

Opinion Statement ECJ-TF 3/2017 on the Decision of the Court of Justice of the European Union of 16 May 2017 in *Berlioz Investment Fund SA* (Case C-682/15), Concerning the Right to Judicial Review under Article 47 of the EU Charter of Fundamental Rights in Cases of Cross-Border Mutual Assistance in Tax Matters

This CFE Opinion Statement, submitted to the European Institutions in November 2017, comments on the ECJ decision in *Berlioz Investment Fund SA* (Case C-682/15).

1. Introduction

The Grand Chamber of the Court of Justice of the European Union (ECJ) delivered its decision in *Berlioz Investment Fund SA* (Case C-682/15) on 16 May 2017,¹ following the Opinion of Advocate General Wathelet of 10 January 2017.²

The case concerned the levying of tax penalties in circumstances in which a third party partially refused to provide the Luxembourg tax authorities with information requested, by way of mutual assistance under the Mutual Assistance Directive (2011/16),³ by the French tax authorities.

Having clarified that when exchanging information by way of mutual assistance under an EU directive, EU Member States are implementing EU Law, the Grand Chamber confirmed the right to judicial review in connection with the levying of penalties and acknowledged

Berlioz' legal standing to challenge the foreseeable relevance of information that one tax authority asks another to exchange by way of mutual assistance. When reviewing the legality of the request in this context, the judiciary will ascertain whether manifestly irrelevant information is being requested, without necessarily informing the taxpayer of the details.

2. Background and Issues

This case addresses the need to reconcile effective cross-border tax exchange of information with the protection of the fundamental rights of (relevant) persons in tax matters.

The Mutual Assistance Directive (2011/16) allows for mutual assistance by way of cross-border exchange between tax authorities of "foreseeably relevant" information relating to tax matters. Such information is covered by an obligation of secrecy.

The Directive obliges the requested state to gather and provide the relevant information. However, the requested state may refuse, *inter alia*, when the requesting state⁴ has not exhausted its usual sources of information. Requests are to be conveyed through the standard form, which includes, among other things, the identity of the person under examination or investigation and the tax purpose for which the information is sought.

In implementing the Mutual Assistance Directive (2011/16), the approach of the Luxembourg tax system to mutual assistance was significantly reformed. In particular, the reform has allowed the Luxembourg tax authorities to exchange, with other tax authorities, information that is foreseeably relevant to any tax matter connected with the interpretation and application of domestic or treaty provisions. The condition for Luxembourg tax authorities to supply information is that the request state the legal basis,

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1. FR: ECJ, 16 May 2017, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*, ECJ Case Law IBFD, ECLI:EU:C:2017:373.

2. FR: Opinion of Advocate General Wathelet, 10 Jan. 2017, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*, ECJ Case Law IBFD, ECLI:EU:C:2017:2.

3. Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64 (2011), EU Law IBFD [hereinafter *Mutual Assistance Directive* (2011/16)].

4. Art. 17(1) *Mutual Assistance Directive* (2011/16).

identify the requesting authority and contain the information prescribed by relevant treaties and domestic laws. The holder of information is then obliged, without any right of appeal, to provide the Luxembourg tax authorities with the requested information in full, together with the documents on which the said information is based, subject to a penalty of up to EUR 250,000. Whilst not being entitled to challenge the legality of the request itself, the holder of the information may nevertheless apply to the judiciary to review the penalty.⁵

Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial within a reasonable time before an independent and impartial tribunal established by law.

In *Berlioz*, the French tax authorities requested that the Luxembourg tax authorities gather information connected with the entitlement of Cofima – a company resident in France – to obtain an exemption from French withholding taxation on a payment of dividends. Accordingly, the Luxembourg tax authorities asked Berlioz – a Luxembourg resident investment fund and a shareholder of Cofima – to provide such information. In particular, the request concerned the place of effective management, employees (including their identification and residence in Luxembourg), the existence of contracts between Berlioz and Cofima, Berlioz' shareholdings in other companies and Cofima's securities recorded as assets of Berlioz, as well as the names and addresses of Berlioz' members, the amount of capital held by each member and the percentage of share capital held.

Berlioz provided all such information, except that it refused to provide the names and addresses of its members, the amount of capital held by each of them and the respective percentage of share capital.

In response to their partial refusal, the Luxembourg tax authorities imposed a tax penalty, against which Berlioz brought an action before the *Tribunal Administratif*, the purpose of which was to verify whether the request for information was well founded. The *Tribunal Administratif* reduced the fine on grounds of proportionality, but declined to review the legality of the information request itself and the exclusion of a right to judicial review of the request. Berlioz appealed to the *Cour Administrative*, arguing that this approach constituted a breach of the right to an effective judicial remedy under article 6(1) of the European Convention on Human Rights (ECHR). By reference to article 47 of the EU Charter, the *Cour Administrative* referred six questions to the Court of Justice of the European Union, under the preliminary ruling procedure.

