

Appeal court questions law on exchange of tax information on request

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Introduction

The Luxembourg Administrative Court of Appeal and the European Court of Justice (on referral for a preliminary ruling) recently considered whether the Luxembourg Law of 25 November 2014 laying down the procedure applicable to the exchange of information on request in tax matters complied with:

- EU Directive 2011/16/EU on the compulsory automatic exchange of information in the field of taxation; and
- the Charter of Fundamental Rights of the European Union.

In particular, the courts examined whether the Luxembourg law complied with the right to an effective remedy set out in the EU directive and the charter.

Legal background

Previously, under the Law of 25 November 2014, neither the Luxembourg tax authorities nor a requested Luxembourg third party (including a bank, a trust company or similar) could examine, with a view to challenging in court, an information request made by the tax authorities of another EU member state. This made it impossible to verify the foreseeable relevance of requested information to a particular tax case, as well as a request's stated fiscal purpose. However, the condition of foreseeable relevance is provided for by EU Directive 2011/16, and foreign tax authorities (in the present case, the French authorities) have based such demands for information on this condition.

Decisions

Further to the European Court of Justice's 16 May 2017 decision, the Luxembourg Administrative Court of Appeal delivered its decision on 26 October 2017, adopting the EU court's conclusions and excluding the application of the challenged provisions of the Law of 25 November 2014. The administrative court penalised the Luxembourg tax authorities for failing to verify the foreseeable relevance of the request and annulled the administrative fine which had been imposed on the requested third party.

To support these conclusions, both courts held as follows:

- The Luxembourg law implemented EU Directive 2011/16; therefore, the Charter of Fundamental Rights of the European Union applies in Luxembourg.
- When applying Article 47 of the charter (rights to an effective remedy and fair trial), a national court hearing an action against a pecuniary administrative penalty imposed for failure to comply with an information order must be able to examine the legality of that information

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order.

- EU member states cannot engage in fishing expeditions or request information that is unlikely to be relevant to the tax affairs of a given taxpayer. On the contrary, there must be a reasonable possibility that the requested information will be foreseeably relevant.
- Verification by a requested authority is not limited to the procedural regularity of a request; however, it must enable the requested authority to satisfy itself that the information sought is not deprived of any foreseeable relevance. When an action is brought by a relevant party against whom a penalty has been imposed by the requested authority for non-compliance with an information order issued by that authority, a national court has jurisdiction to not only vary the penalty imposed, but also review the legality of the information order (which relates to the foreseeable relevance of the requested information).
- In case of judicial review by a national court of an EU member state to which a request for information was addressed, that court must have access to the request.
- A relevant party does not have a right of access to the entirety of a request for information, but the minimum information should be made available thereto in order to allow it to properly present its case before the court.

Comment

Any taxpayer or requested third party may object to an injunction from the tax authorities if it has good reason to believe that the request is irrelevant. Thus, following the decisions of the European Court of Justice and the Luxembourg Administrative Court of Appeal, the Luxembourg government recently decided to amend the Law of 25 November 2014. However, the bill has yet to be adopted.

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