ECLI:EU:C:2017:373

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

16 May 2017 (*)

(Reference for a preliminary ruling — Directive 2011/16/EU — Administrative cooperation in the field of taxation — Article 1(1) — Article 5 — Request for information sent to a third party — Refusal to respond — Penalty — Concept of 'foreseeable relevance' of the information requested — Review by the requested authority — Review by a court — Scope — Charter of Fundamental Rights of the European Union — Article 51 — Implementation of EU law — Article 47 — Right to an effective judicial remedy — Access of the court and of the third party to the request for information sent by the requesting authority)

In Case C-682/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour administrative (Administrative Court, Luxembourg), made by decision of 17 December 2015, received at the Court on 18 December 2015, in the proceedings

Berlioz Investment Fund SA

v

Directeur de l'administration des contributions directes,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz, M. Berger and A. Prechal, Presidents of Chambers, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, E. Jarašiūnas, C.G. Fernlund (Rapporteur), C. Vajda and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2016,

after considering the observations submitted on behalf of:

– Berlioz Investment Fund SA, by J.-P. Drescher, avocat,

– the Luxembourg Government, by A. Germeaux and D. Holderer, acting as Agents, and by P.-E. Partsch and T. Evans, avocats,

– the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents,

– the German Government, by T. Henze, acting as Agent,

– the French Government, initially by S. Ghiandoni, acting as Agent, and subsequently by E. de Moustier, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Garofoli, avvocato dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by R. Lyal, J.-F. Brakeland, H. Krämer and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns 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 (OJ 2011 L 64, p. 1), and of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between Berlioz Investment Fund SA (‘Berlioz’) and the directeur de l’administration des contributions directes (Director of the Direct Taxation Administration) (Luxembourg) concerning a pecuniary penalty which the latter imposed on Berlioz for its refusal to respond to a request for information in the context of an exchange of information with the French tax administration.

Legal context

EU law

The Charter

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

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

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

…’

Directive 2011/16

4 Recitals 1, 2, 6 to 9 and 19 of Directive 2011/16 state:

‘(1) ... There is a tremendous development of the mobility of taxpayers, of the number of cross-border transactions and of the internationalisation of financial instruments, which makes it difficult for Member States to assess taxes due properly. This increasing difficulty affects the functioning of taxation systems and entails double taxation, which itself incites tax fraud and tax evasion ...

(2) ... In order to overcome the negative effects of this phenomenon, it is indispensable to develop new administrative cooperation between the Member States’ tax administrations. There is a need for instruments likely to create confidence between Member States, by setting up the same rules, obligations and rights for all Member States.

…

(6) ... To this end, this new Directive is considered to be the proper instrument in terms of effective administrative cooperation.

(7) This Directive builds on the achievements 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 (OJ 1977 L 336, p. 15)] but provides for clearer and more precise rules governing administrative cooperation between Member States where necessary, in order to establish, especially as regards the exchange of information, a wider scope of administrative cooperation between Member States. ...

(8) ... Provision should ... be made to bring about more direct contacts between services with a view to making cooperation more efficient and faster. ...

(9) 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.

…

(19) The situations in which a requested Member State may refuse to provide information should be clearly defined and limited, taking into account certain private interests which should be protected as well as the public interest.'

5 Article 1(1) of Directive 2011/16 provides as follows:

'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.'

6 Article 5 of the directive provides:

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

7 Article 16(1) of the directive is worded as follows:

'Information communicated between Member States in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it. ...

...'

8 Article 17 of the directive, entitled 'Limits', provides:

'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 purposes.

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.'

9 Article 18 of Directive 2011/16, entitled 'Obligations', states:

'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.

...'

10 Article 20(1) of Directive 2011/16 provides, with regard to requests for information and for administrative enquiries pursuant to Article 5 of that directive, for the use, as far as possible, of a form adopted by the Commission. Article 20(2) 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.'

11 Article 22 of Directive 2011/16 provides, in paragraph (1)(c):

'Member States shall take all necessary measures to:

…

(c) ensure the smooth operation of the administrative cooperation arrangements provided for in this Directive.'

