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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
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Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-7/24

AA

in which the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) requests the EFTA Court to give an advisory opinion, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, on the interpretation of certain provisions, relating to the disclosure of beneficial owner information, of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

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1 INTRODUCTION / THE FACTS OF THE CASE

1. The Authority refers to the Request for an advisory opinion (“**the Request**”) for the more detailed factual background. In short, the case concerns Mr AA (“**the Appellant**”), a resident of Russia. The Appellant requested disclosure from the relevant Liechtenstein authorities of the data on the beneficial owners of the BB Foundation (“**the Foundation**”), held on the register of beneficial owners of legal entities.
2. The Appellant claims that the Foundation has been used for the commission of offences which constitute predicate offences to money laundering. He claims to have been the victim of such an offence, and appears to be pursuing civil proceedings in connection with this against the offender CC. In order to bring a criminal prosecution, it is necessary to find out who, other than CC, may have been involved in the (alleged) offences. If CC is (also) a beneficial owner of the Foundation, this will provide useful additional information. The Appellant claims that action on his part (to initiate and encourage the prosecution of the offences) is necessary, because the national control mechanisms established by the Due Diligence Act¹ have failed to uncover the offences.²
3. The Appellant’s disclosure request was refused on the basis that it failed sufficiently to demonstrate, as required by Liechtenstein national law, a legitimate interest in the disclosure of the beneficial ownership information was sought. The Appellant appeals before the Administrative Court of the Principality of Liechtenstein

¹ *Gesetz vom 11. Dezember 2008 über berufliche Sorgfaltspflichten zur Bekämpfung von Geldwäscherei, organisierter Kriminalität und Terrorismusfinanzierung (Sorgfaltspflichtgesetz; “SPG”)*, Liechtenstein Legal Gazette (LGBI.) 2009 No 47. In the Authority’s understanding, this Act regulates the safeguarding of due diligence in the professional exercise of the activities subject to the Act, in order to combat money laundering, organised crime and terrorist financing (Article 1 SPG). Entities subject to this law, such as banks and other financial institutions, must determine and verify the identity of: contracting parties, beneficial owners, the recipient of distributions from discretionary legal entities, and the beneficiaries of life insurance and other insurance policies with an investment purpose. They must also create a business profile and ensure risk-adequate monitoring of the business relationship (Article 5(1) SPG).

² See Request, pp. 2, 8, 9. The Request does not give sufficient detail for the Authority to be sure of the facts. The above reflects the Authority’s understanding on the basis of the information available.

(*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) (“**the Referring Court**”).³

The Referring Court essentially asks, by reference to the interpretation of Directive (EU) 2015/849 (“**the Fourth Anti-Money Laundering Directive**”, “**AMLD IV**” or just “**the Directive**”)⁴:

- (i) Whether a request for beneficial owner information, by a private person whose financial interests were harmed by a predicate offence to money laundering, will ever be necessary and proportionate to the aims of combatting money laundering, predicate offences to money laundering and terrorist financing.
- (ii) Whether such a private person can ever demonstrate a legitimate interest in the beneficial owner information sought.
- (iii) How a legitimate interest may be demonstrated, and what standard of proof applies.⁵

4. The Authority addresses these questions in turn below.

2 EEA LAW

- 5. Recitals 1 and 14 of AMLD IV are relevant. Recitals 30, 41 and 42 of Directive (EU) 2018/843 (“**the Fifth Anti-Money Laundering Directive**” or “**AMLD V**”)⁶ are also relevant.
- 6. Article 1(1) of AMLD IV, as adapted, provides: “[t]his Directive aims to prevent the use of the [EEA] financial system for the purposes of money laundering and terrorist financing.” Article 1(3) thereof sets out the conduct which will be regarded as money laundering.

³ Request, p. 2.

⁴ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing - AMLD IV, incorporated into the EEA Agreement by EEA Joint Committee Decision No 249/2018, OJ L 337, 23.9.2021, p.42, with entry into force on 1 August 2019.

⁵ Request, pp. 8-10.

⁶ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, incorporated into the EEA Agreement by EEA Joint Committee Decision No 63/2020, OJ L 72, 9.3.2023, p.29, entry into force pending (01.08.2024).

