

EXCHANGE OF INFORMATION IN TAX MATTERS AND FUNDAMENTAL RIGHTS OF TAXPAYERS – E.C.J. DELIVERS LANDMARK RULING IN THE AFTERMATH OF *BERLIOZ*

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BACKGROUND FOR NON-EUROPEAN READERS

The Court of Justice of the European Union (“C.J.E.U.”) is the European Union’s judicial arm. When people talk about the C.J.E.U., they are usually referring to the European Court of Justice (“E.C.J.”). However, the C.J.E.U. includes the General Court and the European Civil Service Tribunal in addition to the E.C.J. They all serve different purposes.

Two additional sources of confusion may exist, as well. First, the E.C.J. is often confused with the European Court of Human Rights (“E.C.H.R.”). The E.C.J. rules on E.U. law, while the E.C.H.R. rules on the European Convention on Human Rights, which covers the 47 Member States of the Council of Europe. Second, an Advocate General (“A.G.”) assists the E.C.J.. The job of the A.G. is to provide an independent opinion on each case. These opinions offer impartial advice to the judges to help them reach their decision and are not binding – even where the E.C.J. reaches the same conclusion as the A.G., it may do so for different reasons. The tricky thing is that, too often, the A.G.’s opinion is either presented as a judgment of the E.C.J. or as something the E.C.J. will almost certainly follow. Neither assertion is true.

INTRODUCTION

On October 6, 2020, the European Court of Justice (“E.C.J.”)¹ delivered a landmark ruling in Joined Cases C-245/19 and C-246/19² about the fundamental right to an effective remedy in the context of cross-border exchange of information between Member States of the European Union (“E.U.”) in application of Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation (“D.A.C.”).³ In contrast with the Opinion of its A.G.,⁴ the E.C.J. ruled that, when *indirect* remedies are available, Member States can deny the taxpayer under investigation and other third parties concerned the right to a *direct* judicial remedy.

¹ Reported at <https://curia.europa.eu>.

² E.C.J., 6 October 2020, Joined Cases C-245-19 and C-246/19, *Luxembourg v B and Others*, ECLI:EU:C:2020:795 (“Ruling”).

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, 11 March 2011, pp. 1-12 (“D.A.C.”).

⁴ Opinion of A.G. Kokott, 2 July 2020, Joined Cases C-245/19 and C-246/19, *Luxembourg v B and Others*, ECLI:EU:C:2020:516 (“Opinion A.G.”).

In the aftermath of *Sabou* in 2013 (C-276/12)⁵ and *Berlioz* in 2017 (C-682/15),⁶ the decision sets new standards for fundamental rights in the era of information exchange.⁷

⁵ E.C.J., 22 Oct. 2013, Case C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, ECLI:EU:C:2013:678 (“*Sabou*”); For a detailed analysis of this case, see: J. Calderon and A. Quintas, “The Taxpayer’s Right of Defence in Cross-Border Exchange-of-Information Procedures,” *Bulletin for International Taxation*, 2014, Vol. 68, Issue 9, pp. 498-507; G. Zeyen, “*Affaire Sabou: en route vers un droit à l’information garanti à l’échelle européenne du contribuable*,” *Revue générale du contentieux fiscal*, 2014, Issue 3-4, pp. 234-241; C.-G. Fernlund, “*Quelques réflexions sur la jurisprudence de la Cour de justice de l’UE en matière d’échanges d’informations dans le domaine des impôts directs*,” in *Liber Amicorum Vassilios Skouris*, Brussels, Bruylant, 2015, pp. 215-225.

