



# Taxpayers' rights restored in the exchange of information

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Taxpayers are increasingly confronted with orders from the Luxembourg tax authority to provide information under the threat of a penalty of up to EUR 250,000 (so-called '*décision d'injonction*'). Often, the full disclosure of confidential documents, such as board minutes, employment contracts or bank statements, is requested.

Typically, this exchange of information is requested by foreign tax authorities for their tax administration (e.g. in the course of foreign tax audits) and tax enforcement (e.g. cross-border recovery of tax claims). Luxembourg is obliged to comply with these information requests under the international framework of administrative cooperation.

Now, a law amendment (available [here](#)) restores the right of Luxembourg taxpayers to defend themselves against these information orders.

## Background

In 2013, Luxembourg was criticized by its peers from the Global Forum on Transparency and Exchange of Information for Tax Purposes for not engaging in effective exchange of information in line with international standards.

One of these standards is the 'foreseeable relevance' standard that shall provide for information exchange to the widest possible extent and, at the same time, prevent tax authorities from engaging in 'fishing expeditions' (i.e. speculative requests). Luxembourg courts have developed a strict interpretation of the foreseeable relevance standard and repeatedly cancelled (some) information orders from the Luxembourg tax authority.

In 2014, the legislative framework was adapted. By abolishing the right of taxpayers to claim against information orders, Luxembourg sped up the procedure for exchange of information on request. As a result, the peer review of the Global Forum resulted in a 'Largely Compliant' rating.

In 2017, the Court of Justice of the European Union reinstated the taxpayer's right to claim against information orders. In its preliminary ruling in the *Berlioz Investment Fund* case (C-682/15), the court interpreted both the Charter of Fundamental Rights of the European Union and the Directive 2011/16/EU on Administrative Cooperation in favour of taxpayers. For more details, please read our Tax Alert on this matter [here](#).

## New process for exchange of information on request

There are different methods of exchanging information between authorities: **automatic** exchange (of financial account information, of tax rulings and of cross-border arrangements, for instance), **spontaneous** exchange (of information obtained during the inspection of a taxpayer's affairs) and **on request** (furnishing information on a particular case to a requesting state).

To give effect to the Berlioz ruling, Luxembourg had to amend the law on exchange of information on request. **First**, the new law obliges the Luxembourg tax authority to review the information requests in more detail. **Second**, the new law restores the taxpayer's right to file a claim against information orders thus seeking judicial review of the underlying request.

### Administrative review of information request

As a first step, the Luxembourg tax authority must briefly verify that the information request from the foreign authority meets formal requirements (like legal basis and time limits). For information exchange within the EU, the standard form includes as a minimum the identity of the taxpayer under investigation and the tax purpose for which the information is sought.

In the second step, the Luxembourg tax authority must satisfy itself that the information requested by the foreign authority is not devoid of foreseeable relevance to the particular case. In the Berlioz case, for example, it was disputed that the identity of shareholders and details about their shareholding in a Luxembourg parent company (the information holder) was foreseeably relevant for the assessment by French authorities of withholding tax on dividends paid by a French subsidiary (the taxpayer under investigation).

If the Luxembourg authority does not have all the information in its tax files, it shall carry out administrative enquiries necessary to obtain the information.

### Information order

In practice, the administrative enquiry takes the form of information orders sent by the Luxembourg tax authority by registered mail to the person believed to be in possession of the information.

Information orders may be sent to Luxembourg entities that are associated with the taxpayer under investigation, to financial institutions where the taxpayer has accounts or to investment funds in which the taxpayer holds units. In some cases, information orders are also sent to other third parties providing domiciliation, accounting or corporate services to the taxpayer under investigation.

If the foreign authority requires that the taxpayer is not informed, the Luxembourg tax authority will prohibit the information holder and its directors and employees from disclosing the existence and content of the information order to the taxpayer or to third parties. Each offence against this 'no tipping-off' rule may be subject to a penalty of up to EUR 250,000.

The information holder is obliged to provide the requested information in its entirety, accurately and without alteration, within one month of notification of the information order. Any non-compliance may result in a penalty of up to EUR 250,000.

### Judicial review

The information holder may initiate fast-track litigation to appeal against these penalties imposed by the Luxembourg tax authority.

The law amendment now gives back the procedural right to the information holder to file a claim with the Luxembourg courts against information orders. Any statement of claim must be submitted within one month of notification of the information order.

The claim will automatically suspend the execution of the order so that the information holder does not have to provide the information until the case is decided in court.

The court's review is limited to verification whether the requested information manifestly has no foreseeable relevance to the tax purpose stated by the foreign authority. This tax purpose must be disclosed during the fast-track

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litigation by the authorities in their statement of defence. Given that each party can initially file only one statement, the court may order the submission of additional statements.

The court must render its decision within one month of the filing of the last statement. In general, this may be within the third month after the filing of the claim.

### **KPMG Luxembourg comment**

The increasing flows of information between countries undoubtedly provide advantages. It helps tax authorities to better combat tax evasion and tax fraud as well as enabling them to better assess taxes due.

The risks for taxpayers, however, are manifold: the tax information may be personal data or secret information (trade, business, professional or other secrets). Will the exchange be adequate and proportional in terms of quantity? Is the information correct and complete? How will the authorities interpret and use this information (for and) against the taxpayer? Finally, the process may result in an increasing number of tax disputes.

In most cases, taxpayers will remain unaware of the information exchange. The Luxembourg tax authority will not inform the taxpayer concerned by the request. Here, the law amendment missed the opportunity to enhance the protection of taxpayers' rights. Notifying the resident or national taxpayer may prevent misunderstandings and facilitate exchange (by encouraging taxpayers to cooperate).

In addition, the taxpayers under investigation and concerned by the information request, even if they are a Luxembourg resident or national, have no procedural right to file a claim. The Luxembourg legislator was concerned that such procedural right would unduly slow down the information exchange. This is debatable.

Finally, the safeguards for Luxembourg taxpayers' rights are spread over several legal areas and across different levels of legal hierarchy. Often, the legal interpretation is left exclusively to court decisions, such as the interpretation of the foreseeably relevant criterion.

Companies facing such information orders and taxpayers concerned by the underlying information requests should safeguard their rights.

KPMG Luxembourg can assist you in your response to information orders and requests. KPMG Luxembourg can also help you to proactively prevent, efficiently manage and favourably resolve tax disputes. If required, we represent clients in the fast-track tax litigation before the Luxembourg administrative tribunal.

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