European Union

*Georg Kofler, Alfredo Garcia Prats, Werner Haslehner, Volker Heydt, Eric Kemmeren, Michael Lang, João Nogueira, Christiana HJI Panayi, Stella Raventós-Calvo, Isabelle Richelle, Alexander Rust and Rupert Shiers**

Opinion Statement ECJ-TF 1/2022 on the ECJ Decision of 25 November 2021 in *État Luxembourgeois v. L* (Case C-437/19) on the Conditions for Information Requests and Taxpayer Remedies

In this CFE Opinion Statement, the CFE ECJ Task Force comments on the ECJ decision in *État luxembourgeois v. L* (Case C-437/19) of 25 November 2021. This decision brings further clarification on the rights of information holders in respect of cross-border exchange of information, as well as on the concept of "foreseeable relevance".

1. Introduction

This CFE Opinion Statement, submitted to the EU institutions in January 2022, addresses the ECJ decision in *État Luxembourgeois v. L* (Case C-437/19), in which the Third Chamber of the Court of Justice of the European Union (ECJ) delivered its decision on 25 November 2021,[1] following Advocate General Kokott's Opinion.[2] The Court clarified the conditions for the identification of a taxpayer in group information requests under the Directive on Administrative Cooperation (2011/16) (hereinafter DAC)[3] and confirmed that article 47 of the Charter on Fundamental Rights requires the information holder to be given the necessary information to assess the request's legality.

2. Facts and Preliminary Questions

The case arose from a preliminary ruling request made by the Luxembourg Supreme Administrative Court (*Cour administrative*) in the course of a judicial review of an information request sent by the French tax authorities to the Luxembourg tax administration.

The French tax authorities had requested information regarding the shareholders of Luxembourg resident company L, which they had identified both as the parent of a French real estate company (F) and the direct owner of additional real estate in France. To substantiate the request relating to the – unidentified – shareholders of L, France had explained that individuals indirectly holding real estate in France were liable to declare such property ownership.[4]

The Luxembourg tax administration issued an order requesting that L provide the names and addresses of L's shareholders, its direct and indirect beneficial owners, the distribution of L's share capital and a copy of the company's shareholder register. Following L's non-compliance with that order, the tax director imposed a fine on L. In the absence of a right to challenge the information order itself at that time – a fact the ECJ had already held to be in violation of article 47 of the Charter of Fundamental Rights in *Berlioz* (Case C-682/15)[5] and *État luxembourgeois v. B* (Joined Cases C-245/19 and C-246/19)[6] – L brought an action against the penalty before the Administrative Court (*tribunal administratif*).

* **The CFE ECJ Task Force is formed by CFE Tax Advisors Europe and its members are Alfredo Garcia Prats (Professor at the University of Valencia); Werner Haslehner (Professor at the University of Luxembourg); Volker Heydt (Former official of the European Commission); Eric Kemmeren (Professor of International Taxation and International Tax Law at the Fiscal Institute Tilburg at Tilburg University); Georg Kofler (Chair of this Task Force and Professor at the Institute for Austrian and International Tax Law of WU Wien); Michael Lang (Professor at the Institute for Austrian and International Tax Law of WU Wien); João Nogueira (Deputy Academic Chairman at IBFD and Professor at the Portuguese Catholic University); Christiana HJI Panayi (Professor at Queen Mary University of London); Emmanuel Raingeard de la Blétière (Associate Professor at the University of Rennes, Partner PwC France); Stella Raventós-Calvo (President of AEDAF and Vice-President of CFE); Isabelle Richelle (Co-Chair of the Tax Institute – HEC – University of Liège, Brussels Bar Elegis); Alexander Rust (Professor at the Institute for Austrian and International Tax Law of WU Wien); and Rupert Shiers (Partner at Hogan Lovells). Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group. The CFE ECJ Task Force was founded in 1997 and its founding members were Philip Baker, Paul Farmer, Bruno Gangemi, Luc Hinnekens, Albert Raedler† and Stella Raventós-Calvo. For further information regarding this Opinion Statement of the CFE ECJ Task Force please contact Prof. Dr. Georg Kofler, Chair of the CFE ECJ Task Force, or Aleksandar Ivanovski, Tax Policy Manager, at info@taxadviseseurope.org.**

1. LU: ECJ, 25 Nov. 2021, Case C-437/19, *État luxembourgeois v. L*, Case Law IBFD.
2. LU: Opinion of Advocate General Kokott, 3 June 2021, Case C-437/19, *État luxembourgeois v. L*, Case Law IBFD.
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), Primary Sources IBFD (DAC).
4. *État luxembourgeois* (C-437/19), para. 17.
5. LU: ECJ, 16 May 2017, Case C-682/15, *Berlioz Investment Fund*, para. 59, Case Law IBFD.
6. LU: ECJ, 6 Oct, 2020, Joined Cases C-245/19 and C-246/19, *État Luxembourgeois v. B*, Case Law IBFD.