⁶ E.C.J., 16 May 2017, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l’administration des Contributions directes*, ECLI:EU:C:2017:373 (“*Berlioz*”); For a detailed analysis of this case, see: E.C.J. Taskforce, “CFE 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),” *European Taxation*, 2018, Vol. 58, Issue 2-3, pp. 93-96; J. Frey, A. Jupp and F.-M. Schwarz, “The CJEU’s *Berlioz* Judgment: A New Milestone on Procedural Rights in EU Audits,” *Tax Notes International*, 2017, pp. 679-689; L. Neve, “The *Berlioz*-decision of the CJEU provides legal protection for concerned persons in transnational setting, but will it hold in the international area?” *Review of European administrative law*, 2017, Vol. 10, Issue 2, pp. 95-119; P. Malherbe, “*Arrêt Berlioz: Contester la pertinence vraisemblable des renseignements fiscaux à échanger*,” *Journal de droit européen*, 2017, Issue 9, pp. 361-363; C. Docclo, “*La pertinence, vraisemblable ou non, des informations échangées entre administrations fiscales et la perspective des déclarations de dispositifs transfrontaliers prévues par DAC 6*,” *Journal de droit fiscal*, 2018, Issue 7-8, pp. 242-253; A. Maitrot de la Motte, “*Cour de justice, gde ch., 16 mai 2017, Berlioz Investment Fund SA c/ Directeur de l’administration des contributions directes, aff. C 682/15, ECLI:EU:C:2017:373, Jurisprudence de la CJUE 2017*,” in F. Picod (dir.), *Jurisprudence de la CJUE 2017 – Décisions et commentaires*, Brussels, Bruylant, 2018, pp. 450-466; D. Berlin, “*Souveraineté et protection des droits fondamentaux*,” *Revue des affaires européennes*, 2017, Issue 2, pp. 307-320; S. De Raedt, “*De reikwijdte van de rechtsbescherming bij internationale uitwisseling van fiscale inlichtingen verder toegelicht*,” *Tijdschrift voor Fiscaal Recht*, 2017, Vol. 18, Issue 530, pp. 853-857.

⁷ On this topic, see B. Gangemi, “General Report,” in I.F.A., *Cahiers de Droit Fiscal International. Vol 75b – International Mutual Assistance through Exchange of Information*, Deventer, Kluwer Law and Taxation Publishers, 1990; X. Oberson, “General Report,” in I.F.A., *Cahiers de Droit Fiscal International. Vol. 98b – Exchange of information and cross-border cooperation between tax authorities*, The Hague, I.B.F.D., 2013 ; J.M. Calderón, “Taxpayer Protection within the Exchange of Information Procedure Between State Tax Administrations,” *Intertax*, 2000, Vol. 28, Issue 2, pp. 462-475; T. Schenk-Geers, *International Exchange of Information and the Protection of Taxpayers*, Zuidpoelsingel, Kluwer Law International, Coll. Eucotax, 2009, 344 pp.; N. Diepvens and F. Debelva, *op. cit.*, pp. 210-219; F. Debelva, “*Internationale fiscale gegevensuitwisseling op basis van artikel 26 DBV’s en de vraag naar rechtsbescherming*,” *Algemeen Fiscaal Tijdschrift*, 2015, Issue 1, pp. 5-32; N. Diepvens and F. Debelva, “The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer’s Rights under Pressure,” *EC Tax Review*, 2015/4, pp. 210-219; P. Baker and P. Pistone, “The Practical Protection of Taxpayers’ Fundamental Rights: General Report,” in I.F.A., *Cahiers de droit fiscal international. Vol. 100B – The Practical Protection of Taxpayers’ Fundamental Rights*, The Hague, I.B.F.D., 2015, pp. 17-68; P. Baker and P. Pistone, “BEPS Action 16: The Taxpayers’ Right to an Effective Legal Remedy Under European Law in Cross-Border Situations,” *EC Tax Review*, 2016, Vol. 25, Issue 5-6, pp. 335-345; S. André Rocha, “Exchange of Tax-Related Information and the Protection of Taxpayer Rights: General Comments and the Brazilian Perspective,” *Bulletin for International Taxation*, 2016, Vol. 70, Issue 9, pp. 502-516; M. G. De Flora, “Protection of the Taxpayer in the Information Exchange Procedure,” *Intertax*, 2017, Vol. 45, Issue 6-7, pp. 447-460.



BACKGROUND AND ISSUES: FUNDAMENTAL RIGHTS IN THE ERA OF EXCHANGE OF INFORMATION

Since the Great Recession,⁸ the international exchange of information in direct tax matters has evolved considerably.⁹ This reflects the growing awareness among tax authorities, progressive journalists, and non-governmental organizations (“N.G.O.’s”) that wealthy individuals and large multinational corporations engage expert advisers to fashion effective tax plans resulting in the payment of little or no taxes. Think of the investigations carried out by the International Consortium of Investigative Journalists that revealed the *Lux Leaks*, *Swiss Leaks*, and *Panama Papers*. Given the pressure of mass media and the indignation of public opinion, the Organization for Economic Co-operation and Development (“O.E.C.D.”), the E.U., and the U.S. committed for international tax coordination to effectively counter Base Erosion and Profit Shifting (“B.E.P.S.”) in a framework of global tax transparency.

