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The Right of Defence and the exchange of tax information ruled by EU law

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Abstract

The consideration that the European Union is a union based on the rule of law and the entry into force of the EU Charter of Fundamental Rights mean that the severe assertion in the case law of the ECJ that the rules governing the exchange of tax information do not provide any rights to individuals concerned by such exchange does not imply the defencelessness of such individuals when EU law is applied. At the same time, as analysed in this work, such premises prevent the protection of individuals from being exclusive to the Member States; on the contrary, these premises make it possible to demonstrate how the need to guarantee the right of defence, within the EU, means that the exchange of tax information and the protection of individuals affected by it can be guaranteed from a global perspective, which goes beyond the partial and limited perspective of each state legal system considered in an isolated manner.

Keywords: Right to Defence; Exchange of tax information; Right to a fair trial; Right to good administration; Personal data.

1. Rights of defence of individuals concerned by an exchange of tax information

The EUCJ has categorically established that the regulations governing the exchange of tax information only provide for the exchange of information between tax administrations and only confer rights[1] and obligations[2] on them. The above confirms the traditional deficit of this regulation in rights and guarantees of individuals affected by the exchange of information. In fact, this regulation as has stated the EUCJ does not confer any rights to individuals.[3]

These circumstances could suggest that the legal protection of the individual concerned by an exchange of information is articulated, by virtue of the principle of procedural autonomy, through the

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1. ECJ Judgment of 16 May 2015, *Berlioz*, C-682/15, paragraph 45.
2. ECJ Judgment of 22 October 2013, *Sabou*, C-276/12, paragraph 36.
3. ECJ Judgment of 22 October 2013, *Sabou*, C-276/12, paragraph 30, « It should be stated, first of all, that the Mutual Assistance Directive makes no provision for such rights for the taxpayer. The directive does not contain any rights at all for taxpayers but governs only rights and obligations of the tax authorities of the Member States», ECJ Judgment of 16 May 2015, *Berlioz*, C-682/15, paragraph 45 «Directive 2011/16 does not confer any rights on individuals».

rights recognised in the legal systems of the Member States involved in the exchange of tax information. Such rights would form part of the so-called «participation rights» initially postulated by the OECD, although their importance is now being relativized, even from an international perspective, if they can compromise the outcome of the exchange of tax information.

In my opinion, from the perspective of EU law, this solution is a somewhat limited one.

Firstly, because the rules governing the exchange of information in the EU are not limited to the exchange of information between Member States, but also between Member States and the EU institutions. This circumstance makes it necessary to seek the rights and guarantees of individuals affected by the exchange of information beyond the legal systems of the Member States. Although this study focuses on exchanges of information between Member States, the solutions provided by EU law should not be different from those provided by EU law when EU institutions are involved in such exchanges.

Secondly, because the existence of general principles of EU law, which could be applicable to the exchange of tax information, together with the possibility that certain fundamental rights, initially elaborated under the ECHR, could be affected by such exchange of information, make it possible to state that it is possible to consider that there is a legal framework of reference for the individual concerned by the exchange of information which may offer protection different from that of states and even from that of international legal systems. In the latter case, we must not forget the possibility provided for in Article 52 CFREU, which allows the fundamental rights recognised in the ECHR to be enshrined more broadly in the EU.

Furthermore, the principle of procedural autonomy is not absolute, it must respect the principles of equivalence and effectiveness. The principle of equivalence implies that the regulation established for situations to which EU law is applicable is no less favourable than that applicable to similar situations of an internal nature. The principle of effectiveness assumes that state regulation does not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law. In this respect, it has been pointed out that the EUCJ is prepared to break the traditional «principle of procedural autonomy» in favour of fundamental rights and principles recognised as common legal values in the Member States.[4]

On the other hand, it should be noted that the principle of procedural autonomy applies as long as there is no EU regulatory provision governing such a matter.

As we have pointed out in the regulations governing the exchange of tax information, no rights are explicitly recognised for individuals. However, in the regulation of some of the principles that inspire the exchange of tax information in the EU can be found ways to protect the individual affected by the exchange of information.

Thus, among the principles governing the exchange of information, the «*principle of acting on its own initiative*» inexorably affects the legal system of the requested State by requiring a single legal regime for investigative actions carried out in the requested State, whether at the request of an authority of the requested State or of an authority of the requesting State. This principle can be seen as a specific manifestation of the principle of effectiveness which limits the procedural autonomy of the requested State. Similarly, among the principles that inspire the use of exchanged tax information, the «*principle of speciality*» is configured as a rule that has direct effect and generates obligations for Member States and rights for individuals affected by the exchange of information.[5] From this perspective, the use of the information exchanged is delimited by EU law, which establishes the obligations for States and the rights to individuals deriving from their non-compliance.

Since the *Les Verts* case EUCJ has enshrined that the European Union is a union based on the rule of law, «inasmuch as neither its Member States nor its institutions can avoid a review of the

4. A. Martín Jiménez, *El Derecho financiero constitucional de la Unión europea*, in Civitas, REDF 109-110, January-June 2001.

5. BJM Terra and PJ Wattel, European Tax Law. Kluwer Law International. 4th Edition. 2005, 689.

question of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty»,[6] or the law which derives from it. That means that «individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act».[7]

Consequently, the rights of defence must be considered the highest expression of a rule of law. These are expressed in a multitude of rights and principles (equality of arms, right to adversarial proceedings etc.), through them, depending on the circumstances, it is possible to make a balance on whether the rights of defence have been respected and fulfilled.

Following the entry into force of the Charter of Fundamental Rights of the European Union (CFREU) under the Treaty of Lisbon (Article 6(1) TEU), many of the rights and principles established exclusively by the case law of both the ECtHR and the EUCJ are now also restated in positive EU law. The CRFEU has the same legal value as the Treaties. However, by virtue of Article 6(3) TEU, rights can also be protected as general principles of EU law, like the general principle of respect of the rights of the defence or general principle of a good administration.

The fundamental rights defined in the context of the EU, as well as general principles, will bind Member States only to the extent that they act within the scope of EU law or when they are applying EU law.[8]

Under EU Law, the rights of defence must be guaranteed not only in proceedings before a court, but also in administrative proceedings carried out by EU institutions and bodies or by bodies of Member States applying EU law. These administrative procedures, in order to respect the rights of defence, must enable individuals to exercise their rights vis-à-vis the administration.

As can be seen from the foregoing, the right to a defence is directly related to the right to a fair trial — regulated in Articles 6 ECHR and 47 ECHR —, but the case law of the ECtHR and the EUCJ requires that its guarantees to be applied and complied with in the pre-trial administrative proceedings. Furthermore, as we have just pointed out, the rights of defence also apply to administrative procedures, such as the right to good administration — Article 41 CFREU like the right to be heard, the right to access to one's file etc —, although due to its limited scope to the EU institutions, the content reflected in this right applies to the Member States through the «*general principle of good administration*» or the «*general principle of respect for the rights of defence*».

The rights of defence are applied even where there is no specific legislation and also where legislation exists which does not itself take account of that principle.[9] The rights of defence may relied on by individuals before national courts.[10]

Finally, it should be pointed out that the rights and guarantees provided for in secondary EU legislation on the protection of personal data, currently ruled by a Regulation, may apply to individuals affected by an exchange of tax information.

2. The rights of defence and the right to a fair trial

The effectiveness in EU law of the right to a fair trial, as a fundamental right guaranteed by the ECHR, is evident as it becomes a general principle of EU law.

6. ECJ Judgment of 23 April 1986, *Les Verts v Parliament*, C-294/83, paragraph 23.

7. ECJ Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, paragraph 31.

8. In this regard, an abundant jurisprudence has been pronounced, ECJ Judgments of 13 July 1989, *Wachauf*, C-5/88; of 13 April 2000, *Kjell Karlsson*, C-292/97.This is also reflected in the wording of Article 51 CFREU.

9. ECJ Judgment of 12 Februry 1992, *Netherland v Commission*, joined cases C-48/90 and 66/90, paragraph 37.

10. ECJ Judgment of 3 July 2014, *Kamino*, joined cases C-129/13 and 130/13.

The analysis of Article 6 ECHR[11] by tax doctrine has focused, on the one hand, on determining whether or not the "right to a fair trial" was applicable to tax matters and, where appropriate, under what circumstances, and on the other hand, whether the content and effectiveness of the "right to a fair trial" was enforceable in the previous administrative proceedings and, therefore, also in tax proceedings.[12]

2.1. The right to a fair trial on tax matters

Regarding the first question, it can be stated, on the one hand, that tax matters, considered in themselves, are excluded from the scope of application of the ECHR, so tax disputes fall outside the scope of Article 6. However, the ECtHR has analysed the application of the right to a fair trial in relation to certain tax aspects, relating them to civil rights or criminal law.

From the civil rights perspective, the right to a fair trial has been recognized in proceedings related to the Revenue's right of pre-emption,[13] to tax collection proceeding,[14] to restitution proceeding (to attain restitution of monies paid under invalidated tax provisions)[15] or to the proceeding related to the regularity of home visits and seizures by the tax administration.[16]

From the second perspective –criminal law-, it must be pointed out that the ECtHR has recognized the application of Article 6 by attributing to tax sanctions a criminal nature[17] and also to tax surcharges, when they do not have a compensatory nature.[18]

However, as we have stated elsewhere,[19] this could not prevent the jurisprudential doctrine elaborated in the European Convention of Human Right on the effectiveness and extension of the right to a fair trial, when EU law is being applied, from being used to the tax matters. Since the EUCJ in assessing this fundamental right is not limited *ratione materiae* by the wording of Article 6 ECHR.

11. ARTICLE 6 Right to a fair trial «*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court*»

12. See J. MALHERBE *La buena administración en derecho fiscal: los derechos fundamentales, and M. GREGGI, El derecho a un procedimiento justo bajo el derecho tributario europeo, in* F. FERNÁNDEZ MARÍN and A. FORNIELES GIL in *Derecho comunitario y procedimiento tributario. Barcelona. 2010.*

13. ECtHR Judgment *Hentrich v France*, application no.13616/88, 22 September 1994.

14. European Commission on Human Rights, *Gurbuz v France*, application no. 32228/96, 14 April 1998,

15. ECtHR Judgment *National & Provincial Bulding Society, The Leeds Permanent Building Society and The Yorkshire Building Society v UK*, application no.117/1996/736/933-935, 23 October1997.

