

PROTECTION REGIME 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). 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 second of a series of three papers addressing these issues, and the focus here will be on the privacy protection regimes for individuals in BO registers.

Reasons for Protection Regime

In the UK and the Netherlands, where the governments have opted for a fully public beneficial ownership register, possibilities for individuals' information to be exempted from the public domain have been provided along the lines set in the AMLD IV: where the beneficial owner would face "the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable."¹

For example, in the UK the exemption is possible if the owners are at serious risk of violence or intimidation as a result of their company's activities. While it is perfectly recommendable to take all the actions possible to ensure the safety of citizens, the right for exemption can also be abused in order to hide illicit business practices. Therefore it is extremely important that if the member states want to introduce similar protection regimes as the UK and the Netherlands, the conditions to do so will have to be carefully designed. For example, the risk of fraud should not be used as a backdoor to grant exemptions purely on economic reasons.

¹ 4th AML Directive, Article 30(9).

Another rule of thumb provided by the AMLD IV is to consider all possible exemptions "on a case-by-case basis in exceptional circumstances" and not allow any kind of blanket exemptions.²



The British approach offers an important precedent for other member states implementing fully public registers. They have explicitly stated that there needs to be a solid ground for the fears resulting in exemption - purely economic risks won't do.³ In other words, individuals do not have the right to be exempted from the public register if the publication would only affect their business activities. It is important to stress that the information on beneficial ownership will be collected in any case, but the question here is only about whether it will be publicly available.

² 4th AML Directive, Article 30(9).

³ "On that basis, we are not persuaded that competition or reputational impact should be taken into account." The register of people with significant control (PSC register): Understanding the new requirements, recording control on the PSC register and protecting people at serious risk of harm, p. 25.

Design of Protection Regime

We firmly believe that information about beneficial ownership is of public interest. Therefore, for the sake of transparency it is important that exemptions are granted only in very particular cases. It is also a case of administrative burden. In some cases members of the public could appeal the decision made by public authorities to deny access to the register or exclude certain information from public view, and these processes could be expensive for both the appellants and authorities. In order to secure citizens privacy and to minimise the number of exemptions, the Netherlands has decided to publish only a suppressed dataset on BO. While 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; and the documentation that goes with the economic stake of the beneficial owner, the public will only have access to name, month and year of birth, nationality, business or service address and nature and size of the economic stake of the BO in the legal entity. When the public access is already so restricted, the cases for exemption from the register should be immensely rare.

If and when exemptions from the public domain are granted, there should be a clear indication of its occurrence. For example, in the company's BO entry there could be a line explaining that an exemp-

tion from the public domain has been granted. Another key point to consider is that these exemptions should not be granted without any time constraints. Businesses are agile and dynamic, which means that even if their activities would bring risks to their owners at a certain moment this is not necessarily the case indefinitely. That is why all the exemptions should be reassessed at regular intervals.

To conclude, carefully considered exemptions ensure that privacy of European citizens is not breached and the safety of its citizens is not put at risk. Exemptions should always be well-grounded and assessed on an individual basis, never provided as 'blanket exemptions'. Even though blanket exemptions might first seem like an attractive option for governments in order to relieve administrative burden, the freedom of information legislation would, in many cases, require public officials to defend the position taken every time a request for information is made. In order to avoid this, the number of exemptions should be minimized and exemptions should always be considered on a case by case basis. After all, as stated by a British Treasury report: "If public policy emphasises privacy above transparency, the greatest beneficiaries are likely to be criminals."⁴

⁴ <http://www.theguardian.com/commentisfree/2015/jul/28/the-guardian-view-on-offshore-secrecy-transparency-is-welcome-but-its-not-a-housing-policy>