The preliminary questions focus on whether: (i) when imposing a penalty for failing to provide information, Luxembourg implements EU law in the sense of article

5. This limitation of jurisdiction formed the basis for the third question submitted by the Luxembourg court to the ECJ, and thus the core reason why Luxembourg's law could be said to violate art. 47 of the Charter of Fundamental Rights of the European Union, OJ C 326/391 (26 Oct. 2012), EU Law IBFD.

51(1) of the EU Charter; (ii) article 47 of the EU Charter entitles the holder of information, on whom a penalty has been applied for the failure to provide it when requested, to challenge the legality of the domestic order that requested its provision; (iii) article 47 of the EU Charter gives the national court unlimited jurisdiction to review the legality of that order; (iv) the effect of articles 1(1) and 5 of the Mutual Assistance Directive (2011/16) is that foreseeable relevance is a condition for the information order to be legal; (v) articles 1(1) and 5 of the Mutual Assistance Directive (2011/16) and article 47 of the EU Charter prevent the requested authority from examining the validity of the request for information; and (vi) article 47(2) of the EU Charter requires the national court to have access to the request for information between the tax authorities and to communicate it to (in this instance) Berlioz.

The Advocate General proposed that the Court should consider Luxembourg's rules to implement EU law in the sense indicated by article 51(1) of the EU Charter. He suggested that, accordingly, article 47 of the EU Charter allows the holder of information to challenge the legality of the order, by having the national court verify the legality of the order with a view to determining whether the request was foreseeably relevant.

3. The Decision of the Court of Justice

The Court of Justice followed the reasoning of its Advocate General and supported a pre-existing line of reasoning that reconciles the need to protect fundamental rights of persons with securing effective cross-border mutual assistance in tax matters.

Extending its reasoning in *Åkerberg Fransson* (Case C-617/10)⁶ to the legal field of tax information exchange, the Court held that the domestic provision constituting the legal basis for the penalty constituted implementation of the Mutual Assistance Directive (2011/16), on the basis that it was intended to enable the Luxembourg authority to comply with its obligations under that Directive.⁷ Accordingly, the Court acknowledged that this case falls within the scope of the EU Charter by virtue of its article 51(1).

Furthermore, it applied its settled case law⁸ to acknowledge that the general principle of protection against arbitrary or disproportionate intervention by public authorities in the private sphere is a right guaranteed by EU law and, as such, article 47 of the EU Charter requires judicial review in connection with the levying of a tax penalty. The Court distinguished *Berlioz* from *Sabou* (Case C-276/12),⁹ as the Directive itself does not confer rights on persons, but only covers mutual assistance between tax authorities. It nevertheless went on to distinguish the facts of that case from the situation in *Berlioz* on the grounds that

6. SE: ECJ, 26 Feb. 2013, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, para. 28, ECJ Case Law IBFD.

7. *Berlioz* (C-682/15), para. 41.

8. Id., para. 51 and the case law quoted therein.

9. CZ: ECJ, 22 Oct. 2013, Case C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, para. 36, ECJ Case Law IBFD.

the relevant person here was the addressee of an information order and subject to a penalty on that basis, and not merely the subject of an information request that had not yet had other legal consequences.¹⁰ In so doing, the Court pre-empted any criticism that a mere information holder was protected in a situation in which the same protection would be denied to a taxpayer whose affairs were under investigation.

After affirming that foreseeable relevance was a necessary characteristic of the information for it to be requested, and that the requesting authority (in this instance, France) has, in principle, the discretion to assess this,¹¹ the Court proceeded to interpret this requirement. In doing so, it acknowledged the value of the OECD Model (2014)¹² and defined foreseeable relevance by reference to recital 9 of the Mutual Assistance Directive (2011/16). According to the Court, the standard aims to enable the requesting authority to “obtain any information that seems to it to be justified for the purpose of its investigation, while not authorising it manifestly to exceed the parameters of that investigation nor to place an excessive burden on the requested authority”.¹³

In this context, the Court held that the requested authority must be put into a position to verify that the requesting authority has not exceeded the parameters of its investigation, and is not confined merely to a formal verification of regularity, but can have regard to the substance of the matter under investigation.¹⁴

Importantly however, both the requested authority and the national court in the requested authority’s territory are limited in their substantive review to ascertaining whether the information request is “manifestly devoid of any foreseeable relevance, having regard to the taxpayer, the information holder and the tax purpose pursued by the request”.¹⁵

The Court added that the national court must have full access to the information request if it is to carry out an effective judicial review under article 47 of the EU Charter,¹⁶ i.e. to ascertain whether the information request manifestly lacks foreseeable relevance. By contrast, the information request generally need not be disclosed to the information holder or subject of investigation, but can remain secret in accordance with article 16 of the Mutual Assistance Directive (2011/16).¹⁷

4. Comments

The Court’s decision marks another important step forward in the protection of taxpayer rights within the framework of cross-border tax disputes, which is partic-

ularly timely given the steady increase in cross-border sharing of information by tax authorities.

