



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 6 June 2013¹

Case C-276/12

Jiří Sabou

v

Finanční ředitelství pro hlavní město Prahu

(Request for a preliminary ruling from the Nejvyšší správní soud (Czech Republic))

(Taxation — Procedure — Mutual assistance between the Member States in the field of direct taxation — Directive 77/799/EEC — Exchange on request — Taxpayer's procedural rights)

I – Introduction

1. It is difficult, these days, to escape the preoccupation with football. Football is of interest to nearly everyone, including the tax administration.
2. The present request for a preliminary ruling concerns the Czech tax administration's interest in a professional footballer's income. In the course of its inspection, it found interested allies in the tax administrations of other Member States, which made investigations at professional football clubs and an agency. However, the information supplied by the allied tax administrations affected the professional footballer so adversely that he challenged the findings of the investigations, in particular because he considered that his procedural rights had been infringed in the investigations.
3. The Court is now required to examine the scope of such procedural rights of a taxpayer in the context of cross-border cooperation between the tax administrations of the Member States. Consideration will have to be given not only to the applicable secondary law, but also to the fundamental rights of a professional footballer. The Court's findings regarding the procedural rights will not only be important for those with an interest in football, but will have particular repercussions throughout taxation law and in antitrust law.

¹ — Original language: German.

II – Legislative framework

A – *European Union law*

1. The Charter of Fundamental Rights of the European Union

4. Article 41 of the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on 12 December 2007 ('the Charter'), makes provision for a right to be heard, under the heading 'Right to good administration':

'1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

...'

2. Directive 77/799/EEC

5. Directive 77/799/EEC² regulated in particular mutual assistance between the Member States in the field of direct taxation ('the Mutual Assistance Directive') up to 31 December 2012.³ Under Article 1(1), the competent authorities of the Member States must exchange 'any information that may enable them to effect a correct assessment of taxes on income ...'.

6. Article 2 of the Mutual Assistance Directive governs 'exchange on request':

'1. The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case. ...

2. For the purpose of forwarding the information referred to in paragraph 1, the competent authority of the requested Member State shall arrange for the conduct of any enquiries necessary to obtain such information.

In order to obtain the information sought, the requested authority or the administrative authority to which it has recourse shall proceed as though acting on its own account or at the request of another authority in its own Member State.'

B – *Czech law*

7. The Mutual Assistance Directive was transposed into Czech law by Law No 253/2000.⁴

2 — Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Directives 79/1070/EEC of 6 December 1979 (OJ 1979 L 331, p. 8), 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1), 2003/93/EC of 7 October 2003 (OJ 2003 L 264, p. 23), 2004/56/EC of 21 April 2004 (OJ 2004 L 127, p. 70), 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30) and 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129).

3 — See Article 28 of 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).

4 — Law No 253/2000 on international assistance in tax administration and amending Law No 531/1990 on territorial tax authorities.

8. Under Czech procedural law, a taxpayer is entitled, where Czech tax authorities take evidence, to take part in the examination of a witness and to ask questions.

III – Main proceedings and procedure before the Court

9. In the main proceedings, Jiří Sabou has brought proceedings to challenge a notice on the taxation of his income for 2004 in the Czech Republic. Mr Sabou was a professional footballer in that year.

10. The contested notice was issued on 28 May 2009 following a tax inspection and increased the tax by CZK 221 904 (approximately EUR 8 600) compared with the original notice. The increase was the result of a decision not to allow expenditure which Mr Sabou had claimed for services provided by Solomon Group Kft, established in Budapest, which were allegedly connected, among other things, with negotiations on his possible transfer to foreign football clubs.

11. In order to verify the statements made by Mr Sabou, before issuing the notice the Czech tax administration had inter alia requested information from tax authorities of other Member States on the basis of the Mutual Assistance Directive. The Spanish, French and British tax authorities were to clarify whether the football clubs mentioned by Mr Sabou could confirm negotiations with him or Solomon Group Kft. According to the tax authorities, however, that was not the case: Mr Sabou was not even known to the football clubs.

12. In addition, the Czech tax administration had requested the Hungarian tax authorities to verify that the services supplied by Solomon Group Kft had in fact been carried out. To that end, the company's manager had been questioned as a witness in Hungary. She had stated, among other things, that her company had been only an intermediary for the services, which had in fact been carried out by Solomon International Ltd, established in the Bahamas. The Hungarian tax authorities had notified the Czech tax administration that only an inspection of Solomon International Ltd could confirm that the services had actually been supplied.

