

# E-administracja

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Skuteczna, odpowiedzialna i otwarta  
administracja publiczna  
w Unii Europejskiej

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REDAKCJA

Sławomir Dudzik · Inga Kawka · Renata Śliwa

Krakow Jean Monnet Research Papers





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**Sławomir Dudzik · Inga Kawka · Renata Śliwa**



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Sławomir Dudzik   
Uniwersytet Jagielloński, Kraków  
✉ s.dudzik@uj.edu.pl

Inga Kawka   
Uniwersytet Jagielloński, Kraków  
✉ inga.kawka@uj.edu.pl

Renata Śliwa   
Uniwersytet Pedagogiczny im. KEN, Kraków  
✉ renata.sliwa@up.krakow.pl

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WYDAWNICTWO KSIĘGARNIA AKADEMICKA  
ul. św. Anny 6, 31-008 Kraków  
tel.: 12 421-13-87; 12 431-27-43  
e-mail: publishing@akademicka.pl

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# SPIS TREŚCI

Słowo wstępne.....	7
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## CZĘŚĆ I

### E-ADMINISTRACJA Z PERSPEKTYWY PRAWA EUROPEJSKIEGO

SŁAWOMIR DUDZIK

Podstawy prawne działania e-administracji a ochrona danych osobowych .....	13
--	----

MAGDALENA FEDOROWICZ

E-administracja nadzorcza na rynku finansowym UE a stabilność finansowa z perspektywy projektów rozporządzeń DORA i MiCA.....	29
---	----

MONIKA NIEDŹWIEDŹ

Dokument w postaci elektronicznej jako dowód w postępowaniu administracyjnym i sądownoadministracyjnym w świetle wytycznych Rady Europy .....	49
---	----

DAMIAN SZULC

Is the Central Register of Beneficial Owners a Reliable and Independent Source of Information? Different ways of Implementing the 4th and 5th AML Directives in Poland and Germany .....	69
--	----

## CZĘŚĆ II

### CYFRYZACJA ADMINISTRACJI JAKO KATALIZATOR TRANSFORMACJI W KIERUNKU

#### ADMINISTRACJI OTWARTEJ, ODPOWIEDZIALNEJ I ŚWIADCZĄCEJ E-USŁUGI

#### DLA OBYWATELI

INGA KAWKA

Wdrożenie sieci 5G jako warunek rozwoju europejskich inteligentnych miast.....	91
--	----

ADAM J. JAROSZ

Digitalizacja usług publicznych na przykładzie biletów komunikacji miejskiej .....	111
--	-----

ALICJA SIKORA

Rozważania o koncepcji e-demokracji w unijnym porządku prawnym .....	127
--	-----

ALEKSANDRA SOŁTYSIŃSKA

E-procurement and the Principle of Transparency in Public Procurement in the European Union .....	147
---	-----

RENATA ŚLIWA Regulatory Impact Assessment – Retrospect Preview, Purpose, Consequences: Toward e-RIA.....	165
--	-----

### **CZĘŚĆ III**

#### **AKTUALNE WYZWANIA CYFROWE DLA POLSKIEJ ADMINISTRACJI**

MARIUSZ GODLEWSKI E-administracja w procesie inwestycyjnym. Elektroniczna forma składania wniosków w postępowaniu budowlanym – uwagi na tle ostatnich nowelizacji prawa budowlanego.....	185
TOMASZ GRZYBOWSKI Granice cyfrowej kontroli podatnika na przykładzie zmian uszczelniających w VAT ....	203
MAŁGORZATA KOŻUCH Czy e-postępowanie mediacyjne zwiększa odpowiedzialność administracji?.....	221
ELŻBIETA MAŁECKA Wybrane aspekty wdrożenia i funkcjonowania e-administracji w Polsce na przykładzie Urzędu Transportu Kolejowego .....	237
PIOTR RUCZKOWSKI Elektroniczny tytuł wykonawczy w postępowaniu egzekucyjnym w administracji .....	255

### **CZĘŚĆ IV**

#### **E-ADMINISTRACJA JAKO CZYNNIK ZWIĘKSZAJĄCY POTENCJAŁ ADMINISTRACJI PUBLICZNEJ W PAŃSTWACH CZŁONKOWSKICH UE I PAŃSTWACH STOWARZYSZONYCH ORAZ ORGANIZACJACH MIĘDZYNARODOWYCH**

ITAI APTER International and EU E-Norm and Decision Making (E-Governance): Lessons for Public Administrations for the COVID-19 Era and Beyond.....	269
MIOMIRA P. KOSTIĆ E-Public Policies and the Issue of Gender Equality.....	287
CHRISTINE MENGÈS-LE PAPE Migration et e-administration en France.....	305
ONDREJ MITAL The Impact of Social Media Use on E-communication Between Government and Public: The Case of Slovakia .....	315
Indeks osobowy .....	337

DAMIAN SZULC<sup>1</sup>

## IS THE CENTRAL REGISTER OF BENEFICIAL OWNERS A RELIABLE AND INDEPENDENT SOURCE OF INFORMATION?

### DIFFERENT WAYS OF IMPLEMENTING THE 4TH AND 5TH AML DIRECTIVES IN POLAND AND GERMANY

**ABSTRACT:** The provisions of Directive 2015/849 (the 4th AML Directive) on the prevention of money laundering and terrorist financing required Member States to establish and maintain registers of beneficial owners, defined as natural persons who ultimately own or control the customer or the natural person on whose behalf a transaction or activity is carried out. The Directive sets out a general framework for the register, leaving Member States free to develop detailed solutions. Most Member States have already established relevant registers. Significant differences can be observed not only in the data held in the registers, but also in the way the registers are managed. In some countries no verification of the data held in the registers is carried out. This raises serious doubts as to whether such data can therefore be regarded as reliable and independent information. The author focuses in particular on comparing the solutions introduced in Polish and German law, making an attempt to formulate *de lege lata* postulates for improving the functioning of central registers of beneficial owners.

