Foundation for
Family Businesses and Politics

Transparency Register and Data Protection

What are the implications of the CJEU ruling on the removal of unrestricted access to the transparency register?

A special publication by the
Foundation for Family Businesses and Politics

Summary of main results

The entire study in German language is available here:

1. The CJEU ruling on the transparency register handed down in November 2022 (CJEU, judgment of 22/11/2022, C-37/20, C-601/20 (WM and Sovim SA/Luxembourg Business Registers), ECLI:EU:C:2022:912) confirms the previously expressed criticism of making the register more accessible as a result of the EU lawmakers' amendment decided in 2018. No longer making access for non-governmental players conditional on a legitimate interest and thus effectively giving access to everyone disregards the fundamental rights to respect for private life and the protection of personal data protected in the Charter (Art. 7 and Art. 8 of the Charter of Fundamental Rights (CFREU)).

The requirement for the existence of a legitimate interest for public access from the Anti-Money Laundering Directive of 2015 is revived.

2. At the level of European Union law, the direct consequence of the ruling is initially only the ineffectiveness of the provision in the Amending Directive to the Anti-Money Laundering Directive of 2018, which previously provided for limitless access to the transparency register for the public. With this provision becoming ineffective, it is necessary to revert to the old provision of the Anti-Money Laundering Directive of 2015, which made access conditional on the existence of a legitimate interest.
3. This requirement rightly works in both directions. The Member States are required to grant access if there is a legitimate interest but are at the same time prevented from permitting access without proof of the legitimate interest. The same result also arises from the application of the General Data Protection Regulation (GDPR), which constitutes the legal framework for the application and implementation of the Anti-Money Laundering Directive in national law. Granting access to everyone contradicts Art. 5 (1) c GDPR, which puts the principle of proportionality into concrete terms and is to be interpreted in light of the values enshrined in Art. 7 and Art. 8 CFREU. With regard to the primacy of European Union law, the office keeping the register in Germany – Bundesanzeiger Verlag GmbH – is thus in any event obliged to make access by non-governmental bodies conditional on proof of a legitimate interest. Further restrictions arise from national constitutional law (see no. 5 below).
4. The access to the transparency register ordered by the Amending Directive of 2018 was implemented in Germany by Section 23 (1) no. 3 of the German Money Laundering Act (GwG), which grants access to all members of the public. This provision disregards the aforementioned requirements of European Union law, i.e. both the requirement of binding access to a legitimate interest and the principle of proportionality set out in the GDPR (see no. 3 above). As a result, this means that access to the transparency register is also only to be granted when the applicant has a legitimate interest. The GwG in its current version thus cannot be applied in compliance with EU law.

5. When implementing the requirements of the Anti-Money Laundering Directive, German lawmakers also need to observe the standards of national constitutional law. This includes the principles of legal clarity and certainty for infringements of data privacy. This disregards the current version of Section 23 of the GwG because the wording does not make access by the public conditional on a legitimate interest and is thus too broad. Furthermore, important questions for the protection of the data subjects' fundamental rights are left to be regulated by the competent ministry. Section 8 of the German Regulation on the Inspection of the Transparency Register (TrEinV) originally contained a corresponding protective regulation, which became obsolete on access being granted to the transparency register and was repealed in 2021. The applicable law thus does not provide a legal basis for accessing the register, even when a legitimate interest is proven.

The German Money Laundering Act does not currently offer any legal basis for access to the register.

6. The European Commission justified the removal of the access requirement of legitimate interest by stating that the term had caused practical difficulties due to its vagueness. As a result of the CJEU's decision, the term should now have gained a clear shape, meaning that this objection can no longer be seriously raised. Anti-money laundering and countering the financing of terrorism is primarily the responsibility of government bodies and credit and financial institutions, meaning that the term legitimate interest tends to be understood narrowly. Both primary law evaluations and the recitals to the Directive leave no real doubt that a legitimate interest is to be assumed in the case of the press and NGOs provided that they are pursuing the purposes of the Directive with a specific request for information.
7. The legitimate interest in investigating the crimes of money laundering and the financing of terrorism must, in light of the CJEU ruling, be weighed against the fundamental rights of individuals who are entered in the transparency register as beneficial owners. In accordance with its function, the transparency register records all EU citizens who hold a stake of more than 25 percent in a company and in comparable legal entities. The vast majority of these individuals are law-abiding and have the legitimate expectation that the personal data collected will be processed with the due degree of diligence and will only be processed for the purpose for which it was collected. The protection of these fundamental rights positions against improper use of the data must be guaranteed by procedural safeguards. The current regulation lacks the necessary safeguards. The GwG therefore requires a revision compliant with fundamental rights.
8. The identification and registration of the individuals who access the data serve as procedural safeguards against data misuse. The search history should be permanently stored in order to enable an investigation, if necessary, if it should subsequently become apparent that the data was used improperly. The individuals accessing the data should also be reminded of their due diligence obligations under data protection law through a declaration of commitment to be signed and should particularly commit to not using the data accessed improperly.

Risk of data misuse must be curbed by procedural safeguards.

Plausible statement of the legitimate interest required; confirmation by declaration in lieu of an oath advisable.

9. Because the legitimate interest is determined in relation to the purpose of the Directive (anti-money laundering and countering the financing of terrorism), the individuals accessing the data should at least plausibly state their legitimate interest to the body keeping the register. In addition, it is advisable to have a provision under which the statement of the legitimate interest is confirmed by a declaration in lieu of an oath. The consequences under criminal law of a false declaration in lieu of an oath indirectly result in increased protection for the data subject against misuse of the data.

10. In the interest of an effective research option, there must not, on the other hand, be excessive barriers to use of the transparency register. Access should therefore be enabled promptly in the event of a suitably legitimate request. A fee may only be charged in the amount of the administrative costs actually incurred. This will indirectly contribute to reducing the burden on the authority keeping the register because willingness to pay a moderate administration fee underlines the seriousness of the interest. In the case of improper use, the data subjects must, however, be granted a subjective right to clarification and, if appropriate, damages.

Publication details

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