

Case C-245/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

20 March 2019

Referring court:

Cour administrative (Luxembourg)

Date of the decision to refer:

14 March 2019

Appellant:

State of the Grand Duchy of Luxembourg

Respondent:

B

I. Subject matter and circumstances of the dispute

- 1 By letter of 16 June 2017 ('the decision of 16 June 2017'), the directeur de l'administration des contributions directes de Luxembourg (Director of the Direct Taxation Administration, Luxembourg) ordered the company B to provide him with certain information concerning Ms F.C., as follows:

'... On 18 October 2016, the competent authority of the Spanish tax administration sent us a request for information pursuant to the tax convention between Luxembourg and Spain ... and Council Directive 2011/16/EU of 15 February 2011, transposed into domestic law by the Law of 29 March 2013.

...

The natural person concerned by the request is Ms F.C., born on ..., residing in ..., Spain. The legal person concerned by the request is B, a company incorporated under Luxembourg law with its registered office at [address].

Please provide us with the following information and documents in relation to the period 1 January 2011 to 31 December 2014 ...:

- Please provide copies of the contracts concluded by the company B with the companies E and F in relation to the rights of the artist Ms F.C..
- Please provide copies of any other contract from the financial years 2011 to 2014 and any other contract concluded earlier or later but taking effect in the aforementioned financial years in relation to the artist Ms F.C..
- Please provide copies of all invoices issued or received in connection with those contracts, and the method of their collection and payment.
- Please provide details of the bank accounts and financial institutions in which the cash shown on the balance sheet is deposited.

...

In accordance with Article 6 of the Law of 25 November 2014 ..., no action may be brought against this information order ...’.

- 2 B nevertheless brought an action before the tribunal administratif (Administrative Court, Luxembourg) on 17 July 2017.
- 3 By judgment of 26 June 2018, the Administrative Court disapplied Article 6 of the Law of 25 November 2014 on the basis of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’), allowed the action and annulled the decision of 16 June 2017 in so far as it ordered B to supply information that went beyond the following documents:
 - copies of its contracts concluded with the companies ‘E’ and ‘F’ in relation to Ms F.C.’s rights;
 - copies of all invoices issued or received in connection with those contracts, and the method of their collection and payment;
 - details of the bank accounts and financial institutions in which the cash shown on the balance sheet was deposited.
- 4 On 24 July 2018 the State of the Grand Duchy of Luxembourg brought an appeal against that judgment before the Cour administrative (Higher Administrative Court, Luxembourg).

II. Provisions at issue

EU law

Charter of Fundamental Rights of the European Union

- 5 Article 7, entitled ‘Respect for private and family life’, reads as follows:

‘Everyone has the right to respect for his or her private and family life, home and communications’.

6 Article 8, entitled ‘Protection of personal data’, reads as follows:

‘1. Everyone has the right to the protection of personal data concerning him or her....’

7 Article 47, entitled ‘Right to an effective remedy and to a fair trial’, provides:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’.

8 Article 52, entitled ‘Scope and interpretation of rights and principles’, provides:

‘1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

...

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

...’

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

9 Article 1, entitled ‘Subject matter’, provides:

‘1. This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2...’

10 Article 5, entitled ‘Procedure for the exchange of information on request’, provides:

‘At the request of the requesting authority, the requested authority shall communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries.’

Luxembourg law

Loi du 25 novembre 2014 prévoyant la procédure applicable à l’échange de renseignements sur demande en matière fiscale (Law of 25 November 2014 laying down the procedure applicable to the exchange of information on request in tax matters)

Article 1

‘1. This Law shall apply from its entry into force to requests for exchange of information in tax matters made by the competent authority of a requesting State pursuant to:

...

4. the amended Law of 29 March 2013 on administrative cooperation in the field of taxation *;...’

Article 3

‘1. The competent tax administration shall verify that the request for exchange of information is in order. A request for exchange of information shall be considered to be in order if it states the legal basis, identifies the competent

* Loi du 29 mars 2013 portant transposition de la directive 2011/16/UE du Conseil du 15 février 2011 relative à la coopération administrative dans le domaine fiscal et abrogeant la directive 77/799/CEE ... (Law of 29 March 2013 transposing Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC ...).

authority making the request and contains the other information prescribed by Conventions and laws.

...

3. If the competent tax administration is not in possession of the requested information, the director of the competent tax administration or his authorised representative shall notify the holder of the information by registered letter of his decision requiring the requested information to be provided (information order). Notification of that information order to the holder of the requested information shall constitute notification to any other person referred to therein.

