

Case C-37/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

24 January 2020

Referring court:

Tribunal d'arrondissement (Luxembourg)

Date of the decision to refer:

24 January 2020

Applicant:

WM

Defendant:

Luxembourg Business Registers

I. Subject matter of the main proceedings

- 1 On 5 December 2019, the applicant WM issued proceedings against the economic interest grouping Luxembourg Business Registers ('LBR GIE') before the Tribunal d'arrondissement de Luxembourg (Luxembourg District Court) seeking reversal of LBR GIE's decision of 20 November 2019. That decision rejected the applicant's request that, for a period of 3 years, access to information relating to him regarding his status as beneficial owner of Société civile immobilière YO (YO SCI) should be limited solely to the national authorities, credit institutions and financial institutions, and to bailiffs and notaries acting as public officers.
- 2 The Tribunal d'arrondissement de Luxembourg (Luxembourg District Court), the referring court, is required to answer the question whether WM meets the requirements under the law for access to information concerning his status as beneficial owner of YO SCI to be limited.

II. Legal context

1. EU law

- 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, as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU

3 Recitals 14 to 16 and 36 of Directive 2015/849, as amended, read:

‘(14) The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure. Member States should therefore ensure that entities incorporated within their territory in accordance with national law obtain and hold adequate, accurate and current information on their beneficial ownership, in addition to basic information such as the company name and address and proof of incorporation and legal ownership. With a view to enhancing transparency in order to combat the misuse of legal entities, Member States should ensure that beneficial ownership information is stored in a central register located outside the company, in full compliance with Union law. Member States can, for that purpose, use a central database which collects beneficial ownership information, or the business register, or another central register. Member States may decide that obliged entities are responsible for filling in the register. Member States should make sure that in all cases that information is made available to competent authorities and FIUs and is provided to obliged entities when the latter take customer due diligence measures. Member States should also ensure that other persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud, are granted access to beneficial ownership information, in accordance with data protection rules. The persons who are able to demonstrate a legitimate interest should have access to information on the nature and extent of the beneficial interest held consisting of its approximate weight.

(15) For that purpose, Member States should be able, under national law, to allow for access that is wider than the access provided for under this Directive.

(16) Timely access to information on beneficial ownership should be ensured in ways which avoid any risk of tipping off the company concerned.

[...]

(36) Moreover, with the aim of ensuring a proportionate and balanced approach and to guarantee the rights to private life and personal data protection, it should be

possible for Member States to provide for exemptions to the disclosure through the registers of beneficial ownership information and to access to such information, in exceptional circumstances, where that information would expose the beneficial owner to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation. [...]

4 Article 30(9) of Directive 2015/849, as amended, provides:

‘In exceptional circumstances to be laid down in national law, where the access referred to in points (b) and (c) of the first subparagraph of paragraph 5 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, Member States may provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis. Member States shall ensure that these exemptions are granted upon a detailed evaluation of the exceptional nature of the circumstances. [...]

2. National law

5 Directive 2015/849 was transposed into Luxembourg law by the Law of 13 January 2019 setting up a Register of Beneficial Owners.

6 Article 15(1) of the Law of 13 January 2019 provides:

‘A registered entity or a beneficial owner may request, on a case-by-case basis and in the following exceptional circumstances, in a properly reasoned request to the administrator, that access to the information listed in Article 3 should be limited solely to national authorities, credit institutions and financial institutions, and to bailiffs 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.’

III. Facts

7 The applicant, WM, is beneficial owner of 35 commercial companies and of the non-trading property investment company, YO SCI. Each of those companies has requested that access to that information, as defined in Article 3 of the Law of 13 January 2019, should be limited so far as the applicant is concerned, under Article 15 of that law, because disclosure of that information would expose him and his family, in a way that is distinct, genuine and current, to ‘disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation’. Those requests were refused by LBR GIE’s decisions of 19 and 20 November 2019, the decision relating to YO SCI being dated 20 November 2019.

