



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 10 January 2017¹

Case C-682/15

Berlioz Investment Fund SA

v

Directeur de l'administration des Contributions directes

(Request for a preliminary ruling from the Cour administrative (Luxembourg))

(Reference for a preliminary ruling — Directive 2011/16/EU — Article 1(1) — Article 5 — Administrative cooperation in the field of taxation — Exchange of information between tax administrations — Concept of ‘foreseeable relevance’ of the information requested — Refusal of a third party in the requested State to communicate certain information — Penalties — Application of the Charter of Fundamental Rights of the European Union — Article 47 — Article 51(1) — Right to an effective judicial remedy — Right of action against the request for information addressed to the third party)

I – Introduction

1. The present request for a preliminary ruling relates essentially to the interpretation of Article 1(1) and Article 5 of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC,² and of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2. This request has been made in the particular climate of the recent disclosures of ‘financial scandals’³ and other possible tax advantages granted by certain countries to multinational companies which have been reported in the press in recent months.⁴ These events have prompted a large number of citizens to desire greater transparency and greater fairness in such matters, and indeed, in the case of certain citizens, have led to incomprehension in the absence of tax harmonisation within the European Union.

3. In that context, the legal instruments that improve the means of combating tax evasion — such as Directive 2011/16 — are increasingly used by Member States. Inevitably, the increasing use of those means raises the question of the balance between, on the one hand, administrative efficiency and, on the other, respect for citizens’ rights, including the right to an effective remedy.

¹ Original language: French.

² OJ 2011 L 64, p. 1.

³ I am thinking of the investigations carried out by journalists from different countries within the framework of the International Consortium of Investigative Journalists (ICIJ) that resulted in what are known as the LuxLeaks, SwissLeaks or Panama Papers disclosures.

⁴ The European Commission has opened a number of investigations against different Member States which have granted advantageous tax rates to certain undertakings, such as the Kingdom of the Netherlands for Starbucks, Ireland for Apple, the Grand Duchy of Luxembourg for McDonald’s and Amazon or the Kingdom of Belgium for its ‘excess profits rulings’ system.

4. In fact, it is that delicate equation that lies at the heart of the questions for a preliminary ruling submitted by the Cour administrative (Administrative Court) (Luxembourg).

II – Legal context

A – EU law

1. *The Charter*

5. Article 47 of the Charter, entitled ‘Right to an effective remedy and to a fair trial’, provides as follows:

‘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 insofar as such aid is necessary to ensure effective access to justice.’

2. *Directive 2011/16*

6. Recital 9 of Directive 2011/16 provides as follows:

‘Member States should exchange information concerning particular cases where requested by another Member State and should make the necessary enquiries to obtain such information. The standard of ‘foreseeable relevance’ is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in ‘fishing expeditions’ or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While Article 20 of this Directive contains procedural requirements, those provisions need to be interpreted liberally in order not to frustrate the effective exchange of information.’

7. According to Article 1(1) of Directive 2011/16:

‘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.’

8. Article 5 of Directive 2011/16 provides as follows:

‘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.’

9. Article 7(4) of Directive 2011/16 states the following:

‘Within one month of receipt of the request, the requested authority shall notify the requesting authority of any deficiencies in the request and of the need for any additional background information. In such a case, the time limits provided for in paragraph 1 shall start the day after the requested authority has received the additional information needed.’

10. According to Article 17 of Directive 2011/16, entitled ‘Limits’:

‘1. A requested authority in one Member State shall provide a requesting authority in another Member State with the information referred to in Article 5 provided that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives.

2. This Directive shall impose no obligation upon a requested Member State to carry out enquiries or to communicate information, if it would be contrary to its legislation to conduct such inquiries or to collect the information requested for its own purpose.

3. The competent authority of a requested Member State may decline to provide information where the requesting Member State is unable, for legal reasons, to provide similar information.

4. The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.

5. The requested authority shall inform the requesting authority of the grounds for refusing a request for information.’

11. In the words of Article 18 of Directive 2011/16, entitled ‘Obligations’:

‘1. If information is requested by a Member State in accordance with this Directive, the requested Member State shall use its measures aimed at gathering information to obtain the requested information, even though that Member State may not need such information for its own tax purposes. That obligation is without prejudice to paragraphs 2, 3 and 4 of Article 17, the invocation of which shall in no case be construed as permitting a requested Member State to decline to supply information solely because it has no domestic interest in such information.

2. In no case shall Article 17(2) and (4) be construed as permitting a requested authority of a Member State to decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

...’

12. Last, Article 20(2) of Directive 2011/16 specifies the minimum information that must be given in the standard forms used for the exchange of information. That provision is worded as follows:

‘The standard form referred to in paragraph 1 shall include at least the following information to be provided by the requesting authority:

- (a) the identity of the person under examination or investigation;
- (b) the tax purpose for which the information is sought.

The requesting authority may, to the extent known and in line with international developments, provide the name and address of any person believed to be in possession of the requested information as well as any element that may facilitate the collection of information by the requested authority.'

B – Luxembourg law

1. The Law of 29 March 2013

13. Directive 2011/16 was transposed into Luxembourg law by the Law of 29 March 2013 'transposing ... Directive 2011/16 ...' ('the Law of 29 March 2013').

14. Article 6 of the Law of 29 March 2013 provides as follows:

'At the request of the requesting authority, the Luxembourg requested authority shall communicate to it the information that is foreseeably relevant for the administration and application of the domestic legislation of the requesting Member State relating to the taxes referred to in Article 1 which it has or which it shall obtain following administrative investigations.'

15. Article 8(1) of the Law of 29 March 2013 provides as follows:

'The Luxembourg requested authority shall effect the communications referred to in Article 6 as quickly as possible, and no later than six months from the date of receipt of the request. However, where the Luxembourg requested authority is already in possession of the information concerned, the communications shall be effected within two months of that date.'

2. The Law of 25 November 2014

16. The Law of 25 November 2014 'laying down the procedure applicable to the exchange of information on request in tax matters and amending the Law of 31 March 2010 approving the tax conventions and laying down the procedure applicable thereto in relation to the exchange of information on request' ('the Law of 25 November 2014') contains the following provisions.

17. Article 1 of the Law of 25 November 2014 provides as follows:

'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;

...'

18. According to Article 2 of the Law of 25 November 2014:

'1. Tax administrations shall be authorised to request information of any kind required in order to implement the exchange of information provided for by Conventions and laws from the holder of that information.

2. The holder of the information shall be obliged to provide the requested information in its entirety, accurately and without alteration, within one month of notification of the decision requiring the requested information to be provided. That obligation shall extend to the transmission of unaltered documents on which the information is based.

...'

19. In the words of Article 3 of the Law of 25 November 2014:

'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 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 information requested, 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. Notification of the decision to the holder of the information requested shall constitute notification to any other person referred to therein.

4. The request for exchange of information may not be disclosed. The decision requiring the requested information to be provided shall contain only such information as is essential in order to enable the holder of the information to identify the information requested.

...'

20. Article 5(1) of the Law of 25 November 2014 provides as follows:

'If the information requested is not provided within one month of notification of the decision requiring the requested information to be provided, 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.'

21. According to Article 6 of the Law of 25 November 2014:

'1. No appeal shall lie against a request for exchange of information or a decision requiring the requested information to be provided as referred to in Article 3(1) and (3).

2. The holder of the information may apply to the tribunal administratif (Administrative Tribunal) 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 information requested. The action shall have suspensive effect ...

An appeal to the Cour administrative (Administrative Court) shall lie against the decisions of the tribunal administratif (Administrative Tribunal). The appeal must be lodged within 15 days of notification of the judgment by the Registry ... The Cour administrative (Administrative Court) shall rule within one month of the date on which the reply is lodged or otherwise within one month of expiry of the period for lodging a reply.'

