



**According to Advocate General Kokott, the addressee, the taxpayer concerned and other concerned third parties must be able to obtain judicial review of an order to provide information made in the context of the cross-border exchange of information between tax authorities**

*Excluding such a possibility of legal protection infringes the right to an effective remedy enshrined in the Charter of Fundamental Rights of the European Union*

In October 2016 and March 2017 the Spanish tax authority, acting on the basis of the Luxembourg-Spain tax convention<sup>1</sup> and the directive on administrative cooperation in the field of taxation,<sup>2</sup> requested information from the Luxembourg tax authority concerning an artist residing in Spain.

The Luxembourg tax authority did not itself have the requested information. In order to comply with the first request for information, it therefore required a Luxembourg company to provide it with copies of the contracts concluded between that company and other companies concerning the artist's rights and with other documents, in particular copies of related invoices and bank account details. In accordance with Luxembourg law as then in force,<sup>3</sup> it was stated that that requirement could not be challenged in legal proceedings. Luxembourg law also provides that a fine of a maximum of €250,000 may be imposed upon a holder of information who does not comply with such an order within one month.

In order to comply with the second request for information, the Luxembourg tax authority required a Luxembourg bank to give it information concerning accounts, account balances and other assets of the taxpayer herself and concerning assets which she held for other companies controlled by her. Here too, a challenge by way of legal proceedings was precluded.

Nevertheless, the Luxembourg company to which the first order was addressed (C-245/19), the Luxembourg bank to which the second order was addressed, the companies mentioned in it and the artist challenged the orders before the Luxembourg courts.

The Cour administrative (Higher Administrative Court, Luxembourg), before which those legal disputes have been brought on appeal, wishes to ascertain from the Court of Justice whether the order to provide information<sup>4</sup> already constitutes an interference with the fundamental rights of the person required to provide information, the taxpayer and other concerned third parties against which an effective remedy must lie under Article 47 of the Charter of Fundamental Rights of the European Union.

<sup>1</sup> Tax convention between Luxembourg and Spain of 3 June 1986.

<sup>2</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1). This directive has in the meantime been amended by Council Directive (EU) 2018/822 of 25 May 2018 (OJ 2018 L 139, p. 1). The Member States must apply from 1 July 2020 the provisions by which they comply with that amendment.

<sup>3</sup> Pursuant to a legislative amendment that entered into force on 9 March 2019, *the holder of information* (that is to say, the addressee) may now challenge before the administrative court the order addressed to it.

<sup>4</sup> Case: [C-682/15](#) Berlioz Investment Fund, see also Press Release No. [53/17](#) a person required to provide information in the context of an exchange between national tax administrations pursuant to Directive 2011/16 is entitled in the requested Member State to indirect review of the legality of the order to provide information by challenging the decision by which the requested authority has imposed a pecuniary penalty on account of his refusal to provide information.

Furthermore, the Cour administrative asks how specifically and precisely the request must be drafted in relation to the persons concerned, so that the requested tax authority can assess the 'foreseeable relevance' of the requested information for the tax procedure in the other Member State. Only foreseeably relevant information is covered by administrative cooperation under the directive.

In today's Opinion, Advocate General Juliane Kokott proposes that the Court rule in answer to the first question that **the decision by which an authority requested for support pursuant to Directive 2011/16 requires a person to provide information on a taxpayer or third parties can be challenged by that person, the taxpayer and concerned third parties before the courts of the requested Member State.**

According to the Advocate General, **the addressee of the order to provide information** is automatically entitled, under Article 47 of the Charter, to judicial review of the legality of that decision, because that order constitutes a legal measure adversely affecting the addressee. There is accordingly no need to decide whether or which (other) fundamental rights of the addressee guaranteed by the Charter may have been infringed.

Since the obligation of a third party to transmit a taxpayer's personal data interferes in any event with the latter's fundamental right to the protection of such data, **the taxpayer concerned** can also have the legality of such an order to provide information reviewed by a court under Article 47 of the Charter. The possibility of challenging any subsequent tax assessment does not provide sufficient protection of the taxpayer's fundamental right to data protection.

As regards **concerned third parties** (here, several companies), the Advocate General points out that under the case-law the fundamental right to the protection of personal data (Article 8 of the Charter) relates in principle to natural persons. Legal persons may, however, in any event rely on the fundamental right to respect for private and family life (Article 7 of the Charter) where, as here, information concerning bank accounts and assets is demanded. Such third parties too can therefore obtain judicial review of the order to provide information, under Article 47 of the Charter.

Consequently, the exclusion of legal protection for the addressee of the order to provide information, for the taxpayer concerned and for concerned third parties infringes Article 47 of the Charter.

With regard to the second question, Advocate General Kokott proposes that the Court answer that **the requesting authority must justify the request for information so that the requested authority can examine whether the information sought does not clearly lack foreseeable relevance for the requesting authority's tax assessment. The request must contain specific indications of the facts and transactions that are relevant for tax purposes, so that impermissible fishing expeditions are precluded.**

Thus, the requesting authority must normally include in the request for information the facts that it would like to investigate or at least specific grounds for suspecting those facts and their relevance for tax purposes. This must enable the requested State to justify before its courts interference with the fundamental rights of the addressee, the taxpayer or concerned third parties that is attributable to the administrative cooperation. The requirements imposed by the duty to state reasons increase with the extent and sensitivity of the information sought.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*Press contact: Jacques René Zammit ☎ (+352) 4303 3355*