7. Article 30(5) of AMLD IV, as adapted, provides (emphasis added):

*“Contracting Parties shall ensure that the information on the beneficial ownership is accessible in **all** cases to:*

- (a) competent authorities and FIUs,⁷ 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 or organisations referred to in point (c) shall access at least the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held.

For the purposes of this paragraph, access to 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.”

8. Article 1(15)(c) of AMLD V, as adapted, provides that Article 30(5) of AMLD IV is to be replaced by the following (emphasis added):

“5. Contracting Parties 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 or organisations referred to in point (c) shall 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.

[...] .”

9. In **Joined Cases C-37/20 and C-601/20 WM and Sovim SA v Luxembourg Business Registers**⁸ the CJEU invalidated Article 1(15)(c) of AMLD V, in so far as it amended point (c) of the first subparagraph of Article 30(5) of AMLD IV in such a way that it required Member States to ensure that information on the beneficial

⁷ Financial Intelligence Units: see recital 11 to AMLD IV.

⁸ Judgment of the Grand Chamber of the CJEU of 22 November 2022 in Joined Cases C-37/20 and C-601/20 *WM and Sovim SA v Luxembourg Business Registers*, EU:C:2022:912 (“**Luxembourg Business Registers**”).

ownership of companies and of other legal entities incorporated within their territory was to be accessible in all cases to any member of the general public.

10. At the time of submitting the present observations, at least for the purposes of the EEA Agreement, Article 30(5)(c) of AMLD IV continues to provide that information on beneficial ownership shall be available to **“any person or organisation that can demonstrate a legitimate interest.”**

3 NATIONAL LAW

11. The Act of 3 December 2020 on the Register of Beneficial Owners of Legal Entities (**“the VwbPG”**)⁹ implements Articles 30 and 31 of AMLD IV.¹⁰

12. Article 17 thereof (*“Disclosure of data to third parties”*) provides (emphasis added):

“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) The Office of Justice shall refuse to disclose information about the relevant beneficial owners if: [...] b) the declaration pursuant to paragraph 2(c) is not plausibly demonstrated; [...].¹¹

⁹ Gesetz vom 03. Dezember 2020 über das Verzeichnis der wirtschaftlich berechtigten Personen von Rechtsträgern (VwbPG)), Liechtenstein Legal Gazette (LGBL.) 2021 No 33.

¹⁰ Request, pp. 2-4.

¹¹ Translation of paragraph 3 provided by the Authority. The original language version reads: “3) Das Amt für Justiz hat die Offenlegung über die entsprechenden wirtschaftlich berechtigten Personen zu verweigern, wenn: [...] b) die Erklärung nach Abs. 2 Bst. c nicht glaubhaft ist; [...].”

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) 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.¹²

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 [do they mean attached??] 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 specific in paragraph 7 does not exist; or
- g) the fee was not paid.

(12 – 14) [...].”

¹² The original language version refers to “glaubhaft,” which the Authority understands can also be read as meaning “plausibly demonstrated”.

4 THE QUESTIONS REFERRED

13. Against this background, the Referring Court has asked the following questions:

“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?”

5 LEGAL ANALYSIS

5.1 PRELIMINARY REMARKS

14. While the questions referred relate to AMLD IV, the Request also refers to AMLD V.¹³ At the time of submitting these observations, AMLD V, while incorporated into the EEA Agreement, has not yet entered into force (see footnote 6 above), and the relevant act to be interpreted is AMLD IV.¹⁴

¹³ Request, pp. 5, 6, 7, 8.

¹⁴ Nevertheless, before the entry into force of AMLD V, EFTA States must, under Article 3 EEA, refrain from taking measures which could compromise the objectives of that directive.

15. However, entry into force of AMLD V is foreseen on 1 August 2024. Given this intervening entry into force, the Authority respectfully submits that consideration will need to be given in the hearing to the EEA law status of the amendments made by Article 1(15)(c) of AMLD V to point (c) of the first subparagraph of Article 30(5) of AMLD IV. As described at paragraphs 9-10 above, the CJEU invalidated the relevant AMLD V amendments for the purposes of the EU legal order.

