Legal Protection in the Context of International Exchange of Information upon Request between Tax Authorities

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Abstract

Countries are increasingly using the method of international exchange of information to share information about taxpayers between countries. Both in an EU and OECD context, the legal basis for such information exchange has been broadened significantly in recent years. However, the legal protection for parties affected by such international information exchange does not seem to keep pace. In this article, we discuss the legal protection against the exchange of information on request. We conclude that there is legal protection for information holders who are being ordered to exchange information with their tax authority so that this tax authority can fulfil a request to exchange information with its local counterpart based on the EU administrative cooperation directive (DAC). If the information holder is also the taxpayer being investigated by the requesting EU Member State, it is not clear whether legal protection exists. In situations where information is exchanged on non-DAC basis, like for example, based on a tax treaty or a tax information exchange agreement (TIEA), there is no case law that stipulates any legal protection. Against the actual exchange of information from a state to another state no minimum standard of legal protection exists. Furthermore, we give a brief overview in this article of the legal protection according to Dutch law and give suggestions for a framework for legal protection.

Keywords: legal protection, Berlioz, État luxembourgeois, foreseeably relevance, directive of administrative cooperation (DAC).

1 Introduction

Countries are increasingly using the method of international exchange of information to share information about taxpayers between countries.[1] Both in an EU and OECD context, the legal basis for such information exchange has been broadened significantly in recent years. However, the legal protection for parties affected by such international exchange of information does not seem to keep pace.[2]

Regarding the exchange of information between EU Member States based on the administrative cooperation directive (DAC)[3] the Court of Justice of the European Union (ECJ) has ruled that private parties in certain limited situations must be able to challenge a decision of the competent authority of their country when this country is complying with a request for the exchange of information by another EU Member State.

In this article, we will discuss the legal protection of parties affected by the exchange of information upon request.[4] We will first set out the different phases of international exchange of information on request. Subsequently, we will describe and analyse the legal protection possibilities of affected persons in each phase. After this analysis, we will look back at the legal protection methods the Dutch law offered earlier and compare this to the current legal protection possibilities Dutch law offers. We will end with a suggestion for a legal protection framework.

We refer to the second article in this issue[5] for a discussion regarding exchange of information and the General Data Protection Regulation (GDPR).

2 Phases of International Exchange of Information

The international exchange of information upon request can be divided in to three main phases.

i. The first phase is for the requesting country to draw up a request for the exchange of information with another country after it has exhausted its national

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1 T. Fensby, P.O. Gjesti & L. Rosenfeld, 'The Global Forum Standard on Transparency and Information Exchange', *Tax Notes International* 86, 1211-1219 (2017).

2 See in this context also P. Baker and P. Pistone, *The Practical Protection of Taxpayers' Fundamental Rights* (2015).

3 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (hereinafter: DAC).

4 Other methods of exchanging information are exchanging on an automatic basis and spontaneously. The legal protection for parties affected by these methods of exchanging of information is also debatable.

5 E. Huiskers-Stoop, A. Breuer & M. Nieuweboer, Exchange of Information, Tax Confidentiality, Privacy and Data Protection from an EU Perspective, *15*(3), *Erasmus Law Review* (2022), 86-99.

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possibilities to obtain the information it is looking for.

ii. The second phase is the gathering of information by the national tax authority of the requested country. In some instances, the requested authority may already be in possession of the requested information. But when it does not, then it should arrange to carry out any administrative enquiries that are necessary to obtain the requested information.

iii. The third phase is the actual exchange of this gathered information by the national tax authority of the requested country to its foreign counterpart of the requesting country.

2.1 Requesting the Information

In the first phase, when drawing up a request for exchange of information, the requesting country should ascertain if the request meets both the requirement of 'foreseeable relevance' and reciprocity. Later in this article we will focus in more detail on the requirement of foreseeable relevance. In short, the requirement of reciprocity entails that a country should not request information from another country, if in the reverse situation it would not be allowed to provide similar information to that other country based on its own domestic laws.

2.2 Gathering of Information

The second phase of the information exchange is the gathering of information by the local tax authority from its own residents, the information holders. In the absence of mandatory international or EU procedural legislation, this is generally a national matter which is governed by the domestic rules of procedural law. This also means that the domestic procedural rules apply with respect to the notification to affected persons, possibility of appeal, and the levying of fines (or other types of penalisations) in case of non-compliance by the information holder.

A lot of information is typically already obtained in the domestic tax return/assessment phase. Particularly for the information which is being exchanged automatically to other states this information will normally already be in the possession of the exchanging tax authority. For example, financial institutions have the obligation to share certain information with their national tax authority. This information, which already is in the possession of the tax authority could also be exchanged on request if there is, for example, no automatic exchange agreement in place between the requesting and requested country.

Should the tax authority not already be in possession of the information requested by another state, they can initiate an investigation. For EU Member States Article 6 DAC contains the obligation that they must initiate an investigation in order to receive the information that the other EU Member State requests. The investigation must be conducted in accordance with the domestic procedures for similar domestic information investigations.

Note that the information holder can be the same person as the taxpayer which is the subject of the investigation by the requesting state. However, in this context it is important to realise that the information holder is not always the same as the taxpayer. The information holder could also be a third party which has possession of relevant information regarding the taxpayer, like a supplier of the taxpayer, a customer of the taxpayer, a (financial) service provider to the taxpayer, and so on. As we will discuss later in more detail, sometimes as a result of the exchange of information an information holder may also need to disclose information from persons other than the taxpayer. For example, when such information is directly connected with the information concerning the taxpayer. In summary, there are three categories of persons that could be affected as part of the gathering of information phase: the taxpayer, the information holder not being the taxpayer, and a third party of which information is directly connected with the information of the taxpayer.

