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EU Direct Tax Newsalert

CJEU rules on cross-border exchange of information upon request

Further to the Berlioz Investment Fund case (C-682/15), the European Court of Justice of the European Union (CJEU) continues to review the legal framework of the exchange of information between EU Member States for tax purposes. Ruling on questions referred by the Luxembourg Administrative Court (C-245/19 and C-256/19), the Judgment rendered by the CJEU on 6 October 2020:

- confirms that the addressee of an information order issued in the context of an exchange between tax authorities of Member States pursuant to Directive 2011/16 is entitled to judicial review of the legality of that decision;
- concludes however that a similar legal remedy is not available to the taxpayer concerned by such an information order and to third parties.

The CJEU also included some comments on the question of foreseeable relevance of the requested information.

Background and facts

The Spanish tax authorities sent requests for information to the Luxembourg tax authorities pursuant to Directive 2011/16 on Administrative Cooperation (the "Directive") regarding Spanish resident individuals subject to an investigation in Spain. Following these requests, the Luxembourg tax administration adopted decisions requesting a Luxembourg company and a Luxembourg bank to provide certain information that was considered related to the Spanish individuals and the investigation.

In their decisions, the Luxembourg courts, in first instance, partially cancelled the tax authorities' requests on the grounds of the Charter of Fundamental Rights of the European Union (the "Charter") as:

- those decisions did not offer the possibility of any appeal to their recipients and
- as certain information requested was not considered as sufficiently foreseeably relevant for the tax issue being reviewed by the Spanish tax authorities.

Upon the appeal of the Luxembourg tax authorities, the Administrative Court of Luxembourg referred those two points to the CJEU for a preliminary ruling.

CJEU Judgment

The CJEU ruled that the right to claim an effective remedy together with the rights to a private

life which are guaranteed by the Charter:

- preclude the legislation of a Member State implementing the procedure for the exchange of information established by the Directive, to lead to the issuance of a decision by the competent authority of that Member State which would require that a person holding information would be obliged to provide such information, without offering the possibility for this person to claim a legal remedy such as judicial review of such a decision; but
- do not preclude the legislation of a Member State excluding the possibility to claim a legal remedy in respect of such type of decision by the taxpayer concerned by the investigation or by third parties concerned by the information requested.

In addition, the CJEU considers that requesting information from a third party holding such data does not constitute non-foreseeably relevant information to the extent the request indicates:

- the identity of the person holding the information in question,
- the identity of the taxpayer who is the subject of the investigation that gave rise to the request for exchange of information;
- the period covered by the investigation; and that the requests relate to contracts, invoicing and payments which, although not precisely identified, are delineated by means of criteria relating to the fact that (i) they were respectively concluded or made by the person holding the information, (ii) they took place during the period covered by the investigation and, (iii) their link with the taxpayer concerned.

Takeaway

The Judgement has mainly an historical value in Luxembourg, as the Luxembourg legal framework has been amended further to the Berlioz Investment Fund case and now secures a legal remedy for the addressee of an information order.

It is, however, relevant for past periods and ongoing litigation, as well being informative for the procedures of other Member States.

With respect to the foreseeable relevance criterion, the decision provides some insight on how this criterion is to be assessed.