13. Mr Sabou appealed against the amended payment notice to the Finanční ředitelství pro hlavní město Prahu (Tax Directorate for the City of Prague) on the ground that the Czech tax administration had obtained information from the tax authorities of the other Member States by unlawful means. First, he should have been notified in advance of the request for information so as to be able to formulate his own questions. Secondly, he should have been granted the right to take part in the examinations of witnesses conducted by the foreign tax authorities; he would have had the same right in examinations by the Czech tax authorities. Thirdly, it was not apparent from the information supplied by the Spanish, French and British tax authorities how those tax authorities had made their findings.

14. Against this background, the Nejvyšší správní soud (Supreme Administrative Court), which is now hearing the case, made reference to the Court pursuant to Article 267 TFEU for a preliminary ruling on the following questions, by which, according to the grounds of its order, it is requesting inter alia the interpretation of Article 41(2)(a) of the Charter:

'1. Does it follow from European Union law that a taxpayer has the right to be informed of a decision of the tax authorities to make a request for information in accordance with Directive 77/799/EEC? Does the taxpayer have the right to take part in formulating the request addressed to the requested Member State? If the taxpayer does not derive such rights from European Union law, is it possible for domestic law to confer similar rights on him?

2. Does a taxpayer have the right to take part in the examination of witnesses in the requested State in the course of dealing with a request for information under Directive 77/799/EEC? Is the requested Member State obliged to inform the taxpayer beforehand of when the witness will be examined, if it has been requested to do so by the requesting Member State?

3. Are the tax authorities in the requested Member State obliged, when providing information in accordance with Directive 77/799/EEC, to observe a certain minimum content of their answer, so that it is clear from what sources and by what method the requested tax authorities have obtained the information provided? May the taxpayer challenge the correctness of the information thus provided, for example on grounds of procedural defects of the proceedings in the requested State which preceded the provision of the information? Or does the principle of mutual trust and cooperation apply, according to which the information provided by the requested tax authorities may not be called in question?

15. In the proceedings before the Court, the Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Poland, the Republic of Finland and the Commission submitted written observations.

IV – Legal assessment

A – Jurisdiction of the Court

16. It is first necessary to examine the jurisdiction of the Court, which has been called into question, partially, by the Commission.

17. In the Commission's view, the *assessment* of income tax in a Member State, which is the subject of the main proceedings, is not regulated either by the Mutual Assistance Directive or by other European Union law. In so far as the questions referred concern the assessment of tax, there is therefore no connection with European Union law. Furthermore, the Charter is applicable, under Article 51(1) thereof, only when the Member States are implementing Union law. This condition is not satisfied, however, where a Member State makes a request for information to another Member State. In the Commission's view, the Court does not therefore have jurisdiction to answer parts of the first and third questions.

18. Under indent (a) of the first paragraph of Article 267 TFEU, the Court has jurisdiction for the interpretation of European Union law. The questions referred are intended to clarify the influence of European Union law on cross-border gathering and use of information in national income tax proceedings. It is possible to determine whether and in what way this is the case only through an interpretation of European Union law. Specifically with regard to the interpretation of the Charter desired by the referring court, it must also be stressed that clarification of the applicability of a provision of European Union law constitutes interpretation of European Union law. The questions referred therefore as a whole concern the interpretation of European Union law, with the result that, in principle, the Court has jurisdiction to answer them under indent (a) of the first paragraph of Article 267 TFEU

19. The Court has declined jurisdiction, in its settled case-law, where it was obvious that the provision of European Union law referred to the Court for interpretation was incapable of applying.⁵ In the present case, however, no such finding can be made. While regard must undoubtedly be had in the main proceedings to the Mutual Assistance Directive, the influence of fundamental rights under European Union law also cannot manifestly be ruled out, in particular because, with the Mutual Assistance Directive, the national tax administration availed itself of a procedure for obtaining information laid down in European Union law.

20. Consequently, the Court has full jurisdiction to answer the questions referred.

B – Second part of the third question: effects of information

21. I will begin my analysis with the third question in so far as its answer affects the consideration of the other questions. The second part of the third question concerns the effects of information supplied by another Member State pursuant to Article 2 of the Mutual Assistance Directive in national tax proceedings. The referring court asks whether a taxpayer may call into question the findings from such information or whether the requested Member State makes binding factual findings. In the main proceedings, the main point at issue is whether it has been established for the purposes of the Czech administrative and judicial proceedings, on the basis of the information from the requested Member States, that Mr Sabou did not conduct any negotiations with the football clubs of which enquiries were made.

