

LEGITIMATE INTEREST FOR BENEFICIAL OWNERSHIP INFORMATION



AMLD IV

The fourth Anti-Money Laundering Directive (AMLD IV) was adopted on 20 May 2015. One of the most important developments to increase transparency in the AMLD IV was the introduction of centralised national registers of beneficial ownership (BO).¹ However, the adopted Directive has a number of caveats that can have an impact on its real benefit to people in the European Union and elsewhere. As always with Directives, it only sets a minimum standard, leaving some leeway as it is transposed by EU member states (within two years of its adoption).

Now that the implementation period is nearing its halfway mark, each member state has a great opportunity to make the registers reach their fullest potential; sharing public and easily accessible information about the true owners of European companies. However, these are make-or-break decisions; short-sighted implementation might risk the continuation of money laundering and terrorism financing practices.

The main issues causing uncertainty regarding the registers are 1) 'legitimate interest' to access the register, 2) privacy protection regimes used in the register, and 3) the data format of the registers. This is the first of a series of three papers addressing these issues, and the focus here will be on the 'legitimate interest'.

What is 'Legitimate interest'?

Ahead of the adoption of the AMLD IV, there was a strong push across Europe to have an EU-level mandate on establishing public beneficial ownership registers. However, the AMLD IV fell short of that by including the following condition: in order to have access to a register, a member of the public needs to have a 'legitimate interest' to do so. What makes this controversial is that it is unclear what 'legitimate' actually means, since the Directive does not define it. Fortunately (and maybe because of this lack of definition), the Directive explicitly states that the member states can opt for establishing fully public registers.

Therefore, it is up to EU member states to decide what constitutes a 'legitimate interest' in their national contexts. This can lead to varying interpretations, causing arbitrary restrictions in accessing the registers in some countries, where in others the notion of 'legitimate interest' will be understood in broader terms, or be disregarded altogether.

In our view, everybody has a 'legitimate interest' to access this information. In most cases business owners are proud to link their names with their businesses and providing this information in a public register is not an issue for them. It simply means filling one extra box in their companies' annual report, something that can hardly be called administratively burdensome. However, when this little piece of information is not required it opens the possibility for criminals (such as money launderers, arms traffickers and drug dealers) to anonymously own businesses. Anonymous companies are used to hide these illegal businesses, but they also facilitate other kinds of illegal activity such as tax evasion. Surely it is in anyone's interest



to remove any kind of legal loopholes giving incentives to break other laws. In the same vein, everyone has a legitimate interest to make sure that, for example, the beneficial owner of the company they are buying insurance through is not a known scam artist. Fully public registers ensure equal opportunities for citizens across the EU to access information that concerns them, while at the same time minimizing the administrative costs for the public authorities and users. Moreover, business worldwide stands to benefit; with a public register the due diligence processes will be more effective and companies can avoid dealing with phony and corrupt business partners.²

All these public benefits are undermined if accessing registers is a cumbersome process that is expensive for both the requestor and the government. Without a clear pan-European view on 'legitimate interest', the EU citizens and businesses are facing arbitrary risks in accessing information in the collection of which they have participated and that are stored in registers that are funded by their own tax payments.

¹ 4th AML Directive, Article 30(3).

² On the business case for BO transparency, see e.g. The B Team: Ending Anonymous Companies.

BENEFICIAL OWNERSHIP



Is there a satisfactory way to define who has a legitimate interest?

No, there is not. As one of the first member states to come up with a detailed proposal to transpose AMLD IV into its national legislation, the Dutch government had to grapple with this problem. Their assessment leaves no room for interpretation. In their view defining a 'legitimate interest' on a case by case basis would be 'hard to verify and enforce and burdensome for both the administrator of the register as its users.' This is one of the reasons they have decided to make the registry public without this conditionality.³

The whole purpose for amending this section of the AMLD was to make the system more transparent to the governments and to the public. Why insert an additional layer of secrecy to the information the government has already collected? The European Parliament has explicitly stated that persons and organisations having 'legitimate interest' include "investigative journalists and other concerned citizens."⁴ While this wording did not make it into the final Directive it gives a clear signal what was originally meant by 'legitimate interest'. Considering that the recent polls in the UK show that the main concern citizens have about business behaviour is corporate tax avoidance, the governments would be fighting an uphill battle dismissing this as an illegitimate concern.⁵ Taking note of the concerns of the British public, the UK government decided to make the British BO register open to public without any kind of assessments of legitimate interest.⁶

Is requiring legitimate interest necessary to safeguard privacy?

There is no evidence that ownership information would lead to problems relating to privacy or basic rights such as right to property or freedom to conduct business. On the contrary, increased information about beneficial ownership makes conducting business easier than before. In the abovementioned cases of the UK and the Netherlands, some parts of the information are concealed from the public in order to remove any privacy concerns. Registers can be designed to reduce the possibility of identity fraud.⁷ Public BO registers are perfectly compatible with the updated Data Protection Directive (DPD), too. According to the DPD, when data is collected to comply with a legal obligation it does not undermine citizens' privacy. The DPD aims to enhance the co-operation between member states' criminal law enforcement authorities; something that can be ensured by BO registers following open data standards. Moreover, the vast majority of EU citizens see the publicity of beneficial ownership as a necessity, thus prioritising it over somewhat vague privacy concerns of the owners.⁸

³ <http://www.knb.nl/nieuwsberichten/contouren-openbaar-ubo-register-bekend> (in Dutch).

⁴ <http://www.europarl.europa.eu/news/en/news-room/20141216IPR02043/Money-laundering-Parliament-and-Council-negotiators-agree-on-central-registers>

⁵ http://www.ibe.org.uk/userassets/pressreleases/2015attitudes_pr.pdf

⁶ <https://www.gov.uk/government/news/public-register-to-boost-company-transparency>

⁷ The officials will have access to name; date of birth; nationality; place and country of birth; address; TIN when available; key data of, or a copy of the ID that was used for verification; the documentation that goes with the economic stake of the beneficial owner, while the public will only have access to name, month and year of birth, nationality, place of residence and nature and size of the economic stake of the BO in the legal entity.

⁸ http://www.transparency.org/news/pressrelease/new_data_shows_eu_citizens_back_crackdown_on_dirty_money.