



**tax advisers
europe**

Taxpayer Rights and DAC

Paul Kraan

30 November 2020

Taxpayer Rights and DAC Contents

- **Safeguards for taxpayers in respect of AEoI and EoIR**
 - DAC - exchange of information within the EU
 - **C-682/15** *Berlioz Investment Fund*
 - Joined cases **C-245/19** *Luxembourg State vs. B* and **C-246/19** *Luxembourg State vs. B and Others*
 - Pending case **C-437/19** *Luxembourg State vs. L*
 - Safeguards for taxpayers?

- **Mandatory Disclosure Rules (DAC6)**
 - interference with the right of confidentiality (legal professional privilege)

Taxpayer Rights and DAC

DAC – exchange of information

- Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, as amended by Council Directive 2014/107/EU of 9 December 2014 (**DAC**)

- DAC provides for 3 forms of exchange of information (EoI) between Member States:
 1. spontaneous exchange of information (SEoI)
 2. automatic exchange of information (AEoI)
 3. exchange of information on request (EoIR)

- DAC has been amended five times:
 1. 2011/16 is the original DAC
 2. 2014/107 introduced AEoI of financial account information
 3. 2015/2376 introduced AEoI of tax rulings and APAs
 4. 2016/881 introduced AEoI of CbC reports
 5. 2016/2258 enabled access to beneficial ownership information (collected pursuant to the AML Directive)
 6. 2018/822 introduces AEoI of reports on cross-border arrangements (obtained by introducing mandatory disclosure rules)

Taxpayer Rights and DAC

The Berlioz case - C-682/15

- CJEU 16 May 2017 **C-682/15** *Berlioz Investment Fund SA*
- Scope European Charter of Fundamental Rights (**ECFR**) extends to domestic provisions aimed to enforce legal obligations arising from EU Directives such as DAC - broad interpretation of Art 51(1) ECFR
- Art 47 ECFR implies relevant person punished for failure to comply with information order arising from DAC is entitled to challenge legality of information order
- Pursuant to Art 1(1) and Art 5 DAC:
 - 'foreseeable relevance' Eol request condition for legality (and thus culpability of failure to comply with) information order
 - verification Eol request based on DAC extends to validation information is not 'devoid of any foreseeable relevance'
- Based on Art 47 ECFR *juncto* above DAC provisions, national courts have jurisdiction to review legality information order, albeit that review foreseeable relevance is limited to verification that requested information 'manifestly' has no such relevance
- To this end, based on Art 47(2) ECFR national courts must have access to underlying Eol request
- Since based on Art 16 DAC Eol request must remain secret, relevant person does not have such right
- Provided relevant person has information referred to in Article 20(2) DAC that is - in principle - sufficient to be given full hearing in relation to lack of any foreseeable relevance

Taxpayer Rights and DAC

Joint Lux cases C-245/19 & C-246/19

- Recent new case law re taxpayer rights concerning Eol: CJEU 6 October 2020
 1. **C-245/19** *State of the Grand Duchy of Luxembourg vs. B*
 2. **C-246/19** *State of the Grand Duchy of Luxembourg vs. B and Others*
- CJEU confirms its Berlioz doctrine: *information holder* must have right to appeal to national court against information order as Art 47 ECFR guarantees right to effective legal remedy
- However, CJEU denies *taxpayer* access to direct remedy against information order provided other legal remedies might enable taxpayer to obtain effective (incidental) judicial review of measure (*e.g.* right of appeal against resulting correction or adjustment)
- Likewise any *third parties concerned* (*i.e.*, other than information holder or taxpayer) may be prevented from bringing direct action against information order provided alternative routes (*e.g.* initiating an action to establish liability) enable them to obtain effective legal remedy

Taxpayer Rights and DAC

C-245/19 & C-246/19 (continued)