5.2 QUESTIONS 1 AND 2: PROPORTIONALITY AND LEGITIMATE INTEREST

16. By its first and second questions, the Referring Court asks: (i) whether a request for beneficial owner information, by a private person whose financial interests were harmed by a predicate offence to money laundering, will ever be necessary and proportionate to the aims of combatting money laundering, predicate offences to money laundering and terrorist financing; and (ii) whether such a private person can ever demonstrate a legitimate interest in the beneficial owner information sought.

17. The Authority considers that these questions are interlinked, and will answer them together.

18. In its **first question**, the Referring Court refers to an access request by a private person “*whose only connection*” with money laundering and associated predicate offences is that their financial interests were harmed by a predicate offence.¹⁵ It appears to consider that such a request is never necessary and proportionate in order to combat such crimes, because the person could instead complain to the competent prosecuting authorities, which would then have access to the beneficial ownership information in question.¹⁶

¹⁵ The Authority assumes that the predicate offence to which the Request refers is one which would fall within the scope of the Directive, e.g. a “*criminal activity*” within the meaning of Articles 1(3)(a) and 3(4) of the Directive (on this point see also Article 57 as amended by AMLD V, which refers to the offences in Article 3(4) of the Directive as “*predicate offences*”).

¹⁶ Request, pp. 8 and 10.

19. The Authority submits that such an approach, that is, the categorical exclusion of such persons *ex ante* from the scope of Article 30(5), is not supported by the wording of the provision or relevant case-law.

20. First, the wording and scheme of Article 30(5) makes clear that information on beneficial ownership must be “*accessible in **all** cases*”:

- under category (a) to competent authorities and FIUs “*without any restriction*”; and
- under category (c) to “***any** person or organisation that can demonstrate a legitimate interest.*”

21. In many cases, a person potentially falling within ‘category (c)’ might also be able to make a complaint to a competent authority falling within ‘category (a)’. The fact that both categories (a) and (c) were nevertheless included in the Directive strongly suggests that different persons may have equally valid interests in accessing the same information. Competent authorities are recognised as a privileged category, who may access the information without restriction. Private individuals must first show a legitimate interest in combatting money laundering,¹⁷ but this is the only limitation on their right of access. Once that is shown, the plain wording of the provision requires that “*any*” such person be granted access. There is nothing in the wording of the provision which suggests that the ability of such persons to make a complaint to the competent authorities must also be taken into account.

22. Further, if it were correct that the ability to make a complaint automatically renders the access of private persons under category (c) unnecessary and disproportionate, this would remove the rights of such persons in a large spectrum of cases. This would significantly undermine the effectiveness of category (c). The Authority submits that such a construction should therefore be avoided.¹⁸ Further, such a construction, by removing a potentially important pool of persons seeking to

¹⁷ Unless specified otherwise, by “*money laundering*” the Authority means money laundering, terrorist financing and the associated predicate offences within AMLD IV.

¹⁸ See e.g. judgments of 23 January 2012 in Case E-2/11 *STX Norway Offshore and Others*, paras. 29 and 76 and of 25 January 2024 in Case E-2/23 *A Ltd v Finanzmarktaufsicht (“A Ltd”)*, paras. 43, 61 and 63.

uncover illicit activity, would not seem consistent with the aim of the Directive of combatting money laundering. The Authority refers to recital 14 of the Directive, which refers broadly to “*other persons who are able to demonstrate a legitimate interest*”.

23. Second, the Authority recognises that measures interfering with fundamental rights (such as the right to private life, here beneficial owner information) must be justified in accordance with law, and therefore also necessary and proportionate.¹⁹ This matter was considered at length by the CJEU in **C-37/20 and C-601/20 Luxembourg Business Registers**. There, it invalidated Article 1(15)(c) of AMLD V, in so far as it amended point (c) of the first subparagraph of Article 30(5) of AMLD IV in such a way that it required Member States to ensure that beneficial ownership information in their territory was to be accessible in all cases to any member of the general public. It did so because, *inter alia*, granting such general access was not proportionate to the aim of seeking to prevent money laundering and terrorist financing.²⁰ The declared invalidity prevented the amendment to point (c) of the first subparagraph of Article 30(5) of AMLD IV from being applied.

