



Reports of Cases

Joined Cases C-245/19 and C-246/19

État luxembourgeois

v

B and Others

(Requests for a preliminary ruling from the Cour administrative (Luxembourg))

Judgment of the Court (Grand Chamber), 6 October 2020

(References for a preliminary ruling – Directive 2011/16/EU – Administrative cooperation in the field of taxation – Articles 1 and 5 – Decision ordering that information be provided to the competent authority of a Member State, acting in response to a request for exchange of information from the competent authority of another Member State – Person holding information the production of which is ordered by the competent authority of the first Member State – Taxpayer concerned by the investigation giving rise to the request from the competent authority of the second Member State – Third parties with whom that taxpayer maintains legal, banking, financial or, more broadly, economic relations – Judicial protection – Charter of Fundamental Rights of the European Union – Article 47 – Right to an effective remedy – Article 52(1) – Limitation – Legal basis – Respect for the essence of the right to an effective remedy – Existence of a remedy enabling the individuals in question to obtain an effective review of all the relevant issues of fact and of law, as well as effective judicial protection of the rights guaranteed to them by EU law – Objective of general interest recognised by the Union – Combating international tax fraud and tax evasion – Proportionality – Whether the information referred to in the information order is ‘foreseeably relevant’ – Judicial review – Scope – Personal, temporal and material factors to be taken into consideration)

1. *Fundamental rights – Charter of Fundamental Rights of the European Union – Scope – Implementation of EU law – National legislation specifying the details of the procedure for the exchange of information on request established by Directive 2011/16 – Included (Charter of Fundamental Rights of the European Union, Art. 51(1); Council Directive 2011/16)*

(see paragraphs 45, 46)

2. *Fundamental rights – Right to effective judicial protection – Right to an effective remedy – Right to respect for private life – Right to the protection of personal data – Balancing of fundamental rights – Limitations on the exercise of the rights and freedoms guaranteed by the Charter – Whether permissible – Conditions (Charter of Fundamental Rights of the European Union, Arts 7, 8 and 47)*

(see paragraphs 47-51)

3. *Fundamental rights – Right to effective judicial protection – Right to an effective remedy – Invocability*
(Charter of Fundamental Rights of the European Union, Art. 47)

(see paragraphs 54, 55)
4. *EU law – Principles – Fundamental rights – Protection against arbitrary or disproportionate intervention by the public authorities – Right to effective judicial protection – Scope – Legal persons – Information order intended to follow up on a request for information on the basis of Directive 2011/16 and measure penalising non-compliance with such an order – Included*
(Charter of Fundamental Rights of the European Union, Arts 47 and 52(1))

(see paragraphs 57-59)
5. *Fundamental rights – Right to effective judicial protection – Right to an effective remedy – Limitation on the exercise of the right to an effective remedy under national law – Conditions – Respect for the essence of a right – Concept of the essence of a right – Access to a court or tribunal ensuring respect for the rights guaranteed by EU law – No need for the rightholder to infringe national law or to be subject to the penalty attached to such an offence – Included*
(Charter of Fundamental Rights of the European Union, Art. 47)

(see paragraphs 60, 66)
6. *Fundamental rights – Respect for private life – Protection of personal data – Articles 7 and 8 of the Charter of Fundamental Rights of the European Union – Scope – Information concerning an identified or identifiable natural person – Information regarding that person’s bank accounts and financial assets and legal or economic relations with third parties – Included*
(Charter of Fundamental Rights of the European Union, Arts 7 and 8)

(see paragraphs 73, 74)
7. *Fundamental rights – Right to effective judicial protection – Right to an effective remedy – Scope – Third parties who are legal persons – Included*
(Charter of Fundamental Rights of the European Union, Art. 47)

(see paragraphs 96, 97)
8. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Exchange of information on request – Request from one Member State addressed to another Member State seeking to implement the exchange procedure – Decision of the competent authority of the latter Member State following up on the request for information – Decision ordering the legal person holding the information to provide the competent authority with that information or face a penalty – Right to effective judicial protection –*

