



**Joined cases C-245/19 and C-246/19, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)***

**AG Kokott delivered her Opinion on cross-border exchange of information upon request**

On 2 July 2020, the Advocate General Kokott ("AG") issued her Opinion in joined cases C-245/19 and C-246/19, *État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale)*. The cases concern a request of information sent by the Spanish competent authority to the Luxembourg competent authority in respect of an artist resident of Spain. The request was made pursuant to the Spain - Luxembourg tax treaty (signed on 3 June 1986) and the directive on administrative cooperation in the field of taxation (Council Directive 2011/16/EU of 15 February 2011, the "DAC").

Following the receipt of the request, the Luxembourg competent authority ordered a Luxembourg company to provide the copies of the contracts concluded between that company and other companies concerning the artist's rights, as well as other documents, in particular copies of related invoices and bank statements. In addition, the Luxembourg tax authorities ordered a Luxembourg bank to provide information concerning the bank accounts and the other financial assets of the artist, as well as those of her controlled companies.

Under the Luxembourg law in force at that time the request of information could not be challenged in Court and, in addition, a fine up to €250,000 could be charged where the addressee of the request made by the Luxembourg authorities did not comply with it.

Nevertheless, the addressees of the request, the artist and concerned third parties (*i.e.* the other companies mentioned in the orders) challenged the orders before the Luxembourg court. The Higher Administrative Court, before which those disputes were brought on appeal, referred two preliminary questions to the CJEU.

With the first question, the referring Court asked the CJEU to assess whether national legislation of a Member State which precludes a judicial remedy against a tax information request entails a violation of Article 47 of Charter of Fundamental Rights of the European Union (hereafter the "Charter").

With regard to this question, the AG concluded that an order requiring a person to provide information is a legal measure adversely affecting the addressee. Therefore, under Article 47 of the Charter, the addressee should be entitled to claim a judicial review of the validity of such order. According to the AG, under Article 47 of the Charter, also the taxpayer concerned by the request should be entitled to a judicial review of the order. Moreover, the AG pointed out that the

possibility of subsequently challenging a tax assessment issued on the basis of the information so gathered does not provide the taxpayer with sufficient legal protection of the taxpayer's legal right of data protection.

In respect of the concerned third parties, which in the specific case were for the most part corporate entities, the AG clarified that legal persons may rely on the fundamental right to respect for private and family life (Article 7 of the Charter) where the request relates to information concerning bank accounts and financial assets. Accordingly, also the concerned third parties should be entitled to obtain judicial review of the order to provide information.

With the second question, the referring Court asked the CJEU to clarify how the request should be drafted in order to satisfy the requirement of 'foreseeable relevance' of the requested information, which is encompassed in Article 1(1) and Article 5 of the DAC and which is also provided for in article 26 of the OECD Model Tax Convention.

In this respect, the AG concluded that the competent authority requesting information pursuant to the DAC should state in such request the reasons why the information requested should be regarded as "foreseeably relevant", in order to enable the requested authority to examine whether the information sought did not clearly lack of any foreseeable relevance in connection with the requesting authority's tax audit. With a view to avoid unlawful fishing expeditions, the request should contain specific indications of the relevant facts and transactions or, at least, the specific grounds for suspecting that those facts and transactions could have occurred, as well as their relevance for tax audit purposes. Interestingly, the AG stressed that the requirement of "foreseeable relevance" under the Directive should be regarded as having an autonomous meaning from the one elucidated in the Commentary on Article 26 of the OECD Model Tax Convention, thus departing from the conclusion reached by the CJEU (Grand Chamber) in the decision issued in the *Berlioz* case (CJEU, 16 May 2017, case C-682/15, *Berlioz Investment Fund SA*, p. 67).

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For further information: **Maisto e Associati**

**Milan**

Piazza F. Meda 5  
20121  
T: +39.02.776931

**Rome**

Piazza d'Aracoeli 1  
00186  
T: +39.06.45441410

**London**

2, Throgmorton Avenue  
EC2N 2DG  
T: +44.207.3740299

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