Luxembourg law

The Law of 29 March 2013

12 Directive 2011/16 was transposed into Luxembourg law by the loi du 29 mars 2013 portant transposition de la directive 2011/16 et portant 1) modification de la loi générale des impôts, 2) abrogation de la loi modifiée du 15 mars 1979 concernant l'assistance administrative internationale en matière d'impôts directs (Law of 29 March 2013 transposing Directive 2011/16 and (1) amending the General Tax Law; and (2) repealing the amended Law of 15 March 1979 on international administrative assistance in the field of direct taxation) (*Mémorial* A 2013, p. 756; 'the Law of 29 March 2013').

13 Article 6 of the Law of 29 March 2013 provides:

'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 that it has in its possession or that it obtains as a result of administrative enquiries.'

14 Article 8(1) of the Law of 29 March 2013 provides:

'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.'

The Law of 25 November 2014

15 The loi du 25 novembre 2014 prévoyant la procédure applicable à l'échange de renseignements sur demande en matière fiscale et modifiant la loi du 31 mars 2010

portant approbation des conventions fiscales et prévoyant la procédure y applicable en matière d'échange de renseignements sur demande (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) (*Mémorial* A 2014, p. 4170; 'the Law of 25 November 2014') contains the following provisions.

16 Article 1(1) of the Law of 25 November 2014 provides:

'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 [Law of 29 March 2013] on administrative cooperation in the field of taxation;

...'

17 Article 2 of the Law of 25 November 2014 provides:

'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.

...'

18 According to 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.

...'

19 Article 5(1) of the Law of 25 November 2014 provides:

'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.'

20 Article 6 of the Law of 25 November 2014 states:

'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, Luxembourg) 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.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 Berlioz is a joint stock company governed by Luxembourg law, which received the dividends paid to it by its subsidiary, Cofima, a simplified joint stock company governed by French law, in application of an exemption from withholding tax.

22 On 3 December 2014, the French tax administration, doubtful as to whether the exemption enjoyed by Cofima complied with the conditions laid down by French law, sent the Luxembourg tax administration a request for information concerning Berlioz pursuant, in particular, to Directive 2011/16.

23 Following that request, the Director of the Direct Taxation Administration adopted a decision on 16 March 2015 in which he stated that the French tax authorities were checking Cofima's tax affairs and needed information in order to be able to make a ruling on the application of withholding taxes on dividends paid by Cofima to Berlioz. In that decision, he directed Berlioz, on the basis of Article 2(2) of the Law of 25 November 2014, to communicate certain information to him, asking it, in particular:

– whether the company has a place of effective management in Luxembourg and what are its key features, namely a description of the office, the amount of its office space, physical and IT equipment belonging to it, a copy of the lease of the premises and the business address, with supporting documentation;

– to provide a list of its employees with their function within the company and identification of employees linked to the company's registered office;

– whether it hires staff in Luxembourg;

– whether there is a contract between Berlioz and Cofima and, if so, for a copy of the contract;

– to provide a statement of its shareholdings in other companies and how those shareholdings were financed, with supporting documentation;

– to provide 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; and

– to provide details of the amount in 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.

24 On 21 April 2015, Berlioz stated that it was responding to the decision requiring the requested information to be provided ('information order') of 16 March 2015, 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 assessment as to whether the dividend distributions made by its subsidiary should be subject to a withholding tax, that being the subject matter of the checks being carried out by the French tax administration.

25 By decision of 18 May 2015, the Director of the Direct Taxation Administration imposed an administrative fine of EUR 250 000 on Berlioz, on the basis of Article 5(1) of the Law of 25 November 2014, on account of its refusal to provide that information.

26 On 18 June 2015, Berlioz brought an action before the tribunal administratif (Administrative Tribunal) against the decision of the Director of the Direct Taxation Administration imposing the fine, and asked that court to determine whether the information order of 16 March 2015 was well founded.

27 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, but dismissed the action as to the remainder, holding that there was no need to adjudicate on the action for annulment brought in the alternative.