*National legislation not allowing a direct action against the information order – Legal person holding the information – Not permissible – Natural person concerned, as a taxpayer, by the investigation giving rise to the request, and third parties who are legal persons concerned by the information in question – Whether permissible
(Charter of Fundamental Rights of the European Union, Arts 7, 8 and 47; Council Directive 2011/16)*

(see paragraphs 69, 76, 78-85, 87-93, 98, 101,104, 105, operative part 1)

9. *Approximation of laws – Administrative cooperation in the field of taxation – Directive 2011/16 – Exchange of information on request – Request for information addressed to the person holding that information – Lawfulness of an information order addressed by that Member State to a citizen – Condition – Foreseeable relevance of the requested information – Assessment to be made by the requested authority – Judicial review – Limits – Criteria to be taken into consideration
(Council Directive 2011/16, Arts 1(1) and 5)*

(see paragraphs 110-116, 124, operative part 2)

Résumé

The right to an effective remedy guaranteed by the Charter of Fundamental Rights requires that persons who hold information that is requested by the national administration, in the context of a cooperation procedure between Member States, must be able to bring a direct action against such a request. Nevertheless, Member States may deny the taxpayer concerned by the tax investigation and the third parties concerned by the information in question the right to bring such a direct action, provided that there are other remedies enabling them to obtain an indirect review of that request

Furthermore, a request for information may relate to categories of information rather than specific information where such categories are defined by criteria establishing their ‘foreseeable relevance’

In response to two requests for exchange of information made by the Spanish tax administration in the context of an investigation concerning F.C., a natural person resident in Spain, the director of Luxembourg’s direct taxation administration issued to Company B and Bank A decisions ordering them to provide information regarding bank accounts and financial assets held or beneficially owned by F.C. and regarding various legal, banking, financial and economic transactions that may have been carried out by F.C. or by third parties acting on her behalf or in her interest.

Under Luxembourg legislation on the procedure applicable to the exchange of information on request in tax matters, an action could not, at the time of the material facts, be brought against such information orders. Nevertheless, F.C. and Companies B, C and D brought actions before the tribunal administratif du Luxembourg (Administrative Court, Luxembourg) seeking, primarily, variation or, in the alternative, annulment of those orders. The tribunal administratif (Administrative Court) declared that it had jurisdiction to hear those actions on the basis that the Luxembourg legislation was not consistent with Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), which enshrines the right to an effective remedy for everyone whose rights and freedoms guaranteed by EU law have been infringed, and that that

legislation should therefore not be applied. As to the substance, that court annulled the information orders in part, on the ground that some of the information requested was not foreseeably relevant.

État luxembourgeois (Luxembourg State) brought appeals against those judgments before the Cour administrative (Higher Administrative Court, Luxembourg), which decided to make references for a preliminary ruling to the Court of Justice concerning, in particular, the interpretation of Article 47 of the Charter. The referring court thus asks whether that article precludes national legislation that excludes a person holding information (such as Company B), a taxpayer concerned by a tax investigation (such as F.C.) and third parties concerned by such information (such as Companies C and D) from bringing a direct action against an information order. In addition, the referring court is uncertain as to the scope of the possibility, under Directive 2011/16,¹ for Member States to exchange information provided that it is 'foreseeably relevant' to the administration and enforcement of national tax law.

In its judgment of 6 October 2020 in Cases C-245/19 and C-246/19, the Court (Grand Chamber) held, in the first place, that Article 47 of the Charter, read together with Articles 7 and 8 thereof (which enshrine the right to privacy and the right to the protection of personal data, respectively), and Article 52(1) thereof (which allows the exercise of certain fundamental rights to be limited in certain circumstances):

- precludes legislation of a Member State implementing the procedure for the exchange of information on request established by Directive 2011/16 from preventing a person who holds information from bringing an action against a decision by which the competent authority of that Member State orders that person to provide it with that information, with a view to following up on a request for exchange of information made by the competent authority of another Member State, but
- does not preclude such legislation from preventing the taxpayer concerned by the investigation giving rise to that request for information and the third parties concerned by the information in question from bringing actions against that decision.

