

Case C-601/20

Request for a preliminary ruling

Date lodged:

13 November 2020

Referring court:

Tribunal d'arrondissement (Luxembourg)

Date of the decision to refer:

13 October 2020

Applicant:

SOVIM SA

Defendant:

Luxembourg Business Registers

Order in Commercial Case 2020TALCH02/01568, made pursuant to Articles 7(3) and 15(5) of the loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs (Law of 13 January 2019 establishing a Register of Beneficial Owners ('RBO'))

[...]

In the proceedings [...]

between:

The public limited company **SOVIM SA**, established and having its head office at L-2449 Luxembourg, [...];

applicant [...]

and:

the economic interest group **LUXEMBOURG BUSINESS REGISTERS**, abbreviated **LBR**, established at L-1468 Luxembourg [...]

defendant [...]

[...]

After hearing submissions from the representatives of the parties at a hearing on 13 October 2020, [...]

The court, at the public hearing of today's date [**Or. 2**], makes the following

order:

Facts

By letter of 12 August 2019, addressed to the Registre des bénéficiaires effectifs (Register of Beneficial Owners; the 'RBO') the public limited company SOVIM SA made a request to limit access to information concerning its beneficial owner, on the basis of Article 15 of the loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs (Law of 15 January establishing a Register of Beneficial Owners; the 'Law').

By registered letter of 6 February 2020, the administrator of the RBO, the economic interest group LUXEMBOURG BUSINESS REGISTERS ('LBR') refused to grant that request.

[...]

Claims and pleas in law of the parties

SOVIM submits, as its principal claim, that the court should hold that Articles 12 and/or 15 of the Law infringe the right to respect for private and family life, the right to protection of data and/or the right to an effective judicial remedy, and, accordingly, refrain from applying those provisions and order that the information provided by SOVIM pursuant to Article 3 of the Law is not to be publicly accessible in the RBO.

In the alternative, it requests the court to refer the necessary questions to the Court of Justice of the European Union ('CJEU') [...].

In the further alternative, it claims that the court should hold that there is a disproportionate risk in the present case, within the meaning of Article 15(1) of the Law, and accordingly make an order requiring LBR to limit access to the information referred to in Article 3 of the Law, and providing for the final judgment in the matter to be deposited in SOVIM's file held by the LBR.

In support of its claims, SOVIM submits that granting public access to the identity and personal data of the beneficial owner communicated to the RBO would infringe the right to protection of his private and family life, as provided for in Article 8 of the European Convention on Human Rights, in Article 7 of the Charter of Fundamental Rights of the European Union, and in Article 11(3) of the Luxembourg Constitution.

It submits that the aim pursued by Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC ('Directive 2015/849'), as amended by Directive 2018/843, on the basis of which the Law was introduced into Luxembourg legislation, consists in the identification of the beneficial owners of companies used [Or. 3] for the purposes of money laundering or terrorist financing, as well as certainty in commercial relationships and market confidence.

However, it argues, it has not been shown how granting the public entirely unrestricted access to the data contained in the RBO enables those objectives to be achieved. On the contrary, such access represents a serious and disproportionate interference in the private lives of beneficial owners, which is incompatible with the legal texts referred to above.

SOVIM also submits that public access to the RBO constitutes an infringement of Article 7 of the Charter of Fundamental Rights of the European Union, which has the same meaning and scope as Article 8 of the European Convention on Human Rights. It argues that making the RBO public represents a further interference which serves no purpose, since it is no more effective in combatting money laundering than making access limited to the authorities.

[...] [Consideration of national constitutional law]

SOVIM goes on to assert that public access to the personal data contained in the RBO is a breach of a number of fundamental principles set out in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the 'GDPR').

Thus, such access infringes the data minimisation principle set out in Article 5(1)(c) of the GDPR, not only by reason of the volume of data accessible, but also by reason of the very fact that the public have access to it, inter alia in that such access is not necessary to achieve the aim pursued of combating money laundering and terrorist financing.

