The Rights of Persons involved in the Exchange of Tax Information: Recent Openings of the Court of Justice and Persisting Doubts on the respect of EU Fundamental Rights

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Abstract

The present work intends to offer an analysis of the topic of people' rights involved in the tax information exchange, based on the recent jurisprudential arrests offered by the Court of Justice of the European Union

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1. Introduction: the role of tax cooperation and the taxpayer's rights

Cooperation between the tax administrations of different states is an essential instrument to ensure the correct taxation of transnational income as well as to enforce tax claims in another jurisdiction[1]. This dual function is clearly manifested in all the instruments through which tax cooperation is implemented: on the one hand, procedures (information exchange, simultaneous controls, physical presence in administrative offices and participation in administrative enquiries) which aim to ascertain the effective ability to pay of a taxpayer who has links with several jurisdictions; on the other hand, procedures (assistance in tax collection) through which a state can concretely implement its tax claim outside its national borders[2].

In the present days such mechanisms are used much more widely than in the past, due to the awareness of states of the need for greater cooperation to protect their fiscal systems, particularly following the global economic crisis[3]; indeed, they are proving to have an additional function, namely as privileged instruments for governing international tax policy choices[4]. The global economic crisis, which exploded in 2008, has led to international cooperation being given the pre-eminent role of helping to recover, as far as possible, revenue for state coffers. Thus, this issue has become central to the political debate among states, which have understood the need to strengthen forms of mutual assistance, without which these days no one nation is able to adequately govern its tax system. This awareness has favoured a multilateral approach, simultaneously involving a plurality of interested states, through both political forums (e.g., the G20 or the main multilateral organizations such as the UN and the OECD) and international multilateral agreements, which are capable of

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[1] See M. Stewart, *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, World Tax J. 152 (2012)

[2] On the development of the strong tendency towards cooperation between States see X. Oberson, *International Exchange of Information in Tax Matters. Toward Global Transparency* (2015).

[3] A. Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, Nw. J. Law & Soc. Pol'y 19 (2010).

[4] For a detailed examination of the fiscal consequences of the global economic crisis, see J. Wouters, G. Meuwissen, *Global Tax Governance: Work in Progress?*, *EUI Working Papers RSCAS 2011/12*, 2011.

regulating the phenomenon without the fragmentation typical of the system of bilateral conventions against double taxation[5].

The EU experience confirms this trend. Here tax cooperation not only has a strictly tax function, but also supports the whole European political framework, with – as we shall see – an unusual focus on the protection of taxpayers' rights.

Hence, the subject of this contribution is precisely the way the EU legal system protects the rights of the persons involved in a procedure of exchange of information. After a brief overview on how the European sources deal with these procedures and the opposite duties of the States involved, the attention will be focused on the recent case law of the Court of Justice of the European Union. As we will we see, although there is an evolution in the Court's jurisprudence towards a greater focus on individual rights, there is still resistance to a complete opening up of taxpayers' participation rights in the course of the exchange of information, which can only be justified by the overriding interest of States in the recovery of revenue. Although apparently characterized by recourse to multilateralism, the framework that emerges still aims to protect the tax system of each Member State and, therefore, is a partial contradiction in terms[6]. At the end of the day, this could lead, also within the national legal orders (as the Italian one), to an overestimation of the public interest, which now seems frankly anachronistic in light of the safeguard of the taxpayer's rights.

[5] Some authors propose the institutionalisation of tax cooperation through the creation of a forum for consultations and common decisions, as it already happens in other fields of international law: D. Rosembloom, N. Noked, M. Helal, *The Unruly World of Tax: A Proposal for an International Tax Cooperation Forum*, Riv. trim. dir. trib. 183 (2014).

[6] The new features of sovereignty in tax matters have been explored by a large number of scholars in recent times. See, inter alia, T. Dagan, Tax Sovereignty in an Era of Tax Multilateralism, in D. Weber (ed.), *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* (2017); B. Peeters, *Tax sovereignty of EU Member States in view of the global financial and economic crisis*, EC Tax Rev. 236 (2010); and L. Van Apeldoorn, *BEPS, Tax Sovereignty and Global Justice*, Critical Rev. Int'l Soc. & Pol. Phil. 478 (2018). On the contributions of the Italian doctrine, see F. Gallo, *Giustizia sociale e giustizia fiscale tra decentramento e globalizzazione*, Riv. dir. trib. 1069 (2014); and G. Tremonti, *La paura e la speranza. Europa: la crisi globale che si avvicina e la via per superarla* (2008).

2. Information exchange: the forms and unstoppable rise of automatic exchange

Information exchange is the instrument through which two or more states make available to each other data and documents that have been collected in their own territory, in application of their domestic provisions, concerning the position of a resident taxpayer, in order to correctly determine the latter's worldwide tax base[7]. This form of tax cooperation takes place mainly between states. However, joint bodies can be set up in order to coordinate the procedure between the two states involved. For example, the Directive 2011/16/EU creates a European data supervisor and an exchange of information committee, whose task is to assist the Commission in the work of supervising and implementing the discipline therein. Moreover, the European data supervisor's remit also covers the circulation of information for tax purposes[8].