2.3 Exchange of Information

For EU situations the DAC requires that the information requested by a Member State must be 'foreseeably relevant'.[6] Simultaneously with the introduction of DAC7 in March 2021, a provision was included in the DAC on how the 'foreseeably relevant' requirement should be interpreted and what information a request for information should contain in order to demonstrate that this is the case.[7] In addition, this provision also makes clear what a request for information from another EU Member State regarding a group of taxpayers who cannot be identified individually must at least contain. The OECD Model Tax Convention, which also contains an article on exchange of information, also uses the requirement that the requested information must be 'foreseeably relevant'.[8] Fishing expeditions by other (Member) States are therefore not permitted.

Taxpayers or third parties from whom the information originates may have objections to the (proposed) exchange of information. First and foremost, they may feel that the exchange of information is unlawful, for example, since there is no foreseeable relevance. They may also fear that inadequately secured information systems could lead to data leaks. In addition, there may be doubts as to whether the requesting authority is competent to request information. Does the requesting authority have the permission under its national law to request the information? Another question is whether the principle of exhaustion has been complied with.[9] In our opinion, taxpayers and third parties from whom the information originates should be allowed to submit such questions to an independent court.

6 Art. 1 under 1 DAC in connection with Art. 5 DAC.
7 Art. 5a DAC.
8 Art. 26 OECD Model Convention (2017).
9 For example Art. 17 under 1 DAC.

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3 Legal Protection and the Gathering of Information

As a distinction can be made between the three phases of the process of exchanging of information upon request, the same distinction can be made for the legal protection in each phase. In our opinion, the phases lack fundamental legal protection. However specifically for exchanging of information upon request based on the DAC the ECJ has ruled that persons should have legal protection, though this is balanced against the importance of an effective exchange of information to combat tax avoidance. In the next section, we will set out the current legal protection and will discuss the relevant ECJ case law.

3.1 Legal Protection against the Gathering of Information in Intra EU Situations

As stated earlier, tax authorities already collect a lot of information without the specific purpose of exchanging it internationally but, for example, for national tax returns/assessments. Persons can try to appeal this local gathering of information according to the domestic procedural laws of the state collecting the data. International (case) law does not require any specific additional legal protection against this collection of information without the purpose of exchanging it with other (Member) States.

The ECJ however has ruled that in particular situations specific persons should have the option of appealing against a domestic request for information from their own tax authority if the tax authority is requesting for this information in order to fulfil a received exchange of information request from a tax authority of another EU Member State.

3.1.1 Berlioz Investment Fund

One of the few ECJ cases which deals with legal protection in the context of the exchange of information concerns Berlioz Investment Fund SA/Directeur de l'administration des contributions directes[10] (Berlioz Investment Fund). Berlioz is a joint stock company governed by Luxembourg law. Berlioz received dividends paid by its subsidiary which is governed by French law. These dividends were exempt from withholding tax. The French tax administration was doubtful as to whether the exemption complied with the conditions laid down in French domestic law. Therefore, the French tax administration sent the Luxembourg tax administration a request for information concerning Berlioz pursuant to the DAC.

The Luxembourg tax administration did not have the information themselves at hand and ordered Berlioz to communicate certain information to the tax administration. Berlioz did provide some of the requested information, but not all because in its view that part of the requested information was not 'foreseeably relevant' within the meaning of the DAC. The Luxembourg tax administration subsequently imposed an administrative fine of EUR 250,000 on Berlioz because of its refusal to provide information which Berlioz was obliged to provide according to Luxembourg law. Berlioz filed an appeal against the fine before Luxembourg's courts and asked the courts to determine whether the information order was well founded due to not being foreseeably relevant. Although the appeal itself was raised against the levying of the fine, the question arose whether the underlying request for information could be challenged during the proceedings concerning the fine.[11]

The Luxembourgian administrative court asked a preliminary ruling and asked the ECJ six questions. First of all the court asked the ECJ if a Member State was implementing EU law and therefore the Charter of Fundamental Rights of the European Union (hereinafter: Charter), more specifically Article 47 Charter stating the right to an effective judicial remedy, was applicable if a EU Member State makes a provision in its legislation for a pecuniary penalty to be imposed on a person who refuses to supply information in the context of an exchange of information based on the provision of the DAC. The ECJ ruled that national legislation which provides for a penalty for failure to respond to a request from the national tax authority that is intended to enable that authority to comply with the obligations laid down in the DAC, must be regarded as implementing that directive.[12]

Regarding the second question, the ECJ confirmed that a relevant person is entitled to challenge the legality of an order to provide information by and to its tax authority in the context of exchange of information pursuant to the DAC when a pecuniary penalty has been imposed on the information holder for failure to provide the requested information.[13],[14]

Subsequently, questions arose regarding the contents of the request made by the foreign requesting tax authority to its local counterpart. The ECJ ruled that the 'foreseeable relevance' of the information requested by the requesting tax authority of a Member State to its local counterpart is a condition and must be satisfied before the requested tax authority of the Member State is required to comply with that request. Furthermore, the requested tax authority of a Member State must satisfy itself that the information requested by the requesting tax authority is not lacking any foreseeable relevance. The national court subsequently has the authority to review the legality of the information order and needs to

10 ECJ, 16 May 2017, C-682/15, after opinion A-G Wathelet, ECLI:EU:C:2017:373 (*Berlioz*).

11 For a more elaborate discussion on the Berlioz case, and the preceding national court procedures, please see B. Michel, 'Luxembourg: Exchange of Information on Request: Whenever, Wherever? Shakira's (and Berlioz's) Right to Judicial Review of the Foreseeable Relevance Standard', 73(2) *Bulletin for International Taxation* 90-104 (2019).