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<sup>1</sup> Mgr Damian Szulc, Master of Arts in Law, University of Gdansk, <https://orcid.org/0000-0003-2004-4417>.

**KEYWORDS:** anti-money laundering, beneficial ownership register, European Union Directives, independence, reliability

**CZY CENTRALNY REJESTR BENEFICJENTÓW RZECZYWISTYCH JEST WIARYGODNYM I NIEZALEŻNYM ŹRÓDŁEM INFORMACJI? RÓŻNE SPOSOBY IMPLEMENTACJI IV I V DYREKTYWY AML W POLSCE I W NIEMCZECH**

**ABSTRAKT:** Przepisy dyrektywy 2015/849 (IV Dyrektywa AML) w sprawie przeciwdziałania praniu pieniędzy oraz finansowaniu terroryzmu nałożyły na państwa członkowskie obowiązek utworzenia i prowadzenia rejestrów beneficjentów rzeczywistych, którzy zostali zdefiniowani jako osoby fizyczne będące ostatecznymi właścicielami klienta lub sprawujące kontrolę nad tym klientem lub osobę fizyczną lub osoby fizyczne, w imieniu których przeprowadzana jest transakcja lub działalność. W dyrektywie określono ogólne ramy prawne rejestrów, pozostawiając państwom członkowskim swobodę w opracowaniu szczegółowych rozwiązań. Większość państw członkowskich utworzyła już odpowiednie rejestry. Znaczne różnice można zaobserwować nie tylko w odniesieniu do danych przechowywanych w rejestrach, ale także w sposobie zarządzania rejestrami. W większości państw członkowskich nie przeprowadza się weryfikacji danych przechowywanych w rejestrach. Budzi to poważne wątpliwości, czy dane te mogą być traktowane jako wiarygodne i niezależne informacje. Autor niniejszej pracy skupia się w szczególności na porównaniu rozwiązań wprowadzonych w prawie polskim i niemieckim, podejmując próbę sformułowania postulatów *de lege lata* dotyczących usprawnienia funkcjonowania centralnych rejestrów beneficjentów rzeczywistych.

**SŁOWA KLUCZOWE:** dyrektywy Unii Europejskiej, przeciwdziałanie praniu pieniędzy, rejestr beneficjentów rzeczywistych, niezależność, wiarygodność

## **1. Introduction**

### **1.1. Beneficial ownership registers as a new tool in the fight against money laundering and terrorist financing**

In recent years, we have observed a high increase in new national and European Union legislation in the area of anti-money laundering and counter-terrorist financing. The new laws have improved the existing due diligence measures, while also introducing a number of new measures to facilitate the detection of criminal dealings.

A fundamental European Union-wide anti-money laundering and counter-terrorist financing due diligence measure is the obligation to identify and verify the identity of the clients and beneficial owners, which, as defined by the European Union Directi-

ves, means the natural person or persons who ultimately own or control the entities specified in national laws.<sup>2</sup> According to the directives, the identification and identity verification process should be based on data from reliable and independent sources of information.<sup>3</sup> Such sources are commonly recognized as, for example, government-issued identity documents, notarised documents or government-maintained registers, including the registers of companies.

In the Fourth Anti-Money Laundering Directive (AMLD4), with a view to a more effective use of beneficial owner data in anti-money laundering, it was determined that Member States should ensure that information on beneficial owners is stored in a central register located outside the company, in full compliance with European Union law. The purpose for setting up central registers, according to the EU legislator, is the desire to enhance transparency in order to combat the misuse of legal entities.<sup>4</sup> The Directive only sets out a general framework without specifying technical or legal requirements, leaving issues such as verification of the reliability of the data or the accessibility of the register to Member States.<sup>5</sup> The fifth Anti-Money Laundering Directive (5AMLD) makes a modification to the 4AMLD stating that the registers are to be public.<sup>6</sup>

The Directive's objective of creating national central beneficial ownership registers has been welcomed with confidence by the financial market. Obligated entities could justifiably hope that the newly created registers would relieve them, at least to a small extent, from time-consuming and costly processes connected with the application of due diligence measures. It seems that in applying the due diligence measures it will be possible to use the beneficial ownership registers as a reliable and independent source of information, as is the case with the use of company registers in every member state of the European Union.

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<sup>2</sup> 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, Official Journal of the European Union 2015, L 141/73, Article 3(6).

<sup>3</sup> Ibid., Article 13(1).

<sup>4</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention..., (14) of the introduction.

