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OPINION OF THE LEGAL SERVICE¹

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC

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

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I. INTRODUCTION

1. On 5 July 2016, the Commission presented a proposal for a Directive amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC ("the proposal").²

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

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

a) The proposal

6. The proposal aims at amending Directive 2015/849 (the "4th AMLD") and Directive 2009/101/EC.
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 *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"*.

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