...'

Article 5

'1. If the requested information is not provided within one month from the date of notification of the information order, the holder of the information may be subject to an administrative fine of a maximum of EUR 250 000. The amount of the fine shall be fixed by the director of the competent tax administration or his authorised representative.'

Article 6

'1. No action may be brought against a request for exchange of information or an information order as referred to in Article 3(1) and (3).

2. The holder of the information may apply to the Administrative Court for a decision referred to in Article 5 to be varied. The action must be brought within one month of notification of the decision to the holder of the requested information. The action shall have suspensive effect. By way of derogation from the legislation relating to procedure in the administrative courts and tribunals, each party may lodge no more than one pleading, including the application initiating proceedings. The reply must be provided within one month of the date on which the application initiating proceedings was lodged at the registry of the Administrative Court. However, if the preparation of the case so requires, the President of the Chamber called upon to hear and determine the case may, of his own motion, order additional pleadings to be produced within a period which he shall determine. The Administrative Court shall rule within one month of the date on which the reply is lodged or of the date on which the time limit for the lodging of additional pleadings expires.'

III. The position of the appellant

- 11 The Luxembourg State submits that an information order may not be the subject of an action before the administrative courts except in the context of a challenge to a decision imposing a financial penalty. According to the Luxembourg State, the

possibility of bringing proceedings before the administrative courts to challenge the administrative fine, provided for in Article 5(2) of the Law of 25 November 2014, constitutes an effective remedy within the meaning of Article 47 of the Charter.

- 12 Even if a right of action exists, the Luxembourg State recalls that, in the judgment in *Berlioz*, the Court of Justice defined the limits on judicial review in the requested State when it confirmed that ‘the courts must merely verify that the information order is based on a sufficiently reasoned request by the requesting authority concerning information that is not — manifestly — devoid of any foreseeable relevance having regard, on the one hand, to the taxpayer concerned and to any third party who is being asked to provide the information and, on the other hand, to the tax purpose being pursued’ (judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 86).
- 13 The Luxembourg State considers that the Administrative Court misinterpreted the applicable provisions in finding that the request of the Spanish authorities was intended, in a general and abstract manner, to discover general information about other contracts, the existence of which was not established but merely suspected by the Spanish tax authorities. By thus requiring the Spanish authorities to provide further details which could lead to the admission of the existence of other contracts likely to be relevant to the taxation case in question, the Administrative Court went beyond the requirements set out in the international standard for the exchange of information, as described in the commentary on Article 26 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Cooperation and Development (OECD) (‘the Model Convention’).
- 14 The Luxembourg State argues that information relating to contracts other than those concluded by the respondent with the companies referred to in the decision of 16 June 2017 is of foreseeable relevance for the Spanish authorities’ investigation with regard to the identity of the taxpayer concerned and the tax purpose pursued. It considers that the request would, in that regard, be validly limited to contracts which were, first, concluded by the respondent; secondly, applicable during the tax years covered by the Spanish authorities’ investigation and, thirdly, related to the taxpayer in question.

IV. Assessment by the Higher Administrative Court

- 15 The Higher Administrative Court confirms, first of all, that the Charter does indeed apply to the present case since the Luxembourg legislation at issue implements EU law. It refers in that regard to the judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 37): ‘while it refers to the measures aimed at gathering information that exist under national law, Directive 2011/16 thus requires Member States to take the necessary measures to obtain the requested information in a way that is consistent with their obligations in relation to the exchange of information’.

16 In those circumstances, the competent authority of the requested Member State implements EU law when it issues decisions requiring the holders of information to provide the information requested by an authority of another Member State, meaning that the provisions of the Charter also apply to the contested information order.