16. ECtHR Judgment *Ravon & others v. France*, application no.18497/03, 21 February 2008.

17. European Commission on Human Rights, *S.M. v. Austria,* application no. 11919/79, 8 May 1987; *Von M.S v Sweden, application no. 11464/85, 12 May 1987;* ECtHR, *A.P., M.P. & T.P. v Switzerland,* application no. 19958/92, 29 August 1997; *Hozee v The Netherlands, application no.* 21961/93, 22 May 1998, *Jamil v France, application no.* 15917/89 , 8 June 1995; *Benhan v United Kingdom*, application no. 19380/92 , 10 June 1996.

18. ECtHR Judgments *Janosevic v Sweden,* application no. 34619/97, 23 july 2002. *Sträg Datatjänster AB v Sweden*, Application no. 50664/99, 21 june 2005; *Jussila v Finland*, application no. 73053/2001, 23 November 2006.

19. F. Fernández Marín, *La tutela de la Unión Europea al contribuyente en el intercambio de información tributaria*. Ed. Atelier. Barcelona. 2007.

After the entry into force of the European Charter of Fundamental Rights (CFREU), the application of this right to a fair process to tax matters can be firmly affirmed. Consequently, the first issue raised by the doctrine is no longer relevant when EU law is being applied, either by its institutions or by the Member States.

Article 47 CFREU regulates the «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 in compliance with the conditions laid down in this Article*.[20]
>
> *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*.[21]
>
> *Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice».*

The explanations[22] relating to the CFREU indicate that *the Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston), According to the EUCJ, that general principle applies to the institutions of the EU and the Members States when they are implementing Union law», and regarding Article 47 (2) that «in Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law».* However, as the explanations clarifies *«in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union».*

Although not specifically mentioned in Article 6 ECHR, the right to remain silent and the privilege against self-incrimination form part of the heart of the notion of a fair trial under Article 6(1). The right not to incriminate oneself, in particular, presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged". By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and securing the aims of Article 6. Thus, it was that the Court found Article 6.1 to have been violated by the bringing of a prosecution with a view to obtaining incriminating documents from the accused himself;[23] the use of incriminating evidence secured from the accused himself by inspectors using powers of compulsion.[24]

Recently, the ECtHR in the *Van Veerlet* case,[25] related to the use of tax information received from a

20. The first paragraph is based on Article 13 ECHR: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*" However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court.

21. The second paragraph corresponds to Article 6(1) ECHR which reads as follows: *«In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice».*

22. DOUE C 303/17, 14 December 2007.

23. ECtHR Judgments *Funke v. France, application no. 10828/84, 23 February 1993, J.B. v. Switzerland, application no. 31827/96, 3 May 2001.*

24. ECtHR Judgment *Saunders v United Kingdom*, application no. 19187/91, paragraph 85

25. *ECtHR Decision Van Veerlet v the Netherlands*, application no. 784/14, 16 June 2015. The German tax authorities received information concerning assets held in a Liechtenstein bank by non-Liechtenstein residents, a number of Netherlands residents among them. The German tax authorities transferred to the Netherlands Tax and Customs Administration a file containing particulars concerning the Netherlands residents under the procedure for spontaneous

spontaneous exchange of information for criminals proceedings, considered that said exchange does not constitute a violation of the right to a fair trial, as long as the information exchanged, provided in compliance with the duty of collaboration with the Tax Administration for purposes of levying tax, don't be used for the imposition of fines or the prosecution of crimes.

From the opposite perspective, the EUCJ has ruled in the *WebMindLicenses* case on whether tax authorities can, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained without the taxpayer knowledge in the context of a parallel criminal procedure that has not yet been concluded, by means, for example, of the interception of telecommunications and seizure of emails. From the perspective of Article 47 CFREU, the EUCJ established that such use would not be contrary to the right to a fair trial, provided that the right to effective judicial remedy is complied with. This «requirement is satisfied if the court hearing an action challenging the decision of the tax authorities adjusting VAT is empowered to check that the evidence upon which that decision is founded, deriving from a parallel criminal procedure that has not yet been concluded, was obtained in that criminal procedure in accordance with the rights guaranteed by EU law or can at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that that evidence was obtained in accordance with EU law[26]». If this requirement is not met, such evidence, obtained in a criminal proceeding and used in an administrative proceeding, should be inadmissible and the decision of tax authorities annulled accordingly.

In the same way, in the *Glencore* case the Advocate General Bobek has considered in accordance with article 47 the fact of being able to use in a subsequent proceedings the evidence that has been obtained in the context of administrative or criminal procedures carried out against a third party, with whom the taxable person has had a relationship.[27] This will be the case, as long as the court can review all elements of fact and law, including the lawfulness of the manner in which the evidence was collected, irrespective of the origin of such evidence,[28] penal procedures or administrative proceedings.

The right to a fair trial requires the court to have unlimited jurisdictional competence, so that the court can know the proceedings previously carried out to obtain information in a tax procedure so that its use and effectiveness can be assessed from the perspective of this right in criminal proceedings, or vice versa, with the aim of safeguarding the rights of individuals. Furthermore, in the absence of an EU regulation on evidence, the taking of evidence must be carried out in accordance with national law; however, the national rules on the collection of evidence must not undermine the effectiveness of EU law and must respect the rights guaranteed by the Charter.[29]

In addition, it may be noted that the right to a fair trial, ultimately the right of defence, may impede the provision of mutual tax assistance thereby limiting the effectiveness of the *principle of mutual trust* that inspires it. In relation to Directive 2010/24/EU, the EUCJ[30] has considered that Article 47 CFREU allows for the refusal to provide mutual tax assistance, when on the ground that the decision imposing the fine was not properly notified to the person concerned before the request for recovery was made to that authority pursuant to that directive. All this is without assessing, on the part of the requested Member State, the legality of the instrument permitting its enforcement

exchange of tax information (Article 4 of Council Directive 77/799/EEC). The Netherlands tax authorities requested the German tax authorities' permission to use these particulars in criminal proceedings to be held in public; this was granted.

26. ECJ Judgment of 17 December 2015, *personal data*, C-419/14, paragraph 88.

27. Opinion Advocate General Bobek, 5 June 2019, *Glencore*, C-189/18, paragraph 39.

28. Opinion Advocate General Bobek, 5 June 2019, *Glencore*, C-189/18, paragraph 75.

29. Opinion Advocate General Bobek, 5 June 2019, *Glencore*, C-189/18, paragraphs 37. ECJ Judgment of 17 December 2015, *WebMindLicenses*, C-419/14, paragraph 65 and 68.

30. Judgment of ECJ, 26 April 2018, *Donnellan*, C-34/17.

and without the individual's claim in the requested State can being rejected outright on the ground that the matter should have been challenged before the requesting State.[31]

2.2. The application of the right to a fair trial on tax proceedings

It is now necessary to analyze the second of the questions raised by the doctrine on the effectiveness of Article 6 ECHR, regarding the possibility of applying the right to a fair trial to pre-trial administrative proceedings, and therefore also to tax proceedings. The ECtHR has ruled on this possibility, in tax matters that, under Article 6, had been considered a question relating to criminal law or to civil rights.

From the scope of article 6 ECHR under its criminal head. It is clear that the right to a fair trial, and all the guarantees and principles that inform it, have their scope of natural application within the framework of a judicial process. However, the ECtHR, initially, allowed its extension to sanctioning tax proceedings, to which, during its performance, it is extended such guarantees and principles that inform the right to a fair process: the principles of equality of arms and the right to adversarial proceedings.

For the purposes of our presentation, the doctrine of the European Commission on Human Rights, in the *Miailhe case (2)*, is essential.[32] The applicant complains that he was not given access to all the documents supplied by the Philippine Tax authorities within the framework of the mutual assistance provisions of the Convention concluded between France and the Philippines on 9 January 1976. This constitutes a violation of the principle of equality of arms during the "administrative" stage of the proceedings, because it was impossible for him to have access to all the documents of which originals were seized by the customs service and communicated to the tax authorities, to enable him to organise his defence. Also the applicant complains of a violation of the rights of the defence at the judicial stage of the proceedings, since the tax authorities did not, as fairness required, produce at the hearings all the documents which had been passed on to them by the Philippine tax authorities, but only those which were likely to support the authorities' case.

In order to defend the importance of administrative action in relation to the right to a fair trial, and the consequent anticipation of its guarantees to fiscal procedure, the Commission develops the following arguments:

- The Commission recalls that, for article 6 to apply, the authority before which the proceedings take place must have the power to determine the dispute, this condition excludes bodies which are merely empowered to tender advice.[33]
- However the Court recognises that "demands of flexibility and efficiency may justify the prior intervention of administrative bodies and, a fortiori, of judicial bodies which do not satisfy the requirements (of Article 6 of the Convention) in every respect" and that tribunals need not meet all the requirements of Article 6 at all stages of their proceedings.[34]
- In any case, the Commission recalls that, while the primary purpose of article 6 as far as criminal matters are concerned is to ensure a fair trial by a tribunal competent to determinate the charge, it does not follow that the Article has no application to pre-trial proceedings. The requirements of Article 6 may therefore become operative before the case is submitted to the

31. See Article 14 Directive 2011/16/UE.

32. European Commission on Human Rights Decision on the admissibility of the application, application no. 18978/91, 6 April 1994.

33. The commission notes in this context that consulting the "Tax Offences Commission" is an essential formality prior to the institution of any criminal proceedings for tax evasion. Moreover, the Commission's opinion, if it is favourable, is binding on the Minister of Finance, who must the institute criminal proceedings.

34. ECtHR Judgment *Le Compte, Van Leuven and de Meyere v. Belgium*, application no. 6878/75; 7238/75, 23 June 1981, paragraph 51.

court, whether and in so far as the initial failure to observe them poses a serious threat to the fairness of the proceedings.

The Commission therefore declares that Article 6 can apply to the procedural stage before the Tax Administration and considers that Article 6 — principle of equality of arms and the right of defence — has been violated.[35]

Therefore, this right can be applied in the previous administrative phases, but we must ask ourselves what consequences has its violation or nonobservance in these phases.