III – The facts of the dispute in the main proceedings

22. On 3 December 2014, the competent authority of the French tax administration sent the Luxembourg tax administration a request for information, on the basis of Directive 2011/16, in the context of the examination of the tax situation of the simplified joint stock company governed by French law Cofima SAS. That request concerned information relating to the company that owned Cofima, namely the joint stock company governed by Luxembourg law Berlioz Investment SA ('Berlioz').

23. Berlioz received the dividends paid to it by its subsidiary, Cofima, in application of an exemption from a withholding tax and the French tax administration sought to ascertain whether the relevant conditions of French law had been complied with. It wished to obtain certain information from its Luxembourg counterpart.

24. Following that request for assistance, the directeur de l'administration des contributions directes luxembourgeoise (Director of the Luxembourg direct taxation administration; 'the Director') adopted a decision on 16 March 2015 directing Berlioz to communicate certain information to him ('the information order'), asking, in particular:

- whether the company has a place of effective management in Luxembourg and what were the key features of the successive registered offices (description of the office, amount of Berlioz's own office space, physical and IT equipment belonging to Berlioz, a copy of the lease for the premises, home address), with supporting documentation;
- a list of employees of Berlioz with their function within the company and identification of employees linked to the company's registered office;
- whether Berlioz hires staff in Luxembourg;
- whether there is a contract between Berlioz and Cofima and, if so, for a copy of the contract;
- the shareholdings held by Berlioz in other companies and how those shareholdings are financed, with supporting documentation;
- the names and addresses of the members of Berlioz and the amount of capital held by each member and the percentage of share capital held by each member, and
- the amount at which Cofima's securities were recorded as assets of Berlioz prior to the general meeting of Cofima on 7 March 2012 and a chronology of the starting values at which Cofima securities were recorded as assets at the time of the capital contribution of 5 December 2002, the capital contribution of 31 October 2003 and the acquisition on 2 October 2007.

25. On 21 April 2015, Berlioz replied to the order, except as regards the names and addresses of its members, the amount of capital held by each member and the percentage of share capital held by each member, on the ground that that information was not foreseeably relevant, within the meaning of Directive 2011/16, for the checks carried out by the French tax administration.

26. On 22 April 2015, the Director ordered Berlioz to communicate the requested information to him by 29 April 2015, failing which an administrative fine might be imposed on the basis of Article 5(1) of the Law of 25 November 2014. Berlioz persisted in its refusal and the Director imposed an administrative fine of EUR 250 000 on it on 18 May 2015.

27. Following that fine, Berlioz brought an action before the tribunal administratif (Administrative Tribunal) (Luxembourg) against the Director's decision imposing a fine on it and asked that court to determine whether the information order was well founded.

28. By judgment of 13 August 2015, the tribunal administratif (Administrative Tribunal) upheld in part the main action for variation and reduced the fine to EUR 150 000. It dismissed the action as to the remainder and held that there was no need to adjudicate on the alternative action for annulment.

29. By application of 31 August 2015, Berlioz brought an appeal before the Cour administrative (Administrative Court), maintaining that the refusal of the tribunal administratif (Administrative Tribunal) to determine whether the information order was well founded, in accordance with Article 6(1) of the Law of 25 November 2014, constituted a breach of its right to an effective judicial remedy as guaranteed by Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.⁵

30. The Cour administrative (Administrative Court) considered that it might be necessary to take account of the Charter, and in particular Article 47. After requesting the parties to the main proceedings to submit their observations on the matter, the Cour administrative decided to stay proceedings and to request the Court to give a preliminary ruling.

IV – The request for a preliminary ruling and the procedure before the Court

31. By decision of 17 December 2015, received at the Court on 18 December 2015, the Cour administrative (Administrative Court) decided to refer the following questions to the Court for a preliminary ruling under Article 267 TFEU:

- (1) Is a Member State implementing EU law and thus rendering the Charter applicable in accordance with Article 51(1) thereof in a situation such as that in the main proceedings when it imposes an administrative pecuniary penalty on a person on account of that person's alleged failure to fulfil his obligations to cooperate pursuant to an order requiring him to provide information ('information order') made by the competent national authority of that State under national procedural rules introduced for that purpose, in the context of that Member State's execution, in its capacity as the requested State, of a request for exchange of information from another Member State that is based by the latter State, inter alia, on the provisions of Directive 2011/16 on the exchange of information on request?
- (2) In the event that it is established that the Charter is applicable to the present case, can a person rely on Article 47 of the Charter if he takes the view that the aforementioned administrative pecuniary penalty imposed on him is designed to place him under an obligation to provide information in the context of the execution, by the competent authority of the requested Member State of which he is a resident, of a request for information from another Member State for which there is no justification as regards the actual fiscal aim, there being therefore no legitimate aim in the present case, and which is intended to obtain information that has no foreseeable relevance to the tax case concerned?
- (3) In the event that it is established that the Charter is applicable to the present case, does the right to an effective remedy and to a fair trial as laid down by Article 47 of the Charter require — without the possibility of restrictions being imposed under Article 52(1) of the Charter — that the competent national court must have unlimited jurisdiction and accordingly the power to review, at least as a result of an objection, the validity of an information order made by the competent authority of a Member State in the execution of a request for exchange of information

⁵ 'The ECHR'.

submitted by the competent authority of another Member State, *inter alia*, on the basis of Directive 2011/16 in an action brought by the third party holder of the information, to whom that information order is addressed, such action being directed against a decision imposing an administrative pecuniary penalty for that person's alleged failure to fulfil his obligation to cooperate in the context of the execution of that request?

- (4) In the event that it is established that the Charter is applicable to the present case, are Articles 1(1) and 5 of Directive 2011/16, in the light, on the one hand, of the parallels with the standard of foreseeable relevance arising out of the Organisation for Economic Cooperation and Development's Model Tax Convention on Income and on Capital and, on the other, of the principle of sincere cooperation laid down in Article 4 TEU, together forming the objective of Directive 2011/16, to be interpreted as meaning that the foreseeable relevance, in relation to the tax case referred to and to the stated fiscal purpose, of the information sought by one Member State from another Member State constitutes a condition which the request for information must satisfy in order to trigger an obligation on the part of the competent authority of the requested Member State to act on that request, and in order to justify an information order issued to a third party by that authority?
- (5) In the event that it is established that the Charter is applicable to the present case, are the provisions of Article 1(1) in conjunction with Article 5 of Directive 2011/16, and Article 47 of the Charter, to be interpreted as precluding a legal provision of a Member State that generally limits the examination by its competent national authority, acting as the authority of the requested State, of the validity of a request for information to a review as to whether the request is in order, and as requiring a national court seised of court proceedings such as those described in the third question above to verify, in the context of those court proceedings, that the condition of foreseeable relevance of the information requested has been satisfied in all its aspects regarding the links to the particular tax case in question, the stated fiscal purpose and compliance with Article 17 of Directive 2011/16?
- (6) In the event that it is established that the Charter is applicable to the present case, does the second paragraph of Article 47 of the Charter preclude a legal provision of a Member State that precludes a request for information made by the competent authority of another Member State from being submitted to the competent national court of the requested State in court proceedings before it such as those described in the third question above; and does it require that document to be produced to the competent national court and access to it to be granted to the third party holding the information, or, indeed, that document to be produced to the national court without access to it being granted to the third party holding the information, owing to the confidential nature of that document, provided that any difficulties caused to the third party by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the competent national court?

32. Written observations were lodged by Berlioz and the Luxembourg, Belgian, Italian, Polish and Finnish Governments, and also by the European Commission.

33. The representative of the Luxembourg Government and the Commission made submissions at the hearing, which took place on 8 November 2016. The representative of the German Government and the representative of the French Government, which had not lodged written submissions, were also granted leave to submit argument at the hearing.