28 By application of 31 August 2015, Berlioz lodged an appeal before the Cour administrative (Administrative Court), maintaining that the refusal of the tribunal administratif (Administrative Tribunal), based on Article 6(1) of the Law of 25 November 2014, to determine whether the information order of 16 March 2015 was well founded constituted a breach of its right to an effective judicial remedy as guaranteed by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

29 The Cour administrative (Administrative Court) considered that it might be necessary to take account, in particular, of Article 47 of the Charter, which mirrors the right referred to in Article 6(1) of the ECHR, and requested the parties to the main proceedings to submit their observations on the matter.

30 The Cour administrative (Administrative Court) queries whether a person who may be the subject of administrative measures (a 'relevant person'), such as Berlioz, has a right to an effective remedy if that person cannot, even exceptionally, have examined the validity of the information order underpinning the penalty imposed on him. It questions, in particular, the meaning of the 'foreseeable relevance' of the information requested, as referred to in Article 1(1) of Directive 2011/16, and the scope of the review which the tax and judicial authorities of the requested State must carry out in that respect without undermining the purpose of that directive.

31 In those circumstances the Cour administrative (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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 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 Article 1(1) and Article 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 [(OECD'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?'

Consideration of the questions referred

The first question

32 By its first question, the referring court asks, in essence, whether Article 51(1) of the Charter must be interpreted as meaning that a Member State implements EU law within the meaning of that provision, and that the Charter is therefore applicable, when that Member State makes provision in its legislation for a pecuniary penalty to be imposed on a relevant person who refuses to supply information in the context of an exchange of information between tax authorities based, in particular, on the provisions of Directive 2011/16.

33 According to Article 51(1) of the Charter, the provisions of the Charter are addressed to the Member States only when they are implementing Union law. Accordingly, it is necessary to determine whether a national measure providing for such a penalty can be regarded as an implementation of EU law.

34 It must be noted in that regard that Directive 2011/16 imposes certain obligations on Member States. In particular, Article 5 of the directive provides that the requested authority is to communicate certain information to the requesting authority.

35 Furthermore, under Article 18 of Directive 2011/16, entitled 'Obligations', the requested Member State is to use its measures aimed at gathering information to obtain the requested information.

36 In addition, as set out in Article 22(1)(c) of Directive 2011/16, Member States must take all necessary measures to ensure the smooth operation of the administrative cooperation arrangements provided for in the directive.

37 While it refers to the measures aimed at gathering information that exist under national law, Directive 2011/16 thus requires Member States to take the necessary measures to obtain the requested information in a way that is consistent with their obligations in relation to the exchange of information.

38 It must be noted that, in order to ensure that the directive has practical effect, those measures must include arrangements, such as the pecuniary penalty at issue in the main proceedings, which ensure that there is sufficient incentive for the relevant person to respond to tax authorities' requests, and thereby enable the requested authority to fulfil its obligations towards the requesting authority.

39 The fact that Directive 2011/16 does not make express provision for penalties to be imposed does not mean that penalties cannot be regarded as involving the implementation of that directive and, consequently, falling within the scope of EU law. The concepts of 'measures aimed at gathering information' within the meaning of Article 18 of the directive and 'necessary measures to ensure the smooth operation of the administrative cooperation arrangements' within the meaning of Article 22(1) of the directive are capable of encompassing such penalties.

40 In those circumstances, it is irrelevant that the national provision serving as the basis for a penalty such as that imposed on Berlioz is included in a law that was not adopted in order to transpose Directive 2011/16, since the application of that national provision is intended to ensure that of the directive (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 28).

41 National legislation, such as that at issue in the main proceedings, which provides for a penalty for failure to respond to a request from the national tax authority that is intended to enable that authority to comply with the obligations laid down by Directive 2011/16 must, therefore, be regarded as implementing that directive.

42 Consequently, the answer to the first question is that Article 51(1) of the Charter must be interpreted as meaning that a Member State implements EU law within the meaning of that provision, and that the Charter is therefore applicable, when that Member State makes provision in its legislation for a pecuniary penalty to be imposed on a relevant person who refuses to supply information in the context of an exchange between tax authorities based, in particular, on the provisions of Directive 2011/16.

