

22 November 2022

## European Court of Justice puts a stop to a publicly accessible UBO-register



**Update 5 June 2023** - In response to the Court's judgement, the Minister of Finance published on 30 May 2023 the draft bill 'Amendment Act Restricting Access to UBO-Registers'. The internet consultation contains a proposal to limit access to the Dutch 'regular' UBO-registers and the Dutch Trust register. This restriction means that access is only maintained to the UBO-registers:

- a. parties to whom mandatory access must be arranged on the basis of the Anti-Money Laundering Directive, which means: the competent authorities and FIU's, the reporting entities in the context of the customer due diligence that they must carry out under the Anti-Money Laundering Directive, any natural person or legal entity that can demonstrate a legitimate interest and, - in the case of the UBO-register for trusts and similar legal arrangements - natural and legal persons insofar as it concerns legal arrangements with a majority interest in a legal entity established outside the EU;
- b. parties that are given access in the interest of compliance with sanctions and their supervision and enforcement;
- c. administrative bodies for which it is necessary to trace UBOs in connection with a statutory or European law obligation; and
- d. parties that are registered in the UBO-registers, insofar as it concerns their own data.

The public internet consultation closes on 28 June 2023.

**N.B.:** This draft bill does not change anything with regard to the obligations for parties to register or consult UBO-information.

# European Court of Justice puts a stop to a publicly accessible UBO-register

**On 22 November 2022, the European Court of Justice rendered its judgement on the compatibility of public access to UBO-information with the fundamental right to protection of private life and the right to protection of personal data. This judgement was issued in response to preliminary questions raised by the Luxembourg court. The ECJ declares the currently prescribed public accessibility of UBO-information in the UBO-register invalid.**

## The UBO-register: what is it?

The UBO-register is a register that contains certain personal details of ultimate beneficial owners (**UBOs**) of Dutch corporate entities and other legal entities or arrangements. The implementation of a UBO-register is one of the measures that is included in the (amended) fourth EU Anti-Money Laundering Directive (**the Directive**). All Member States of the European Union are required to implement a UBO-register.

The Dutch UBO-register for corporate entities and other entities entered into force on 27 September 2020 and is controlled by the Chamber of Commerce. Next to this 'regular' UBO-register, a separate UBO-register for trusts and similar legal arrangements entered into force on 1 November 2022. In this UBO-register certain personal information of the UBOs of trusts and similar legal arrangements, including the Dutch mutual fund (FGR), is included.

## What UBO-information is publicly accessible?

Part of the UBO-information in the UBO-register is publicly accessible. Another part of the information is only accessible to certain competent authorities and the Financial Intelligence Unit.

### Publicly accessible UBO-information

- Surname and last name;
- Month and year of birth;
- Nationality;
- Country of residence; and
- Nature and size of the beneficial interest held.

### Not publicly accessible UBO-information

- Citizen Service Number (Burgerservicenummer) / foreign tax identification number;
- Date and place of birth;
- Address;
- Email (in case of the UBO-register for trusts);
- Copy of passport / ID; and
- Documentation supporting the conclusion that the individual qualifies as UBO and the nature and size of the beneficial interest held.

## Can UBO-information be shielded?

Based on the Directive, Member States may provide for public access to UBO-information to be shielded, on a case-by-case basis, if the UBO is a minor or legally incapable, or if the publication of UBO-information would expose the UBO to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation. The cases in Luxembourg concerned (i) the compatibility of the public access to the UBO-register with the right to protection of personal data and (ii) a clarification of what is considered a 'disproportionate risk'.

In the Netherlands, the UBO-information of a minor or person who is legally incapable is shielded. In other cases, UBO-information will only be shielded if a UBO is under 'police protection': this is the case if the UBO is under the protection of the Public Prosecutor of the National Coordinator for Counterterrorism and Security.

## What is the judgement of the European Court of Justice?

The ECJ declares the prescribed public accessibility to the UBO-register invalid. The ECJ finds the public access to UBO-information to constitute a serious interference with the fundamental rights to respect private and family life and the right to protection of personal data (hereafter: **fundamental rights**), which interference is not limited to what is strictly necessary and disproportionate to the objective pursued.

A restriction of fundamental rights can be justified if the measure concerned pursues an objective of general interest and the measure is limited to what is strictly necessary and is not disproportionate. The Directive aims to combat money laundering and terrorist financing. Public accessibility to the UBO-register aims to contribute to this objective by increasing transparency on beneficial owners of companies and other entities.

The ECJ finds that the restriction of fundamental rights due to the public accessibility of UBO-information goes beyond what is necessary and proportionate in view of the objectives pursued. The public access to information in the UBO-register makes it for instance possible to draft a profile, which profile can be used for purposes other than the objective of the Directive.

The fact that mandatory public accessibility was introduced because the European Commission found it difficult to determine what should be considered a 'legitimate interest' in case of an alternative approach to allowing insight in UBO-information is, according to the ECJ, insufficient to justify public accessibility.

## What is the impact of the judgement to the Dutch UBO-registers?

In line with the Directive, certain information in the Dutch UBO-registers is accessible to the public. This public accessibility of UBO-information seems no longer viable based on the judgement of the ECJ. It is now up to the legislature to take action on this. In the meantime, however, the Dutch Minister of Finance has announced that the Chamber of Commerce - that manages the UBO-register - will until further notice no longer provide extracts from the UBO-register. It is unknown what this means with respect to client identification requirements of obliged entities under the Dutch Anti-Money Laundering and Anti-Terrorist Financing Act (e.g. banks, lawyers, civil-law notaries, accountants and tax advisers).

The judgement does not free companies and entities from their requirement to timely register accurate UBO-information. Companies and entities that already registered their UBOs could consider amending the UBO-registration and request for the shielding of UBO-information. Newly incorporated companies, entities or constructions can request for the shielding of UBO-information upon their first registration. If so requested, the request for the shielding of UBO-information could be motivated by referring to the judgement of the ECJ.

The judgement of the ECJ may also have implications for other European regulations that provide for public disclosure of certain (personal) data. What the scope of the judgement will be for those regulations is not clear at this time.

## Contact

Do you have any questions about the UBO-register? Maybe an informal introductory meeting would be of interest? Please contact your Loyens & Loeff adviser or get in touch with one of our dedicated advisers in the [Family Owned Business & Private Wealth](#) department.

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