EU law leaves Member States free to choose the most appropriate modes of exchange. However, three methods are more commonly used. The most widely used to date is exchange on request, wherein the tax administration of one state requires the competent authorities of another state to collect and transmit information in its possession which can be of interest for the former. Therefore, if the state receiving the request does not already have the information in question, it has to activate the investigation procedures set out in its domestic law in order to retrieve it. The request must be detailed, so as to allow the Member State in question to carry out targeted activities and thus avoid wasting resources[9]; in particular, it must indicate both the details of the taxpayer to whom the request refers and the elements already collected by the requesting state which lead to the well-founded belief that the information requested is "foreseeably relevant" for the application of the domestic law, as pointed out by the Court of Justice on several occasions[10].

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[7] For a thorough analysis of this kind of tax cooperation, see R. Seer, M. Gaber (eds.), *Mutual assistance and information exchange* (2010).

[8] See Art. 26.

[9] C. Garbarino, S. Garufi, *Transparency and Exchange of Information in International Taxation*, in A. Bianchi, B. Peters (eds.), *Transparency in International Law* (2013).

[10] According to para. 9 of the initial recitals of the 2011 Directive, "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

These indications serve to avoid so-called "fishing expeditions", that is, the formulation of indeterminate and generic requests with the sole purpose of finding clues useful for the requesting state to begin an assessment activity[11]. The main aim is to protect the requested state's fiscal sovereignty, which would be jeopardized by excessively vague requests. Additionally, more responsibility is also required on the part of the requesting state, so that it may only resort to the exchange of information after it has already identified elements that make the other state's cooperation indispensable in a sufficiently delineated case.

Recently, for "group requests" – requests formulated not with reference to an individual and identified taxpayer, but to a class or group of taxpayers – this limit has been partly reduced. Nevertheless, the boundaries of group membership must be sufficiently outlined and circumscribed, so that it does not become an "excuse" to circumvent the ban on fishing expeditions[12].

Spontaneous exchange is less widespread. In this case, a state which in the course of its internal investigation activities comes across data relating to residents of another country that are potentially relevant to its tax administration has the right to transmit them to the other state. The latter then decides whether and how to use the data for the purposes of its internal tax system[13].

Finally, there is automatic information exchange, in other words the sharing of regularly updated databases between states, from which each tax administration can freely draw the information it needs[14]. The technical complexity of this form of

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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".

[11] J. Malherbe, M. Beynsberger, *2011: The Year of Implementation of the Standards?*, in A. Rust, E. Fort (eds.), *Exchange of Information and Bank Secrecy* (2012).

[12] L. Papadopoulos, *Switzerland: Demarcation between an Acceptable Group Request and an Unacceptable "Fishing Expedition"*, in M. Lang et al. (eds.), *Tax Treaty Case Around The World 2017* (2018).

[13] Art. 10, para. 10, of the 2011 Directive defines spontaneous exchange as "the non-systematic communication, at any moment and without prior request, of information to another Member State". The operative discipline is then provided for in art. 9.

[14] M. Somare, V. Wohrer, *Automatic exchange of financial information under the Directive on administrative coopération in the light of the global movement towards transparency*", Intertax (2015).

cooperation conditioned its use for a long time. However, in just a few years, since the outbreak of the world economic crisis in 2008, this type of exchange of information has developed rapidly. Today, the international community clearly believes that automatic exchange is the ideal means to wage an effective fight against international tax evasion and avoidance. In the European legal system, the last decade has seen the introduction of a series of legislative instruments that have greatly expanded the use of this type of exchange.

With EU Directive 2014/107/EU, which draws on developments in the OECD and G20 in the fight against tax fraud and tax evasion, the Council made it obligatory for Member States to automatically exchange information on certain categories of income (labour income, managers' income, life insurance products, pensions and real estate income) through transmission by resident financial intermediaries[15]. Then the automatic exchange was extended to cross-border rulings and advance transfer pricing agreements[16], information gathered in application of anti-money laundering legislation[17] and lastly reportable cross-border arrangements. It was made mandatory for intermediaries, professionals or taxpayers to disclose such data to the tax authorities, for subsequent automatic exchange among the EU Member States[18].

Automatic exchange is therefore becoming the main form of tax cooperation within the EU: it ensures the elimination of the knowledge deficit between Member States, which had hitherto been exploited by some economic operators to obtain undue tax advantages; and it gives private entities and individuals – first financial institutions, now professionals and, in the future, digital

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[15] COUNCIL DIRECTIVE 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

[16] COUNCIL DIRECTIVE (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

[17] COUNCIL DIRECTIVE (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities.

[18] COUNCIL DIRECTIVE (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

platform operators[19] – the mandate to collect information useful for the tax policies of all Member States.

That exchange on request has been overtaken by automatic information exchange shows that tax cooperation is going in the direction of limiting forms of mutual recognition (cases in which one state accepts another state's request)[20] in favour of genuinely supranational administrative procedures[21]. The automatic nature of the sharing of data and information between States presupposes agreement on the identification of platforms for the collection of such data, procedures for accessing these platforms and rules for the use of the stored information. Hence, from the purely bilateral logic of exchange on request, we have therefore moved on to a multilateral system based on a set of rules and procedures shared between States.

