



# ECJ case law on Exchange of Information

## A state of play

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## Relevant ECJ case law

- C-276/12 Sabou
- C-682/15 Berlioz Investment Fund
- C-245/19 & C-246/19 État luxembourgeois

# C-245/19 & C-246/19 État luxembourgeois

- Injunction 1 (case C-245/19)
  - Company B to provide:
    - Contracts between Co B and Co E & F in relation to the taxpayer
    - Any other contracts concluded during the relevant period or thereafter in relation to the taxpayer
    - All invoices issued or received in connection to those contracts
    - Details of bank accounts and financial institutions in which cash shown on balance sheet is deposited

# C-245/19 & C-246/19 État luxembourgeois

- Injunction 2 (case C-246/19)
  - Bank A to provide:
    - Name(s) of current holder(s) of a given bank account
    - Name(s) of person(s) authorised to carry out transactions with regard to that account
    - Name(s) of person(s) who had opened that account
    - Statements for that account during the relevant period
    - Whether another bank account had been opened with Bank A
    - Statements of any financial assets held by taxpayer in Company B, D or any other company controlled by taxpayer during the relevant period
    - Statements of financial assets where taxpayer appears as actual beneficial owner during the relevant period

# Questions for the practitioner

- What can be challenged?
- Who can challenge it?
- If I can challenge it, on which grounds can I challenge it?

## What can be challenged?

- The information request from the Spanish authorities to the Luxembourg authorities?
- The injunction issued by the Luxembourg authorities?

→ the only decision that can be challenged directly is the injunction.

# Who can challenge it?

- 3 categories of possible plaintiffs:
  - Taxpayer
    - No, has to wait for a decision affecting his tax position
  - Addressee of injunction
    - Yes, as addressee of the injunction position is directly affected by it
  - Third party concerned
    - No, but can sue for damages

# On which grounds can I challenge it?

- “fundamental rights” / “human rights”
  - Charter of Fundamental Rights of the European Union
    - Article 47: right to an effective remedy and a fair trial
    - Article 7: respect for private and family life
    - Article 8: protection of personal data
- DAC : directive 2011/16 on administrative cooperation between tax authorities
  - Article 1(1): information must be “foreseeably relevant”



# Charter of Fundamental Rights of the European Union

- Article 47: right to an effective remedy and a fair trial
  - Procedural right
  - Can be invoked alone or in conjunction with substantive rights
- Article 7: respect for private and family life
- Article 8: protection of personal data
  - Substantive rights

## Article 47: right to an effective remedy and a fair trial

« Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. »

- Available to everyone whose rights and freedoms have been violated
- 3 categories: all have a right to an effective remedy, but only for the addressee of the injunction does that mean the right to challenge the injunction

# Article 7: respect for private and family life

« Everyone has the right to respect for his or her private and family life, home and communications.»

- Can be invoked by both natural and legal persons

## Article 8: protection of personal data

« 1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority. »

- Can only be invoked by natural persons, not by legal persons

# What is the meaning of “foreseeably relevant”?

- Article 1(1) of DAC :
  - “This Directive lays down the rules and procedures under which the MSs shall cooperate with each other with a view to exchanging information that is **foreseeably relevant** to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2.”
- Consideration 9 preamble:
  - “[...] The standard of ‘foreseeable relevance’ is intended to provide for exchange of information in tax matters **to the widest possible extent** and, at the same time, to clarify that Member States are **not at liberty to engage in ‘fishing expeditions’ or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.**”

# What is the meaning of “foreseeably relevant”?

- ECJ
  - 1. intended to enable the requesting authority to request and obtain « *any information that it may reasonably consider will prove to be relevant for the purposes of its investigation* »
  - 2. it may not « *manifestly exceed the parameters of that investigation or to place an excessive burden on the requested authority* »
  - 3. no « *fishing expedition* » is allowed

# Who must assess the « foreseeable relevance » ?

- In order of precedence:
  - 1. the requesting authority (in this case the Spanish administration)
  - 2. the requested authority
  - 3. the Court having jurisdiction to review the injunction (ie. Lux court)
- What is the test?
  - « *whether a decision ordering that information be provided [...] taken together with the request for exchange of information on which it is based, concerns information which is **not manifestly devoid of any foreseeable relevance.** »*

## Issue in Luxembourg cases

- The request included contracts, invoices and payments which were not specifically identified
- ECJ:
  - 1. Contracts, invoices and payments not specifically identified were concluded or carried out during the period under investigation by the person holding the information and connected with the taxpayer under investigation
    - Not manifestly devoid of any foreseeable relevance
  - 2. The request is made in a preliminary stage during which the administration has no full and precise knowledge
    - Even if the information in the end proves irrelevant in the light of the result of the investigation, that in itself cannot mean that the information is manifestly devoid of foreseeable relevance for the review of the injunction



- Any questions?