The Administrative Court concluded that the information request was contradictory and annulled the tax director's decision because of doubts concerning the identity of the taxpayer to which the information request related. The Luxembourg administration appealed that decision.

While the Luxembourg Supreme Administrative Court did not agree with the first instance's decision, considering the low standard of review that a request be "manifestly devoid of foreseeable relevance" for it to be invalid, it raised several other questions on the request's legality. Principally, these concerned whether a taxpayer needs to be "individually identified" and whether the addressee of an information order must be given all relevant information to make a decision whether to comply or challenge the order at the time they receive it. Thus, the Supreme Administrative Court decided to stay the proceedings and refer the following three questions to the ECJ for a preliminary ruling:

> (1) Must Article 20(2)(a) of Directive 2011/16 be interpreted as meaning that where a request for exchange of information formulated by an authority of a requesting Member State designates the taxpayers to which it relates simply by reference to their status as shareholders and beneficial owners of a company, without those taxpayers having been identified by the requesting authority in advance, individually and by name, the request satisfies the identification requirements laid down by that provision?
>
> (2) If the answer to the first question is in the affirmative, must Article 1(1) and Article 5 of that directive be interpreted as meaning that the standard of foreseeable relevance may be met, if the requesting Member State, in order to establish that it is not engaged in a fishing expedition, despite the fact that it has not individually identified the taxpayers concerned, provides a clear and sufficient explanation evidencing that it is conducting a targeted investigation into a limited group of persons, and not simply an investigation by way of general fiscal surveillance, and that its investigation is justified by reasonable suspicions of non-compliance with a specific legal obligation?
>
> (3) Must Article 47 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that, where
> – a person who has had imposed upon him [or her] by the competent authority of a Member State an administrative financial penalty for non-compliance with an administrative decision, requiring him [or her] to provide information in connection with an exchange of information between national tax authorities pursuant to Directive 2011/16, where the national law of the requested Member State does not make provision for an action to be brought against the latter decision, and where the person concerned has challenged the legality of that decision within an action brought against the financial penalty, and
> – has only obtained disclosure of the minimal information referred to in Article 20(2) of Directive 2011/16 in the course of the judicial procedure set in motion by the bringing of that action, that person is entitled, in the event of a definitive incidental finding upholding the validity of the decision requiring the requested information and of the decision imposing a fine on him [or her], to a period of grace for the payment of that fine, so that he [or she] has an opportunity, having thus been given disclosure of the material supporting the contention – definitively accepted by the competent court – that the test of foreseeable relevance is met, to comply with the decision requiring the requested information?

3. ECJ Decision

3.1. The first and second question concerning group requests

The Court examined the first and second questions together and held – relying heavily on Advocate General Kokott's Opinion – that group requests without individually identifying and naming the subjects of an investigation are covered by the DAC as long as there is a "clear and sufficient explanation that [the requesting authority] is conducting a targeted investigation into a limited group of persons, justified by reasonable suspicions of non-compliance with a specific legal obligation".[7]

In reaching this conclusion, the Court carried out a three-step analysis, building on its earlier jurisprudence on closely-related questions.

First, it reiterated that information requests must not be devoid of any foreseeable relevance and held that a combined reading of the provisions of the DAC made it clear that "the identity of the person under examination or investigation" was a necessary element to be included in an information request.[8]

Second, relying on a literal,[9] contextual[10] and teleological[11] interpretation, the Court concluded that the concept of "identity of the person under examination or investigation" as required by article 20(2) of the DAC includes a set of distinctive qualities or characteristics enabling the identification of the person or persons under examination or investigation.[12]

Third, weighing the discretion of the requesting authority to assess the foreseeable relevance of the requested information and the burden on the requested authority to provide such information in an effort to avoid mere "fishing expeditions", the Court concluded that the request must include three elements: (i) as full and precise a description as possible of the group of taxpayers under examination or investigation, specifying the common set of distinctive qualities or characteristics that enable the requested authority to identify those persons, (ii) an explanation of the specific tax obligations of those persons, and (iii) a statement of reasons why those persons are suspected of having committed the infringements or omissions under examination or investigation.[13]

