

Vaduz, 20 December 2023

REGISTERED LETTER

EFTA Court
1, Rue du Fort Thüngen
1499 Luxembourg
Luxembourg

Request for an advisory opinion (VGH 2023/110)

Dear Sirs,

At the closed sitting of 15 December 2023, the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) ruled that in the administrative appeal in case VGH 2023/110 pending before it (appellant: Ms TC, resident in Malaysia, represented by Amann Partners Rechtsanwälte, Industriestrasse 16, LI-9487 Gamprin-Bendern) proceedings are to be stayed and that a reference be made to the EFTA Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) with a request for an advisory opinion.

Facts

By letter of 1 March 2023 and supplementary letter of 30 March 2023, the appellant requested the Office of Justice, Foundation Supervision and Anti-Money Laundering Division, (*Amt für Justiz, Abteilung Stiftungsaufsicht und Geldwäschereiprävention*) to disclose to her the full data of all (independent and dependent) legal entities in relation to which the appellant herself and/or her father VC and/or her brother BC and/or Mr NN are registered as beneficial owner(s).

By letter of 26 April 2023, the Office of Justice, Foundation Supervision and Anti-Money Laundering Division, forwarded the request for disclosure to the VwbP¹ Commission, which decides in first instance on requests for disclosure concerning non-unattached legal entities.

¹ Translator's note: VwbP is the abbreviation for *Verzeichnis wirtschaftlich berechtigten Personen* (register of beneficial owners).

By decision of 11 May 2023, the VwbP Commission pronounced as follows:

The request for disclosure is not granted.

It explained, as reasoning, that, simply by virtue of statutory requirements, the request for disclosure cannot succeed as it must identify by firm name or name the specific legal entities whose data is to be disclosed (Article 17 of the VwbPG).

By order of 15 May 2023, the Office of Justice, Foundation Supervision and Anti-Money Laundering Division, ruled on the request for disclosure, to the extent that it concerns unattached legal entities, as follows:

1. *Disclosure of the data is refused.*
2. *The applicant shall pay the costs of the procedure consisting in a decision fee of CHF 10.00.*

This decision was reasoned on the basis that, in her request, the appellant – contrary to Article 17(2)(b) of the VwbPG – had not specified a firm name or a name of an unattached legal entity whose data was to be disclosed. From the circumstance that, pursuant to Article 30(5) of the Money Laundering Directive, persons or organisations shall be permitted to access the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held it could not be concluded that an applicant also had the right to the naming of the firm name or name of all the legal entities in which this or other persons had a beneficial interest.

By decisions of 2 August 2023 in cases VBK 2023/46 and 2023/47, the Board of Appeal for Administrative Matters (*Beschwerdekommision für Verwaltungsangelegenheiten* (VBK)) refused the appeals brought against the decision of the VwbP Commission of 11 May 2023 and of the order of the Office of Justice of 15 May 2023. Against these decisions, the appellant brought an appeal to the Administrative Court.

Liechtenstein legal framework

The Act of 3 December 2020 on the Register of Beneficial Owners of Legal Entities (*Gesetz vom 03. Dezember 2020 über das Verzeichnis der wirtschaftlich berechtigten Personen von Rechtsträgern* (VwbPG)), Liechtenstein Legal Gazette (LGBL.) 2021 No 33, serves to implement Articles 30 and 31 of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

Chapter IV. C. of the VwbPG governs the disclosure of data. The provision at issue in the present case is worded as follows:

Article 17
Disclosure of data to third parties

- 1) *Domestic and foreign persons and organisations may for a fee request from the Office of Justice that the data of unattached legal entities specified in Annex 1 entered in the Register be disclosed.*
- 2) *The application referred to in paragraph 1 shall be submitted to the Office of Justice. It shall contain the following information and documents:*
 - a) *information on the applicant:*
 1. *in the case of natural persons: surname, first name and address;*
 2. *in the case of legal entities and organisations: firm name, name or designation and address, purpose and domicile as well as the surname and first name of the natural person authorised to represent it; the power of representation must be proven;*
 - b) *firm name or name of the unattached legal entity specified in Annex 1 whose data are to be disclosed; and*
 - c) *a statement that the data from the Register are required for the prevention of money laundering, predicate offences to money laundering and terrorist financing.*
- 3) *...*
- 4) *Domestic and foreign persons and organisations may for a fee request from the Office of Justice in relation to legal entities that cannot be deemed unattached legal entities specified in Annex 1 that the data entered in the Register be disclosed. This shall not apply to the data of founders and protectors who do not exercise control of a non-unattached legal entity specified in Annex 1. This shall be without prejudice to Articles 13, 15 and 16.*
- 5) *The application referred to in paragraph 4 shall be submitted to the Office of Justice. It shall contain the following information and documents:*
 - a) *information on the applicant:*
 1. *in the case of natural persons: surname, first name and address;*
 2. *in the case of legal entities and organisations: firm name, name or designation and address, purpose and domicile as well as the surname and first name of the natural person authorised to represent it; the power of representation must be proven;*
 - b) *firm name or name of the legal entity whose data are to be disclosed;*
 - c) *information on the intended use of the information requested; and*
 - d) *proof of a legitimate interest as specified in paragraph 6 or of a controlling interest as specified in paragraph 7.*

6) – 9) ...

10) *The Office for Justice shall forward the application referred to in paragraph 4, including the associated documents referred to in paragraphs 5 and 8, to the VwbP Commission for a decision.*

European legal framework

To implement the requirements of the Fourth Money Laundering Directive (Directive (EU) 2015/849), the Act on the Register of Beneficial Owners of Domestic Legal Entities (*Gesetz über das Verzeichnis der wirtschaftlichen Eigentümer inländischer Rechtsträger* (VwEG)) was established in Liechtenstein, which entered into force on 1 August 2019. Shortly after the implementation of Article 30 and Article 31 of the Fourth Money Laundering Directive by way of the VwEG the requirements of the Fifth Money Laundering Directive (Directive (EU) 2018/843) in relation to Article 30 and Article 31 had to be incorporated into Liechtenstein law. These provided for more extensive obligations in relation to the content and transparency of the register of beneficial owners. By Decision of the EEA Joint Committee No 63/2020 of 30 April 2020, the incorporation of the Fifth Money Laundering Directive in the EEA Agreement was agreed.

By way of Article 1(15)(c) of Directive (EU) 2018/843, Article 30(5) of Directive (EU) 2015/849 was amended as follows:

Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:

- (a) competent authorities and FIUs, without any restriction;*
- (b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;*
- (c) any member of the general public.*

The persons referred to in point (c) shall be permitted to access at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held.

Member States may, under conditions to be determined in national law, provide for access to additional information enabling the identification of the beneficial owner.

That additional information shall include at least the date of birth or contact details in accordance with data protection rules.

By judgment of 22 November 2022 in Joined Cases C-37/20 and C-601/20, the European Court of Justice (ECJ) declared Article 1(15)(c) of Directive (EU) 2018/843 invalid in so far as it amended point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849 in such a way that Member States must ensure that information on the beneficial ownership is accessible in all cases to any member of the general public.

It follows from this that point (c) of the first subparagraph of Article 30(5) as provided for in Directive (EU) 2015/849 applies once again. This is worded as follows:

(c) any person or organisation that can demonstrate a legitimate interest.

The arguments advanced

According to the appellant, it is suspected that assets of family C and/or the C group of companies have been diverted via private and business offshore structures to the detriment of the appellant. The data sought by the requests of 1 and 30 March 2023 will facilitate the investigation of property offences and money laundering. By reason of suspicions prevailing in relation to property offences and money laundering activities, the Indian criminal justice authority is carrying out investigations. The appellant claims that it is not possible for her, in her request for disclosure, to name a specific legal entity especially as family assets are being diverted from family companies and hidden in offshore legal entities unknown to the appellant. The naming of specific legal entities is not mentioned as a requirement in Articles 30 and 31 of the Money Laundering Directive. The requirement to name specific legal entities neither can be derived from a provision of the Money Laundering Directive nor is it justified having regard to the spirit and purpose of the Money Laundering Directive. According to the appellant, recitals 25 to 36 of the Money Laundering Directive are crucial for the interpretation. She claims that the requirement that a request for disclosure must include the firm name or name of the legal entity whose data are to be disclosed must ultimately yield to the primacy of application of Article 30(5) of the Money Laundering Directive.