This argument of the Commission was not totally rejected by the Court,[36] although the result of its judgment is contrary to that reached by the Commission. In fact, the Court concludes that there is no violation of article 6 ECHR, because to see if the result of this precept has been achieved — the fair process — we must take into account all the processes related to the case as a whole.[37] In the present case, the Court considers that the set of processes was of a fair character.[38]

So, the ECtHR does not disavow the Commission in its assertion of the violation of the equality of arms and the principle of the contradictory, in the administrative stage, nor denies the importance of their respect in that phase, but the Court integrates them from a global perspective. In conclusion, it can be said that in tax proceedings that lead to a criminal process, the principles of equality of arms and the right to adversarial proceedings are applied, as an expression of the right to a fair process.

In support of this thesis can be brought up the decision of the ECtHR in the *Georgiou*[39] case, in which the court decided to apply Article 6 to the tax assessment. Since tax assessments can be considered "criminal charges" for the purposes of the guarantees of Article 6, because the penalty procedures rely on the assessments for their validity, it would be wrong not to look at the proceedings as a whole. The Court accepts that it is not possible, given the various matters which were being determined by the VAT tribunal, to separate those parts of the proceedings which determined a "criminal charge" from those parts which did not. It will consider the proceedings to the extent to which they determined a "criminal charge" against the applicants, although that consideration will necessarily involve the "pure" tax assessments to a certain extent.[40]

From the scope of the article 6 ECHR under its civil head. The ECtHR in the *Hentrich* case considers that the requirements of the right to a fair process of article 6, like «equality of arms» must be

35. European Commission on Human Rights in its report of 11 April 1995, it expressed the opinion by eleven votes to two that there had been a breach of Article 6.

36. ECtHR Judgment, *Miailhe (2)*, application no. 18978/91, 26 September 1996.

37. Miailhe (2) case, p.43 «It is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence (see, among other authorities, the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, para. 46). It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any». ECtHR, Judgment *Imbrioscia v Netherlands*, application no 13972/88, 24 November 1993, paragraph 38.

38. Miailhe (2) Case, p.46 «In conclusion, the proceedings in issue, taken as a whole, were fair. There has therefore been no breach of Article 6 para. 1»

39. ECtHR Decision, application no. 40042/98, 16 May 2000.

40. In this regard, the following decisions of the ECtHR can be cited, *Jussila v. Finland* case, application no. 73053/01, 23 November 2006 « While the Court has found that Article 6 § 1 of the Convention extends to tax-surcharge proceedings, that provision does not apply to a dispute over the tax itself (…). It is, however, not uncommon for procedures to combine the varying elements and it may not be possible to separate those parts of the proceedings which determine a "criminal charge" from those parts which do not. The Court must accordingly consider the proceedings in issue to the extent to which they determined a "criminal charge" against the applicant, although that consideration will necessarily involve the "pure" tax assessment to a certain extent ». *Sträg Datatjänster Ab v. Sweden*, application no. 50664/99, 21 June 2005.

applied in the previous administrative procedure, because its infringement by the tax administration in the administrative procedure, cannot always be amended in a subsequent judicial process.[41]

The ECtHR also has considered that in order to comply with the requirement of a reasonable time laid down in Article 6 ECHR, the overall duration of administrative and judicial proceedings must be taken into account. Thus, the ECtHR[42] ruled that, even taken into account the complexity of the case from a legal point of view, the length of the proceedings (before the domestic authorities and courts) as a whole was excessive and failed to meet the reasonable time requirement. There has therefore been a breach of Article 6(1) of the Convention on account of the length of the proceedings.

In the *Ravon*[43] case the ECtHR considers that the right to a fair process of article 6 ECHR has been violated, although the tax administration has been legally authorized by a judge to enter the domicile of a taxpayer — which constitutes a guarantee for ensuring the preservation of the rights contained in article 8 ECHR[44] — , when the person concerned, who ignores the existence of a procedure against it, has not been able to be heard, or not has been allowed to review of the measures taken by the administration on the basis of judicial authorization. In addition, the ECtHR has considered that the existing remedies, which are aimed at obtaining compensation of damage caused during a home visit, are not in line with the requirements of the right to a fair trial. This right requires a «check of the regularity of the decision prescribing it and the measures taken on its basis, so that, it cannot be considered as "effective judicial review" required».

From the previous exposition, we can anticipate two conclusions. The first is that from both the civil and criminal perspective of Article 6 ECHR, it turns out that the application to a tax procedure of the guarantees of the right to a fair trial is necessary, in accordance with the case law of the ECtHR, when these cannot be guaranteed throughout the judicial process. The second is that the anticipation to tax proceedings of the guarantees that make up the right to a fair trial, when EU law is applied, would not be conditioned to the fact that the tax issue was linked to a civil or criminal matter, since tax matters, in themselves considered, are not excluded from the jurisdiction of the EUCJ.[45] Moreover, this conclusion is reaffirmed by the recognition in the EU of a "right to good administration", which applies to EU bodies, or of the «general principle of the good administration» and the «general principle of respect for the rights of defence», which apply both to EU bodies and to Member Estates when they apply EU law.

2.3. Leading case Berlioz

A pronouncement of the EUCJ essential to the object of our study is the Berlioz case, where the exchange of tax information is analyzed under the prism of the right to a fair trial.

In the Berlioz case,[46] the dispute in the main proceedings concerns a measure penalizing a third party (Berlioz, Luxembourger company) for failing to comply with a decision directing it to provide the requested authority (Luxembourger Tax Administration) with information on a taxpayer

41. In this sense, the ECtHR states that «that one of the requirements of a "fair trial" is "equality of arms", which implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent». «In the instant case, the proceedings on the merits did not afford the applicant such an opportunity: on the one hand, the tribunals of fact allowed the Revenue to confine the reasons given for its decision to exercise the right of pre-emption to stating "the sale price declared in the contract of sale [is] too low" (see paragraphs 9 and 15 above) — reasons that were too summary and general to enable Mrs Hentrich to mount a reasoned challenge to that assessment; and on the other hand, the tribunals of fact declined to allow the applicant to establish that the price agreed between the parties corresponded to the real market value of the property.». ECtHR Judgment *Hentrich v. France*, application no. 13616/88, 24 September 1994.

42. ECtHR, Judgment *Satakunnan v Finland*, application no. 931/13, 27 June 2017, paragraph 214.

43. ECtHR Judgment *Ravon & others v. France*, application no.18497/03, 21 February 2008.

44. Article 8 ECHR «Right to respect for private and family life»

45. ECJ Judgment of 26 April 2018, *Donellan*, C-34/17 paragraph 62, and Opinion Advocate General Tanchev, *Donellan*, 8 March 2018, C-34/17, paragraph 76.

46. ECJ Judgment of 16 May 2017, *Berlioz*, C-682/15.

(Cofima, French company, Berlioz's subsidiary) to enable that authority to respond to a request made by the requesting authority (French Tax Administration) on the basis, in particular, of Directive 2011/16/EU.

Berlioz refuses to supply all the information requested on the ground that that information was not foreseeably relevant, within the meaning of the Directive 2011/16/EU, in relation to the matter to be verified by the authority of the requesting State. Consequently, a penalty was imposed on it by Luxembourg Tax authorities. This sanction was appealed, asking the Administrative Tribunal to determine whether the information injunction was well founded. The Tribunal merely reduced the penalty imposed but dismissed the remainder of the appeal. Berlioz lodged an appeal before the Administrative Court maintaining that the refusal of the Administrative Tribunal to determine whether the injunction was well founded constituted a breach of its right to an effective judicial remedy as guaranteed by Article 6 ECHR.

The EUCJ considers that although the Directive 2011/16/EU does not confer any rights on individuals, this circumstance does not prevent an individual from being able to defend his case before a court, in accordance with Article 47 CFREU within the framework of the application of the Directive. The protection of this Article can be invoked by an individual in respect of a measure adversely affecting him such as the *information injunction and the penalty*[47] at issue in the main proceedings. The EUCJ concludes that the individual, who has been fined for failing to comply with the information injunction issued under the Directive 2011/16/EU, is entitled to challenge the legality of this information injunction.

Given the previous described situation, a question arises: the protection of Article 47 of the Charter is only applicable when a sanction is challenged. In fact, this question has sense because the Court has considered not only the sanction, but also the information injunction like measures that adversely affecting Berlioz.

In this regard, Advocate General Kokott also gave his opinion in the Sabou case. Although it was nevertheless considered that the request for information under Directive 77/799, being part of the investigation phase in respect of a taxpayer, did not give rise to a right to be heard. This did not entail any loss of guarantees for the taxpayer, as he could exercise his right before the authorities of the requesting State, at the contradictory stage, and subsequently before the courts of that State.

However, it would be difficult to place Berlioz in Sabou's position. It can hardly be considered, under Directive 2011/16/EU, that a request for information to a third party regarding a taxpayer constitutes, in relation to the requested third party, an action within the inspection phase. In addition, it can hardly be considered that the third party can exercise its rights in the contentious phase before the authority of the requesting State.[48]

It could therefore be concluded that, in the Berlioz case, the circumstances limiting the right of defence in the Sabou case do not exist, and therefore such a right must be recognised, irrespective of the possibility of challenging a sanction before the requested State, which is the State which applies EU law to the requested third party.

On the other hand, if the Berlioz judgment sought to recognise access to the protection of Article 47 CFREU only to third parties who have been penalised for not providing the information required, the requirement to challenge the sanction in order to delimit access to the protection of Article 47 is not an appropriate condition for making such a limitation effective.

In effect, it will suffice for the third party to fail to comply with the obligation to provide the information required, in order to obtain access to Article 47, either because such failure is sanctioned, or because the administration of the requested state deploys its powers to obtain the requested information from the third party, its exercise will involve interference in the private life of the third

47. ECJ Judgment of 16 May 2017, *Berlioz*, C-682/15, paragraph 52.

48. Opinion Advocate General Wathelet, 10 January 2017, *Berlioz*, C-682/15, paragraph 117.

party — Article 8 ECHR and Articles 7 and 8 CFREU — and could therefore open access to a court, since, in my opinion, it would be difficult to consider it proportionate for the third party to be unaware of the reason for the request for information made by the requesting State and executed by the requested State.

