A COVID-TAKEAWAY, INSOLVENCY AND A NEW BENEFICIAL OWNERSHIP REGISTER

NOTEWORTHY DEVELOPMENTS IN THE LIECHTENSTEIN LEGAL LANDSCAPE IN 2021

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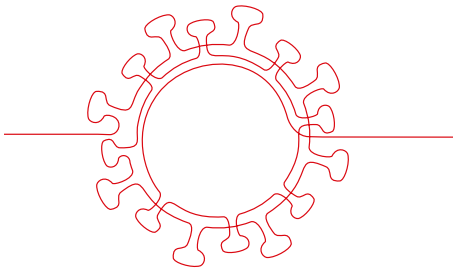


Making a Virtue of Necessity: A (Possible) Takeaway from COVID-19 Times

As this piece is being written, cases of infections with COVID-19 are surging (once again) all across Europe. Although we hoped that the virus would be left behind together with the year 2020, COVID has not loosened its grip over everyday life and also continues to affect judicial and administrative processes in Liechtenstein. Consequently, the Liechtenstein government has recognized the necessity to extend ancillary administrative measures (nearly) throughout the current year (until 30 September).

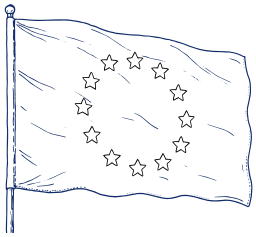
And although the possibly returning restrictions of public life and judicial process remain an ongoing matter of concern to all of us, there could be at least one positive takeaway from this precarious situation. The wish to maintain basic functions of business life, while reducing inter-personal contacts has led to a temporary introduction of the (limited) possibility to convene and conduct meetings of supreme corporate bodies of enterprises without physical presence of attendees in the form of video or telephone conferences in the COVID-19 Ancillary Measures Act.

This tool not only helped to reduce physical contacts and thereby infection chances but also enabled businesses to cut unnecessary formalities and improve efficiency and travel. The lawgiver should ponder to maintain this useful instrument even after we hopefully leave the virus behind in the year to come.

Legislation Updates: A Revision of Insolvency Law and a new Beneficial Ownership Register

However, adapting to the new normal and living with the virus in the second year since its discovery was not the only novelty in 2021. In addition to the comprehensive reform of insolvency law (in force since 1 January 2021), which my colleague Sophie Herdina covered in depth in the previous issue, the legislature enacted a total revision of the Beneficial Ownership

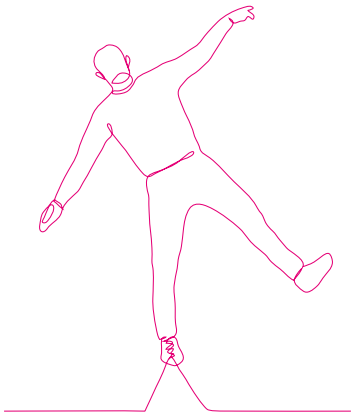
Register Act, which came into force on 1 April 2021, to implement the 5th EU Anti-Money Laundering Directive (AMLD) in Liechtenstein. The following section is aimed at covering the new Beneficial Ownership Register Act and endeavours to shed light on the implications of the enactment of the new law for corporations and practitioners.



The Growing Influence of AML as a Policy Priority on EU and National Level

The ever-present danger of an (ab) use of the international financial system for the harmful purposes of money laundering and terrorist financing has been further aggravated through the ongoing processes of globalization, digitalization and the use of technology. This has led to the combat against such abuse, becoming one of the top policy priorities within the EU and the EEA. Consequently, in the previous years, the EU has steadily out rolled, expanded and detailed its regulatory framework to prevent money laundering and terrorist financing.

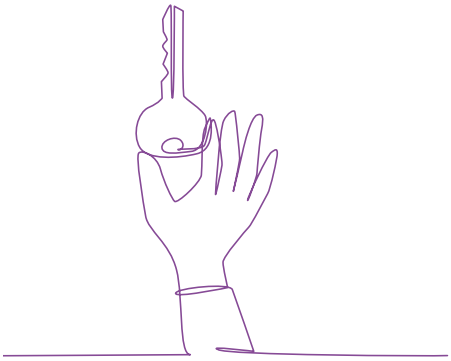
As an EEA member country, Liechtenstein participates in these efforts and is required to adopt EU level legislation accordingly into national law. Lately, the Beneficial Ownership Register Act was enacted, bringing about sweeping changes to its predecessor law which was aimed at implementing the 4th AMLD back then.



Transparency vs Privacy: A Balancing Act

The new Directive as well as the corresponding national law focus on expanding the content, transparency and accessibility of the register. Notably, the Directive aims to extend the right to inspection of the register beyond previous possibilities and thereby challenges the lawgiver to walk the tightrope between providing adequate instruments for the prevention of money laundering and terrorist financing and at the same time respecting the privacy rights of persons entered into the register. In the course of the total revision, significant adaptations were implemented in the Act (and Ordinance) on Professional Due Diligence Obligations.

From now on, a central national Beneficial Ownership Register containing the name, country of residence, citizenship and date of birth of the beneficial owner will be maintained by the Department of Justice. All legal entities are obliged to enter their beneficial owners, i.e. the natural persons on whose behalf or in whose interest an entity is finally managed, into the register.

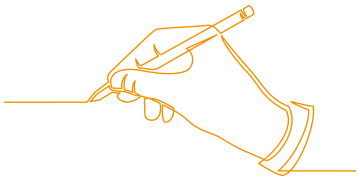


Possibilities and Limits of Disclosure

National authorities like the public prosecutor's office, the Financial Market Authority (FMA) or the Financial Intelligence Unit (FIU) enjoy unlimited access. However, for fraud and asset recovery practitioners, the newly introduced provisions on potential access to the register by third persons are of far greater interest. Third person access in general has been a hot-button issue in the legislative process leading to the enactment of the law and has been heavily criticized by the Liechtenstein Bar Association for constituting an infringement on the fundamental rights of citizens, namely privacy and data protection.

Firstly, banks and other financial institutions may request disclosure of information in order to fulfil their own professional due diligence obligations. Secondly, according to the new law any foreign or domestic natural person or legal entity may request disclosure of information from the register against payment of a fee under certain conditions.

For such application for disclosure to be approved, the applicant needs to substantiate a legitimate interest. A legitimate interest will only be assumed where disclosure is necessary to combat money laundering, predicate offenses to money laundering or terrorist financing. Practically, such interest will be hard to prove for a private individual. Furthermore, all third-party applications will be served upon the concerned legal entity for a statement on the fulfilment of disclosure requirements. The application and statement will then be submitted together to a special independent commission which decides all cases where third parties are seeking disclosure. In special cases where criminal offences or harassment against parties entered into the register must be assumed, access and disclosure can be restricted beforehand.



Conclusion

These restrictions make it considerably more difficult to achieve disclosure and can be considered a result of critical voices (e.g. of the Bar Association and the Association of Professional Trustees) heard in the legislative process.

The overall solution implemented by the legislature at least strives to balance the (sometimes opposed) interests of ensuring transparency while considering legitimate privacy and secrecy needs without giving undifferentiated precedence to transparency which seems to be en vogue these days.

However, the concrete application, handling and relevance of this provision in future cases is yet to be conclusively determined by the authorities and courts.