Analysis

Berlioz: challenges to information orders – fair or fantastic?

Speed read

Directive 2011/16/EU sets out an inter-state regime for exchange of information. People other than taxpayers can be asked for information pursuant to it. The CJEU said they can challenge the 'information order' they receive. Must they do that without seeing the request for information sent between the authorities? The advocate general said 'no'. The CJEU said 'yes' when the challenge alleges that the information sought is not foreseeably relevant. Is the court's answer consistent with the right to a fair trial and equality of arms? The judgment ought not to be the last word on the matter.

Timothy Lyons QC
39 Essex Chambers
Timothy Lyons QC is a member of the public, EU and tax law group at 39 Essex Chambers. He is recommended in *Chambers UK* and the *Legal 500*, and he handles many cases in which the implications of EU law are significant. Email: timothy.lyons@39essex.com.

Tax law is increasingly understood as part of public law which strikes a balance between the state and the citizen.

Sometimes the technicalities of tax legislation obscure the court's balancing act. In other cases, like *Berlioz Investment Fund SA* (Case C-682/15), it is as plain as can be. As the advocate general said: 'The legal instruments that improve the means of combating tax evasion … are increasingly used by member states. Inevitably, the increasing use of those means raises the question of the balance between, on the one hand, administrative efficiency and, on the other, respect for citizens' rights, including the right to an effective remedy' (para 3).

Wathelet AG acknowledged that a 'delicate equation' was at the heart of the questions asked by the court.

Some facts

Berlioz was the Luxembourg parent of a French subsidiary. The subsidiary was subject to a French tax enquiry over its entitlement to an exemption from French withholding tax in respect of a dividend it had paid its parent.

As part of their enquiry, the French authorities sought information from the Luxembourg authorities under Directive 2011/16/EU ('the Directive'). The Luxembourg authorities in turn ordered *Berlioz* to provide information.

The questions that the Luxembourg authorities asked largely concerned the nature of Berlioz's activities. It answered most of the questions but refused to give the names and addresses of its members, the amount of capital held by each member and the percentage of share capital held by each member.

Berlioz said that the information sought was not 'foreseeably relevant' to the investigation. The first article of the Directive says that it concerns the exchange of information that 'is foreseeably relevant to the administration and enforcement of the domestic laws of the member states'.

Put shortly, Berlioz was arguing that the landlocked director was on a fishing expedition. Recital (9) of the Directive made clear that: "'foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and … to clarify that member states are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant'.

Berlioz was given an 'administrative fine' of €250,000 for non-compliance by the director of the direct tax administration, reduced to €100,000 by the Luxembourg Administrative Tribunal. The tribunal refused, though, to consider, as Berlioz wanted, whether or not the directors' information order was well founded.

Berlioz went to the Administrative Court and said that there had been a breach of its right to an effective judicial remedy under article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

What about the Charter?

In order to decide the case the Administrative Court referred some questions to the CJEU. The first one asked if the Charter of Fundamental Rights of the EU was applicable. The advocate general noted, wryly perhaps, that the Administrative Court 'considered that it might be necessary to take account of the Charter' (para 30).

Luxembourg and Finland contended that the Charter is addressed to EU institutions and the member states only when they are implementing Union law (article 51 of the Charter). The fine imposed on Berlioz was imposed according to national law and not the Directive. Therefore, the Charter was irrelevant.

Member states often want to try to keep under national control the penalty regimes which operate in relation to EU law. They have done the same in resisting the European Commission's proposals dealing with customs sanctions.

In this case, the claim for national control was roundly rejected. The penalty was imposed for failure to respond to a request made in order to comply with obligations under the Directive and in order to ensure the application of the Directive. Therefore the penalty provision implemented the Directive. It did not matter that the national legislation did not transpose the Directive. This was all quite consistent with the earlier case of *Åkerberg Fransson* (Case C-617/10) EU:C:2013:105.

Luxembourg undermined its own contentions. The law under which the penalty was imposed stated that it was made pursuant to the law which transposed the Directive. The advocate general called the claim that EU law was not implemented 'particularly strange' (para 46).

The distinction which member states want to draw between a law and the penalty for its breach is untenable. Hans Kelsen famously said that: 'Law is the primary norm which stipulates the sanction.' The advocate general put it in less abstract terms: 'Without the threat of a penalty, a rule prescribing a particular form of conduct is ineffective' (para 45, footnote omitted).

Can the information order be challenged?

Given that the Charter applied, did article 47 give Berlioz the right to challenge the validity of the director's decision?

The first paragraph of article 47 says that: '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.'