12 ECJ, 16 May 2017, C-682/15, nr. 41 (*Berlioz*).

13 ECJ, 16 May 2017, C-682/15, nr. 59 (*Berlioz*).

14 For a more elaborate analysis regarding Art. 47 Charter and tax procedures, we refer to: K. Perrou, 'The Application of the EU Charter of Fundamental Rights to Tax Procedures: Trends in the Case Law of the Court of Justice', 49(10) *Intertax* 853-861.

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verify whether the requested information manifestly has no such foreseeable relevance. The last question was whether the national court should have access to the request for information made by the requesting Member State and if that document must also be communicated to the information holder in the requested Member State. Communicating the information request to the information holder would give the information holder a fair hearing regarding the legality of the information request. The ECJ ruled that the national court must have access to the request for information. However, the information holder does not have the right to access the whole information request document. The document must remain secret according to Article 16 DAC. In order to give the information holder a full hearing in relation to the lack of any foreseeable relevance of the requested information, it is sufficient that the information holder is in possession of the information referred to in Article 20 under DAC. The information referred to in this article is the identification of the person that is being investigated and the tax purpose the requested information is going to be used for.

Concluding, the ECJ ruled that Berlioz should be able to appeal against a punitive sanction because of non-compliance with an order for information, and during this appeal the contents of the request for information by the other Member State itself must also be examined. More specifically it should be examined whether the requested information is of 'foreseeable relevance' for taxation in the Member State of the requesting authority.[15]

3.1.2 État Luxembourgeois (C-245/19 & C-246/19)

Almost three years later the joined cases État luxembourgeois[16] concerned a similar matter. The Spanish tax authority requested information from the Luxembourg tax authority for the years 2011 to 2014 regarding bank accounts allegedly held by the singer Shakira in Luxembourg and statements of all financial assets of companies owned by Shakira.[17] The Luxembourg tax authority was not in possession of this information and ordered a bank to provide it. It was explicitly stated in the information order that no appeal was possible against this order. Nevertheless, both the requested bank, the taxpayer to whom the information related (Shakira) and a third party whose name was mentioned in the requested information appealed. It should be noted that, unlike in Berlioz, Luxembourg had not (yet) imposed a fine.

The ECJ considered that a person who receives an order for information has no effective legal protection, but may obtain it through non-compliance with the information order issued by his own tax authority, and may then create a legal remedy by appealing against a subsequent sanction (i.e. the pecuniary penalty levied for non-compliance with the information order). In short, the Berlioz route. However, the ECJ considers it undesirable that it would be needed as a condition precedent to provoke a punitive sanction for the information holder to obtain legal protection. Persons who receive an order for information to enable their own Member State to comply with a request for information exchange based on the DAC should be able to appeal against the information order from their own tax authority and should not have to incur a penalty first.[18]

The situation is different for the taxpayer (who is the subject of an investigation abroad) when he is not the same person as the information holder from whom the information concerning the taxpayer is requested. Similarly, the situation is different for a third party, which is not the taxpayer and not the information holder, but of whom information is also being shared. Advocate General Kokott concluded earlier in this case that they too must be able to oppose the order for information, considering that they too are persons affected by the information request. The ECJ does, however, not follow the advice from the Advocate General in this matter, because the order to provide information does not entail any obligation and therefore also poses no sanction risk for such taxpayers and third parties to whom the information relates. The taxpayer still has legal remedies in the phase after the exchange of information, namely, against the use of the information, for example, in the assessment phase. Advocate-General Kokott doubted earlier in her conclusion whether these legal remedies are sufficient or even present at all. In our opinion, she was right to point out that it is not clear if and when a tax assessment will be given. For example, when no tax is due. The third party whom the information concerns does not have any legal protection at all. Meanwhile, the respect for private life (Art. 7 Charter) and the right to protection of personal data (Art. 8 Charter), which are fundamental European rights, are being infringed. Kokott stated:

> 72. (…) that the collection of data does not become unlawful simply because the tax assessment notice is incorrect. Nor does the tax assessment notice necessarily become incorrect simply because the data collection was unlawful. If the unlawful collection of data served as a basis for the tax assessment notice, an absolute prohibition on the use of the data does not follow from EU law in any event.
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> 73. Moreover, it is not clear whether and when a tax assessment notice will be issued. For example, if the data collected leads to the conclusion that the requesting State does not have a tax claim, there will never be a corresponding onerous tax assessment notice that could be challenged by the taxpayer. The same applies if the data collected was not relevant for tax purposes, but a tax assessment notice is issued for other reasons. When pursuing a legal remedy against

15 See for a discussion about the contents of a request to meet the foreseeable relevance criterium in relation to DAC7: M. Manca, 'EU DAC7 Proposal Further Strengthens EU Tax Administrative Cooperation, Even in Respect of Digital Platforms', 61(4) *European Taxation* 139-146 (2021).

