Brussels, 16 December 2016
(OR. en)

Interinstitutional File:
2016/0208 (COD)

LIMITE

JUR 612
ECOFIN 1194
DROIPEN 221
CRIMORG 185
COTER 138
CODEC 1912
IA 142
DAPIX 233
DATAPROTECT 110
FISC 238

OPINION OF THE LEGAL SERVICE¹


compatibility of the provisions on public access to beneficial ownership information with the applicable data protection guarantees

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (03.08.2017)

I. INTRODUCTION


² COM(2016) 450 final.
2. The proposal aims at amending, *inter alia*, Articles 30 and 31 of the Directive (EU) 2015/849 and to insert a new Article 1a of Directive 2009/101/EC, which, taken together, would allow the disclosure to the general public of information on the beneficial ownership of corporate and legal entities and on for-profit trusts and on arrangements similar to such trusts. The proposal also would introduce a requirement to provide beneficial ownership information on other types of trusts to any person that could demonstrate a legitimate interest in accessing such information.

3. During the discussions in the Council's preparatory bodies of this part of the proposal, questions were raised as to the compatibility of the proposed widening of the scope of the beneficial ownership information access with the data protection regime in the EU, as well as to the legal soundness of the proposed approach consisting in the amendment of Directive (EU) 2015/849 and of Directive 2009/101/EC to this effect.

4. At the meeting of the Council (ECOFIN) of 8 November 2016, the Council Legal Service ("CLS") addressed in general terms the need to establish the proportionality between the interference with the fundamental right to privacy and the legitimate goal of fighting money laundering and terrorist financing.

5. Delivered at the request of the Financial Attachés Working Party of 17 November 2016, the present opinion reflects and further develops this intervention.
II. **LEGAL AND FACTUAL BACKGROUND**

   \textit{a) The proposal}


7. The 4th AMLD is based on Article 114 TFEU and aims at preventing the use of the Union’s financial system for the purposes of money laundering and terrorist financing (Article 1(1)).

8. Directive 2009/101/EC is based on Article 50 TFEU and provides that the "coordination of national provisions concerning disclosure, [...] of companies limited by shares or otherwise having limited liability is of special importance for the purpose of protecting the interests of third parties" (recital (2) thereof).

9. The proposal requires Member States to ensure access to beneficial ownership information. The initial Commission proposal purports to establish a twofold regime, distinguishing between corporate and other legal entities, "business" trusts and entities similar to them, on the one hand, and any other trusts, on the other hand.

10. In respect of the \textit{first category}, i.e., corporate and other legal entities, "business" trusts and entities similar to them, Member States would be obliged to grant public access to the name, the month and the year of birth, the nationality and the country of residence of the beneficial owner as well the nature and extent of the beneficial interest held.

11. This obligation to grant public access is justified by a series of considerations related to corporate transparency.
12. Thus, according to recitals (22) to (24), "public access by way of compulsory disclosure of certain information on the beneficial ownership of companies provides additional guarantees to third parties wishing to do business with those companies...Public access also allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system. It can contribute to combating the misuse of legal entities and legal arrangements both by helping investigations and through reputational effects, given that anyone who could enter into transactions with them is aware of the identity of the beneficial owners. It also facilitates the timely and efficient availability of information for financial institutions as well as authorities, including authorities of third countries, involved in the fight against these offences. Confidence in financial markets from investors and the general public depends in large part on the existence of an accurate disclosure regime that provides transparency in the beneficial ownership and control structures of companies."

13. As regards the second category, i.e., trusts other than business trusts, only persons or organisations that can demonstrate a "legitimate interest" would be granted access to beneficial ownership information, consisting of the name, the month and year of birth, the nationality and the country of residence of the beneficial owner.

14. For this purpose, recital (35) to the proposal provides guidance on the notion of "legitimate interest" as follows "money laundering, terrorist financing and the associated predicate offences should be justified by readily available means, such as statutes or mission statement of non-governmental organisations, or on the basis of demonstrated previous activities relevant to the fight against money laundering and terrorist financing or associated predicate offences, or a proven track record of surveys or actions in that field".

15. During the discussions in the financial attachés Working Party, the Presidency issued a first compromise, which transferred all public access provisions to the part of the proposal amending the 4th AMLD, without changing in substance the justifications in the corresponding recitals.³

³ Document 13872/16 of 28 October 2016.
16. Subsequently, the Presidency put forward a second compromise solution, whereby the general public access is abandoned in favour of a more restrictive disclosure based on demonstrating a "legitimate interest". This proposal would amend only the 4th AMLD, thus implying that the justification for such access is anti-money laundering only, and not anymore corporate transparency.

17. The recitals justifying the decision to require public access were redrafted in order to pivot around the notion of "legitimate interest." The notion of "legitimate interest" itself is referred to in a less specific manner by comparison with the drafting initially proposed by the Commission (see above paragraph 14) and makes use of open-ended terms. Moreover, recital (22) includes an explicit possibility for Member States to widen the scope of the access beyond the circle of those with legitimate interest.

b) Applicable data protection provisions

18. Article 7 of the Charter of fundamental rights of the European Union ("the Charter"), on respect for private and family life, states that "[e]veryone has the right to respect for his or her private and family life, home and communications."

\[4\] "The legitimate interest with respect to money laundering, terrorist financing and the associated predicate offences should be at least given to those who demonstrated previous relevant activities related to the fight against money laundering and terrorist financing or associated predicate offences, or a proven track record of actions in that field" (document 14884/16 of 25 November 2016, recital (35)).

\[5\] "Member States may decide to opt for such wider access in their national legislation in case they choose to do so having regard to the utmost importance to retain balance and proportionality in the aim of transparency and the aim of protection of fundamental rights of the individuals especially the right to privacy" "Member States may allow for a wider access to the information held in the register referred to in the paragraph 3a in accordance with their national law." (document 14884/16 of 25 November 2016, recital (22) and Article 1(10)).
19. Article 8 of the Charter, on protection of personal data, reads as follows:

“1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.”

20. Directive 95/46 EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, lays down provisions concerning the processing of personal data with a view to protect the fundamental rights and freedoms of natural persons, and in particular their rights to privacy. Under that Directive, subject to the exceptions permitted under Article 13, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 thereof and, second, with one of the criteria for making data processing legitimate listed in Article 7.

21. According to settled case-law, those provisions, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, must necessarily be interpreted in the light of fundamental rights, in particular in the light of Articles 7 and 8 of the Charter.

DELETED FROM THIS POINT UNTIL THE END OF THE DOCUMENT (page 16)

6 Judgment in Österreichischer Rundfunk, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 65, and judgment in Google Spain and Google, C-131/12, EU:C:2014:317, paragraph 71.

7 Judgment in Google Spain and Google, above, paragraph 74, and judgment in YS and others, C-141/12 and C-372/12, EU:C:2014:2081, paragraph 54.