

Jersey and Guernsey to delay public access to beneficial ownership records following ruling by the Court of Justice of the European Union

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The European Union has adopted various anti-money laundering directives in recent years. The Fourth Anti-Money Laundering Directive requires member states to implement central registers of beneficial owners of companies, and certain other entities. Pursuant to the Fifth Anti-Money Laundering Directive, each EU member state must make the information stored on its central register publicly accessible.

In consequence of these directives, Luxembourg has, since 2019, maintained a register of beneficial ownership with unrestricted public access.

Actions were brought in the Luxembourg District Court, on the basis that this level of unlimited access to personal information endangered the privacy of the respective beneficial owners. The Luxembourg District Court referred this case to the Court of Justice of the European Union for preliminary ruling.

Ruling by the Court of Justice of the European Union on public registers of beneficial ownership

Further to the proceedings filed in Luxembourg, the Court of Justice of the European Union (CJEU) provided its judgment on 22 November 2022 with respect to the interpretation of the Anti-Money Laundering Directives in view of an individual's right to privacy enshrined in the Charter of Fundamental Human Rights.

The CJEU ruled that such unrestricted public access to information on the beneficial ownership register was not proportionate and constituted a violation of human rights, in particular, the rights to respect for private life and to the protection of personal data.

This type of unlimited public access will therefore need to be reviewed and an alternative approach taken going forward.

As a direct consequence of the CJEU judgment, multiple EU countries have taken down access to their "public" registers to include Germany, Ireland and the Netherlands. Neither Jersey nor Guernsey are part of the EU and therefore the judgment has no direct application to either island. Nonetheless the principles behind the decision are likely to be relevant and, on the application of human rights and data protection legislation, persuasive noting that both islands have enshrined the European Convention on Human Rights and the General Data Protection Regulation into respective domestic legislation.

Position on registers of beneficial ownership in Jersey and Guernsey

For companies, foundations, and partnerships with legal personality, this is not a new requirement in Jersey or Guernsey. Entities registered in Jersey and Guernsey were already required to provide details of beneficial ownership on establishment. Indeed a central register of beneficial ownership has been in place in both islands for some years now and rely upon fiduciary service providers and resident agents to retain full details of beneficial ownership and control and to make such information available to the companies registry or certain bodies (including the regulator in each island) upon request.

In terms of implementation of the Fourth and Fifth Anti-Money Laundering Directives the position in Jersey and Guernsey has been a phased approach to the implementation of more detailed beneficial ownership registers and, fundamentally, public access.

Both Jersey and Guernsey have completed the initial stage, and currently maintain beneficial ownership registers which are accessible by law enforcement and certain other authorities and regulators. The second stage was set to complete by the end of 2022 and it was intended that legislation would be brought into force to provide access to beneficial ownership information to financial services businesses as well as certain other approved businesses for customer due diligence purposes.

The last phase of the implementation, the introduction of public access to the information on the beneficial ownership registers in line with the EU Anti-Money Laundering Directives, was anticipated to be completed by 2023.

Recent decision by Jersey and Guernsey following the CJEU Judgment

Following this recent judgment by the CJEU, Jersey and Guernsey, in conjunction with the Isle of

Man, have given a joint statement explaining the decision to postpone the introduction of legislation to provide access to obliged entities for the purpose of conducting customer due diligence. The aim of this delay is to reassess the impacts of such legislation as well as to take specialist legal advice. Subject to this, it is intended that the legislation will come into force as soon as possible.

Similarly, with respect to opening access to the beneficial ownership registers to the public, the statement confirmed that "In respect of extending access beyond obliged entities, we intend to obtain expert legal advice on all relevant issues and, in due course, intend to review the public commitment in line with that advice and any recent development of international best practice."

It is unknown what the approach will be going forward, and it may be that in the future public access to beneficial ownership registers will be granted, but it is anticipated this will only be upon demonstration of a legitimate interest in order to provide a greater balance between transparency and privacy.

Ogier comment

This is nothing new for Jersey and Guernsey which have long collated and maintained accurate beneficial ownership data. The fact that the data on both registers is verified by regulated fiduciary service providers in both islands as to its accuracy and thereafter monitored and updated on any changes in beneficial ownership is of fundamental importance. All of these registers stand or fall on the accuracy of the data actually held. Further, each registry itself is staffed by experts mandated to keep the data accurate.

Registers which hold inaccurate data on beneficial ownership on a self-reporting basis with no checks and balances in place are plainly not going to be as effective in combating financial crime.

Furthermore, the empirical evidence and data supporting the notion that providing "public access" to these registers has a positive impact in combatting financial crime is substantially lacking.

Against this backdrop, Jersey and Guernsey are clearly considering their options carefully, as is to be expected from well regulated, reputable jurisdictions.

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