Public access to the RBO data is also contrary, SOVIM submits, to Article 25 of the GDPR, which requires appropriate technical and organisational measures to be

implemented to ensure that, by default, only personal data which are necessary for each specific purpose of the processing are processed.

SOVIM goes on to argue that public access to the RBO constitutes an infringement of Articles 14 to 22 of the GDPR.

It criticises the Luxembourg legislature for not having put security measures in place to establish the identity of persons seeking access to the information in the RBO, for example by requiring them to create an account on the RBO website in order to obtain access to the data contained in the register. SOVIM also submits that the lack of any requirement for a legitimate interest in consulting the information in the RBO is contrary to the intention of the EU legislature.

It claims that the principle of limitation of data set out in Article 5(1)(c) of the GDPR is infringed, in so far as there is no guarantee that data which is contained in the RBO and available to the public will be used [only] for specified, explicit and legitimate purposes. **[Or. 4]**

SOVIM argues, furthermore, that unrestricted public access to the personal data of beneficial owners constitutes an infringement of Article 8 of the Charter of Fundamental Rights of the European Union.

Lastly, it raises the matter of compliance with Article 6(1) of the European Convention on Human Rights, which enshrines the right to an effective judicial remedy within a reasonable time, bearing in mind that on the one hand, no time limit is laid down for the decisions taken by LBR in relation to requests to limit access, while on the other, an action challenging such a decision must be brought within 15 days of notification of the refusal, failing which it is time-barred.

The same right is, moreover, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

As to the merits of this particular case, SOVIM claims that its beneficial owner would be subject to a clear, real and present disproportionate risk, as there would be a risk that he and his family would be kidnapped while travelling or residing in Africa, particularly in East Africa, where instances of wealthy people being kidnapped by terrorist groups and held for ransom are becoming more and more frequent.

It submits that the request for limitation of access should therefore be granted.

At the hearing of 13 October 2020, SOVIM requested the court, before proceeding any further, to refer a number of questions to the CJEU for a preliminary ruling.

[...]

LBR, in its capacity as administrator of the RBO, has not taken any specific position on the merits of the case and places itself in the hands of the court as regards the questions for a preliminary ruling proposed by SOVIM.

Assessment

Article 15(1) of the Law provides that *‘a registered entity or beneficial owner may apply, on a case-by-case basis and in the exceptional circumstances described below, by way of a reasoned request addressed to the administrator, for access to the information referred to in Article 3 to be limited to the national authorities, to credit institutions and financial institutions, and to enforcement officers of the court and notaries acting in their capacity as public officers, where such access would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable’*.

Under that article, LBR and (in the event of an action being brought against a decision refusing to limit access) the judge presiding over the Commercial Chamber of the District Court must consider, on a case-by-case basis, and thus taking subjective matters into account, whether there are exceptional circumstances justifying a restriction of access to the RBO. **[Or. 5]**

It should be noted that pursuant to an order of 24 January 2020, [...] [the] District Court, [...] has already referred a number of questions for a preliminary ruling in the context of proceedings seeking the same type of relief. Those questions related to the meaning of ‘exceptional circumstances’, ‘risk’ and ‘disproportionate’, in the context of the Law, and were worded as follows:

[...]

[...] **[Or. 6]** [...]

[...]

[...] **[Or. 7]** [...]

[Wording of the questions referred to the Court for a preliminary ruling in Case C-37/20]

The questions proposed by SOVIM for a preliminary ruling in the present proceedings raise further issues.

Under Article 3 of the Law, *‘the following information on the beneficial owners of registered entities must be entered and retained in the Register of Beneficial Owners:*

1. surname;

2. *forename(s)*;
3. *nationality (or nationalities)*;
4. *day of birth*;
5. *month of birth*;
6. *year of birth*;
7. *place of birth*;
8. *country of residence*;
9. *complete private or professional address, including:*
 - (a) *for addresses in the Grand Duchy of Luxembourg, the habitual residence appearing in the National Register of Natural Persons or, in the case of a professional address, the locality, street and building number appearing in the National Register of Localities and Streets, as provided for in Article 2(g) of the amended Law of 25 July 2002 restructuring the administration of the land and topography registry, as well as the postcode.*
 - (b) *for foreign addresses, the foreign locality, street and building number, the postcode and the country;*
10. *for persons registered in the National Register of Natural Persons, the identification number provided for by the amended Law of 19 June 2013 on the identification of natural persons;*
11. *for non-residents who are not registered in the National Register of Natural Persons, a foreign identification number;*
12. *the nature of the beneficial interests held;*
13. *the extent of the beneficial interests held.'*