V – Analysis

A – Preliminary observation on Article 47 of the Charter and the right which it enshrines

34. Article 47 of the Charter is entitled ‘Right to an effective remedy and to a fair trial’. By that provision, the Charter recognises the right to an effective remedy enshrined in Article 13 of the ECHR and the right to a fair trial recognised in Article 6(1) of the ECHR.

35. The relationship between those articles of the ECHR and Article 47 of the Charter is expressly mentioned in the Explanations relating to the Charter of Fundamental Rights: the first paragraph of Article 47 of the Charter ‘is based on Article 13 of the ECHR’ and the second paragraph ‘corresponds to Article 6(1) of the ECHR’.⁶

36. In accordance with Article 52(3) of the Charter, the meaning and scope of the right to an effective remedy enshrined in Article 47 of the Charter must therefore be the same as those laid down in the ECHR. However, that provision makes it clear that it is not to prevent Union law providing more extensive protection.

37. In that regard, it should be pointed out that Article 47 of the Charter is more demanding than Article 13 of the ECHR, since the former requires an effective remedy before a ‘tribunal’, whereas Article 13 of the ECHR is satisfied with a ‘national authority’. In addition, Article 47 of the Charter has a wider scope *ratione materiae*. It applies where ‘[the] rights and freedoms guaranteed by the law of the Union are violated’ (whether or not they are set out in the Charter), whereas Article 13 of the ECHR requires a violation of ‘[the] rights and freedoms as set forth in the [ECHR]’.⁷ In addition, Article 6(1) of the ECHR limits the right to a fair trial to the determination of civil rights and obligations or of any criminal charge. No such restriction is to be found in the second paragraph of Article 47 of the Charter.⁸

38. Last, Article 47 of the Charter cannot be treated independently of the second paragraph of Article 19 TEU, since under that provision Member States are required to provide ‘remedies sufficient to ensure effective legal protection in the fields covered by Union law’.⁹

39. It is with those observations in mind that I shall examine the questions for a preliminary ruling submitted by the referring court.

B – The first question

40. By its first question, the referring court asks, in essence, whether a Member State implements EU law and thus renders the Charter applicable when it makes provision in its legislation for a pecuniary penalty to be imposed on a person who refuses to supply information in the context of an exchange of information between tax authorities based on a directive.

⁶ OJ 2007 C 303, pp. 17 to 35, especially pp. 29 and 30. See, in particular, to that effect, judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 40). On the Court’s case-law on that issue, see Lebrun, G., ‘De l’utilité de l’article 47 de la Charte des droits fondamentaux de l’Union européenne’, *Rev. trim. dr. h.*, 2016/106, pp. 433 to 459, especially p. 440.

⁷ Emphasis added. See, to that effect, Braibant, G., *La Charte des droits fondamentaux de l’Union européenne*, Éditions du Seuil, 2001, pp. 235 and 236.

⁸ See, to that effect, Shelton, D., ‘Article 47 — Right to an Effective Remedy and to a Fair Trial’, in Peers, St., Hervey, T., Kenner, J., and Ward, A. (ed.), *The EU Charter of Fundamental Rights— A commentary*, Hart Publishing, Oxford, 2014, pp. 1197 to 1275, especially No 47.44.

⁹ See, to that effect, Hofmann, H. Ch., ‘Article 47 — Right to an Effective Remedy and to a Fair Trial’, in Peers, St., Hervey, T., Kenner, J., and Ward, A. (ed.), *The EU Charter of Fundamental Rights— A commentary*, Hart Publishing, 2014, pp. 1197 to 1275, especially No 47.50.

41. According to Article 51(1) of the Charter, the implementation of EU law is in practice the condition *sine qua non* of the applicability of the Charter to Member States. According to the Luxembourg and Finnish Governments, however, that is not the case of the national law at issue in the main proceedings, since the pecuniary penalty which it prescribes is not provided for in Directive 2011/16.

42. By that argument, those Member States distinguish the present case from the case giving rise to the judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105). In that judgment, the Court held that Article 2, Article 250(1) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,¹⁰ and Article 4(3) TEU, envisaged the application of measures necessary for the collection of the tax. On the basis of that finding, the Court considered that pecuniary penalties and criminal proceedings, such as those provided for in the national legislation at issue, constituted implementation of the EU law that made the Charter applicable.

43. In the first place, I do not share the theory of the Luxembourg and Finnish Governments, since in my view the distinction which they draw is not a valid one.

44. First of all, it should be pointed out that, in paragraph 28 of its judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105), the Court also held that it was not necessary that the national laws concerned *themselves* had the object of transposing an EU directive, since their application was designed to penalise an infringement of that directive. In other words, the legislation in question must implement a specific obligation, but is not required to do so explicitly.

45. Next, Article 22 of Directive 2011/16 requires Member States — and does so in as general a fashion as the provisions referred to in the judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105),¹¹ — to take ‘all necessary measures to ... ensure the smooth operation of the administrative cooperation arrangements provided for in this Directive’. A mechanism for imposing sanctions is most certainly a necessary measure to ensure the effectiveness of the system for the exchange of information established by Directive 2011/16.¹² Without the threat of a penalty, a rule prescribing a particular form of conduct is ineffective.

46. In the second place, it is particularly strange that the Luxembourg Government should claim that the Law of 25 November 2014 is not the implementation of EU law. According to Article 1 of that law (which, according to its title, lays down the procedure applicable to the exchange of information on request in tax matters), the law is to apply to requests made by the competent authority of a requesting State ‘pursuant to ... the amended Law of 29 March 2013 on administrative cooperation in the field of taxation’. In fact, it is that law that transposes Directive 2011/16.

47. To my mind, it therefore seems difficult to maintain that that law, which sets out the procedure to be followed in order to obtain the information sought by a Member State on the basis of Directive 2011/16, does not implement that directive. In fact, any measure taken ‘in the context’ defined by an obligation which arises under EU law is a matter of EU law and constitutes an implementation of EU law.¹³

¹⁰ OJ 2006 L 347, p. 1.

¹¹ According to the first paragraph of Article 273 of Directive 2006/112, ‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT [value added tax] and to prevent evasion ...’. Article 2 of Directive 2006/112 defines the transactions subject to VAT and Article 250(1) of that directive concerns the VAT return that must be made by taxable persons.

¹² In that regard, the fact that Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ 2016 L 148, p. 8) inserts a new Article 25a into Directive 2011/16 which expressly provides that Member States are to lay down the rules on penalties applicable of national provisions adopted pursuant to that directive concerning one article in particular (the new Article 8aa) is not of such a kind as to alter the scope of the rule laid down in Article 22 of Directive 2011/16.

¹³ See, to that effect, Safjan, M., Düsterhaus, D., and Guérin, A., ‘La Charte des droits fondamentaux de l’Union européenne et les ordres juridiques nationaux, de la mise en œuvre à la mise en balance’, *RTD Eur.*, 2016, pp. 219 to 247, especially p. 229.

48. In the third place, the Court has already confirmed that the rules on requests for information and on the use of that information form part of the application of EU law. In the judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678), which concerned the interpretation of 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,¹⁴ which preceded Directive 2011/16, the Court considered that ‘the questions referred ... concern[ed] the *implementation* of EU law and [that] the Court [had] jurisdiction to examine the application, in [that] context, of fundamental rights’.¹⁵ Although in that case the Court held that the Charter was not applicable, it did so solely because the Charter had entered into force after the assistance procedure at issue.

49. In the light of the foregoing considerations, I consider that where a Member State makes provision in its legislation for the imposition of a pecuniary penalty on a person who refuses to provide information in the context of an exchange of information between tax authorities based, in particular, on the provisions of Directive 2011/16, it implements EU law, which entails the application of the Charter.

