

ACCESS TO FINANCIAL INFORMATION FOR TAX PURPOSES AND PROPORTIONALITY – BALANCING PUBLIC INTEREST WITH THE PROTECTION OF PRIVACY

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Abstract

The purpose of the article is to analyse how to balance public interests with the protection of privacy in the tax field. It has not been an easy task especially in the context of access to financial information.

In this area, the compromise to achieve transparency needs to pay regard to the principle of proportionality, as reinforced by recent case law of the ECJ, and align with specific legislation such as the EU General Data Protection Regulation and recently enacted EU Digital Services Act.

It is extremely important to investigate the possible consequences of acting against fundamental rights that are attributed to European citizens (and not only), such as the right to privacy and the protection of personal data. The paper aims to provide relevant and further insight to paths that lead to a fair way to handle such relevant information.

Every citizen, every academically inclined and dedicated individual, every public official, every judicial agent, must question whether the public interest can ever, or at least, recurrently, surpass a fundamental right to privacy, specially, in a sensible area as the financial information of an individual. Such actions can often lead, if mistakes are made along the way, to dangerous outcomes, such as public humiliation, and can even harm the person's professional and personal life.

Methodology. In the course of the paper, an analysis is made of public decisions taken in cases across the European continent. Additionally, some considerations are made about the recent legislation that is produced by competent authorities, particularly the European Institutions.

Results of the research. The authors offer a personal insight regarding the information that has been gathered, confirming some significant concerns. What is of crucial importance, as stated in the title of this article, is a well established balance between the public interest and the protection of privacy, with explained and defined possible paths to follow.

Keywords: financial information, tax, privacy, public interest.

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INTRODUCTION

The article is based on two main EU principles: transparency and proportionality. Its balance, especially in times of crisis, relies ultimately in the pursuit of public interest of the people, of the nation state, with respect of the fundamental human rights.

In the financial field, two fundamental values can be evidenced:

- 1) right of privacy;
- 2) fight against crime (e.g. money laundering) and terrorism.

How to balance these values?

Is full transparency always desirable, or shall it be limited by the principle of proportionality and alignment with the fundamental human right to privacy?

In the tax field, the aim to balance the right of privacy with the pursuit of public interest through the collection of tax revenue, needs also to be assessed through the proportionality principle (e.g. prohibition of ‘fishing expeditions’).

On the one hand, there is the right of privacy of taxpayers to protect their financial and commercial data (business secrecy). On the other hand, there is the right of tax administration to have access to the taxpayer’s business and personal information to determine their tax liability.

This article proposes to treat the problem in two ways. Firstly, in light of the recent ECJ case law applying in the field of beneficial ownership, and secondly, in light of a recent decision from the Finnish Data Ombudsman of November 11, 2022.

1. BENEFICIAL OWNERSHIP AND RECENT ECJ CASE LAW

In the context of the prevention of money laundering, or terrorism financed by using the financial system, Portuguese Law no. 83/2017, partially transposes Directives 2015/849/EU and 2016/2258/EU. It establishes in its article 2º, no. 1, paragraph h), the definition of beneficial owner. Briefly speaking, “the beneficial owner is the natural person who controls, through ownership of shareholdings or other means (...) a company, association, foundation, business entity, civil society, cooperative or trust”. Indicators of control of the entity are considered to be the holding of 25% of share capital directly (ownership), or indirectly (voting rights), the holding of special rights that allow for controlling the entity and also, in special cases, top management (managers, directors, etc.).

The concept of beneficial owner comes also into play in domestic tax provisions and in double taxation treaties, in order to ascertain the identity and liability of taxpayers. Ascertaining the actual beneficiary is an essential condition for the distribution of taxing powers. Therefore, for the tax authorities,

the importance of clarifying the concept in question is also connected with the determination of the place where the operation is carried out by the taxpayer.

The use of the beneficial owner concept outside the tax sphere has also proved important in recent years in the prevention of money laundering and terrorist financing. It is an issue that arises in the financial sphere, for the identification and punishment of shell companies or, complex schemes used for illegal monetary flows related, among others, to tax evasion, corruption, terrorism financing and money laundering.

In the EU, the concept of beneficial owner was introduced by the Directive 2005/60/CE of the European Parliament and the Council, which was superseded by Directive (UE) 2015/849 of the European Parliament and of the Council.

On November 22, 2022, in Press Release 188/22, the CJEU gives a preliminary ruling on the judgment of the Court of Justice in Joined Cases C-37/20 *Luxemburg Business Registers* and C-601/20 *Sovim* concerning Directive (UE) 2015/849 of the European Parliament and of the Council. More specifically, it concerns the provision which states that information on the beneficial owner of corporate entities incorporated in the territory of a Member State must be accessible, apart from exceptional cases.