22. The Hellenic Republic takes the view that information obtained under the Mutual Assistance Directive can no longer be called into question by the taxpayer. It says that this runs counter to the principle of mutual trust. Furthermore, the spirit of the procedure under the Mutual Assistance Directive is called into question if the information provided has no probative value.

23. I do not concur with that view.

24. The Court made clear in *Twoh International* that the information supplied by a Member State under the Mutual Assistance Directive in respect of a specific situation does not constitute decisive proof of a fact to be established.⁶

25. In addition, the Mutual Assistance Directive does not contain any provisions concerning recognition of information by the requesting Member State or the probative value of the information in general. The Czech Republic and the French Republic are therefore right to state that the appraisal of evidence in national tax proceedings, i.e. the way in which the information is utilised, must be assessed in accordance with national procedural law.

26. It is therefore for the national court to ascertain the probative value of the information supplied by a Member State under the Mutual Assistance Directive in each individual case.⁷ The national court may thus assess autonomously whether the information requires counter-evidence from the taxpayer or cannot be utilised because sources are not indicated or for other reasons. Where the object is an activity of the taxpayer protected by fundamental freedoms, however, the national court must also comply with the principles of equivalence and effectiveness.⁸

5 — Judgment of 21 June 2012 in Case C-84/11 *Susisalo and Others*, paragraph 17 and the case-law cited.

6 — See Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 37.

7 — See also, to that effect, the judgment of 6 December 2012 in Case C-285/11 *BONIK*, paragraph 32, with regard to VAT.

8 — See for instance Case C-262/09 *Meilicke and Others* [2011] ECR I-5669, paragraph 55.

27. It must therefore be stated that European Union law does not prevent a taxpayer from calling into question the correctness of information supplied by other Member States under Article 2 of the Mutual Assistance Directive in national tax proceedings.

C – First question: the taxpayer's procedural rights in the requesting Member State

28. In order to answer the first question it must now be explored to what extent European Union law makes provision regarding a taxpayer's procedural rights vis-à-vis his competent tax administration where it requests information from another Member State pursuant to Article 2 of the Mutual Assistance Directive. It must be examined both whether European Union law itself confers certain procedural rights (see section 1) and whether European Union law prohibits any national procedural rights (see section 2).

1. Does European Union law confer procedural rights?

29. First of all, the referring court wishes to know whether under European Union law a taxpayer must be notified in advance by his competent tax administration of a request for information and whether he is entitled to take part in formulating the request.

(a) The Mutual Assistance Directive

30. It should be stated, first of all, that the Mutual Assistance Directive makes no provision for such rights for the taxpayer. The directive does not contain any rights at all for taxpayers,⁹ but governs only rights and obligations of the tax authorities of the Member States.¹⁰

(b) The Charter

31. However, the referring court raises the question whether a taxpayer derives such procedural rights from Article 41(2)(a) of the Charter. Under that provision, every person has the right to be heard before any individual measure which would affect him or her adversely is taken.

32. The objection can be raised against the application of Article 41(2)(a) of the Charter in the present case, first, that – as the Commission has also argued – according to its wording that provision is not actually addressed to the national authorities.¹¹ It is binding on only the institutions, bodies, offices and agencies of *the Union*.

33. There is no need to examine here whether the judgment recently delivered in *M.* is to be interpreted to the effect that Article 41(2)(a) of the Charter is nevertheless also binding on the authorities of the Member States.¹²

34. Irrespective of whether Article 41(2)(a) of the Charter applies to the authorities of the Member States, the temporal validity of that provision is also limited. The Charter only became legally binding by virtue of Article 6(1) TEU as amended by the Treaty of Lisbon, which itself entered into force on 1 December 2009. The request for information at issue in the present case was made and processed before that date, however, as the payment notice at issue in the main proceedings had been issued on 28 May 2009.

9 — See *Twoh International*, cited in footnote 6, paragraph 31.

10 — See, to that effect, Case C-101/05 *A* [2007] ECR I-11531, paragraph 61.

11 — See also Case C-482/10 *Cicala* [2011] ECR I-14139, paragraph 28, with regard to Article 41(2)(c).

12 — See the judgment of 22 November 2012 in Case C-277/11 *M*, paragraphs 83 to 89.

35. For the purposes of the main proceedings, the taxpayer does not therefore derive any procedural rights from Article 41(2)(a) of the Charter.

(c) The general legal principle of observance of the rights of the defence

36. However, the European Union law applicable in the main proceedings also includes the general legal principle of observance of the rights of the defence.¹³ An element of this principle is the right to be heard.¹⁴ A taxpayer might derive the procedural rights at issue in the main proceedings from this.