Under Article 11 of the Law, all of the above information is accessible to the national authorities in the exercise of their functions, while under **[Or. 8]** Article 12, the information referred to in Article 3(1), points (1) to (8), (12) and (13) is accessible to any person.

Article 8 of the European Convention on Human Rights, which concerns the right to respect for private and family life, provides that:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Furthermore, Article 7 of the Charter of Fundamental Rights of the European Union (the ‘Charter’) provides that *‘everyone has the right to respect for his or her private and family life, home and communications’*.

Article 52 of the Charter provides that:

‘1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

The question thus arises of whether it is compatible with those provisions, and in particular with the Charter, for the general public to have access to certain data contained in the RBO, and it is therefore appropriate to refer the questions set out in the operative part of this order to the CJEU for a preliminary ruling.

Article 5 of the GDPR, which concerns principles relating to the processing of personal data, reads as follows:

‘1. Personal data shall be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject [Or. 9] (“lawfulness, fairness and transparency”);*
- (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (“purpose limitation”);*

- (c) *adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (“data minimisation”);*
- (d) *accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (“accuracy”);*
- (e) *kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods in so far as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject (“storage limitation”);*
- (f) *processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (“integrity and confidentiality”);*

2. *The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 (“accountability”).*

Upon reading that text, a legitimate question arises as to whether it is compatible with those provisions for the data contained in the RBO to be accessible to the public.

It is therefore appropriate to refer the questions set out in the operative part of this order to the CJEU for a preliminary ruling. **[Or. 10]**

SOVIM also raises the issue of whether Article 15 of the Law is compatible with the requirement to provide an effective judicial remedy, in that the period of 15 days is (it submits) extremely short, and thus infringes Article 6 of the Convention on Human Rights.

Article 15 of the Law provides that ‘(2) *The administrator shall provisionally limit access to the information referred to in Article 3 to the national authorities as from receipt of the request pending notification of its decision, and in the event of refusal to grant the request, for a further fifteen days. In the event that an appeal is brought against a refusal decision, the limitation on access to information shall continue until that decision is no longer open to appeal. ...*

(4) *A notice indicating that access to the information has been limited, and also indicating the date of the relevant decision, shall be published in the Register of Beneficial Owners by its administrator.*

(5) Any interested party wishing to challenge a decision of the administrator taken under paragraphs 2 or 3 may bring an action in accordance with Article 7(3) of that decision within 15 days of publication of the notice referred to in paragraph 4.'

The period for bringing the action thus begins to run from publication of the notice rather than notification of the decision to the beneficial owner.

Furthermore, it has not been shown why the 15-day period allowed for bringing the action, which is the same as is applicable in many other situations, should be regarded as insufficient in respect of Article 6 of the European Convention on Human Rights.

In those circumstances, it is not appropriate to refer a question to the CJEU for a preliminary ruling in that regard.

On those grounds:

[...] The tribunal d'arrondissement de Luxembourg (District Court, Luxembourg), ruling *inter partes*,

[...]

stays the proceedings and refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

Question 1

Is Article 1(15)(c) of Directive (EU) 2018/843, amending the first subparagraph of Article 30(5) of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, in so far as it requires Member States to make **[Or. 11]** information on beneficial owners accessible to the general public in all cases, with no requirement for a legitimate interest to be shown, a valid provision:

(a) in the light of the right to respect for private and family life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union (the '**Charter**'), interpreted in accordance with Article 8 of the European Convention on Human Rights, having regard to the objectives stated *inter alia* in recitals 30 and 31 of Directive 2018/843 relating, in particular, to efforts to combat money laundering and terrorist financing; and

(b) in the light of the right to protection of personal data guaranteed by Article 8 of the Charter, in so far as it is intended, *inter alia*, to guarantee that personal data are processed lawfully, fairly and in a transparent manner in relation to the data

subject, that the purposes for which such data are collected are limited, and that the data are minimised?

