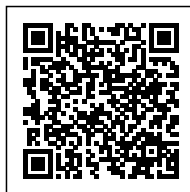


THE IMPACT OF EU LAW ON TAX INSPECTIONS - PWC

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The judgement of the European Court of Justice (ECJ) in case C-682/15 (the "Berlioz" case), handed down within the framework of a preliminary ruling referral by the Luxembourg Administrative Court, was published on 16 May 2017.

The case relates, in short, to a request for tax information presented by the French tax authorities to the Luxembourg tax authorities, within the context of inspection proceedings being carried out related to dividends paid by a French subsidiary to its parent company in Luxembourg. The

Luxembourg company presented all the information requested except for the names and addresses of its shareholders, the capital stock figure and the ownership percentage held, based on the understanding that such data were not relevant for the purposes of the inspection being carried out by the French authorities.

As a result of this "partial" provision of information, the Luxembourg authorities imposed a fine on the Luxembourg company, which Berlioz appealed against before the Luxembourg courts. During this dispute before the national courts, a number of questions requiring preliminary rulings arose, giving rise to the ECJ judgement in question. Specifically, the Luxembourg court's questions to the ECJ concerned the application of various provisions of the Charter of Fundamental Rights of the European Union in relation to Council Directive 2011/16/EU of 15 February on administrative cooperation in matters of taxation, and the impact they have on internal tax proceedings in a Member State.

The first main conclusion to be drawn from the ECJ judgement is that the Charter of Fundamental Rights of the European Union is applicable to the case in question. It should be borne in mind that since the entry into force of the Lisbon Treaty (1 December 2009), the Charter has been legally binding (article 19 of the Treaty), although according to article 51.1 of the Charter, compliance with its provisions by the national authorities of the Member States is obligatory when they are applying European Union Law. In the Berlioz case, the ECJ took the view that this requirement was met since the fine imposed on the taxpayer by the Luxembourg Authorities was imposed within the framework of a request for information based on Directive 2011/16/EU, and although the imposition of penalties is not expressly envisaged in such Directive and it is the Member State whose internal legislation envisages the penalty, it was clear to the ECJ that the purpose of the national provision was to guarantee the application of the Directive.

Based on the above premise, the ECJ analyses the impact that article 47 of the Charter (right to an effective remedy) has on tax proceedings based on information requests issued under the terms of the Directive on cooperation between Member States, the conclusion reached being as follows: the court of the Member State which is examining the appeal against a tax penalty imposed on a taxpayer by the tax authorities of such State for failure to respond to a request for tax information is perfectly entitled to examine the legality of such request to ensure that the right to an effective remedy, established in article 47 of the Charter of Fundamental Rights of the European Union, is respected. According to the provisions of Directive 2011/16/EU, the cooperation obligation between Member States applies only to the communication of information which is "foreseeably relevant". In other words, investigations of a generic nature carried out on the off-chance and which are not of relevance in relation to the specific tax situation of the taxpayer, within the framework of a specific inspection proceeding being carried out in respect of such taxpayer, are not permissible. To use the terminology employed in English-speaking countries, an express ban is placed on what are referred to as "fishing expeditions". If this requirement is not met, the national court can – and should – declare the administrative decision in question null and void in order to comply fully with European Union Law. Linked to the latter, the tax authorities of the State from which the information is requested should not simply check that the request for tax information is in order from the procedural perspective. They should also, to ensure that the aforementioned fundamental right is respected, check that the information requested meets the requirements in terms of foreseeable relevance to a specific tax inspection being carried out in the State by which the information is sought. It is for this same reason, according to the ECJ, that the court of the Member State by which the request is received should be able to review the legality of the request made by the other State and, in particular, the reasoning behind it and its relevance within the specific framework of the tax proceedings being carried out in respect of the taxpayer. Finally, the ECJ concludes that to be able to properly review such legality, the national court should have full access to the information request – including any supplementary information which the authorities of the requesting State may

have provided or asked for - although the same principle is not applicable to the taxpayer itself, who may not have the same full access. The court adds in this respect that, to ensure that the fundamental rights of the party being investigated are fully respected, such party should be given access, at least, to the essential details of the information request (the identity of the taxpayer in question and the tax-related purpose for which the information is being sought), although with the national court having the option, in any event, of providing the taxpayer with more information if, in its opinion, the minimum data referred to is insufficient.

In light of the above, this ECJ judgement is clearly of great significance given the measures currently in place for cooperation in matters of taxation between the European Union Member States in their efforts to combat tax fraud – which have even resulted in such measures being brought forward at national level – since it establishes boundaries which the public authorities must respect when exercising their powers in order to ensure that the fundamental rights of taxpayers are respected. We can clearly expect the Charter of Fundamental Rights of the European Union to feature more prominently in the coming years in tax disputes.

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