



Beneficial Ownership! Public Registry and Privacy Rights

Jamaica comes under close watch as its February 2023, date looms to address its strategic deficiencies in its regime to combat money laundering. The country is among twenty-six jurisdictions named in the Financial Action Task Force (FATF) October 2022 publication of high-risked, and other monitored jurisdictions for money laundering.

The FATF's assessment of Jamaica, records three areas which require improvements. Namely:

(1) including all Financial Institutions (FIs) and Designated Non-Financial Businesses Professionals (DNFBPs) in the Anti-Money Laundering/Counter Financing of Terrorism (AML/CFT) regime and ensuring adequate, risk-based supervision in all sectors;

(2) taking appropriate measures to prevent legal persons and arrangements from being misused for criminal purposes, and ensuring that accurate and up-to-date basic and beneficial ownership information is available on a timely basis to competent authorities; and

(3) implementing a risk-based approach for supervision of the Not-for-Profit Organization (NPO) sector to prevent abuse for Terrorism Finance (TF) purposes.

In this missive, we explore point 2 above, narrowing in on beneficial ownership information and its availability to the public considering the recent ruling by the European Court of Justice (ECJ) on November 22, 2022, which ruled on the infringement of guaranteed rights by this FAFT requirement which forms part of the 40 recommendations aimed at combating money laundering.

The ECJ in its ruling pronounced on the interference with fundamentals rights guaranteed in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. In paragraph 44 of its ruling, the ECJ held that ***“the general public’s access to information on beneficial ownership, provided for in point (c) of the first subparagraph of Article 30(5) of Directive 2015/849 as amended, constitutes a serious interference with fundamental rights enshrined in Articles 7 and 8 of the Charter.”*** With Jamaica actively working to address point 2 above, which calls for beneficial ownership information to be available on a timely basis to competent authorities, what lessons, if any, can be drawn from this ruling in view of Jamaica’s efforts to pass into law a register of beneficial ownership information? How would enshrining into law of this FATF recommendation interfere with rights guaranteed under Jamaica’s Constitution, and Data Protection Act?

FATF Requirement

Recommendation 24 of the FATF recommendations on combating money laundering speaks to the Transparency and Beneficial Ownership of Legal Persons. In its interpretive notes on this recommendation, the FATF indicates that *“competent authorities should be able to obtain, or have access in a timely fashion to adequate, accurate and current information on the beneficial ownership and control of companies and other legal persons that are created in the country.”* It goes on to prescribe four minimum requirements by which this is to be accomplished. Among them is the requirement to make the information publicly available.



Beneficial Ownership

Beneficial Ownership simply put, seeks to identify the legal person(s) who controls or has controlling interest in an established enterprise, or otherwise who owns the enterprise and calls the shots. As a mechanism to fight money laundering, it is important that such information is known and available to law enforcement. Importantly, financial institutions often carry the burden of unearthing the beneficial ownership of businesses as part of their due diligence requirements. This becomes quite challenging when the beneficial owner(s) is shrouded in secrecy through offshore registration using Special Purpose Vehicles (SPVs) and Trust arrangements and often through several obscure legal entities. In keeping with the objective of the recommendation, the transparency which comes with a beneficial ownership registry, if publicly available, grants law enforcement and financial institutions an advantage in identifying the true ownership and control of entities. However, this would come at the expense of guaranteed rights under the constitution to the citizens, using the ECJ's ruling in context. As Jamaica prepares for its follow-up review session with the FATF in February 2023 and passing legislation to give effect to a beneficial ownership registry, public or otherwise, the ECJ's ruling may be considered in the drafting of the intended law.

What areas of Jamaican law could a public registry on beneficial ownership interfere with? We consider provisions under the Charter of Fundamental Rights and Freedoms under the Jamaican Constitution and the Data Protection Act 2020.

Charter of Fundamental Rights and Freedoms

The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 in Chapter III Section 13(3), outlines the rights guaranteed to Jamaicans under the Constitution. Privacy rights, as contained in this section, appears at section 13(3)(j)(ii) and (iii). Specifically, they indicate *"the right of everyone to:*

(ii) respect for and protection of private and family life, and privacy of the home; and

(iii) protection of privacy of other property and of communication."

Data Protection Act

The Data Protection Act, 2020 under Part II addresses the rights of data subjects and others. Under section 6(2)(a) of the Act, "an individual is entitled to be informed by the data controller, free of charge, whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller." Further, in 6(2)(b), once personal data is being processed, the data subject is entitled to *"a description of the personal data of which the individual is the data subject, the purpose for which the personal data are being or are to be processed and the recipients or classes of recipients to whom they are, or may be, disclosed."*

Takeaways from the ECJ's Ruling in view of Privacy Rights and the Processing of Personal Data, making the Jamaican connection