The underlying rationale is simple: national tax authorities collect income taxes based on information received from taxpayers themselves. Where appropriate, they conduct inquiries into the taxpayers’ activities or request information from third parties, such as banks. While this system works reasonably well for taxpayers involved in purely domestic activities and transactions, difficulties arise for resident taxpayers earning some or most of their income in other countries. When national tax authorities investigate foreign-source income, their investigative authority stops at the national border, which serves as the outer limit of sovereignty. This fact pattern is viewed as an invitation for tax evasion or avoidance on one hand, but also can lead to international double taxation when authorities in two states each claim the primary right to impose tax. Cross-border cooperation between domestic tax authorities is viewed as a means of ensuring effective taxation for global investors and a means of relieving double taxation.¹⁰

In this “Brave New World” of tax transparency, two international standards ensure cross-border cooperation: the automatic exchange of information (“A.E.O.I.”) and

⁸ The “Great Recession” is the global economic downturn from 2007 to 2009 that devastated world financial markets as well as the banking and real estate industries. The crisis led to increases in home mortgage foreclosures worldwide and caused millions of people to lose their life savings, their jobs, and their homes. Even though its effects were global, the Great Recession mostly struck the U.S., where it originated in the subprime mortgage crisis, and Western Europe.

⁹ Similarly, see S. Gadzo and I. Klemencic, “Effective International Information Exchange as a Key Element of Modern Tax Systems: Promises and Pitfalls of the OECD’s Common Reporting Standard,” *Public Sector Economics*, Vol. 1, Issue 2, 2017, pp. 208-226. For an overview of the main EOI instruments, see N. Diepvens and F. Debelva, “The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer’s Rights under Pressure,” *EC Tax Review*, 2015, Vol. 24, Issue 4, pp. 210-219, spec. 210-214; R. Biebel and J. Voje, “EU Report” in I.F.A., *Cahiers de droit fiscal international. Vol. 105B – Exchange of information: issues, use and collaboration*, The Hague, I.B.F.D., 2020, pp. 65-93.

¹⁰ This is all the more true in the current global economic environment, characterized by high mobility of capital and labor across national borders. On this topic, see M. Stewart, “Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration,” *World Tax Journal*, 2012, Vol. 4, Issue 2, pp. 152-179.

“Currently, E.U. Member States are sharing unprecedented levels of tax information. Between 2013 and 2017, Member States sent between 8.200 and 9.400 requests for information per year, based on D.A.C.”

the exchange of information on request (“E.O.I.R”). In the annotated cases, the E.C.J. reviews the E.O.I.R. standard, which enables one State to request from another State any foreseeably relevant information for the administration or enforcement of its domestic tax laws, such as ownership, accounting or banking information. Numerous legal instruments provide for an E.O.I.R., for instance: the 2002 O.E.C.D. Model Agreement on Exchange of Information on Tax Matters and its commentary; Article 26 of the O.E.C.D. Model Tax Convention and its commentary; and Article 26 of the United Nations Model Double Taxation Convention and its commentary.¹¹

Within the E.U., the provisions of D.A.C. also enter into play. Currently, E.U. Member States are sharing unprecedented levels of tax information.¹² Between 2013 and 2017, Member States sent between 8.200 and 9.400 requests for information per year, based on D.A.C.¹³ This represents a substantial increase compared to the period between 2008 and 2012, when the figures ranged between 4.000 and 5.800 per year under the predecessor of D.A.C., namely the E.U. Mutual Assistance Directive.¹⁴ The rising figures inevitably raise the question of a balance between administrative efficiency for tax authorities and respect for taxpayers’ fundamental rights.¹⁵ In the words of Schaper:

There is a clear contrast between the speed at which the powers of tax administrations have been increased through Union legislation in the last years and the apparent lack of urgency on the side of the Union legislator to balance this with taxpayers’ rights grounded in EU law. The Union legislator appears reluctant to regulate data protection rights through Union legislation and seems to prefer to leave the matter to the Member States.¹⁶

This delicate equation lies at the heart of the recent decision in the E.C.J. cases.