16 ECJ, 6 October 2020, C-245/19 & C-246/19, after opinion Kokott, ECLI:EU:C:2020:795 (*État luxembourgeois)*.

17 Michel, above n. 10.

18 ECJ, 6 October 2020, C-245/19 & C-246/19, nrs. 67-69 (*État luxembourgeois)*.

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> that tax assessment notice, the taxpayer could hardly complain about the unlawfulness of the 'unsuccessful' collection of data.
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> 74. For all these reasons, an indirect legal remedy against the collection of data by means of a legal remedy against the tax assessment notice is not an effective remedy within the meaning of Article 47 of the Charter. Such a remedy is no longer capable of effectively preventing interference with the protection of personal data. This already occurred when the data was collected. A possible use of the data at a later stage merely perpetuates this interference, meaning that a legal remedy against the use of the data in the course of the tax proceedings — even if there were a corresponding prohibition on use — merely serves to provide a defence against the perpetuation of the interference, but not against the interference itself.[19]

The ECJ did not follow Kokott's line of reasoning and did not make clear what effective remedy the third party or taxpayer has when no tax assessment will be levied or the information received by the requesting tax authorities will not be used in the tax assessment procedure.
After the ruling of the ECJ in the État luxembourgeois case, it is clear that information holders do have judicial protection against an order for information made by their tax authorities if this order is given to exchange this information after being requested to do so by the tax authorities of another Member State pursuant to the DAC. Information holders do not have to provoke a penalty by being non-compliant with the request for information by their own tax authority. The ECJ seems to be offering legal protection since there is a risk for a judiciary penalty when not complying with the domestic information order. Most likely a highly theoretical question, but it may be interesting to see what the ECJ would rule if an information holder would not have this judiciary penalty risk when failing to comply with the domestic information order. As stated highly theoretical since if there is no penalty risk involved information holders might not be willing to fulfil information orders at all.

3.1.3 État Luxembourgeois v. L

Last year the ECJ ruled in another relevant case in the context of international exchange of information upon request.[20] It again concerned the Luxembourg tax authority that was being asked to send information to the French tax authority based on the DAC. The request stated that France wanted to know who the natural persons were that directly or indirectly owned immovable property in France via 'L'. L was a company established in Luxembourg. The Luxembourg tax authority did not have the requested information in its possession and ordered L to provide the information requested such that the Luxembourg tax authority could fulfil the request made by the French tax authority.
The ECJ ruled that the addressee of the information order must be able to question the legality of this information order before the court of its own Member State. It referred to its previous line of reasoning in État luxembourgeois (C-245/19 & C-246/19). L, being the addressee of the information order, was according to Luxembourg law not able to challenge the legality of this order. It was only able to challenge the penalty imposed on it for failing to comply with the information order. The ECJ condemned this Luxembourg law because it is a breach of the right to an effective remedy by the Article 47 Charter.
The key point is that the ECJ stated that under these circumstances the information holder must, after a national court has upheld the legality of the order, be given the opportunity to comply with the request within the time limit prescribed for the information order (so before the penalty is levied) according to national procedural law. This without entailing the continued application of a possible penalty which that person has incurred in order to exercise his right to an effective legal remedy. The penalty will only legitimately become payable after the time limit given within the possibility to again comply to the order (after first having appealed against it). Hence, the ECJ essentially prescribes that the time limitation before a penalty can be levied as laid down in national procedural law, only starts after an appeal against the legality of the information order has been denied. This is irrespective of what the national procedural law itself says about the start of the time limitation. As such, in this case the ECJ has extended the legal protection for information holders a little bit further.

3.1.4 Analysis

It is striking that in both Berlioz and État luxemburgeois the ECJ mainly attaches value to being subjected to an obligation to provide information and to the risk of a fine if this obligation is not (sufficiently or timely) fulfilled. No legal protection is given by the ECJ to other persons that are affected by the information request, such as taxpayers which are not the information holders or other third parties of which information is included in the information request. The ECJ ruled in État luxemburgeois that Articles 7 and 8 of the Charter were being violated for these other affected persons. However, the ECJ explicitly does not offer them an opportunity to appeal via Article 47 of the Charter, the right to an effective remedy in the event of a violation of the rights and freedoms guaranteed by the Union. The DAC, in fact, pursues an objective of general interest, namely, the combating of international tax fraud and avoidance. Because there is a public interest objective, the legal recourse, which normally lies in Article 47 of the Charter, can be restricted. This limitation is made possible by Article 52 of the Charter. As such, when balancing the legal protection of those other affected persons against the public interest objective, the ECJ gives priority to the latter. In its defence, the ECJ does not fully ignore

19 Opinion Advocate General Kokott of 2 July 2020, C-245/19 & C-246/19, ECLI:EU:C:2020:516.

20 ECJ, 25 November 2021, C-437/19, after opinion Kokott, ECLI:EU:C:2021:953, ECLI:EU:C:2021:953, nrs. 97-99 (*État luxembourgeois* v. *L)*. See also the opinion statement of the CFE ECJ Task Force on this ECJ decision in *European Taxation*, 62, No. 5.