3. Obligations of the states involved in the information exchange

In both the international and European contexts, restrictions are progressively being placed on the freedom of states to cooperate in tax matters. Indeed, those states receiving a request to exchange information must follow it up even if this

[19] Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 15.7.2020, COM(2020) 314 final

[20] It is worth noting that, according to one author, the development of the principle of mutual recognition for tax purposes within the EU runs counter to the legitimate expectations of Member States with regards to a non-harmonized field (J. Ghosh, *Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition*, Cambridge Y.B. Eur. Legal Stud. 1899 (2014)). However, the Member States' resistance against mutual recognition also covers a field such as VAT, which has already been harmonized, according to P. Genschel, *Why no mutual recognition of VAT? Regulation, taxation and the integration of the EU's internal market for goods*, J. Eur. Pub. Pol'y 743 (2007).

[21] See F. Lafarge, *EU law implementation through administrative cooperation between Member States*, Riv. it. dir. pubbl. comunit. 119 (2010). A wide study concerning the interactions between national tax law, EU law and international law, not limited to the issues under discussion in the present article, can be found in G. Bizioli, *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale* (2008).

information is of no interest for the application of its domestic tax provisions[22].

Bank secrecy cannot be used to justify the non-cooperation of one state with another. Article 18(2) of Directive 2011/16/EU now expressly prevents Member States from refusing to exchange information solely on the grounds that the information is held by a bank, other financial institution, agent or person acting in a fiduciary capacity. The new wording therefore seems to considerably restrict state discretion in exchanging information despite the latter being covered by banking secrecy in national law. The fact that the "era of banking secrecy" is now at an end[23] is confirmed by the rise of automatic information exchange as the standard for tax cooperation in the EU system. As currently outlined, this standard includes the obligation for the financial institutions of each participating state to collect the data in their possession concerning residents of other states. This must then be provided to the government authorities on a regular basis, so that the latter can upload the information on the common database.

Hence, the Directive asserts that the mere reception from another state of a request that meets some formal requirements places the requested state under obligation. Therefore, this instrument lays out a system which implicitly recognizes the administrative act containing the information request[24].

Unlike the international system, in certain circumstances the EU system makes it obligatory for a Member State to use information exchange when the case subject to assessment is linked to another Member State. This duty stems from the function of tax cooperation within the EU system. Indeed, from the outset, the purpose of tax cooperation between Member States has not been to combat evasive practices alone. Instead, it has been interpreted in a broader sense, as a means of promoting the establishment and correct functioning of the common market.

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[22] Art. 18 of 2011 Directive.

[23] Reference is made to the final communiqué of the G-20 summit in London, Action Plan for Recovery and Reform, of 2 April 2009, where paragraph 15, point 7, states that, as a result of the agreements made by the participating States, "the era of banking secrecy is over".

[24] See S. Dorigo, *Mutual recognition versus transnational administration in tax law: is fiscal sovereignty still alive?*, Rev. Eur. Admin. L. 111 (2020).

Article 94 of the EC Treaty, now article 115 of the TFEU (significantly, the legal basis of Directive 77/799/EEC, the first act regulating the exchange of information between Member States), expressly envisages the issuance of directives for the approximation of national laws, regulations or administrative provisions concerning direct taxation, in the event the latter directly affect the establishment or functioning of the internal market[25]. Consequently, it can be argued that the instrument in question was designed not only to play a negative role, namely, to defend the European system against distortions by economic operators, but first and foremost to play a positive role in promoting the objectives of the Treaty, namely to achieve the fundamental freedoms of the common market[26].

The link between tax cooperation and the defence of fundamental freedoms has therefore led the Court of Justice to emphasize the opportunity for Member States to make use of the exchange of information whenever the acquisition of such information appears relevant in order to avoid situations likely to affect the enjoyment of one of those freedoms[27]. Hence, it appears possible to maintain this obligation, which is closely linked to the original objectives of European integration, even in the context of automatic exchange as provided for in Directive 2014/107/EU.

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[25] The article reads as follows: «Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market».

[26] The Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee about "Co-ordinating Member States' direct tax systems in the Internal Market" expressly acknowledged the importance of administrative cooperation between the Member States as a means not only of preventing abuses, but above all of ensuring the elimination of all forms of discrimination and double taxation as obstacles to Community freedoms.

[27] Judgment of the Court (Grand Chamber) of 27 January 2009, *Hein Persche v Finanzamt Lüdenscheid*, Case C-318/07, European Court Reports 2009 I-00359, ECLI:EU:C:2009:33.

4. Limits to the use of information received

The information exchanged shall enjoy a high degree of confidentiality in the receiving state in order to prevent misuse outside the objectives pursued through the cooperation procedure. Thus, Article 16 of the 2011 Directive lays down that information communicated between Member States be covered by the obligation of official secrecy. Moreover, it enjoys the protection extended to similar information under the national law of the Member State which received it. However, specific provisions against the misuse of taxpayers' data are missing from European legislation, especially with regard to the protection of privacy. Rather, after referring in general terms to the applicability of Directive 95/46/EC on data protection (now replaced by Regulation 2016/679), article 25 of the Directive expressly states that the rights set out therein may be legitimately limited in the course of an exchange of information when an important economic and financial interest of the Member State or the Union, "including in tax matters", needs to be safeguarded.