C – Second question

50. By its second question, the referring court asks, in essence, whether a person may rely on Article 47 of the Charter when he considers that the pecuniary administrative penalty imposed on him (because he refused to communicate information in the context of an exchange of information between tax authorities) is based on a request for information the validity of which he questions.

51. According to the first paragraph of Article 47 of the Charter, ‘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’. The second question submitted by the referring court is therefore fundamental, since the Court must define the scope of Article 47 of the Charter. In fact, the question to be answered by the Court is quite simply whether the application of the Charter automatically renders Article 47 applicable or whether the applicability of that article is conditional upon the alleged violation of a right or freedom guaranteed by the law of the Union.

52. The wording of the first paragraph of Article 47 of the Charter does admittedly tend to favour the second part of the alternative. However, I am of the view that that interpretation cannot be accepted.

53. On the one hand, such a literal interpretation of Article 47 of the Charter would run counter to the process of recognition of the right to an effective remedy in EU law. That right was initially recognised by the case-law of the Court as a general principle of law: and the systematic identification of a specific right or freedom as a condition of the application of the right to an effective remedy does not follow from that case-law (see Section 1 below).

54. On the other hand, that interpretation would run counter to the differences in drafting between Article 47 of the Charter by comparison and Articles 6 and 13 of the ECHR (see Section 2 below).

1. A brief overview of the historical development of the recognition of the right to effective judicial protection in EU law

55. First of all, I recall that even before it was formally set out in the Charter, the Court had considered that the existence of a judicial remedy was a general principle of EU law.

¹⁴ OJ 1977 L 336, p. 15.

¹⁵ Paragraph 27 of that judgment. Emphasis added.

56. In fact, given a fundamental right such as the right to freedom of movement for workers, the Court considered that ‘the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right [was] essential in order to secure for the individual effective protection for his right. As the Court held in its judgment of 15 May 1986 [*Johnston*, 222/84, (EU:C:1986:206)], *that requirement reflects a general principle of Community law* which underlies the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms’.¹⁶

57. Admittedly, that case involved the violation of a right, the right to freedom of movement. However, the Court then took an additional step by linking the general principle of the right to an effective remedy to the establishment of the European Union as a ‘Union subject to the rule of law’.

58. According to the Court, that concept means that ‘*neither its Member States* nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’,¹⁷ and also with the ‘general principles of law [and with] fundamental rights’.¹⁸

59. In that context, it seems logical that the systematic identification of a specific right or freedom guaranteed by the law of the Union as a condition for the application of the right to an effective remedy is not required in the Court’s case-law.

60. The judgment of 26 September 2013, *Texdata Software* (C-418/11, EU:C:2013:588), illustrates the Court’s approach. In that judgment, the Court first of all considered that the national legislation which lays down the penalties incurred in the event of failure to comply with the obligation to disclose accounting documents¹⁹ constituted a case of the implementing of Union law for the purposes of Article 51(1) of the Charter.²⁰ Next, the Court inferred that the provisions of the Charter were applicable.²¹ Last, without seeking to identify the violation of a specific right or freedom, the Court went on to examine compliance with Article 47 of the Charter.²²

2. The interpretation of the first paragraph of Article 47 of the Charter

61. In addition, as I pointed out in my preliminary observation, the scope *ratione materiae* of Article 47 of the Charter is broader than that of the ECHR.

62. Whereas Article 13 of the ECHR requires a violation of the ‘rights and freedoms as set forth in [the ECHR]’ in order to be applicable, Article 47 of the Charter applies provided that ‘[the] rights and freedoms guaranteed by the law of the Union are violated’, whether or not they are set out in the Charter.

¹⁶ Judgment of 15 October 1987, *Heylens and Others* (222/86, EU:C:1987:442, paragraph 14). Emphasis added.

¹⁷ Judgment of 23 April 1986, *Les Verts v Parliament* (294/83, EU:C:1986:166, paragraph 23). Emphasis added.

¹⁸ Judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 91), and of 19 December 2013, *Telefónica v Commission* (C-274/12 P, EU:C:2013:852, paragraph 56).

¹⁹ This obligation is laid down in Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

²⁰ See paragraph 75 of that judgment.

²¹ See paragraph 76 of that judgment.

²² See paragraph 77 et seq. of that judgment.

63. However, according to Article 51(1) thereof, the Charter can be relied on as against Member States only when they are implementing Union law. Consequently, recognition of the applicability of the Charter already necessarily implies the existence of a right guaranteed by the law of the Union.²³ To require that that rule of EU law, which entails the applicability of the Charter, should also confer a specific subjective right capable of having been breached in the case of the person concerned seems to me to contradict the liberal intention that underpins Article 47 of the Charter.

64. Furthermore, to my mind that intention to authorise the automatic application of Article 47 of the Charter where the Charter is itself applicable is enshrined in the use of the expression ‘hearing’ in the second paragraph.

65. In fact, in addition to making judicial protection available for all EU law, the second paragraph of Article 47 of the Charter recognises that everyone is entitled to a fair ‘hearing’ by an independent and impartial tribunal, where Article 6(1) of the ECHR restricts the concept of a hearing to the determination of civil *rights and obligations* or of any criminal *charge*.

66. Last, where, as in the present case, a person seeks to challenge a decision adversely affecting him, the applicability of Article 47 of the Charter appears to be the *condition sine qua non* of a Union subject to the rule of law. As I have observed above, a Union subject to the rule of law means that neither the Member States nor the institutions of the Union can avoid review of the conformity of their acts.

67. In conclusion, I consider that the right to an effective remedy and to an impartial tribunal enshrined in Article 47 of the Charter necessarily entails *the right of access to justice*, that is to say, the possibility for an individual to secure a rigorous judicial review of any act capable of adversely affecting his interests.²⁴ In fact, it is on the Member States that the second paragraph of Article 19 TEU imposes the obligation to provide ‘remedies sufficient to ensure effective legal protection in the fields covered by Union law’.

68. Consequently, I consider that a person may rely on Article 47 of the Charter where he considers that the pecuniary administrative penalty imposed on him is based on a request for information the validity of which he questions provided that that request is made in the context of a procedure which constitutes the implementing of the law of the Union.

D – Third and fifth questions

69. By its third question, the referring court asks, in essence, whether the right to an effective remedy and to an impartial tribunal, as enshrined in Article 47 of the Charter, requires that the national court has unlimited jurisdiction in the action brought against a pecuniary administrative penalty imposed on the applicant because of its refusal to communicate information in the context of an exchange of tax information between Member States.

70. From that aspect, the ‘unlimited jurisdiction’ requirement therefore refers to the possibility for the national court to assess the proportionality of the penalty, but also to the possibility of examining the legality of the information order on which the penalty is based.

²³ See, to that effect, Shelton, D., ‘Article 47 — Right to an Effective Remedy and to a Fair Trial’, in Peers, St., Hervey, T., Kenner, J., et Ward, A. (ed.), *The EU Charter of Fundamental Rights— A commentary*, Hart Publishing, 2014, pp. 1197 to 1275, especially Nos 47.01 and 47.46.

²⁴ See, to that effect, Pliakos, A., *Le principe général de la protection juridictionnelle efficace en droit communautaire*, Sakkoulas/Bruylant, Athens/Brussels, 1997, p. 102, and also Prechal, S., ‘The Court of Justice and effective judicial protection: what has the Charter changed?’ in Paulussen, C., Takács, T., Lazic, V. and Van Rompuy, B. (ed.), *Fundamental Rights in International and European Law. Public and Private Law Perspective*, Springer, Berlin, 2016, pp. 143 to 157, especially p. 148.

