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Balancing Corporate Transparency with the Rights to Privacy and Data Protection

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Summary

This thesis examines the balance between corporate transparency and the rights to privacy and data protection in the context of the CJEU ruling in *WM and Sovim SA v Luxembourg Business Registers*.

Using the doctrinal legal research method to explore and analyse the topic, the thesis first discusses the historical development of corporate transparency in the EU. Subsequently, it analyses possible interferences of the current state of the beneficial ownership transparency regime with the fundamental rights of the EU citizens. In particular, the thesis critically examines the CJEU ruling in *WM and Sovim SA v Luxembourg Business Registers* case. The findings reveal that the ruling, while aiming to protect privacy and data protection rights, perhaps insufficiently considers the broader societal need for corporate transparency. As such, it risks creating an environment in which illicit activities can flourish, shielded by an overly broad interpretation of privacy rights.

The thesis concludes by proposing alternative approaches, such as adopting a risk-based approach and providing special access mechanism for civil society and the press, which may help to better reconcile the rivalling demands of transparency and privacy. In doing so, the thesis aims to contribute to the ongoing discourse around finding an adequate balance between corporate transparency and privacy/data protection rights.

Abbreviations

AML	Anti-Money Laundering
AMLD	Anti-Money Laundering Directive
BO	Beneficial Ownership
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union This refers to both Courts, the Court of Justice and the General Court.
EU	European Union
FATF	Financial Action Task Force
GDPR	General Data Protection Regulation
MS	Member States
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of European Union

1 Introduction

1.1 Background

After the Panama and Paradise papers exposed how the global elite hid their illicit wealth in offshore countries through the use of complex corporate structures,¹ there has been an increased awareness of the need for transparency in ascertaining the genuine owners of businesses and assets.² As a result, a number of governments and international organisations have started to adopt new legislation with the aim of piercing the corporate veil and shedding more light on corporate ownership.³ One of the first jurisdictions to take such step was the European Union (EU) which adopted the 4th Anti-Money Laundering Directive (AMLD4) in 2015.⁴ The new Directive required all EU Member States (MS) to establish central registers containing beneficial ownership (BO) data of firms operating within their territories. The AMLD4 required that the central registers must be primarily open to financial intelligence units, other law enforcement agencies and obliged private entities listed in the Directive.

Although the AMLD4 was a useful step towards the increased corporate transparency, the European Commission considered that it was not sufficient to combat financial crime and terrorist financing. This spurred the introduction of the EU's 5th Anti-Money Laundering Directive (AMLD5) in 2018, mandating the MS to create public registries containing BO data and this time, such data was to be open to any member of the general public.⁵ Nonetheless, the execution of BO transparency initiatives, especially with regards to the

¹ International Consortium of Investigative Journalists, 'Offshore Leaks Database-Data from Panama Papers' [2016] < www.offshoreleaks.icij.org/investigations/panama-papers > accessed 17 May 2023; International Consortium of Investigative Journalists, 'Offshore Leaks Database-Data from Paradise Papers' [2017] < www.offshoreleaks.icij.org/investigations/paradise-papers > accessed 17 May 2023.

² Mark Fenwick and Erik Vermeulen, 'Disclosure of Beneficial Ownership after the Panama Papers' (2016) Lex Research Topics in Corporate Law & Economics Working Paper No. 2016-3.

³ Adriana Fraiha Granjo and Maíra Martini, 'Access denied? Availability and accessibility of beneficial ownership data in the European Union' (2021) Transparency International < www.transparency.org/en/publications/access-denied-availability-accessibility-beneficial-ownership-registers-data-european-union > accessed 01 May 2023.

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 [2015] OJ L 141/P. 73 (AMLD4).

⁵ 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, [2018] OJ L 156/P. 43–74. (AMLD5).

general public access, presents significant concerns regarding the equilibrium between transparency and the rights to privacy and data protection. In November 2022, the Court of Justice of the European Union (CJEU) delivered a pivotal judgement in the case of *WM and Sovim SA v Luxembourg Business Registers*, which directly addressed this matter.⁶

The CJEU was requested by the Luxembourg District Court to evaluate if the EU AMLD5's provisions allowing general public access to BO data contravened Articles 7 and 8 of the EU Charter of Fundamental Rights (CFR) or the provisions of the EU's General Data Protection Regulation (GDPR). The Court decided that public access to such information disproportionately violated the aforementioned articles and seriously interfered with the fundamental rights to respect private life and personal data, leading to the invalidation of the AMLD5's article that granted public access.

This ruling offers very useful insights into the CJEU's stance with regards to debates surrounding financial privacy and corporate transparency. The EU's anti-money laundering (AML) legislation relies heavily on data disclosures and data retention measures and therefore, this case addresses very important questions regarding the interference of these measures with citizens' fundamental rights.⁷ Importantly, the case also raises many questions regarding the balance between the rights to privacy/data protection and the principle of transparency.

1.2 Research questions and objectives

This thesis seeks to examine the complex relationship between corporate transparency and privacy rights in the EU. The primary research question guiding this thesis is how the EU can strike an adequate balance between the rivalling demands of corporate transparency and privacy.

To address this research question, the thesis will delve into the following sub-questions:

1. What are the legal frameworks surrounding corporate transparency and privacy/data protection in the EU?
2. What are the potential interferences between these concepts?

⁶ Joined Cases C-37/20 and C-601/20 *WM and Sovim SA v Luxembourg Business Registers* [2022] ECLI:EU:C:2022:912 (WM and Sovim SA v Luxembourg Business).

⁷ See e.g. AMLD4, Chapters III, IV, V.

3. How does the CJEU ruling in *WM and Sovim SA v Luxembourg Business Registers* impact the balance between these concepts, and what are the potential shortcomings and challenges posed by the ruling?

4. What alternative approaches can be proposed to effectively tackle financial crimes without undermining privacy and data protection rights?

By answering these questions, the thesis aims to investigate the key considerations and challenges in finding a delicate balance between corporate transparency and privacy rights. While using the CJEU ruling in *WM and Sovim SA v Luxembourg Business Registers* as a reference point, the main focus of this thesis is to contribute to the ongoing discussion surrounding the equilibrium between the two opposing concepts.

1.3 Methodology and materials

This thesis employs a doctrinal legal research method to examine the corporate transparency regime within the EU. Doctrinal legal research is a method of examining legal rules, principles and concepts in a systematic and comprehensive manner so as to provide a clear and coherent understanding of the law.⁸ It involves analysing and synthesizing various statutes, case law and legal literature in order to develop structured and well-informed arguments.⁹ Ultimately, the use of the doctrinal legal research method in this thesis facilitates an in-depth and nuanced assessment of the relevant legal frameworks and their impact on the balance between corporate transparency and individual privacy rights.

The initial stage of the research involved a comprehensive review of the EU primary law (e.g. the EU treaties, CFR), secondary law (e.g. directives and regulations related to AML and privacy/data protection) and the CJEU rulings and decisions, in order to identify the legal sources which are relevant to the research questions. In addition, a number of working documents of the European Commission (e.g. impact assessments and proposals), relevant legal literature and opinions of various civil society organizations were analysed with the purpose of evaluating the legal rules and provisions related to corporate transparency and privacy rights. Subsequently, by analysing and synthesizing these sources, the thesis developed structured arguments to address the above-mentioned research questions.

1.4 State-of-the-art

⁸ P. Ishwara Bhat, 'Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles', *Idea and Methods of Legal Research* (Delhi, 2020; online edn, Oxford Academic, 23 Jan. 2020).

⁹ *Ibid.*

The relationship between corporate transparency and privacy rights in the EU has been debated and researched extensively. The literature on this topic can be traced back to the early theoretical foundations of these two important concepts. Corporate transparency literature primarily focuses on the importance of BO transparency measures in promoting accountability, the stability of capital markets and the protection of investors.¹⁰ On the other hand, literature regarding privacy rights emphasizes the significance of human dignity, individual autonomy and personal data protection.¹¹

Several studies have previously analyzed the interference of the corporate transparency measures with various human rights, including the rights to privacy and data protection.¹² However, most of these studies were conducted prior to the CJEU's ruling in *WM and Sovim SA v Luxembourg Business Registers* case and therefore, they may not take into account the concerns raised by the CJEU in its recent ruling. Nevertheless, there have been a few studies which discussed the issues raised by the CJEU. Some of these papers supported the CJEU's ruling for bringing the rights to privacy and data protection back into the debate.¹³ At the same time, some other authors have criticized the ruling for its negative impact on transparency.¹⁴ Predictably, there was a heavy criticism of the ruling by the press, specifically by the transparency proponents.¹⁵

¹⁰ See e.g. Edita Čulinović Herc and Dionis Jurić, 'Disclosure of Beneficial Ownership – From EU Major Shareholdings Directive to EU New Transparency Directive – What Needs to Be Changed in Croatian Securities Markets Act?' (2013) (5th International Conference 'Economic Integration, competition and cooperation', Croatia, Opatija, 2005.) < www.dx.doi.org/10.2139/ssrn.2239280 > accessed 17 May 2023; Avnita Lakhani, 'Imposing Company Ownership Transparency Requirements: Opportunities for Effective Governance of Equity Capital Markets or Constraints on Corporate Performance' (2016) 16 *Chi.-Kent J. Int'l & Comp. L.* 122; Erik Vermeulen, 'Beneficial Ownership and Control: A Comparative Study - Disclosure, Information and Enforcement', (2013) OECD Corporate Governance Working Papers, No. 7, OECD Publishing, Paris, < www.doi.org/10.1787/5k4dkhwckbzv-en > accessed 17 May 2023.