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the legal protection of the taxpayer, since it points out that at a later stage (e.g. when the requested information is used to levy a tax assessment) the taxpayer has the possibility to appeal to the use of the information requested. However, as we have described, this may not always result in a full legal remedy (e.g. when no tax assessment is levied, or when the exchanged information is not used when levying the assessment).[21]

The question at hand is what the ECJ would rule if the taxpayer would be requested to share information with its own tax authority so that its Member State (as requested Member State) can exchange this information with the requesting Member State. In other words, what would be the verdict of the ECJ if the taxpayer is the information holder. The reasoning of the ECJ in État luxembourgeois seems to lead to the conclusion that the taxpayer only has legal protection against the use of the information in the assessment phase in the requesting Member State and therefore not against the information order in the requested Member State. It is difficult to estimate how the ECJ would rule if the requested information owner were also the taxpayer. Following the analysis of the ECJ in État luxembourgeois the taxpayer does have the obligation to share information and may have the risk of being fined if this obligation is not (sufficiently or timely) fulfilled. However, in the line of reasoning of the ECJ, it is possible for the taxpayer to challenge the *use* of the information in the tax assessment phase. But, as stated earlier, we concur with Advocate General Kokott that in the situation in which no tax assessment will be issued, the taxpayer will not have a legal remedy against the *gathering* of information in and by the requested Member State.

There is however a 'solution' for the information holder who is also the taxpayer.[22] Such a taxpayer can provoke a penalty by not providing the ordered information and then appeal against this penalty, so that the underlying request for information can also be submitted for review. In short, the taxpayer could create a situation like the one in the Berlioz judgment. It should be noted that the Berlioz judgment concerned an information holder who was not the taxpayer concerned. However, a penalty had been imposed, so to what extent is it still relevant whether the information holder is also the taxpayer or not. In the Berlioz judgment the Court ruled:

> (…) that Article 47 of the Charter must be interpreted as meaning that a relevant person on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information in the context of an exchange between national tax administrations pursuant to Directive 2011/16 is entitled to challenge the legality of that decision.[23]

Here, therefore, no distinction seems to be made between the situation in which the information holder is also the taxpayer or not, but the fact is that someone is fined for failing to comply with the obligation to provide information.

3.2 Legal Protection against the Gathering of Information in a Broader International Context

In the broader international context, no case law of the European Court of Human Rights (ECtHR) has yet been established on information gathering. But, since the OECD Model Tax Treaty and the DAC both have the 'foreseeable relevance' requirement of the information they wish to receive from another state upon request and as the ECJ and the ECtHR regularly refer to each other's case law when it comes to general principles and fundamental rights, it is likely that the ECtHR will rule in line with the ECJ. The ECtHR has done the same in the Othymia Investments BV/Nederland case that will be discussed later in section 4.

4 Legal Protection and Exchange of Information

After the requested state is in possession of the information or already had possession of this information and therefore did not need to give an information order to the information holder, the phase of the actual exchange of this information to the requesting (Member) State will commence. In the situation in which the requested state already had possession of the information being requested by the other state, in principle only those two states should have knowledge about the information request.[24] The taxpayer being investigated or other parties that are being named in the information may have no knowledge of the information request procedure. The question at hand is whether these parties have legal protection against the actual exchange and/or must be notified about this exchange being done.

Within an EU context, the ECJ has been asked whether the taxpayer needs to be notified about the information request being made based on the DAC. In the Sabou case, the ECJ ruled on the question whether the taxpayer has a right to challenge the international exchange of information between tax authorities.[25] The question arose whether Sabou should be informed under EU law of a request for information from his own tax authority to the tax authority of another Member State. The ECJ ruled that a request for information made under the

21 Also see S. Zagà, 'The Protection of Individual Taxpayer Rights Regarding Exchange of Information on Request in the European Union', 62(2/3) *European Taxation* 105-113 (2022); for some critical considerations.

22 W. Boei, Rechtsbescherming bij fiscale internationale gegevensuitwisseling anno 2021, *WFR* 2021/114 (Dutch only).

23 ECJ, 16 May 2017, C-682/15, ECLI:EU:C:2017:313, nr. 59 (*Berlioz*).

24 Of course, the national procedural law of a specific state may still have a domestic rule which obliges the requested state to share a notification of the information exchange with the affected persons. But international and EU law do not prescribe this, and they do require an efficient exchange of information procedure.

25 ECJ, 22 October 2013, nr. C-276/12, after opinion Kokott, ECLI:EU:C:2013:678 (*Sabou*). Also see the commentary with this case written by J.A.R. van Eijsden in H&I 2014/91.

DAC is part of the information-gathering process between Member States and taxpayers therefore do not need to be informed in advance. According to the ECJ, this is not a breach of the principle of defence. Therefore, the tax authority may request information from the tax authority of another Member State without prior notice to the taxpayer. The same applies, according to the ECJ, to the tax authority that intends to provide information to the tax authority of another Member State (upon request or spontaneously); in that case, too, the tax authority does not have to notify the taxpayer in advance.

Nor does the right to effective legal protection under Article 6 ECHR require any notification of the taxpayer. In the case of Othymia Investments BV/Netherlands, the Dutch tax authority had provided information about Othymia to and at the request of the Spanish tax authority.[26] The tax authority subsequently sent a notice of this provision about information to Othymia, against which Othymia appealed to the Dutch administrative court. The ECtHR explicitly referred to the Sabou case of the ECJ, used virtually the same wording as the ECJ and subsequently reached a similar conclusion.