7. *État luxembourgeois* (C-437/19), para. 72.
8. Id., para. 48.
9. Id., para. 51. The term "identity" in everyday usage encompasses a person's characteristics beyond their name.
10. Id., paras. 52-55 The DAC defines "person" very broadly to include even legal arrangements without legal personality (*see* art. 3(11) DAC), making it impossible in all cases to require an identification on the basis of a person's civil status; recital 9 also specifies that exchange of information ought to be enabled to the widest possible extent, requiring a liberal interpretation.
11. *État luxembourgeois* (C-437/19), paras. 56-60. The DAC aims at a quick and efficient exchange of information for the purpose of combatting tax fraud and evasion – an objective that would be jeopardized if every information request necessarily had to individually identify and specify the name of each person under investigation.
12. Id., paras. 61-62.
13. Id., paras. 63-67.

Ultimately, the ECJ left it to the referring Court to determine whether the information request satisfied the requirement to not manifestly exceed the parameters of the tax investigation or to place an excessive burden on the requesting authorities.[14]

3.2. The third question concerning information to be given to the addressee of the order

The third question concerned whether an information holder must – pursuant to article 47 of the Charter – be given the opportunity to provide the requested information without having to pay a penalty after an incidental judicial review had ruled the order was valid. In the case at hand, the information holder could not avoid receiving an administrative penalty for non-compliance with an information order. Its only possibility to challenge the order's legality was to indirectly challenge the penalty.

The Court briefly dealt with the Luxembourg government's objections regarding its jurisdiction and admissibility of the question, rejecting both as: (i) the question related to EU law rather than purely domestic procedural aspects since the relevant procedural law implements an EU directive;[15] and (ii), the question was still relevant despite the fact that Luxembourg had already introduced the possibility to challenge information orders directly. Insofar as it clearly related to EU law and formed part of an actual dispute, the question enjoyed a presumption of relevance;[16] moreover, the referring Court had made it clear that the statutory changes did not apply to the dispute in question.

In substance, the Court held that the right to an effective remedy guaranteed in article 47 of the Charter presupposes both that national courts can review the information request in order to assess its legality[17] and also that the person concerned must be able to ascertain the reasons upon which the order they receive is based.[18]

Since, in the case at hand, the person concerned did not have the possibility to challenge the information order directly – which the ECJ reiterated to be in violation of article 47 of the Charter[19] – it follows that the addressee of the information order must be given the opportunity to comply with that order in the event it is found to be legal and thus to avoid paying the penalty for non-compliance. For that purpose, the time limit for compliance with that order prescribed in the national law ought to apply.

4. Comments

4.1. Introduction

The case is the latest in a series of decisions on the conditions for exchange of information as regulated by EU law. It confirms and builds on those previous decisions, while providing some clarification on previously unanswered issues.

In *Sabou* (Case C-276/12),[20] the Court specified that the DAC did not itself confer rights on taxpayers, and that, while general principles of EU law are applicable to information procedures conducted under the rules of the Directive, these did not protect affected taxpayers during the "investigation stage", given that a remedy was available to them during the "contentious stage".

In *Berlioz* (Case C-682/15),[21] the Court held that the addressee of an information order (i.e., the "information holder") had the right to an effective judicial review of that order in accordance with article 47 of the Charter. It set a high bar for such judicial review, however, holding – in essence – that information requests could be successfully challenged only if they were manifestly devoid of foreseeable relevance.[22]

In *État luxembourgeois v. B*,[23] it reconciled the earlier decisions, making it clear that the information holder, but not the taxpayer, must be given the possibility to challenge an information order, whereas the latter would be given redress against possible violations of their rights in the later proceedings. It also held that a request for certain documentation that was not specifically identified, but defined by criteria relating to the taxpayer, the information holder and the period under investigation, was not manifestly devoid of foreseeable relevance and thus a legitimate target for an information order.

The case at hand follows the trend established by these cases, aiming to ensure an effective exchange of information regarding a wide range of personal and objective data while ensuring a minimum level of protection against the arbitrary exercise of governmental powers to collect and exchange information upon request. Specifically, it confirms the legality of group requests, although the criteria established by the Court for that purpose are themselves not entirely unambiguous. It also confirms that information holders have a direct right to challenge an information order and clarifies that, in order to exercise that right, they must not only be given the minimum information required by article 20(2) of the DAC but also the information order itself must be duly reasoned.

