

Exchange of Information and Fundamental Rights:

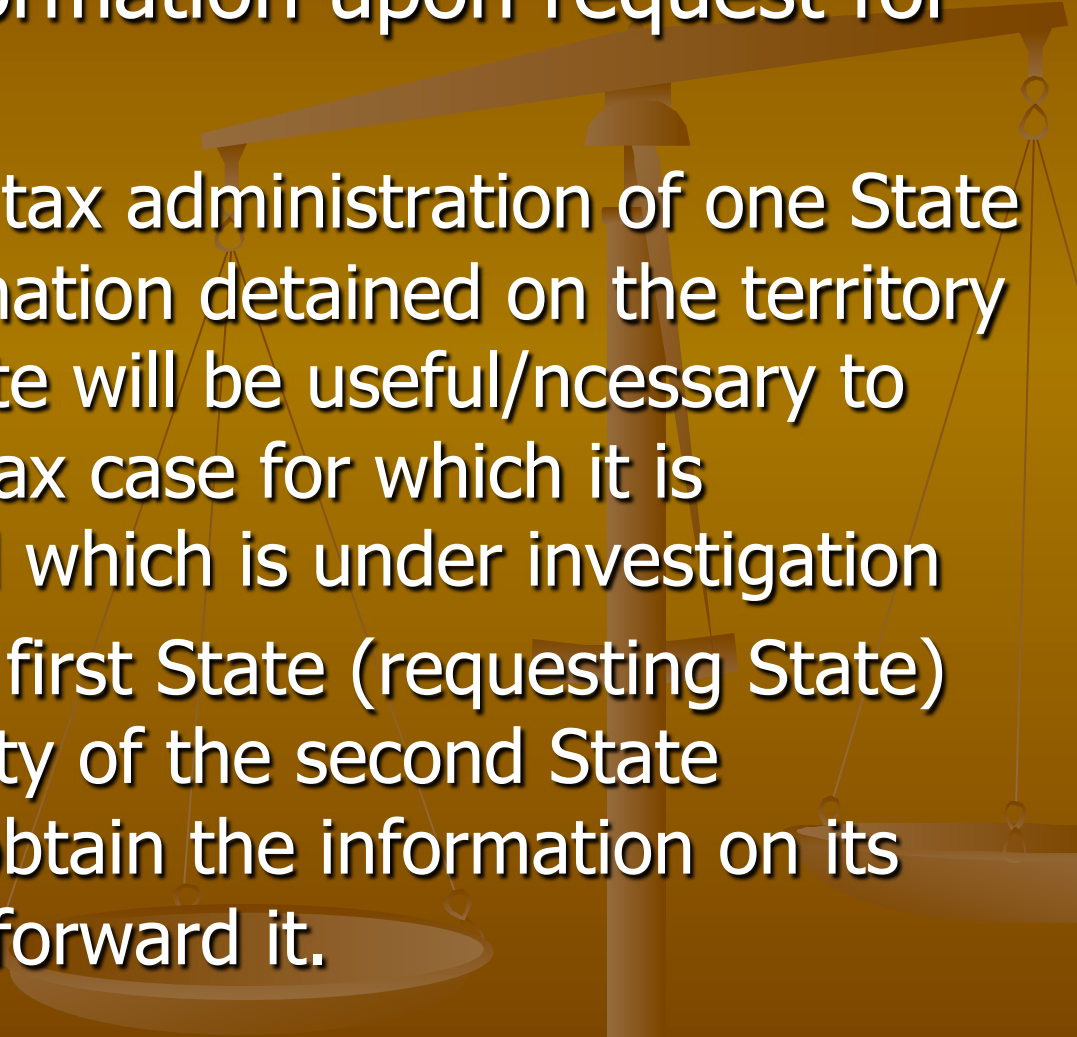
The Berlioz Investment Fund Case

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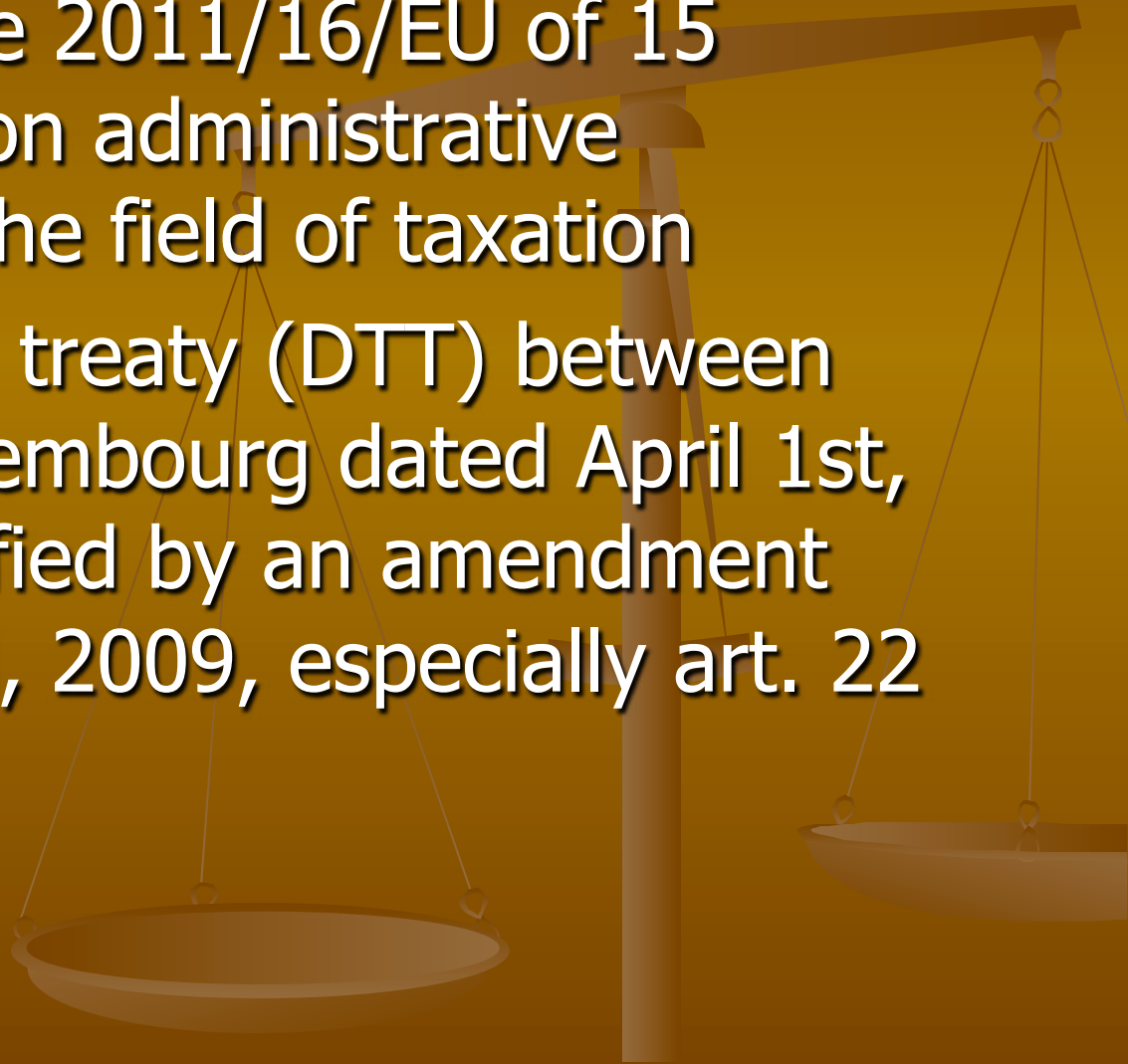


Global subject of the case

- Exchange of information upon request for tax purposes
 - Case where the tax administration of one State finds that information detained on the territory of the other State will be useful/necessary to solve a certain tax case for which it is competent and which is under investigation
 - Authority of the first State (requesting State) asks the authority of the second State (requested) to obtain the information on its territory and to forward it.
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Supranational legal framework

- Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation
- Double taxation treaty (DTT) between France and Luxembourg dated April 1st, 1958, last modified by an amendment signed June 3rd, 2009, especially art. 22