¹¹ Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 307–312 *Philos. Technol.* 29; Jackie Jones, "Common constitutional traditions": can the meaning of human dignity under German law guide the European Court of Justice? (2004) 167–187 *Public Law*; Gloria González Fuster, *The emergence of personal data protection as a fundamental right of the EU*, vol 16 (Springer Science & Business 2014).

¹² Radu Mares, 'Corporate transparency laws: A hollow victory?' (2018) 36(3) *Netherlands Quarterly of Human Rights*, 189–213; Filippo Noseda, 'CRS and beneficial ownership registers—what serious newspapers and tabloids have in common: The improbable story of a private client lawyer turned human rights activist' (2017) 23(6) *Trusts & Trustees*.

¹³ See e.g. Dominic Thomas-James, "Editorial: The Court of Justice of the European Union and the beginning of the end for corporate transparency?", (2023) Vol. 30 No. 2, p. 307, *Journal of Financial Crime*.

¹⁴ See e.g. Katerina Pantazatou, 'A Never-Ending Battle Between Privacy and Transparency: The Case of Registers of Beneficial Ownership Before the CJEU', (2023), 32, *EC Tax Review*, Issue 3, pp. 103-116.

¹⁵ *Ibid.*, See e.g. Tax Justice Network, 'EU court returns EU to dark ages of dirty money' (23 November 2022) < www.taxjustice.net/press/eu-court-returns-eu-to-dark-ages-of-dirty-

The existing literature highlights the challenges, opportunities and ongoing debates regarding the relationship between corporate transparency and privacy. By building on these previous works, this thesis aims to contribute to the academic discourse by exploring different ways that the EU legislator can strike an adequate balance between the two concepts, in the light of the CJEU ruling in *WM and Sovim SA v Luxembourg Business Registers* case.

1.5 Delimitations

The scope of this study is limited to an analysis of the EU's legal framework for corporate transparency and privacy/data protection, specifically with regard to the BO disclosure requirements. However, certain aspects have been excluded from the scope of this research. These include: in-depth analyses of the legal definition of 'beneficial owner'; international initiatives regarding corporate transparency, such as the recommendations of the Financial Action Task Force (FATF), and extensive case law on the rights to privacy and data protection. While these aspects may be relevant to the broader discussion of corporate transparency and its legal implications, they are beyond the intended scope of this study.

1.6 Disposition

The first chapter of this thesis introduces the research topic, research questions and objectives, and provides a brief state-of-the-art overview. The second chapter focuses on the current state of the corporate transparency regime in the EU. Initially, the thesis provides a brief historical overview of the legal developments in the EU concerning general public access to BO data. In order to do so, it examines various stages in the development of the EU's AML legislation. Subsequently, the thesis analyses the extent to which unrestricted public access to central registers of BO data interferes with fundamental rights, specifically the rights to privacy and data protection. Upon addressing these interferences, the recent judgement of the CJEU in the *WM and Sovim SA v Luxembourg Business Registers* case will be expounded upon.

The third chapter of the thesis starts by critically analysing the CJEU's ruling in the *WM and Sovim SA v Luxembourg Business Registers* case. In doing so, it discusses various potential shortcomings and uncertainties which resulted from the Court's reasoning in this case. In particular, this section criticizes the Court's arguments provided in its proportionality assessment. Next, the thesis analyses the extent to which general public access to BO data has been

money/> accessed 18 May 2023; OCCPR, 'The Luxembourg businessman who got Europe's corporate registries shut down – and his secret offshore interests' (10 February 2023) <www.investigate-europe.eu/en/2023/luxembourg-businessman-offshore-transparency-shut-down/> accessed 18 May 2023.

effective in the EU's fight against financial crimes. Before providing concluding remarks, the fourth chapter explores possible developments in the future with regards to corporate transparency in the EU.

2 General public access to the beneficial ownership information in the EU

2.1 Legal developments in the EU with regards to corporate transparency

In recent years, there has been a growing recognition of the importance of corporate transparency in the EU, especially with regards to identifying the ultimate beneficial owners of companies and assets. This was driven, *inter alia*, by several high-profile events which revealed how the global elite hid their illegally gained funds behind offshore companies and complex corporate structures.¹⁶ These scandals increased public awareness concerning the need for greater transparency which, subsequently, pushed governments and international organisations to take action.

Admittedly, the importance of identifying beneficial owners in combatting financial crimes was already recognised prior to the aforementioned major events. The legal obligation for financial institutions to identify their customers was imposed by the 1st AML Directive in 1991 (AMLD1), but it included very limited information on the relevant procedures.¹⁷ It was not until the 3rd AML Directive in 2005 (AMLD3) that the EU legislator laid out more detailed information regarding the customer identification requirements for the financial institutions.¹⁸ This required the legislator to define what “beneficial owner” means. So, the Article 3 of the AMLD3 defined the term of “beneficial owner” as “the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted”.¹⁹ In order to identify the beneficial owner, financial institutions could ask their clients for the relevant documentation, and/or verify the identity of the beneficial owner using public records and other sources if they are available.

However, the task of identifying the true beneficial owner of a company or an asset was not such an easy task. This is particularly true when we consider that some countries at the time required just a little more than a name and an

¹⁶ Dominic Thomas-James, "Editorial: The Court of Justice of the European Union and the beginning of the end for corporate transparency?", (2023) Vol. 30 No. 2, p. 305, *Journal of Financial Crime*.

¹⁷ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L 166/ P. 0077 – 0083.

¹⁸ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L 309/P. 15–36.

¹⁹ *ibid* Article 3.

address to register a new company in their jurisdiction. Moreover, such records might not have always been available due to the lack of central registers in those countries.

Under the circumstances, the EU legislator took a significant step towards BO transparency with the adoption of the 4th AML Directive in 2015 (AMLD4).²⁰ The AMLD4 mandated that the EU MS must maintain a central register containing an accurate and current information regarding the beneficial owners of companies registered in their jurisdictions.²¹ Such information must include at least the personal details of the beneficial owner (i.e. full name, complete date of birth, nationality, country of residence) and the details of the beneficial interests held by the person.²²

It also stated that such registers must be accessible in all cases to the competent authorities and financial intelligence units (FIUs), without any reservations.²³ Additionally, in accordance with the AMLD4, such registers must be made accessible to entities obliged by AMLD4 to perform customer due diligence (e.g. credit and financial institutions) and any person or organisation which is able to demonstrate that they have a legitimate interest in accessing the register.²⁴ However, the access to the central registers by some of the obliged entities and person(s) with a legitimate interest could be restricted where it could expose the beneficial owner to the risk of kidnapping, intimidation, blackmail, fraud and violence, or in case where the beneficial owner is a minor or incapable.²⁵

The AMLD4 required MS to establish such central registers by June 2017.²⁶ However, this was not the case as several countries failed to adhere by these deadlines. For example, according to the report from 2021 by Transparency International, after 4 years of transposition deadline, countries such as Hungary, Italy and Lithuania did not have any kind of BO registers in place.²⁷

²⁰ 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 [2015] OJ L 141/P. 73 (AMLD4).

²¹ Ibid Article 30 (3).

²² Ibid Article 30 (5).

²³ Ibid Article 30 (5) (a).

²⁴ Ibid Article 30 (5) (b), (c).

²⁵ Ibid Article 30 (9).

²⁶ Ibid Article 67.

²⁷ Adriana Fraiha Granjo and Maíra Martini, 'Access denied? Availability and accessibility of beneficial ownership data in the European Union' (2021) Transparency International <www.transparency.org/en/publications/access-denied-availability-accessibility-beneficial-ownership-registers-data-european-union> accessed 01 May 2023.

