

## **REGISTERED LETTER**

EFTA Court  
1, Rue du Fort Thüngen  
1499 Luxembourg  
Luxembourg

Vaduz, 15 March 2024

### **Request for an advisory opinion (VGH 2023/112)**

Dear Sirs,

At the closed sitting of 15 March 2024, the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) ruled that in the administrative appeal in case VGH 2023/112 pending before it (appellant: Mr AA, resident in the Russian Federation, represented by Graf & Naydis Rechtsanwälte Partnerschaftsgesellschaft mbB, Albert-Rosshaupter-Strasse 73, D-81369 Munich, agent for the purpose of accepting service: Schurti Partners Rechtsanwälte AG, Zollstrasse 2, LI-9490 Vaduz) 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 email of 13 January 2023 and supplementary letter of 6 February 2023, the appellant requested the (Liechtenstein) Office of Justice (*Amt für Justiz*) to disclose to him the data on the beneficial owners of the BB Foundation from the register of beneficial owners of legal entities. By letter of 2 March 2023, the BB Foundation expressed its opposition to the disclosure requested, as in its view a legitimate interest did not exist. By letter of 8 March 2023, the Office of Justice forwarded the request for disclosure of 13 January/6 February 2023 to the VwbP<sup>1</sup> Commission for a decision.

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

By decision of 27 April 2023, the VwbP Commission pronounced as follows:

*The disclosure of the data is refused.*

It explained, as reasoning, that a legitimate interest in the disclosure of the data within the meaning of Article 17(6) of the VwbPG had not been sufficiently demonstrated.

The appellant AA brought an appeal against this decision to the Board of Appeal for Administrative Matters (*Beschwerdekommision für Verwaltungsangelegenheiten* (VBK)), which by decision of 2 August 2023 refused the appeal.

Against that decision, the appellant brought an appeal to the Administrative Court. He argues that he has credibly demonstrated that the BB Foundation has been used for the commission of offences which constitute predicate offences to money laundering. Thus, the disclosure of the persons behind this legal entity is necessary. In his view, through the inspection of the register, those very individuals harmed by offences obtain the opportunity to effectively initiate and encourage the prosecution of offences. They obtain the opportunity through this to persuade the authorities to prosecute offences and to monitor the progress of the procedure. It is necessary that the requested disclosure of the data be permitted so that persons affected by the predicate offences can follow up on the law enforcement. In the appellant's view, in the present case, the control mechanisms established by the Due Diligence Act (*Sorgfaltspflichtgesetz* (SPG)) have not succeeded in uncovering these offences. Precisely because the trustees and lawyers under supervision have not fulfilled their obligations action on the part of the appellant is necessary. The courts are dealing with the appellant's concern to uncover the criminal machinations conducted. However, this involves the assertion of the appellant's claim, as a matter of civil law, against the offender CC. The criminal prosecution of the persons involved in the offences cannot be ensured through this. As long as it is not known who, other than CC, was involved in the offences, the criminal prosecution cannot be ensured. If CC himself is behind the BB Foundation, this insight, too, is essential to pursue a criminal action.

### 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. For the purpose of combatting money laundering, predicate offences to money laundering and terrorist financing it regulates, in particular, the disclosure of data (Article 1(1)(c) of the VwbPG). The following disclosure situations

are distinguished: disclosure of data to domestic authorities by retrieval procedure (Article 13 of the VwbPG), disclosure of data to foreign authorities in the context of mutual assistance (Article 14 of the VwbPG), disclosure of data to banks and financial institutions (Article 15 of the VwbPG), disclosure of data to domestic persons subject to due diligence obligations (Article 16 of the VwbPG) and disclosure of data to third parties (Article 17 of the VwbPG). The provision on the disclosure of data to third parties relevant in the present case is worded, to the extent relevant here, 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 persons 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 the data of which are to be disclosed; and
  - c) a statement that the data from the Register are necessary 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 exclude 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 the data of which 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) A legitimate interest as referred to in paragraph 5(d) shall exist where the use of the data requested in the context of the combatting of money laundering, predicate offences to money laundering and terrorist financing is substantiated.
- 7) A controlling interest as referred to in paragraph 5(d) shall exist where a trust or similar legal agreement entered in the Register holds a direct or indirect interest in the amount of 25% or more in a company or legal person domiciled in a third state.
- 8) ...
- 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.
- 11) The VwbP Commission shall refuse the disclosure of data concerning the respective beneficial owners where:
- a) despite a request, the application referred to in paragraph 4 does not contain all the necessary information and documents specified in paragraph 5;
  - b) a founder or protector does not exercise any control of a non-unattached legal entity specified in Annex 1;
  - c) a limitation on the disclosure of data as specified in Article 18 exists;
  - d) the intended use referred to in paragraph 5(c) is not satisfactory;

- e) a legitimate interest as specified in paragraph 6 does not exist;
- f) a controlling interest as specified in paragraph 7 does not exist; or
- g) the fee was not paid.