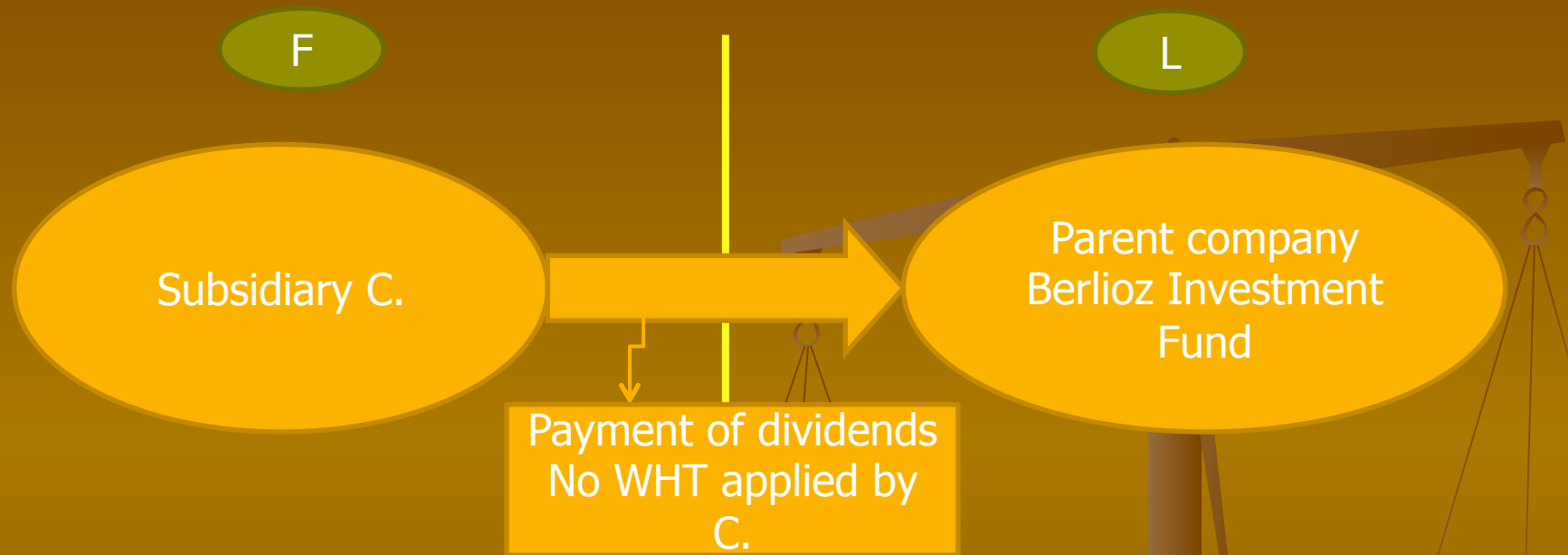
National legal framework

- Until December 1st, 2014 → law March 31st, 2010 approving certain DTT and amendments and providing for the procedure concerning exchange of information
 - Examination of a foreign request by Director of Administration des Contributions directes as competent authority
 - If considered as valid → injunction by the director to the holder of information to give information for exchange
 - Legal action possible against the injunction before the administrative tribunal – possibility of appeal
 - If holder of information did not comply → possibility of an administrative fine of up to 250.000 €
 - Legal action possible against the fine before the administrative tribunal – possibility of appeal

National legal framework

- From December 1st, 2014 onwards → law November 25th, 2014 concerning the procedure for the exchange of information regarding taxes → changes
 - No legal action admissible against an injunction decision of the director
 - Possibility to forbid the holder of information to inform the concerned tax payer about the request of information (« no tipping off »)
 - Foreign request for information is confidential and cannot be communicated by the director
 - Legal action only possible against the fine before the administrative tribunal – possibility of appeal

Berlioz Case – facts



- Berlioz Investment Fund SA holds capital of a French subsidiary C.
- Subsidiary pays dividends to Berlioz without withholding tax on dividends (2011 + 2012)
- French administration controls respect of conditions of withholding tax exemption