The receiving state has wide discretion in the use of the information exchanged for its domestic purposes. The supplying state cannot condition or limit the discretion of the other state in the use of such information, provided that this use remains within proceedings for the assessment and collection of taxes[28].

A question arises with regard to the possible use of the information exchanged during criminal trials in the receiving state for crimes (tax or other crimes, for example, money laundering of profits from a tax offence) which could be proven by such data. It must be considered that such use is in principle not excluded, provided that it takes place in accordance with strict conditions. Indeed, Article 16 of Directive 2011/16/EU clarifies that "with the permission of the competent authority of the Member State communicating information pursuant to this Directive, and only in so far as this is allowed under the legislation of the Member State of the competent authority receiving the information, information and documents received pursuant to this Directive may be used for other purposes than those referred to in paragraph 1 [the administration and collection of taxes covered by the Directive]. Such permission shall be granted if the information

[28] Art. 16, para. 1.

can be used for similar purposes in the Member State of the competent authority communicating the information" [29].

The use of the information exchanged for tax purposes is therefore not permitted in different areas unless the state that provided it gives its express consent and its national legislation allows such use: this prevents the data exchanged from being used in criminal proceedings in prejudice to the general rules and provisions governing defendants' rights[30].

5. Taxpayer's protection during information exchange: a brief overview on international tax law.

According to what has been observed so far, information exchange is usually between states. In essence, it is an instrument to facilitate relations between the tax authorities of two or more states in order to acquire information useful for the determination of a taxpayer's tax liability if this information cannot be found within a single system. There are, however, further persons who are involved in the information exchange procedures: the taxpayer and third parties in possession of data concerning the former. In theory, the taxpayer should be granted rights of information and intervention during the procedure in order to preserve his/her right of defence. So far, however, states have given the issue little attention: the main concern has been the effectiveness of the information exchange, so as to achieve fair taxation, in the belief that allowing some form of intervention by the other interested party would jeopardize this purpose[31].

[29] S. Dorigo, P. Mastellone, *Lotta alla criminalità economica*, in F. Amatucci, R. Cordeiro Guerra (eds.), *L'evasione e l'elusione fiscale in ambito nazionale e internazionale* (2016).

[30] See C. Sacchetto, *Lo scambio di informazioni in materia fiscale. Collegamenti con il procedimento penale. L'approccio italiano*, Riv. dir. tribut. intern. 92 (2009).

[31] P. Mastellone, *Exchange of information versus protection of taxpayers' rights: the evident imbalance impedes achieving a fair international tax environment*, Journal of Int'l Tax Tr. & Corp. Plan. 77 (2017). However, it has been held that "stronger powers for tax authorities to cooperate in cross-border scenarios worldwide should march hand-in-hand with a stronger protection of taxpayers' basic rights" (P. Pistone, *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law*, World Tax J. (2014)).

If, in the past, such an approach might have been understandable, given the public nature of the tax relationship and the perceived prevalence of the State's interest over other individual positions involved, today the situation has profoundly changed. There is a growing consensus that the rights granted to the individual under international law must also be invoked when that individual takes on the role of taxpayer[32]. These are rights that are due to each individual as such and cannot be circumscribed in the case where they are to be invoked against a public subject who is the bearer of a collective interest.

Thus, on this basis, it is growingly argued that certain fundamental rights, which the international conventions on human rights attribute to each individual, must be respected also within the tax relation between the taxpayer and the State. In particular, the right of the former to effective protection has been highlighted, both during the administrative procedure aimed at assessing the tax debt and during the proceedings arising from the appeal against the assessment notice[33].

However, this changed approach is struggling to establish itself in the area of international tax cooperation, and at present the practical implementation of the rights of the person subject to exchange of information appears to be largely inadequate. This, moreover, seems to be the result of the same approach manifested within the supranational bodies that have, in various contexts, dictated the rules on the exchange of information.

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[32] The indicated interpretation has been developed particularly with regard to the rights enshrined in the European Convention on Human Rights. About this topic, see the various essays in F. Bilancia, C. Califano, L. Del Federico, P. Puoti, *Convenzione europea dei diritti dell'uomo e giustizia tributaria italiana* (2014). It seems relevant in this context the analysis of G. Tesauro, *Giusto processo e processo tributario*, Rass. trib. 22 (2006), which is rooted on the influence of the ECHR over the procedural rights, always difficult to permeate by international influences.

[33] See Article 6 of the European Convention on Human Rights, which, in enshrining the right of everyone to a fair trial, provides for protection which, as has been recognised over time by the case-law of the European Court of Human Rights, also applies to the procedural stage prior to trial. The Court has repeatedly recognised, albeit not always in a straightforward manner, that this protection also applies in the tax field. (Jussila v. Finland, 23-11-2006). More recently, the Strasbourg Court has held that the guarantees of a fair trial provided for in Article 6 of the Convention also apply to the investigation stage, prior to the commencement of the actual trial (Ravon v. France, 21-2-2008).

