Anonymised version

Case C-317/21

Request for a preliminary ruling

Date lodged:

21 May 2021

Referring court:

Tribunal d'arrondissement (District Court, Luxembourg)

Date of the decision to refer:

12 February 2021

Applicant:

G-Finance SARL

DV

Defendant:

Luxembourg Business Registers

Order 2021TALCH02/00245, made pursuant to Articles 7 and 15 of the loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs (Law of 13 January 2019 establishing a Register of Beneficial Owners)

[…]

In the proceedings (Ref.: TAL-2020-10209)

between:

1) The limited liability company governed by Luxembourg law **G-FINANCE SARL**, established and having its registered office in […] Luxembourg […]

2) **DV**, […] residing in […] Luxembourg […],

applicants […]

and:

the economic interest group **LUXEMBOURG BUSINESS REGISTERS**, abbreviated **LBR**, established in […] Luxembourg, […], in its capacity as administrator of the Register of Beneficial Owners;

defendant, […]

[…]

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

order:

Facts

By letter of 15 November 2019, addressed to the Registre des bénéficiaires effectifs (Register of Beneficial Owners; 'the RBO') the limited liability company G-FINANCE SARL 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 [13] January establishing a Register of Beneficial Owners; 'the Law').

By registered letter of 30 November 2020, the administrator of the RBO, the economic interest group LUXEMBOURG BUSINESS REGISTERS ('LBR') refused to grant that request.

[…]

Claims and pleas of the parties

G-FINANCE and DV request that the court:

– annul the refusal decision of 30 November 2020 and declare the request to limit access of 15 November 2019 substantiated and well-founded;

– therefore, order LBR to limit access to the information set out in Article 3 of the Law concerning DV, in connection with G-FINANCE, solely to national authorities, to credit institutions and financial institutions, and to enforcement officers of the court and notaries acting in their capacity as public officers for a period of three years from the order to be made, or from 30 November 2020, the date of the refusal decision, or from 15 November 2019, the date of the request to limit access;

– order LBR to publish a notice indicating that access has been limited pursuant to Article 15(4) of the Law, or

– refer the case back to LBR for a decision on limiting access to information concerning DV, in connection with G-FINANCE;

– order LBR to pay the costs of the proceedings;

– order provisional enforcement, without security, of the order to be made.

In the alternative, and before any further steps are taken in the proceedings, the applicants request that the court stay the proceedings and refer a number of questions [to the Court of Justice of the European Union ('the Court of Justice') for] […] a preliminary ruling: **[Or. 3]**

[…]

[Proposed questions to be referred to the Court of Justice for a preliminary ruling].

In the further alternative, they request that the court stay the proceedings and refer [a number of] questions to the Cour constitutionnelle (Constitutional Court) for a preliminary ruling […]:

[…]

[…] **[Or. 4]**

[Proposed questions to be referred to the Constitutional Court for a preliminary ruling].

In support of their request, the applicants state that G-FINANCE is a family holding company set up in 2003, which forms an integral part of the Giorgetti group, while its beneficial owner [is] DV […].

They criticise neither the principle nor the objectives of the RBO in combating money laundering and terrorist financing, but the fact that access to information on a beneficial owner is open to any person under Article 30 of Directive (EU) 2015/849 and Article 12 of the Law, without any requirement to demonstrate a legitimate interest.

The applicants claim, first, that the European Union lacks competence to legislate in the field of access on the part of the general public to the RBO, on the ground that such legislation does not remove any obstacle to freedom of movement and does not contribute to the elimination of appreciable distortions of competition, requirements which are, however, fundamental for European Union competence.

They further argue that the provisions establishing access on the part of the general public to the information contained in the RBO infringe the principle of proportionality enshrined in Article 5(4) of the Treaty on European Union ('the

TEU'). Indeed, the provision at issue is, in their view, incomplete, entirely ineffective and discriminatory.

Access on the part of the general public to information on beneficial owners also infringes certain fundamental rights enshrined in the Charter of Fundamental Rights of the European Union ('the Charter') and the general principle of EU law of protection of business secrecy.

It should be noted that the arguments made in their application concerning the infringement of Articles 7 and 8 of the Charter were not taken up in oral argument, although several questions relating to those matters have already been referred to the Court of Justice for a preliminary ruling.

The applicants argue, however, that the disclosure of data relating to the beneficial owners of companies and therefore data relating to shareholders jeopardises business secrecy, in so far as competitors are thus be in a position to deduce and comprehend on which markets undertakings are, or will be, active, and to deduce the strengths and weaknesses and the balances of power within undertakings. The anonymity of transactions in a company's capital is no longer protected, which is liable to constitute a breach of business secrecy.