<sup>5</sup> J. Grynfelder, *Centralny Rejestr Beneficjentów Rzeczywistych*, [in:] *Przeciwdziałanie praniu pieniędzy oraz finansowaniu terroryzmu. Komentarz*, W. Kapica [ed.], Warsaw 2020, p. 195.

<sup>6</sup> T. Van der Merwe, *Beneficial Ownership Registers: Progress to Date*, "CMI U4 Helpdesk Answer", 2020, p. 6, 5.

## **1.2. Purpose of the work**

In this paper, the author attempts to prove that the sole attribute of statehood of the register does not determine its status as an independent and reliable source of information. There are many factors that require detailed analysis, such as legal, technical, quality and management factors. Each potential source containing data which are to be used for identification and verification of the identity of the beneficial owner must first be analysed in detail in terms of possessing the criteria of reliability and independence.

## **1.3. Methodology**

The author conducted a review of specialist publications in the discussed area, and focused mainly on the analysis of European Union directives and on the assessment of regulations implementing them on the national ground of selected European Union Member States. In the comparative analysis of directive implementation methods, the author has focused on the Polish, German and Dutch systems.

## **1.4. Literature**

Currently, due to the newness of the regulation and its dynamic character, not many studies examine the beneficial ownership registers. There are chapters in general monographs on anti-money laundering and terrorist financing, or in commentaries to national laws, for example in those edited by W. Kapica or F. Herzog. The analysis of the effectiveness of European beneficial ownership registers was conducted, among others, by T. Van der Merwe, L. Campbell, or P. M. Gilmour. The author also relied to a large extent on analyses and guidelines issued by respected and independent international organisations such as the Financial Action Task Force and the Tax Justice Network. The intention of this paper is to encourage the academic community to further discuss this topic.

# **2. The rationale of reliability and independence under the Anti-money laundering Directives**

## **2.1. Due diligence measures for identification and identity verification**

National legislations implementing the Anti-Money Laundering Directives (AMLDs) have imposed on obliged entities a number of obligations relating to the application

of due diligence measures. One of the most important due diligence measures is the obligation to identify and verify the identity of the customer and its beneficial owner. The Financial Action Task Force (FATF) identifies two purposes for applying these measures. First, to obtain a full understanding of the customer and his intentions in order to properly assess the potential money laundering or terrorist financing risks associated with the business relationship. Second, as the FATF points out, these measures are themselves intended to serve as a step to reduce the risk of using the financial system for money laundering or terrorist financing.<sup>7</sup>

The first European Anti-Money Laundering Directives only provided for the need to seek identification of the beneficial owner, without the need to verify his identity. The situation changed with the Fourth Anti-Money Laundering Directive (4AMLD), which stated that obliged entities should be obliged to identify the beneficial owner and take reasonable steps to verify his identity.<sup>8</sup>

## 2.2. The concepts of identification and verification

Identification is a process aimed at establishing who a person (e.g. a customer or beneficial owner) is. National laws specify the extent to which obliged entities should know the identity of the identified person by indicating specific identification data. These data usually include name, nationality or date of birth, and sometimes also residential address and others.

Verification, on the other hand, aims at confirming the accuracy and validity of the identification data obtained during the identification process. For the confirmation to be meaningful, it must be based on reliable material, in the language of the Directive, based on information from a reliable and independent source. As identification data is changeable, the identification-verification process requires cyclical repetition. The FATF, in its recommendations, recommends that countries should ensure that obliged entities maintain adequate, accurate and timely information on beneficial owners.<sup>9</sup> The Directive repeats this requirement of the FATF by obliging States to ensure that obliged entities keep adequate, accurate and timely information on beneficial owners.<sup>10</sup>

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<sup>7</sup> Financial Action Task Force, *Guidance on Transparency and Beneficial Ownership*, Paris 2014, pp. 65-66.

<sup>8</sup> W. Kapica et al., *Przeciwdziałanie praniu pieniędzy oraz finansowaniu terroryzmu. Praktyczny przewodnik*, Warszawa 2019, p. 156.

<sup>9</sup> Financial Action Task Force, *Guidance on Transparency and Beneficial Ownership*, 2014, p. 3.

<sup>10</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention..., Article 30(4).

### 2.3. A reliable and independent source of information as verification evidence

The above-mentioned attributes should be considered as indicative of the reliability and independence of the information, as the concept of reliability and independence of the information source is not defined in any ALMDs. Directives as well as national laws merely indicate examples of such sources.

Article 13(1)(a) of the 4AMLD specifies that the application of due diligence measures relating to the identification and verification of the customer should be carried out on the basis of documents, data or information obtained from a reliable and independent source. In view of further considerations, it is important to emphasise that the AMLDs do not refer this obligation to the process of identification and verification of the beneficial owner. However, the character of the European Union Directives allows Member States the freedom to adopt more restrictive national provisions. For example, the Polish legislator has extended the requirement to use a reliable and independent source also to the process of verification of the beneficial owner.<sup>11</sup>