In its decisions of 2 August 2023, the Board of Appeal for Administrative Matters reasoned as follows:

The register of beneficial owners was established for the purposes of preventing and/or combating money laundering and terrorist financing and contains data on the beneficial owners of corporate and other legal entities, foundations and trusts. The persons at issue are the natural persons in whose ownership or under whose control a legal entity ultimately stands. The register of beneficial owners is intended to ensure that these persons are actually listed in a public register.

In this connection, the Register serves first and foremost the authorities. In its judgment of 22 November 2022 (Joined Cases C-37/20 and C-601/20 Sovim SA v Luxembourg Business Registers, paragraph 74), the ECJ made it clear that the data must be handled cautiously as otherwise fundamental rights of the persons registered will be infringed. In its reasoning, the ECJ clearly indicates that it regards the second and third subparagraphs of Article 30(5) of Directive 2015/849 as amended to entail a further unjustified interference with fundamental rights. Pursuant to the second subparagraph of this provision, the public is to be permitted to access a minimum set of information about the beneficial owners (name, month and year of birth, country of residence, nationality and nature and extent of the beneficial interest). The third subparagraph of this provision gives Member States the possibility to provide for access by the public to additional information and, in particular, “at least the date of birth or contact details”. The ECJ takes exception already at the use of the expression “at least”, as this allows for data to be made available to the public which “are not

sufficiently defined and identifiable”. This is critical, according to the ECJ, as in this way too much information is provided. In other words, the ECJ makes it very clear that information should not be disclosed to the public without reason and in an undifferentiated manner. Hence, consultation of the register is not intended to allow an unrestricted insight to be gained at all times and to “see through” any structure, as if one were in a surveillance state.

The Board of Appeal in Administrative Matters upholds the reasoning of the previous instance as regards the absence of any specification of the legal entities.

In the present case, it is undisputed that no firm names or names were named. The appellant claims that, in this respect, the Act is an incorrect transposition and that the EEA Directives require information to be provided readily and in a very broad manner. In support of this, the appellant relies extensively on recitals 25-36 of the Money Laundering Directive. In doing so, she overlooks the fact that, in essence, these recitals set out the requirements for Member States that relevant data are collected, that this is monitored, that they are available in a register and that, under certain conditions, this information is also disclosed and made available to the public.

The nature of the “public” can and must differentiate between authorities (as a rule, criminal justice authorities) and the broader public. For example, authorities within the meaning of Articles 13 to 15 of the Act can obtain access to the data much more easily. This is also justified because the access must be limited to the sole purposes of combating money laundering and the associated predicate offences.

Question referred

Pursuant to Article 17(2)(b) of the VwbPG, the request for disclosure of the data entered in the register on unattached legal entities must include the firm name or name of the legal entity whose data are to be disclosed.

Pursuant to Article 17(5)(b) of the VwbPG, the request for disclosure of the data entered in the register on legal entities that cannot be deemed to be unattached must include the firm name or name of the legal entity whose data are to be disclosed.

The requirement to name the firm name or name of the legal entity appears not to have any basis in the wording of Directive (EU) 2015/849, as amended by Directive (EU) 2018/843. Thus the question arises whether the transposition in Article 17(2)(b) and Article 17(5)(b) of the VwbPG is in conformity with European law.

Request

For all these reasons, the Administrative Court requests the EFTA Court to answer the following question in an advisory opinion:

Must Directive (EU) 2015/849, as amended by Directive (EU) 2018/843, be interpreted as meaning that it precludes a national provision according to which

the request of a domestic or foreign person or organisation for disclosure of the data entered in the register of beneficial owners on legal entities must include the naming of the firm name or name of the legal entity whose data are to be disclosed?

If further information or explanations are required, please do not hesitate to contact the Administrative Court.

Yours faithfully

Administrative Court

lic.iur. Andreas Batliner
President

cc: - Amann Partners, Rechtsanwälte, Industriestrasse 16, LI-9487 Gamprin-Bendern