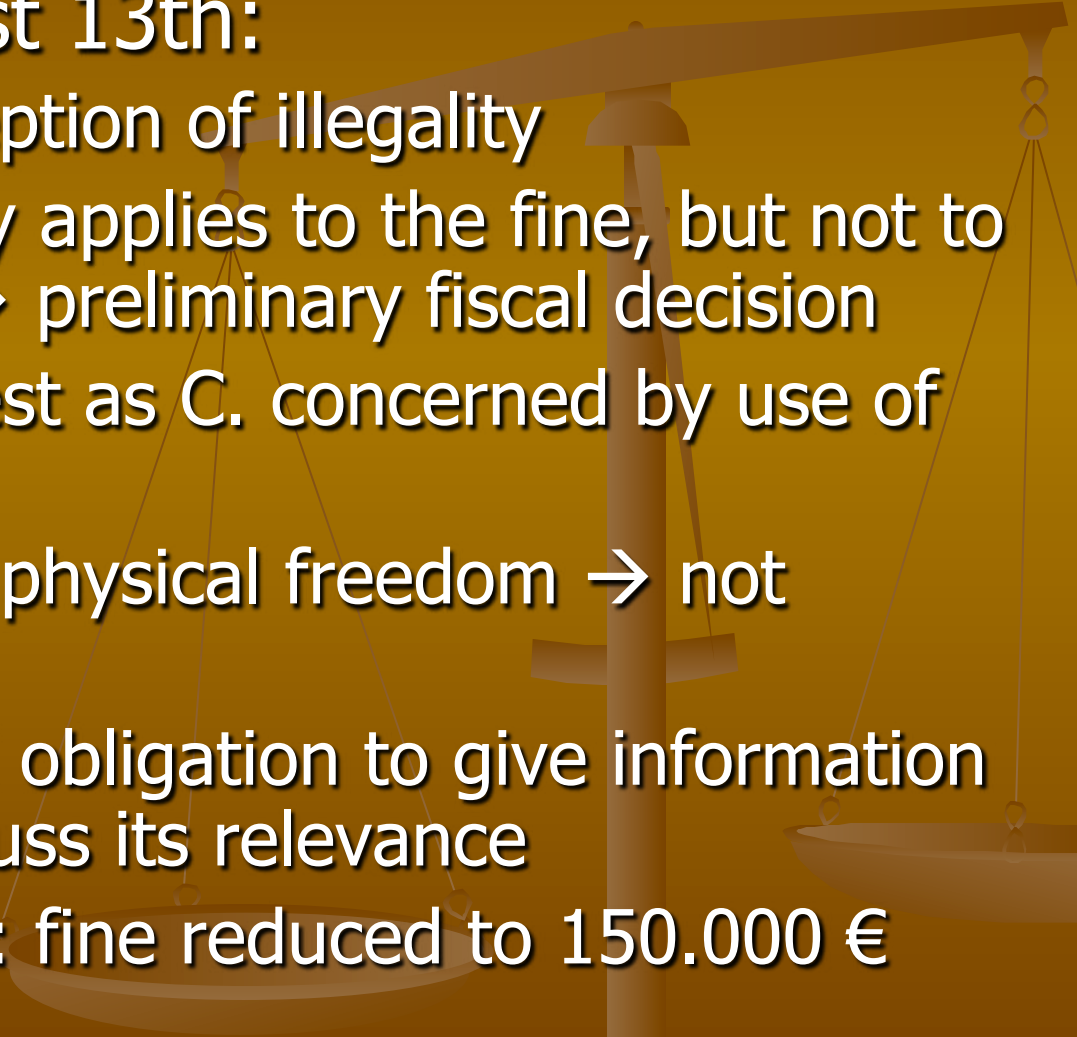
Berlioz Case – facts

- French authorities → art. 119ter CGI: condition to give identities of shareholders of parent company
- Subsidiary C. → exemption founded on CJEU December 14, 2006, Denkavit International BV → information on identities not necessary for exemption
- French authorities → December 3rd, 2014: request for information to Luxembourg → informations about substance + effective residence of Berlioz in Luxembourg + identities of shareholders of Berlioz
- March 16th, 2015: Director's injunction to Berlioz to give those informations
- Berlioz gives informations about its substance + effective residence but refuses to give identities of its shareholders
- May 18th, 2015: Director imposes fine of 250.000 € on Berlioz for not having entirely complied with the injunction
- June 18th, 2015: legal action against fine by Berlioz before administrative tribunal

Berlioz Case - arguments

- Proportionality of the fine
- Exclusion of any control of the injunction even in the framework of a legal action against the fine = violation of art. 6 ECHR
 - Criminal matter
 - Right to equal treatment of parties + to effective remedy
 - Necessity that the juge may control the validity of the injunction → foreseeable relevance of the information
 - Right to access to the French request
- Violation of art. 12 Constitution → right of defense
- Condition of foreseeable relevance is not met