4.2. Taxpayer identification in group requests

The Court's interpretation of the conditions laid down in the Directive for a valid information request is quite

14. Id., para. 68.
15. Id., para. 74.
16. Id., para. 81.
17. As it had already held previously, in *Berlioz* (C-682/15) and *État luxembourgeois v. B* (Joined Cases C-245/19 and 246/19).
18. *État luxembourgeois* (C-437/19), para. 91. To that effect previously, *Berlioz* (C-682/15), para. 100.
19. *État luxembourgeois* (C-437/19), para. 97.
20. CZ: ECJ 22 Oct. 2013, Case C-276/12, *Jirí Sabou*, Case Law IBFD; *see* CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2014 of the CFE on the Decision of the European Court of Justice in Sabou (Case C-276/12), Concerning Taxpayer Rights in Respect of Exchange of Information upon Request*, 54 Eur. Taxn. 7 (2014), Journal Articles & Opinion Pieces IBFD.
21. *Berlioz* (C-682/15); *see* CFE ECJ Task Force, *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*, 58 Eur. Taxn. 2/3 (2018), Journal Articles & Opinion Pieces IBFD.
22. *Berlioz* (C-682/15), paras. 84-86.
23. *État Luxembourgeois v. B* (C-245/19 and 246/19).

lenient. Following Advocate General Kokott's Opinion, in substance (if not every argument in the Opinion), the result that group requests would be covered by the Directive is ultimately convincing only if heavy emphasis is put on the contextual and teleological arguments. Although the Court also referred to the wording of article 20(2)(a) of the DAC ("the identity of the person under examination or investigation"), it is clear that the contextual and teleological interpretation carried substantially more weight in this case. The Court simply did not consider the wording to be an obstacle to that interpretation.[24]

This result is convincing insofar as the context and purpose of the Directive do indeed support a liberal interpretation of the requirements to provide information in order not to frustrate the effective exchange of information.[25] A possible counterargument might have been that group requests are first mentioned explicitly in the DAC 7 amendment via directive 2021/514,[26] which will have to be implemented to apply from 1 January 2023 only. In contrast to Advocate General Kokott's Opinion,[27] the Court did not discuss the relevance of that amendment. Having reached its conclusion on the basis of the literal, contextual and teleological interpretation, it clearly saw no need to consider that later change, thus agreeing in essence with the Advocate General's view that the subsequent insertion of a special legal basis did not exclude the possibility to make group requests prior to that insertion.

The result adds a layer of difficulty to the assessment of an information request's legality insofar as it replaces a rather simple test – whether a name or other clear individual identification has been provided – with a multi-facetted and uncertain test. In particular, the term "as full and precise a description as possible" is open to a wide range of different applications in practice. The Court further sought to clarify what it considered necessary but managed no more than a reference to the existence of a "common set of distinctive qualities or characteristics". The question arises: how "distinct" must the group be? How many such distinct "qualities or characteristics" of the group under investigation need to be given? On one end of the spectrum of possibilities, only one or two such qualities could suffice: for example, all persons who *own shares in a(ny) Luxembourg company* where that company *owns shares or immovable assets in France*. This would be too remote a description, chiefly because it would make it excessively onerous for the Luxembourg tax administration even to identify and compel the relevant information holders.

The other two elements, i.e. "a description of the persons'" specific tax obligations and "reasons for suspicion" seem clearer; in this respect, it appears likely that only manifestly insufficient descriptions and statements of reasons will invalidate an information request.

The criteria developed by the Court largely dovetail with those laid down in Directive amendment 2021/514, according to which group requests must contain (i) a detailed description of the group; (ii) an explanation of the applicable law and facts based on which there is reason to believe that the taxpayers in the group have not complied with that law; (iii) an explanation of how the requested information would assist in determining compliance by the taxpayers in the group; and – where relevant – (iv) facts and circumstances related to the involvement of a third party actively contributing to the potential non-compliance.[28] Insofar as the first criterion of a "detailed description of the group" could be seen as giving even more discretion to the tax administration than the Court's requirement for a "full and precise description" of a group with a "common set of distinctive qualities or characteristics", it remains to be seen whether the Court will see a need to reconcile the two once the Directive's new wording is applicable, i.e. from 2023.

