



16 January 2017

AG Wathelet issues opinion in C-682/15 *Berlioz*, supports questioning ‘foreseeable relevance’ of tax authorities’ information exchange requests

The case C-682/15 *Berlioz Investment Fund S.A.*, lodged on 19 December 2015, concerns the application of EU law in relation to administrative penalties for holders of information questioning the foreseeable relevance of information to be transferred to third countries.

Advocate General Wathelet in the Opinion issued on 10 January 2017 confirmed that the taxpayer has the right to challenge a request for information issued by Luxembourg pursuant to Directive 2011/16, on request from the French competent authority.

Berlioz Investment SA had to deal with a request for information sent to Luxembourg by the French competent authority in relation to dividends received from *Cofima*, Luxembourg subsidiary of *Berlioz*. *Berlioz* had requested exemption from withholding taxes related to the inbound dividends received from *Cofima*, whilst the French tax authorities wanted to ascertain whether relevant conditions of French law have been fulfilled. The requested information from Luxembourg on behalf of the French authorities concerned in particular whether the company has place of effective management in Luxembourg, list of employees with link to company’s registered office in Luxembourg, contractual relations between *Berlioz* and *Cofima* with any supporting documentation, information on shareholdings, amount of capital held by participants with percentage of capital held by each member etc. *Berlioz* objected to providing the latter information based on it lacking ‘foreseeable relevance’.

As part of the domestic litigation in Luxembourg, *Berlioz* brought an appeal to the Administrative court in Luxembourg alleging breach of Article 6 ECHR. The Administrative court filed a preliminary ruling to CJEU bringing in by its own motion Article 47 of the EU Charter of Fundamental Rights, which as binding EU law guaranteeing the ‘right of effective remedy and to a fair trial’.

Advocate General Wathelet is of the opinion that the requested authority must be in a position to determine whether the requested information is foreseeably relevant, i.e. whether a *nexus* exists between the request for information and the factual situation of a particular taxpayer. There must be a possibility for judicial review of the legality of the information on which the fine was based, in order to comply with Article 47 of the Charter. This needs to be balanced with the legitimate objective of combating tax evasion and tax avoidance pursued by the

Directive, so the deficiency must be manifest. This type of review according to the Advocate General complies with Article 47 of the Charter and the principle of proportionality.

The concept of foreseeable relevance, as a 'yardstick' to judge the legality of information requests, prevents tax authorities from 'fishing expeditions', i.e. making requests that have no apparent nexus to an open inquiry or tax investigation with a particular taxpayer. According to AG Wathelet, this approach is also supported by Article 26 OECD Model Tax Convention, by which this EU legislation was inspired.

It remains to be seen whether the legal reasoning by the Advocate General will eventually be upheld by the Court of Justice.

European Commission presented the Services Package

European Commission presented on 10 January 2017 a proposal aimed at reform of the provision of professional services in the European single market with four legislative and non-legislative proposals. The proposal includes four steps:

- ? New EU Services card: Regulation introducing a European services e-card and related administrative facilities: simplified electronic procedure for providers of business services (IT companies, engineering firm) where they engage with simple contact in the host member state only;
- ? New proportionality test directive for regulated professions: EU law will now require that Member states need to prove that new national regulatory requirements for access to a profession are proportionate, necessary and balanced. Before amending national rules related to regulated professions, Member states must satisfy conditions of Article 6 of the Proportionality Test Directive. The criteria will be non-retroactive and will concern new or amended national rules of professional regulation;
- ? Communication (non-binding instrument) which identifies means for reforming regulated professions across EU member states, European Commission proposes appropriate measures to tackle remaining barriers to cross-border provision of services; Non-binding guidelines for national reforms in regulation of professions;
- ? Improvement in the notification of draft national laws on service: EU law (Services Directive) already requires from member states to notify any changes to domestic rules concerning services to the European Commission. The envisaged changes would make this procedure 'more efficient and transparent'.

The Services Package is part of European Commission's Single Market strategy which aims to make the cross-border provision of services in the EU easier and to enable services providers to navigate through administrative formalities.

In relation to this subject matter, CFE has issued [Opinion Statement PAC 4/2016](#) on the regulation of cross-border professional services.

OECD invites comments on BEPS Actions 6 and treaty-entitlements of funds which are not collective investment vehicles by 3 February 2017

OECD is inviting comments on three drafts before 3 February 2017 related to OECD's work under Action 6 - preventing granting of treaty benefits in inappropriate circumstances and the treaty entitlements of funds which are not collective investment vehicles (CIV).

Comments on [BEPS action 6 discussion draft on non-CIV funds](#) should be sent by 3 February 2017 at the latest by email to taxtreaties@oecd.org in Word format.

Save the date- CFE's Forum 2017, our International Tax Conference will take place on 30 March 2017 in Brussels

This year's CFE Forum brings together prominent speakers revisiting the concept of permanent establishment post-BEPS, with specific focus on fixed establishment for VAT purposes. Watch this space for more details. In the meantime, take a look at the [tentative agenda](#).

Overview of the activities of CFE's Fiscal Committee for 2016

Please follow the link below for overview of the main activities and publications of CFE's Fiscal Committee for 2016. CFE Fiscal Committee overview of activities and publications: [LINK](#)

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