Apart from that, even where MS had established some sort of a central register, access to the information were often hindered by registration requirements, search functionalities, etc.²⁸

Moreover, there were also other issues related to the BO transparency regime established by the AMLD4. In accordance with the AMLD4, a person or an organisation could gain access to the BO information if they could demonstrate a legitimate interest.²⁹ However, the AMLD4 did not provide any definition for the concept of a “legitimate interest” in this particular context. The lack of a uniform definition might have potentially given rise to divergent applications of the law among MS. The Commission published an impact assessment document in 2016 accompanying the Proposal for a Directive of the European Parliament and of the Council 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 Directive 2009/101/EC.³⁰ According to this document, the lack of uniform definition of the “legitimate interest” gave rise to various practical difficulties in its application.³¹

The above mentioned proposal gave rise to a new AML directive in the EU. In May 2018, the 5th AML Directive (AMLD5) was adopted by the European Parliament and Council, and it came into force on July 2018.³² The new directive, AMLD5, built on the measures introduced by AMLD4, aimed to further strengthen the EU’s AML framework and enhance the corporate transparency. One of the key aspects of AMLD5 is that it requires MS to open up their central registers with BO information to all members of the general public. In other words, it removed the previous requirement of demonstrating a legitimate interest and instead, mandated the central registers to become public. Apart from solving the practical difficulties associated with applying the legitimate interest test, it also recognized the importance of the public scrutiny and civil society engagement in combatting financial crimes.³³

The AMLD5 states that in exceptional circumstances, which are to be determined in national law, such access can be restricted if the beneficial owner

²⁸ Ibid.

²⁹ AMLD4, Article 30 (5) (c).

³⁰ Commission, Staff Working Document Impact Assessment accompanying the document Proposal for a directive of the European Parliament and of the Council 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 Directive 2009/101/EC, SWD (2016) 224 final.

³¹ Ibid.

³² 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, [2018] OJ L 156/P. 43–74. (AMLD5).

³³ Adriana Fraiha Granjo and Maíra Martini, ‘Access denied? Availability and accessibility of beneficial ownership data in the European Union’ (2021) Transparency International, p.3 < www.transparency.org/en/publications/access-denied-availability-accessibility-beneficial-ownership-registers-data-european-union > accessed 01 May 2023.

can demonstrate that the disclosure of BO information would lead 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”.³⁴

The AMLD5 requires that MS must transpose the Directive into their national legal systems by January 2020.³⁵ However, according to the above mentioned report of Transparency International, more than a year after this transposition deadline, there were still 9 EU MS which had not yet established public BO registers.³⁶ Apart from that, in some countries where such public registers were established, the registers had complicated registration requirements which often limited the ability of foreign FIUs and other competent authorities to access the relevant information regarding the BO.³⁷

Nevertheless, over the years, governments and international organisations all around the globe took serious steps towards increasing corporate transparency. As mentioned above, this was a result of, inter alia, increased public awareness of how kleptocrats around the world are using complex corporate structures to hide the money they stole from their countries. The modern global financial system allows for the money to flow without borders, while AML laws are often constrained by national borders. The AMLD5’s requirement for MS to establish publicly available registers of beneficial owners was a significant step towards the corporate transparency, allowing not only EU MS but also non-EU countries to combat financial crimes more effectively.

2.2 Possible interference of corporate transparency with fundamental rights

Traditionally, transparency has been an important aspect when it comes to the activities of public authorities. As one of the notable political philosophers of the 20th century Norberto Bobbio argued, democracy can be seen as “the government of public power in public”.³⁸

The principle of transparency has an important place in the EU legal order and it has been codified in the primary law, with Article 1 of the Treaty on

³⁴ AMLD5, Article 20a (15) (g).

³⁵ Ibid Article 65.

³⁶ Adriana Fraiha Granjo and Maíra Martini, ‘Access denied? Availability and accessibility of beneficial ownership data in the European Union’ (2021) Transparency International, p.5 < www.transparency.org/en/publications/access-denied-availability-accessibility-beneficial-ownership-registers-data-european-union > accessed 01 May 2023.

³⁷ Ibid p. 7.

³⁸ Norberto Bobbio, *Il futuro della democrazia*, Einaudi, Turin, [1984] p. 76.

EU (TEU) being a salient example in this regard.³⁹ The CJEU also acknowledged the connection between democracy and transparency in its various rulings. For example, in one of its judgements, the Court has stated that transparency provides more legitimacy to the public authorities and enables citizens to take a more active role in the decision-making processes in their countries.⁴⁰

The transparency required in exercising public power can be juxtaposed with the protection of secrecy of private life. With the rise of digital technologies and the internet, the right to privacy has gained even more importance and came to include the protection of personal data. These rights have been codified both in the primary and the secondary laws of the EU. For example, the right to the protection of personal data has been enshrined in the Article 8 of the EU CFR.⁴¹ This right was further strengthened and codified in the General Data Protection Regulation (GDPR) of the EU.⁴²

However, given the modern complex world, the public and private spheres often overlap and interfere with each other. As a result, the dividing line between the two is not always straightforward. In some contexts, certain private acts or individuals may have an important impact on the public life in that society and as a result, a general interest might arise to know certain aspects of an individual's life which could otherwise be considered private. In such situations, conflicts may arise between the need for transparency and the rights to privacy and data protection.

In its case law, on several occasions, the CJEU attempted to find the adequate balance between these two objectives. For example, in *Volker und Markus Schecke and Eifert*, the Court ruled that publishing of nominative data about the recipients of agricultural aid contributed to the transparency and gave the citizens more control over the use of public funds.⁴³ In another ruling, the CJEU acknowledged that certain private organizations, under certain conditions, may have a significant impact on the public life of the society and therefore, the higher level of transparency regarding these organizations may constitute an overriding reason in the general interest.⁴⁴

³⁹ Consolidated version of the Treaty on European Union [2012] OJ C 326/P. 13–390. (TEU). See also Article 10 TEU.

⁴⁰ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] EU:C:2010:662, para 68.

⁴¹ Charter of Fundamental Rights of the European Union [2012] OJ C 326/P. 391–407. (EU Charter of Fundamental Rights).

⁴² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/P. 1–88.

⁴³ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] EU:C:2010:662.

⁴⁴ Case C-78/18 *Commission v Hungary* [2020] EU:C:2020:476, para 79.

After the relationship between anonymous corporate structures and money laundering became well known to the public, the movement towards corporate transparency gained momentum. One of the outcomes of this movement was the requirement of the AMLD5 for MS to establish public registers of beneficial owners of companies incorporated in their respective jurisdiction. However, the access to such information by the general public remains controversial up to this day due to its potential interference with the beneficial owners' rights to privacy and data protection.

The issue of interference of preventive AML measures with other fundamental rights protected by the EU has previously been discussed in the CJEU's case law and various academic works. In *Jyske Bank*, the CJEU was tasked with balancing AML measures with the citizens' freedom to provide services.⁴⁵ In its analyses, the Court recognised that combatting financial crime constitutes a legitimate aim and an overriding reason in the public interest and therefore, it is capable of justifying interference with certain rights and freedoms.⁴⁶ To borrow the reasoning of another author, the fight against money laundering, through the EU legislation and the court's case law, has emerged as a "general interest" of the EU whose interferences with other fundamental rights needs to be assessed considering the principle of proportionality.⁴⁷ In the case of public registers of BO, it is first necessary to ascertain whether such interferences with the rights to privacy and data protection exist.

The rights to privacy and data protection are enshrined in Articles 7 and 8 of the EU CFR.⁴⁸ Based on the CJEU's case law, these rights concern any information related to "an identified or identifiable individual".⁴⁹ In the case of beneficial owners of companies, in accordance with the Article 3(6) of the AMLD4, this requirement is satisfied as a beneficial owner is an identifiable natural person. As for the data that is being disclosed in the public registers, it can be classified as personal data within the meaning of the Articles 7 and 8 of the EU CFR. This assumption is based on the Court's case law where it has stated that personal data is protected by the EU law regardless of whether it forms part of a professional activity or can be considered sensitive or not.⁵⁰ Based on these analyses, one can deduce that the information disclosed on the public registers of beneficial owners falls within the scope of the rights pro-

⁴⁵ Case C-212/11, *Jyske Bank Gibraltar Ltd. v. Administracion del Estado* [2013] ECLI:EU:C:2013:270.

⁴⁶ *Ibid* paras 62-64.

⁴⁷ Sara De Vido, "Anti-Money Laundering Measures Versus European Union Fundamental Freedoms and Human Rights in the Recent Jurisprudence of the European Court of Human Rights and the European Court of Justice" (2015) 16 German Law Journal 1271.

⁴⁸ EU Charter of Fundamental Rights, Articles 7-8.

⁴⁹ Opinion 1/15 of the Court *EU-Canada PNR Agreement* [2017] ECLI:EU:C:2017:592, para 122.

⁵⁰ See Case C-398/15 *Manni* [2017] EU:C:2017:197, para 34; Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others* [2020] EU:C:2020:791, para 115.

tected by the EU CFR. Therefore, disclosing the said data to the general public may constitute an interference with the concerned persons' rights to privacy and data protection.