Germany, on the other hand, decided to regulate this issue without direct reference to the concept of “reliable and independent source,” indicating separate open catalogues of documents and information that may be used in the identification and verification processes of both the customer and the beneficial owner. According to paragraph 12 of the German Anti-Money Laundering Act (*Geldwäschegesetz* (GwG)), with respect to the customer and the persons representing him, these may be: a valid official identity document which includes a photograph of the holder, an electronic proof of identity, a qualified electronic signature pursuant, a notified electronic identification scheme and other documents, such as a certificate of birth, which are listed in a national regulation determining documents admissible for the identification of a person to be identified under the Money Laundering Act for the purpose of opening a payment account. With regard to the beneficial owner, the German legislator states only that the obliged entity must take measures appropriate to the risk in order to ensure that the information is correct, with the possibility of using the register of beneficial owners under the conditions laid down by law.<sup>12</sup>

None of the legal systems analysed by the author explicitly mentions the register of beneficial owners as an example of a reliable and independent source of information. Due to the open nature of the catalogue, this does not completely rule out the possibility of considering specific beneficial ownership registers as sources holding

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<sup>11</sup> Ustawa z dnia 1 marca 2018 r. o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu, Dz.U. 2018, art. 37(1), poz. 723, ze zmianami.

<sup>12</sup> Geldwäschegesetz vom 23. Juni 2017, BGBl. I S. 1822, Article 12(3), as amended.

reliable and independent information. It appears that the Directive also allows the use of registers in verifying the identity of beneficial owners, but this does not automatically imply a status of reliability and independence of this information. In order for a register to be considered as having such a status, it would be necessary to establish that it possesses the attributes of reliability and independence.

Numerous studies carried out by international organisations indicate that the lack of adequate, accurate and current beneficial ownership information facilitates the hiding of identity, the source of funds, and the true purpose of an account or property.<sup>13</sup> These circumstances significantly increase the risk of money laundering or terrorist financing offences occurring and not being identified.<sup>14</sup>

### **3. Reliability and independence of beneficial ownership registers**

#### **3.1. Doubts to the reliability and independence**

Why any doubts about the reliability of the data contained in the beneficial ownership registers exist? The four most common concerns for doubting the reliability and independence of the beneficial ownership registers currently operating in the European Union are: legal issues, technical capacity, data quality capacity and currency of collected data. Each affects a separate area, however, each has a significant impact on the final assessment of the register as reliable and independent.

#### **3.2. Legal status of beneficial ownership registers**

##### **3.2.1. Inconsistency of the legal systems**

Doctrine associates the ineffectiveness of the registers mainly with the weakness of the regulations requiring their creation or the regulations creating them, that is, the EU directive and national regulations, respectively. M. Levi and P. Reuter identify the reason for this in "weak conceptual foundations."<sup>15</sup> Campbell further points out that beneficial ownership registers set up by EU Member States are ineffective due

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<sup>13</sup> Financial Action Task Force (FATF), *Guidance on Transparency...*, p. 6.

<sup>14</sup> E. van der Does de Willebois et al., *The Puppet Masters. How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*, Washington 2011, p. 13.

<sup>15</sup> M. Levi and P. Reuter, *Money Laundering*, [in:] *The Oxford Handbook of Crime and Public*, M. Tonry (ed.), Oxford 2009, pp. 357-358.

to inconsistencies in their legal frameworks.<sup>16</sup> Other factors (such as technical issues) that adversely affect the effectiveness of registers are usually derived from inconsistent and incoherent legislation.<sup>17</sup> Due to the broad discretion left to Member States by the AMLDs to regulate the status of registers of beneficial owners, we can observe a diversity of approaches to the deployment of registers in identification and verification processes.

A desirable legal solution for establishing the reliability and independence of the data stored in beneficial ownership registers is undoubtedly the explicit establishment of such a status in a national regulation. Such a step should only be declaratory and linked to the prior actual ensuring and maintaining of reliability and independence of the system. A premature introduction of a provision classifying registers as a source of reliable and independent information may consequently lead to legal chaos.

### 3.2.2. Different ways of regulation

The best example of legal inconsistency in regulating the status of beneficial ownership register is the Polish Anti-Money Laundering Act. When Article 68 was introduced stating that data entered into the Register shall be presumed to be true, many financial institutions treated this step as an assurance of reliability and independence of data provided in the Register. Consequently, voices were also raised about the possibility of using the Register in verification processes. Some obliged entities even introduced provisions to their internal procedures classifying the register of beneficial owners as a reliable and independent source of information. At the same time, the Polish legal doctrine, from the very beginning of the Register's establishment, pointed out that due to technical aspects and despite the existing presumption of data veracity, the Register should not serve as a source providing reliable and independent information.<sup>18</sup> The practice of supervisory authorities has also proved that the use of the statutory presumption of data veracity is not acceptable in this case.

The hopes of Polish obliged entities were definitely undermined by the introduction into the Act of the provision of Article 37(3) of the Polish Anti Money Laundering Act, according to which obliged entities, in applying a due diligence measures, may not rely solely on the information from the Polish beneficial ownership register or from relevant registers kept in other Member States.

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<sup>16</sup> L. Campbell, *Dirty Cash (Money Talks): 4AMLD and the Money Laundering Regulations 2017*, "Criminal Law Review", 2018, no. 2, London 2018, p. 116.

<sup>17</sup> W. Kapica et al., *Przeciwdziałanie praniu pieniędzy oraz...*, p. 170.

<sup>18</sup> *Ibidem*, p. 170.

