



Legal Alert | Constitutional Court to rule on the compatibility of the procedure for exchange of information with the rule of law



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BACKGROUND

In 2014, the Luxembourg legislator changed the procedural rules applicable to the exchange of information upon request, in tax matters. As a consequence of the law dated November 25th 2014, there are now no legal remedies available against an order issued by the Luxembourg tax authorities to a taxpayer ordering the latter to provide information requested by a foreign tax authority. These procedural rules apply to requests for exchange of information based on both the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation as well as bilateral double tax treaties entered into by Luxembourg.

In the context of requests for exchange of information originating from EU Member States, the Court of Justice of the European Union already ruled, in the *Berlioz* case (please refer to our [legal alert dated June 16th 2017](#) for more details), that the right to an effective remedy foreseen in the Charter of Fundamental Rights of the European Union implies that a taxpayer facing a fine for not having followed the Luxembourg tax authorities' order to provide information has to be entitled to challenge the legality of the order in court, despite any statutory restrictions.

REFERENCE FOR A PRELIMINARY RULING TO THE LUXEMBOURG CONSTITUTIONAL COURT

Although the *Berlioz* ruling has been consistently followed by the Luxembourg administrative courts ever since it was issued, it does not apply in a non-EU context. Taxpayers facing an order to provide information issued by the Luxembourg tax authorities following a request made by a non-EU State are thus still in a situation that they have no legal remedy.

A recent decision by the lower Luxembourg Administrative Court (*Tribunal administratif*) might however change this situation going forward. In that case, the Swiss tax authorities issued a request for exchange of information to

their Luxembourg counterparts, based on which the latter ordered a Luxembourg bank to provide information relating to various bank accounts. On behalf of the Swiss taxpayer concerned by the Swiss authorities' request, BSP argued that the statutory prohibition to challenge the order issued to the bank in front of an independent judge violates the rule of law (*principe de l'Etat de droit et de la légalité*), a general principle of constitutional value.

Given that the argument was considered as being one which merits consideration by the Constitutional Court (*Cour constitutionnelle*), the lower Luxembourg Administrative Court (*Tribunal administratif*), in its judgement dated January 10th 2019 (docket n° 37014a), decided to stay the pending proceedings and defer the following questions in a reference for a preliminary ruling:

- Can the rule of law (*principe de l'Etat de droit et de la légalité*) be inferred from the provisions of the Luxembourg Constitution as a general principle of constitutional value?
- In the affirmative, is the law dated November 25th 2014 compatible with the rule of law to the extent it provides for a statutory prohibition to challenge an order to provide information by the Luxembourg tax authorities in court?

OUTLOOK

A final decision by the Constitutional Court (*Cour constitutionnelle*) is to be expected in approximately six months. In the meantime, and in reaction to the *Berlioz* case, the Luxembourg legislator has already begun the process of amending the 2014 law in order to re-introduce the possibility of a legal remedy for all orders to provide information which are issued going forward. Pending the amendment of the law, taxpayers facing potentially illegal information requests should consider taking legal action in order to preserve their rights.

For more info



Pol Mellina
Senior Associate
pmellina@bsp.lu
Tax Department



Right by you in Luxembourg

bsp.lu

2, rue Peterelchen | Immeuble C2
L-2370 Howald | Luxembourg
mail@bsp.lu