



# Taxpayer-friendly CJEU decision for exchange of information upon request (C-682/15)

On 16 May 2017, the Court of Justice of the European Union ('CJEU' or 'Court') issued its decision in the case *Berlioz Investment Fund SA v Directeur de l'Administration des Contributions directes* [\(C-682/15\)](#).

The Court found that Berlioz Investment Fund SA ('Berlioz'), a Luxembourg company, can rely on the Charter of Fundamental Rights of the European Union ('Charter') to challenge not only the Luxembourg tax authority's penalty for not providing information ordered pursuant to a request to the Luxembourg tax authorities from the French tax authorities under Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation ('[EU DAC](#)'), but also the legality of the demand itself. The CJEU found that the condition in the EU DAC regarding the 'foreseeable relevance' of the information was also a necessary condition of the legality of the information order addressed by the Luxembourg tax authorities to Berlioz.

## Background

Berlioz received dividends paid to it by its French subsidiary, Cofima SAS, on the basis that they were exempt from French withholding tax. In order to ascertain whether the conditions of the withholding tax exemption had been complied with, the French tax authorities requested information from the Luxembourg tax authorities which, in turn, issued an information order to Berlioz.

Berlioz provided all of the information requested except the names and addresses of its members, the amount of capital held by each member and the percentage share capital held by each member. Berlioz refused to provide this information on the grounds that it was not *foreseeably relevant* for the French withholding tax exemption. As a result of this non-compliance, a penalty of EUR 250,000 was imposed on Berlioz by the Luxembourg tax authorities.

Berlioz obtained a reduction in the fine to EUR 150,000 in local court proceedings. However, the Administrative Tribunal refused to determine whether the information order was well founded. Berlioz appealed to the Administrative Court which referred questions to the CJEU as to whether it should examine the validity of the information order (from the Luxembourg tax authorities) and the underlying request for exchange of information (from the French tax authorities).

## The CJEU's decision

In line with the Advocate General opinion of 10 January 2017, the Court held that Berlioz could invoke the Charter. A condition for invoking the Charter is that the rule in question applies EU law. Even though the penalty was based on Luxembourg law, the rule in question applied EU law since it was imposed in the context of the implementation of the EU DAC.

The Court went on to conclude that Berlioz was entitled to challenge the legality of the information order. The Court further ruled that the '*foreseeable relevance*' of the requested information mentioned in the EU DAC is a condition not only for the request for exchange of information by one Member State from another, but also for the legality of the information order under which the latter State demands the information from a relevant person. The Court noted that recital 9 of the EU DAC does not allow Member States to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. What is more, there must be a 'reasonable possibility' that the requested information will be relevant for the requesting authority. Luxembourg is therefore not obliged to exchange information that has no relevance to the tax investigation concerned.

The CJEU added that the requested Luxembourg authority has an obligation to check whether the information requested has any foreseeable relevance for the purposes of the foreign tax investigation. The CJEU went on to say that the Luxembourg court had a similar obligation to verify that the information order from the Luxembourg authorities is based on a sufficiently reasoned request for exchange of information and concerns information that is not manifestly devoid of any foreseeable relevance.

The Court also made it clear that the Luxembourg court should have access to the request for exchange of information in order to conduct its judicial review. While the holders of the information should have a reasonable opportunity to present their case, it is not necessary for them to have access to the whole request, but, in principle, just to the identity of the taxpayer and the tax purpose for which the information was sought.

### KPMG Luxembourg comment

This case might become a reference for both the taxpayers and the tax authorities in respect of the substantial OECD and EU achievements in the field of improving tax transparency.

KPMG Luxembourg welcomes this decision which protects taxpayers' rights. As a reminder, Luxembourg introduced the [legislation at stake](#) in 2014 further to the [peer review](#) by the Global Forum on Tax Transparency and Exchange of Information for Tax Purposes. Luxembourg may now have to amend its legislation by reintroducing certain taxpayers' rights – taking into account the Court's decision and the impact of such an amendment on its rating by the Global Forum.

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