– (i) Applicability of the general legal principle

37. The first condition is that the tax administration of a Member State is actually bound by the general legal principle of observance of the rights of the defence in a situation where it makes a request for information to another Member State under Article 2 of the Mutual Assistance Directive.

38. The administrations of the Member States must comply with this legal principle, like all fundamental rights laid down by European Union law, only when they take decisions which come within the scope of Union law.¹⁵ The Court recently found in *Åkerberg Fransson* that the settled case-law on the applicability of the general legal principles is now confirmed by Article 51(1) of the Charter, which defines the scope of the Charter.¹⁶ In other words, Article 51(1) of the Charter merely codifies the conditions which have always governed the application of the general principles of European Union law. The Court has thus unified the conditions governing the application of the Charter and of the general legal principles.

39. I therefore consider it appropriate – as the Commission has also suggested – also to have regard to Article 51(1) of the Charter in the present case with a view to the clarification of the applicability of the general legal principle of observance of the rights of the defence. Under that provision, the Charter applies to the Member States only when they are implementing Union law.

40. In the Commission's view, however, the Member States are not implementing Union law where they request information from another Member State under Article 2 of the Mutual Assistance Directive. The Mutual Assistance Directive does not impose any obligation on the Member States to make such a request for information. Rather, it is merely an optional procedural step in the context of the assessment of tax, which is itself based solely on national law.

41. It is indeed correct that the Mutual Assistance Directive does not contain any obligation on the Member States to make a request for information to another Member State.¹⁷ The Court has also accepted, in *Åkerberg Fransson* in particular, the implementation of Union law on the basis of existing obligations imposed on the Member States by European Union law.¹⁸

13 — See, inter alia, Joined Cases C-48/90 and C-66/90 *Netherlands and Others v Commission* [1992] ECR I-565, paragraph 44; Case C-32/95 P *Commission v Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 36; Case C-110/10 P *Solvay v Commission* [2011] ECR I-10439, paragraph 47; and *M*, cited in footnote 12, paragraph 81.

14 — *M*, cited in footnote 12, paragraph 82; see, with regard to observance of the rights of the defence, Case 32/62 *Alvis v Council* [1963] ECR 49, 55; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 9; Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 27; and *Commission v Lisrestal and Others*, cited in footnote 13, paragraphs 21 and 31 et seq.

15 — See *Sopropé*, cited in footnote 13, paragraph 38, and the judgment of 26 February 2013 in Case C-617/10 *Åkerberg Fransson*, paragraph 19 and the case-law cited.

16 — *Åkerberg Fransson*, cited in footnote 15, paragraphs 17 and 18.

17 — See, inter alia, *Twoh International*, cited in footnote 6, paragraph 32; Case C-318/07 *Persche* [2009] ECR I-359, paragraph 65; and Case C-310/09 *Accor* [2011] ECR I-8115, paragraph 98.

18 — See *Åkerberg Fransson*, cited in footnote 15, paragraphs 24 to 27.

42. It is not convincing, however, to take implementation of Union law within the meaning of Article 51(1) of the Charter to exist only where the Member States fulfil an obligation under European Union law. Rather, the Member States are also implementing Union law where they exercise a right conferred by European Union law, as is the case with the Mutual Assistance Directive. With the request for information under Article 2, the directive offers the Member States a procedure laid down in European Union law by recourse to which they are able to obtain taxation-related information from another Member State. If a Member State avails itself of this procedure laid down in European Union law, it is also implementing Union law.

43. Any other view would mean differentiating between the applicability of the general legal principles and of the Charter depending on whether European Union law imposes obligations on a Member State or confers rights on the Member State. The crucial factor, however, is whether or not a Member State's action is based on European Union law. If a Member State acts on the basis of Union law, it is also implementing Union law, even if it is not subject to any obligation under that law.

44. As the Czech tax administration availed itself of the Mutual Assistance Directive in the present case, there is no need to determine whether implementation of Union law within the meaning of Article 51(1) of the Charter can be taken to exist on other grounds. In this respect, the Commission's view that, without exception, the assessment of income tax does not constitute implementation of Union law is not free from doubt. In so far as Mr Sabou was protected, as regards the allowance for tax purposes of his expenditure in connection with seeking employment with football clubs in other Member States, by the freedom of movement for workers under Article 39 EC or the freedom to provide services under Article 49 EC, the Czech tax administration could also have implemented Union law.