12) - 14) ...

### European legal framework

Article 1(1) of Directive (EU) 2015/849 is worded as follows: *This Directive aims to prevent the use of the Union's financial system for the purposes of money laundering and terrorist financing.*

Article 30(5) of Directive (EU) 2015/849 was worded as follows:

- (5) *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 person or organisation that can demonstrate a legitimate interest.*

*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.*

*For the purposes of this paragraph, access to the information on beneficial ownership shall be in accordance with data protection rules and may be subject to online registration and to the payment of a fee. The fees charged for obtaining the information shall not exceed the administrative costs thereof.*

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

- (5) *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, in accordance with that amended version, Member States must ensure that information on the beneficial ownership of all corporate and other legal entities incorporated within their territory 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.*

Thus point (c) of the first subparagraph of Article 30(5) is worded substantively the same as point (c) of the first subparagraph of Article 31(4) of Directive (EU) 2015/849 as amended by Directive (EU) 2018/843.

In recital 14 of Directive (EU) 2015/849 it is stated as follows:

*Member States should also ensure that other persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud, are granted access to beneficial ownership information, in accordance with data protection rules. The persons who are able to demonstrate a legitimate interest should have access to information on the nature and extent of the beneficial interest held consisting of its approximate weight.*

In recital 42 of Directive (EU) 2018/843 it is stated as follows:

*Member States should define legitimate interest, both as a general concept and as a criterion for accessing beneficial ownership information in their national law. In particular, those definitions should not restrict the concept of legitimate interest to cases*

*of pending administrative or legal proceedings, and should enable to take into account the preventive work in the field of anti-money laundering, counter terrorist financing and associate predicate offences undertaken by non-governmental organisations and investigative journalists, where appropriate.*

### Questions referred

A disclosure of data contained in the register of beneficial owners of legal entities constitutes an interference with the right to informational self-determination of those natural persons whose data are disclosed. This interference is only permissible where it is appropriate, necessary and reasonable to attain an objective in the public interest.

The objective in the public interest which is served by the disclosure of data from the register is the combatting of money laundering, predicate offences to money laundering and terrorist financing (Article 1(1) of Directive (EU) 2015/849; Article 1(1) of the VwbPG).

Every disclosure of data from the register, that is the disclosure of data to domestic authorities, to banks and financial institutions, to domestic persons subject to due diligence obligations and to third parties, must serve the objective of combatting money laundering, predicate offences to money laundering and terrorist financing (Article 1(1) of Directive (EU) 2015/849; Article 13 et seq of the VwbPG; Article 1(2) of the SPG).

Pursuant to the first subparagraph of Article 30(5) of Directive (EU) 2015/849, authorities, persons subject to due diligence obligations and *any person or organisation that can demonstrate a legitimate interest* shall have access to the data contained in the register. In all three cases, the disclosure of the data must further the combatting of money laundering, predicate offences to money laundering and terrorist financing. It follows from this that the additional requirement of a legitimate interest mentioned in point (c) of the first subparagraph of Article 30(5) of Directive 2015/849 cannot mean the purpose of the disclosure of the data and therefore not the combatting of money laundering, predicate offences to money laundering and terrorist financing. Rather, by way of the additional requirement of a legitimate interest, the group of third persons or organisations that may request a disclosure of data to combat money laundering, predicate offences to money laundering and terrorist financing is limited. Not every third party is permitted to inspect the register in order to combat money laundering, predicate offences to money laundering and terrorist financing rather only third persons or organisations that can demonstrate a legitimate interest.

