THE AVER ADVISORY

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PRIVACY

EU Court of Justice invalidates public access to identities of beneficial owners

Judgment of the Court of Justice in Joined Cases C-37/20 | Luxembourg Business Registers and C-601/20; Release No 188/2022, November 22, 2022

On November 22, 2022, the Court of Justice of the European Union invalidated a provision of the *5th EU Anti-Money Laundering Directive* that guaranteed public access to beneficial ownership data of registered entities.

Facts. In accordance with the EU directive, Luxembourg established a Register of Beneficial Ownership of Companies in 2019, which provided that a wide range of data on the beneficial owners of registered entities must be entered and retained in that register. Some of this information was accessible online to the general public. Beneficial owners had the right to request a restriction on access to such information in certain cases.

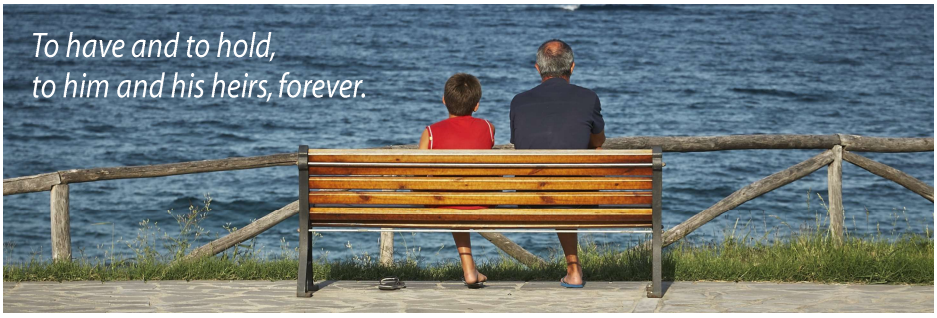
After an unsuccessful request to restrict the general public's access to their information, a Luxembourg company and its beneficial owners brought actions before the Luxembourg District Court. The Luxembourg court found that the disclosure of such information could create a disproportionate risk to the fundamental privacy rights of the beneficial owners; that is, their rights to respect for private life and to the protection of personal data, enshrined in Articles 7 and 8 of the *Charter of Fundamental Rights of the European Union*. The District Court referred the case to the Court of Justice of the European Union.

Decision. The Court of Justice noted that the EU legislature seeks to prevent money laundering and terrorist financing by creating—by means of increased transparency—an environment less likely to be used for those purposes. The court noted that, in principle, the general public's access to information on beneficial ownership can be appropriate for contributing to the attainment of this legislative objective.

However, the court found that the level of infringement caused by this legislative measure is neither limited to what is strictly necessary nor proportionate to the legislative objectives. The information disclosed by the Luxembourg register enables a potentially unlimited number of persons to find out about the material and financial situation of a beneficial owner. Furthermore, the court noted that information can not only be freely consulted, it can also be retained and disseminated. The court therefore held that the provision of the *EU Anti-Money Laundering Directive*, which ensures public access to the beneficial ownership of companies, is invalid.

Comments. As a consequence of this decision, company beneficial ownership registries were immediately taken offline throughout the EU. This decision may not cure the naming-and-shaming damage caused by sensational journalism, but it is a very welcome development and is likely to have practical implications beyond the EU, worldwide.

Christmas definitely seems to have come earlier this year in Luxembourg. In a judgment of 8 December 2022, the same EU Court of Justice held that the so-called *DAC6 Directive* obligation for a lawyer to inform other intermediaries involved in cross-border (tax planning) transactions infringes the right to respect for communications with his or her client. ■



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Foundations

Belgian inheritance tax at 55% on a Liechtenstein foundation distribution (which was tax exempt)

Belgium Court of Appeal (Ghent), April 5, 2022

A Belgian judge recently slipped up over a creative argument submitted by the Flemish tax administration.

Facts. A Belgian resident (in Flanders) set up a Liechtenstein foundation into which he placed part of his assets. He was married, but had no children. He designated his wife as the first beneficiary and her niece as one of several second beneficiaries. The statutes of the foundation indicated that distributions were to be decided by the foundation council in a discretionary manner. The founder died in 2003. His widow (the first beneficiary) did not receive any distribution from the foundation and she died in 2014. The niece received a substantial distribution from the foundation in 2017 and the Flemish tax authorities sought to apply 55% inheritance tax on these benefits.