According to the Recital 5 of the AMLD5, the measures brought forward by the Directive must be pursued having regard to other fundamental rights protected by the EU such as right to the protection of personal data and where there are interferences with the said right, MS should apply the principle of proportionality.⁵¹ In another occasion, the Directive states that the exemption brought by the Article 20a (15) (g) of the AMLD5⁵² aims to provide a balanced and proportionate approach in maintaining public registers so that MS can protect the secrecy of citizens' private life and their personal data when disclosing the BO information would otherwise disproportionately violate the said rights.⁵³

Despite these safeguards provided by the legislator, it is still controversial whether the general public access to such information is proportionate to the objective pursued by the Directive. The proponents of transparency often argue based on the "nothing to hide, nothing to fear" notion.⁵⁴ However, as stated earlier, disclosure of personal data may undermine the rights to privacy and data protection even when the disclosed information is not sensitive or does not necessarily result in disadvantage for the person whose data was disclosed.⁵⁵

2.3 The CJEU ruling in *WM and Sovim SA v Luxembourg Business Registers*

On 22 November 2022, in the preliminary ruling procedure, the CJEU issued a judgement in the case of *WM and Sovim SA v Luxembourg Business Registers*.⁵⁶ In this case, the CJEU was asked to evaluate the validity of the AMLD5 requirement for MS to establish publicly available registers of BO.

⁵¹ AMLD5, Recital 5.

⁵² Article 20a (15) (g) of the AMLD5 states that Member States may provide an exemption to the disclosure of beneficial ownership information to the general public and certain obliged entities if such disclosure would result in disproportionate risk, risk of kidnapping, fraud, extortion, blackmail, intimidation, harassment or violence, or where the beneficial owner in question is a minor or legally incapable in some other way.

⁵³ AMLD5, Recital 36.

⁵⁴ Dominic Thomas-James, "Editorial: The Court of Justice of the European Union and the beginning of the end for corporate transparency?", (2023) Vol. 30 No. 2, p. 305, *Journal of Financial Crime*.

⁵⁵ See Case C-398/15 *Manni* [2017] EU:C:2017:197, para 34; Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others* [2020] EU:C:2020:791, para 115.

⁵⁶ Joined Cases C-37/20 and C-601/20 *WM and Sovim SA v Luxembourg Business Registers* [2022] ECLI:EU:C:2022:912.

2.3.1 Background of the case

In 2019, Luxemburg implemented a public register of BO, providing public access to a broad range of information on ultimate beneficial owners of companies registered under its jurisdiction. Two parties, WM (C-37/20) and Sovim (C-601/20), brought attention to this new regulation as both parties requested the Luxembourg Business Register (LBR) to restrict access to information available on the public register. Despite their efforts, the LBR rejected both applications, leading to their appeal to the Luxembourg District Court. WM argued that exceptional circumstances existed within the meaning of Article 30 AMLD4 (as amended by AMLD5), while Sovim contended that allowing public access to the identity and personal data of their BO information breached the fundamental rights to privacy and protection of personal data guaranteed by the EU CFR and several provisions of the GDPR.

The Luxembourg District Court stayed the proceedings in both cases and referred various questions to the CJEU for clarification on the interpretation of Article 30 AMLD4 (as amended) and its compliance with the EU CFR and several provisions of the GDPR.

2.3.2 Serious interference with the fundamental rights

The CJEU initiated its deliberations by addressing the compatibility issue of Article 30 of the AMLD4 (as amended) with the fundamental rights enshrined in Articles 7 and 8 EU CFR. The Court was of the opinion that the data related to ultimate beneficial owners constituted personal data and the disclosure of such data to third parties amounted to data processing. The CJEU concluded that this action interferes with the fundamental rights as enshrined in Articles 7 and 8 of the EU CFR, regardless of the subsequent use of such information.⁵⁷ The CJEU disagreed with AG Giovanni Pitruzzella's view and found the interference with the above mentioned fundamental rights to be serious.⁵⁸ The Court based its conclusion on two primary grounds described below.

First, the information contained in the BO register makes it possible to create a profile concerning the natural person whose personal identifying data is being disclosed. The Court noted that the registry consists of information on the beneficial owner's identity as well as nature, and extent of their interest held in a given corporate or other legal entity. Depending on the configuration of national law, it may also give information regarding the state of the person's

⁵⁷ Ibid, paras 38-39.

⁵⁸ Ibid, Opinion of the AG Giovanni Pitruzzella, para 104.

wealth and involvement in a particular economic sectors, countries, and information about specific undertakings in which he or she has invested.⁵⁹

Second, the Court focused on the inherent aspect of the public registers which is making personal data of a natural person freely accessible to any member of the general public by putting it on the internet. The problem is that this leads to a loss of control over the purpose for which the disclosed information might be used or processed. Thus, the information in the public registries may be used for purposes other than AML and counter-terrorism financing, which puts the individuals concerned in an increasingly challenging or even unrealistic position to protect themselves against any possible misuses.⁶⁰

2.3.3 Transparency arguments

When examining if the measure in question fulfils the EU's recognized general interest objective, the Court made a distinction between two aspects: the first being the creation of a hostile environment for criminals by increasing transparency, and the second being transparency as a principle that allows citizens to participate in the democratic decision-making processes.

In terms of the first aspect, the CJEU recognized that the creation of a hostile environment for criminals by promoting transparency so as to prevent money laundering and terrorism financing is an objective of general interest recognized by the EU.⁶¹ Admittedly, this objective is capable of justifying serious interferences with the rights protected in Articles 7 and 8 of the EU CFR. The EU's AML and counter-terrorism financing policy aims to prevent the use of the EU financial system for such illicit purposes. The AMLD5 takes this policy further by recognizing that transparency is essential to achieving this objective. According to the AMLD5, enhanced transparency could be a powerful deterrent to criminals seeking to hide their finances through non-transparent structures.⁶² To achieve better transparency, public access to BO information is necessary. This information would enable more active scrutiny by civil society, especially the press and civil society organizations.⁶³ Moreover, it would also help fight the misuse of companies and various complex corporate structures for money laundering and terrorist financing purposes, as anyone doing business would be aware who is the beneficial owner of a legal entity.⁶⁴

⁵⁹ Ibid, para 41.

⁶⁰ Ibid, paras 42-43.

⁶¹ Ibid, para 59.

⁶² AMLD5, Recital 4.

⁶³ AMLD5, Recital 30.

⁶⁴ Ibid.

In terms of the second aspect, the CJEU disagreed that the principle of transparency in itself constitutes a general interest of the EU in this particular context. The Court recognized that the principle of transparency plays an important role in democratic societies and it is enshrined in the primary law of the EU, particularly in the Articles 1 and 10 of the TEU. However, the Court argued that the transparency mentioned in the primary law refers to exercising public power, such as government activities. It does not concern the identities of beneficial owners, nature and extent of their beneficial interests.⁶⁵

2.3.4 Assessing the proportionality of the interference

The CJEU used a three-step test to determine whether the interference was proportional. This approach has been used by the Court in its previous case law, for example in the case involving the retention of traffic and location data.⁶⁶ It involves evaluating whether the measure is appropriate, necessary, and proportional to the objective of general interest being pursued.

As a first step, the Court analysed whether the measure in question is appropriate for achieving the intended objective. According to the Court, the general public access to the information regarding beneficial owners as required by the AMLD5 increases the corporate transparency and contributes to creating a more hostile environment for criminals intending to launder the proceeds of crime and/or finance terrorism. Thus, the Court concluded that creating public registers of beneficial owners is an appropriate measure for achieving the general interest pursued in this case.⁶⁷

Following this, the Court proceeded to assess whether the measure in question is strictly necessary to achieve the proclaimed general interest. It stated that ‘where there is a choice between several measures appropriate to meeting the legitimate objectives pursued, recourse must be had to the least onerous’.⁶⁸ The CJEU started by analysing the reasons behind amending the regime established by the AMLD4 where BO information was accessible, inter alia, to any person or entity which was able to prove that they have a legitimate interest. The Commission previously argued that the concept of a legitimate interest is not easy to define from the legal perspective and it creates practical difficulties in application.⁶⁹ The Court rejected the Commission’s argument

⁶⁵ Ibid, paras 58-62.

⁶⁶ Case C-140/20, *G.D. v Commissioner of An Garda Síochána* [2022] ECLI:EU:C:2022:258.

⁶⁷ *WM and Sovim SA v Luxembourg Business Registers*, paras 66-67.

⁶⁸ Ibid, para 64.

⁶⁹ Commission, Staff Working Document Impact Assessment accompanying the document Proposal for a directive of the European Parliament and of the Council 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 Directive 2009/101/EC, SWD (2016) 224 final.

and stated that it does not constitute a reasonable justification for expanding such access to the general public.