From this perspective, it is absurd that the third party who is required to provide information on the taxpayer does not have the right to know the statement of reasons for the request for information. That is to say, is absurd that the third party does not have the right to know the statement of reasons, not only the legal basis, of an act that creates obligations for it, and yet, if the third party objects to providing the required information, it may have access to the statement of reasons of the request by virtue, ultimately, of Article 47 CFREU.

The legality of an information injunction addressed by a Member State to an individual is based on the «foreseeably relevant» of the requested information. Also, the «foreseeably relevant» of the requested information constitutes the condition that must be satisfy in order the requested Member state to be required to comply with that request.[49]

The authority of the requesting Member State shall determine the foreseeable relevance of the requested information. Although the requesting authority has a discretion in that regard, it cannot request information that is of no relevance to the investigation concerned, because such a request would not comply with Articles 1 and 5 of Directive 2011/16/EU.

The review carried out by the requested authority is limited by that discretion of requesting authority. In any event, the requested authority cannot substitute the assessment made by the requesting authority of the possible usefulness of the information requested for its own assessment.

However, the requested authority must nevertheless check that the information requested is not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority, accordingly the verification by the requested authority is not limited to a brief and formal verification of the regularity of the request of information.[50]

The information to be provided by the requesting authority in the standard form[51] plays an important role in this verification, as does the adequate statement of reasons explaining the purpose of the information sought and as well as the possibility for the requested authority to request additional information.

In these circumstances, the judge's control cannot only be aimed at the proportionality of the sanction, but also at the legality of the information injunction. To that end, Article 47 requires that the reasons given by the requesting authority must allow the national judge to exercise control over the legality of the request for information, however, 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.

However, in order for such judicial control to be effective, the court must have access to the request for information and additional information obtained by the authority of the requested State. Though, the individual's access to such information is limited by its secrecy, in order not to undermine the effectiveness of the investigation. In this case, and in accordance with his rights of defence, it is considered sufficient, in principle, that the individual has access to the minimum information referred to Article 20(2) of the Directive. Nevertheless, if the court considers that this minimum

49. ECJ Judgment of 16 May 2017, *Berlioz*, C-682/15, paragraph 74.

50. ECJ Judgment of16 May 2017, *Berlioz*, C-682/15, paragraph 89. The Advocate General Wathelet keeps different criteria Opinion, 10 January 2017, *Berlioz*, C-682/15, paragraph 111.

51. Article 20.2 Directive 2011/16EU «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».

is not enough, it may provide the individual with additional information obtained by the authority of the requested State, taking due account the possible confidentiality of some of these additional data.[52]

Therefore, the foreseeable tax relevance of the request for tax information constitutes a requirement for the validity of the actions carried out by the requested State. Compliance with this requirement, with the limitations indicated above, must be verified by the administrative and, where appropriate, judicial authorities of the requested State regardless of whether or not a tax sanction exists. This opens up a way, not so exceptional, to limit, from the respect and safeguarding of the EU's right of defence, the principle of mutual trust that governs the provision of mutual tax assistance.

3. The rights of the defence and the right to good administration

3.1. The general principle of good administration or the right to good administration

The right to good administration is regulated in Article 41 CFREU and states that:

> *«1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
>
> *2. This right includes:*
>
> *(a)the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
>
> *(b)the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
>
> *(c)the obligation of the administration to give reasons for its decisions.*
>
> *3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
>
> *4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.»*

This right does not originate in the European Convention of Human Rights. This Article is based on the fact that the Union is a community subject to the rule of law. Therefore, the extent and the characteristics of the right to good administration were developed in the case law which enshrined good administration as a general principle of law.

This principle was introduced by the jurisprudence of the EUCJ from the expression of the maladministration of Article 195.1 TEC (ex Article138 E) concerning the Ombudsman.

The right to good administration, includes a right of individuals and rules that should inspire the actions of the institutions, bodies and offices and agencies of the EU in their actions.

Indeed, the case law of the EUCJ had considered that «*where the Community institutions have a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an*

52. ECJ Judgment of 16 May 2017, *Berlioz*, C-682/15, paragraphs 100 and 101. In this sense, the Advocate General Wathelet is more explicitly, Opinion, 10 January 2017, *Berlioz*, C-682/15, paragraph 137.

adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present[53]».

Although the right to good administration (Article 41 CFREU) owes its origin and content to the general principle of good administration. However, they have different scope, as Article 41 of the Charter governing the right to good administration does not apply to Member States,[54] whereas the principle of good administration must be respected by Member States when implementing EU law.

If the content of Article 41 is analysed, it is clear that the different rights listed in article 41 paragraph 2 also reflect specific general principles and rights of EU law, like the general principles of respect for the rights of the defence, including the right to be heard, or the duty to state reasons. The differentiation between general principles of EU law and the fundamental rights of the European Charter is justified because the content of the right of defense, applied by the Member States «may differ from the specific and autonomous guarantees provided for in Article 41 of the Charter, which are applicable to the direct administration of the EU».[55] The principle of respect for the rights of defence is not absolute, it may be subject to limitations.[56]

The right to good administration contains the right to a fair and impartial procedure and a procedure that has a reasonable duration. From this content can derive the obligation of the Administration to act with due diligence.[57]

3.2. The statement of reasons

This right to good administration includes *the obligation of the administration to give reasons for its decisions*. This obligation in established in the article 296 Treaty of the Functioning of the European Union (ex art. 253 TCE). It is not necessary to emphasize the importance of the duty of the Administration to explain the reasons for its decisions, in relation to the right of defence. The EUCJ has consistently held, with regard to the statement of reasons required by this article that «the statement of reasons must disclose in a clear and unequivocable fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction».[58]

The EUCJ has stated, in relation to the investigation proceedings, that the indication of its subject-matter and its purpose «constitutes a fundamental guarantee of the right of defence». Therefore, «the scope of the obligation to establish the reasons on which the decisions ordering the investigations are based cannot be restricted on the basis of considerations regarding the effectiveness of the investigation. Although the Commission is not required to communicate to the addressee of a decision ordering an investigation all the information at its disposal concerning the presumed

53. ECJ Judgment of 21 November 1991, *Technische Universität München*, C-269/90, paragraph 14.

54. «After some initial hesitations, the Court has repeatedly held, in line with the wording of the Charter, that Article 41 of the Charter is addressed only to the institutions, bodies, offices and agencies of the European Union» Opinion of Advocate General Bobek, 7 September 2017, Ispas, C-298/16, paragraph 77. However, this conclusion is a controversial topic.

55. Opinion of Advocate General Bobek, 7 September 2017, Ispas, C-298/16, paragraph 90.

56. Indeed, according to settled case law of the Court, the general principle of EU law of respect for the rights of defence is not an unfettered prerogative but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and do not constitute a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed. ECJ Judgments of 26 September 2013, *Texdata Software*, C-418/11, paragraph 84, and of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, joined cases C-129/13 and C-130/13, paragraph 42).

57. The due diligence of the Administration in the exchange of information is reflected in the so-called *principle of acting on its own initiative*. Art.6 Council Directive 2011/16/EU, of 15 February 2011.

58. ECJ Judgment of 21 November 1991, *Technische Universität München*, C-269/90, paragraph 26.

infringements, or to make a precise legal analysis of those infringements, it must none the less clearly indicate the presumed facts which it intends to investigate».[59]

In this sense, the Berlioz judgment has made clear the importance of the statement of reasons by the requesting State to request information, in order to demonstrate the foreseeable relevance of the information requested from the requested State.[60]

3.3. The right to access to one's file and the right to be heard

The right to good administration includes the *right of every person to have access to his or her file*, without prejudice to the more general right of access to documents,[61] as a requirement of the principle of transparency that governs the public action of the EU, is recognized as piece of the statute of the interested party in a procedure. In fact, the right to access the file is instrumental to the exercise of the rights of defence of persons whose interests may be affected by the adoption of a decision of the public authorities.[62]

The EUCJ case law on competition, referred to Article 101 TFEU (ex art.81 TEC), has recognized that the right of access to the file, is a fundamental content of the right to defense and involves, within this administrative procedure, that the parties concerned should be put in a position before the decision is issued to present their observations on the complaints which the Commission considers must be upheld against them».[63] For that purpose, they must be informed of the facts upon which these complaints are based, but it is not necessary communicate to them the entire content of the file.

In this sense, «access to file as such, understood as the *complete* set of documents and information in possession of the administrative authorities, should be clearly distinguished from the right to have access to the documents upon which the final administrative decision is based».[64]In accordance with the principle of respect for the rights of defence, «the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the *information on which the authorities intend to base their decision*».[65]

The right of access to the file implies «that the taxable person must be able to examine *all* the documents in the investigation file that are relevant for the exercise of his defence»,[66] more specifically, first «the elements of the file which the authorities intend to rely on in their decision against the taxable person»; second «other documents which, although perhaps not directly relied on by the authorities in the statement of reason of their decision, concern the taxable person's conduct that is the subject of the investigation»;[67] third, «not only incriminating evidence, but also exculpatory evidence which may have been collected by the tax authorities».[68]

Therefore, the Advocate General Bobek considers that «there is no right to see the complete file, but rather to have access to the key information or documents which form the basis of the administrative

59. ECJ Judgment of 21 September 1989, *Hoechst* joined cases C-46/87 & c-227/88, paragraph 41. ECJ Judgment of 17 October 1989, *Dow Benelux*, C-85/87, paragraph 8.