IV. Arguments of the parties

1. WM

- 8 The applicant states that his functions as the agent for commercial companies operating at international level under the trading name XN require him to make regular visits to countries with unstable political regimes experiencing a high level of ordinary crime, creating for him a significant risk of kidnapping, abduction, violence, and even death. The risk would be even greater if it were disclosed that he is a director and beneficial owner of any of those legal persons, since that status would give rise to a presumption that he owned those legal persons and that an attempt to extract money from him would be all the more lucrative. Those circumstances mean that the applicant needs, inter alia, to have close personal protection and to take out a special insurance policy to cover the risk of kidnapping, the premiums for which would increase considerably if it was disclosed to the public that he was beneficial owner of the companies concerned.
- 9 The applicant puts forward two arguments in support of his request.
- 10 First, the protection afforded by law through of the possibility of limiting access to information concerning the status of beneficial owner should be assessed, not in relation to the legal persons but in relation to the person of the beneficial owner. Any other approach would distort the meaning of the law and the concept of beneficial owner. It is therefore necessary to determine whether the beneficial owner incurs increased risk as a result of that status. It is irrelevant that, in the present case, YO SCI does not operate in a particularly exposed field or one that gives rise in itself to increased risk.
- 11 Secondly, the status of beneficial owner should be examined as regards all the legal persons in which the applicant has that status and not only as regards YO SCI. The possibility of limiting access to information is granted due to the subjective risk incurred by a specific person as beneficial owner of a legal person. Indivisible protection is granted covering all the entities in which a natural person has the status of beneficial owner where that natural person enjoys such protection in respect of any one of those entities.

1.2 Luxembourg Business Registers GIE

- 12 LBR GIE considers that the applicant's situation does not meet the requirements of the law.
- 13 It points to the general philosophy of the EU acts on which the Law of 13 January 2019 is based, which is to afford the broadest possible access to information concerning the identity of beneficial owners of legal persons. Article 15 of the Law of 13 January 2019, since it is a derogation from the general principle, should be interpreted restrictively.

- 14 LBR GIE denies that WM can rely on either ‘exceptional circumstances’ or exposure to ‘disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation’, as required by the law.
- 15 As regards the concept of ‘exceptional circumstances’, LBR GIE considers that the substantive conditions in which the applicant pursues his activities, or the economic owner’s financial position, are not exceptional circumstances, since to allow otherwise would mean that a large number of persons would benefit under the derogation contained in Article 15 of the Law of 13 January 2019 and the latter would be rendered meaningless to a great extent.
- 16 As regards the concept of ‘risk’, LBR GIE maintains that it should be distinct, genuine and current and should actually be borne by the beneficial owner as a person. It denies that access to information concerning WM’s status as beneficial owner of YO SCI ‘would lead to a more than proportionate increase in the risks incurred by the beneficial owner’. It denies especially that conclusions can be drawn from it regarding the beneficial owner’s financial position or that, even if a financial position can be inferred from it, that it might give rise to more a than proportionate increase in the risks incurred.
- 17 LBR GIE further points out that WM is named in the Trade and Companies Register as a partner of YO SCI and that the concept of partner is generally equated to that of beneficial owner. The information appearing in the Trade and Companies Register is in any event publicly available and so limiting access to information on beneficial ownership does not benefit the applicant.
- 18 LBR GIE also states that the search engine used in the Register of Beneficial Owners does not permit searches to be made using the names of beneficial owners; it is possible only to select legal persons in order to find out the identity of their beneficial owners. The way the register’s system is organised, therefore, does not make it possible, without considerable effort, to identify all the structures in which a natural person is recorded as being a beneficial owner.

V. Findings of the referring court

1. The concept of ‘exceptional circumstances’

- 19 In order to benefit from the restriction of access to his data, provided for in Article 15(1) of the 2019 Law, the beneficial owner must demonstrate that he finds himself in ‘*exceptional circumstances*’.
- 20 The Luxembourg legislature transposed the concept of ‘exceptional circumstances to be laid down in national law’, contained in Article 30(9) of Directive 2015/849, by the expression ‘the following exceptional circumstances’, considering that ‘disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation constitute in themselves exceptional circumstances that may justify a request for limitation of access to information contained in the

[Register of Beneficial Owners]’ (Opinion of the Justice Committee of the Chamber of Deputies, replicating the Government’s position set out in the Comments on the Government’s amendments of 8 October 2018).