Furthermore, the Commission provided arguments relying on the Recital 30 of the AMLD5 which stated that the general public access to the BO information enables civil society to conduct closer scrutiny and take a more active role in combatting financial crimes and terrorist financing. In that regard, the recital makes an express reference to the press and civil society organisations. Apart from that, the recital argues that the public access also allows potential business partners to make more informed decisions on whether they would like to enter into transactions with each other or not. The Court recognized the importance of giving such access to the above mentioned actors and stated that they have a legitimate interest within the meaning of the Article 30 of the AMLD4 (before being amended by the AMLD5). Thus, the Court concluded that giving access to any member of the general public is not strictly necessary to achieve the objectives stated by the AMLD5.⁷⁰

Finally, the CJEU analysed whether the measure in question meets the requirement of proportionality *stricto sensu*. In order to do so, the Court considered whether the objective pursued by giving public access to the BO information is balanced properly with the fundamental rights in question, and whether there are enough safeguards to prevent the abuse of the measure.⁷¹ The Commission contended, based on the Recital 34 of the AMLD5, that the AMLD5 precisely defines the scope of the information to be disclosed to the public and that there are sufficient safeguards to minimise the risk of abuse. Moreover, the Commission, the Parliament and the Council stated that the possibility to derogate from the disclosure requirement, as enshrined in the Article 30(9) of the AMLD5, provides additional safeguards against the risk of abuse.⁷²

However, the Court noted that the Article 30(5) of the AMLD5 provides that the scope of the information disclosed through public registers includes “at least” the data mentioned in that provision. It implies that the MS may provide an additional information other than those mentioned in the Article 30(5) of the AMLD5. The Court concluded that the provisions providing for general public access to BO information do not meet the requirements of clarity and precision.⁷³

Having established that providing access to any member of the general public is not proportionate to the objective pursued by the AMLD5, the Court effectively invalidated those provisions of the Directive. Thus, it did not examine

⁷⁰ WM and Sovim SA v Luxembourg Business Registers, paras 74-76.

⁷¹ Ibid, para 77.

⁷² Ibid, para 80.

⁷³ Ibid, para 82. See also Opinion 1/15 of the Court *EU-Canada PNR Agreement* [2017] ECLI:EU:C:2017:592, para 160.

other questions sent by the referring court. It also implies that MS are now required to comply with the ruling and adjust their public registers so that the general public does not have an access to it as it was previously required by the Article 30 of the AMLD4 (as amended by the AMLD5).

3 Critical analysis of the CJEU ruling and its impact on corporate transparency

3.1 Transparency vs privacy

The principles of transparency and privacy/data protection are inherently opposing concepts. Expansion of the one usually means limitation of the other. Looking at the bigger picture, the CJEU ruling in *WM and Sovim SA v Luxembourg Business Registers* can be viewed as an extension of the Court's recent pattern in its decisions regarding the clash of transparency with the privacy and data protection rights. In August 2022, the CJEU delivered a judgement in *OT v. Vyriausioji tarnybinės etikos komisija* where the Court once again expanded the scope of the protection of personal data to the detriment of transparency.⁷⁴ The case concerned a director of a private entity which received public funds and therefore, in accordance with Lithuanian law, the director had an obligation to disclose certain personal data, financial activities and limited data concerning his or her spouse, partner or cohabitee. The presented data would then be published online in order to provide more visibility for the public to control where the public funds were spent. Similarly, the CJEU found the Lithuanian measure, particularly the requirement to publish the data online, to be disproportionate to the objective pursued and therefore, incompatible with the EU law.⁷⁵

These recent cases provide useful insights about the position of the highest court in the EU with regards to debates around financial privacy and corporate transparency. The AML legislation of the EU is based on quite extensive requirements of data disclosure and retention.⁷⁶ Thus, it was crucial that some of these questions were answered by the CJEU in its recent case law. However, the answers provided in its judgement, particularly with regards to *WM and Sovim SA v Luxembourg Business Registers* case, raise more questions than they answer and create further uncertainties. Some of these uncertainties are discussed below.

3.1.1 The sensitivity of financial data

⁷⁴ Case C-184/20 *OT v. Vyriausioji tarnybinės etikos komisija* (Chief Ethics Commission, Lithuania) (C-184/20) [2022] ECLI:EU:C:2022:601.

⁷⁵ *Ibid.*

⁷⁶ See AMLD4 (as amended), Chapters III, IV, V.

One of the issues raised by the CJEU analysis in *WM and Sovim SA v Luxembourg Business Registers* case is about the level of sensitivity of personal data processed in public registers of beneficial owners. Despite the limited amount of information provided in the registers (i.e. full name, date of birth, nationality, country of residence and nature and extent of the beneficial interest held), the CJEU considered that it was enough to draw up a profile of a natural person and thus, it constitutes a severe interference with the rights to privacy and data protection of individuals. This exact criterion was previously used in the Court's case law regarding the protection of personal data and privacy, particularly in the cases regarding Passenger Name Records (PNR) and Telecommunications data.⁷⁷ However, both of these cases concerned public data related to an entire population rather than data related to a limited category of individuals. Moreover, in contrast to these other cases, the data in question in *WM and Sovim SA v Luxembourg Business Registers* case is related to legal persons, and not natural persons. It is argued that the criterion that apply to natural persons should not be applied to legal persons in the same way.⁷⁸

The CJEU's analyses state that the profile drawn up using the information from BO registers can reveal the "the state of the person's wealth and the economic sectors, countries and specific undertakings in which he or she has invested".⁷⁹ This is also the approach taken by the Constitutional Council of France in 2016 where it declared public register of trusts to be unconstitutional.⁸⁰ However, this approach is debatable and raises questions whether the limited amount of information revealed through BO information is as sensitive as transactional data. Also, it is argued that the Court did not provide a detailed analysis on the essence of the rights to privacy and data protection, which resulted in convoluted interpretations of the judgement.⁸¹

3.1.2 The conundrum of transparency

⁷⁷ Case C-817/19 *Ligue des droits humains v. Conseil des ministres* [2022] ECLI:EU:C:2022:491 (PNR case); Joined Cases C 511/18, C 512/18, C 520/18 *La Quadrature du Net and Others* [2020] ECLI:EU:C:2020:791 (Telecommunications data case); See also Case C-203/15 - *Tele2 Sverige* [2016]; Case C-293/12 - *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

⁷⁸ Maíra Martini, 'Why are EU public registers going offline, and what's next for corporate transparency?' (*Transparency International*, 25 November 2022) <www.transparency.org/en/blog/cjeu-ruling-eu-public-beneficial-ownership-registers-what-next-for-corporate-transparency> accessed 05 May 2023.

⁷⁹ *WM and Sovim SA v Luxembourg Business Registers*, para 41.

⁸⁰ Décision no 2016-591 QPC 21 October 2016 <www.conseil-constitutionnel.fr/decision/2016/2016591QPC.htm> accessed 05 May 2023.

⁸¹ Magdalena Brewczyńska, Privacy and data protection vs public access to entrepreneurs' personal data. Score 2:0: How did the ECJ balance the rights to privacy and data protection against transparency of Ultimate Beneficial Owners registries in *WM and Sovim SA v Luxembourg Business Registers*? (*European Law Blog*, 15 December 2022) <www.europeanlawblog.eu/2022/12/15/privacy-and-data-protection-vs-public-access-to-entrepreneurs-personal-data-score-20/> accessed 05 May 2023.

As it has been stated by the EU legislator in Recital 31 of the AMLD5, the purpose of making BO information available to the general public is to increase corporate transparency so as to create a more hostile environment for criminals intending to launder proceeds of crime or finance terrorist activities. Therefore, it can be argued that the principle of transparency is at the heart of this measure. However, according to the CJEU, the principle of transparency, which can be found in Articles 1 and 10 of the TEU and also Article 15 of the Treaty on the Functioning of the EU (TFEU)⁸², is about enabling EU nationals to take a more active role in the democratic processes in their countries which will give the governments of MS more legitimacy.⁸³ Based on this reasoning, the Court found that in the case of BO transparency, the necessary connection with the public institutions is missing as it concerns only transparency related to private entities.

From the reasoning of the Court regarding the principle of transparency, it can be deduced that transparency related to public institutions is necessary in order to establish a system of public supervision so as to detect potential corruption, conflict of interest and other possible illegal acts by public officials. It is because the public officials can have a significant impact on their societies. It is also an indication that the principle of transparency implies that law enforcement authorities and journalists alone cannot detect all the illegal acts.

In our complex modern world, corporate entities are gaining more and more power and already have an ability to have a serious impact on societies. This has been also admitted by the European Commission on several occasions.⁸⁴ Traditionally, the idea behind creating legal persons was creating a better conditions for starting a business, namely by offering personal liability protection and better access to capital.⁸⁵ They were not meant to be used in order to hide the identity of a natural person.⁸⁶ Therefore, one might argue that the general public may have a legitimate expectation of certain level of transparency from private entities due to their significant impact on societies. The limited amount of data revealed in the BO registers might have addressed the said expectation.