71. The fifth question submitted by the referring court concerns the extent of the review that must be carried out. By that question, the Cour administrative (Administrative Court) seeks to ascertain whether the review which the tax authority and the court of the requested State must carry out — in the event that it should be recognised as having unlimited jurisdiction — is limited to the procedural regularity of the request for information.

72. Since I consider that Article 47 of the Charter requires an examination of the regularity of the information order on which the pecuniary penalty imposed following the refusal to respond to that information order is based, I shall examine the two questions together.

1. The ‘unlimited jurisdiction’ requirement

73. As I have already had occasion to point out, Article 52(3) of the Charter specifies that the meaning and scope of the rights recognised by the Charter which correspond to rights guaranteed by the ECHR are to be the same as those laid down in that Convention. Subject to my preliminary observations, that is the case of Article 47 of the Charter by comparison with Article 6(1) and Article 13 of the ECHR.

74. According to the explanation on Article 52(3) of the Charter, the meaning and scope of the rights guaranteed are to be determined not only by the text of the ECHR but also by the case-law of the European Court of Human Rights (‘the ECtHR’).²⁵ It must be stated that the case-law of the ECtHR on the requirement for an effective remedy is consistent: where there is a system of administrative fines — such as tax penalties — the right to a fair hearing (guaranteed by Article 6(1) of the ECHR and the second paragraph of Article 47 of the Charter) assumes that the decision of an administrative authority which does not itself satisfy the conditions of that article must be subject to subsequent control by a judicial body that has full jurisdiction.²⁶

75. According to the ECtHR, ‘the characteristics of a judicial body with full jurisdiction include the power to quash in all respects, on questions of fact and law, the decision of the body below. It must have jurisdiction to examine all questions of fact and law relevant to the dispute before it’.²⁷

76. In addition, the ECtHR has also consistently held that a court can be bound by an administrative decision that was crucial to the determination of the case only if the decision at issue was taken in an administrative procedure which itself complied with the requirements of Article 6(1) of the ECHR.²⁸

77. In the present case, two observations are called for. First, Article 5(1) of the Law of 25 November 2014 expressly classifies the measure penalising the refusal to communicate the requested information as ‘an administrative fine’. Second, it follows from Article 6 of that Law that only an action against the decision imposing the pecuniary penalty is available to the person concerned, as the competent court is implicitly bound by the information order.

²⁵ See, to that effect, judgment of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraph 35).

²⁶ See, to that effect, ECtHR, 7 June 2012, *Segame SA v. France*, CE:ECHR:2012:0607JUD000483706, paragraphs 54 and 55.

²⁷ ECtHR, 7 June 2012, *Segame SA v. France*, CE:ECHR:2012:0607JUD000483706, paragraph 55. See also, concerning the determination of civil rights and obligations, ECtHR, 15 September 2015, *Tsanova-Gecheva v. Bulgaria*, CE:ECHR:2015:0915JUD0004380012, paragraph 92, and ECtHR, 13 February 2003, *Chevrol v. France*, CE:ECHR:2003:0213JUD004963699, paragraph 77.

²⁸ See, to that effect, ECtHR, 16 April 2013, *Fazliyski v. Bulgaria*, CE:ECHR:2013:0416JUD004090805, paragraphs 59 and 60; ECtHR, 24 November 2005, *Capital Bank AD v. Bulgaria*, CE:ECHR:2005:1124JUD004942999, paragraphs 99 to 108; and ECtHR, 28 April 2005, *I.D. v. Bulgaria*, CE:ECHR:2005:0428JUD004357898, paragraphs 50 to 55.

78. It cannot be denied that procedure for administrative cooperation in the field of taxation established by Directive 2011/16, transposed into Luxembourg law by the Law of 29 March 2013, and the subsequent decisions requiring information and imposing a penalty adopted on the basis of those provisions, do not provide the guarantees set out in Article 47 of the Charter. Having regard to the objective of effective collaboration between administrations that forms the basis of those decisions,²⁹ it is logical that those decisions are not taken by an independent and impartial authority after the party concerned has been given a fair and public hearing.

79. While Directive 2011/16 does not in itself confer any right on individuals,³⁰ the imposition of a pecuniary administrative penalty provided for with the aim of ensuring compliance with that directive, conversely, requires access to a court.

80. Consequently, in order for Article 47 of the Charter to be complied with, it seems to me that the court hearing the action against the pecuniary administrative penalty must be able to examine the legality of the information order on which the penalty is based. The national court cannot be bound by the information order taken unilaterally by the administration; and the legality of that information order is without doubt a question of law relevant for the case and its resolution.

2. The extent of an action involving the exercise of unlimited jurisdiction

81. It follows from the case-law of the Court and from that of the ECtHR that the right of access to a court or tribunal is not an absolute right.³¹ The exercise of the right to an effective remedy may therefore be regulated.

a) The possibility of limiting the right to an effective remedy

82. According to the Court, ‘it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, to that effect, [judgment of 15 June 2006, *Dokter and Others* (C-28/05, EU:C:2006:408), paragraph 75 and the case-law cited, and judgment of the ECtHR of 21 November 2001, *Fogarty v. United Kingdom*, *Reports of judgments and decisions*, 2001-XI, § 33]’.³²

83. That approach is broadly comparable to the approach taken by the ECtHR when it examines the restrictions placed on the rights guaranteed by Articles 6 and 13 of the ECHR.³³

²⁹ See, in particular, recitals 3 and 12 of Directive 2011/16. According to the Court, the aim of Directive 77/799 was ‘to combat international tax evasion and avoidance, and that it [had] therefore [been] adopted in order to govern cooperation between the tax authorities of the Member States’ (judgment of 22 October 2013, *Sabou*, C-276/12, EU:C:2013:678, paragraph 32). Those objectives did not change with the adoption of Directive 2011/16.

³⁰ See, to that effect, concerning Directive 77/799, judgment of 27 September 2007, *Twoh International* (C-184/05, EU:C:2007:550 paragraph 31). See also, still concerning Directive 77/799, and more specifically the taxpayer who is the subject of the request for information, judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 36).

³¹ See, to that effect, judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 44 and the case-law cited).

³² Judgment of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 63).

³³ See, to that effect, Shelton, D., ‘Article 47 — Right to an Effective Remedy and to a Fair Trial’, in Peers, St., Hervey, T., Kenner, J., and Ward, A. (ed.), *The EU Charter of Fundamental Rights— A commentary*, Hart Publishing, 2014, pp. 1197 to 1275, especially No 47.84.

84. In reality, it is quite simply a matter of complying with the requirement laid down in Article 52(1) of the Charter, which states that ‘a limitation on the right to an effective remedy before a tribunal within the meaning of Article 47 of the Charter ... can therefore be justified only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others’.³⁴

85. The exercise of the right to an effective remedy may therefore be limited, provided that the *essence* of the right is not infringed. From that aspect, the ECtHR has also made clear that the role of Article 6 of the ECHR was not to guarantee access to a tribunal that could *substitute* its own view for that of the administrative authorities.³⁵

86. In order to evaluate the sufficiency of the extent of the review that may be carried out by the competent national court, the object of the contested decision must be taken into consideration. That element is all the more important when the decision ‘deals with a specific field requiring specialised knowledge or if, and to what extent, it entails the exercise of the administration’s discretion’.³⁶

87. In those circumstances, it seems to me that the review of the validity of the information order on which the administrative pecuniary penalty is based might be limited provided that that restriction does not adversely affect the essence of the right to an effective remedy and pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim pursued.³⁷

b) The extent of the review of regularity (by the administration of the requested State) and legality (by a court of that State) in the context of a request for information based on Directive 2011/16

88. In the first place, it will be recalled that the objective of Directive 77/799 was to combat international tax evasion and avoidance.³⁸ The first two recitals of Directive 2011/16 confirm that objective, which may also be inferred from Article 23(2) of Directive 2011/16, which provides that ‘Member State shall communicate to the Commission any relevant information necessary for the evaluation of the effectiveness of administrative cooperation in accordance with this Directive *in combating tax evasion and tax avoidance*’.³⁹

89. In fact, the Court has consistently held that the objective of combating tax evasion and tax avoidance may be considered to be legitimate and to constitute an overriding reason of general interest.⁴⁰

90. In the second place, the Court has held that the requested State was, in principle, *bound* to respond to the request for information made by the competent authority of another Member State.⁴¹

34 Judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 49).

35 See, to that effect, ECtHR, 15 September 2015, *Tsanova-Gecheva v. Bulgaria*, CE:ECHR:2015:0915JUD0004380012, paragraph 97.