Berlioz Case – judgment 1st instance

- Judgment August 13th:
 - No general exception of illegality
 - Art. 6 ECHR only applies to the fine, but not to the injunction → preliminary fiscal decision
 - Berlioz no interest as C. concerned by use of information
 - Art 12 Const. = physical freedom → not relevant
 - Holder has legal obligation to give information and cannot discuss its relevance
 - Proportionnality: fine reduced to 150.000 €
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Berlioz Case – appeal

■ Berlioz

- Argues again violation of art. 6 ECHR
- Adds argument of absence of exhaustion of internal investigations in France

■ Court

- New law from November 25th, 2014 applies as French request = dated December 3rd, 2014
- French request based on DTT + directive 2011/16
- Directive prevails over DTT in relations between Member States (CJEU October 11th, 2007, ELISA, C-451/05)
- → decisions are measures to execute obligations of Luxembourg under the directive
- Considering n° 28 directive: respects Charter of Fundamental Rights in the European Union
- → legal logic imposes to examine applicability of protecting rules which are part of the same legal order of EU-law, i.e. the Charter, before referring to ECHR

Berlioz Case -appeal

- Question of applicability of the Charter
 - Art. 51 (1): « *addressed to the ... Member States only when they are implementing Union law* »
 - CJEU February 26th, 2013, C-617/10, Fransson: Scope of application of EU-law + CJEU July 10th, 2014, C-198/13, Hemandez: « *degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other* »
 - Here application of directive 2011/16 → obligation of cooperation with other Member States
 - Execution of these obligations → art. 5 (3) + 18 (1): reference to national procedures and no particular procedures in directive → use of national measures to satisfy obligations under directive 2011/16 to be considered as implementing EU-law → CJEU October 22nd, 2013, C-276/12, Sabou
 - This should also apply for fines → VAT fine in Fransson case
 - → good reasons to conclude that the Charter should apply

Berlioz Case - appeal

- Supposing that Charter applies, several fundamental rights could be touched:
 - Respect for private and family life, home and communications (art. 7)
 - Respect of personal data (art. 8)
- If at least one right is touched → application of art. 47: right to an effective remedy and to a fair trial
 - Reference to art. 6 ECHR: judge must have right to analyse all points of facts and law; administrative decisions cannot impose themselves unless taken under conditions in line with art. 6
 - But here precisely injunction against which no remedy was possible → opposability would entail automatic fault
- → Applicability of art. 47 can be validly argued

Berlioz Case - appeal

- Art. 52 (1): limitations possible??
 - Here situation of holder of information in requested country
 - Obligated to give information in his possession for purpose regarding another person
 - No legal action in requesting country → only concerned taxpayer in requesting country
 - No further legal action in his own country in the framework of his own taxation as request outside of personal taxation procedure
 - → stand-alone administrative decision imposing an obligation which cannot be questioned even at stadium of sanction for non-compliance??
 - Is argument that information will not be used against the holder but against another taxpayer sufficient to deny interest to act and right to a legal remedy?? Rule of law??
- Conclusion: here certain probability that Charter applies → control of injunction to be made by judge in framework of action against fine

Berlioz Case - appeal

- Questions on application of directive 2011/16
 - Is foreseeable relevance of requested information a condition for the validity of an injunction?
 - Is the competent authority of the requested State allowed to control the respect of the condition of foreseeable relevance?
 - Must the judge in the requested country be allowed to control the respect of formal + material conditions for exchange → art. 47 Charter?
 - Must the foreign request of information be submitted by the State in the framework of a legal action → art. 47 Charter?

Berlioz Case - result

- December 17th, 2015: judgment by Court requesting preliminary rulings on 6 questions
 1. Does the Charter apply to a fine against the holder of information for non compliance to an injunction which is an execution of directive 2011/16
 2. Can the holder of information invoke art. 47 Charter to question the justification of the request?
 3. Must the judge in requested State have the power to control validity of the injunction at least in framework of an action against a fine for non-compliance
 4. Is foreseeable relevance a condition for validity of request and for causing obligation for requested state to execute it?
 5. Must the national authority + judge of requested State be allowed to control the respect of all formal + material conditions and more particularly foreseeable relevance?
 6. Can a national law exclude the submission of the foreign request to the competent judge in requested country

... and now the ball is in the
court of the CJEU!!!!



Bend it like
Beckham!!