¹¹ For further details, see T. Falcão and A. Lara Yaffar, “General Report Subject 2,” in IFA, *Cahiers de Droit Fiscal International. Vol 105b – Exchange of Information: Issues, Use and Collaboration*, The Hague, I.B.F.D., 2020, pp. 17-62.

¹² See N. Diepvens, *De grensoverschrijdende administratiefrechtelijke gegevensuitwisseling op verzoek in de inkomstenbelastingen vanuit Belgisch standpunt*, Gent, Larcier, 2018, pp. 395-396.

¹³ See R. Biebel and J. Voje, “EU Report” in IFA, *Cahiers de droit fiscal international. Vol. 105B – Exchange of information: issues, use and collaboration*, The Hague, I.B.F.D., 2020, p. 70.

¹⁴ Council Directive 77/799/EEC of 19 December 1977 concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation, OJ L 336, 27 December 1977, pp. 15-20.

¹⁵ For further details on (i) the origin of the administrative cooperation between tax authorities of different States for the correct establishment of income taxes, (ii) the tension between the procedure of cross-border administrative exchange of information on request, and (iii) judicial protection of the taxpayer and the procedural safeguards necessary for the taxpayer, see the doctoral thesis of N. Diepvens (*op. cit.*).

¹⁶ M. Schaper, “Data Protection Rights and Tax Information Exchange in the European Union: An Uneasy Combination,” *Maastricht Journal of European and Comparative Law*, Vol. 23, Issue 3, pp. 514-530, spec. p. 530.

JOINED CASES C-245/19 AND C-246/19

Facts

In the context of an investigation of the tax position of a Spanish tax resident (“Taxpayer”), Spanish tax authorities (“Requesting Tax Authorities”) sent two requests for information to their Luxembourg counterparts (“Requested Tax Authorities”) based on D.A.C. and the Luxembourg-Spain Income Tax Treaty.¹⁷ Since the Requested Tax Authorities did not possess the requested information, they addressed information orders to a Luxembourg based company and a Luxembourg based bank (“Addressees”). As each Addressee faced a possible fine of up to €250,000 for non-compliance, significant incentives existed for compliance. The company was asked to provide copies of contracts involving the Taxpayer¹⁸ and the bank was ordered to share information concerning accounts, account balances, and other financial assets held or beneficially owned by the Taxpayer.¹⁹

The Addressees, the Taxpayer and other third parties concerned disputed the orders before the *Tribunal Administratif* (Luxembourg Administrative Court),²⁰ which partly annulled them.²¹ The Luxembourg tax authorities then lodged an appeal before the *Cour Administrative* (Luxembourg Higher Administrative Court, “Referring Court”).²² The latter stayed the proceedings and referred two preliminary questions to the E.C.J.

The “preliminary reference” mechanism under Article 267 of the Treaty on the Functioning of the European Union (“T.F.E.U.”) constitutes one of the cornerstones of the E.U. judicial system as it ensures the uniform interpretation and application of E.U. law in the Member States. It is designed as a noncontentious mechanism through which a national judge asks guidance from the C.J.E.U. regarding the interpretation of E.U. law or the validity of E.U. acts. The C.J.E.U.’s preliminary ruling strongly influences the outcome of the national procedure, as it is binding for the national courts. The preliminary reference procedure, however, is not a remedy available to the parties since individuals cannot make use of it and it is within national judges’ power to decide whether to refer a question.²³

Regarding the first question, the Referring Court asked whether the Luxembourg legislation that precluded a direct judicial remedy against information orders violated a fundamental right of the Addressees, the Taxpayer and other parties concerned under Article 47 (right to an effective remedy and to a fair trial) of the Charter of Fundamental Rights of the E.U. (“Charter”), as well as Articles 7 (right to privacy), 8 (right to protection of personal data), and 52(1) (restriction of fundamental rights in specific circumstances).²⁴ Regarding the second question, the Referring Court

¹⁷ Ruling, § 24; Opinion A.G., § 29.