A. *The first question referred*

- 17 The Higher Administrative Court states, however, that, in the present case, proceedings were brought directly against the initial measure taken at the first stage of the procedure for the exchange of information in the requested State, namely against the decision of 16 June 2017, without waiting for an administrative penalty to be imposed at the second stage of the procedure for failure to comply with that decision. In its judgment in *Berlioz*, the Court of Justice did not, however, rule on the interpretation of Article 47 of the Charter at the first stage of the procedure for the exchange of information, namely at the stage of the actual information order.
- 18 According to the Explanations relating to the Charter, the rights guaranteed in Article 7 (respect for private and family life) correspond to those guaranteed by Article 8 of the European Convention on Human Rights ('the ECHR'). To take account of developments in technology the word 'correspondence' has been replaced by 'communications'. In accordance with Article 52(3) of the Charter, the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR.
- 19 It emerges from the case-law of the European Court of Human Rights ('the ECtHR') that the transmission of clients' banking data by the State of the bank which is the custodian of the account to the authorities of another State, in this case the State of residence, in the context of an exchange of information is to be classified, at the latest at the time of actual transmission to the State of residence, as interference with the right to respect for private life, which is justified only if it satisfies the conditions laid down in Article 8(2) of the ECHR (ECtHR, 22 December 2015, *G.S.B. v. Switzerland*, Case 28601/11).
- 20 On the other hand, in relation to the exchange of information, the ECtHR also applies its case-law on the positive obligations of States and the procedural safeguards which they must provide in order to ensure effective protection of the rights deriving from Article 8 of the ECHR, on the basis of that provision alone, independently of Article 6 of the ECHR. The positive obligations are both substantive, in that they must ensure the effective exercise of protected rights, and procedural, in that the effective enjoyment of the right protected under Article 8 of the ECHR means that the decision-making process must be fair and make it possible properly to observe the interests protected therein (ECtHR, 20 March 2007, *Tysiac v. Poland*, Case 5410/03, and ECtHR, 14 February 2006, *Turek v. Slovakia*, Case 57986/00).

- 21 There are therefore substantial grounds for interpreting Articles 7 and 52(1) of the Charter, whether or not read in conjunction with Article 47 thereof, as meaning that the decision of 16 June 2017 ordering the respondent, with a view to an exchange of information with the Spanish authorities, to provide information concerning contracts it had concluded relating to the taxpayer, the associated invoices and the details of the respondent's bank accounts, must be classified as State interference with the respondent's private life, triggering an obligation on the part of the requested Member State to provide in its legislation for procedural guarantees in order to ensure effective protection of the rights deriving from Article 7 of the Charter, or even to put in place effective remedies in accordance with Article 47 of the Charter.
- 22 The Higher Administrative Court adds that it is also necessary to consider Article 8 of the Charter, which ensures the protection of natural persons with regard to the processing of personal data, since the collection of information from a third party may, under certain conditions, be understood as constituting such processing and since that protection is regarded as part of the protection afforded by Article 8 of the ECHR.
- 23 Considering that the Court of Justice has not yet had the opportunity to state its views either on the existence of an interference with the private life, within the meaning of Article 7 of the Charter, of a third party holding information to whom an information order is addressed, as a result of an exchange of information made between Member States pursuant to Directive 2011/16, or on the requirement for Member States to provide procedural safeguards following any State interference, the Higher Administrative Court refers the first question set out below.

B. The second question referred

- 24 The arguments put forward by the Luxembourg State raise the question of the substance of the criterion of foreseeable relevance of the requested information ('information that is foreseeably relevant') and the scope of review by the court having jurisdiction in the requested State.
- 25 The Court of Justice has stated that 'this concept of foreseeable relevance reflects that used in Article 26 of the OECD Model Tax Convention, both because of the similarity between the concepts used and given the reference to OECD conventions in the explanatory memorandum to the proposal for a Council Directive COM (2009) 29 final of 2 February 2009 on administrative cooperation in the field of taxation, which led to the adoption of Directive 2011/16. According to the commentary on that article adopted by the OECD Council on 17 July 2012, Contracting States are not at liberty "to engage in fishing expeditions", nor to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. On the contrary, there must be a reasonable possibility that the requested information will be relevant' (judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 67).