36 ECtHR, 15 September 2015, *Tsanova-Gecheva v. Bulgaria*, CE:ECHR:2015:0915JUD0004380012, paragraph 98.

37 See, to that effect, judgment of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraph 60).

38 See, to that effect, judgments of 27 September 2007, *Twoh International* (C-184/05, EU:C:2007:550, paragraph 30), and of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 32).

39 Emphasis added.

40 See, in particular, to that effect, judgments of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraph 60), and of 21 February 2013, *A* (C-123/11, EU:C:2013:84, paragraphs 40, 45 and 46).

41 See, to that effect, judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 34).

91. In that regard, the use of the verb ‘shall’ in Article 5 of Directive 2011/16 confirms that the communication of information is mandatory. According to that article, ‘at the request of the requesting authority, the requested authority *shall communicate* to the requesting authority any information referred to in Article 1(1) ...’.⁴² The reservation previously set out in Article 2(1) of Directive 77/799 is now developed in a specific article of Directive 2011/16 entitled ‘Limits’, namely Article 17. Nonetheless, Article 18 of that directive makes clear that the provisions of Article 17(2), (3) and (4) ‘shall in no case be construed as permitting a requested Member State to decline to supply information solely because it has no domestic interest in such information’.

92. In the third place, it is equally clear that the requesting State is not entitled to request any tax information whatsoever which it may wish to obtain. The reference which Article 5 of Directive 2011/16 makes to Article 1 of that directive places a clear restriction: that directive establishes the rules and procedures that allow Member States to cooperate with each other in order to exchange information that is *foreseeably relevant* to the administration and enforcement of the domestic laws concerning taxes.⁴³

93. That limit is explained in recital 9 of Directive 2011/16, according to which ‘the standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer ...’.

94. It follows from that provision and from the explanation given that compliance with the standard known as ‘foreseeable relevance’ is a condition of the regularity of the request for information. The request for information must therefore be verified on that point by the requested authority. Furthermore, Article 7(4) of Directive 2011/16 authorises the requested authority to notify the requesting authority of any deficiencies in the request.

95. Consequently, that standard also constitutes the criterion by reference to which the legality of the information order must be examined, and be examined by a tribunal within the meaning of Article 47 of the Charter.

96. In the fourth place, speed and discretion are clearly essential in combating tax evasion and tax avoidance, as confirmed by recitals 4 and 8 of Directive 2011/16. It is for that reason that time limits for the communication of information were set down in Article 7 of that directive.⁴⁴

97. It follows from the four observations set out above that, if the cooperation mechanism established by Directive 2011/16 is not to be rendered largely ineffective, the verification of the regularity of the request for information by the tax authority of the requested State and the subsequent review of legality by the national court must be limited. Such a restriction is justified in the light of the objective of general interest of combating tax evasion and tax avoidance pursued by that directive.

98. In that regard, Article 20 of Directive 2011/16 defines the parameters appropriate to the definition of the control to be carried out, by prescribing minimum information that must be included on the standard forms the use of which is suggested by the legislature for the requests for information referred to in Article 5 of Directive 2011/16 and the responses to those requests. Recital 9 of Directive 2011/16, moreover, which refers to the standard of ‘foreseeable relevance’, refers expressly to Article 20.

⁴² Emphasis added.

⁴³ With the exception of value added tax, customs duties, excise duties covered by other Union legislation or administrative cooperation between Member States, and social security contributions (Article 2(2) of Directive 2011/16).

⁴⁴ See recital 12 of Directive 2011/16. Thus, for example, if the requested authority wishes to notify the requesting authority of any deficiencies in the request for information, Article 7(4) of Directive 2011/16 requires it to do so within one month of receipt of the request for information.

99. The specific information mentioned in the first subparagraph of Article 20(2) of Directive 2011/16 consists of the identity of the person under examination or investigation and the tax purpose for which the information is sought. The final subparagraph adds that the requesting authority may also provide the name and address of any person believed to be in possession of the requested information.

100. On the basis of that information, the requested authority must be in a position to determine whether the requested information is *foreseeably relevant* in order to achieve the objective described by the requesting authority, that is to say, that it does indeed relate to the tax situation of the taxpayer concerned and that it is capable of assisting the requesting authority to make a correct assessment of the tax due.

101. In other words, the authority of the requested State must be in a position to answer the question whether the requested information can *foreseeably* be connected to the assessment of the tax which the requesting authority seeks to make.⁴⁵

102. That interpretation is supported by the commentary on Article 26 of the Model Tax Convention of the OECD, by which the EU legislature was itself inspired.⁴⁶ According to the explanations relating to Article 26 of that Treaty, there must be ‘a *reasonable* possibility that the requested information *will be relevant*’.⁴⁷ The concept of ‘foreseeable relevance’ is intended to prevent a State from making requests for information ‘that have *no apparent nexus* to an open inquiry or investigation’.⁴⁸

103. The legitimate objective pursued by Directive 2011/16 requires that the same limits apply to the review of legality of the information order carried out in the context of a judicial action brought against the pecuniary penalty imposed on the person who refused to communicate the requested information.

104. In concrete terms, the national court must be able to ascertain that the information order is based on a request for information which demonstrates a link between, on the one hand, the requested information, the taxpayer concerned and any third party asked to provide the information and, on the other, the tax objective pursued.

105. In order to be penalised, the deficiency between the request for information and the tax objective pursued must be manifest. To require the court of the requested State to carry out a detailed legal analysis would assume extensive knowledge of the factual and legal framework prevailing in the requesting State, which it cannot be required to have and which, moreover, would not be realistic.⁴⁹ I share the Commission’s view that the concept of ‘foreseeable relevance’ requires ‘[only] a “brief and formal verification, of a factual nature”’.⁵⁰

⁴⁵ I note that in the proposal of 2 February 2009 for a Council Directive on administrative cooperation in the field of taxation (COM(2009)29 final), Article 5(1) referred to ‘information *which may be relevant* for the correct assessment of taxes’. Emphasis added.

⁴⁶ See paragraph 570 of the explanation of the reasons for the proposal of 2 February 2009 for a Council Directive on administrative cooperation in the field of taxation (COM(2009)29 final). The Court has already held that the Member States are entitled to be guided by an OECD Model Treaty. See, for example, concerning the Model Double Taxation Treaty, judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 32).

⁴⁷ Commentary on Article 26 of the Model Tax Convention on Income and on Capital 2014 of the OECD, point 5. Emphasis added.

⁴⁸ Commentary on Article 26 of the Model Tax Convention on Income and on Capital 2014 of the OECD. Emphasis added.

⁴⁹ See, to that effect, concerning Directive 77/799, judgment of 13 April 2000, *W.N.* (C-420/98, EU:C:2000:209, paragraph 18).

⁵⁰ See paragraph 50 of the Commission’s written observations.