In conclusion, the current state of EU and international tax law and jurisprudence is that no minimum standard of legal protection exists in the phase of information exchange and thus against the intended and actual exchange of information. Tax authorities are not obligated by EU or international law to notify relevant parties about their intention to either request information from another state or send information to another state. Of course, countries are at liberty to implement such notification procedures in their domestic laws, so long as it does not infringe on the requirement of efficient exchange of information and secrecy.

5 Legal Protection in the Netherlands in the Context of the Exchange of Information

In this section, we will give a brief overview of the legal protection according to Dutch law over the recent years.

5.1 Gathering of Information on Shell Entities

In the Netherlands there is a specific reporting obligation for certain types of shell entities, the so called *dienstverleningslichamen*. Entities based in the Netherlands with primarily cross-border passive income and limited substance in the Netherlands are, if they benefit from an advantage of a tax treaty, required to include in their corporate income returns that they do not meet the substance requirements and which one of the specific substance requirements they do not meet. Simultaneously with the filing of the annual tax return the shell entity needs to inform the tax authority (formally the minister of finance) which of the substance requirements it does not meet, send the information required to conclude that the entity does meet the other substance requirements and give an overview of the received passive income for which it benefits from an advantage based on a tax treaty or the interest and royalty directive.[27] The Netherlands may subsequently spontaneously inform relevant states that the entity is a shell entity and exchange other relevant information. Thereafter, it is up to the other state to decide what it will do with the received information. For example, the other state may subsequently conduct its own investigation in order to determine whether the shell entity is entitled to a specific tax benefit granted under a tax treaty (such as reduced withholding tax rate, or an exemption from a withholding tax at source).

The Dutch high administrative court has ruled that entities that are being marked by the Dutch tax authorities as not meeting the substance requirements must be able to appeal or file an objection before the administrative court against this status of being a shell entity.[28] This legal protection may be characterised as legal protection against the gathering of information.[29] The sole purpose of the obligation of the shell entity to provide certain information is so that the Dutch tax authorities can internationally exchange that information (being on a spontaneous basis). The Dutch high administrative court stated that the decision of the Dutch tax authorities that an entity is a shell entity (i.e. does not meet the substance requirements) is under Dutch domestic law in principle not open to objection or appeal before the administrative court. The court, however, characterised the decision of the Dutch tax authorities as an administrative law judgment (in Dutch: *bestuurlijk rechtsoordeel*).[30] The alternative way for the entity to create a possibility to appeal against the decision that the entity is considered a shell entity is that it does not send the required by-law information to the Dutch tax authorities. The entity should then receive a penalty against which the entity could appeal before an administrative court. The Dutch high administrative court marked this alternative approach as disproportionate and therefore ruled that the entity can appeal directly against the decision of the Dutch tax authorities to classify an entity as a shell entity and should therefore not have to provoke a penalty.

26 ECtHR 16 June 2015, nr. 75292/10, ECLI:NL:XX:2015:280 (*Othymia Investments BV*).

27 Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different member states.

28 Dutch case law: ABRvS 12 February 2020, ECLI:NL:RVS:2020:453 (Dutch only).

29 W. Boei and J.A.R. van Eijsden, De introductie van het bestuurlijk rechtsoordeel in het belastingrecht, *WFR* 2020/144 (Dutch only).

30 See for more background information regarding the administrative law judgment and its characteristics: W. Boei and J.A.R. van Eijsden, De introductie van het bestuurlijk rechtsoordeel in het belastingrecht, *WFR* 2020/114 and the sources referred to in this article (Dutch only).

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5.2 Notification Procedure

In the 1980s, the Dutch legislator introduced a notification obligation for the Dutch tax authorities before they exchanged information with another state. This notification was only applicable if it concerned the exchange of information upon request or spontaneously. The person from whom the information originated had to be notified of the envisaged exchange. This notification was also required in a pure domestic context when the information was required by the Dutch tax authorities in a domestic tax assessment procedure. The taxpayer did not have to be notified separately. Only when the information was however obtained via the taxpayer (i.e. the taxpayer itself was the information holder), he had to be notified.

Upon receiving the notification the person whom the information originated from could appeal against the exchange of information but had to do this within ten days. Note that the standard time period within which an administrative objection or appeal must be lodged is six weeks. Subsequently such a person could start a procedure before the court in order to suspend the actual exchange of information. According to a letter of the State secretary of finance, this whole procedure could take around ten to eighteen-and-a-half weeks. The purpose of the procedure was to enable the person whom the information originated from to check whether the information to be exchanged was correct.[31]

5.3 Information Order Procedure

In 2007, the Court of Appeal of The Hague ruled in a case where the Netherlands had received a request to exchange information from another state.[32] The Dutch tax authorities subsequently ordered a Dutch trust office to give access to the administration over the years 2003 up until 2005 of specific companies which the trust office managed. The trust office appealed against this order of the Dutch tax authorities. The question arose whether the trust office was able to legitimately appeal the order to give access to the information.

The Court of Appeal of The Hague ruled that a legal remedy is available from the moment the investigation by the Dutch tax authorities is announced.