60. ECJ Judgment of 16 May 2017, *Berlioz*, C-682/15, paragraphs 80 to 84.

61. Article 42 CFREU «*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents*».

62. Opinion Advocate General Bobek, 5 June 2019, *Glencore*, C-198/18, paragraph 51.

63. ECJ Judgment of 13 July 1966, *Consten & Grundig v. Commission*, joined cases C-56 & 58/64.

64. Opinion General Advocate Bobek, 7 September 2017, *Ispas*, C-298/16, paragraph 116.

65. ECJ'S Judgment of18 December 2008, *Sopropé*, C-349/07, paragraph 37.

66. Opinion General Advocate Bobek, 5 June 2019, *Glenclore*, C-189/18, paragraphs 56 and 57.

67. Opinion General Advocate Bobek, 5 June 2019, *Glenclore,* C-189/18, paragraph 59.

68. Opinion General Advocate Bobek, 5 June 2019, *Glenclore,* C-189/18, paragraph 60.

decision».[69] Advocate General clarifies that there is no right to see the complete file if by that it meant «the complete set of documents and information in the possession of the administrative authorities including elements not directly relating to a decision adopted, such as some internal notes, drafts, auxiliary calculations, and all the information obtained from third parties».[70]

Access to the file must be granted during the administrative procedure and in any case before the authorities take their final decision, and also before any judicial process begins.[71] Access to the file at a later stage (within the judicial procedure) constitutes an infringement of the rights of the defence which cannot, as a rule, be remedied,[72] unless the procedure initiated against the decision taken by the administration «has the effect of automatically suspending the execution of the adverse decision, rendering it immediately inoperative».[73]

With regard to the time element which delimits the scope of the information, a distinction must be made between the investigation phase at which the information has been collected and the contradictory phase or «contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment».[74] Thus, «to the extent that such documents do not form the basis of a decision, I do not see the obligation, as a matter of EU law, to give access to all the documents and information collected during the investigation phase, even if the information collected in that preliminary phase might have contributed to triggering the adoption of the proposed adjustment».[75]

Finally, Advocate General Bobek affirm that there is not «a requirement to provide the pertinent documents or information *ex officio*».[76] So, the EUCJ concludes that «the general principle of EU law of respect for the rights of defence must be interpreted as a requirement that, in national administrative procedures of inspection and establishment of the basis for the assessment of value added tax, an individual is to have the opportunity to have communicated to him, at his request, the information and documents in the administrative file and considered by the public authority when it adopted its decision, unless objectives of public interest warrant restricting access to that information and those documents».[77]

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69. Opinion General Advocate Bobek, 7 September 2017, *Ispas*, C-298/16, paragraph 121.

70. Opinion General Advocate Bobek, 5 June 2019, *Glenclore* C-189/18, paragraph 61.

71. Opinion General Advocate Bobek, 5 June 2019, *Glenclore* C-189/18, paragraphs 53 and 54

72. Opinion General Advocate Bobek, 5 June 2019, *Glenclore* C-189/18, paragraphs 55.

73. ECJ's Judgment, 3 July 2014, *Kamino*, joined cases C-129/13 and 130/13, paragraph 54 and subsequent. The Court's judgment in the *Texdata Software* case is thus transferred to this judgment. In this case, the ECJ ruled that « the imposition of a penalty without prior notice or the opportunity to be heard before the penalty is imposed does not appear to impair the core of the fundamental right at issue, since the submission of a reasoned objection against the decision imposing the penalty renders that decision immediately inoperable and triggers an ordinary procedure under which there is a right to be Heard», Judgments of 26 September 2013, *Texdata Software*, C-418/11.

74. ECJ's Judgment 22 October 2013, *Sabou*, C-276/12, paragraph 40.

75. Opinion General Advocate Bobek, 7 September 2017, *Ispas*, C-298/16, paragraph 121.

76. Opinion General Advocate Bobek, 7 September 2017, *Ispas*, C-298/16, paragraph 122.

77. ECJ's Judgment, 9 November 2017, *Ispas*, C-298/16. In relation to this matter, see Opinion General Advocate Bobek, 5 June 2019, *Glenclore*, C-189/18, paragraphs 63 and 64. > *«63. Furthermore, according to settled case-law, the general principle of EU law of respect for the rights of the defence is not an unfettered prerogative but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed. Thus, access to the file may be restricted in those cases where it appears strictly necessary to ensure that important public interests are protected (for example, the secrecy of ongoing criminal investigations) or that other persons' fundamental rights are not unduly affected (for example, the confidentiality of personal data or of business secrets). 64. It is, however, for the authorities to prove that the requirements for those exceptions are met, subject to review by a court. Nevertheless, the authorities are required to consider whether partial disclosure of the documents to which one of the exceptions applies may be granted: that requires, in particular, checking whether access limited to only certain parts of the documents is possible and does not require a disproportionate amount of work on the part of the authorities. It must be borne in mind, in this context, that in the modern IT environment the handling of a large volume of documents and, where necessary, the editing of documents, has become significantly easier than in the past».*

The EUCJ, in the WebMindLicenses[78] case, considered, under the right to defence as a general principle, that in order for evidence obtained in a criminal proceeding not yet concluded and unknown to the taxpayer, to can be used as the basis for the tax settlement, the taxpayer should have access to such evidences and have the opportunity to be heard in relation to it. If this requirement is not met, such evidence, obtained in a criminal proceeding and used in an administrative proceeding, should be inadmissible and the decision of tax authorities annulled accordingly.

The Advocate General makes the same pronouncement in the Glencore case when he considers that «the fact that certain documents are transferred from one procedure to another does not, per se, result a breach of the rights of defence of the taxable person being investigated in the latter procedure». However, if the tax administration intends to rely on such documents in a later decision, the tax administration must «(i) grant access to those documents to the taxable person with regard those documents may be used as evidence in the subsequent decision; (ii) give that taxable person the possibility to be heard with regard to those documents and to submit evidence in support of his arguments; (iii) expressly reconcile the relevant documents and their pertinence in its decision, incorporating, responding to, or refuting the taxable person's relevant arguments in its decision. That is so regardless of whether those documents already formed the basis of a previous decision that has become definitive in the meantime».[79]

The principle of respect for the rights of defence, particularly, the right of every person to be heard before the adoption of an adverse individual measure is violated even though the individuals can express their views during a subsequent administrative objection stage, if national legislation does not allow the addressees of such demands, in the absence of the prior hearing, to obtain suspension of their implementation until their possible amendment.[80]

The right to good administration also includes «the right of every person to be heard, before any individual measure which would affect him or her adversely is taken», or the adversarial principle. This principle also is integrated in the right of defence.

Initially, this principle was recognized, in the field of competition law, in a restrictive manner and limited to administrative sanctioning procedures.[81] Subsequently the scope of application of this principle is generalized. First, this right was extended to the previous phases of investigation of such sanctioning administrative procedures. Therefore, from the stage of preliminary inquiry, must be respected the right to legal representation and the privileged nature of the correspondence between the lawyer and the client,[82] as well as the right, on one hand, to be informed about the purposes pursued and the legal basis of the request of information, and, on the other, that the information thus obtained not subsequently be used outside the legal context in which the request was made.[83] In second place, now, for this principle to apply, it is only necessary that an unfavorable or harmful consequence to a person occurs. And finally, the right of defense, as the general principle of EU law, even in the absence of express provisions, must be observed,[84] and may be relied on directly by individuals before national courts.[85]

78. ECJ's Judgment, 17 December 2015, *WebMindLicenses*, C-419/14, paragraph 88. The article 41 of CFREU is not relevant in the main proceedings, because the wording of Article 41 CFREU is addressed not to the Member states but to the EU.

79. Opinion Advocate General Bobek, 5 June 2019, *Glencore*, C-189/18, paragraphs 40 and 41.

80. ECJ Judgment of 3 July 2014, *Kamino*, Joined cases c-129 /13 and 130/13.

81. ECJ Judgment of 29 June 1994, *Fiskano*, C-135/92, paragraph 40 «It follows from that case law that observance of the right to be heard requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on the basis of which the Commission imposes the penalty».

82. ECJ Judgment of 17 October 1989, *Dow Benelux*, C-85/87, paragraphs 26 and 27

83. ECJ Judgment of 16 July 1992, *Asociación Española de la banca y otros*, C-67/91 paragraph 36.

84. EJC Judgments of 12 February 1992, *Netherland v. Commission* joined cases C-48/90 and 66/90, paragraph 37; of 17 December 2015, *WebMindLicenses*, C- 419/14 paragraph 84 and 22 October 2013, *Sabou*, C-276/12, paragraph 38.

85. ECJ Judgment of 3 July 2014, *Kamino*, joined cases C-129/13 y 130/13.

The Jurisprudence of EUCJ has affirmed that for an infringement of the right of defence to result in an annulment it must, however, be established that, had it not been for that irregularity, the outcome of the procedure might have been different.[86]

This jurisprudence has evolved favorably for the individual, considering that the infringement committed of the right of defense, is not remedied by the mere fact that access to the file was made possible during the judicial proceedings. This circumstance does not put back the individual into the situation in which it would have been if it had been able to rely on those documents in presenting its written and oral observations to the Administration in the administrative procedure. Therefore, the tardy knowledge of the file is not an adequate remedy for the infringement of the right of defence.

Consequently, the individual does not have to show that, if it had access to the file of the administrative decision would have been different in content, but only that the individual would have been able to use the file in its defence.[87]

This last assertion has been made in the field of competition law, the question, therefore, is to what extent it can be applied in tax proceedings, due to the fact that «the nature of the procedures is simply very different». Competition law imposes sanctions of a nature and degree that reach a quasi-criminal nature. By contrast, tax proceedings are aimed to ascertaining the amount of the tax due.[88]

From the above, two conclusions can be drawn. The first conclusion is that these legal consequences are applicable to sanctioning administrative procedures,[89] and therefore, they should be observed in tax procedures that impose sanctions. The case law of the Court confirm that the assessment of whether an infringement of the rights of defence, including the right of access to file, has occurred in a particular case ought to be made having regard not only to the specific circumstances at issue, but also the nature of the act concerned and the legal rules governing the matter in question.[90] This means that the different requirements that arise from the principle of respect for the rights of defense and the consequences arising from its violation may vary depending on the elements previously referred to.

The second conclusion, once delimited the scope of application of such legal consequences, is that the right of defence within the EU law is not only integrated in the judicial processes, but it is a right that protects the individual in administrative procedures, and that right cannot always be repaired in the subsequent judicial phase.

From this perspective, the position of the ECtHR, analyzed when exposing the right to a fair process is overcome. As we have seen, the ECtHR, in proceedings of a sanctioning nature, from a global perspective, recognized that during the jurisdictional phase the possible damage to the right of defense that occurred during the administrative procedure could be remedied.