The second question

43 By its second question, the referring court asks, in essence, whether Article 47 of the Charter must be interpreted as meaning that a relevant person on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information in the context of an exchange between national tax administrations pursuant to Directive 2011/16 is entitled to challenge the legality of that decision.

Whether there is a right to a remedy under Article 47 of the Charter

44 According to Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial', everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. The obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to that right.

45 Several governments submitted that, in a case such as that in the main proceedings, there was no '[right] guaranteed by the law of the Union' within the meaning of Article 47 of the Charter because Directive 2011/16 does not confer any rights on individuals. According to those governments, like Directive 77/799, which the Court examined in its judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678), Directive 2011/16 covers only the exchange of information between tax administrations and confers rights only on them. Accordingly, a relevant person such as Berlioz could not claim on the basis of Article 47 of the Charter that it has a right to an effective remedy.

46 The Court held, in paragraphs 30 to 36 of that judgment, that Directive 77/799, the purpose of which is to govern cooperation between the tax authorities of Member States, coordinates the transfer of information between competent authorities by imposing certain obligations on the Member States, but does not confer specific rights on the taxpayer as regards his participation in the procedure for the exchange of information between those authorities. In particular, that directive does not impose any obligation for those authorities to give the taxpayer a hearing.

47 For its part, Directive 2011/16 states, in recital 7, that it builds on the achievements of Directive 77/799 by providing for clearer and more precise rules governing administrative cooperation between Member States where necessary, in order to broaden the scope of such cooperation. It must be noted that, in so doing, Directive 2011/16 pursues a similar objective to that of Directive 77/799, which it replaces.

48 However, that does not mean that a relevant person in Berlioz's situation cannot defend his case before a tribunal in accordance with Article 47 of the Charter in the context of the application of Directive 2011/16.

49 The Court has consistently held that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 19 to 21, and of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, paragraphs 72 and 73).

50 In the present case, the dispute in the main proceedings concerns a measure penalising a relevant person for failing to comply with a decision directing it to provide the requested authority with information to enable that authority to respond to a request

made by the requesting authority on the basis, in particular, of Directive 2011/16. Since that penalty was based on a national provision which, as is evident from the answer to the first question, implements EU law within the meaning of Article 51(1) of the Charter, it follows that the provisions of the Charter, in particular Article 47 thereof, are applicable to the facts of the dispute in the main proceedings (see, to that effect, judgment of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, paragraphs 74 to 77).

51 As regards, specifically, the requirement of a right guaranteed by EU law within the meaning of Article 47 of the Charter, it should be borne in mind that, according to settled case-law, protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person constitutes a general principle of EU law (judgments of 21 September 1989, *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19, and of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 27, and order of 17 November 2005, *Minoan Lines* v *Commission*, C-121/04 P, not published, EU:C:2005:695, paragraph 30).

52 That protection may be invoked by a relevant person, such as Berlioz, in respect of a measure adversely affecting him, such as the information order and the penalty at issue in the main proceedings, so that a relevant person can rely on a right guaranteed by EU law, within the meaning of Article 47 of the Charter, giving him the right to an effective remedy.

The subject matter of the right to a remedy

53 In the case of a penalty, it is necessary to establish whether a right to a remedy against that measure, such as that provided for by the legislation at issue in the main proceedings, is sufficient to enable the relevant person to assert the rights conferred on him by Article 47 of the Charter, or whether that article requires that he should also be able then to challenge the legality of the information order on which the penalty is based.

54 It should be noted in that regard that the principle of effective judicial protection is a general principle of EU law, which is now set out in Article 47 of the Charter. Article 47 secures in EU law the protection afforded by Article 6(1) and Article 13 of the ECHR. It is necessary, therefore, to refer only to Article 47 (see, to that effect, judgment of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraphs 46 and 47).

55 The second paragraph of Article 47 of the Charter provides that everyone is entitled to a hearing by an independent and impartial tribunal. Compliance with that right assumes that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues.