Decision. Notwithstanding the lack of any evidence, the Court (presided by one single judge) held with the tax authorities that there must have been a verbal agreement between the deceased first beneficiary and the foundation council—a so-called third-party clause—and followed the reasoning of the tax authorities that the first beneficiary had assigned a legal claim to the niece. The court thus allowed the distribution to the second beneficiary to be taxed as a bequest from the first beneficiary, taxable at 55%.

Comments. The judge clearly made a mistake and seems to need a crash course on foundations. Firstly, based on the rules of Belgian private international law, she should have applied Liechtenstein law to come to conclusions. Secondly, under Liechtenstein foundation law, as in Belgian foundation law, the assets of a foundation belong to the foundation and to nobody else—the foundation assets do not belong to the estate of the founder, nor do they belong to the estate of any beneficiary.

Astonishingly, the judge overlooked the fact that the distributed assets were never part of the estate of the founder's widow!

Conclusion. You will want to involve a tax lawyer familiar with the basics of foundation law when it comes to defending your interests in foundations for Belgian residents. There is no reason to treat Liechtenstein and Belgian foundations differently (see *Aver Advisory April 2015*). ■

Trusts

Letters of wishes are not binding

In the Matter of the Piedmont Trust & Riviera Trust, [2021] JRC 248

The Jersey Royal Court recently considered the magnitude of a settlor's letter of wishes in the exercise of a trustee's fiduciary duties.

Facts. The trustees of two trusts—the Piedmont Trust and the Riviera Trust—sought court approval regarding the distribution of assets upon the termination of the trusts. Both trusts were settled by the father of three adult children; his daughter and two sons. The father passed away in April 2020.

In two early letters of wishes—in 2000 and 2006—the settlor expressed his desire that the trust should be divided in equal parts between his three children. By 2010, the father and daughter had fallen out and the father expressed his desire that the daughter be excluded from the trusts.

Decision. The court noted that a settlor's wishes are "a relevant consideration and trustees are therefore bound to take them into account." They are not, however, binding upon trustees, who must "make up their own mind and are free to depart from the settlor's wishes." Not to form their own view when exercising dispositive powers would be a breach of trust leaving their decision open to challenge, the court noted.

The court confirmed that trustees "may decide to place little or no weight on a settlor's wishes if they are satisfied that such wishes are based upon an unreasonable animus against a particular beneficiary." The court held that it was correct for the trustees not to place weight on the 2010 wishes. ■

Tax Residency

The determination of one's tax residence is made on an annual basis

Batten v. HRMC, UK First-Tier Tribunal, June 23, 2022

A recent UK case reminds us that the determination of an individual's tax residence is an exercise that is made on an annual basis.

Facts. The case concerned the residence status of Mr. Batten and whether he should be treated as a non-UK resident for tax purposes. Batten, a British football manager and businessman, claimed to have moved from the UK to Gibraltar in 2010, and back to the UK in 2015. For his first two years overseas, he was effectively classified as non-resident.

Decision. Although Batten had made a distinct break with the UK in 2010, the court found that Batten had become a UK resident again in 2012/2013, when the distinct break with the UK came to an end, based on:

- Accommodation at his family home in the UK was available for him at all times. His wife lived there and ran the house while he was not there. It was the family home to which his sons would also return.
- Although Mr Batten had bought an apartment in Gibraltar, it was only 80 square meters and there was no indication that it became a family home.
- Mr. Batten enjoyed the Gibraltar lifestyle in the summer months when the place was buzzing, but spent much of the winter away from Gibraltar from 2012 onwards, with a considerable period over Christmas and New Year spent in the UK.
- Mr. Batten had redirected his mail to Gibraltar for two years but that redirection ceased by April 2012.
- As the years passed, he returned more frequently to the UK, to the extent that he engaged in brief runs to Calais to reduce his midnight count in the UK.
- Mr Batten was able to use at least one car when he came back to the UK. ■

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Celebrity Estates

Larry King's handwritten will complicates his estate plan

A family dispute over Larry King's estate once again highlights the importance of purposeful and regular reviews of an estate plan; particularly following significant life events.