None of the legal texts governing the exchange of information devotes specific attention to this issue. In fact, neither Article 26 of the OECD Model nor the Strasbourg Convention adequately outlines this fundamental aspect. The OECD Model is even silent on the matter, while the Convention merely refers, in Article 21, to the need to safeguard the rights and protections afforded to persons under the laws or administrative practice of the requested State. These are obviously generic formulas, which do not make it possible to identify the specific rights that the individual should be able to exercise in the course of the information exchange procedure. It is true that the amendments to the Strasbourg Convention, adopted with the Paris Protocol of 2010, seem to better express, in the initial recitals, the need for cooperation between States in this matter to ensure, in any event, "adequate protection of the rights of taxpayers". The nature of such rights, which, according to the Explanatory Report to Article 1 of the Convention, must be applied also in the procedural phase consisting in the "prosecution before an administrative authority and imposition of administrative penalties", is also clarified in the recent 2011 Commentary, which acknowledges that within this formula should be understood as including the "rights secured to persons that may flow from applicable international agreements on human rights".

However, the vagueness of both the catalogue of rights that would thus be rendered operative, and of the tools available to the taxpayer to avail himself of them, make the statement of principle theoretical, albeit acceptable.

6. The EU approach and the jurisprudence of the EU Court of Justice before *État luxembourgeois*.

European Union legislation on information exchange does not provide specific measures protecting the rights of the persons whose information is exchanged. Directive 2011/16/EU, as well as the amending Directives, contain a reference to the need for the cooperation procedure to respect “fundamental rights” and to observe “the principles recognized in particular by the Charter of

Fundamental Rights of the European Union, including the right to the protection of personal data" [34].

In the context of the Union, on the basis of what can be inferred from the Charter of Fundamental Rights, which is an integral part of EU law and therefore mandatory for member states and EU institutions, it has been held that the taxpayer should be allowed to be informed about the existence of the exchange procedure in order to effectively defend his/her rights[35]. However, to date, there are no rules that actually implement the protection of those involved in the information exchange, be they the taxpayer or third parties holding the information.

However, the case law of the Court of Justice gives an impulse to overcome these limits. In the *Sabou* judgment[36], the court initially denied that the Directives on information exchange could give rise to rights that the taxpayer could exercise immediately in the course of the procedure. According to the court, the right of defence is, however, protected in the subsequent stage of the procedure, as regulated by the individual state systems[37]. Nevertheless, it remained unclear whether, at that stage, the taxpayer could challenge the legality of the procedure of information exchange between states.

In the *Berlioz* judgment[38], while acknowledging that the procedure for the exchange of information takes place between

[34] See recital 28 of the 2011 Directive and recital 17 of the 2014 Directive.

[35] The possibility to affirm the taxpayer's right to be informed and hence to participate to an exchange of information procedure under art. 47 of the Charter of Fundamental Freedoms is advocated by F. Fernández Marín, *The Right of Defence and the exchange of tax information ruled by EU law*, Studi tribut. europei 25 (2018). More in general, on the impact of EU Charter of Fundamental Rights on the rights of taxpayers see P. Pistone, *The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation*, in B. J. M. Terra, et al. (eds.), *European Tax Law – Volume 1: General Topics and Direct Taxation* (2018).

[36] ECJ (Grand Chamber) of 22.10.2013 – C-276/12, ECLI:EU:C:2013:678, *Sabou*.

[37] On the *Sabou* judgement, see F. Chaouche, W. Haslehner, *Cross-Border Exchange of Tax Information and Fundamental Rights*, in W. Haslehner, G. Kofler & A. Rust (eds.), *EU Tax Law and Policy in the 21st Century* (2017), at 188 ff.

[38] Judgment of the court (Grand Chamber),16 May 2017, *Berlioz Investment Fund S.A. v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373. For a comment on this judgment, see A. Pantazatou, *Fundamental Rights in the Era of Information Exchange - The Berlioz Case (C-682/15)*, in M. Lang, P. Pistone, A. Rust, J. Schuch, K. Staringer, O. Storck (eds.), *CJEU: Recent Developments in Direct Taxation* (2018); and J.F. Pinto Nogueira, F.A. Garcia Prats, W.C.

states, the Grand Chamber of the Court of Justice reaffirmed the importance of respecting "the fundamental rights guaranteed in the legal order of the Union", including those enshrined in article 47 of the Charter of Fundamental Rights[39]. Consequently, EU law requires each state to allow third parties who have been ordered to hand over documents relating to the taxpayer in the course of an international cooperation procedure to challenge both the legitimacy of decisions imposing a penalty for the failure to hand over such documents and any flaws in the request for international administrative assistance before the judicial authorities of their state of residence[40].