56 Consequently, as the Advocate General noted in point 80 of his Opinion, the national court hearing an action against the pecuniary administrative penalty imposed on the relevant person for failure to comply with an information order must be able to

examine the legality of that information order if it is to satisfy the requirements of Article 47 of the Charter.

57 The Commission argued that to accept that the relevant person has a right to a remedy against an information order would effectively be to acknowledge that he has more procedural rights than a taxpayer. It follows, according to the Commission, from paragraph 40 of the judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678), that a request for information that is sent to a taxpayer, which is part of the investigation stage during which information is collected, is a measure that is merely preparatory to the final decision and could not be challenged.

58 The circumstances of the case in the main proceedings must, however, be distinguished from those of the case that gave rise to the judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678). The latter case concerned requests for information sent by the tax administration of one Member State to the tax administration of another Member State and, in particular, the right for the taxpayer who was the subject of a tax investigation in the requesting Member State to participate in the procedure relating to those requests. No request for information had, however, been sent to the relevant person, unlike in the case of Berlioz in the main proceedings. Thus, in the case that led to that judgment, the Court was called upon to determine whether the taxpayer who was the subject of requests for information as between national tax administrations had a right to be heard in that process, and not, as in the present case, whether a relevant person in the requested Member State has a right to a remedy against a penalty imposed on him for failure to comply with an information order issued to him by the requested authority following a request for information sent to that authority by the requesting authority.

59 The answer to the second question is, therefore, that Article 47 of the Charter must be interpreted as meaning that a relevant person on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information in the context of an exchange between national tax administrations pursuant to Directive 2011/16 is entitled to challenge the legality of that decision.

The fourth question

60 By its fourth question, which must be examined before the third, the referring court asks, in essence, whether Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that the ‘foreseeable relevance’ of the information requested 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 that request, and thus a condition of the legality of the information order addressed by that Member State to a relevant person.

61 Under Article 1(1) of Directive 2011/16 concerning the subject matter of that directive, the Member States are to cooperate with each other with a view to exchanging information that is ‘foreseeably relevant’ to the requesting administration in the light of the provisions of the tax laws of the Member State of that administration.

62 Article 5 of Directive 2011/16 refers to that information in providing that, at the request of the requesting authority, the requested authority is to 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. Article 5 thus imposes an obligation on the requested authority.

63 It is apparent from the wording of those provisions that the words 'foreseeably relevant' describe a necessary characteristic of the requested information. The obligation imposed on the requested authority under Article 5 of Directive 2011/16 to cooperate with the requesting authority does not extend to the communication of information that is considered not to have that characteristic.

64 Thus, characterisation of the requested information as being of 'foreseeable relevance' is a condition of the request relating to that information.

65 It is also necessary to determine by whom and how that characteristic is assessed, and whether the relevant person to whom the requested authority turns in order to obtain the information sought by the requesting authority may claim that it lacks that characteristic.

66 Reference must be made in this respect to the wording of 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.

67 As a number of governments and the Commission argued, this concept of foreseeable relevance reflects that used in Article 26 of the OECD Model Tax Convention, both because of the similarity between the concepts used and given the reference to OECD conventions in the explanatory memorandum to the proposal for a Council Directive COM(2009) 29 final of 2 February 2009 on administrative cooperation in the field of taxation, which led to the adoption of Directive 2011/16. According to the commentary on that article adopted by the OECD Council on 17 July 2012, Contracting States are not at liberty 'to engage in fishing expeditions', nor to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. On the contrary, there must be a reasonable possibility that the requested information will be relevant.

68 The aim of the concept of foreseeable relevance according to recital 9 of Directive 2011/16 is thus to enable the requesting authority to obtain any information that seems to it to be justified for the purpose of its investigation, while not authorising it manifestly to exceed the parameters of that investigation nor to place an excessive burden on the requested authority.

69 The requesting authority must be able, in the context of its investigation, to determine the information it considers that it would need, having regard to national law, in order, as recital 1 of Directive 2011/16 states, properly to assess the taxes due.