This reflects also the relevant recitals of Directives (EU) 2015/849 and (EU) 2018/843. Recital 14 of Directive (EU) 2015/849 states that *other persons who are able to*

*demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences* are granted access to beneficial ownership information which serves to combat money laundering, predicate offences and terrorist financing. It is stated, for example, in recital 42 of Directive (EU) 2018/843 that non-governmental organisations and investigative journalists which undertake *preventive work in the field of anti-money laundering, counter terrorist financing and associate predicate offences* have a legitimate interest in connection with money laundering, terrorist financing and associated predicate offences. Thus, the legitimate interest describes the connection that the third party has to the subject area of combating money laundering and terrorist financing and must be distinguished from the purpose of the disclosure.

It is in this sense that also the national definition of legitimate interest, as referred to in point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849, in Article 17(6) of the VwbPG must be understood. *A legitimate interest ... shall exist where the use of the data requested in the context of the combatting of money laundering, predicate offences to money laundering and terrorist financing is substantiated.* The phrase “in the context of the combatting” indicates the connection that the third party must have to the subject area of money laundering and terrorist financing in order to inspect the register and thus to combat money laundering and terrorist financing.

In the present case, a private third party who claims to have been the victim of a predicate offence to money laundering seeks to inspect the register of beneficial owners. The Administrative Court takes the view that inspection by a private third party who claims to be the victim of a predicate offence is never necessary and thus never proportionate in order to combat money laundering, predicate offences to money laundering and terrorist financing. The more moderate instrument of a criminal complaint to the competent prosecuting authorities is always available; these may then inspect the register of beneficial owners in order to combat money laundering, predicate offences and terrorist financing.

If the EFTA Court should take the view, however, that inspection by a private third party who claims to be the victim of a predicate offence may be appropriate, necessary and reasonable and thus proportionate in order to combat money laundering, predicate offences and terrorist financing, the following question arises:

It may be asked whether also a private third party who claims to be the victim of predicate offence to money laundering is a person who can demonstrate a legitimate interest and thus a connection to the subject area of money laundering and terrorist financing. In the case of investigative journalists mentioned in the recitals of Directive (EU) 2018/843, it is part of their professional activity to uncover illegal structures and



machinations and, in this way, to combat money laundering and terrorist financing. This connection is absent in the case of a third party who has potentially been harmed by a predicate offence. Apart from the fact that he may have been harmed by a predicate offence, he does not have any connection to the subject area of combatting money laundering and terrorist financing. It is, in particular, not the task of an injured party to combat money laundering and terrorist financing; this is the task of the public authorities which are competent in these matters.

If the EFTA Court takes the view that a private third party who claims to be the victim of a predicate offence to money laundering may have a legitimate interest in accordance with point (c) of the first subparagraph of Article 30(5) of Directive 2015/849 in the original version, the question arises how this legitimate interest must be *demonstrated*, or respectively, what standard of proof applies in relation to the legitimate interest. On the one hand, it cannot suffice if the private third party simply claims to be the victim of a predicate offence, as the limiting criterion of “legitimate interest” is thus rendered meaningless. On the other hand, nor can the standard of “full conviction” apply, as neither the register authority nor the private third party can produce evidence to this standard. It is not possible and also not reasonable for the register authority to pursue ordinary criminal proceedings to determine whether the private third party was in fact a victim of a predicate offence. The Administrative Court understands the standard of proof of “demonstrate” as entailing that a substantiation (*Glaubhaftmachung*) is necessary but also sufficient. Raising the standard of proof would limit access to the register for private third parties demonstrating a legitimate interest. If the standard of proof is lower than substantiation, the interference in the right of informational self-determination is no longer reasonable for the natural persons entered in the register.

## Request

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

**1. Must Article 1(1) of Directive (EU) 2015/849 and point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849 in the original version be interpreted as meaning that an inspection of the register of beneficial owners by a private person whose only connection with money laundering, terrorist financing and associated predicate offences consists in the fact that their financial interests were harmed by a predicate offence is not necessary and thus not proportionate in order to combat money laundering, predicate offences to money laundering and terrorist financing?**

**2. If Question 1 is answered in the negative:**

**Must point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849 in the original version be interpreted as meaning that a private person whose only connection with money laundering, terrorist financing and associated predicate offences consists in the fact that their financial interests were harmed by a predicate offence does not have a legitimate interest in inspecting the register of beneficial owners?**

**3. If Question 2 is answered in the negative:**

**Must point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849 in the original version be interpreted as meaning that a substantiation of a legitimate interest is necessary but also sufficient?**

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: - Schurti Partners Rechtsanwälte AG, Zollstrasse 2, 9490 Vaduz