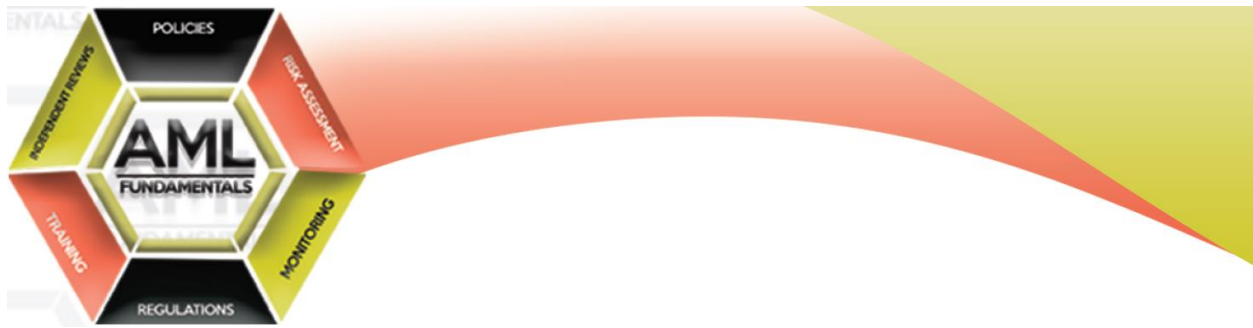
In paragraph 35 of its ruling, the ECJ acknowledged that *“Article 7 of the charter guarantees everyone the right to respect for his or her private and family life, home and communications, while Article 8(1) of the Charter expressly confers on everyone the right to protection of personal data concerning him or her.”* We note the similarity of the wording of Article 8 and that of section 13(3)(j) under the Jamaican Charter of Fundamental Rights and Freedoms. The ECJ in its ruling made several notable judgements as it concerns privacy right and beneficial ownership public registries as follows:

- Paragraph 38 – “the access of any member of the general public to those data affects the fundamental right to respect of private life, guaranteed under Article 7 of the Charter. In addition, making available those data to the general public in that manner constitutes the processing of personal data falling under Article 8 of the Charter.”
- Paragraph 39 – “It should also be noted that, as is apparent from the Court’s settled case-law, making personal data available to third parties constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter.”
- Paragraph 44 – “accordingly, the general public’s access to information on beneficial ownership, provided for in point (c) of the first subparagraph of Article 30(5) of Directive 2015/849 as amended, constitutes a serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter.”

Of note, the ECJ in its ruling at paragraph 58 also considered the objective of the European Union (EU) in view of combating money laundering within the EU, and the effect of transparency in beneficial ownership registry leading to an environment less likely to be used for those purposes. The court however concluded in paragraph 62 that *“the principle of transparency as it results from Articles 1 and 10 TEU and from Article 15 TFEU, cannot be considered, as such, an objective of general interest capable of justifying the interference with fundamental rights guaranteed in Articles 7 and 8 of the Charter, which results from the public’s access to information on beneficial ownership.”*

Conclusions

As Jamaica rushes to address its strategic deficiencies in view of the FATF recommendations, and specifically recommendation 24 on Beneficial Ownership, prudence dictates that the legal drafters take note of this ruling from the ECJ given the close similarity of wording in Article 7 and 8 when compared with section 13(3)(j) of the Charter of Rights. Given the considerations of the court, it would be fool hardy to embark on a similar trajectory to satisfy our obligation to give legal footing to recommendation 24, specific to publicly accessible beneficial ownership registries as called for by the FATF, given the obvious conflict with rights guaranteed under Jamaica’s Charter of Rights, and its further likely interference with data subjects rights. With February 2023, only two months away, and with no indication of the governments approach to addressing this strategic deficiency, and Jamaica facing possible adverse consequences should we fail to satisfy the FATF of our efforts at the appointed time, it would be wise for the powers that be to re-examine the proposed approach to beneficial ownership registries, if they had previously intended to make same accessible to the general public. Such a re-examination would also avoid future constitutional



challenges should the law being contemplated move in a direction which seriously interferes with rights guaranteed under Jamaica's constitution.

More broadly, it is worth mentioning that the FATF has issued for public consultation, amendments to Recommendation 24, in October 2022. Carried in the introduction of its amended guidance, the FATF signifies that the revised guidance is aimed at “strengthening the international standards on beneficial ownership, to better prevent and deter the misuse of legal persons”, and to respond to outcomes of the FATF’s mutual evaluation process which points to insufficient levels of effectiveness to combat money laundering through the misuse of legal persons. Further, countries will now be expected to adopt a multipronged approach in collecting beneficial ownership information, accurately, adequately, and timely, and make it accessible to competent authorities. The revision will also now require countries to adopt a risk-based approach in assessing their exposure to legal persons within the jurisdiction, and externally where there are “sufficient links with their country”.

It remains to be seen how the ECJ’s ruling on public access to beneficial registries will impact the FATF’s guidance and expectations of countries seeking to adopt this recommendation into law, should the insistence on publicly accessible beneficial ownership registries be maintained by the FAFT. Of note in perusing the revised guidance, the FATF may be amenable to publicly available beneficial ownership registries not being an absolute requirement going forward. At paragraph 10.1 which addresses “Example features – Public authority or body holding beneficial ownership information”, it records at “(xii) Basic information on the company is publicly available; some or all BO information could also be made publicly available or be made available to FIs and DNFBPs at a minimum.”

No doubt, all jurisdictions with existing laws guaranteeing citizens privacy rights should consider the ECJ’s ruling and if deemed applicable and appropriate, seek alignment with constitutional provisions, since the FATF recommendation and adoption into national law ought not to trump fundamental rights and freedoms within a sovereign nation, where it is not demonstrably justified.

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