Later on, the recent case of the European Court of Justice that was made public concerned *WM and Sovim SA vs. Luxembourg Business Registers*¹, which raises questions on the disclosure of beneficial ownership information of companies. It has been carried out on the basis of Directive (UE) 2015/849 of the European Parliament and of the Council (prevention of the use of the financial system for the purposes of money laundering or terrorism financing).

In essence, the question at issue concerned the lack of privacy and security in which the beneficial owners of companies registered in the national beneficial ownership registers were placed, since personal information, which allows them to be easily identifiable was accessible at all times. It was possible to get by means of the internet, without any need for justification or access control, and such information included:

- 1) surname;
- 2) forename;
- 3) nationality (or nationalities);
- 4) day of birth;
- 5) month of birth;
- 6) year of birth;
- 7) place of birth;
- 8) country of residence;
- 9) complete private or professional address;

¹ Joined cases C-37/20 and C-601/20 of 22 November 2022.

10) for persons registered in the national register of natural persons, the identification number;

11) for non-residents who are not registered in the national register of natural persons, a foreign identification number;

12) the nature of the beneficial interest held; and

13) the extent of the beneficial interest hold.

To resolve such a case, the CJEU assessed the issue by analyzing various principles enshrined in the EU law that could be at stake. These principles included proportionality, legality and transparency. Regarding the analysis performed on the principles when applied to the contested situations that the Luxembourg court of first instance raised, the CJEU found that there was no violation of the principle of transparency and legality. As regards the principle of proportionality, it was determined that the “possible existence of difficulties in precisely defining the cases and conditions under which the public may have access to information on beneficial ownership, cannot justify the EU legislature providing for public access to such information in general”. Thus considering the measure applied as disproportionate to the intended purpose, and an interference with the fundamental rights defined by the Charter, mainly the rights to privacy and freedom proved crucial.

This case has a recognized importance in all European Union countries as it was common practice that the register of beneficial owners of companies based in the countries in question was public, with no control over who accessed this information, and whether it was copied. The CJEU’s decision changes these registers as we know them, and now raises uncertainty about how they will work. It is clear and evident that authorities and certain entities, as determined in Article 30(9)(a) and (b) of Directive 2015/849, will retain their right to access this information necessary to pursue their recurring activities. However, one can think of activities carried out by entities that are not authorities or specified entities, but will need to rely on these records to be able to pursue their activities diligently.

The question that arises is what the access to this information will be for the individuals or legal entities that need it. Another issue is whether access will be determined in a more restricted manner in cases where those who are accessing the beneficial ownership registers are not considered under the terms of paragraphs (a) and (b) of Article 30(9).

After this decision, we urgently need conformity within the European Union on this matter, to avoid cases of disparity of treatment in the access to beneficial ownership information and its disclosure within the Union.

Certainly, we are all interested to see how these amendments will be applied in the future, and how they will positively influence the lives of beneficial owners, without negatively affecting the prevention and fight against money laundering and terrorist financing as well as the security and trust related to private entities.

2. THE FINNISH DATA OMBUDSMAN'S DECISION

In an era, where information often becomes available through illegal access to personal and most importantly private data, a recent decision, dated of November 11, 2022, when the Finnish Data Ombudsman (Tietosuojavaltuutettu), which is the national authority supervising compliance with data protection legislation, gave her ruling in the case Dnro 3681/186/21, giving a proper insight when it comes to the performance required by the competent entities, when such cases occur. In this case, the Finnish Tax Administration requested that all the banks, providing banking services in Finland, are to report on all cross-border payments made by their clients between 2015 and 2021. So, the first question that has to be raised when looking into such facts, is if such a request would be in accordance with the applicable legislation namely, the EU General Data Protection Regulation (2016/679). Was it necessary, for the Finnish Tax Administration to access such vast amount of data in order to preserve tax revenue collection? One could argue that access to such information, would guarantee a more effective approach by the legal and competent authorities in preventing more financial crimes, such as tax evasion, money laundering or even terrorism financing, from happening. Still, the evaluation of each specific situation must always be made under the protection of the law, in a just and fair manner.

That is why, the EU General Data Protection Regulation states in its article 5(1)(c) that personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed “data minimization”. Furthermore, the controller shall implement appropriate technical and organizational measures for ensuring that, by default, only personal data that is necessary for each specific purpose of the processing is used. That obligation applies to the amount of personal data collected, the extent of its processing, the period of its storage and accessibility. This means that, by default, personal data is not made accessible to an indefinite number of natural persons without the individual’s knowledge (article 25(2)).

What the Data Ombudsman found was that the Tax Administration had violated the Regulation and the domestic law in the data request, but only to the extent in which the request covered individuals, because it went over what would be the legitimate interest of the State in the matter requested. Therefore, the Data Ombudsman ordered the Tax Administration to stop requesting data in such a wide form in the future, and also ordered the Tax Administration to destroy all of the data that was collected in breach of the law.