- Recent ruling provides guidance on ‘foreseeably relevant’ information for DAC purposes
- According to the CJEU, foreseeably relevant information includes:
 - identity of person holding information
 - identity of taxpayer subject to investigation giving rise to request for EoI
 - period covered by investigation
- Furthermore, CJEU rules that foreseeably relevant information includes contracts, invoices and payments defined by personal, temporal and material criteria establishing links with (taxpayer subject to) investigation, even though not expressly identified
- Combination of criteria sufficient to consider information requested is not manifestly devoid of any foreseeable relevance - more precise definition not necessary

Taxpayer Rights and DAC

Pending Lux case C-437/19

- Pending case **C-437/19** *State of the Grand Duchy of Luxembourg v L*. in which the Luxembourgish Court of Appeal requested the CJEU on 31 May 2019 to clarify the notion of ‘fishing expedition’ as laid down in DAC
- First question is whether identification requirements laid down in Art 20(2)(a) DAC can be met by referring to an interest in certain entities, *i.e.*, rather than identifying the taxpayers to which request EoI relates individually (by name) in advance
- If indeed taxpayers concerned do not need to be identified individually, the question rises whether Art 1(1) and Art 5 DAC allow evidence of foreseeable relevance (*i.e.*, no fishing expedition) by providing sufficient explanation that EoI relates to targeted investigation into limited group of persons, justified by reasonable suspicions of non-compliance with specific legal obligation
- Furthermore, the CJEU is requested to clarify whether pursuant to Art 47 ECFR a grace period should apply if an information holder still wishes comply with an information order the legality of which if had initially challenged (though in vain) before the courts

Taxpayer Rights and DAC Safeguards for taxpayers?

- Berlioz doctrine does recognize right to direct legal remedy for information holder
- Room to challenge evident fishing expeditions in court
- In case of grey area, case may be lost, may come at a cost (penalty)
- Recent joint Lux cases would prevent taxpayer and other third parties from direct access to court
- Incidental appeal in case against resulting assessment may not be effective legal remedy
- GDPR issues as level of AEoI increases

Taxpayer Rights and DAC

DAC6 and its interference with LPP (1)

- Council Directive (EU) 2018/822 amending Directive 2011/16/EU (**DAC6**) as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements
- DAC6 provides for (i) mandatory disclosure of cross-border arrangements by intermediaries or taxpayers to tax authorities and (ii) mandates automatic exchange of such information between EU Member States
- Being considered 'intermediaries' for DAC6 purposes, as a rule lawyers may also be required to report certain cross-border arrangements
- However, DAC6 provides for exemption where reporting might breach legal professional privilege (**LPP**) as applicable in relevant jurisdiction
- If LPP applies, instead lawyers must inform clients (and/or potentially other intermediaries) regarding their disclosure obligations under DAC6
- Mere assessment whether specific arrangement is reportable (advice or opinion) does not imply that lawyer (or any other professional) qualifies as intermediary under DAC6

Taxpayer Rights and DAC

DAC6 and its interference with LPP (2)

- Lawyers still have obligation to notify clients (and/or potentially other intermediaries) with respect to their disclosure obligations under DAC6
- Notification must be done on case-by-case basis, *i.e.*, per reportable cross-border arrangement
- Notification must be done 'without delay'
- No specific requirements as regards form of notification
- Failure to notify client and/or other intermediaries may give rise to penalty
- Query whether notification by itself could breach LPP
- Query whether sharing DAC6 arrangement number with other intermediaries may breach LPP

Taxpayer Rights and DAC

DAC6 and its interference with LPP (3)

- Lawyers must verify whether making DAC6 report would interfere with right of confidentiality
- Information in DAC6 report might be substance or subject matter of confidential communications between lawyer and clients in the context of providing legal advice
- Normally LPP will prevent lawyer from making DAC6 report when he has advised client regarding reportable cross-border arrangement
- LPP can only be waived by client (not by lawyer) – recommended to waive LPP explicitly in writing

