DISCRIMINATORY OR NOT? THAT IS THE QUESTION

HEATHER L THOMPSON AND **JOHANNES GASSER** CONSIDER THE EFFECT OF THE EU'S REGISTERS OF BENEFICIAL OWNERSHIP ON NON-EU COMPANIES

ON 30 MAY 2018, the EU endorsed its Fifth Anti-Money Laundering Directive (5AMLD),[1] which amended the Fourth Anti-Money Laundering Directive (4AMLD) of 2015.[2] Accordingly, all legal entities (e.g. companies, partnerships, etc) established under the laws of an EU country are now required to register their beneficial ownership (BO) in a central register.

However, for trusts (and similar legal arrangements), the requirement for registration appears to be triggered only when the trust is administered in the EU or when the trustee engages in business relationships or acquires real estate in the EU.

ARTICLES 30 AND 31

Both directives uphold the different treatment of companies under art.30, and of trusts and similar legal arrangements under art.31. It is important to draw a clear line between both provisions and categories, as they will not allow access to their registers to the public in the same manner. While the company register will be publicly accessible without restriction, the trust register will generally be open only to those who will be able to show a legitimate interest.

However, there is an exception that breaches this line and is at the very least selective, if not discriminatory, depending on your perspective.

According to art.31 of 5AMLD, the information on the BO of a trust or a similar legal arrangement is accessible in all cases to, *inter alia*, 'any natural or legal person that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity other than those referred to in Article 30(1), through direct or indirect ownership, including through bearer shareholdings, or through control via other means'.

It is this sub-paragraph that creates 'some confusion',[3] even to those who welcome what some fear is the ultimate threat to privacy in the world of trusts. Obviously, it applies to non-EU companies (not providing similar BO register access) within an EU- or European Economic Area-topped structure. Both 5AMLD and the Council of the European Union press release of 20 December 2017[4] explain that this clause refers to a trust (very likely administered or with business relationships in the EU) that owns or controls a company or legal entity incorporated outside the EU, as a company incorporated outside the EU would not be covered by art.30(1).

PRACTICAL EXAMPLE

To illustrate this, we will outline the situation using Liechtenstein and the Bahamas as example jurisdictions. BO records relating to a Liechtenstein foundation holding shares in a Luxembourg subsidiary company would not be accessible to the public; but if the subsidiary were from the Bahamas, the whole structure, including on the Liechtenstein level, would be exposed to the public.[5]

Arguably, this provision thus seeks to discriminate against such structures by opening the national BO register to the public where it would otherwise have restricted access only. Is this geared to discourage structuring wealth with non-EU entities that are, absent transparency on BO via public registers, considered opaque? And if so, does this make it discriminatory?

At first glance, these articles seem merely to treat EU companies (granting access to BO registers) and non-EU companies (not granting such access) equally. Otherwise, by using non-EU companies to hold assets in the EU, no BO information would be accessible.

However, such access is being granted on a different level. Using our example, if a member of the public accessed the BO information of the Luxembourg company, they would learn about the Liechtenstein foundation; but, on that higher level, they would fail to unearth its beneficial owners – absent such right to access without showing a legitimate interest.

Even if the purpose of these provisions is not discriminatory, the effect may be. Ultimately, it will be up to the European courts to consider such potential for discriminatory effect. In the meantime, planners, trustees and beneficiaries, and potential settlors will need to consider how and whether to navigate these waters.

1 bit.ly/2JUeq4w **2** bit.ly/2OOcqsK **3** bit.ly/2GSB6xP **4** bit.ly/2Jj3r3j **5** Exceptions to disclosure relating to personal risk are provided for, though it is not clear how any risk evaluation would be made in a particular Member State.

HEATHER L THOMPSON TEP IS OF COUNSEL AT HIGGS & JOHNSON IN THE BAHAMAS, AND **JOHANNES GASSER TEP** IS SENIOR PARTNER AT GASSER PARTNER IN LIECHTENSTEIN