¹⁸ Ruling, § 26; Opinion A.G., §§ 30-33.

¹⁹ Ruling, § 36; Opinion A.G., §§ 34-36.

²⁰ Ruling, §§ 28 and 38; Opinion A.G., § 37.

²¹ Ruling, §§ 29 and 39; Opinion A.G., § 38-40.

²² Ruling, §§ 30-31 and §§ 40-41.

²³ See C. Lacchi, *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection*, Brussels, Larcier, 2020, 348 pp.

²⁴ Ruling, § 44; Opinion A.G., § 46.

asked how one should interpret the term “foreseeably relevant information” within the meaning of Article 5 of D.A.C., read in conjunction with Article 1(1) thereof.²⁵

Analysis and Ruling of the E.C.J.

The Direct or Indirect Right to an Effective Remedy

In *Berlioz*, the E.C.J. ruled that, under Article 47 of the Charter, an Addressee of an Information Order that was fined for noncompliance has the right to challenge the order’s legality when disputing the fine (“indirect judicial remedy”).²⁶ However, the ruling did not address the right to an effective remedy where no fine was imposed for a compliance failure (“direct judicial remedy”). In addition, the decision in *Berlioz* focused exclusively on the Addressees of Information Orders without addressing the fundamental rights of the Taxpayer under investigation and third parties concerned. In the cases at hand, the Referring Court asked the E.C.J. to address the two open questions.

In her Opinion, A.G. Kokott positioned herself in favor of taxpayers’ rights and explained that the Addressees, the Taxpayer, and the third parties concerned should each have a right to a direct judicial remedy against information orders.²⁷ The E.C.J., however, took a different approach. It separately evaluated the procedural safeguards available for each of the Addressees, the Taxpayer, and the third parties.

- **Rights of the Addressees of Information Orders.**²⁸ The E.C.J. explained that Article 47 of the Charter guarantees the right of the Addressee to an effective remedy, without having to infringe any legal rule and await to receive a penalty for such an infringement.²⁹ The E.C.J. found that the Luxembourg law applicable to Addressees provides a remedy only when the Addressee does not comply with the order and receives a fine. Only then can the Addressee challenge the order indirectly by challenging the penalty.³⁰ Consequently, the Luxembourg law is incompatible with Article 47 and Article 52(1) of the Charter, read together.³¹

“In her Opinion, A.G. Kokott . . . evaluated the procedural safeguards available for each of the Addressees, the Taxpayer, and the third parties.”

²⁵ Ruling, § 107; Opinion A.G., § 109.

²⁶ See *Berlioz*, §§ 49, 51, 55, 56, and 59.

²⁷ Opinion A.G., §§ 58, 82, and 108.

²⁸ For the E.C.J.’s position about the Addressees, see Ruling, §§ 56-69.

²⁹ Ruling, § 66 (and case-law cited therein); See, similarly, Opinion A.G., § 57 (and case-law cited therein):

In a country based on the rule of law and in a union based on the rule of law, it is unreasonable to require a person concerned to violate an administrative order in order to be able to review the legality of the order indirectly. This applies all the more so if [...] the decision as to whether to initiate proceedings for an administrative penalty is within the discretion of the tax authority. This is because, in such cases, the tax authority would be able to prevent a review of the legality of the request for information by refraining from initiating proceedings for an administrative penalty.

³⁰ Ruling, § 67.

³¹ Ruling, § 69.

- **Rights of the Taxpayer under investigation.**³² The E.C.J. explained that Article 47 of the Charter applies to the Taxpayer since the disclosure of the Taxpayer’s personal data³³ to a public authority affects the fundamental rights to privacy and the protection of personal data guaranteed by Articles 7 and 8 of the Charter.³⁴ Nevertheless, the E.C.J. departed from the view of the A.G. and ruled that the right to an effective remedy does not necessarily mean that the Taxpayer must have a direct action against information orders. The Taxpayer could challenge the tax assessment note established at the end of the Spanish investigation and, in that context, indirectly dispute the information order. Therefore, the Luxembourg law – which prevented the Taxpayer from lodging a direct action against information orders – does not frustrate the right to an effective remedy under Article 47 of the Charter. The restriction imposed by the Luxembourg law meets an objective of general interest, *viz.*, combating international tax evasion or avoidance and strengthening cooperation between the Member States, and is proportional to that interest.
- **For third parties concerned.**³⁵ Article 47 of the Charter guarantees the right to an effective remedy to third parties.³⁶ However, in contrast with the Addressees, third parties are not under the threat of a fine in case of noncompliance.³⁷ Therefore, like the Taxpayer under investigation, national law can exclude their right to a direct judicial remedy against information orders when they can obtain the effective respect of their fundamental rights through other actions, such as an action to ascertain liability.³⁸