4.3. Rights to information and effective remedy

Earlier decisions already established that information holders can rely on article 47 of the Charter to directly challenge information orders as potentially arbitrary or disproportionate interventions by public authorities in the sphere of their private activities, as the protection from such interference is recognized as a general principle of EU law.[29]

The case at hand added to this jurisprudence by clarifying that the addressee of an information order must not only be given the minimum information to assess its legality,[30] but that that order must also be duly reasoned for that same purpose.[31] The Court did not specify what due reasoning entails, except that the information holder must be put in a position to assess, on the basis of the information and that reasoning disclosed to them, whether the information order has been issued in accordance with the requirements of EU law, in particular with respect to the foreseeable relevance of the requested information. As this matter is context dependent, the assessment of "due reasoning" in a concrete case will fall to the domestic courts. The ECJ may give further guidance on the requirement in future cases.

24. It is also notable that art. 20(2) DAC does not use "identity" and "name" synonymously, as it refers to the possibility for the tax administration to "provide the name and address of any person believed to be in possession of the requested information" in its second subparagraph.
25. *See* recital 9 DAC.
26. Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ST/12908/2020/INIT, OJ L 104 (25 Mar. 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021L0514.
27. AG Opinion in *État luxembourgeois* (C-437/19), paras. 71-73.
28. *See* art. 1(2) Directive 2021/514 inserting art. 5a into the Directive on Administrative Cooperation (2011/16), as amended.
29. *État Luxembourgeois v. B* (C-245/19 and 246/19), paras. 57-58.
30. To that end, the Court held in *Berlioz* that the addressee is informed about the minimum content of an information request as described in art. 20(2) DAC, namely the identity of the person under examination or investigation and the tax purpose for which the information is sought (*Berlioz* (C-682/15), paras. 92, 99, 100).
31. *État Luxembourgeois* (C-437/19), para. 97.

4.4. Relevance of OECD material for the interpretation of EU directives

While the Court referred to the Commentary on the OECD Model (2017)[32] in interpreting the terms of the DAC, despite also holding that the key terms used in the Directive are to be given an autonomous meaning under EU law,[33] it did not dwell on the question – discussed at length in the preliminary reference by the *Cour administrative* – of which version of the Commentary ought to be taken into account when making any such reference.

The Court did not rely on the OECD Commentary to reach its conclusion. It reiterated, however, that the concept of foreseeable relevance in the DAC "reflects that used in Article 26(1) of the [OECD Model Tax Convention]".[34] In so doing, it also noted that its interpretation "corresponds" to that of the concept of foreseeable relevance in the OECD Model as approved by the OECD Council on 17 July 2012, citing paragraphs 5.1 and 5.2 of the OECD Commentary on Article 26.[35]

Consequently, the nature and legal relevance of the Court's references to the OECD material remain somewhat open. It should certainly not be read to imply that the interpretation of the DAC in any way depends on the possible evolution of exchange of information as regulated under bilateral treaties. It is more reasonable to understand the reference as an acknowledgement of the historical context of the DAC's development, which coincided with the review of the international standards for information exchange at the level of the OECD so that a matching interpretation was reasonable.[36] In that sense, the explanations in the OECD Commentary, which build on an unchanged wording of article 26 of the OECD Model, was seen as a mere confirmation of the result reached independently on the basis of the wording, context and purpose of the DAC.

In this respect, the Court arguably took a similar view to Advocate General in her Opinion, who notes that the OECD Commentary could not be legally binding for the Court, but simply had reached the "correct conclusion".[37] A different reading could clearly not be sustained given the status of the OECD Commentary among EU Member States, including both those who are OECD Members and those who are not.

5. The Statement

The CFE Tax Advisers Europe welcomes the decision of the Court, as it provides further clarification on the legal protection of the information holders afforded by article 47 of the Charter of Fundamental Rights of the European Union in cases of cross-border exchange of information. Article 47 of the Charter guarantees that national courts can review the cross-border information request in order to assess its legality and also that the information holder must be able to ascertain the reasons upon which the order they receive is based.

Moreover, the CFE Tax Advisers Europe welcomes the illumination regarding the concept of "foreseeable relevance", but also notes that additional clarification will be needed to distinguish permissible group requests from illegal "fishing expeditions".

32. *OECD Model Tax Convention on Income and on Capital: Commentary* (21 Nov. 2017), Treaties & Models IBFD.
33. *État luxembourgeois* (C-437/19), para. 50.
34. Id., para. 70.
35. Id., paras. 69-71.
36. See the reference to the OECD Convention on Mutual Administrative Assistance in Tax Matters (*Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988) (amended by the 2010 Protocol) and art. 26 OECD Model in the explanatory memorandum to the proposal for a Council Directive COM(2009)29 final of 2 Feb. 2009.
37. AG Opinion in *État luxembourgeois* (C-437/19), para. 67.