Having ruled that the Charter was applicable in so far as the national legislation at issue in the main proceedings implemented EU law, the Court noted, first, as regards the right to an effective remedy, that the protection of natural and legal persons against arbitrary or disproportionate intervention by public authorities in their private sphere is a general principle of EU law and may be relied on by a legal person who is the addressee of a decision ordering that information be provided to the tax administration, in order to challenge that decision in court.

Nevertheless, the Court recalled that the exercise of the right to an effective remedy may be limited, in the absence of relevant EU rules, by national legislation, where the conditions laid down in Article 52(1) of the Charter are satisfied. That provision requires, in particular, that the essence of the rights and freedoms guaranteed by the Charter be respected.

In that regard, the Court clarified that the essence of the right to an effective remedy enshrined in Article 47 of the Charter includes, among other things, the possibility for the person who holds that right of accessing a court or tribunal with the jurisdiction to ensure respect for the rights and freedoms guaranteed by EU law and, to that end, to consider any question of law or fact

¹ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive 2014/107/EU of 9 December 2014 (OJ 2014 L 359, p. 1).

relevant to the outcome of the dispute before it. Furthermore, in order to have access to such a court or tribunal, that person cannot be compelled to infringe a legal rule or obligation or be subject to the penalty attached to that offence. The Court found that, under the national law applicable in the present instance, it is only where the addressee of the information order does not comply with that order and subsequently receives a financial penalty on that ground that that person has the possibility of challenging that order indirectly, in the context of the action brought against such a penalty. Consequently, such national legislation does not comply with Article 47 and Article 52(1) of the Charter, read together.

As regards, secondly, the right to an effective remedy of the taxpayer concerned by the investigation giving rise to the information order, the Court held that such a taxpayer is, as a natural person, entitled to the right to privacy guaranteed by Article 7 of the Charter and the right to the protection of personal data guaranteed by Article 8 thereof, and that the communication of information concerning him or her to a public authority is liable to infringe those rights, in which situation it is justified for the person concerned to be granted the benefit of the right to an effective remedy.

The Court added, however, that the requirement that the essence of that right be respected does not mean that the taxpayer must have access to a direct remedy aimed primarily at challenging a particular measure, provided that there are one or more remedies available before the various competent national courts or tribunals enabling him or her to obtain, indirectly, an effective judicial review of that measure without running the risk of being penalised for doing so. Accordingly, where there is no possibility of bringing a direct action against an information order, the taxpayer must have a right of appeal against the correction decision or adjustment decision adopted at the end of the investigation and, in that context, the possibility of challenging, indirectly, the first of those decisions and the conditions in which the evidence gathered on the basis of that decision was obtained and used. Thus, the Court held that legislation preventing such a taxpayer from bringing a direct action against an information order does not adversely affect the essence of the right to an effective remedy.

Furthermore, the Court noted that such legislation meets an objective of general interest that is recognised by the European Union, namely the objective of combating international tax fraud and tax evasion by strengthening cooperation between the competent national authorities in that area, and that it complies with the principle of proportionality.

As regards, thirdly, the situation of the third parties concerned by the information in question, the Court held, similarly, that the exercise of the right to an effective remedy which must be available to such third parties, where there is an information order that could infringe their right to protection against arbitrary or disproportionate intervention by public authorities in their private sphere, may be limited by national legislation excluding the bringing of a direct action against such an order, provided that such third parties have, in addition, a remedy that enables them to obtain effective respect of their fundamental rights, such as an action to establish liability.

In the second place, the Court ruled that a decision by which the competent authority of a Member State orders a person holding information to provide it with that information, with a view to following up on a request for exchange of information, is to be regarded as relating to information that is 'foreseeably relevant', within the meaning of Directive 2011/16, where it states the identity of the person holding the information in question, that of the taxpayer concerned by the investigation giving rise to the request for exchange of information, and the period covered by that investigation, and where it relates to contracts, invoices and payments

which, although not specifically identified, are defined by personal, temporal and material criteria establishing their connection with the investigation and the taxpayer concerned by that investigation. That combination of criteria is sufficient to consider that the information requested is not manifestly devoid of any foreseeable relevance, so that a more precise definition of that information is not necessary.