In order to ensure the effectiveness of this right, the court then recognized the right of these third parties to access the documents subject to the inter-state cooperation procedure. On this point, the Grand Chamber highlighted the necessity not to alter the "principle of equality of arms, which is a corollary of the very concept of fair trial"[41]. Therefore, there is a balance between the two opposing requirements (of the state and of the private subject), considering that the outcome must not completely sacrifice one requirement to the other.

The *Sabou* and *Berlioz* judgements both held that the taxpayer's rights -i.e. the right pertaining to the person under investigation in the requesting State- could be adequately guaranteed in the latter State, after the closure of the exchange of information procedure, by challenging the assessment based on the data exchanged. *Berlioz*, in contrast to the previous decision, goes so far as to recognise a right of the third party holding information on the taxpayer to immediate judicial protection against the request for tax cooperation between the two Member

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Haslehner, V. Heydt, E. Kemmeren, G. Kofler, M. Lang, J. Lüdicke, P. Pistone, S. Raventos-Calvo, E. Raingeard de la Blétière, I. Richelle, A. Rust, R. Shiers, *OS ECJ-TF 3/2017 on the Decision of the Court of Justice of the European Union of 16 May 2017 in Berlioz Investment Fund SA (Case C-682/15), Concerning the Right to Judicial Review Under Article 47 of the EU Charter of Fundamental Rights in Cases of Cross-Border Mutual Assistance in Tax Matters*, 58 Eur. Tax'n 2/3 (2018). On that case, see also M. Eliantonio, P. Mazzotti, *Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union*, Eur. Papers 41 (2020).

[39] Para. 49.

[40] Para. 59.

[41] Para. 96.

States, resulting in an order against him to produce such information. However, there are a number of points which continue to give rise to doubts: first, the deferred procedural protection of the taxpayer may come at a time when his/her rights have already been compromised; second, the impossibility for him/her to challenge the legality of the request for tax cooperation before the courts of the State of the third party holding the information conflicts with other fundamental rights, other than the right to effective judicial protection, such as the right to protection of privacy and the proper processing of his personal data.

In these respects, therefore, the Berlioz judgment also appeared inadequate and more guaranteeing decisions were awaited from the Court of Justice.

7. The judgement of the Court of Justice in *État luxembourgeois*: one step forward and two steps back.

The opportunity for a broadening of the protection of those involved in the information exchange procedure came from the most recent ruling of the Grand Chamber on joined cases C-245/19 and C-246/19[42]. The case involved a Spanish taxpayer, who was subject to a tax audit in her home country also with reference to investments held abroad through corporate vehicles resident in Luxembourg. In order to reconstruct these investments, Spain sent a request for exchange of information to the Luxembourg tax authorities, on the basis of which the local authorities asked the companies to provide a series of information useful for the investigation. As in the Berlioz case, therefore, the rights of both the taxpayer under investigation in his country of residence (Spain) and the Luxembourg entities holding the information concerning that taxpayer were at stake.

In her submissions to the Court, Advocate General Kokott strongly argued that the rights of the taxpayer should be protected in the State of residence of the information holder in two

[42] Judgment of the Court (Grand Chamber) of 6 October 2020, État luxembourgeois v B and Others. Requests for a preliminary ruling from the Cour administrative (Luxembourg), ECLI:EU:C:2020:795.

respects[43]. After confirming the approach already taken in *Berlioz,* according to which "*the addressee of an information order issued in the context of an exchange between tax authorities of Member States pursuant to Directive 2011/16 is entitled, under Article 47 of the Charter, to judicial review of the legality of that decision*"[44], the Advocate General had upheld the taxpayer's right to challenge directly the acts of the information exchange procedure, which "*concerns information on accounts, account balances, other assets and shareholdings of a natural person, that is to say, personal data*"[45]. Consequently, with regard to these data the right to the protection of one's personal data as laid down in Article 8 of the Charter of Fundamental Rights is taken into account, since "t*he obligation of the addressee of the information order to transmit this data to the tax administration constitutes, in itself, an interference with the taxpayer's fundamental right*"[46].

According to the Advocate General, therefore, it is necessary - as required both by Article 47 of the Charter and by the provisions (Articles 7 and 8 thereof) concerning respect for private life - that the taxpayer be allowed to challenge directly the request for exchange of information, as well as the consequent orders to produce information addressed by the authorities of the requested State to the holder of the information, since it is not sufficient to protect the former's rights by means of a deferred challenge to the act of assessment based on the data exchanged. As stated in the AG Conclusions, in fact, if in the requesting State such information were not considered relevant and therefore no assessment was issued, the taxpayer would be left without judicial protection against a violation of her right to privacy which has already occurred.

In the view of Advocate General Kokott, therefore, the *Berlioz* case-law should be completely overtaken, in particular by recognising the full right of the taxpayer - not only procedurally but also, as has been said, substantively - to challenge before the courts of the requested State the lawfulness of the request for information in the name of the right to protection of privacy and

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[43] Opinion of Advocate General Kokott, delivered on 2 July 2020, ECLI:EU:C:2020:516.
[44] Para. 58.
[45] Para. 64.
[46] Para. 65.

personal data recognised by the Charter of Fundamental Rights of the European Union. Had this position been upheld by the Court, we would today be in a position to talk about the full recognition of taxpayers' rights in information exchange procedures in the EU system. On the contrary, the ECJ maintained a cautious stance, partly going beyond the limits of its own precedents, but nevertheless avoiding a general opening in favour of the taxpayer as the Advocate General had requested.