Question 2

1. Is Article 1(15)(g) of Directive 2018/843 to be interpreted as meaning that the exceptional circumstances to which it refers, in which Member States can provide for exemptions from access to all or part of the information on beneficial owners, where access on the part of the general public would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, exist only where it is demonstrated that there is a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation which is exceptional, which is actually borne by the beneficial owner as an individual, and which is clear, real and present?

2. Should this be answered in the affirmative, is Article 1(15)(g) of Directive 2018/843, thus interpreted, a valid provision in the light of the right to respect to private and family life guaranteed by Article 7 of the Charter and the right to protection of personal data guaranteed by Article 8 of the Charter?

Question 3

1. Is Article 5(1)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the ‘GDPR’), which requires data to be processed lawfully, fairly and in a transparent manner in relation to the data subject, to be interpreted as not precluding:

(a) that the personal data of a beneficial owner, recorded in a register of beneficial owners established in accordance with Article 30 of Directive 2015/849, as amended by Article 1(15) of Directive 2018/843, is accessible to the general public, with no monitoring of access and no requirement for any member of the public to provide justification, and without any way for the data subject (the beneficial owner) to know who has accessed his personal data; or **[Or. 12]**

(b) that [the] data controller responsible [for] such a register of beneficial owners provides access to the personal data of beneficial owners to an unlimited and indeterminable number of persons?

2. Is Article 5(1)(b) of the GDPR, which requires the purposes of data processing to be limited, to be interpreted as not precluding that the personal data of a beneficial owner, recorded in a register of beneficial owners established in accordance with Article 30 of Directive 2015/849, as amended by Article 1(15) of Directive 2018/843, is accessible to the general public, in circumstances where the data controller cannot guarantee that those data will be used only for the purpose for which they were collected, which, in essence, is that of combating money

laundering and terrorist financing – a purpose in relation to which the general public is not the responsible body from which compliance is required?

3. Is Article 5(1)(c) of the GDPR, which requires data to be minimised, to be interpreted as not precluding the general public from having access, through a register of beneficial owners established in accordance with Article 30 of Directive 2015/849, as amended by Article 1(15) of Directive 2018/843, to data indicating, in addition to the beneficial owner's name, month and year of birth, nationality and country of residence, as well as the nature and extent of his beneficial interests, also his day and place of birth?

4. Does Article 5(1)(f) of the GDPR, which requires data to be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing, and thus guarantees the integrity and confidentiality of such data, preclude access to the personal data of beneficial owners contained in a register of beneficial owners established in accordance with Article 30 of Directive 2015/849, as amended by Article 1(15) of Directive 2018/843, from being provided on an unlimited and unconditional basis, with no commitment to keep such data confidential?

5. Is Article 25(2) of the GDPR, which guarantees data protection by default, providing in particular that by default, personal data must not be made accessible without the individual's intervention to an indefinite number of natural persons, to be interpreted as not precluding:

(a) that a register of beneficial owners established in accordance with Article 30 of Directive 2015/849, as amended by Article 1(15) of Directive 2018/843, does not require members of the general public consulting the personal data of a beneficial owner on its website to create an account; or

(b) that no information concerning a consultation of personal data of a beneficial owner contained in such a register is disclosed to that beneficial owner; or

(c) that no restriction on the extent and accessibility of the personal data at issue is applicable in the light of the purpose of their processing? **[Or. 13]**

6. Are Articles 44 to 50 of the GDPR, under which the transfer of personal data to a third country is subject to strict conditions, to be interpreted as not precluding that the personal data of a beneficial owner, contained in a register of beneficial owners established in accordance with Article 30 of Directive 2015/849, as amended by Article 1(15) of Directive 2018/843, is accessible in any circumstances to any member of the general public, with no requirement to demonstrate a legitimate interest and no limitations as to the location of that public?

[...]