3.4. Leading case Sabou

The EUCJ in the Sabou[91] case concentrates on the analysis of the effectiveness and scope of the right to be heard regulated in Czech law in relation to the exchange of tax information regulated

86. ECJ Judgment of 11 November 1987, *France v. Commission*, C-259/85, paragraph 13.

87. ECJ Judgments of 6 July 1999, *Hercules Chemicals v. Commission*, C-51/92,paragraphs 75 to 81; of 25 October 2011, *Solvay v. Commission*, C-110/10 P; of 15 October 2002, *Limburgse and others v. Commission* (Joined cases C 238/99 P, C 244/99 P, C 245/99 P, C 247/99 P, C 250/99 P to C 252/99 P and C 254/99); of 7 January 2004, *Aalborg Portland and other* (Joined cases C 204/00 P, C 205/00 P, C 211/00 P, C 213/00 P, C 217/00 P and C 219/00 P).

88. Opinion of Advocate General Bobek, 7 September 2017, *Ispas*, C-298/16, paragraph 108.

89. The Court has declared that Article 48 CFREU applies in the context of competition law proceedings, ECJ Judgment of 22 November 2012, *E. ON Energie v. Commission*, C-89/11, paragraphs 72 and 73.

90. ECJ Judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, paragraph 97.

91. ECJ Judgment of 22 October 2013, *Sabou*, C-276/12.

by EU law. Mr Sabou claimed that the Czech tax authorities had obtained information about him illegally. First, they had not informed him of their request for assistance to other authorities, so that he had not been able to take part in formulating the questions addressed to those authorities. Secondly, he had not been invited to take part in the examination of witnesses in other Member States, in contrast to the rights he enjoys under Czech law in similar domestic proceedings. The Czech Supreme Administrative Court refer the following questions to the EUCJ for a preliminary ruling:

- Does the taxpayer have the right to be informed of a decision of the tax authorities to make a request for information in accordance with Directive 77/799/EEC? Does the taxpayer have the right to take part in formulating such request?
- Does a taxpayer have the right to take part in the examination of witnesses in the requested Member State? Is the requested Member State obliged to inform the taxpayer beforehand of when the witness will be examined, if it has been requested to do so by the requesting Member State?
- Must the information provided observe a certain minimum content, so that it is clear from what sources and by what method the requested authorities have obtained such information? Can the taxpayer challenge the accuracy of the information obtained by the requesting tax authorities, for example on grounds of procedural defects of the proceedings in the requested State?

The court focuses its analysis on the general principle of respect for the rights of defence, which includes the right to be heard. The court ignores the application of Article 41 CFREU, the right to good administration, because the European Charter was not in force when the question was referred for a preliminary ruling. In any case, Article 41 would not have been applicable because this right only applies to EU bodies, and not to States, according to the majority opinion of the Court. However, the right of defence, as a general principle of EU law, even in the absence of express provisions, must be respected and guaranteed, when EU law is applied, both by EU bodies and by Member States.[92] In this regard the Court has pointed out that «Subject to the observance of Community law, and in particular its fundamental principles, it is therefore a matter for national law to define the appropriate procedural rules in order to guarantee the rights of the defence of the persons concerned. Such guarantees may differ from those which apply in Community proceedings».[93]

Finally, we must point out that the right to be heard is not absolute where the recognition of the right in question implies or may imply the failure of the purpose of the administrative measure.[94]

From this perspective — to determine whether the taxpayer has a right to be informed of the request for exchange of information, whether the taxpayer has a right to participate in the formulation of this request for information, whether the taxpayer has a right to participate in the hearing of witnesses in the requested State or whether that State has an obligation to inform the taxpayer in advance of the date of the hearing — the approach adopted by the Advocate General and the Court of Justice is correct when they ask themselves whether the implementation of the Czech State in requesting an exchange of tax information presupposes, first, that Mr Sabou be regarded as the addressee of that injunction, or not, and, second, that it has an adverse effect, or not, on Mr Sabou, circumstances which, in their case, would make it possible to implement the right to be heard.

It must be pointed out from the rules of European Union law that it is limited to regulating relations between Member States, so that the recipient of the exchange of information will necessarily be another State. It is possible, however, to consider that the result of this request for exchange of information may indirectly have legal effects for the taxable person and, in this regard, be detrimental to him.

92. ECJ Judgment of 19 June 1997, *Air Inter Sa v Commission* T-260/94, paragraph 65.

93. ECJ Judgment of 10 November 1993, *Otto vs Postbank,* C-60/92, paragraph14.

94. Opinion of Advocate General Kokott, 6 June 2013, *Sabou*, C-276/12, paragraph 61.

Indeed, the right to be heard does not exist for all decisions of an authority, but only for decisions which are «onerous in character», in other words, measures that «adversely affecting» a person or decisions that «significantly affect» a person's «interests». Consequently, the question is whether a request for information under Article 2 of the Mutual Assistance Directive constitutes such a decision. The Advocate General Kokott considers that «the decision on a request for information under Article 2 of the Mutual Assistance Directive can have indirect legal effects on the taxpayer and thus be onerous», but also, considers that this decision «may not be seen in isolation», because this decision «constitutes an investigate measure in administrative proceedings culminating in a payment notice».[95]

The question would therefore be whether these negative effects are so serious as to require compliance with the right to be heard during the course of the whole activity covered by the exchange of information. It should not be forgotten that the purpose of the exchange of information is simply to help the conduct of an investigation, in other words, to prepare the content of a tax decision that has legal effects on the taxpayer.

The EUCJ and the Advocate General rightly consider that investigation stage, during which information is collected and which includes the exchange of information between the requesting and the requested State, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment. The protection of the taxpayer is guaranteed by the fact that the person concerned is heard before the decision is taken at the end of the administrative procedure, and therefore it must be guaranteed in the requesting State.[96] This second stage «necessarily entails, for the taxpayer, respect for certain rights, including the right to challenge any final decision before a tribunal».[97]

Accordingly, the EUJC considers that «the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organized by the requested Member State».[98] Although, «there is nothing to prevent a Member State from extending the right to be heard to other parts of the investigation stage».[99]

When the tax inspection is carried out exclusively on data submitted by the taxpayer it is clear that the right of defence does not require the taxpayer to be heard. The solution should be the same, when using the exchange of information to investigate data of the taxpayer provided by third parties, or unknown data of the taxpayer, because it would be possible to exercise the right to be heard before the decision is taken at the end of the tax proceedings.

The Sabou judgment also raises the question of whether the requested State has a duty to apply, within its territory, the procedural rights and guarantees established by the requesting State. The Advocate General Kokott considers that «no such obligation for the requested Member State can be inferred directly from the Mutual Assistance Directive»[100] and affirms that «the inquiries made

95. Opinion of Advocate General Kokott, 6 June 2013, *Sabou*, C-276/12, paragraphs 51,52,53 and 56.

96. Opinion Advocate General Kokot, 6 June 2013, *Sabou*, C-276/12, paragraph 57. However, The Advocate General does not rule out the existence of investigative measures which are so onerous in themselves that the protection of the person concerned requires a right to be heard, that is not the situation in the present case. ECJ Judgment of 22 October 2013, *Sabou*, C-276/12, paragraph 40.

97. Opinion Advocate General Wathelet, *Berlioz*, C-682/15, paragraph 116.

98. ECJ Judgment of 22 October 2013, *Sabou*, C-276/12, paragraph 46.

99. ECJ Judgment of 22 October 2013, *Sabou*, C-276/12, paragraph 45.

100. Opinion Advocate General Kokot, 6 June 2013, *Sabou*, C-276/12, paragraph 67.

by the requested Member State are thus intended to be subject only to its national procedural law, from which the rights and obligations of the parties are derived».[101]

The conclusion cannot be different in the light of the principle of equivalence and the principle of acting on its own initiative. These principles, in my view, have been established to facilitate the exchange of information and its effectiveness. The second principle implies that it will be followed by the requested authority the same procedures as when it is acting on its own initiative or at the request of another authority in its own Member state. The principle of equivalence entails that the required Member State is not obliged 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.[102]

In the EU law, when carrying out an exchange of information the limits established by the requesting State are not taken into consideration, unlike what happens at the international law. This shortcoming has not been resolved either in Directive 77/799/EEC or in Directive 2011/16/EU, so it can be concluded that this omission is the result of a legislative option to make the exchange of information efficient. Indeed, the reference to the law of the requested State made by EU law, by virtue of the principle of equivalence, leads to the limitation of the procedural autonomy of the requesting State.

The Sabou case focuses on a very relevant issue, the use by the requesting State of information obtained by the requested State, in accordance with its legal system but without respecting the rights and guarantees established by the requesting State, to whose respect the requested State is not bound.

The solution given at international law is not uniform, although it is generally accepted that the information exchanged must be in accordance with the conditions laid down by the requesting State, otherwise the taxpayer affected by the exchange may oppose it. In my opinion, the international solution cannot be applied to the exchange of tax information ruled by EU. A seemingly paradoxical solution is reached in the EU. The aim that this exchange of information is intended to achieve is not only an objective of the Member States, the correct application of the tax, but also an objective of the EU, the fight against tax evasion in order to achieve the proper functioning of the market.

The question is whether the requesting State should avoid using the information received, through the provisions of Union law, when the requested Member State has not respected the guarantees which requesting State's law gives to taxpayers or, in other perspective, whether the taxpayer can rely on such non-compliance before the judicial authority of the requesting State, in order to render the use of the information exchanged ineffective. In my opinion, neither the requesting State can ignore the information, nor can the taxpayer oppose its use in the courts for this reason. However, there should be no doubt that the taxpayer can challenge and discuss the effectiveness of the information exchanged with any other argument before the authority or courts of the requesting State.

However, this solution does not conflict with the proportionality approach taken by the ECtHR in the F.S. V Germany case, since in the Sabou case it is not a question of what information can be exchanged — in fact, the information declared by the taxpayer himself was being checked — but of how the information to be exchanged was obtained.

