



***Joined cases C-245/19 and C-246/19, État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)***

**CJEU ruled on cross-border exchange of information upon request**

On 6 October 2020, the Court of Justice of the European Union ("CJEU") issued its judgment in joined cases C-245/19 and C-246/19, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*. The cases concern a request for information sent by the Spanish competent authority to the Luxembourg competent authority in respect of an artist resident of Spain pursuant to the Spain - Luxembourg tax treaty (signed on 3 June 1986) and the directive on administrative cooperation in the field of taxation (Council Directive 2011/16/EU of 15 February 2011, the "DAC"). The addressees of the request, the artist and the concerned third parties (i.e. the other companies mentioned in the orders) challenged the orders before the Luxembourg court. The Higher Administrative Court, before which those disputes were brought on appeal, stopped the proceedings and requested a preliminary ruling from the CJEU (see also our EU Tax Alert 2020/07 at <https://www.maisto.it/it/newsletter/eu-tax-alert--94.html>).

With the first question, the referring Court asked the CJEU to assess whether national legislation of a Member State which precludes a judicial remedy against a tax information request entails a violation of Article 47 of Charter of Fundamental Rights of the European Union (hereafter the "Charter").

The CJEU 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. Such protection may also be claimed by a legal person who is the addressee of a decision ordering information to be provided to the tax administration, in order to challenge in court that decision or the relevant penalties imposed in case of non-fulfillment of that decision.

That said, the CJEU recalled that the exercise of the right to an effective remedy may be restricted by EU rules. In this respect, the CJEU noted that it does not follow from any provision of the DAC that EU law intended to limit the exercise of the right to an effective remedy in the event of a decision ordering to provide information. In addition, the right to an effective remedy may be also restricted by national legislation, subject to Article 52(1) of the Charter, which is aimed at ensuring that the essence of the rights and freedoms guaranteed by the Charter are, in any case, preserved. In this regard, the CJEU clarified that the right to an effective remedy as set forth in Article 47 of the Charter must ensure, among other things, the possibility for the holder of that right to claim jurisdictional remedy against any violation of the rights and freedoms guaranteed by EU law. In the case at stake, the CJEU found that the addressee of the order to provide

information had the right to challenge the order only in the context of an action brought against the relevant penalty imposed for the non-fulfilment of that order. According to the Court, under those circumstances, national legislation did not comply with Article 47 and Article 52(1) of the Charter.

Second, the CJEU also held that the request for information is able to infringe the taxpayer's right to privacy guaranteed by Article 7 of the Charter and the right to the protection of personal data guaranteed by Article 8. In this respect, the CJEU clarified that such rights are preserved if there are one or more remedies available before the national courts enabling the taxpayer to activate, although in an incidental manner, an effective judicial review of any measure affecting his rights without running the risk of being penalised for doing so. Thus, the CJEU held that legislation preventing the taxpayer from bringing a direct action against an order to provide information does not breach the right to an effective remedy, if an effective judicial review may be triggered incidentally. Furthermore, the CJEU noted that such a legislation meets an objective of general interest, namely that of combating international tax evasion and avoidance by strengthening cooperation between the competent national authorities in that area, and that it complies with the principle of proportionality.

Third, as regards the situation of the third parties concerned by the information to be provided, the CJEU held that an information order may have an impact on their right to protection against arbitrary or disproportionate intervention by public authorities in their private sphere. However, the right of those third parties to an effective remedy may be limited by national legislation by excluding the right to activate a direct action against such an order, provided that such third parties may obtain the effective respect of their fundamental rights through other actions, such as an action to ascertain liability. Also in this respect, the CJEU recognized the existence of an objective of general interest and the proportionality of the relevant domestic legislation.

Finally, the CJEU ruled that a decision by which the competent authority of a Member State orders a person to provide information complies with the standard of "foreseeable relevance" required by the DAC where it states the identity of the person holding the information in question, that of the taxpayer subject to investigation and the period covered by that investigation, and where it relates to contracts, invoices and payments that, although not expressly identified, are defined by personal, temporal and material criteria establishing their links with the investigation and the taxpayer subject to 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.

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