In this context, it must be considered that the presumption set out in Article 68 of the Act has no actual reference to actions taken in the application of due diligence measures. An analogous provision preventing the use of the Register in the identification and verification processes was introduced by the Dutch legislator. The Dutch law states namely that when conducting customer due diligence, the institutions do not rely solely on the information in the trade register, as referred to in Article 2 of the Dutch Trade Register Act.<sup>19</sup>

This issue was resolved in a different manner in Germany. Germany was one of the first countries to legally sanction the use of the national beneficial ownership register for verification purposes. With the amendment of 25 June 2021, a provision was introduced into the Act stating that obliged entities fulfil their obligation to verify the identity of the beneficial owner if beneficial owner data in the identification process is obtained from the customer and at the same time complies with the data contained in the Register (verification). At the same time, Article 11 (5) sentence 3 of the German Anti Money Laundering Act emphasises that the collection of information from the German beneficial ownership register is not sufficient to fulfill the obligation to establish the data of the beneficial owner (identification).

Accordingly, under German law, the use of the Register has been limited to the process of verifying the identity of the beneficial owner, thereby significantly facilitating the application of this due diligence measure by German obliged entities. The exceptions where the verification of the identity of the beneficial owner must be carried out in the existing manner are limited to the situations where there are doubts about the identity of the beneficial owners, their position as beneficial owners or the accuracy of other information pursuant to Section 19(1) or that indicate a higher risk of money laundering and terrorist financing.<sup>20</sup>

It must be emphasised in this regard that by introducing this provision, the German legislator did not consider the national beneficial ownership registry to be a reliable and independent source of information. The possibility to use the Register was limited exclusively to verifying the identity of the beneficial owner, which, as already indicated in this paper, should be considered to be in compliance with AMLDs. In contrast, the use of the German register as a source of identification and verification of data other than the beneficial owner is still not permitted under that provision. An additional protective obligation imposed on the obliged entities in Germany is the

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<sup>19</sup> Ustawa z dnia 1 marca 2018 r. o przeciwdziałaniu..., Article 3(18).

<sup>20</sup> Geldwäschegesetz..., Article 12(3).

necessity to record the measure of identity verification and any difficulties that occur during the verification process.

### **3.2.3. Independence of structures**

In order to ensure the reliability and independence of the beneficial ownership register, it is also important for the register to be established within independent structures. According to the AMLDs, Registers should be operated by independent public authorities. Practice in EU countries shows that this rule is followed, and the Registers are in principle maintained by Ministries of Finance. However, as has been demonstrated in this work, the keeping of a register by a state authority is not in itself a factor guaranteeing the status of reliability and independence of the data stored in the register.

## **3.3. Technical capacity of registers**

### **3.3.1. Importance of technical factors**

The second premise significantly influencing the status of beneficial ownership registers as storing reliable and independent information is the technical conditions of the system as regards the verification of the accuracy of the collected data.

In principle, data is entered into the registers by persons representing entities or by beneficial owners of these entities. Currently, no European Union Member State has mechanisms for direct and complete verification of the data entered into the register by these entities. This casts doubt on the authenticity of the data stored in the register and, above all, opens the door to misuse. The submission of a false declaration is often undetectable in practice. What is more, it is possible to assume a hypothetical situation in which a smaller obligated entity, which does not have a team of lawyers and well-developed anti-money laundering procedures, will, due to the public (state) character of the register, wrongly assume that the register stores data which it can trust. A criminal who is aware of the erroneous practice of such an entity can easily take advantage of an authentic but misleading entry in the register.

From the technical point of view, the ministers indicated in the national laws are, in principle, responsible for the registers of beneficial owners. They are responsible for the establishment, operation and maintenance of the register. They are also often competent to issue regulations on matters such as the details of the submission of notifications or the control procedure.

To consider a Register from a technical point of view as storing reliable and independent data, it would be necessary to examine first how this data is ‘technically’

verified and kept up to date.<sup>21</sup> The lack of a system to verify the data entered in the notifications leads to a situation where the Registers are, in practice, a place for storing self-declarations whose veracity and accuracy is not verified.<sup>22</sup>

### 3.3.2. Methods of ensuring accuracy

There are many methods for verifying the accuracy of data submitted to the beneficial ownership registers. Establishing a dedicated team to verify and update the data contained in the notification would be a possible solution. This would require the creation of complex procedures providing for continuous contact between team members and entities obliged to report information on beneficial owners. The establishment of such a large team would, however, entail high financial costs. The state could therefore consider allocating the costs of operating the system proportionally to the obliged entities, which would be the main beneficiaries of the change in the legal status of the registers.

The literature agrees that the most effective solution is to implement an automated online data verification process rather than to establish multi-person analysis teams. Non-governmental organisations, such as the Tax Justice Network, indicate that countries operating beneficial ownership registers could use existing registers in this area, such as commercial registers, registers of civil registration systems, registers of identity documents, or even central registers of vehicles and drivers.<sup>23</sup> This solution is partially used in Austria, where notifications to the beneficial ownership register can only be made if the data of legal entities or beneficial owners are already contained in another national register.<sup>24</sup> These data are subsequently verified for compliance under the so-called cross-check procedure. A similar solution has been successfully applied to the Danish Company Register.<sup>25</sup>

An interesting solution allowing verification of part of the data reported to the beneficial ownership register was introduced by the Dutch legislator. In the notification to the Register, in addition to the identification data of the beneficial owner, a copy of the documentation that was used in the process of verifying the submitted identification data (e.g. an identity document) must also be attached. Nevertheless,

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<sup>21</sup> W. Kapica et al., *Przeciwdziałanie praniu pieniędzy oraz...*, p. 170.