The court ruled, in continuity with the precedent cited above, that where, upon receipt of a request for information from another Member State, the state authorities require a resident to disclose information held on a taxpayer involved in an international cooperation procedure, that resident must be allowed to challenge the lawfulness of the decision and the subsequent request before the national court[47].

On the contrary, according to the Court the taxpayers involved in the investigation from which the information exchange request originated do not hold the same right. Although, theoretically, article 47 of the Charter grants the taxpayer the right to effective judicial protection in procedures concerning his/her data, this does not justify his/her direct action against the decision of the requested State addressed to a third party which owns the taxpayer's data. In fact, according to the court, the taxpayer has the right to effective protection before the authorities of his/her state of residence, and can exercise it against any assessment based on exchanged data[48].

However, that right, which the court reaffirms in continuity with the *Sabou* ruling, seems now to have acquired a broader scope. As such, the taxpayer must also in any case be given the possibility of asserting, before his/her national court, the flaws of the original request and contesting the consequent decision issued by the requested authorities against the holder of his/her data.

The judgment in question, therefore, on the one hand reaffirms the conclusions of the previous *Berlioz* ruling with regard both the direct right of the holder of the information and the indirect one of the taxpayer. On the other hand, however, it extends protection to the taxpayer involved in the information

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[47] Para. 58.
[48] Para. 83.

exchange procedure, allowing him/her – although only once the international cooperation procedure has been concluded – to question the requesting state's original request for assistance.

Therefore, an albeit indirect judicial protection is envisaged for the taxpayer with respect to the acts of the information exchange procedure.

The judgment of the ECJ in joined Cases C-245/19 and C-246/19 therefore remains ambiguous. It recognises that the right of a taxpayer to challenge before a court the grounds for a request for exchange of information between two Member States concerns not only the procedural aspect (i.e. the right to an effective remedy under Article 47 of the Charter), but above all the substantive aspect, the former being the means of protecting the right of each person to respect for his private life[49]. However, the Court did not have the courage to go so far as to recognise the possibility for the taxpayer to have direct protection against the acts of the international cooperation procedure before the courts of the requested State. In short, the taxpayer must wait until the information exchanged is the basis of an assessment by the tax authorities of his own State in order to challenge, by way of an appeal against that assessment, the defects in the original request which gave rise to the information exchange procedure.

This is an unsatisfactory solution, since it overlooks both the tardiness of the protection moved forward to the moment of notification of the assessment, and even more the possibility that the violation of substantive rights (those under Articles 7 and 8 of the Charter) remains for the taxpayer without any possibility of remedy, in the event that those data are either not considered relevant for the motivation of the assessment, or even do not lead to the issuance of any tax act against the taxpayer. On the contrary, whatever the outcome of the tax investigation by the requesting State, the fact that the taxpayer's data have been subjected to improper circulation and use constitutes a violation of fundamental rights which - in the absence of a challengeable act following the exchange of information - becomes definitive.

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[49] Exchange of information procedures put under pressure the taxpayer's right to privacy. For an analysis before *État luxembourgeois* see F. Debelva, I. Mosquera, *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions*, Intertax 362 (2017).

The timidity of the Court of Justice in the *État luxembourgeois* case shows that, even in a context that has always endeavoured to limit the typical imbalance in tax relations by enhancing the rights of the taxpayer, there is still a long way to go to fully equalise the positions of the public and private parties.

8. Conclusions: the effects of European case law on the Italian tax system.

The exchange of information procedure requires a fair balance between the need for effective cooperation between tax authorities and the protection of taxpayers' fundamental rights[50]. Although this principle seems to be valid in general, the practice shows a quite different approach. The recent case law of the CJEU remain ambiguous and that attitude risks to feed some "reactionary" approaches which are typical in the Italian legal system. It seems then appropriate to conclude our analysis with a quick look at the Italian domestic law, on which the *État luxembourgeois* judgment may have an influence that could not be entirely positive.

The Italian Constitution does not provide specific norms with regard to international cooperation in tax matters. However, the constitutional system recognizes and guarantees some inviolable rights to individuals even when they act as taxpayers. Apart from general rules included in the Constitution which protect the freedom of persons, domicile and correspondence, it may be recalled that Law No. 212/2000 (the "Taxpayer's Rights Charter") provides for various rights to be exercised during the administrative procedure of investigation and assessment, and therefore also in connection with an exchange of information procedure[51]. The law is considered as an instrument realizing some fundamental principles envisaged in the Constitution and

[50] P. Selicato, *Scambio di informazioni, contraddittorio e Statuto del contribuente*, Rass. trib. 321 (2012).

[51] L. Del Federico, *Tutela del contribuente ed integrazione giuridica europea* (2010), at 279, emphasizes the role of art. 12 as a norm strengthening the principle of proportionality to be followed during a tax inspection; nothing prevents the invocation of such guarantee for the taxpayer also during an exchange of information procedure

therefore having a special force, in the hierarchy of domestic norms, towards other ordinary laws.