These different purposes, once the requested State in the exchange of information has respected the fundamental principles and rights of the EU, make the information obtained and exchanged fully effective in the requesting State. Since the fight against tax evasion and the proper functioning of the market cannot be conditioned by a state legal system, even if the latter provides for broader guarantees than those of the requested State which have been considered appropriate by EU law. The use of the information received from another Member State, whenever it has always respected

101. Opinion Advocate General Kokot, 6 June 2013, *Sabou*, C-276/12, paragraph 71.

102. Directive 2011/16/UE articles17.2 and 6.3

the minimum standards of the EU's general principles and rights, must therefore be mandatory, because otherwise it would be like leaving the concrete achievement of a Union objective to the discretion of a Member State.

This is a solution that fits the so-called «better law» principle, which is the option adopted by the EU to define in the application of its fundamental rights and general principles, the content that best suits the achievement of the EU's objectives. This avoids that broader taxpayer protection could become an obstacle to the effectiveness of exchange of tax information in the EU.[103]

Finally, with regard to the content of the information. Advocate General Kokott considers that «the requested Member State is obliged, in principle, under Article 1(1) and Article 2 of the Mutual Assistance Directive also to provide information about the inquiries on which the notified findings are based».[104] Clearly, this choice would increase the evidentiary value of the information exchanged and thus its effectiveness. From the taxpayer's perspective, this would mean strengthening the taxpayer's defence, and hence his rights. However, the Court of Justice does not share this view, stating that Directive 77/799/EEC «does not impose any particular obligation with regard to the content of the information conveyed».[105]

4. The rights to defence and the right to the protection of personal data

4.1. Regulatory framework for the right to the protection of personal data in the EU

The right to the protection of personal data, within the scope of the Council of Europe and the jurisprudence of the ECtHR, has been located in art. 8 CEDH — the right to respect for private and family life —, as a consequence of the broad conception that ECtHR maintains of the concept of private life,[106] treating it as a more specific expression of the right to privacy in respect of the processing of personal data.

The regulation of this right in the Council of Europe was initially unitary, but the insufficiencies of Article 8 of the Convention to preserve individuals from the abuse of information technology led to the promulgation of Convention No. 108 for the protection of persons with respect to the automatic processing of personal data, 28 January 1981.[107]

However, the regulation in the EU law of such rights is separate. Article 7 CFRUE regulates «the right to respect for private and family life», and Article 8 CFRUE regulates «the right to the protection of personal data».

From the above a question arises, is this interpretation of the ECtHR applicable in EU law, since, in this legal order there is a separate regulation of both rights?

The rights guaranteed in Article 7 of CFREU correspond to those guaranteed by article 8 ECHR. So, in accordance with Article 52 of CFREU the meaning and the scope of this right are the same

103. For a specific comment on the Sabou case see F. Fernández Marín, *La tutela nazionale del contribuente nello scambio comunitario d'informazioni*, in Rassegna Tributaria nº 6, 2014.

104. Opinion Advocate General Kokot, 6 June 2013, *Sabou*, C-276/12, paragraph 82.

105. ECJ Judgment of 22 October 2013, *Sabou*, C-276/12

106. Indeed, the notion of private life is not limited to an "inner circle" in which the individual may live his own personal life as he chooses, but extends to relations with the outside world an may include professional and business activities» ECtHR Judgment *Niemiezt v Germany*, 16 December 1992, application no. 13710/88, paragraph 29, this highlights its tax transcendence.

107. ECtHR Judgment *Z v Finland*, application no. 22009/1993, 25 February 1997, paragraph 95 «The Court will take into account that the protection of personal data, (…), is of fundamental importance to a person's enjoyment to this or her right to respect for private and family life as guaranteed by Article of the Convention».

as those of the corresponding article of the ECHR. It follows that the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 ECHR. According to the Article 52 of the Charter, where there is a correspondence between the rights of this and those of the ECHR, «EU law permits the Court of Justice to deviate from the case law of ECtHR only to extent that the former ascribes more extensive protection to specific fundamental rights than the latter»,[108] In other words, these rights, under EU Law, cannot have less protection than that established by the ECtHR case law.

The Article 8 CFREU has been based on Article 286 of Treaty establishing the European Community[109]and the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data[110] as well as on Article 8 ECHR and on the Council of Europe Convention of 28 January 1981. However, in this case, must be understand that this right is exercised under the conditions established by the Regulation (EU) 2016/679[111] and may be limited under the conditions established in Article 52 of the Charter, therefore, without any reference to the limitations provided by Article 8 ECHR. The explanations of the Charter consider this right different from the ones listed in the European Convention of Human Rights.[112]

However, it should be clarified that the scope of the fundamental right to data protection in Article 8 CRFEU is not affected by Article 2 of the Regulation (EU) 2016/679. This follows in particular from Article 51.1 CRFEU. This states that the fundamental rights guaranteed in the UE legal order apply in all situations governed by EU law. The CFREU is applicable to penalties in the area of taxation[113] — however, the Regulation cannot be applied —, in so far as it relates to fiscal provisions of EU law.[114] If the latter does not occur, Article 8 ECHR could become applicable.[115]

Despite this separate regulation of these rights in two articles of the European Charter, the reality of the analysis of the normative development in the EU of the right to the protection of personal data, that is, article 52 of the Charter and article 23 of Regulation (EU) No 2016/679, it is stated that the requirements established to limit this fundamental right correspond to those of article 8 ECHR. Similarly, from the analysis of the jurisprudence of the EUCJ on the right to the protection of personal data, it can be verified that the Court identifies, in their origin, both rights, the right to private life and the right to the protection of personal data, extending to the latter the jurisprudential doctrine of the ECtHR on Article 8 ECHR.

The protection afforded by the Regulation (EU) 2016/679 should apply to natural persons and to the processing of personal data by automated means, as well as to manual processing.[116] From the perspective of the exchange of information, this means that the protection afforded by the Regulation

108. Opinion Advocate General Kokott, 30 March 2017, *Puškár*, C-73/16, paragraph 123.

109. Current Article 16 Treaty on the Functioning of the European Union.

110. Currently this matter is ruled by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

111. Regulation that has repealed Directive 95/46/EC.

112. Draft Charter of Fundamental Rights of the European Union, 11 October 2000, CHARTE 4473/00

113. ECJ Judgment of 26 February 2013, *Åkerberg Fransson,* C-617/10, paragraph 27.

114. VAT, excise duties, also specific questions of direct taxation subject to EU Law (harmonisation measures or when fundamental freedom are restricted).

115. Opinion of Advocate General Kokott, 30 March 2017, *Puškár*, C-73/16, paragraph 29.

116. However, it is important to remember that the provisions of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications, «particularise and complement Directive 95/46/EC for the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons» and that «This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community».

should apply to all exchanges of information, i.e. exchange of information on request; automatic exchange of information and spontaneous exchange of information.

4.2. Right to privacy and the Right to «informational self-determination»

The *right to respect for private and family life* is not absolute, it may, therefore, suffer limitations. Any way these limitations must be interpreted restrictively because they affect a fundamental right. However, an interference in this right does not constitute a violation of Article 8 ECHR, as long as the interference «is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being for the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

The Commission[117] has ruled on the possible violation of Article 8 ECHR, in a spontaneous exchange of tax information between Germany and the Netherlands, within the scope of Directive 77/779/EEC, on matters related to the assessment of taxes if there were reasons to assume that taxes were evaded in the Netherlands. This information was obtained legally in the context of a tax evasion procedure carried out against a third party. Consequently, without prior knowledge of the taxpayer that will be investigated in the Netherlands.

The Commission considers that the disclosure of tax information amounts to an interference with the right under Article 8.1 ECHR. Such interference violates Article 8, if it is not justified under paragraph 2 of Article 8 as being in accordance with law and necessary in a democratic society to achieve one of the aims mentioned therein. The Commission notes that the transmission of the information in question was based on the German law transposing Directive 77/779/EEC, confirming the concurrence of the principle of legality, therefore the interference is in accordance with German law. The Commission considers that «the measure in question was taken in the interest of the economic well-being of the country and also aimed at the prevention of crime». The Commission finally examines whether such interference was necessary in a democratic society to accomplish the said aim.

Consequently, the Commission determined that there were relevant reasons for the exchange of information — the taxpayer was evading taxes in the Netherlands and the correct assessment of taxes in the EC Members States- and concluded that the measures adopted were proportionate to the legitimate aims pursued, because the information exchanged, it was information that the taxpayer would have had to provide to the Dutch tax authorities.

It is interesting to note that proportionality, as a parameter of legitimate interference in a person's private life, displays its effectiveness, not in relation to the actions taken to obtain information by the requested State, nor as a limit on the use of the information by the requesting State. The effectiveness of proportionality determines the exchange or not of the information. This conclusion is important because the taxpayer may oppose the exchange of information obtained by the requested State acting on its own initiative, but which cannot be obtained in the requesting State.[118]

The ECtHR[119] rules that disclosing banking information to tax authorities of another State through a bilateral agreement (US and Switzerland) constitutes an infringement of Article 8 but this infringement doesn't constitute a violation of Article 8, because it meets the requirements of the second paragraph of the article. Indeed, the ECtHR affirms that the measure was «in accordance with the law», because is not contrary to this requirement that the retroactive application of the bilateral treaty was unforeseeable. Provisions on administrative cooperation, including those related

117. European Commission of Human Rights Decision F.S. v Germany, 27 November 1996, application no. 30128/96.

118. This possibility of defense of the taxpayer is added to the possible ways of defense allowed in the regulatory dispositions of the exchange of information, both in the requested State, for the actions developed to obtain the information, and those of the requesting State regarding the use of the information exchanged.

119. ECtHR Judgment *G.S.B. v Switzerland, application no. 28601/11, 22 December 2015*

to the exchange of information, are procedural in nature and, therefore, applied, in principle, to all current or future proceedings, including those related to any tax years pre-dating their adoption.[120]

The ECtHR,[121] also, accepts that the development of an inspection procedure, within the framework of a mutual assistance procedure of the Directive 77/779/EEC, and the exchange of tax information obtained in this procedure without the prior knowledge of the person investigated constitutes an interference of Article 8, but no a violation of right to privacy, because, the transposition of the Directive is an adequate legal basis for this interference. The ECtHR considers, regard to the right to be hearing, that the fact that the applicant is not the "taxpayer" and therefore is not directly concerned by the Sabou judgment,[122] it cannot be decisive. Consequently, the ECtHR has accepted «in the context of "the interests of national security" and "public safety" and "the prevention of crime", that investigative methods may have to be used covertly». The ECtHR «considers that the same applies in matters of taxation: it cannot be a requirement of Article 8 of the Convention that prior notice of lawful tax investigations or exchanges of tax-related information be given to all persons potentially implicated».