- 26 In order to illustrate the application of Article 26, point 8 of the commentary describes four typical situations which may give rise to an exchange of information. Each of those situations concerns information which is defined with a certain degree of precision (the price paid for goods in example (a); the price paid by a company for goods in example (b); information about the prices charged by a company or group of companies in the requested State in order to enable the prices charged by the company in the requesting State to be checked by direct comparison in example (c); and confirmation that the cost of services was properly entered into the books and records of the provider of services established in the requested State in example (d)).
- 27 It was only by means of an amendment to the commentary, made on 15 July 2014, that point 8 of the commentary was supplemented by an example (e), which indicates that a request to obtain information about unspecified bank accounts which represent all the accounts with a particular bank of which the taxpayer concerned is the beneficial owner, and also about unspecified bank accounts held in the name of other persons individually named and having a connection to the taxpayer concerned, fulfil the ‘foreseeable relevance’ criterion.
- 28 It is that example (e) which is substantially similar to the present case, where the information requested by the Spanish authorities concerns contracts and the associated invoices and payments which are unspecified but which are defined by criteria concerning, first, the fact that the contracts at issue were concluded by the respondent, secondly, the tax years covered by the Spanish authorities’ investigation and, thirdly, their relationship with the taxpayer concerned.
- 29 This extension of the exchange of information on request to information that is unspecified but defined by certain criteria was therefore incorporated into the commentary on the Model Convention by means of a number of amendments made to the commentary on Article 26 on 15 July 2014.
- 30 The commentary on [Article 26 of] the Model Convention states in paragraph 4.3 that the amendments made on 15 July 2014 to the Model Convention were ‘to take into account recent developments and to further elaborate on the interpretation of certain provisions of this Article’. Paragraph 4.4 adds that the commentary on Article 26 ‘was expanded to develop the interpretation of the standard of “foreseeable relevance” and the term “fishing expeditions” through the addition of: general clarifications (see paragraph 5), language in respect of the identification of the taxpayer under examination or investigation (see paragraph 5.1), language in respect of requests in relation to a group of taxpayers (see paragraph 5.2) and new examples (see subparagraphs (e) to (h) of paragraph 8 and paragraph 8.1)’.
- 31 It is reasonable to look beyond the presentation of these issues as mere clarifications of the interpretation of Article 26 of the Model Convention and to ask whether all of them, including the issue relating to information which is unspecified but defined by certain criteria, may indeed be regarded as mere

written affirmations of the text of the non-amended Treaty, the scope of which remains unaltered, or whether they should instead be classified as developments in the interpretation of Article 26 of the Model Convention capable of affecting the scope of that provision, given their effects on the rights and obligations of the States and of the persons concerned by the exchange of information. In the latter scenario, the amendments made to the commentary on Article 26 of the Model Convention would amount to a new stage in the development of a designated international standard on the exchange of information on request which the OECD should be seeking to apply as extensively as possible from now on.

- 32 Since the amendments made on 15 July 2014 to the commentary on Article 26 of the Model Convention could potentially be classified as developments in the interpretation of that provision, which would have an impact on the rights and obligations of the States and of the persons concerned by the exchange of information, it is necessary to consider first of all the specific question of whether a directive proposed in 2009 and adopted in 2011 can be interpreted subsequently by reference to a later version of the Model Convention in which those new developments in relation to the exchange of information on request have been incorporated, before proceeding to the more general question of whether the EU legislature may legitimately delegate to a third party international organisation the specific interpretation of provisions of EU law which impose obligations on Member States and affect the fundamental rights of persons concerned.
- 33 Although the Court of Justice has already acknowledged in its judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134), that ‘the successive amendments of that [OECD Model Tax Convention] and of the commentaries relating thereto are, therefore, relevant’ when interpreting a directive, the Higher Administrative Court is nonetheless unsure whether the same approach may be adopted with regard to questions of interpretation affecting the fundamental rights of persons, and whether that approach is compatible with the requirements arising from respect for legal certainty, which is a fundamental principle of EU law.
- 34 In the light of all those considerations, there are valid doubts as to the interpretation of Article 1(1) and Article 5 of Directive 2011/16 and of the resulting criterion of foreseeable relevance of the requested information.

V. Questions referred for a preliminary ruling

- 35 The Higher Administrative Court refers the following questions for a preliminary ruling:
1. Must Articles 7, 8 and 52(1) of the Charter of Fundamental Rights of the European Union, whether or not read in conjunction with Article 47 of that Charter, be interpreted as precluding national legislation of a Member State which, in the context of the procedure for the exchange of information on request established in particular with a view to the implementation of Council Directive

2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, excludes any remedy, in particular a judicial remedy, on the part of a third party holding information to challenge a decision by which the competent authority of that Member State requires that third party to communicate information to it for the purposes of implementing a request for exchange of information received from another Member State?

2. If the answer to the first question is in the affirmative, must Article 1(1) and Article 5 of Directive 2011/16 be interpreted, if necessary taking account of the evolving nature of the interpretation of Article 26 of the OECD Model Tax Convention, as meaning that a request for exchange of information, and a consequent information order from the competent authority of the requested Member State, satisfy the condition that there is not a manifest lack of foreseeable relevance where the requesting Member State states the identity of the taxpayer concerned, the period covered by the investigation in the requesting Member State and the identity of the holder of the information in question, while seeking information concerning contracts and the associated invoices and payments which are unspecified but which are defined by criteria concerning, first, the fact that the contracts were concluded by the identified holder of the information, secondly, their applicability to the tax years covered by the investigation by the authorities in the requesting State and, thirdly, their relationship with the identified taxpayer concerned?

WORKING DOCUMENT