The same rights can also be invoked by taxpayers under the main treaties on human rights, although -as already said- these instruments do not expressly mention the tax relationship between states and individuals: human rights, as recognized under international law, have to be respected if the individuals who demand them have the status of taxpayers before the domestic tax authorities[52].

Notwithstanding the different opinion based on the special nature of the relationship between the state and taxpayers, which should be unequal because of the predominance of the former's public interest, the applicability of the fair trial principles during the tax controversies and even in the preceding administrative phase of investigation is gaining preponderance, also thanks to the jurisprudence of the ECtHR and its effect on the Italian legal system.

Despite this clear system of rules, the taxpayer has very rare opportunities to be involved in a procedure for exchange of information in Italian practice. If Italy receives a request, it has to gather information according to its domestic rules and transmit it to the requesting authorities. The taxpayer has no right to be informed about this request and normally the Italian authorities do not inform him either. Therefore, if the information is already in the hands of the tax administration, it is transmitted to the other state without the taxpayer's involvement; if a specific investigation is needed, then it is conducted as a purely domestic one and the taxpayer is not made aware of its aim to provide information to a foreign state. This is also true if the information is requested by Italy to a foreign state: in both cases, a specific involvement of the taxpayer is not allowed and the latter does not have the possibility of disputing the exchange of information or even of controlling the way in which the procedure is put in place.

It is clear that the situation does not change in cases of automatic or spontaneous exchange of information. Therefore it follows that the first and basically the only involvement of the

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[52] See S. Dorigo, R. Cordeiro Guerra, *Taxpayers' rights during tax procedures as human rights*, in G. Kofler, M. Maduro & P. Pistone (eds.), *Human Rights and Taxation in Europe and the World* (2011).

taxpayer takes place during the judicial phase in the Tax Court and after the notification of an assessment based on the information exchanged. However, this protection seems to be tardy and not completely effective. As shown by the various judicial cases decided by Italian tax courts with regard to the "stolen lists"[53], the trial begins after the fulfilment of the exchange of information procedure and, therefore, at a time when the violation of the taxpayer's right cannot be entirely redressed. The latter's interest, in fact, is that information not legally gathered is not shared between the competent authorities: when the assessment is notified and the appeal is filed, the information has just been transmitted and the substantial effects of the violation seem not to be completely removed.

Moreover, even in this situation the taxpayer does not have the right to take cognizance of all the documents exchanged, but only of those on which the assessment is based. As a judgment of the Italian Council of State explains[54], the former is not in a position to have access to the acts of the procedure; therefore he/she cannot adequately protect his/her rights and interests as he/she would if he/she could review all the documents – even those not explicitly referred to in the assessment – and the related procedure in order to question the correctness of the latter and the conclusions drawn by the Revenue Agency.

Such an outcome raises many doubts in the light of the rights that the *Statuto dei diritti del contribuente* and the various international and European instruments on the protection of

[53] Reference is made to the Italian case law following the transmission of lists of clients of some banks located in states with extensive bank secrecy, stolen by untrustworthy employees and then sold to foreign states. This practice highlights the contrast, not yet resolved, between two different positions. On the one hand, the fight against tax evasion justifies the abandoning of the traditional limits to exchange of information – and in particular those concerning bank secrecy – in the name of the need to avoid the erosion of taxable income; on the other hand, the taxpayer's fundamental rights have to be protected, especially those related to his active participation in the exchange of information procedure and timely awareness of all the documents transmitted. After initial uncertainties, the Italian Supreme Court stated that the correctness of the procedure through which Italy has acquired the information is sufficient to make the information lawfully usable, regardless of what has happened before. On this trend, see P. Mastellone, *Tutela del contribuente nei confronti delle prove illecitamente acquisite all'estero*, Dir. e prat. tribut. 791 (2013).

[54] See the decision of the Italian Council of State, section IV, 9-12-2011, n. 6472.

human rights today grant to all individuals, even when acting as taxpayers. The approach of the Italian administration (followed by many judges until now) seems to emphasize the supremacy of the public interest to collect taxes and to efficiently cooperate with other sovereign states at the international level over the protection of the interests of persons (be they the taxpayer or also other individuals or companies keeping the requested information concerning the former) variously involved in the procedure.

On the contrary, the principles clearly show that there are no real and persuasive reasons to deny the existence of taxpayers' rights which may be invoked during the exchange of information procedures. Such rights, necessarily modelled on those which in international instruments for the protection of human rights form part of the right to a fair trial, can and must stand together with the recognition of the original sovereignty of states concerning the definition of the domestic tax system and the management of its international relations.

The limits that the EU Court of Justice continues to place on the full recognition of the taxpayer's participation rights in the information exchange phases are likely to reinforce the restrictive attitude of the tax administration and tax judges in Italy. This is a negative effect, which risks enhancing only the instrumental profile of judicial protection, forgetting that, behind and before the right to an effective remedy, there are substantive rights (i.e. the right to privacy and respect to private life) that have to be adequately protected.