45. If, therefore, the Court did not regard the recourse to the Mutual Assistance Directive by the requesting Member State as implementation of Union law, it would have to be further examined whether tax collection arrangements in cross-border situations like that of Mr Sabou constitute a restriction of a fundamental freedom and whether a Member State is also implementing Union law in such a case, because it must comply with commitments under European Union law.¹⁹

46. It must therefore be concluded that the tax administrations of the Member States must comply with the general legal principle of observance of the rights of the defence where they make a request for information to another Member State under Article 2 of the Mutual Assistance Directive.

– (ii) Conditions governing a right to be heard

47. If the Czech tax administration was essentially required to guarantee the rights of the defence conferred on Mr Sabou by European Union law in the present case, the further question arises, however, whether a taxpayer enjoys a right to be heard specifically with regard to the decision by a Member State's authority to make a request for information to another Member State.

48. This right to be heard ensures that only the addressees of certain official decisions have the possibility effectively to make known their views on the elements on which the administration intends to base its decision.²⁰

19 — This might be suggested by the reference in *Åkerberg Fransson*, cited in footnote 15, paragraph 19, to Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43; but see, in contrast, the judgment of 27 November 2012 in Case C-370/12 *Pringle*, paragraph 180, which did not consider Union law to be implemented despite the commitments under the second sentence of Article 125(1) TFEU (see paragraph 136).

20 — *Sopropé*, cited in footnote 13, paragraph 37; see *Commission v Lisrestal and Others*, cited in footnote 13, paragraph 21; Case C-287/02 *Spain v Commission* [2005] ECR I-5093, paragraph 37; and *M*, cited in footnote 12, paragraph 87.

49. First of all, the addressee of the decision to make a request for information to another Member State is not the taxpayer. The request for information helps to prepare a decision which is to be addressed to the taxpayer, namely the income tax assessment. But the request itself is directed only at the requested Member State.

50. However, a right to be heard may also exist in certain cases for persons who are not addressees of a decision. European Union law contains an example of this in Article 108(2) TFEU, under which all those potentially affected by a State aid decision taken by the Commission must be heard even though the sole addressee of that decision is the Member State concerned.²¹ The reason is that the State aid decision may also adversely affect the interests of persons other than the addressees, such as the aid recipients. Consequently, according to case-law, it is also ultimately crucial for the existence of a right to be heard what effects a decision has on the person concerned.²²

51. This focus on the effects of a decision is consistent with the further requirement laid down in case-law that a right to be heard does not exist for all decisions of an authority, but only for decisions which are onerous in character.²³ The Court refers in this respect either to measures ‘adversely affecting’ a person²⁴ or decisions which ‘significantly affect’ the ‘interests’ of a person.²⁵

52. The referring court rightly points out that the question arises in the present case whether a request for information under Article 2 of the Mutual Assistance Directive constitutes such a decision, as that decision has direct legal effects only vis-à-vis the requested Member State, which is thereby under an obligation to answer.²⁶ European Union law also does not provide, as has already been explained,²⁷ that national tax proceedings are bound by the information supplied, with the result that in this respect too there are no direct legal effects on the taxpayer.

53. The inquiries conducted by the requested Member State may, however, yield evidence which influences the assessment of national income tax *de facto* by confirming or refuting statements made by the taxpayer. Thus, the decision on a request for information under Article 2 of the Mutual Assistance Directive can have indirect legal effects on the taxpayer and thus be onerous. Furthermore, it may also adversely affect him *de facto* if, for example, his reputation with the persons questioned suffers as a result of inquiries.

21 — See the second sentence of Article 6(1) in conjunction with Article 1(h) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1); see also, before that regulation applied, Case 323/82 *Intermills v Commission* [1984] ECR 3809, paragraphs 16 and 17.

22 — See, to that effect, *Commission v Lisrestal and Others*, cited in footnote 13, paragraph 22 et seq.

23 — See, in this regard, the foundational Opinion of Advocate General Warner in Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, 1090.

24 — See, inter alia, *Belgium v Commission*, cited in footnote 14, paragraph 27; *Netherlands and Others v Commission*, cited in footnote 13, paragraph 44; Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885, paragraph 39; *Commission v Lisrestal and Others*, cited in footnote 13, paragraph 21; Case C-395/00 *Cipriani* [2002] ECR I-11877, paragraph 51; and *Spain v Commission*, cited in footnote 20, paragraph 37.

25 — *Sopropé*, cited in footnote 13, paragraph 37; see also *Commission v Lisrestal and Others*, cited in footnote 13, paragraph 21; and *Spain v Commission*, cited in footnote 20, paragraph 37; see also, similarly, *Transocean Marine Paint Association v Commission*, cited in footnote 23, paragraph 15.