Admittedly, at the time when the EU Treaties were adopted, the legislator might have included the principle of transparency related to the activities of

⁸² Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202.

⁸³ WM and Sovim SA v Luxembourg Business Registers, para 60.

⁸⁴ See e.g. Commission, 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (European Commission, 23 February 2022) <www.ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 06 May 2023.

⁸⁵ Maíra Martini, 'Why are EU public registers going offline, and what's next for corporate transparency?' (*Transparency International*, 25 November 2022) <www.transparency.org/en/blog/cjeu-ruling-eu-public-beneficial-ownership-registers-what-next-for-corporate-transparency> accessed 05 May 2023.

⁸⁶ Ibid.

public authorities. However, after the Panama and Paradise papers revealed how private entities are being used to hide illicit funds of corrupt officials, the need for corporate transparency has become widely acknowledged.⁸⁷ In this sense, in the case of *WM and Sovim SA v Luxembourg Business Registers*, the CJEU had an opportunity to recognise the newly emerged need for corporate transparency.

3.1.3 Proportionality test disconnected with the reality

After finding that the BO registers as required by the AMLD4 (as amended) constitute a serious interference with the rights to privacy and data protection, the CJEU proceeded to conduct its three step proportionality test. The test consists of analysing whether the measure in question is appropriate, necessary and proportionate to the objective pursued. The Court found that giving public access to the BO information is neither strictly necessary nor proportionate. However, the Court's analysis is questionable for the following reasons.

First, the Court rejected the Commission's arguments regarding the practical difficulties created by the previous AMLD4 regime whereas third parties could access the BO information by demonstrating a 'legitimate interest'. The Court stated that the existence of practical difficulties in defining a legitimate interest 'is no reason for the EU legislature to provide for the general public to access that information'.⁸⁸ However, the Court did not provide any guidance on how to define the concept of a legitimate interest in this particular context. Admittedly, the Court did state that civil society might have a legitimate interest in accessing the BO information if they are connected with combating money laundering and terrorist financing. This implies that civil society, in particular the press and civil society organisations, may be asked to provide a proof of such connection in order to get an access to BO data. This, in turn, would require case-by-case assessment by the relevant authorities which would inevitably lead to delays in the work of these organisations.

According to the Court, combatting financial crime and terrorist financing is not a priority for the general public or civil society, but it is the responsibility of public authorities and the obliged entities (e.g. credit institutions).⁸⁹ Ideally, well-funded and adequately staffed financial intelligence units and law enforcement agencies should be sufficient to combat criminality. However, any adequate proportionality test needs to keep the reality in mind. According to one of the recent reports prepared by the Financial Action Task Force

⁸⁷ Dominic Thomas-James, "Editorial: The Court of Justice of the European Union and the beginning of the end for corporate transparency?", (2023) Vol. 30 No. 2, p. 305, *Journal of Financial Crime*.

⁸⁸ *WM and Sovim SA v Luxembourg Business Registers*, para 68.

⁸⁹ *Ibid*, para 83.

(FATF) and MONEYVAL, one of the main issues faced by the FIUs in Europe is ‘understaffing and insufficient material resources’.⁹⁰ This is in the light of the increasing number of suspicious activity reports (SARs) submitted by the financial institutions. According to the EUROPOL report, the number of SARs received by the EU FIUs in 2014 was around 1 million and the number continued increasing.⁹¹ The same report claims that only around 10 per cent of these reports were further investigated and only 1 per cent of the proceeds of crime were confiscated.⁹² According to another report prepared by the Association of Certified AML Specialists (ACAMS), the number of SARs received by the FIUs in 2018 in the 12 largest European countries was expected to be higher than 1.6 million. These reports indicate that the volume of work for FIUs and law enforcement agencies have been increasing, which is likely to overwhelm these government entities and affect their efficiency. In this sense, one might argue that the Court might have overlooked the important and necessary role played by investigative journalists, media and civil society organisations in the fight against financial crime and terrorist financing. Some of the evidence on the effectiveness of the general public access to BO will be discussed in the following section of this thesis.⁹³

Another interesting point to be made in this instance is that the Court has explicitly expanded the responsibility to combat money laundering to the obliged entities such as credit and other financial institutions.⁹⁴ Therefore, the Court stated that the unrestricted access to BO information by these obliged entities is justified. Based on this, one can deduce that the CJEU has included private entities as one of the primary actors to combat financial crime and terrorist financing. Therefore, it is unclear why the Court has so easily disregarded the role of other private parties such as the civil society and the general public in the prevention and combatting of financial crimes.

3.2 The efficacy of existing corporate transparency measures in preventing financial crimes

Although public registers of beneficial owners are relatively new phenomena, there is a compelling evidence that they can play a vital role in discovering and tackling financial crimes, tax abuses, corruption and other illicit activities. This is in opposition to the CJEU’s argument during its proportionality

⁹⁰ Council of Europe ‘Urgent need to strengthen financial intelligence units – Sharper tools needed to improve confiscation of illegal assets’ (19 March 2021) Resolution 2365 < www.cbr.ru/Content/Document/File/126308/CoE_2365.pdf> accessed 06 May 2023.

⁹¹ EUROPOL, ‘From Suspicion to Action – Converting financial intelligence into greater operational impact’ [2017] < www.europol.europa.eu/media-press/newsroom/news/global-anti-money-laundering-framework-%E2%80%93-europol-report-reveals-poor-success-rate-and-offers-ways-to-improve> accessed 06 May 2023.

⁹² Ibid.

⁹³ See Chapter 3, Section 2.

⁹⁴ *WM and Sovim SA v Luxembourg Business Registers*, para 83.

assessment that the public access to BO data is not strictly necessary to combat financial crimes. This section will provide some of the instances where the public registers enabled media and civil society organisations to pierce the corporate veil, connect the dots and identify various financial crimes.

One of the important aspects of public registers is that it can help to identify potential cases of conflict of interest. This was the case in 2018 when Transparency International Czech Republic discovered that Andrej Babiš, who was the Prime Minister of the Czech Republic at the time, was also the ultimate beneficiary of the trust funds which owned Agrofert.⁹⁵ Agrofert is an agrochemical conglomerate that Andrej Babiš was the sole owner of prior to 2017. In 2017, when he became the Prime Minister, he claimed that he transferred his shares to two trusts implying that he was not the beneficial owner of the company anymore.⁹⁶ However, with the help of Slovakia's public register of beneficial owners, it was possible to identify that Andrej Babiš was also the ultimate beneficial owner of these two trusts. As a result, he exercised the controlling powers on Agrofert. This was subsequently confirmed by the European Commission's audit.⁹⁷

This was an important finding because Agrofert was a recipient of the EU public funds. According to the EU Parliament's decision, the undertakings which are owned and/or controlled by politicians must not be recipients of EU subsidies.⁹⁸ Therefore, following the discovery, Andrej Babiš faced trials in a fraud case involving the EU subsidies.⁹⁹ Apart from illustrating the benefits of free and public BO register in Slovakia, it also demonstrated the potential danger of ineffective registers since Germany's BO register failed to

⁹⁵ Transparency International, 'Andrej Babiš is our controlling person (beneficial owner), says Agrofert' (22 June 2018), < www.transparency.org/en/press/andrej-babish-is-our-controlling-person-czech-republic > accessed 10 May 2023.

⁹⁶ Transparency International, 'Out in the open: how public beneficial ownership registers advance anti-corruption' (10 September 2021), < www.transparency.org/en/news/how-public-beneficial-ownership-registers-advance-anti-corruption > accessed 10 May 2023. (Transparency International 10 September 2021).

⁹⁷ European Commission, 'Final report on the audit of the functioning of the management and control systems in place to avoid conflict of interest in Czechia', (23 April 2021), < www.ec.europa.eu/regional_policy/en/information/publications/reports/2021/final-report-on-the-audit-of-the-functioning-of-the-management-and-control-systems-in-place-to-avoid-conflict-of-interest-in-czechia > accessed 10 May 2023.

⁹⁸ European Parliament, 'European Parliament resolution of 14 September 2017 on transparency, accountability and integrity in the EU institutions (2015/2041(INI))' P8_TA(2017)0358 (14 September 2017), www.europarl.europa.eu/doceo/document/TA-8-2017-0358_EN.html accessed 10 May 2023.

⁹⁹ Associated Press, 'Former Czech PM, Andrej Babiš, to face trial in EU subsidy fraud case' *The Guardian* (London, 21 March 2022) < www.theguardian.com/world/2022/mar/21/former-czech-pm-andrej-babis-to-face-trial-in-eu-subsidy-case > accessed 13 May 2023.

include Andrej Babiš as a shareholder of the German subsidiary of Agrofert.¹⁰⁰

Another example was when the journalists from the French newspaper *Le Monde* identified that Aécio Neves, who is a prominent politician in Brazil, has a 81-year-old mother who owns a company in Luxembourg which potentially transacted in millions of euros.¹⁰¹ As a result, he is currently being investigated in connection to multiple corruption and money laundering cases.¹⁰² This finding was also possible due to the newly established public register of BO information in Luxembourg as required by the AMLD5.