24. The CJEU did not expressly rule on the lawfulness and proportionality of the original AMLD IV formulation, namely that beneficial ownership information must be “*accessible in all cases*” to “*any person or organisation that can demonstrate a legitimate interest*.” The Authority submits however that the CJEU must have considered that the legitimate interest test was sufficient to prevent a disproportionate accessing of beneficial ownership information, otherwise it would have addressed this in its ruling. Accordingly, the Authority considers that the legitimate interest test can be seen as a mechanism through which an access request must pass, in order to be proportionate. Therefore, provided the Appellant

¹⁹ See by analogy e.g. C-37/20 and C-601/20 *Luxembourg Business Registers*, paras. 38-39, 63-88, and see further judgments of 5 May 2022 in Case E-12/20 *Telenor v EFTA Surveillance Authority*, para. 75, and of 9 July 2014 in Joined Cases E-3/13 and E-20/13 *Fred Olsen and Others v Norwegian State*, paras. 224-231.

²⁰ C-37/20 and C-601/20 *Luxembourg Business Registers*, paras. 63-88, and in particular paras. 63-68 and 77-88.

can, in the present case, demonstrate a legitimate interest, his access request should, at least as a matter of principle, be proportionate.²¹

25. To conclude on the first question, the Authority submits that, where a private person has been harmed by a predicate offence to money laundering, whether they may access beneficial ownership information under point (c) of the first subparagraph of Article 30(5) of AMLD IV must be determined on the basis of whether they can demonstrate a legitimate interest.²² The fact that such a person may also be able to make a complaint about the relevant conduct to the national competent authorities cannot justify the automatic conclusion that they do not have a legitimate interest within the meaning of point (c) of the first subparagraph of Article 30(5) of AMLD IV.

26. Turning to the **second question**, the Request suggests that a private third party, the victim only of a predicate offence to money laundering, can never have a connection to the subject area of money laundering and therefore can never have a “*legitimate interest*”. The reason given is that the activities of a private individual are not *per se* connected to the subject area of combatting money laundering, unlike say those of investigative journalists, whose professional activity may be to uncover such illegal structures, or those of public authorities who are competent to take action in such matters.²³ The Request refers to recital 42 of AMLD V.

²¹ By *in principle* the Authority refers to the balancing of the different interests (e.g. privacy vs disclosure). Other, practical, aspects of proportionality might still need to be considered, depending on the facts of the case.

²² This is for the Referring Court to assess. In the present case, it appears that the Appellant is pursuing civil proceedings in relation to the offences complained of. Recital 42 of AMLD V recognises that those involved in such proceedings may have a “*legitimate interest*”: “*Member States should define legitimate interest ... In particular, those definitions should not restrict the concept of legitimate interest to cases of pending administrative or legal proceedings [...]*.” The Authority refers further to Joined Cases C-37/20 and C-601/20 *Luxembourg Business Registers*, para. 30. There, the Grand Chamber of the CJEU refers to the legitimate interest of private persons who wish to know the identity of the beneficial owners of a company or other legal entity because they are likely to enter into transactions with them, thereby contributing to preserving trust in the integrity of business transactions (as referred to in recital 30 to AMLD V). If a legitimate interest can validly be shown by individuals *before* entering into business with a particular company or business, it would seem *a fortiori* possible to demonstrate such an interest after having transacted with them.

²³ Request, pp. 8-10.