26 — See, with regard to the obligation on the requested Member State, my Opinion in Case C-533/03 *Commission v Council* [2006] ECR I-1025, point 83.

27 — See above, point 21 et seq.

54. The usual sources of law for the general principles of European Union law do not offer any assistance in ascertaining whether such effects are sufficient to establish a right to be heard for the taxpayer. For example, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees a right to be heard only in judicial or quasi-judicial proceedings, but not in administrative proceedings.²⁸ The constitutional traditions common to the Member States also have included a right to be heard in the context of administrative proceedings only in isolated cases and only recently.²⁹

55. Any clarification must therefore take into account the recognised objectives of the right to be heard. As Advocate General Bot has recently explained, the right to be heard serves two objectives: the preparation of an informed decision and the protection of the person concerned.³⁰

56. It should be stated, first of all, that a decision on a request for information under Article 2 of the Mutual Assistance Directive may not be seen in isolation. That decision constitutes an investigative measure in administrative proceedings culminating in a payment notice. It thus serves to prepare a decision which has significant legal effects on the taxpayer. In the case-law it is recognised in principle that a distinction must be drawn, as regards the right to be heard, between such investigative measures and the decisions taken at the end of a procedure.³¹

57. The purpose of such a distinction is evident. If an individual enjoyed a right to be heard before any individual investigative measure taken by an authority, the associated expenditure would tend to hinder the preparation of an informed decision without significantly increasing the protection of the person concerned. Such protection is, as a rule, adequately guaranteed by the fact that the person concerned is heard before the decision is adopted at the end of the administrative proceedings.

58. Although I do not wish to rule out the existence of investigative measures which are so onerous in themselves that the protection of the person concerned requires a right to be heard, that is not the situation in the present case.

59. As I have already explained elsewhere, requests for information under the Mutual Assistance Directive are essentially intended to check taxable persons' statements and evidence.³² In the present case too, the Czech tax administration wished to check the taxable person's statements which he himself had previously made in the administrative proceedings. In such cases, the protection of the person concerned does not require him to be heard in relation to an investigative measure. First, he has already set out his point of view through his own statements and, secondly, negative factual consequences of the inquiries could be attributed primarily to his own deficient statements. Moreover, as has been seen,³³ European Union law does not prevent the taxpayer calling the information supplied into question in national tax proceedings; he is thus as a rule given a fresh opportunity to put forward his point of view.

28 — See also Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 70.

29 — See Kai-Dieter Classen, *Gute Verwaltung im Recht der Europäischen Union*, 2008, p. 177 et seq.

30 — See the Opinion of Advocate General Bot in *M*, cited in footnote 12, points 35 and 36.

31 — See Case 57/69 *ACNA v Commission* [1972] ECR 933, paragraphs 12 to 14, and Case 136/79 *National Panasonic v Commission* [1980] ECR 2033, paragraph 21.

32 — Opinion in *Twoh International*, cited in footnote 6, point 23.

33 — See above, point 21 et seq.

60. If a right to be heard does not therefore exist in the case of such requests for information, it must, however, be stressed that the Member States are also bound by the other general principles of European Union law since they are implementing Union law in this respect. When taking the decision to make a request for information to another Member State under Article 2 of the Mutual Assistance Directive, the national tax authority must therefore also comply with the principle of proportionality and the taxpayer's other fundamental rights.

61. In the event that, contrary to my arguments, the Court were to accept the existence of a right to be heard in the present case, attention should be drawn to the balance which must still be struck in the individual case. Thus, Advocate General Warner accepted the existence of an exception to the right to be heard where 'the purpose of the decision would or might be defeated if the right were accorded'.³⁴ The Court has recognised this restriction of the right to be heard.³⁵ In this regard, the French Republic rightly has pointed out that notifying the taxpayer in advance of an intended request for information also undermines the value of information, for example because witnesses might be influenced.³⁶ Because the request for information is intended to check the taxable person's statements, it would therefore have to be examined in each individual case whether notifying the taxpayer in advance could defeat that purpose.

(d) Interim conclusion

62. In conclusion, however, I would make the general statement that a taxpayer does not enjoy a right to be heard under European Union law with regard to the decision by his competent tax administration to request information from another Member State under Article 2 of the Mutual Assistance Directive, at least where the request relates only to checking the taxpayer's own statements. In that case European Union law does not therefore require a taxpayer to be notified in advance by his competent tax administration of such a request for information or to be permitted to take part in formulating the request.