Apart from revealing the cases of conflict of interest, corruption and tax abuses, the public registers were also useful in revealing the AML breaches of various banks which, in certain cases, even resulted in withdrawing the banks' licenses. One of such examples is the case of Andelskasse in Denmark. It was a bank in Denmark which allegedly laundered more than US\$600 million in 2017-2018.¹⁰³ Having gained access to the bank's list of high-risk clientele, Danish newspaper 'Børsen' conducted its own investigation by using the public register of beneficial owners in Denmark.¹⁰⁴ As a result, it found that a number of bank's clients had connections to various suspicious activities, with some of them being under investigation for money laundering in their own respective countries. These findings raised suspicions regarding the bank's compliance with the requirements of customer due diligence and its reporting obligations.¹⁰⁵

These and other examples demonstrate that despite being around only for a short period of time, public registers of BO data have played a significant role in identifying various financial crimes. Apart from its use in terms of preventing financial crimes, it is also commonly used by the private sector for business reasons. For example, in one of the surveys conducted in 2016, almost all of the surveyed executives (91 per cent) stated that it is important to know the beneficial owner of an entity with which they might do business together.¹⁰⁶ In a report prepared by the Financial Accountability and Corporate

¹⁰⁰ Transparency International 10 September 2021.

¹⁰¹ Svetlana Tiourina, 'Luxembourg Companies Add Evidence for Brazilian Investigations Into Corruption, Crime' *Organized Crime and Corruption Reporting Project (OCCRP)* (11 February 2021), < www.occrp.org/en/openlux/luxembourg-companies-add-evidence-for-brazilian-investigations-into-corruption-crime > accessed 13 May 2023.

¹⁰² *Ibid.*

¹⁰³ Transparency International 10 September 2021.

¹⁰⁴ Tor Johannesson, Johan Christensen, Thomas Hvelplund Askjær, 'En fyrste, spionforbin-delser og en hvidva-sk-mistænkt: Mød milliard-dæ-rerne bag andelskas-sens danske kunder' *Børsen* (12 April 2019) < www.borsen.dk/nyheder/finans/en-fyrste-spionforbindelser-og-en-hvidvaskmistaenkt-mod-milliardaererne-bag-andelskassens-danske-kunder > accessed 13 May 2023.

¹⁰⁵ *Ibid.*

¹⁰⁶ Rob Haden, 'EY's Global Fraud Survey', *LinkedIn* (21 April 2016), < www.linkedin.com/pulse/eys-global-fraud-survey-2016-rob-haden?articleId=6128943671413923841 > accessed 13 May 2023.

Transparency Coalition (FACT Coalition), it states that anonymous corporate structures facilitate illicit commerce and increase reputational and financial risk for companies.¹⁰⁷

The use of BO information by various companies in the private sector has been known for a long time now.¹⁰⁸ Larger companies are known to purchase this information from various paid registries.¹⁰⁹ However, this approach is not sustainable for smaller companies as the cost of it would be disproportionately higher for them.¹¹⁰ Therefore, creating publicly accessible registers of BO data contributes to minimise the cost of customer due diligence while allowing companies to make more informed business decisions. This, in turn, levels the playing field¹¹¹ and enhances market competition.¹¹² Public registers also benefit other sectors such as environmental and social governance where the need for BO information is on the rise.¹¹³ This was also recognised in the conclusions of the World Economic Forum in Davos in 2021 which highlighted the importance of knowing the beneficial owner of companies so as to gain more oversight and make more informed decisions.¹¹⁴

The examples provided above indicate that the public access to BO data has emerged as a ground-breaking tool in the fight against financial crimes and other illegal activities. While the CJEU in *WM and Sovim SA v Luxembourg Business Registers* case argued that it is not strictly necessary to provide such access to the general public, a growing body of evidence suggests otherwise. By providing open access, public registers enabled investigative journalists and other members of civil society to work with the law enforcement agencies

¹⁰⁷ David M. Luna, 'Anonymous Companies Help Finance Illicit Commerce and Harm American Businesses and Citizens', [2019] FACT Coalition < www.thefactcoalition.org/anonymous-companies-help-finance-illicitcommerce-and-harm-american-businesses-and-citizens > accessed 13 May 2023.

¹⁰⁸ Sadaf Lakhani, 'The use of beneficial ownership data by private entities' [2021] Cognitiks and Open Ownership, p.6 < www.openownership.org/en/publications/the-use-of-beneficial-ownership-data-by-private-entities/ > accessed 13 May 2023.

¹⁰⁹ Ibid.

¹¹⁰ Petrus van Duyn, Jackie Harvey, and Liliya Gelemerova, *The Critical Handbook of Money Laundering* (London: Palgrave Macmillan, 2018), 254.

¹¹¹ The B Team 'Ending anonymous companies: Tackling corruption and promoting stability through beneficial ownership transparency', [2015] p. 8-9. < www.bteam.org/assets/reports/B-Team-BusinessCase-Ending-Anonymous-Companies-Report.pdf > accessed 13 May 2023.

¹¹² Tymon Kiepe and Eva Okunbor, 'Beneficial ownership data in procurement', [2021] Open Ownership < www.openownership.org/uploads/OO%20BO%20Data%20in%20Procurement.pdf > accessed 13 May 2023.

¹¹³ RMF, 'The ESG Due Diligence and Transparency Report on Extractive Commodity Trading', [2021] < www.responsibleminingfoundation.org/app/uploads/EN_RMF_DDAT_TRADING_2021_WEB.pdf > accessed 13 May 2023.

¹¹⁴ LexisNexis, 'Companies at Davos Urged to Meet ESG Expectations after the Pandemic', [2021] < www.internationalsales.lexisnexis.com/sg/news-and-events/companies-at-davos-urged-to-meet-esg-expectations-after-the-pandemic. > accessed 13 May 2023.

in deterring criminals from exploiting complex corporate structures to conceal their illicit activities.

4 What is the future for the corporate transparency in the EU?

Given the CJEU's ruling in *WM and Sovim SA v Luxembourg Business Registers* case, the future of corporate transparency in the EU seems to be at crossroads. The ruling prompted a need to revisit and revise the EU's AML legal framework in order to address the concerns raised by the CJEU. Such revision would necessarily include clarifying the balance between transparency and privacy/data protection rights. Also, current situation requires the Commission to be creative when it comes to drafting the forthcoming AML regulation in order to take into consideration interests of both pro-transparency and pro-privacy groups. In this section, I will explore some of the factors which could shape the future of corporate transparency in the EU.

4.1 A new anti-money laundering legislative package

In July 2021, the Commission announced a new legislative package related to the AML and countering the financing of terrorism.¹¹⁵ The new package includes, inter alia, a proposal for a new AML Regulation (AMLR) and a proposal for the 6th AML Directive (AMLD6). Both of these proposals for the legal instruments have provisions regarding the BO transparency which build on the AMLD4 (as amended). However, since these proposals were drafted prior to the CJEU's ruling in *WM and Sovim SA v Luxembourg Business Registers* case, they do not take the CJEU's concerns into account. Nevertheless, some of their provisions affecting the corporate transparency do not directly conflict with the Court's ruling and thus, they may appear in the forthcoming AML legislations.

The proposal for the AMLR, which aims to harmonise some of the rules across the EU, does not have any provisions regarding the general public access to BO data. However, proposal for the AMLR offers a harmonised definition of the concept of a "beneficial owner" and lists precise requirements as to what information should be collected in each case.¹¹⁶ The Recitals 64-69 of the text of the AMLR proposal explain that the level of BO transparency

¹¹⁵ Commission, 'Anti-money laundering and countering the financing of terrorism legislative package', (European Commission, 20 July 2021), < www.finance.ec.europa.eu/publications/anti-money-laundering-and-countering-financing-terrorism-legislative-package_en > accessed 13 May 2023.

¹¹⁶ Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2021] COM/2021/420 final. (AMLR Proposal); See e.g. Chapter IV of AMLR Proposal.

regime differs across the EU which, subsequently, hampers the intended level of transparency.¹¹⁷ While analysing the proportionality *stricto sensu* of the AMLD4's (as amended) measure, the CJEU stated that the rules regarding the disclosure of BO data are not sufficiently defined and thus, they do not meet the requirements of clarity and precision.¹¹⁸ In this sense, the proposal for the harmonised definition of a “beneficial owner” and precise disclosure requirements addresses one of the CJEU's concerns expressed in its ruling. Therefore, it is likely to be in the final version of the AMLR when it is adopted.