- 21 The referring court asks, nonetheless, whether the reference in the directive to details to be provided by national law can be expressed in national law merely by a reference to ‘disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation’, concepts now incorporated in the conditions for applying the legal regime deriving from EU law, and what conclusions the national court should draw where its national law is silent on the details to be provided in respect of the concept of ‘exceptional circumstances’.

2. The concept of ‘risk’

- 22 The economic owner must also demonstrate that access to his data would expose him to ‘disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation’. The transposing law essentially repeated here the wording of Article 30(9) of Directive 2015/849, as amended.
- 23 The referring court notes however that the concept of risk to be taken into account underwent amendments with the adoption of amending Directive 2018/843, changing from exposure to ‘the risk of fraud, kidnapping, blackmail, violence or intimidation’ to exposure to ‘disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation’. That change, through the addition of the ‘disproportionality’ requirement, might be regarded as strengthening, to the detriment of beneficial owners, the conditions attaching to the enjoyment of limitation of access.
- 24 The referring court notes moreover that in the French version of the directive, the condition is stated in two different ways: recital 36 speaks of exposure ‘à un risque disproportionné’ (‘to a disproportionate risk’) — no comma — ‘de fraude, d’enlèvement, de chantage, d’extorsion de fonds, de harcèlement, de violence ou d’intimidation’ (‘of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation’) whereas Article 30 speaks of exposure ‘à un risque disproportionné, à un risque de fraude, d’enlèvement, de chantage, d’extorsion, de harcèlement, de violence ou d’intimidation’ (‘to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation’). The same variation is to be found in the English version of the directive, but not, for example, in the German version.
- 25 That variation allows two possible interpretations. According to the first, the risk condition is fulfilled if the beneficial owner is exposed to disproportionate risk of whatever nature, or to a series of other specific risks (fraud, kidnapping, blackmail, extortion, harassment, violence, intimidation) that do not, however, have to be disproportionate. According to the second, the risk condition is fulfilled if the beneficial owner is exposed to the abovementioned series of risks, each risk being specific and disproportionate.

- 26 Since the lack of clarity of the text cannot be resolved by examining the preparatory discussions leading to the adoption of Directive 2018/843, it results in the need for a reference to be made to the Court of Justice of the European Union and for the latter to give its interpretation.
- 27 The definition of the concept of ‘risk’, according to the referring court, quoting WM’s plea, raises, moreover raises the question whether the risk at issue should be examined taking into account solely the person of the beneficial owner in his relationship with a specific legal person in respect of which he is beneficial owner and in relation to which he seeks to limit access, or whether it is necessary to take into account the relationships as beneficial owner which that person has with other legal persons that might be such as to create or aggravate the risk incurred. The referring court considers that it might be relevant to examine whether a status other than that of beneficial owner in another entity, such as that of agent, employee or partner/spouse of the beneficial owner, agent or an employee, may be taken into consideration in order to characterise the risk.
- 28 Lastly, the referring court asks, with reference to LBR GIE’s argument, whether the fact that WM is a beneficial owner of legal persons operating under the XN brand, or is at least involved with those legal persons, is a matter of public knowledge, or whether the fact that that information is easily accessible by means other than consulting the Register of Beneficial Owners, has an effect that benefits the applicant. It is therefore necessary to refer a question on that point to the Court of Justice of the European Union.

3. The concept of ‘disproportionate’ risk

- 29 The referring court states that the ‘disproportionality’ criterion appears to apply in any event for the purposes of assessing a request for access to information concerning a beneficial owner to be limited, whether the risk is general or specific.
- 30 Application of that criterion calls for a balancing of two interests that are equally worthy of protection. Article 30(9) of Directive 2015/849 therefore raises the question of which conflicting interests should be balanced in the context of its application. An initial reading of the provision, in the light of the underlying objective of Directive 2015/849, leads to offsetting the objective of transparency pursued by Directive 2015/849 in order to promote the fight against money laundering and terrorist financing, against protection of the beneficial owner’s physical and psychological integrity and property, which may be affected by the activities of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation on the part of third persons.
- 31 A second reading takes into account the recitals of the directive, which precede the normative text and help in the assessment of its scope. The disproportionality criterion, absent from Directive 2015/849, was introduced by Directive 2018/843, inter alia in recital 36. The latter refers to the right to private life, which appears to

cover a field that is both wider and narrower than the aspects of protection for physical and psychological integrity and property (covered by the concern to prevent risk in general and/or the risks of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation), and the right to protection of personal data, which again appears to be a more limited consideration than protection of physical and psychological integrity and property.