To answer the question asked, the court had to define the scope of this article. As the advocate general said, this issue was 'fundamental' (para 51). It had significance way beyond the confines of tax law.

Several governments argued that the Directive concerned inter-governmental cooperation and that no right or freedom of anyone was in play (para 45). This kind of argument has been around since the days of the EEC. The doctrine of direct effect was developed to counter it.

Fortunately, the court rejected the argument. It said that protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person constitutes a general principle of EU law. It went on to confirm that such protection could be invoked in relation to the information order and the penalty in question (paras 51 and 52).

A right was in play. What is more, the order could be challenged. The contentions of the European Commission to the contrary were rejected. That is only to be expected in a legal system in which authority is exercised subject to law.

How important is 'foreseeable relevance'?

Given that the order could be challenged how important was 'foreseeable relevance'? The CJEU said it was for the requesting authority to determine whether or not the criterion of foreseeable relevance was met. That authority is to determine the information it needs, having exhausted the usual sources of information available to it.

Nevertheless, the requesting authority does not have *carte blanche*. The criterion of foreseeable relevance must be met for the requested authority to be bound to reply to the request. Furthermore, the criterion of foreseeable relevance was a condition of the legality of the information order and the imposition of the penalty on Berlioz.

The CJEU referred to recital (9) of the Directive quoted above. It also referred to the commentary on the OECD Model Tax Convention in support of its position.

Information order: grounds of review

The CJEU concluded that the relationship between the requesting authority and the requested authority under the Directive should be one of cooperation and trust. It is not for the requested authority to substitute its judgment for the judgment of the requesting authority. Nevertheless, trust is not to be unlimited.

The requesting authority must provide the requested authority with an adequate statement of reasons explaining the purpose of the information sought in the context of the tax investigation of the taxpayer. Furthermore, 'the reasons given by the requesting authority must put the national court in a position in which it may carry out the review of the legality of the request for information' (para 84).

The requested authority and the court must verify whether the information requested is not devoid of any foreseeable relevance to the investigation; indeed, so far as the court is concerned, 'manifestly devoid' of such relevance (para 86).

Article 17 of the Directive contains some limits to the information exchange regime, some of which may be relevant to the legality of requests. They were not engaged in relation to Berlioz but may be for others.

Who sees the inter-state information request?

One might have thought that both the court hearing the challenge to the information order and the person challenging its legality would see the information request to which the order gave effect. As the advocate general said: 'The question is not trivial: it affects the adversarial principle, which is regarded as a fundamental principle since it permits the exercise of the rights of the defence and the establishment of the judicial truth' (para 124).

Wathelet AG also pointed out that, even in the context of anti-terrorist law, the state has to prove that state security would be compromised by disclosure of material. He concluded that the request for information must necessarily be communicated to the court hearing the action against the pecuniary sanction and to the litigant. If communication is capable of compromising the effectiveness of the collaboration between administrations with a view to combating tax evasion and tax avoidance, or of adversely affecting another public interest or the fundamental right of another individual, the administration should adduce evidence to that effect and the court should resolve the question (para 137).

The question is not trivial: it affects the adversarial principle

That was the right approach, tried and tested in other situations. Unfortunately, it was not followed by the CJEU.

The CJEU was clear that the court hearing the challenge to the information order should see it. The litigant, however, need not to see it. The CJEU noted that the request was secret under the Directive, article 16. It also took account of rights of defence and said that: 'the principle of equality of arms, which is a corollary of the very concept of a fair hearing, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent' (para 96).

Nevertheless, in a challenge based on 'foreseeable relevance' the litigant is to be given only the information specified in article 20.2 of the Directive. This requires the standard form request to contain 'at least' the identity of the person being investigated and the tax purpose for which the information is sought. If the reviewing court obtains further information that can be made available to the litigant, 'taking due account' of the possible confidentiality of information.

Conclusion

The way that the advocate general would have struck the balance between competing interests in *Berlioz* is much to be preferred to the way the CJEU chose. The CJEU explicitly confined what it said, though, to challenges based on 'foreseeable relevance'. Other challenges are not governed by this judgment.

Even so, article 20.2 sets out only the minimum information required. The actual request may contain more. Article 20.1 permits the request for information to be accompanied by 'reports, statements and any other documents, or certified true copies or extracts thereof.' These will not be disclosed to the litigant, who may be denied a considerable body of relevant information.

Is that consistent with the right to a fair trial, equality of arms and ECHR article 6 which the Luxembourg court asked about? Cases on everything from control orders in the UK to the availability of reports on EU fraud investigations will be relevant in answering that question.

This case should not be the last word on the matter. ■

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