<sup>22</sup> T. Van der Merwe, *Beneficial Ownership Registers...*, 2020, p. 6, 5, 14.

<sup>23</sup> A. Knobel, *Beneficial Ownership Verification: Ensuring the Truthfulness and Accuracy of Registered Ownership Information*, London 2019, pp. 3-4.

<sup>24</sup> Financial Action Task Force (FATF), *Best Practices on Beneficial Ownership for Legal Persons*, Paris 2019, p. 57.

<sup>25</sup> *Ibidem*.

the Netherlands has not chosen to grant its register the status of a register holding reliable and independent data. There is even a provision in the Dutch Act stating that when conducting customer due diligence, the entities do not rely solely on the information in the trade register.<sup>26</sup>

In Poland, by contrast, until May 2021, no procedure for verifying the accuracy and currency of the data contained in the Register was specified.<sup>27</sup> The Act, pursuant to Article 57(2), provided only that taking actions to ensure the correctness and updating of the information contained in the Register is the task of the responsible authority, that is, the minister competent for public finance. However, the responsible authority has not issued any regulation regulating these issues. This changed with the amendment of May 2021, which introduced Article 61b of the Act, stating that in matters of the Register the competent authority may initiate proceedings to clarify whether the information collected in the Register is correct and up-to-date. At the same time, on 14 May 2021, an ordinance was issued designating the Director of the Tax Administration Chamber in Bydgoszcz as the authority designated to keep the Register and to take actions to ensure that the information contained therein is accurate and up-to-date.<sup>28</sup>

In view of the previous lack of detailed regulation of the Register, the steps taken should be assessed positively. In the author's opinion, however, these steps are not sufficient to ensure the authenticity of the data stored in the Register. Firstly, the new provision is structured using the adjective "may", which limits the verification procedure only to selected information provided in the Register. In order for the Register to be considered a reliable source of information, in the author's opinion, all or a significant majority of entries should be subject to such verification. In a situation where only some entries are subjected to the verification procedure, we cannot claim the reliability of the entire Register, but only the reliability of individual pieces of information that were verified and found by the authority to be correct. Theoretically, therefore, information deemed correct under the verification procedure could be considered as coming from a reliable source within the meaning of the Polish Anti

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<sup>26</sup> Wet van 15 juli 2008, houdende samenvoeging van de Wet identificatie bij dienstverlening en de Wet melding ongebruikelijke transacties (Wet ter voorkoming van witwassen en financieren van terrorisme), as amended, Article 3(18).

<sup>27</sup> W. Kapica et al., *Przeciwdziałanie praniu pieniędzy oraz...*, pp. 170-171.

<sup>28</sup> Rozporządzenie Ministra Finansów, Funduszy i Polityki Regionalnej z dnia 14 maja 2021 r. w sprawie wyznaczenia organu Krajowej Administracji Skarbowej do wykonywania niektórych zadań organu właściwego w sprawach Centralnego Rejestru Beneficjentów Rzeczywistych, Poz. 903.

Money Laundering Act. Theoretically, because the detailed description of the verification procedure is not yet known.

Under the current Polish law, these changes will not significantly affect due diligence processes conducted by obliged entities. This follows from the fact that, despite the introduction of sanctioning provisions against persons submitting false data to the beneficial ownership register, the responsibility for the use of inaccurate data ultimately lies with the obliged institution.

### **3.4. Quality and scope of data**

#### **3.4.1. Importance of collected data**

As important for determining the status of each beneficial ownership register as the legal and technical context is undoubtedly the quality and scope of collected data, which affect the accuracy and adequacy of data. In practice, identity verification consists in confirming the accuracy of previously collected identification data.

The first step necessary to build an effective beneficial ownership register is to precisely define the scope of entities required to report information to the beneficial ownership registers. It is equally important to define who the actual beneficiary or the person representing the client is, and what data of these persons should be collected in the registers. Without a precise realization of these activities, even a system equipped with automated verification processes will be of no practical value from the point of view of the due diligence procedure of obliged institutions.

#### **3.4.2. The problem of inconsistency**

In the area of identification data, attention should be paid, in particular, to a possible lack of consistency between the scope of data collected in the Register and the scope of data for identification and verification of which obliged entities were obliged by law. In many countries, the Register does not collect all the data required by law to identify and verify the identity of the beneficial owner or the customer. Although the scope of collected data does not directly affect the reliability of information stored in the Register, in practice, even if they were granted the status of reliable and independent, such Registers would be only partially useful from the point of view of obliged entities in due diligence procedures. Due to the need to verify data outside the scope of data collected in the register, an obliged entity would still have to request additional

documents from the customer or beneficial owner. An example of such a situation could be the collection by the Polish Registry of only one nationality of the beneficial owner. Under the strict interpretation of the previous version of the Polish Anti Money Laundering Act, obliged entities had to verify each nationality held by the beneficial owner, which would not have been feasible with the Polish Registry due to the failure to store data on other nationalities. Currently in Poland, the Register also does not collect information on the country of birth of both the beneficial owner and the person representing the reporting entity, yet the Act requires verification of this data in certain cases.<sup>29</sup>

In line with NGO recommendations, in the case of beneficial owners it is recommended to collect full name, date of birth, nationalities, country of residence, address, personal identification number and information on how the beneficial owner exercises control over the entity.<sup>30</sup> An example of a country implementing these recommendations is the Netherlands, with the exception that the Registry does not collect data on full date of birth, but only on month and year of birth.