VI. Reasons for the reference

- 32 In the light of all the above considerations and the doubts surrounding the interpretation of Article 30(9) of Directive (EU) 2015/849, which is required in order to resolve the dispute in the main proceedings, the Tribunal d'arrondissement de Luxembourg (Luxembourg District Court) makes a reference to the Court of Justice of the European Union for a preliminary ruling on the following questions.

VII. Questions referred

- 33 Question 1: concerning the concept of 'exceptional circumstances'

1(a) Can Article 30(9) of 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, as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU, in so far as it makes the limiting of access to information concerning beneficial owners conditional upon '*exceptional circumstances to be laid down in national law*', be interpreted as allowing national law to define the concept of '*exceptional circumstances*' solely as being equivalent to '*disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation*', concepts now constituting a condition for applying the limitation of access through the wording of Article 30(9) cited above?

1(b) In the event that Question 1(a) is answered in the negative and in a situation where the transposing national law has not defined the concept of '*exceptional circumstances*' other than by a reference to the ineffective concepts of '*disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation*', must Article 30(9) cited above be interpreted as allowing a national court to disregard the condition of '*exceptional circumstances*', or must it make up for the national legislature's failure by using its own authority to determine the scope of the concept of '*exceptional circumstances*'? In the latter situation, since, according to the wording of Article 30(9) cited above, that is a condition whose content is to be determined by national law, is it possible for the Court of Justice of the European Union to give

guidance to the national court in its task? In the event of the latter question being answered in the affirmative, what guidelines should the national court follow in determining the content of the concept of ‘*exceptional circumstances*’?

34 Question 2: concerning the concept of ‘risk’

2(a) Must Article 30(9) of 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, as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU, in so far as it makes the limiting of access to information concerning beneficial owners conditional upon ‘*disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation*’, be interpreted as referring to a group of eight cases, the first of which corresponds to a general risk subject to the disproportionality requirement and the other seven correspond to specific risks not subject to the disproportionality requirement, or as referring to a group of seven cases, each of which corresponds to a specific risk subject to the disproportionality requirement?

2(b) Must Article 30(9) of 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, as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU, in so far as it makes the limiting of access to information concerning beneficial owners conditional upon a ‘*risk*’, be interpreted as limiting the assessment of the existence and extent of that risk solely to the relationship which the beneficial owner has with the legal entity with regard to which he seeks specifically to have access limited in respect of information concerning his status as beneficial owner or as involving taking into account the relationship which the beneficial owner concerned has with other legal entities? If it is necessary to take into account relationships with other legal entities, is it necessary to take into account only the status as beneficial owner in relation to other legal entities or is it necessary to take into account any relationship whatsoever with other legal entities? If it is necessary to take into account any relationship whatsoever with other legal entities, is the assessment of the existence and extent of the risk affected by the nature of that relationship?

2(c) Must Article 30(9) of 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, as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of

the financial system for the purposes of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU, in so far as it makes the limiting of access to information concerning beneficial owners conditional upon a ‘*risk*’, be interpreted as meaning that protection resulting from limitation of access may not be enjoyed where that information, and other evidence provided by the beneficial owner to justify the existence and extent of the ‘*risk*’ incurred, are easily available to third parties through other information channels?

35 Question 3: concerning the concept of ‘disproportionate’ risk

What divergent interests must be taken into consideration in the context of applying Article 30(9) of 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, as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU, in so far as it makes the limiting of access to information concerning a beneficial owner conditional upon a ‘disproportionate’ risk?