70 It is therefore for that authority, which is in charge of the investigation from which the request for information arises, to assess, according to the circumstances of the case, the foreseeable relevance of the requested information to that investigation on the basis of the progress made in the proceedings and, in accordance with Article 17(1) of Directive 2011/16, after having exhausted the usual sources of information which it has been able to use in the circumstances.

71 Although the requesting authority has a discretion in that regard, it cannot request information that is of no relevance to the investigation concerned.

72 Such a request would not comply with Articles 1 and 5 of Directive 2011/16.

73 As regards the relevant person, should the requested authority nevertheless contact him, sending him, if necessary, an information order for the purpose of obtaining the information sought, it follows from the answer to the second question that he must be entitled to rely in court on the non-compliance of that request for information with Article 5 of Directive 2011/16 and on the resulting illegality of the information order.

74 The answer to the fourth question is, therefore, that Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that the 'foreseeable relevance' of the information requested 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 that request, and thus a condition of the legality of the information order addressed by that Member State to a relevant person and of the penalty imposed on that person for failure to comply with that information order.

The third and fifth questions

75 By its third and fifth questions, which it is appropriate to examine together, the referring court asks, first, whether Article 47 of the Charter must be interpreted as meaning that, in the context of an action brought by a relevant person against a penalty imposed on that person by the requested authority for non-compliance with an information order issued by that authority following a request for information sent by the requesting authority pursuant to Directive 2011/16, the national court has unlimited jurisdiction to review the legality of that information order. Secondly, it asks whether Article 1(1) and Article 5 of Directive 2011/16 and Article 47 of the Charter must be interpreted as precluding the requested authority's examination of the validity of a request for information issued by the requesting authority from being limited to the procedural regularity of such a request, and as requiring the national court, in such an action, to verify that the condition of foreseeable relevance has been satisfied in all its aspects, including in the light of Article 17 of Directive 2011/16.

76 As regards, in the first place, the review carried out by the requested authority, it has been pointed out in paragraphs 70 and 71 of the present judgment that the requesting authority has a discretion to assess the foreseeable relevance of the information requested of the requested authority, with the result that the scope of the latter's review is limited accordingly.

77 In view of the system of cooperation between tax authorities established by Directive 2011/16, which, as is apparent from recitals 2, 6 and 8 of Directive 2011/16, is founded on rules intended to create confidence between Member States, ensuring that cooperation is efficient and fast, the requested authority must, in principle, trust the requesting authority and assume that the request for information it has been sent both complies with the domestic law of the requesting authority and is necessary for the purposes of its investigation. The requested authority does not generally have extensive knowledge of the factual and legal framework prevailing in the requesting State, and it cannot be expected to have such knowledge (see, to that effect, judgment of 13 April 2000, *W.N.*, C-420/98, EU:C:2000:209, paragraph 18). In any event, the requested authority cannot substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority.

78 However, the requested authority must nevertheless verify whether the information sought is not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority.

79 In that regard, as is apparent from recital 9 of Directive 2011/16, reference must be made to Article 20(2) thereof, which mentions matters that are relevant for the purposes of that review. These include, on the one hand, information which must be provided by the requesting authority: the identity of the person under examination or investigation and the tax purpose for which the information is sought; and, on the other hand, the contact details of any person believed to be in possession of the requested information and anything that may facilitate the collection of information by the requested authority.

80 In order to enable the requested authority to proceed with the verification referred to in paragraphs 78 and 79 of the present judgment, the requesting authority must provide an adequate statement of reasons explaining the purpose of the information sought in the context of the tax procedure underway in respect of the taxpayer identified in the request for information.

81 If required, the requested authority may, for the purposes of that verification, ask the requesting authority, on the basis of the administrative cooperation established by Directive 2011/16 in relation to tax matters, for additional information that may be necessary in order to rule out, from its own perspective, the possibility that the information sought manifestly has no foreseeable relevance in the light of the matters referred to in paragraphs 78 and 79 of the present judgment.

82 The review to be carried out by the requested authority is not limited, therefore, to a brief and formal verification of the regularity of the request for information in the light

of those matters, but must also enable that authority to satisfy itself that the information sought is not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information, and to the requirements of the tax investigation concerned.