This legal remedy therefore precedes the existing possibility to object and appeal against the notification that Dutch affected parties receive when information is provided to a foreign authority. The State secretary of finance considered these two back-to-back legal remedies as a serious delay in the practice of international information exchange.[33] In order to prevent stagnation of the international exchange of information, also in the short term, the State secretary decided in 2007 to introduce an amendment to Dutch law even before the Dutch Supreme Court issued a ruling. The amendment stated that no appeal or objection can be lodged against the announcement of the Dutch tax authorities that an investigation is to be carried out in order to provide information to a foreign tax authority, or against the investigation itself (inter alia an information order). And if no appeal is possible, then under Dutch law no objection is possible either. The State secretary stated that this adjustment is in line with the practice under international law. After the adjustment only one legal remedy was open: the notification procedure when the Dutch tax authorities intended to provide information to a foreign state.

5.4 Abolishment of the Notification Procedure

In 2013, the State secretary of finance conducted research on whether other tax treaty partners also had notification procedures like the one according to Dutch law in their national legislation.[34] The State secretary concluded that the Dutch notification procedure was compared to the other EU Member States unique. Since the practice of exchanging information internationally had shifted primarily to the exchange of information on an automatic basis and less upon request or spontaneously, the Dutch legislation abolished the notification procedure. This abolishment would also speed up the process of information exchange and therefore be more effective in combating tax evasion according to the Dutch legislator.[35]

5.5 Current Practice

After the amendment in 2007 and the abolishment in 2013, the current state of Dutch law is that in principle no legal remedies are possible to challenge an information order made by the Dutch tax authority for it to be able to exchange information with a foreign state or against the intended exchange of information itself with this state. In a recent letter, the State secretary of finance took État luxembourgeois into account and stated that information holders who are not the taxpayer can challenge an information order made by the Dutch tax authorities before a civil court.[36] He stated that the taxpayer, when he is also the requested information holder, can appeal against the information order and the exchange of information in the tax assessment procedure in the foreign state that received the information from the Dutch tax authorities.

There is a flaw in the line of reasoning of the State secretary. It is very uncertain whether a court in a foreign state, will, in a tax assessment procedure initiated by the tax payer take the Dutch (procedural) law into account which is the basis of the information order by the Dutch tax authorities. The court might only decide about the

31 Dutch parliamentary documentation: *Kamerstukken II* 2013/14, 33753, nr. 7 (Dutch only).

32 Dutch case law: Hof Den Haag 25 August 2007, ECLI:NL:GHSGR:2007:BB4858 (Dutch only).

33 Dutch parliamentary documentation: *Kamerstukken II* 2007/08, 31206, nr. 15 (Dutch only).

34 Dutch parliamentary documentation: *Kamerstukken II* 2012/13, 25087, nr. 53).

35 For a more extensive discussion: K.R.C.M. Jonas and J.A.R. van Eijsden, De kennisgeving vooraf bij internationale uitwisseling van informatie verdwijnt. En daarmee de rechtsbescherming ook!, *WFR* 2013/1180 (Dutch only).

36 Dutch parliamentary documentation: Letter of 21 September 2021, 'Prinsjesdagbrief fiscale moties en toezeggingen aan de Eerste Kamer', kenmerk: 2021-0000186083.

usage of the information received by the tax authority but not specifically regarding the infringement of the taxpayer (being the information holder) his Charter rights by the domestic information order itself. Moreover, a taxpayer will remain empty handed if the foreign state decides not to impose a tax assessment. The information, which might be incorrect, is by then already exchanged so there is no way back.

It is also interesting that the amendment of 2007 stating that no appeal can be lodged against an information order is not abolished. The ECJ in Berlioz and later in État luxembourgeois was quite clear that there must be legal protection for information holders that are ordered to send information to their national tax authority for it to fulfil a request for information made by the tax authority of another Member State. An explanation for the amendment of 2007 still being applicable law is that the amendment only blocks the procedure before the administrative court of law and the tax department of the Dutch Supreme Court and not before the civil court of law. In Dutch literature, the amendment is therefore deemed to be a dead letter and some writers even conclude that it is in violation of EU law.[37] According to a letter of the State secretary of finance dating from after the discussion in Dutch literature, the amendment is not in violation with EU law since it only blocks a procedure before an administrative court and not before the civil court.[38]

5.6 Further Application of the Administrative Law Judgment?

The main question now is what an information holder being the taxpayer can do if he is being requested to provide information. As discussed in section 5.5, the State secretary of finance is of the opinion that the taxpayer can discuss the legality of the information order before the court of the requesting (Member) State in a tax assessment procedure. We however think that there is another option for this taxpayer.

If we take the ruling of the highest Dutch administrative court regarding the shell entity and compare it with the Berlioz and État luxembourgeois cases, there are in our opinion some similarities. The highest Dutch administrative court ruled that having to provoke a penalty in order to be able to appeal the decision of the Dutch tax authorities is disproportionate.[39] The administrative law judgment found in the administrative law was introduced to undo this disproportionality.