The Foreseeably Relevant Information Test

Pursuant to Article 1 of D.A.C., Member States are obligated to cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic tax laws of the Member States. In particular, Recital 9 of the Preamble to D.A.C. states:

Member States should exchange information concerning particular cases where requested by another Member State and should make the necessary enquiries to obtain such information. The standard of ‘foreseeable relevance’ is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in ‘fishing expeditions’ or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

³² For the E.C.J.’s position about the Taxpayer, see Ruling, §§ 70-93.

³³ See Opinion A.G., §63 and case-law cited therein:

Personal data is all information relating to an identified or identifiable person. Information regarding the amount of income received is personal data. The same applies to information about bank details.

³⁴ Ruling, §§ 72-75 and case law cited therein; Opinion A.G., §§ 61-67.

³⁵ For the E.C.J.’s position about third parties, see Ruling, §§ 94-105.

³⁶ Ruling, §§ 94-97.

³⁷ Ruling, § 99.

³⁸ Ruling, §§ 99-102.



This serves to ensure that Requesting Tax Authorities do not carry out investigations on a speculative basis, without having any concrete suspicions.³⁹

In *Berlioz*, the E.C.J. interpreted the foreseeably relevant standard as enabling the Requested Tax Authorities to obtain any information that seems to it to be justified for the purpose of its investigation, while not authorizing it manifestly to exceed the parameters of that investigation nor to place an excessive burden on the Requested Tax Authorities.⁴⁰ In other words, Requesting Tax Authorities choose the information they need for their investigations, but Requested Tax Authorities can refuse to provide information when the request is manifestly devoid of any foreseeable relevance, having regard to the taxpayer, the information holder and the tax purpose pursued by the request.⁴¹

In the subject cases, A.G. Kokott went a step further, and held that in order for the Requested Tax Authorities to ascertain that the requested information is foreseeably relevant, the Requesting Tax Authorities must indicate the facts they wish to investigate or, at least, concrete suspicions surrounding those facts and their relevance for tax purposes.⁴² Put otherwise, the request must provide concrete evidence of the facts or transactions that are relevant for tax purposes, to rule out any fishing expedition.⁴³

Building on the analysis held in *Berlioz*, the E.C.J. ruled that the requested information is not manifestly devoid of foreseeably relevance when:⁴⁴

- The request states (i) the identity of the Addressees of the Information Order, (ii) the identity of the Taxpayer subject to the investigation giving rise to the request for exchange of information, and (iii) the period covered by that investigation.
- The request relates to contracts, invoices, and payments that are defined by personal, temporal, and material criteria establishing their links with (i) the investigation, and (ii) the Taxpayer subject to that investigation, even though not expressly identified in the request.

³⁹ Opinion A.G., § 134.

⁴⁰ *Berlioz*, § 68.

⁴¹ *Berlioz*, § 82; The scope of the Requested Tax Authorities' review is however limited (§ 76). They must indeed trust the Requesting Tax Authorities and assume that the request for information complies with both the domestic law of the Requesting Tax Authorities and is necessary for the purposes of its investigation. Furthermore, the Requested Tax Authority does not have extensive knowledge of the factual and legal framework prevailing in the Requesting State. Hence, the Requested Tax Authorities cannot substitute their own assessment of the possible usefulness of the information sought for that of the Requesting Tax Authorities (§ 77).

⁴² Opinion A.G., § 138.

⁴³ Opinion A.G., § 146.

⁴⁴ Ruling, § 124.