The text of the proposal for AMLD6 contains provisions regarding the general public access to the BO information.¹¹⁹ Specifically, Article 12 of the proposed AMLD6 states that the EU MS must provide access to such information to any member of the general public. This is in line with the requirements of the AMLD4 (as amended). However, given the recent ruling of the CJEU, the EU legislator has to revisit and revise these provisions in a way that could strike a more balanced approach with regards to the fundamental rights and the EU general interest in combatting financial crimes.

4.2 Adopting a risk-based approach

One of the ways to strike such balance might be adopting a risk-based approach to corporate transparency. The FATF defines the risk-based approach as identifying, evaluating and understanding the money laundering risk which one is exposed to, and taking appropriate measures depending on the level of that risk.¹²⁰ In the context of corporate transparency, this could imply assessing and categorizing companies based on their risk profiles which would then determine the level of disclosure requirements. Such risk-based approach could offer a more nuanced understanding of the need for corporate transparency.

For instance, companies which operate in sectors which are historically more prone to money laundering, tax evasion or corruption, or those with a history

¹¹⁷ *Ibid.*

¹¹⁸ *WM and Sovim SA v Luxembourg Business Registers*, para 82.

¹¹⁹ 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 purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849 [2021] COM/2021/423 final. (AMLD6 Proposal). See e.g. Chapter II of AMLD6 Proposal.

¹²⁰ FATF, ‘Risk-Based Approach for the Banking Sector’, [2014] < www.fatf-gafi.org/en/publications/Fatfrecommendations/Risk-based-approach-banking-sector.html > accessed 14 May 2023.

of non-compliance could be subject to higher level of transparency.¹²¹ It could mean that these companies' beneficial owners data would be available to the general public and/or their additional details of the beneficial owners might be provided to competent authorities and obliged entities. It could also mean that they might be subject to more frequent reporting and/or monitoring by the relevant authorities. On the other hand, companies which can be deemed as low-risk (e.g. small family-owned companies without any cross-border operations or connections to any high-risk industries or high-risk jurisdictions from a money laundering perspective) could be subject the lower level of transparency requirements.

By adopting a risk-based approach, the EU legislator could achieve a more adequate balance between promoting corporate transparency and protecting the fundamental rights to privacy and data protection. It is because such approach would be more tailored to the unique risks inherent to various types of business. This could also influence the CJEU's proportionality assessment. The CJEU considered that the general public access to BO data is not strictly necessary. However, should the EU legislator provide such access only with regards to higher-risk companies, the CJEU might possibly reconsider its stance towards the general public.

4.3 Legitimate interest and direct access

After the CJEU's ruling in *WM and Sovim SA v Luxembourg Business Registers* case, many pro-transparency groups have argued that the ruling was blow to the fight against financial crimes and undermined many years of progress.¹²² It is likely that these groups will continue their push towards greater BO transparency in the EU. This, in turn, may influence the policymakers in the EU to look for alternative approaches in order to ensure that these transparency groups have access to the BO information without violating privacy and data protection rights.

One way to uphold transparency would be to allow civil society organisations, journalists and possibly foreign competent authorities to have a direct access

¹²¹ See e.g. Veriff, '7 high-risk customer types and how to identify them' (Veriff, 6 April 2023), < www.veriff.com/blog/7-high-risk-customer-types-and-how-to-identify-them > accessed 14 May 2023.

¹²² Dominic Thomas-James, "Editorial: The Court of Justice of the European Union and the beginning of the end for corporate transparency?", (2023) Vol. 30 No. 2, p. 307, *Journal of Financial Crime*; See also Transparency International, 'EU Court of Justice Delivers Blow to Beneficial Ownership Transparency' (22 November 2022), < www.transparency.org/en/press/eu-court-of-justice-delivers-blow-to-beneficial-ownership-transparency > accessed 14 May 2023.

to the BO registers.¹²³ This would require a special access mechanism whereas the aforementioned actors may need to go through a one-time verification process and provide relevant documentation to prove their watchdog role in preventing money laundering. This in contrast to the case-by-case approach as it was the case prior to the AMLD5. As it was documented by Transparency International, legitimate interest access regime which was established by the AMLD4 (before amendment) created a number of difficulties (e.g. frequent denials to access and redactions of the significant portion of the information) for civil society organisations and investigative journalists in accessing the BO data.¹²⁴ Thus, the above-mentioned direct access regime might allow these actors to exercise their role as watchdogs without constraints. This is in line with the CJEU's argument that civil society organisations and the press have a legitimate interest in accessing the public registers.¹²⁵

Undoubtedly, the CJEU's ruling in *WM and Sovim SA v Luxembourg Business Registers* case has added a degree of ambiguity to the future direction of corporate transparency in the EU. The EU legislator has a task of finding a delicate balance between the two rivalling principles of transparency and privacy. As policymakers, various stakeholders and legal experts around the EU continue to discuss the best ways to achieve such balance, these discussions may lead to innovative regulatory approaches.

¹²³ Maíra Martini, 'Why are EU public registers going offline, and what's next for corporate transparency?' (*Transparency International*, 25 November 2022) < www.transparency.org/en/blog/cjeu-ruling-eu-public-beneficial-ownership-registers-what-next-for-corporate-transparency > accessed 05 May 2023.

¹²⁴ Maíra Martini, Maggie Murphy, 'G20 Leaders or Laggards? Reviewing G20 Promises on Ending Anonymous Companies' (*Transparency International*, 19 April 2018) < www.transparency.org/en/publications/g20-leaders-or-laggards > accessed 14 May 2023.

¹²⁵ *WM and Sovim SA v Luxembourg Business Registers*, para 74.

5 Conclusion

The quest for a harmonious balance between corporate transparency and the rights to privacy and data protection is not an easy endeavour which requires innovative thinking, robust legal and policy tools. After a series of well-known international scandals revealed the dangers of anonymous corporate structures, transparency campaigners have become a strong force in advocating corporate transparency. It has been primarily because of the increased public awareness of the need for greater transparency that the AMLD5, with its requirement of public BO registers, was adopted considerably unopposed.¹²⁶ Predictably, it has raised questions regarding the interference of AML measures, specifically public registers of beneficial owners, with individuals' fundamental rights to privacy and data protection.

The CJEU's ruling in *WM and Sovim SA v Luxembourg Business Registers* case has sparked important discussions on this issue and opened up avenues for new solutions. Specifically, the CJEU's balancing exercise and its subsequent proportionality assessment seems to have created an element of uncertainty with regards to the future of corporate transparency in the EU. For example, the Court did not provide a detailed analysis on the matter of sensitivity of BO data, but sufficed to say that it is capable of revealing 'the state of the person's wealth and the economic sectors, countries and specific undertakings in which he or she has invested'.¹²⁷ It would be important to understand the Court's reasoning as to how it reached this conclusion since it was later used to establish that the disclosure of such data severely interfered with the fundamental rights of the citizens.

It has also been argued that in conducting the proportionality test, the Court's arguments were disconnected with the reality of combatting financial crimes. For example, the Court has easily disregarded the Commission's argument regarding practical difficulties in applying the concept of 'legitimate interest'. Although the Court stated that, inter alia, certain civil society organizations and the press have a legitimate interest in accessing the BO data, it did not offer any practical recommendations as to how and based on what criteria 'legitimate interest' should be determined. Another argument in this regard is that the Court seems to have overlooked the important role played by the investigative journalists and civil society in combatting financial crimes. Given the limited resources available to the competent authorities in the EU, as

¹²⁶ Dominic Thomas-James, "Editorial: The Court of Justice of the European Union and the beginning of the end for corporate transparency?", (2023) Vol. 30 No. 2, p. 307, *Journal of Financial Crime*.

¹²⁷ *WM and Sovim SA v Luxembourg Business Registers*, para 41.

demonstrated by several examples, civil society has played an important role in finding and preventing potential financial crimes.

However, this thesis has not merely critiqued the status quo. It has also explored alternative approaches for achieving a more balanced compromise that can uphold both objectives without undermining either. One of the provided suggestions is to adopt a risk-based approach with regards to BO transparency. It implies assessing and categorizing companies based on their risk profile from a money laundering perspective. Subsequently, the level of transparency required would depend on the level of risk associated with the company. Another proposal discussed in this thesis is allowing civil society organizations, the press and other interested parties to have a direct access to the BO information after a one-time verification process whereas they demonstrate their watchdog status and legitimate interest. This would be in contrast to assessing their legitimate interest case-by-case which would necessarily delay the work of these organizations.

It remains to be seen how the Commission will address the CJEU's concerns in the forthcoming AMLR and AMLD6. It will certainly require a cooperation with a wide range of stakeholders, such as credit and other financial institutions, regulators, data protection authorities and civil society organizations. Ultimately, the goal is to establish a fair, accountable and transparent corporate environment that upholds the fundamental rights of the citizens without jeopardizing the broader societal need in the EU to prevent and combat financial crimes.

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