

CJEU Judgment on the Right to Judicial Review in Tax Cooperation

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News

On 6 October 2020, the CJEU delivered its judgment in *Joined Cases C-245/19 (Luxembourg State v B)* and *C-246/19 (Luxembourg State v B and Others)*.

The background of the preliminary ruling (brought by the Higher Administrative Court, Luxembourg) is a request by the Spanish tax administration to the Luxembourg tax administration for information about an artist living in Spain. The request was based, among other things, on Directive 2011/16/EU on administrative tax cooperation. As the Luxembourg tax administration did not have the information, it obliged a Luxembourg bank and another Luxembourg company to provide information. In accordance with Luxembourg law at the time, recourse to the courts was excluded. If the information was not provided in due time, a fine was possible; only this could be challenged in court. The first question in the case concerned the necessity of a legal remedy against the information request a) by the taxpayer under investigation, and b) by third persons. The second question concerned the specificity and precision of the request. For more information on the case and the opinion of the AG --> [eucrim 2/2020, 70-71](#).

The Grand Chamber of the CJEU held, in the first place, that the national legislation applicable to the case where the taxpayer can only bring a legal challenge against an order of financial penalty for having infringed information obligations is not in line with Art. 47 CFR (right to an effective legal remedy). In view of Art. 52(1) CFR (which allows the exercise of certain fundamental rights to be restricted in certain circumstances), however, legislation preventing such a taxpayer from bringing a direct action against an information order does not damage the essence of his/her right to an effective remedy.

As regards the situation of the third parties concerned by the information request in question, the judges in Luxembourg held, similarly, that the exercise of the right to an effective remedy against the information order (which must, in principle, be available to such third parties) may be limited by national legislation. This legislation may exclude the bringing of a direct action against such an order, provided that such third parties additionally have 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 CJEU clarified the criteria that make an information request by another EU Member State “foreseeably relevant” within the meaning of Directive 2011/16. In the Court’s view, a combination of the following criteria are sufficient to ensure that a request is not manifestly devoid:

- Information on the identity of the person holding the information in question;
- The identity of the taxpayer subject to an investigation; or

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- “Personal, temporal and material” links of contracts, invoices, payments, etc. with the investigation and the taxpayer under investigation..

As a result, the CJEU departs from the opinion of the AG on several points and takes a more nuanced decision on the preliminary ruling questions than the AG. It will be up to the Higher Administrative Court in Luxembourg to apply the CJEU’s answer to the concrete case.

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