106. Likewise, the limits on the obligation to communicate developed in Article 17 of Directive 2011/16 do not in my view have to be taken into consideration. In principle, the requested authority is required to respond to the request for information⁵¹ and the limits set out in Article 17 of that directive are merely *possibilities* left to the discretion of the requested authority not to communicate information.⁵² As the Court has previously held with respect to the requesting State, by using the term ‘may’ the EU legislature indicated that the national tax authorities have a possibility.⁵³ That is the verb used in Article 17(3) and (4) of Directive 2011/16.⁵⁴

107. Accordingly, it is not for the court to assess *a posteriori* whether it is appropriate to make use of those possibilities if the requested authority did not deem it appropriate to do so when it received the request for information.

c) Intermediate conclusions on the extent of the controls of regularity and legality in the context of a request for information based on Directive 2011/16

108. Directive 2011/16 does not in itself confer any rights on individuals.

109. However, before adopting an information order, the requested authority must be in a position to determine whether the requested information is foreseeably relevant in order to achieve the objective described by the requesting authority, that is to say, to ascertain whether it relates to the tax situation of the taxpayer concerned and is capable of assisting the requesting authority to make a correct assessment of the amount of the tax due.

110. The imposition of a pecuniary administrative penalty prescribed with the aim of ensuring compliance with the directive requires, moreover, access to a tribunal within the meaning of Article 47 of the Charter. That assumes that the court hearing the action against the pecuniary penalty is able to examine the legality of the information order on which it is based.

111. However, the legitimate objective of combating tax evasion and tax avoidance pursued by Directive 2011/16 requires that the review of legality is limited as follows: the court must be capable only of verifying, on the basis of a brief examination, that the information order is based on a request for information which demonstrates a link between, on the one hand, the information requested, the taxpayer concerned and any third party asked to provide information and, on the other, the tax objective pursued. In order to entail a finding of illegality, the deficiency between the request for information and the tax objective must be manifest.

112. As thus conceived, that type of review does not seem to me to deprive the right to an effective remedy guaranteed in Article 47 of the Charter of its essence. In addition, it complies with the principle of proportionality since the limitations imposed are necessary in order to ensure the effectiveness of the procedure of administrative cooperation in the field of taxation established by Directive 2011/16 and do not run counter to what is necessary in order to achieve the objective of combating tax evasion and tax avoidance.

⁵¹ See, to that effect, judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 34).

⁵² Only Article 17(1) of Directive 2011/16 imposes a condition on the requested authority’s reply. However, it is impossible for that authority to ensure that the condition is complied with. According to that provision, the requested authority is to provide the information referred to in Article 5 ‘provided that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives’. That condition is therefore binding on the requesting authority. Under the principle of sincere cooperation on which that directive is based, compliance with that condition must necessarily be presumed by the requested authority. The requesting authority will normally have recourse to the directive only when it does not itself have the necessary information.

⁵³ See, to that effect, judgments of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 33), and of 27 September 2007, *Twoh International* (C-184/05, EU:C:2007:550, paragraph 32).

⁵⁴ Article 17(2) of Directive 2011/16 states that the directive ‘shall impose no obligation upon a requested Member State to carry out enquiries or to communicate information, if it would be contrary to its legislation to conduct such inquiries or to collect the information requested for its own purposes’ (emphasis added).

d) Final observation on the lack of inconsistency with the taxpayer's situation

113. In its judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678), the Court held that, in the context of tax control procedures, the investigation stage — which includes the request for information from one tax authority to another — must be distinguished from the contentious stage. According to the Court, ‘respect for the rights of the defence of the taxpayer does not require that the taxpayer should take part in the request for information sent by the requesting Member State to the requested Member State’.⁵⁵

114. According to the Commission, the same reasoning should apply in the case of a third party who has been asked to provide information, since otherwise requested third parties would be granted more procedural rights than the taxpayer subject to the tax investigation, although the tax situation of the former is not affected.⁵⁶ Consequently, the requested third party should not have the right to challenge the foreseeable relevance of the request for information.

115. The argument cannot be upheld, since the taxpayer under investigation and the requested third party are not in comparable situations.

116. In fact, what justifies the absence of mandatory recognition of procedural rights to the taxpayer in the judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678), is the distinction which the Court draws, in the tax control procedure, between the investigation stage and the contentious stage.⁵⁷ The latter stage begins when the taxpayer is sent a correction proposal. That second stage necessarily entails, for the taxpayer, respect for certain rights, including the right to challenge any final decision before a tribunal.

117. The requested third party is not involved in the second stage of the tax control procedure. He will therefore not be able to rely on his rights in that stage. In addition, unlike in the taxpayer's situation, is it really possible to speak of an investigation in the case of the requested third party, especially when a pecuniary penalty is imposed on him? In those circumstances, it is not inconsistent that the question of the right to an effective remedy should be given a different answer, depending on whether the question applies to the taxpayer whose tax the requesting State is seeking to calculate or to the third party to whom the information order made following the request for information is addressed.

E – Fourth question

118. By its fourth question, the referring court asks about the scope of the concept of ‘foreseeable relevance’ referred to in Article 1(1) and Article 5 of Directive 2011/16. In essence, the Court administrative asks whether ‘foreseeable relevance’ is a condition of the validity of the request for information addressed by the requesting authority to the requested authority and of the subsequent information order.

119. When examining the third and fifth questions, I considered that the reference by Article 5 of Directive 2011/16 to Article 1 of that directive placed a clear limitation on the obligation imposed on the requested authority.

⁵⁵ Paragraph 44 of that judgment.

⁵⁶ See paragraph 70 of the Commission's written observations.

⁵⁷ See, in that respect, points 56 to 59 of the Opinion of Advocate General Kokott in *Sabou* (C-276/12, EU:C:2013:370). See also, in the literature, Aubert, M., Broussy, E. and Cassagnabère, H., ‘Chronique de jurisprudence de la CJUE’, *L'actualité juridique; droit administratif*, 2013, p. 2309; Van Eijdsden, A., ‘Sabou. Exchange of information on request. No obligation to inform taxpayer of the request’, *Highlights & Insights on European Taxation*, 2014, No 3, pp. 131 to 134, especially pp. 132 and 133.

120. In fact, in accordance with those two articles, Directive 2011/16 lays down the rules and procedures imposed on Member States to cooperate among themselves for the sole purposes of exchanging information that is *foreseeably relevant* for the administration and application of the domestic legislation of the Member States relating to taxes.⁵⁸

121. I inferred that compliance with the ‘foreseeable relevance’ standard was a condition of the regularity of the request for information, and also of the subsequent information order, and that it also constituted the criterion by reference to which the legality of the information order should be examined by a tribunal for the purposes of Article 47 of the Charter⁵⁹.

122. In other words, the foreseeable relevance of the information sought by one Member State from another Member State is a condition which the request for information must satisfy in order for the requested Member State to be required to comply with it.

F – Sixth question

123. By its sixth question, the referring court asks, in essence, whether Article 47(2) of the Charter requires the request for information addressed by the requesting authority to the requested authority to be communicated to the addressee of the information order and to the tribunal in the context of the action brought against a pecuniary penalty imposed following the refusal to respond to that decision.

124. The question is not trivial: it affects the adversarial principle, which is regarded as a fundamental principle since it permits the exercise of the rights of the defence and the establishment of the judicial truth.⁶⁰

125. In the context of Directive 2011/16, the elements capable of demonstrating the link between the requested information and the tax objective pursued by the requesting authority — that is to say, the foreseeable relevance of the requested information — are necessarily developed in the request for information. On the other hand, it is by no means certain that those elements will be reproduced in the information order notified to the requested third party. Conversely, Article 3(4) of the Law of 25 November 2014 expressly states that the information order is to contain only such information as is essential in order to enable the holder of the information to identify the information requested.⁶¹

126. Such a concise information order certainly does not make it possible to ascertain that it is based on a request for information which shows a link between, on the one hand, the information requested, the taxpayer concerned and any third party asked to provide the information and, on the other, the tax objective pursued.⁶²

127. Consequently, the initial request for information made by the requesting State must necessarily be brought to the attention of the tribunal hearing the action against the pecuniary penalty, as otherwise it would be unable to carry out the review of legality required by Article 47 of the Charter.