27. The Authority observes that such a requirement, namely for a requesting party to be (already) active in the field of the detection/combating of money laundering, is not reflected anywhere in the wording of the Directive. Rather, the wording of point (c) of the first subparagraph of Article 30(5) of AMLD IV provides that “**any person**” who can demonstrate a legitimate interest in accessing the information must be given access. The only criterion is the need to show a legitimate interest, and the structure and aim of the Directive suggest that this legitimate interest must be measured by reference to the *purpose* of seeking to combat money laundering and terrorist financing,²⁴ not by reference to the usual *activities* of the access-seeker. While recital 42 of AMLD V may refer to the important preventive work of investigative journalists, there is nothing in that recital, or in the text of Article 30(5) (whether of AMLD IV or V) to suggest that only those habitually undertaking such detection activities should be given access. Rather, recital 14 of AMLD IV refers simply to the need to ensure that (emphasis added): “**other persons who are able to demonstrate a legitimate interest with respect to money laundering ... and the associated predicate offences ... are granted access to beneficial ownership information.**”

28. Whether, in the present case, the Appellant *can* demonstrate a legitimate interest is for the Referring Court to assess.²⁵ The Authority submits however that the fact that the Appellant is not habitually active in the field of detecting money laundering or its predicate offences cannot justify the automatic conclusion that he does not have a legitimate interest within the meaning of point (c) of the first subparagraph of Article 30(5) of AMLD IV.

5.3 QUESTION 3: PROOF OF A LEGITIMATE INTEREST

29. The Referring Court asks how a “*legitimate interest*” under Article 30(5), first subparagraph, (c), of the Directive must be demonstrated, and in particular which standard of proof should be applied.

²⁴ See C-37/20 and C-601/20 *Luxembourg Business Registers*, para. 55 on the purpose of AMLD IV and V.

²⁵ On this point see also the factors considered in footnote 22 above.

30. The Authority recalls that “*legitimate interest*” is not defined in the Directive,²⁶ nor does the Directive specify what information must be included in a request for access to beneficial ownership information, in order to demonstrate such an interest. It also does not specify a standard of proof. Such definitions and procedures are therefore matters of national law,²⁷ subject however to general principles of EEA law and in particular the principles of effectiveness and equivalence.²⁸ The principle of effectiveness is especially relevant. Thus, the national procedural requirements and standard of proof must not make the enjoyment of the right to access beneficial owner information under 30(5), first subparagraph, (c), excessively difficult or practically impossible. In assessing whether this is so, the aim of the right of access must be considered, in the context of the aims and objectives of the Directive as a whole.

31. In relation, **first**, to how a legitimate interest must be demonstrated, the Authority observes that the provisions of national law are broadly worded. Article 17(6) of the VwbPG (which relates to non-unattached legal entities²⁹) provides simply:

“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.”

²⁶ See paras. 68-72 of the CJEU’s judgment in C-37/20 and C-601/20 *Luxembourg Business Registers* for a discussion of the lack of a uniform definition of “*legitimate interest*”.

²⁷ This is for example recognised in recital 41 and recital 42 (“*States should define legitimate interest, both as a general concept and as a criterion for accessing beneficial ownership information in their national law*”) of AMLD V. Further, as observed by Advocate General Pitruzzella in C-37/20 and C-601/20 *Luxembourg Business Registers*, EU:C:2022:43, at para. 93 (emphasis added): “*the provisions of Article 30 of Directive 2015/849 leave national legislatures with a degree of latitude in deciding how the general public should access the information on beneficial ownership and what procedures must be followed.*”

²⁸ See e.g. judgments of 13 June 2013 in Case E-11/12 *Beatrix Koch*, paras. 121-122 and 132, of 17 September 2018 in Case E-10/17 *Nye Kystlink*, para. 73, and of 30 May 2018 in Case E-6/17 *Fjarskipti*, para. 31.

²⁹ Under national law, only Article 17(5)(d) and (6) of the VwbPG (which apply to non-unattached legal entities) expressly refer to the need to show a “*legitimate interest*” (a differently-worded test applies to unattached legal entities). The Authority therefore assumes given the Referring Court’s multiple references to the need to show a “*legitimate interest*” – that the case in the main proceedings involves non-unattached legal entities.

32. This suggests that, as a matter of national law, it is sufficient: (i) that the requested data is to be used in the context of combatting predicate offences to money laundering; and (ii) that there is evidence that this is so (because the request for use in this context is ‘substantiated’³⁰ in some way).