83 As regards, in the second place, the review by a court seised of an action brought by a relevant person against a penalty imposed on him on the basis of an information order issued by the requested authority in response to the requesting authority's request for information, that review may not only relate to the proportionality of that penalty and lead, where appropriate, to its being varied, but may also concern the legality of that information order, as the answer to the second question shows.

84 If the judicial review guaranteed by Article 47 of the Charter is to be effective, the reasons given by the requesting authority must put the national court in a position in which it may carry out the review of the legality of the request for information (see, to that effect, judgments of 4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, paragraph 53, and of 23 October 2014, *Unitrading*, C-437/13, EU:C:2014:2318, paragraph 20).

85 In the light of what has been stated in paragraphs 70 and 71 of the present judgment concerning the requesting authority's discretion, it must be held that the limits that apply in respect of the requested authority's review are equally applicable to reviews carried out by the courts.

86 Consequently, the courts must merely verify that the information order is based on a sufficiently reasoned request by the requesting authority concerning information that is not — manifestly — devoid of any foreseeable relevance having regard, on the one hand, to the taxpayer concerned and to any third party who is being asked to provide the information and, on the other hand, to the tax purpose being pursued.

87 The referring court also asks whether reviews to be carried out by the courts must cover compliance with the provisions of Article 17 of Directive 2011/16, imposing limits on the communication of information requested by the authority of a Member State.

88 It must be noted that those provisions which, as far as some of them are concerned, could be taken into account in determining the legality of a request for information to the relevant person, do not have any bearing on a review of the foreseeable relevance of that information. As is evident from the request for a preliminary ruling and from the written and oral observations submitted by Berlioz, its refusal to communicate some of the information requested is based solely on the claim that that information has no foreseeable relevance, not on any reliance on a 'limit' within the meaning of Article 17 of Directive 2011/16.

89 Consequently, the answer to the third and fifth questions is that Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that verification by the requested authority to which a request for information has been submitted by the requesting authority pursuant to that directive is not limited to the procedural regularity

of that request but must enable the requested authority to satisfy itself that the information sought is not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information, and to the requirements of the tax investigation concerned. Those provisions of Directive 2011/16 and Article 47 of the Charter must be interpreted as meaning that, in the context of an action brought by a relevant person against a penalty imposed on that person by the requested authority for non-compliance with an information order issued by that authority in response to a request for information sent by the requesting authority pursuant to Directive 2011/16, the national court not only has jurisdiction to vary the penalty imposed but also has jurisdiction to review the legality of that information order. As regards the condition of legality of that information order, which relates to the foreseeable relevance of the requested information, the courts' review is limited to verification that the requested information manifestly has no such relevance.

The sixth question

90 By its sixth question, the referring court asks, in essence, whether the second paragraph of Article 47 of the Charter must be interpreted as meaning that, in the context of a judicial review by a court of the requested Member State, that court must have access to the request for information addressed to the requested Member State by the requesting Member State, and whether that document must also be communicated to the relevant person in the latter Member State, so that his case can be given a fair hearing, or whether he may be refused access on grounds of confidentiality.

91 It should be stated in that regard that any manifest lack of foreseeable relevance of the requested information must be examined in relation to that document.

92 Accordingly, if the court of the requested Member State is to be able to conduct its judicial review, it is important that that court should have access to the request for information sent by the requesting Member State to the requested Member State. That court may, if necessary, ask the requested authority for the additional information which it may have obtained from the requesting authority and which may be necessary in order to rule out, from its own perspective, the possibility that the requested information manifestly has no foreseeable relevance.

93 As to whether the relevant person has a right of access to the request for information, it is necessary to take into account the secrecy attached to that document in accordance with Article 16 of Directive 2011/16.

94 That secrecy is accounted for by the discretion which the requesting authority must normally display at the information-gathering stage and which it is entitled to expect of the requested authority if the effectiveness of its investigation is not to be jeopardised.

95 Anyone can therefore be barred from having access to the request for information in an investigation on account of the fact that it is secret.

96 In the context of judicial proceedings, it should be borne in mind that the principle of equality of arms, which is a corollary of the very concept of a fair hearing, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (judgment of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 71).