European law does not define the scope of identification data subject to subsequent verification, leaving it to the Member States. In general, however, there is a tendency among Member States to minimize the data collected in the Registers. This is usually the result of attempts to adapt the system to public acceptance and preexisting data protection standards. As a consequence, currently there are also differences between Member States in the data collected in the beneficial ownership registers.

The lack of uniform statutory definitions of such terms as customer or beneficial owner is also problematic for the uniformity of data collected in European registers. These definitions at the level of AMLDs are broad, leaving the task of defining them in detail to Member States. Therefore, they often do not correspond with the definitions in force in other countries. In this situation, a person who is considered a beneficial owner in one country may not be considered a beneficial owner in other countries.

### 3.4.3. Standardisation of requirements

The problem of inconsistency of data collected by the national registers with the data collected by obliged entities has been noticed by the European Commission, which on

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<sup>29</sup> W. Kapica et al., *Przeciwdziałanie praniu pieniędzy oraz...*, p. 171; in the case of a person representing the entity, verification of the country of birth is required whenever the person does not have a PESEL number, and in the case of a beneficial owner, additionally when the obliged entity has this information.

<sup>30</sup> T. Van der Merwe, *Beneficial Ownership Registers...*, p. 6, 9.

20 July 2021 presented a proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, whose main objective is to harmonize the systems of Member States. If the changes proposed by the Commission come into force, then Member States will receive guidance on whose and what specific data should be collected by beneficial ownership registers and obligated entities as part of due diligence processes. The proposed standardization would undoubtedly improve the effectiveness of the European anti-money laundering and counter-terrorist financing regime.

### 3.5. Currency of data

#### 3.5.1. Significance of data currency

A very important factor in determining the reliability of data stored in the Registry is its currency. Naturally, data concerning entities as well as individuals may change. Nowadays, data changes may concern such issues as first and last names, and in some countries even the declared sex of individuals. Keeping outdated data in the beneficial ownership register makes it significantly easier for criminals to hide their true identities and thereby successfully launder money.<sup>31</sup> Under Article 30(4) of the Directive, it is the responsibility of Member States to ensure that information is accurate and up-to-date.

The requirement to have up-to-date data applies in practice in two areas. Firstly, it is the obligation to have data on entities defined by law and their beneficial owners from the moment they are created. Secondly, it relates to the ongoing assurance that previously obtained data still reflects the actual state of affairs, and therefore checking that the data held has not changed.

In Poland, the obligation to update the data lies with the party submitting the entry and not with the state. The state does not monitor the currency of the data stored in the register. In Germany, until recently, some entities did not have to report data themselves to the national beneficial ownership register, if the required data was previously held in other national registers.<sup>32</sup> This led to a situation where much of the data in the national register was out of date as soon as it was entered. With the amendment of the German Act, an attempt was made to rectify this problem.

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<sup>31</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention..., (14) of introduction.

<sup>32</sup> F. Herzog et al., *Geldwäschegesetz (GwG). Kommentar*, München 2020, pp. 484-490.

It is also common in European Union Member States to impose an obligation on obliged entities to identify discrepancies between the actual state and the state presented in the register.<sup>33</sup> In accordance with FATF recommendations, such regulations significantly contribute to maintaining higher quality and currency of data stored in the registers. This obligation may apply, as in Poland, to discrepancies identified during customer due diligence processes, or as in Hungary, where institutions will be required under the new law to verify their data against the data held in the national beneficial ownership register.

## **4. The future of beneficial ownership registers**

### **4.1. Proposal for the first AML Regulation**

The need to increase the effectiveness of beneficial ownership registries has been recognized by the European Commission, which on May 7, 2020 adopted an action plan for a comprehensive Union policy on preventing money laundering and terrorist financing, announcing a detailed analysis of the effectiveness of beneficial ownership registers in order to ensure that they are populated with high-quality data.<sup>34</sup> Therein, the Commission announced a reform of the European Anti-money Laundering system aimed at increasing the effectiveness and harmonizing the national systems against money laundering and terrorist financing. The pillars on which such reform would be based include, as the Commission points out, ensuring the effective implementation of the existing European Union anti-money laundering and terrorism financing framework, and establishing an European Union single rulebook covering this area. The main constituent of the reform is to be the Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, whose proposal was published on 20 July 2021.

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<sup>33</sup> Wet van 15 juli 2008, houdende samenvoeging van de Wet... Article 10c(1); see also: Geldwäschegesetz... Article 23a(1) GwG; Ustawa z dnia 1 marca 2018 r. o przeciwdziałaniu..., Article 61a(1).