Access on the part of the general public to information relating to beneficial owners also constitutes an infringement of Article 16 of the Charter, which guarantees the freedom to conduct a business, in that such access makes it possible to reconstruct the way in which business activities are organised, thus allowing the general public to engage in aggressive economic intelligence practices **[Or. 5]** and influencing strategies, leading to the systematic gathering of business intelligence on companies and permitting their investment strategies to be laid bare.

Accordingly, access to information relating to beneficial owners results in infringement of the freedom to conduct a business and, consequently, the four fundamental freedoms of the single market, namely the free movement of goods, persons, capital and services.

The applicants further claim that there is an infringement of Article 12(1) of the Charter, on freedom of assembly and of association, in that giving the general public access to information relating to beneficial owners has a deterrent effect on investment in companies.

They also claim that there has been an infringement of the principle of equal treatment flowing from Article 20 of the Charter, in that companies and other legal entities are treated differently from trusts, in so far as access to information relating to the beneficial owners of trusts is limited 'to any natural or legal person demonstrating a legitimate interest'. [They] take the view that the difference in treatment between different categories of legal entities is not justified.

Moreover, the interferences with fundamental rights, respect for private and family life and the protection of personal data do not satisfy the requirements of Article 52(1) of the Charter, in particular because of the failure to comply with the principle of proportionality.

The interference with fundamental rights is neither proportionate nor necessary and does not serve to attain the objectives of the directive, namely combating money laundering and terrorist financing.

LBR, in its capacity as administrator of the RBO, places itself in the hands of the court as regards the need to make a reference for a preliminary ruling to the Court of Justice.

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. 6]**

It should be noted that […] [the] District Court, Luxembourg, […] 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. 7]** […]

[…]

[…] **[Or. 8]** […]

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

The court has also referred the following questions to the Court of Justice for a preliminary ruling, pursuant to an order of 13 October 2020:

[…]

[…] **[Or. 9]**

[…]

[…] **[Or. 10]** […]

[…]

[Wording of the questions referred to the Court of Justice for a preliminary ruling in Case C-601/20]

While the question proposed by the applicants in point (c) has already been referred to the Court of Justice and will therefore not be raised again, the other proposed questions have not yet been referred to the Court of Justice.

The court notes, however, that the question in point (a), that is to say the question concerning the European Union's alleged lack of competence to legislate in the context of the right of access to information on beneficial owners, where such a measure does not seek to remove an obstacle to freedom of movement or to contribute to the elimination of appreciable distortions of competition, is not justified.

It cannot be denied that combating money laundering and terrorist financing falls within the competences of the European Union under the TEU and the Treaty on the Functioning of the European Union (TFEU). The competence of the European Union is not affected by the fact that a specific provision contained in a **[Or. 11]** directive the subject matter of which falls within that competence may, where relevant, be contrary to the fundamental principles governing the European Union**.**

The question in point (b) relates to the principle of proportionality set out, in particular, in Article 5(4) TEU, which states that 'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

According to recital 30 of Directive 2018/843, *'Public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system. It can contribute to combating the misuse of corporate and other legal entities and legal arrangements for the purposes of money laundering or terrorist financing, both by helping investigations and through reputational effects, given that anyone who could enter into transactions is aware of the identity of the beneficial owners. It also facilitates the timely and efficient availability of information for financial*

institutions as well as authorities, including authorities of third countries, involved in combating such offences. The access to that information would also help investigations on money laundering, associated predicate offences and terrorist financing'.

Recital [35] states that *'The enhanced public scrutiny will contribute to preventing the misuse of legal entities and legal arrangements, including tax avoidance. Therefore, it is essential that the information on beneficial ownership remains available through the national registers and through the system of interconnection of registers for a minimum of five years after the grounds for registering beneficial ownership information of the trust or similar legal arrangement have ceased to exist. However, Member States should be able to provide by law for the processing of the information on beneficial ownership, including personal data for other purposes if such processing meets an objective of public interest and constitutes a necessary and proportionate measure in a democratic society to the legitimate aim pursued.'*

In the present case, the provisions on public access to the information contained in the RBO were adopted in the context of combating money laundering and terrorist financing. However, it has not been established with any certainty why the widest possible opening-up of the RBO to the general public, in particular without a registration obligation and without payment of fees to access the RBO, is necessary to achieve the intended objectives.

The applicants therefore rightly wish to submit to the Court of Justice the question of the proportionality of the measures adopted to the objective pursued, and it is therefore appropriate to refer the relevant question to the Court of Justice for a preliminary ruling.

Article 12 of the Charter provides that *'Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in* **[Or. 12]** *political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests'.*

The applicants claim that the disclosure to the general public of information relating to beneficial owners has a deterrent effect on investment in companies and other legal entities. In their analysis, they rely on a judgment of the Court of Justice of 16 June 2020 (C-78/18), in which it was held that a national law imposing systematic registration obligations on organisations in receipt of support from abroad is liable to have a deterrent effect on the participation of donors resident abroad and therefore restricts the right to freedom of association.