2. Does European Union law prohibit procedural rights?

63. It must therefore still be clarified, on the basis of the second part of the first question, only whether it is compatible with European Union law if *national law* confers such procedural rights on the taxpayer in respect of a request for information under Article 2 of the Mutual Assistance Directive.

64. There is no evident prohibition in European Union law in this regard. As the Republic of Poland and the Republic of Finland have also argued, the taxpayer's procedural rights may rather, in principle, be determined by national law, since no provision is made in the Mutual Assistance Directive.

65. The answer to the second part of the first question is therefore that it is compatible with European Union law if national law confers the procedural rights at issue in the main proceedings on a taxpayer in the requesting Member State.

34 — Opinion of Advocate General Warner in Case 136/79 *National Panasonic v Commission* [1980] ECR 2033, 2069.

35 — See Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* [2008] ECR I-6351, paragraph 338 et seq.

36 — See also the reference in the second sentence of Article 2(1) of Directive 77/799 to 'the risk of endangering the attainment of the sought after result'.

D – Second question: the taxpayer's procedural rights in the requested Member State

66. The second question addresses the procedural rights which a taxpayer enjoys in the *requested* Member State. In particular, the referring court wishes to know whether the requested Member State – at the request of the requesting Member State – must notify the taxpayer of a planned witness examination and also permit him to take part in the examination, as is provided for in Czech procedural law.

67. No such obligation for the requested Member State can be inferred directly from the Mutual Assistance Directive.

68. The Commission contends that the requested Member State must nevertheless ensure that the Mutual Assistance Directive can fulfil its purpose. Information must therefore also be usable in the requesting Member State. Consequently, at the request of the requesting Member State, the requested Member State must notify a taxpayer of a witness examination, unless that is precluded by the procedural law of the requested Member State. The Czech Republic has also put forward similar arguments, inferring a duty of cooperation on the part of the requested Member State from the principle of sincere cooperation under Article 4(3) TEU in so far as compliance with the procedural requirements in the requesting Member State is concerned.

69. That view is correct in so far as the requested Member State has the obligation under the Mutual Assistance Directive to provide information which is as useful as possible. Under Article 1(1) of the directive, the Member States must exchange any information that may enable them to effect a correct assessment. The Court has thus far interpreted that provision only from the perspective of the requesting Member State as regards which information may be requested.³⁷ However, it is also possible, in respect of the requested Member State, to infer from it that the information must enable the assessment of income tax. This is the intended purpose of information under Article 1(1) and the first sentence of Article 2(1) of the Mutual Assistance Directive. However, for the information to enable the assessment of income tax, it must also be able to be utilised in the requesting Member State.

70. However, this obligation for the requested Member State to provide appropriate information, derived from the Mutual Assistance Directive, is to be satisfied only within the limits of the other provisions of the directive. In this respect, particular regard must be had to the second subparagraph of Article 2(2) and Article 8(1) in relation to the procedure to be observed by the requested Member State.

71. Under Article 8(1) of the Mutual Assistance Directive, the requested Member State is not required to carry out inquiries if it is prevented by its laws or administrative practices. It therefore follows not only that the requested Member State does not have to act in contravention of its own procedural law. It is also not required to depart from its administrative practices. Since those practices are presumably based on the applicable procedural law in the requested Member State, an obligation to comply with divergent procedural law of the requesting Member State would run counter to Article 8(1) of the Mutual Assistance Directive.

72. Furthermore, the French Republic has rightly pointed out that an obligation to comply with the procedural law of the requesting Member State would be contrary to the second subparagraph of Article 2(2) of the Mutual Assistance Directive. Under that provision, in order to obtain the information sought, the requested authority must proceed as though acting on its own account or at the request of another authority in its own Member State. As is also shown by the second recital in the preamble to Directive 2004/56/EC, by which that provision was introduced into the Mutual

³⁷ — See *Persche*, cited in footnote 17, paragraph 62.

Assistance Directive,³⁸ it is thereby to be ensured that there will only be one set of rules applying to the information-gathering process. The inquiries made by the requested Member State are thus intended to be subject only to its national procedural law, from which the rights and obligations of the parties are derived.

73. Accepting the existence of an obligation on the requested Member State also to take into consideration, if possible, the procedural law of the requesting Member State could also undermine the purpose of the Mutual Assistance Directive. As the Court of Auditors has stated with regard to Regulation (EC) No 1798/2003,³⁹ cooperation between the tax administrations of the Member States in the field of value added tax has suffered from significant late replies in the exchange of information.⁴⁰ The main reason for such late replies would appear to be that the requested authorities are not investigating their own affairs, i.e. a basic situation which also applies to the Mutual Assistance Directive. If, however, the Court considered that the requested Member State had an obligation under that directive also to take into consideration the procedural law of the requesting Member State, this would create additional difficulties in providing information.

