.

At the moment of ECJ's ruling, Spanish Royal Decree 304/2014 of 5 May (on the adoption of regulation of law on the prevention of money laundering and terrorist financing) established that to fulfil the identification and verification requirement for the beneficial owner's identity, obliged entities may access the beneficial ownership database of the General Council of Notaries.<sup>[36]</sup> This decree, created a specific legal recognition validating these registers for purposes of UBO's due diligence.

33. Implementatiewet registratie uiteindelijk belanghebbenden van trusts en soortgelijke constructies, *Stb.* 2021, 610.

34. The first deadline was 1 Feb. 2023, but it was extended to 1 Apr. 2023.

35. See <https://diariodarepublica.pt/dr/detalhe/lei/89-2017-108028571>, <https://files.diariodarepublica.pt/1s/2018/08/16000/0429304297.pdf> and <https://files.diariodarepublica.pt/1s/2019/06/12200/0313903139.pdf> (accessed 10 Nov. 2023).

36. See <https://www.boe.es/eli/es/rd/2014/05/05/304> (accessed 10 Nov. 2023).



### 3.7.2. Creation of the Central Register of Beneficial Ownership

By virtue of Royal Decree 609/2023 of 11 July, the Spanish government created the Central Register of Beneficial Ownership (CRBO).<sup>[37]</sup> Per articles 30 and 31 of AMLD5, the CRBO, to be managed by the Ministry of Justice, will be the central register for Spain and will be connected to the rest of the EU Member States' central registers. Royal Decree 609/2023 generally entered into force on 19 September 2023, except for the possibility of access to the content of the Register by the general public, which entered into force on 19 October 2023.

The two other registers (General Council of Notaries and Commercial Registry) must upload their data to the CRBO on a daily basis. The first data dump will take place no later than nine months after the CRBO Regulation entered into force, on 19 September 2023.

The CRBO will contain information regarding:

- all Spanish legal persons, which in light of article 4 bis should be understood as companies, foundations, associations and any other legal persons incorporated under Spanish law or with their registered office or branch in Spain;
- entities or structures without legal personality that have their seat of effective management or their main activity in Spain;
- entities or structures without legal personality that are administered or managed by individuals or legal persons resident or established in Spain;
- entities or structures without legal personality that, not being managed or administered from Spain or another EU Member State, and not being registered by another EU Member State, intend to establish business relationships, carry out occasional transactions or acquire real estate in Spain.

The following parties can access the CBRO (in line with ECJ's ruling):

- Spanish and EU Member State authorities with the responsibility for preventing, detecting, investigating and prosecuting criminal offences related to the funding of terrorism and money laundering (and predicate offences) – they will be given unrestricted access to the CRBO free of charge;
- notaries public and registrars, as well as their centralized prevention bodies;
- the national and EU authorities and organizations that manage, verify, pay out or audit European funds, and whose functions are determined in an EU regulation that allows the information about the beneficial ownership of the recipient of the funds to be taken from the central registers;
- obliged entities under Spanish AML/CFT Law which not only can access the information, but are required to do so to comply with the obligation to establish and verify the identity of the beneficial owner – they can also submit other enquiries (which the CRBO Regulation calls “additional”) to other registries. They have access to full up-to-date information, and can also request a certificate of the information; and
- all other persons and organizations that can demonstrate a legitimate interest, or other authorities that can access part of the information. A legitimate interest is presumed in the case of the media and civil society organizations working in AML/CFT.

In certain scenarios, the entities obliged to declare this information can request the CRBO to restrict access to that information (for example, in the case of underage beneficial owners, or when access to that information could expose the beneficial owner to a disproportionate risk, or to a risk of fraud, kidnapping, extortion, harassment, violence or intimidation or other similarly serious risks).

### 3.8. United Kingdom

In the United Kingdom, the obligation for entities to register their UBOs in their Register of Persons with Significant Control (PSC) is regulated by the Companies Act 2006, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, and The Register of People with Significant Control Regulations 2016. The Companies Act 2006 provides a list of a registrable person's – “required particulars” that entities have to provide. Where a registrable person is an individual, these include name, date of birth, nationality, country of residence, a service address and a usual residential address, the date on which the individual became a registrable person and the nature of his or her control over the company. The habitual residential address and full date of birth of registrable persons can only be disclosed to credit reference agencies and to certain public authorities on request, and only in particular circumstances as set by law. The rest of the information is available to any member of the general public free of charge, subject to some limited exceptions, as long as the person seeking access indicates their name, address and the purpose for which the data will be used.

Failure to comply with the obligation to provide the required information and keep it updated is a criminal offence and punishable by up to two years' imprisonment, and a fine for every person responsible for the non-compliance.

<sup>37</sup>. See [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2023-16159](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2023-16159) (accessed 10 Nov. 2023).

The Economic Crime and Corporate Transparency Act 2023 includes a number of tweaks to this registration regime, for example:<sup>[38]</sup>

- all PSCs will be required to verify their identity with Companies House;
- the requirement for companies to maintain their own register of PSCs will be abolished, and instead the information will only be held centrally;
- the rights of PSCs to suppress personal information from public view will be extended; and
- the Registrar will be provided with the power to proactively share the usual residential addresses and date of birth information of PSCs with law enforcement and other public and regulatory bodies when certain conditions are met.

After Brexit, the United Kingdom is no longer bound by ECJ rulings, even though such rulings may still influence UK law. Additionally, UK courts may look at anything done post-transition by the ECJ as far as it is relevant to the matter before them.

#### 4. Conclusion

Every EU Member State has its own national UBO register. European legislation must be amended to comply with the ECJ's ruling. The ECJ's ruling states that the UBO information may not be unrestrictedly accessible to the public. This article shows that the consequences of the ECJ's ruling in France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom varies. UBO information may remain available for authorities and AML/CFT-regulated institutions as well as for individuals and organizations having a legitimate interest. It is not easy to identify the group of individuals and organizations with a legitimate interest. National legislation must give a more detailed definition. It is important for stakeholders to monitor the developments in aforementioned area.

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38. See <https://bills.parliament.uk/bills/3339> (accessed 10 Nov. 2023). The Economic Crime and Corporate Transparency Act 2023 received Royal Assent on 26 Oct. 2023, and the Economic Crime and Corporate Transparency Act 2023 (Commencement No. 1) Regulations 2023 (SI 2023/1206) were made on 13 Nov. 2023.



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