<sup>34</sup> Communication from the Commission on an Action Plan for a Comprehensive Union Policy on Preventing Money Laundering and Terrorist Financing, Official Journal of the European Union 2020, C 164.

## 4.2. Interconnection of the systems

Contrary to the AMLDs, the Regulation will provide for specific solutions in the area of anti-money laundering. The fully binding and directly enforceable character of the Regulation will unify the anti-money laundering system in the European Union. The harmonized system will be an excellent basis for the interconnection of the national beneficial ownership registers, as announced by the Commission.<sup>35</sup> For this purpose, the Commission by issuing Regulation No. 369/2021 established The Beneficial Ownership Registers Interconnection System ('BORIS') as a decentralised system interconnecting the central national beneficial ownership registers with the European e-Justice Portal through the European Central Platform.<sup>36</sup> With BORIS, data of beneficial owners and the entities in which they play this role are to be collected from national systems and published in the European e-Justice Portal, as is already done to some extent for commercial registers. With the simultaneous standardization of the scope of data collected in the national systems, the idea of interconnection of systems may prove effective.

From the perspective of due diligence processes of obliged entities, data collected in the e-Justice system will remain useless as long as the national systems from which these data are extracted do not technically ensure the verification of their accuracy, and as long as Member States do not build an appropriate legal framework allowing the use of European beneficial ownership registers in these processes. In this aspect, the Proposal of the Regulation provides for the requirement that data stored in the beneficial ownership register must be adequate, accurate, and current.<sup>37</sup> However, no indication is provided as to the precise form in which such a condition would be assured. The purposive nature of the provision means that Member States will not have to create beneficial ownership registers from the beginning, but will be able to adapt their current arrangements to the requirements of the Regulation.

## 4.3. Impact of the proposed changes on the anti-money laundering system

If the Regulation enters into force in its proposed form, it will be desirable for obligated entities to adapt their national systems to its content as soon as possible. By simul-

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<sup>35</sup> Communication from...

<sup>36</sup> Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, Official Journal of the European Union 2021, OJ L 71.

<sup>37</sup> Communication from the Commission on an Action Plan for a Comprehensive Union Policy on Preventing..., Article 44.

taneously harmonising relevant definitions, the scope of data collected, and ensuring adequate, accurate, and current information in the registries, it would undoubtedly be possible to consider the data stored in national registries as having the characteristics of reliability and independence.

It must be assessed that the current form of the UBO Registers currently operating in the Member States is unsatisfactory, and that countries are for the most part failing in their obligation to ensure that the information held in the central register is adequate, accurate and current.<sup>38</sup> This has been noted by the European Commission, which has prepared a comprehensive reform package, including the issuance of the first Anti-Money Laundering and Counter-Terrorist Financing Regulation.

The introduction of the Regulation will help to significantly improve the efficiency of European UBO registries, but it will not be sufficient. Legislative changes should be followed by appropriate control measures to ensure that Member States ensure high quality technical operation of the registers, create a friendly and coherent legal context, and efficiently collect and update the data contained in the beneficial ownership registers.

Changes with the interconnection of the systems would positively affect the quality of due diligence processes carried out by obliged entities and thus contribute to the prevention of money laundering and terrorist financing crime worldwide.

## 5. Conclusions

The European Union and the Member States still face many challenges in the implementation of beneficial ownership registers. As shown in this paper, despite the numerous European Union requirements for the operation of beneficial ownership registers, they do not function as desired. In the author's opinion, there is a need for specific guidelines on how to develop the national registers in a manner which would allow them to be classified as reliable and independent sources of information. The steps taken by the European Commission to standardise systems and interconnect registers should therefore be received with satisfaction.

Member States may object to the growing number of obligations; however, harmonisation of the European Union's anti-money laundering and counter-terrorist financing regime will be crucial to its further functioning. Carrying out the necessary

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<sup>38</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention..., Article 30(4).

reform shall facilitate the operation of the entire system in the future, as well as contribute to the automation of due diligence processes. It should be in the interest of the European Union, its Member States, and the obliged entities to ensure that the beneficial ownership registers are as efficient as possible and that they collect only reliable and independent information.

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Zebrane w monografii artykuły naukowe dotyczą szerokiego spektrum zagadnień związanych z cyfrową transformacją administracji publicznej w Europie. Pierwsza część książki została poświęcona analizie e-administracji z perspektywy prawa europejskiego. Następnie cyfryzację administracji przedstawiono jako katalizator transformacji administracji otwartej, odpowiedzialnej i świadczącej e-usługi dla obywateli. Książka ukazuje również wpływ digitalizacji na funkcjonowanie polskiej administracji publicznej. Ostatnia część opracowania dotyczy e-administracji jako czynnika zwiększającego potencjał administracji w państwach członkowskich UE i państwach stowarzyszonych oraz na szczeblu międzynarodowym.

Monografia adresowana jest do badaczy zajmujących się administracją, prawem administracyjnym i europejskim, praktyków: sędziów, prokuratorów, urzędników państwowych, adwokatów i radców prawnych oraz studentów i doktorantów prawa, administracji i ekonomii. Mamy nadzieję, że publikacja poszerzy wiedzę na temat cyfryzacji administracji w Polsce i Europie oraz zachęci do dalszych studiów w tej dziedzinie.



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