⁵⁸ With the exception of value added tax, customs duties, excise duties covered by other Union legislation on administrative cooperation between Member States and social security contributions (Article 2(2) of Directive 2011/16).

⁵⁹ See points 94 and 95 of this Opinion.

⁶⁰ See, to that effect, Miniato, L., *Le principe du contradictoire en droit processuel*, L.G.D.J., Paris, 2008, No 121.

⁶¹ In this case, the legal requirement does not necessarily appear to have been complied with. The request injunction notified to Berlioz in the main proceedings includes information other than the information requested (see footnote 67).

⁶² See point 111 of this Opinion.

128. As Advocate General Bot had occasion to point out recently, in point 92 of his Opinion in ZZ (C-300/11, EU:C:2012:563), ‘*even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the independent appeals authority must be informed of the reasons grounding the contested decision, even if such reasons are not publicly available ...*’.⁶³

129. But what about the requested third party? The fact that he did not have access to the request for information would create an imbalance between the parties to the proceedings.

130. Since the beginning of the European construction, the Court has held that the fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts or documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views.⁶⁴

131. Admittedly, the adversarial principle, too, is not absolute. In that regard, it is necessary to bear in mind the context in which the dispute arose: the collaboration between tax administrations with the aim of combating tax evasion and tax avoidance. In that context, it cannot be precluded that communication of the request for information to the requested third party might damage the effectiveness of the exchange of information or reduce the prospects of success of the investigation carried out by the requesting authority. In addition, would not disclosure of the request for information to the requested third party be likely to breach the right to protection of personal information of the taxpayer who is the subject of the tax investigation?

132. However, I do not believe that those reasons constitute a general and abstract justification for the breach of the guarantees inherent in the right to an effective remedy that limited access to the factors indispensable to the appraisal of the legality of the penalty imposed represents.

133. While the ECtHR has recognised that the adversarial principle might be restricted, it has done so only in order to preserve the fundamental right of another individual or to safeguard an important public interest.⁶⁵ According to the ECtHR, only measures which are ‘strictly necessary’ are permissible under Article 6(1) of the ECHR.⁶⁶

134. In that regard, in the context of Directive 2011/16, the rights of another individual do not appear to me, at first sight, to justify the confidentiality of the request for information vis-à-vis the requested third party. It is likely that the information relating to the taxpayer involved in the tax investigation will already have been disclosed in the information order.⁶⁷ Conversely, combating tax evasion and tax avoidance certainly constitutes an important public interest.

135. However, even in exceptional circumstances connected with public safety in the presence of presumed terrorist threats, the Court has held that the competent national authority had the task of proving that State security would in fact be compromised by precise and full disclosure to the person concerned of the grounds which constitute the basis of the decision at issue.⁶⁸

⁶³ Emphasis added.

⁶⁴ See, to that effect, judgment of 22 March 1961, *Snapat v High Authority* (42/59 and 49/59, EU:C:1961:5) and, for recent confirmation of the principle, judgment of 4 June 2013, ZZ (C-300/11, EU:C:2013:363, paragraph 56).

⁶⁵ See, to that effect, ECtHR, 16 February 2000, *Jasper v. United Kingdom*, CE:ECHR:2000:0216JUD002705295, paragraph 52, and ECtHR, 19 February 2009, *A. and others v. United Kingdom*, CE:ECHR:2009:0219JUD000345505, paragraph 205.

⁶⁶ ECtHR, 16 February 2000, *Jasper v. United Kingdom*, CE:ECHR:2000:0216JUD002705295, paragraph 52.

⁶⁷ That is the position in the present case, moreover, since the information order specifies the identity of the legal person concerned and the purpose of the investigation carried out by the authorities of the requesting State. After stating that ‘the legal person concerned by the request is Cofima SAS’ and indicating the address of its registered office in France, the information order expressly adds that ‘the French tax authorities are checking the tax situation of SAS Cofima, owned by Berlioz Investment SA, and require information in order to be able to make a ruling on the application of the withholding taxes on the distributions made by SAS Cofima to Berlioz Investment SA’ (see document A 1 in the file lodged by the Luxembourg Government).

⁶⁸ See, to that effect, judgment of 4 June 2013, ZZ (C-300/11, EU:C:2013:363, paragraph 61).

136. That requirement is also to be found in the case-law of the ECtHR, which requires that the restriction on the adversarial principle be counterbalanced by adequate procedural mechanisms capable of guaranteeing a satisfactory degree of fairness in the procedure.⁶⁹ The assessment of the need for disclosure that is carried out by the court hearing the case has been considered to be an important safeguard that is capable of compensating for the competent authority's refusal to communicate the request for information.⁷⁰

137. Having regard to those considerations, I consider that the request for information must therefore necessarily be communicated to the court hearing the action against the pecuniary sanction, and also to the requested third party. If the administration of the requested State considers that the latter communication is capable of compromising the effectiveness of the collaboration between administrations with a view to combating tax evasion and tax avoidance (or of adversely affecting another public interest or the fundamental right of another individual), it is for that authority to adduce evidence to that effect in the context of that action and for the court to resolve the question.

VI – Conclusion

138. In the light of the foregoing considerations, I propose that the Court should answer the questions for a preliminary ruling referred by the Cour administrative (Administrative Court) as follows:

- (1) Where a Member State makes provision in its legislation for the imposition of a pecuniary penalty on a person who refuses to provide information in the context of an exchange of information between tax authorities based, in particular, on the provisions of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, it implements EU law, which entails the application of the Charter.
- (2) A person may rely on Article 47 of the Charter where he considers that the pecuniary administrative penalty imposed on him is based on a request for information the validity of which he questions provided that that request is made in the context of a procedure which constitutes the implementing of the law of the Union.
- (3) Article 47 of the Charter must be interpreted as meaning that the court hearing the action against the pecuniary administrative penalty imposed following the refusal to respond to the information order must be able to examine the legality of that order. However, having regard to the legitimate objective of combating tax evasion and tax avoidance pursued by Directive 2011/16, the court must be capable only of verifying, on the basis of a brief examination, that the information order is based on a request for information which demonstrates a link between, on the one hand, the information requested, the taxpayer concerned and any third party asked to provide information and, on the other, the tax objective pursued. In order to entail a finding of illegality, the deficiency between the request for information and the tax objective must be manifest.
- (4) The foreseeable relevance of the information sought by one Member State from another Member State on the basis of Directive 2011/16 is a condition which the request for information must satisfy in order for the requested Member State to be required to comply with it.
- (5) The request for information on which the information order is based must necessarily be communicated to the court hearing the action against the pecuniary sanction, and also to the requested third party. If the administration of the requested State considers that the latter communication is capable of compromising the effectiveness of the collaboration between

⁶⁹ See, to that effect, point 83 of the Opinion of Advocate General Bot in ZZ (C-300/11, EU:C:2012:563) and, in particular, ECtHR, 16 February 2000, *Jasper v. United Kingdom*, CE:ECHR:2000:0216JUD002705295, paragraph 52.

⁷⁰ See, to that effect, ECtHR, 16 February 2000, *Jasper v. United Kingdom*, ECLI:CE:ECHR:2000:0216JUD002705295, paragraph 56.

administrations with a view to combating tax evasion and tax avoidance (or of adversely affecting another public interest or the fundamental right of another individual), it is for that authority to adduce evidence to that effect in the context of that action and for the court to resolve the question.