Larry King was most famous for hosting *Larry King Live on CNN*. King died from COVID-19 in California on January 23, 2021, leaving behind three children and his seventh wife, Shawn Southwick. King had been married to Southwick for 22 years. He filed for divorce from Southwick in 2010, after which the couple reconciled. They separated in 2019 and King once again filed for divorce, although the proceedings were not finalized.

The bulk of King's assets were settled into a revocable trust estimated to be worth over $100 million. King also had $2 million worth of assets not in trust. He reportedly updated his estate plan in 2015 and named Southwick as executor of his estate.

In October 2019, King executed a three-sentence holographic (handwritten) Will in which he attempted to rewrite his estate plan to cut out Southwick. It read:

> "This is my Last Will & Testament.
>
> It should replace all previous writings.
>
> In the event of my death, any day after the above date I want 100% of my funds to be divided equally among my children Andy, Chaia, Lary Jr, Chance & Cannon."

King's daughter Chaia died from lung cancer in 2020 and his son Andy suffered a fatal heart attack within weeks of Chaia's death. Larry Jr. was King's son from a brief marriage to Annette Kaye, while Chance and Cannon were King's children with Southwick.

Southwick objected to probate of the holographic Will on several grounds, including testamentary capacity and undue influence. Indeed, the lack of formality of a holographic Will almost always raises concerns about proper execution and testamentary capacity.

In June 2021, King's estate was reportedly settled in equal portions between Larry Jr. and Southwick—clearly not in accordance with King's wishes as stipulated in his handwritten Will. ■

Estate Planning

Court invalidates retroactive-estate planning-by-forged-Will

Cropper v. Dimberline et al., [2022] EWHC 2202

Facts. Bernard Dimberline died on October 11, 2017. In the days after his death, his partner of 30 years Kim Dimberline contacted various banks at which the deceased had accounts. She informed the banks of Bernard's death and sought to have the balances transferred to herself. All family members, including her son Mark Dimberline, were under the impression that Kim and Bernard were married.

To transfer the funds, the banks required a copy of Bernard's Will or his certificate of marriage to Kim. Knowing that neither a Will nor a certificate existed, Kim and Mark purchased a Will kit from the well-known retailer WH Smith. Mark then prepared a Will with forged signatures and dated it several months prior to Bernard's death. The Will was provided to the banks and the banks in turn transferred the funds from Bernard's accounts.

One of Bernard's daughters, from an earlier marriage, learned of the forged Will and sought a declaration from the court that her father had died intestate.

Decision. The court expressed little doubt that the defendants believed they were doing the right thing in giving effect to what they thought would have been Bernard's wishes with regard to his property. In addition, the court noted that since Bernard's death, significant sums had been made available from the estate to Kim. The court found that this was consistent with the explanation of good intentions and why the Will was drawn up as it was.

Nonetheless, the court noted that "the law lays down formalities as to how property is to be disposed of on death and it is not for persons, after a deceased's death, to try and put in place documents which will give effect to what they think the deceased's intention would have been".

Accordingly, the court declared that the deceased died intestate. ■

CyberSecurity

Your email address provides a window into your financial world for hackers

As Google search engine users, we all visit or are redirected to sites and contact pages that invite us to add our Google, Outlook or other email account or simply require login information; usually an email address and password. Many people use the same or similar login data for multiple sites—a mistake for the unwary.

Your information is only as secure as the least secure place you use it. For example, you may need to login to the website of your child's sports team or to the site of a small organization to which you belong. As these websites are not obvious targets for cybercriminals, they often have lax security. Hackers exploit online weaknesses and can easily break-in to these low-security websites to access a trove of valuable data, including your email and password.

In possession of your email address, hackers will try to log in to your email account. Your email can provide a view into many of your financial dealings. By accessing your email account, hackers can uncover where you bank, they can reset your passwords, and can even change payment instructions on invoices you receive by email.

Password security is critical, and your email password is of utmost importance as it provides a view into many of your financial dealings. Ensure that your passwords are unique (and long) for each online account (see *Aver Advisory Spring 2021*). ■