If the Dutch tax authorities receive a request to exchange information from another (Member) State, they need to conclude whether the requested information is of 'foreseeable relevance' for tax purposes for the requesting (Member) State. In the situation that an information holder, regardless whether he is also the taxpayer or not, receives an information order from the Dutch tax authorities stating that he needs to send information to them, it could be stated that the Dutch tax authorities are of the opinion that the requested information by the foreign (Member) State is of 'foreseeable relevance'. This opinion by the Dutch tax authorities can be stated as an administrative law judgment. However, this does not automatically result in an appeal possibility. According to the highest Dutch administrative court, it is required that the administrative law judgment also works out disproportionately for the persons involved when they want to challenge the decision of the Dutch tax authorities. Only if an administrative law judgment is working out disproportionate for persons involved it may be challenged before the administrative court. In the earlier mentioned shell entity case, the court ruled that there was no legal protection in place. The court highly doubted the likelihood of a foreign court ruling over the Dutch procedure regarding the shell entity. This is in addition to the fact that the alternative way to create an ability to appeal was not to comply with the information order and thereby provoke a penalty, making the court rule that the information holder is able to appeal the decision. The same situation is applicable to the information holder which is being asked to send the information. As we concluded earlier, it is not a certainty that the foreign tax authority will file a tax assessment and subsequently if the foreign court will rule on Dutch procedural law. The alternative for an information holder is to not meet the information order and thereby provoke a fine which can be appealed.

In short, we do think that the highest Dutch administrative court will in the 'normal' situation of being an information holder (despite its status) receiving an information order from the Dutch tax authorities to enable it to meet a request to exchange information (both DAC and non-DAC), rule that this information holder is able to challenge the legality of this information order.

6 Suggestions

Creating the 'ideal' legal protection for the exchange of information framework for both the tax authorities and the information holders is easier said than done. The problem is that tax authorities (of both the requesting (Member) State as the requested (Member) State) are helped with fast and efficient procedures for them to exchange information and assess the tax position of the taxpayer being involved. The information holder (and taxpayer) want the information being exchanged to be lawful and correct.

We would therefore like to suggest a compromise. Providing no legal protection at all is not an option, but a prolonged discussion regarding the information to be exchanged is not an option either. In our opinion, a good

37 See for a discussion about the status of the amendment (Art. 8 under 6 WIB): W. Boei, Rechtsbescherming bij fiscale internationale gegevensuitwisseling anno 2021, *WFR* 2021/144 and the sources referred to in this article (Dutch only).

38 Dutch parliamentary documentation: Letter of 21 September 2021, 'Prinsjesdagbrief fiscale moties en toezeggingen aan de Eerste Kamer', kenmerk: 2021-0000186083.

39 The same was ruled by the ECJ in État luxembourgeois regarding an information order for an information holder not being the taxpayer.

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compromise would be when the abolished notification procedure that was part of Dutch law is reinstated again; however, this procedure needs some altering.[40] The tax authorities should notify both the information holder and the taxpayer when they intend to exchange information. The information holder and the taxpayer should then have a short period after being notified (for example, two weeks/ten working days) to file an appeal before an administrative court against the intended exchange. During this appeal, the procedural requirements could be checked (for example, whether the requested information is of foreseeable relevance) by an administrative court and whether the information to be exchanged is correct. If this administrative court rules that the exchange of information is lawful, the Dutch tax authorities may exchange the information. The information holder and the taxpayer may appeal the decision of this administrative court, but this will not delay the exchange of information. This is in order to not further delay the exchange of information process. It should therefore be no longer possible to appeal against the information order the information holder receives from the tax authorities. Only against the notification of the intended exchange itself.

7 Conclusion

In the situation where the tax authority orders information from its own residents in response to a request for information from another state based on the DAC or a treaty there is in principle legal protection for that information holder. Since the OECD Model Tax Treaty and the DAC both have the 'foreseeable relevance' requirement of the information they wish to receive from another state upon request and the ECJ and ECtHR often interpret the fundamental right having an 'effective remedy' (Art. 47 Charter vs. Art. 13 ECHR) the same,[41] there are leads to think the ECtHR would rule the same as in Berlioz and État luxembourgeois and therefore rule that then also legal protection should exist. The lawfulness of the information order by the tax authority can therefore be questioned by the information holders before a court of law. In DAC situations, the court must then examine whether the reasoning of both the request of the tax authorities and the underlying request of the other Member State relates to information which does not lack foreseeable relevance for taxation in that other Member State. In situations of exchanging information on non-DAC basis, like, for example based on a tax treaty or a tax information exchange agreement (TIEA), there is no case law that gives any legal protection. Against the actual exchange of information from a state to another state, no minimum standard of legal protection exists. Based on EU and international law, there is no notification obligation to the taxpayer or relevant parties for a state when it decides to request for the exchange of information from another state or when a state decides to fulfil a request for this exchange of information by another state.

In the Netherlands, the Dutch highest administrative court introduced some legal protection for a specific situation for alleged shell entities. This ruling gives in our opinion some leads to conclude that the legal protection offered by this court can be applied in the situation that an information holder (despite his status) is being ordered to send information to the Dutch tax authorities.

Finally, in our view there is also the possibility of introducing an appeal procedure against the exchange of information which should both accommodate the benefit for the tax authorities of having an efficient exchange of information process, and at the same time fill the need for legal protection of information holders and tax payers. In short, this would entail an amended version of what used to be part of Dutch law in the past, whereby the information holder received a notification of the intended exchange of information. The information holder could subsequently file an appeal against the intended exchange of information. We suggest to reinstate this procedure again, but with two limitations: (i) the appeal should be lodged within a short time period, and (ii) if the appeal is denied, the exchange of information would no longer be postponed, even when a further appeal is filed against the court's decision to deny the initial appeal.

40 For a similar view, see L. Hendriks and J. van Dam, Recente ontwikkelingen op het gebied van gegevensuitwisseling binnen de EU en de implicaties voor Nederland, *NLF-W* 2021/17 (Dutch only).

41 For example in the Othymia Investments BV ruling of the ECtHR.

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