This decision, despite being applicable only to the Finnish Tax Administration, can set off important precedents to similar situations all over the countries that are members of the European Union, and that fall under

the application of the Regulations and Directives. The limits of access to personal data are yet to be fully established and they need also to be in accordance with the public interest criteria.

3. THE EU DIGITAL SERVICES ACT

While referring to transparency in the digital world, the EU has been upgrading its legislation in order to achieve better ratios of proportionality, so that individuals do not see their personal data unwillingly leaked to the public. Notwithstanding the possibility of tax authorities to access personal information made public through the internet social networks (see the progress being made, particularly, in the case of the Digital Services Act and Digital Markets Act).

The Digital Services Act² aims to create safer spaces in the digital environment, assuring that the fundamental rights of individual persons are respected and adequately protected. The act targets online platforms and intermediaries and is considered one of the most ambitious regulations regarding social media, online marketplaces, very large online platforms (VLOPs) and very large online search engines (VLOSEs).

Here, we can highlight, as objectives of the Digital Services Act, special obligations for online marketplaces in order to combat the online sale of illegal products and services. It will introduce measures to counter illegal content online and obligations to react quickly, impose certain limits on the presentation of advertising and on the use of sensitive personal data for targeted advertising and ban misleading interfaces.

This legislation is created in order to establish frameworks through which governments can act. In other words, governments must stick to the “need to know” basics, and there is still much to be known. It is relevant to look into online trades and exchanges in order to battle money laundering, tax evasion, and other financial crimes. Additionally, while referring to algorithms, now even artificial intelligence can be privileged tools to achieve such purposes. However, it must not be allowed that through these tools, personal and individual information is disproportionately used in a manner that can be harmful and even illegal.

The Digital Services Act will enter completely in force on November 17, 2024, and it is considered a package since it also contains the Digital Market Act regarding gatekeepers platforms and converts the need for user to give consent before processing personal data for targeted advertising.

These two acts combined will give more empowerment to the users, provide greater legal protection of the minor, will create more diligent content moderation and decrease disinformation. Essentially, they aim to create a more transparent and accountable online environment.

² More information to be found in <https://www.eu-digital-services-act.com/>.

Hence, the transparency that this legislation hopes to achieve, is absolutely essential for the fair running of the global economy and financial markets. Yet, one must not forget about the frameworks that should be established, i.e., modern legislation to bring clarity of the definition of public interest, and also, a more precise definition of privacy of an individual and its reconciliation with the public interest criteria of the ECJ.

CONCLUSIONS

It is generally well accepted that both principles of proportionality and transparency shall apply in financial and tax matters.

However, as documented in this article through cases emanated from the ECJ and internal public authorities, those principles shall not violate fundamental human rights such as the protection of privacy in the financial and tax fields.

A long and sinuous path is still to be taken in these matters, specially since the access to personal data, and the consequent violation of privacy, is evermore often. If the legal and competent entities do not act preventively, with swift and just legislation, a rigorous fiscalization by the judicial authorities and strong penalties are not imposed on the perpetrators, we will never be able to stop the flood of attacks in which the individuals will inevitably be targeted.

One of numerous purposes of the law is to guarantee to the citizens, to the general public that it is still and always will be on their side, looking carefully to their fundamental rights, for which the whole generations fought long and exhaustively through the ages.

Access to personal data, particularly directly by tax administrations upon request or, indirectly through access to the beneficial ownership register, may be limited not only by the above mentioned principles but also by the criteria imposed by recent jurisprudence of the ECJ applying to the general public.

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REFERENCES

- Portuguese Law 87/2017, of the 18th of August, which establishes measures to combat money laundering and terrorist financing, partially transposes Directives 2015/849/EU, of the European Parliament and of the Council, of 20 May 2015, and 2016/2258/EU, of the Council, of 6 of December 2016, amends the Penal Code and the Industrial Property Code and revokes Law n.º 25/2008, of June 5, and Decree-Law n.º 125/2008, of July 21.
- Beneficial Ownership Registration, of the Portuguese Government. <https://justica.gov.pt/servicos/Registo-de-Beneficiario-Efetivo> [Accessed 12.03.2023].
- 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, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.
- Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.
- Judgment of the Court (Grand Chamber) of 22 November 2022. WM and Sovim SA v Luxembourg Business Registers. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0037> [Accessed 12.03.2023].
- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
- Decision of the Data Protection Commissioner Case Dnro 3681/186/21 on the delimitation of personal data processed in connection with the implementation of comparative data checks.
- Szymacha, A. (2021). Fundamental Rights and the Obligation to Publicly Disclose Information on Tax Strategy. *Journal of Finance and Financial Law*, 4(32), 7–20.

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