74. Lastly, an obligation on the requested Member State to permit the taxpayer to take part in a witness examination also does not follow from the general legal principle of observance of the rights of the defence. The requested Member State does have to comply with that legal principle in its inquiries on the basis of a request for information under Article 2 of the Mutual Assistance Directive, since it is implementing Union law. In the present case, however, that legal principle does not require a taxpayer to be notified of a planned witness examination or to be permitted to take part in the examination.

75. This applies in particular to the right to be heard mentioned by the referring court. First, the existence of a right to be heard does not as such entail a right to take part in a witness examination. That right does not serve to monitor the investigation by the administration, but to allow the person concerned to put forward his own point of view. Secondly, a taxpayer also does not have a right to be heard in respect of the information supplied by the requested Member State. In this regard, I refer to my statements concerning the *request* for information,⁴¹ which apply *a fortiori* also to the information itself.

76. In other respects too, it is not possible to infer from the general legal principle of observance of the rights of the defence a right for the taxpayer to take part in the examination of a witness in administrative proceedings. It is significant in this regard that Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides for a right to examine witnesses only for persons charged with a criminal offence.

77. Consequently, European Union law neither provides for an obligation on the requested Member State, in the context of inquiries on the basis of a request for information under Article 2 of the Mutual Assistance Directive, to notify a taxpayer in advance of a witness examination, nor does that Member State have to confer on a taxpayer the right to take part in such an examination.

38 — See Article 1(2) of Council Directive 2004/56/EC of 21 April 2004 amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxation of insurance premiums (OJ 2004 L 127, p. 70).

39 — Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1).

40 — Special report No 8/2007 concerning administrative cooperation in the field of value added tax, together with the Commission's replies (OJ 2008 C 20, p. 1), p. 5, under V(b) and (c).

41 — See above, point 56 et seq.

E – First part of the third question: content of information

78. Lastly, in the third question it must be clarified whether the requested Member State is obliged, when providing information, to observe a certain minimum content of its answer, so that it is clear from what sources and by what method the requested tax authorities have obtained the information provided.

79. The directive does not contain any rules governing the formal content of information to be supplied under Article 2 of the Mutual Assistance Directive. However, the requested Member State has the obligation under the Mutual Assistance Directive to provide information which is useful as far as possible.⁴²

80. In order for information to enable the assessment of income tax in the requesting Member State, adequate statements must also be made on the inquiries conducted under the first subparagraph of Article 2(2) of the Mutual Assistance Directive, on which the findings from the information are based. The mere notification of the findings is not sufficient, in principle, since the probative value of such information is, as a rule, severely restricted.

81. An obligation on the requested Member State to indicate the sources of information is also not precluded by any provisions of the directive. In particular, the abovementioned⁴³ second subparagraph of Article 2(2) and Article 8(1) of the Mutual Assistance Directive concern only the conduct of inquiries and the fundamental possibility of an exchange of information, but not its content.

82. The answer to the first part of the third question is therefore that the requested Member State is obliged, in principle, under Article 1(1) and Article 2 of the Mutual Assistance Directive also to provide information about the inquiries on which the notified findings are based.

V – Conclusion

83. I therefore propose that, taken together, the questions referred by the Nejvyšší správní soud should be answered as follows:

- (1) European Union law does not give a taxpayer the right to be notified in advance of the decision by his competent tax administration to request information from another Member State under Article 2 of the Mutual Assistance Directive, or to take part in formulating the request, at least where the request relates only to checking the taxpayer's own statements. European Union law does not, however, preclude the conferral of such rights by national law.
- (2) European Union law neither provides for an obligation on the requested Member State, in the context of inquiries on the basis of a request for information under Article 2 of the Mutual Assistance Directive, to notify a taxpayer in advance of a witness examination, nor does that Member State have to confer on the taxpayer the right to take part in such an examination.
- (3) The requested Member State is obliged, in principle, under Article 1(1) and Article 2 of the Mutual Assistance Directive also to provide information about the inquiries on which the notified findings are based.
- (4) European Union law does not prevent a taxpayer from calling into question the correctness of information supplied by other Member States under Article 2 of the Mutual Assistance Directive in national tax proceedings.

⁴² — See above, point 69.

⁴³ — See above, point 70 et seq.