In particular, the decision provides three important results. First, EU fundamental rights, as reflected in the Charter, apply to the administration of taxation in the same way as in other fields, under the conditions set by article 51 of the Charter. Second, companies, as well as individuals, are entitled to judicial review of the imposition of penalties in appropriate cross-border situations. Third, it reconciled the need to fight abusive and fraudulent practices with access to an effective legal remedy by limiting the circumstances and scope of judicial review to cases of disproportionate exercise of state power. The Court’s interpretation of the concept of “foreseeable relevance” is highly significant, as it will, from now on, bind EU Member States when exchanging information based on EU directives. First, the Court made it clear that the requesting authority has discretion to decide what information they require in order to conduct their investigations under domestic tax law. Secondly, it also clarified that the requested authority nevertheless has the power to review the requesting authority’s exercise of that discretion on substantive grounds. Thirdly, it resolved that tension by setting out the standard for such a review: the requested authority may deny the provision of information only where a request is “devoid of any foreseeable relevance”.¹⁸

This limit on the requesting authority’s discretion in determining the content of its request is obviously aimed at reconciling the interests of taxpayers, third parties and the tax authorities and should, therefore, have a broader application. It is to be hoped that national courts (that do not already legitimately apply a higher standard of protection to taxpayers)¹⁹ will follow that approach in situations of information exchanged on the basis of similar clauses contained in bilateral treaties of EU Member States and perhaps also by courts of non-EU states when interpreting treaties with EU countries and beyond.

The standard set for the requested state to assess foreseeable relevance reflects the views already held by scholars. It also interacts harmoniously with the object and purpose

10. *Berlioz* (C-682/15), para. 58.

11. Id., paras. 70-71 and 79.

12. *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Models IBFD.

13. *Berlioz* (C-682/15), para. 68.

14. Id., para. 82.

15. Id., paras. 81 and 85-86.

16. Id., para. 92.

17. Id., para. 101.

18. Id., para. 78. It is notable that the Court repeatedly, but not consistently, uses the adverb “manifestly” to seemingly qualify the threshold for denying the exchange of information, especially when referring to the domestic court’s review of the administration’s decision (see, for example, paras. 86, 89 and 92; *see also* para. 81 for its use with regard to the requested authority). In other paragraphs, that qualifier is not used. This could be read to mean that there is a higher threshold for a court to deny the exchange of information than it is for the requested authority, since it is possible for relevance to be entirely absent without this being “manifest”, i.e. obvious – a reading that may be particularly likely in the German language version of the decision, wherein it refers to *völlig* (i.e. devoid of any/totally) and *offenkundig* (i.e. manifest), respectively. However, in light of the Court’s explicit holding that “the limits that apply in respect of the requested authority’s review are *equally* applicable to reviews carried out by the courts” (para. 85) it is not convincing to deduce the existence of different standards of review from the slightly different wording. This notwithstanding, the precise nature of the standard is not entirely clear.

19. Such higher standards would generally be permissible under art. 17 *Mutual Assistance Directive* (2011/16), according to which a requested state is not required to collect information that it would be unable to collect under its domestic law.

of the limit established by the OECD Model in respect of cross-border mutual assistance on request. One may, therefore, reasonably expect that, going forward, EU tax authorities will have to meet this standard when making requests, as requested tax authorities of EU Member States will be allowed to treat requests that do not meet this standard as inadequate.

For the first time, the Court has interpreted the expression “foreseeable relevance” and, in doing so, it uses the concept of “manifest irrelevance” of the information requested. This is used to ensure a certain threshold of protection of “relevant persons” against the arbitrary exercise of power in cross-border mutual assistance cases involving direct tax matters. It is doubtful, however, whether this threshold can effectively secure the protection of the relevant persons’ rights. The CFE also wonders whether this offers an effective protection against fishing expeditions or requests for information that is unlikely to be relevant to the tax affairs of a given taxpayer.²⁰

Given this standard, it seems appropriate (from the perspective of securing an effective legal remedy) that an assessment of any manifest irrelevance of a request for information is to be carried out by the judiciary of the requested state. This is especially true given that such a court will have the possibility to verify the actual merits of the request for information, unlike the person subject to the information request, who is generally only entitled to

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20. See Recital 9 *Mutual Assistance Directive* (2011/16).

see the standard form (it appears that there are limited circumstances in which that person may be entitled to more information, but the court deals with this very briefly and the circumstances are not entirely clear).²¹

5. The Statement

The CFE welcomes this decision in that it marks a new page in the protection of taxpayer rights. In line with the principle “wherever there is a right, there is a remedy”, it shows that EU law may reconcile the interest in securing an effective protection of tax collection with that in respecting fundamental rights. As previously mentioned in this section, the CFE wonders whether the threshold of “manifest irrelevance” can effectively secure the protection of the relevant persons’ rights. It also wonders whether this offers an effective protection against fishing expeditions or requests for information that is unlikely to be relevant to the tax affairs of a given taxpayer.²²

One feature of this decision is the very limited input that the person subject to the information request has in relation to the requested state’s response to the request for mutual assistance. For this reason, it is clear that that person should aim to engage with the requesting state in order to influence the information that is requested, rather than waiting until the cross-border request has been made.

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21. *Berlioz* (C-682/15), para.100.

22. See Recital 9 *Mutual Assistance Directive* (2011/16).



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