33. These national law criteria would seem unproblematic from an EEA law perspective. *Firstly*, they permit a data request in a *context* which is ‘legitimate’ by reference to the aims of Article 30(5) of the Directive and of the Directive as a whole, namely combatting money laundering. The Authority refers in particular to recital 14 to the Directive (emphasis added):

“The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure. [...] Member States should make sure that in all cases that information is made available to competent authorities and FIUs and is provided to obliged entities [...]. 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 owner 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.”³¹

Secondly, the legitimacy (and also proportionality) of the request for access is ensured by the need for evidence to support the request. Thus, the mere assertion of a connection with money laundering offences is not enough. This point is considered further under paragraphs 36-37 below.

34. Admittedly, the above does not provide the Referring Court with much useful additional guidance on *how* a legitimate interest may be demonstrated or proven.

³⁰ See also footnote 12 above.

³¹ See also recital 42 to AMLD V, which provides (emphasis added): “**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. [...]**”

This is however largely an unavoidable consequence of the fact that “*legitimate interest*” is not defined by the Directive, and is therefore governed by national law, subject to the constraints of the EEA legal framework described at paragraph 30 above.

35. In such circumstances, case-law suggests that a largely ‘common sense’ approach must be adopted. For example, in **T-27/19 Pilatus Bank**, the GCEU observed that the concept of “*good repute*” (i.e. reputation), contained in Article 23(1) of Directive 2013/36,³² was an indeterminate legal concept. Accordingly, the competent national authorities making the assessment were required:

“[...] to examine on a case-by-case basis whether the criterion of good repute is met by a shareholder seeking to acquire a qualifying holding in a credit institution, taking into account the relevant facts, the reasons underlying the criterion and the objectives which that criterion is intended to secure. The principle of legal certainty does not, therefore, preclude those authorities from enjoying a discretion in the application of the criterion in question.”³³

The Authority submits that such an approach is also appropriate in the present case.

36. In relation, **second**, to the standard of proof, the Authority observes that Article 17 of the VwbPG refers simply to “*substantiation*” - thus to the need for some sort of evidence. The Authority assumes that the quality and quantity of the evidence needed will depend on what is reasonable and necessary in relation to the facts of the particular case.

37. The Authority agrees with the Referring Court that a standard of “*certainty*” or “*full conviction*” would be an extremely high one: it exceeds even a typical criminal law standard of ‘beyond reasonable doubt’. In practice, such a standard would pose an

³² Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC - CRD IV, incorporated into the EEA Agreement by Joint Committee Decision No 79/2019 (OJ L 321, 12.12.2019, p.170), with entry into force on 1 January 2020.

³³ Judgment of the General Court of the EU of 2 February 2022, *Pilatus Bank plc v ECB*, T-27/19, EU:T:2022:46, para. 73, emphasis added.

immense burden on the requesting party and would be extremely difficult to discharge. As a result, most or almost all requests would be rejected (because any doubt about whether a legitimate interest was shown would be enough to reject the application). The Authority submits that this would seem inconsistent with the stated aim of the Directive of combating money laundering and terrorist financing (and predicate offences),³⁴ and would significantly undermine the effectiveness of Article 30(5).³⁵ For these reasons, such an interpretation should be avoided.

6 CONCLUSION

Accordingly, the Authority respectfully requests the Court to answer the questions referred as follows:

- 1. Directive (EU) 2015/849 must be interpreted as meaning that, where a private person has been harmed by a predicate offence to money laundering, whether they may access beneficial ownership information under point (c) of the first subparagraph of Article 30(5) of that Directive must be determined on the basis of whether they can demonstrate a legitimate interest. The fact that such a person:**
 - may also be able to make a complaint about the relevant conduct to the national competent authorities; or**
 - is not habitually active in the field of combatting money laundering or its predicate offences****cannot justify the automatic conclusion that they do not have a legitimate interest within the meaning of point (c) of the first subparagraph of Article 30(5) of that Directive.**

³⁴ See e.g. Article 1 and recitals 1 and 14 to the Directive.

³⁵ See by analogy Case E-2/23 *A Ltd*, paras. 61 and 63.

2. **Point (c) of the first subparagraph of Article 30(5) of Directive (EU) 2015/849 must be interpreted as meaning that EEA States may require the existence of a legitimate interest to be substantiated in some way; certainty is not required.**

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