97 The Court has also held that the question whether there is an infringement of the rights of the defence, including the right of access to the file, must be examined in relation to the specific circumstances of each case, including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question (see judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 102, and of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraphs 32 and 34).

98 It is necessary to determine in the light of those considerations whether a relevant person, such as Berlioz, who regards the information he has been directed to provide as not foreseeably relevant, must have access to the request for information addressed to the requested authority by the requesting authority in order to be able properly to present his case before a court.

99 It follows from the answer to the third and fifth questions that, in order to establish the unlawfulness of the information order that is based on the request for information and of the penalty imposed for failure to comply with it, it is necessary, but sufficient, to demonstrate that all or part of the requested information manifestly has no foreseeable relevance in the light of the investigation being carried out, given the identity of the taxpayer concerned and the tax purpose for which the information is sought.

100 To that end, it is not necessary for the relevant person to have access to the whole of the request for information in order for that person to be given a fair hearing regarding the condition of foreseeable relevance. It is sufficient that that person has access to the minimum information referred to in Article 20(2) of Directive 2011/16, that is to say, the identity of the taxpayer concerned and the tax purpose for which the information is sought. However, if the court of the requested Member State considers that that minimum information is not sufficient in that respect, and if it asks the requested authority for additional information as referred to in paragraph 92 of the present judgment, that court is obliged to provide that additional information to the relevant person, while taking due account of the possible confidentiality of some of that information.

101 Consequently, the answer to the sixth question is that the second paragraph of Article 47 of the Charter must be interpreted as meaning that, in the context of a judicial review by a court of the requested Member State, that court must have access to the request for information addressed to the requested Member State by the requesting Member State. The relevant person does not, however, have a right of access to the whole of that request for information, which is to remain a secret document in accordance with Article 16 of Directive 2011/16. In order for that person to be given a full hearing of his

case in relation to the lack of any foreseeable relevance of the requested information, it is sufficient, in principle, that he be in possession of the information referred to in Article 20(2) of that directive.

Costs

102 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 51(1) of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that a Member State implements EU law within the meaning of that provision, and that the Charter of Fundamental Rights of the European Union is therefore applicable, when that Member State makes provision in its legislation for a pecuniary penalty to be imposed on a person who may be the subject of administrative measures (a 'relevant person') who refuses to supply information in the context of an exchange 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 and repealing Directive 77/799/EEC.**

2. **Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that a relevant person on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information ('information order') in the context of an exchange between national tax administrations pursuant to Directive 2011/16 is entitled to challenge the legality of that decision.**

3. **Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that the 'foreseeable relevance' of the information requested 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 that request, and thus a condition of the legality of the information order addressed by that Member State to a relevant person and of the penalty imposed on that person for failure to comply with that information order.**

4. **Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that verification by the requested authority to which a request for information has been submitted by the requesting authority pursuant to that directive is not limited to the procedural regularity of that request but must enable the requested authority to satisfy itself that the information sought is not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information, and to the requirements of the tax investigation**

concerned. Those provisions of Directive 2011/16 and Article 47 of the Charter must be interpreted as meaning that, in the context of an action brought by a relevant person against a penalty imposed on that person by the requested authority for non-compliance with an information order issued by that authority in response to a request for information sent by the requesting authority pursuant to Directive 2011/16, the national court not only has jurisdiction to vary the penalty imposed but also has jurisdiction to review the legality of that information order. As regards the condition of legality of that information order, which relates to the foreseeable relevance of the requested information, the courts' review is limited to verification that the requested information manifestly has no such relevance.

5. **The second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, in the context of a judicial review by a court of the requested Member State, that court must have access to the request for information addressed to the requested Member State by the requesting Member State. The relevant person does not, however, have a right of access to the whole of that request for information, which is to remain a secret document in accordance with Article 16 of Directive 2011/16. In order for that person to be given a full hearing of his case in relation to the lack of any foreseeable relevance of the requested information, it is sufficient, in principle, that he be in possession of the information referred to in Article 20(2) of that directive.**

[Signatures]

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* Language of the case: French.