It should be noted that the right to freedom of association constitutes *'one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life'* (Court of Justice, Grand Chamber, 18 June 2000, Case C-78/18, paragraphs 110 to 114).

However, the purpose of a commercial company, such as G-FINANCE, is to act not in the common interest, but in the interest of its shareholders and beneficial owners. It must be concluded that commercial companies are not covered by the right to freedom of association, with the result that the alleged infringement of Article 12 of the Charter must be ruled out and that there is therefore no need to submit the related question to the Court of Justice for a preliminary ruling.

According to Article 16 of the Charter *'The freedom to conduct a business in accordance with Community law and national laws and practices is recognised'.*

The applicants claim that the contested provisions on access to the information in the RBO infringe the freedom to conduct a business, by allowing anyone to examine and analyse the shareholding structures of companies and other legal entities and to reconstruct the way in which they organise their business activities. In particular, access to such information makes it possible to know when natural persons become, or cease to be, shareholders of companies, thus enabling aggressive economic intelligence practices and influence strategies. In this way, the spirit of enterprise is impeded.

In the light of the case-law of the Court of Justice, the freedom to conduct a business has a very wide potential scope, including *'the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it'* (Court of Justice, 27 March 2014, Case C-314/12, *UPC Telekabel Wien*, paragraph 49) but also, by virtue of the freedom of contract, the *'the freedom to choose with whom to do business ... and the freedom to determine [freely] the price of a service'* (Court of Justice, Grand Chamber, 22 January 2013, Case C-283/11, *Sky Österreich*, paragraphs 42 and 43).

As with the right to property, set out in Article 17 of the Charter, the broad applicability of the right to conduct a business is, however, qualified by its relative weakness as opposed to the general interest. **[Or. 13]**

According to the established formula of the Court of Justice, that right must be 'viewed in relation to its social function' and it 'may be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed' (see, inter alia, Court of Justice, Grand Chamber, 15 January 2013, Case C-416/10, *Krizan*, paragraph 113) (JurisClasseur Europe Traité, fascicule 160: Charter of Fundamental Rights of the European Union, No 59 et seq.)

The question referred for a preliminary ruling relating to the alleged infringement of the right to conduct a business therefore actually concerns the principle of proportionality referred to previously.

The court nevertheless considers that, for the sake of completeness, it is appropriate to refer the question relating to the infringement of Article 16 of the Charter to the [Court of Justice] for a preliminary ruling.

Article 20 of the Charter provides that 'everyone is equal before the law', while Article 21 provides that 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

The applicants take the view that there is an infringement of those principles in light of the fact that Directive 2018/843 establishes a difference in treatment between companies and other legal entities, on the one hand, and trusts and legal arrangements with a structure or functions similar to those of trusts, on the other, in that access to the registers of beneficial owners of trusts is limited to any natural or legal person who can demonstrate a legitimate interest.

Since trusts could also be used for the purposes money laundering or terrorist financing, the difference in treatment as regards access to the registers is not justified and therefore constitutes an infringement of the principle of equal treatment.

In the absence of a specific justification as to the need for a particular treatment for those two categories of entities, it is appropriate to submit the related question to the Court of Justice for a preliminary ruling.

Finally, the applicants allege infringement of the general principle of European law of protection of business secrecy, which is, in a sense, the equivalent for legal persons of the right to respect for private life, a right which is infringed by the contested provisions.

The Court of Justice has recognised the protection of business secrecy as a general principle (see judgments of 24 June 1986, *AKZO Chemie and AKZO Chemie UK* v *Commission*, Case 53/85, ECR 1965, paragraph 28, and of 19 May 1994, *SEP* v *Commission*, Case C-36/92 P, ECR 1-1911, paragraph 37).

In so far as information relating to the beneficial owners of legal persons may provide the general public with information on shareholders and **[Or. 14]** on internal power games, it is appropriate to submit the relevant question to the Court of Justice for a preliminary ruling.

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:

> *'Are the provisions of 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 amending Directives 2009/138/EC and 2013/36/EU, and in particular Article 1(15)(c) thereof, amending Article 30(5) 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 the aforementioned Directive (EU) 2018/843, in so far as they grant a right of access to information on the beneficial owners of companies and other legal entities to 'any member of the general public',*
>
> *invalid because they:*
>
> *(a) infringe the principle of proportionality, as set out, in particular, in Article 5(4) TEU; and/or*
>
> *(b) infringe Article 16 of the Charter of Fundamental Rights of the European Union (freedom to conduct a business); and/or*
>
> *(c) infringe Articles 20 (equality before the law) and 21 (non-discrimination) of the Charter of Fundamental Rights of the European Union; and/or*
>
> *(d) infringe the general principle of European law of protection of business secrecy?'*

[…]