CONCLUSION

After making an important step forward in the protection of taxpayer rights within the framework of cross-border tax disputes⁴⁵ with *Berlioz*, the E.C.J. seems to have taken a step or two backward⁴⁶ with its annotated preliminary ruling. Clearly, the E.C.J.'s statement is welcome because it recognizes that Addressees of information orders have the right to seek direct judicial review against information orders. However, the absence of an equivalent right for the Taxpayer under investigation seems unreasonable. Indeed, a Taxpayer subject to an investigation will have to wait until the Requesting Tax Authorities issue a tax assessment note to take action, and then seek a review of the legitimacy of the information order. The E.C.J.'s position proves, yet again, that Taxpayers are perceived as “the object” of the exchange of information, and not as holders of rights requiring adequate and timely protection.⁴⁷

The E.C.J. should have followed the A.G. Opinion which pointed out that the requested information contained personal data. Consequently, the request could affect the fundamental rights to privacy and protection of personal data, both of which are fundamental rights that belong to the Taxpayer. Applying these rights indirectly, only when the Requesting Tax Authorities issue a tax assessment note, provides inadequate protection. How does a taxpayer protect against fishing expeditions when the Taxpayer has no procedural avenue available? One might wonder whether, in the eyes of the judges, the political considerations surrounding the importance of exchange of information in tax matters took over the technical legal analysis.⁴⁸

Regarding the foreseeably relevant information test, the E.C.J. correctly followed *Berlioz* and ruled that the Requested Tax Authorities may deny the provision of information where a request is devoid of any foreseeable relevance. This time, however, the E.C.J. enumerated a combination of criteria establishing the personal, temporal and material criteria establishing their links with the investigation and the taxpayer subject to that investigation. We believe that the threshold remains insufficient to effectively secure the protection of the Taxpayer's rights and offer protection against fishing expeditions⁴⁹ or shots in the dark.⁵⁰

To conclude, the words of Baker and Pistone are appropriate when evaluating the position of the E.C.J.:

The BEPS and tax transparency projects strengthened the powers of tax authorities across the borders, but kept silent on the protection of taxpayers' rights, which has become almost a taboo word for international tax coordination under the erroneous assumption that honest taxpayers have nothing to worry about this development and may anyway seek for legal protection at the national level in each country. However, silence won't lead the protection of fundamental

⁴⁵ E.C.J. Taskforce, *op. cit.*, p. 95.

⁴⁶ M. Van Herksen and Gary Barnett, “Judicial review of exchange of information requests,” *Tax Journal*, 23 October 2020, pp. 11-12.

⁴⁷ M. G. De Flora, *op. cit.*, p. 460.

⁴⁸ M. Van Herksen and Gary Barnett, *op. cit.*, p. 12.

⁴⁹ Opinion AG, § 146.

⁵⁰ Opinion AG, § 132.

“After making an important step forward in the protection of taxpayer rights within the framework of cross-border tax disputes with *Berlioz*, the E.C.J. seems to have taken a step or two backward with its annotated preliminary ruling.”

rights of taxpayers to oblivion. Global tax law cannot ignore them for long, since it would otherwise severely undermine the natural correspondence with legal remedies that is the quintessence of the rule of law.”⁵¹

They propose a two-tier system for the conciliation and settlement of cross-border tax disputes with the involvement of taxpayers at all stages. The procedure should be supplemented by notification requirements in respect of all forms of international mutual assistance between tax authorities, subject to specific carve-outs where this would undermine effective tax auditing prerogatives.⁵²

Solutions, therefore, are available, but require political consensus and courage on a sensitive topic. For the time being, and in contrast with the Latin maxim, *Ubi jus, ibi remedium*, the recent decision of the E.C.J. show that where there is a right, not always is there a remedy.



⁵¹ P. Baker and P. Pistone, *op. cit.*, p. 345 ; In the same light, see P. Pistone, “Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law,” *World Tax Journal*, 2014, Vol. 6, Issue 4, pp. 4-5:

Stronger powers for tax authorities to cooperate in cross-border scenarios worldwide should march hand-in-hand with a stronger protection of taxpayers’ basic rights. The plea for an effective and timely protection of human rights across borders in this field is even more obvious insofar as one considers that taxpayers are, after all, human beings! Besides, the need to sharpen the fight against fraudsters should not turn into a disproportionate bonfire of all basic values that constitute the bulk of customary international law and the legal background of civilized nations across the world in the protection of persons.

⁵² *Ibid.*

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