The EUCJ in the WebMindLicenses[123] *case found that evidence obtained in a parallel criminal proceeding not yet been concluded, such as interceptions of communications or the seizure of emails, to be used in a tax proceeding, constitutes interferences with the right to privacy in article 7 CFREU. Such limitations are accordingly possible only if they are provided for by law and if, in observance of the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the EU.*

The EUCJ considers that it should be examined, firstly, whether such interference was provided for by law and whether it was necessary in the framework of criminal proceedings[124] *and, secondly, whether the use of such evidence by the Tax Administration for the assessment of the tax was provided for by law and whether it was necessary. It must be assessed in particular, whether the use of such evidence is proportionate to the aim pursued, examining whether all the necessary information could not have been obtained by means of investigation that interfere less with the right guaranteed by Article 7 CFREU. The EUCJ considers that a valid parameter to assess the proportionality of the interference in the right to private life of Article 7 CFREU is the exchange of information between Member States, i.e. in the present case, if under Regulation 904/2010*[125] *such information can be obtained.*

In light of foregoing, it can be affirmed that although both rights are part of a whole — respect for private life -, nevertheless, it could be considered, from a negative perspective of limiting the interference of public powers in the private sphere of individuals, that Article 8 ECHR refers to the phase of obtaining information, while the right to the protection of personal data refers to the data held by the administration.

120. Furthermore, it could not be argued that the former restrictive practice of the Swiss authorities in matters of administrative cooperation in the tax field created a possible legitimate expectation on applicant's part that he could continue to invest his assets in Switzerland without any supervision by relevant Authorities of the United States, or even free simply of the possibility of retroactive investigations.

121. ECtHR Decision *Othymia Investments BV v the Netherlands, application no.75292/10, 16 June 2015.*

122. ECJ Judgment of 22 October 2013, *Sabou*, C-276/12.

123. ECJ Judgment of 17 December 2015, *WebMindLicenses*, C-419/14.

124. From this perspective, the ECJ considers that the fact that the seizure of emails was carried out without judicial authorization, although it is a violation of Article 7 CRFEU, nevertheless, the ECJ considers that this absence can be counterbalanced by the availability to the person concerned of an ex post factum judicial review relating to both legality and necessity of the seizure. This means, as the ECtHR does in relation to the right to a fair trial, reassessing the respect for fundamental rights and their integrity within the set of legal proceedings considered as a whole, in support of this interpretation the ECJ brings up a ruling of the ECtHR, Judgment *Smirnov v Russia*, 7 June 2007, application no. 71362/01, paragraph 45.

125. Council Regulation (UE) No 904/2010, 7 October 2010, on administrative cooperation and combating fraud in the field of value added tax. It is also a valid parameter to assess proportionality, the simple inspection of the premises.

In the latter case, as it can see below, the legal regime provides for limits to the treatment of data by the administration and a set of rights for individuals affected by such treatment. This double perspective[126] integrates the content of what the doctrine has called the right to «informational self-determination».[127] Consequently, it can be concluded that the essential content of the right to «informational self-determination», unlike the right to privacy, is the set of faculties and rights that allow its owner effective control of his personal data treated. This set of guarantees integrates what is called «*habeas data*».

4.3. Principles applicable to the processing of personal data

Under, General Data Protection Regulation,[128] subject to the exceptions permitted under Article 23,[129] all processing of personal data must comply, first, with the principles relating to processing of personal data set out in the Article 5 — what was kwon under Article 6 of the Directive 95/46 like «principles relating to data quality» — and second with one of the conditions established for the lawfulness of processing listed in Article 6.[130] These principles, applicable to processing of personal data,[131] oblige the Administration to establish control mechanisms over personal data that are in

126. This double protection has been recognized by the EctHR. In *Johnston and Others v Ireland* Judgment, application no.9697/82, 18 December 1986, the Court held "Although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective"respect" for family life», paragraph 55. Regarding personal data this double protection has been recognized, from the positive perspective in *Gaskin v UK* Judgment (right of access by the data subject), application no. 10454/83, 7 July 1989, Judgment *Rees v UK* (right to data rectification) application no. 9532/81, 17 October 1986 case and from the negative perspective in Leander v Sweden Judgment, application no. 9248/81, 26 March 1987. (See *Gaskin v UK* paragraphs 40 et seq.)

127. L.Bergkamp and J. Dhont, *Data protection in Europe and the internet: An Analysis fo the European Community's Privacy Legislation in the Context of the World Wide Web*. in Electronic Communication Law Review. (2000) Nº 7, 7 and 8.

128. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

129. *Article 23.Restrictions: «1Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: …. (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security; »* (…).

130. ECJ Judgment of 20 May 2003, *Österreichischer Rundfunk and Others,* joined cases C-465/00, C-138/01 and C-139/01, paragraph 65. «Under Directive 95/46, subject to the exceptions permitted under Article 13, all processing of personal data must comply, first, with the 'principles relating to data quality' set out in Article 6 of the directive and, second, with one of the 'criteria for making data processing legitimate' listed in Article 7».

131. Chapter II. Principles. Article 5. Principles relating to processing of personal data:

> *«1.Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');*
>
> *(b)collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');*
>
> *(c)adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');*
>
> *(d)accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');*
>
> *(e)kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');*

their possession and may be exchanged, in order to guarantee, on its own motion, their veracity, that is, their accuracy and updating. All this, without prejudice to the rights of individuals to access, rectify and cancel their personal data.

Consequently, these control mechanisms must allow the Administration to erase or rectify inaccurate or incomplete data. Therefore, unless the data held by the Administration is obtained directly from the taxpayer or from a third party affected by the exchange of information, the quality of the data would require to verify this information with the information held by the individuals, before the requested State proceed with the exchange of information. In these sorts of cases, the principle of data quality will allow the taxpayer or third party to know the existence of an exchange of information and be able to oppose it, because the information to be exchanged is not updated or is incorrect.

According to the principle of purpose limitation — Article 5.1 b) — personal data shall be «collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes». A broad interpretation of this precept would imply a breach in the guarantees that the norm itself wishes to establish in favor of the individual. Therefore, the interpretation of the scope of this article must be defined by the sectoral rules that regulate the use of information and the exchange of information held by the tax administration. Particularly, by the so-called «principle of speciality» that regulates the purpose for which the information exchanged can be used.[132]

Finally, it should be pointed out that the transfer of data to a third country constitutes in itself a processing of personal data.

The regulation of these transfers establishes a regime complementary to the general one which lays down the general conditions for the lawfulness of the processing of personal data and is aimed at ensuring a control by the Member States of transfers of personal data to third countries. Such a transfer can only take place if those third countries guarantee an adequate level of protection. The fact that such adequacy has been declared by the Commission does not preclude private individuals concerned by such transfer from submitting questions to the supervisory authorities and from initiating judicial proceedings in which this adequate level of protection is called into question, however, only the EUCJ can declare the Commission's action invalid.[133]

4.4. Restrictions to Right to «informational self-determination»

In accordance with Article 23 of the Regulation (EU) No 2016/679, the scope of the obligations and rights provided by Article 5 can be restricted by way of a legislative measure as long as such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard, among other interests, «an important economic or financial interest of the Union or of a Member State, including monetary, budgetary

(f)processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2.The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')».

132. Article 55, Council Regulation (UE) No 904/2010, 7 October 2010, on administrative cooperation and combating fraud in the field of value added tax; Article 28, Council Regulation (EU) No 389/2012, 2 May 2012, on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004, and Article 16, Council Directive 2011/16/EU, 15 February 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, the rules that regulate this principle in the Directive have direct effect.

133. ECJ Judgment of 6 October 2015, *Schrems*, C-632/14.

and taxation a matters, public health and social security» (Article 23 (1) point e of the Regulation)[134].

At this point we can make three considerations. The first is that the possibility of limiting such rights and obligations is narrower in Article 23 of the Regulation than in Article 13 of the Directive, because it expressly includes two additional restrictions. The first, respect for the essence of fundamental rights and freedoms and, the second, that the measure is not only necessary, but «necessary and proportionate in a democratic society». These restrictions have been inspired by the EUCJ case law , Judgment *Österreichischer Rundfunk and Others*, where the EUCJ assumes the jurisprudential doctrine of the ECtHR, not only in relation to the protection of personal data but also to the protection of private life, and concludes that «In any event, that provision [Article 13 Directive 95/46/EC] cannot be interpreted as conferring legitimacy on an interference with the right to respect for private life contrary to Article 8 of the Convention».[135]

The second consideration is that a data treatment that does not respect the requirements of the principle of data quality, that is, a treatment of inaccurate, outdated, unlawful or unfair data, can hardly be accepted. The foregoing, without prejudice to the liability of the Tax Administration for the inappropriate processing and subsequent transmission of such data.[136]

And the third consideration is that the arguments previously made about the effectiveness of the data quality principle become more consistent if we look at the EU regulation of the exchange of tax information. As stated above, Regulation (EU) 2016/679 is applicable to all types of information exchange, and the regulations governing the exchange of information currently refer to the rules governing the protection of personal data. Indeed, in the field of VAT information exchange, the restrictions of Article 23 of Regulation (EU) 2016/679 do not affect Article 5 of that Regulation, in other words, it does not limit the principle of data quality. The same conclusion can be reached by analyzing the exchange of information on excise duties[137] or the Directive 2011/16/EU.[138] In addition, as a novelty, Regulation (EU) 2010/904[139] specifies the scope of Article 23 (1) point (e), as a sign of a greater guarantee for the individual concerned by the exchange of tax information.

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134. Article 23. 1 e) Council Regulation (EU) 2016/679.

135. ECJ Judgment f 20 May 2003, *Österreichischer Rundfunk and Others*, joined cases C-465/00, C-138/01 and C-139/01, paragraph 91.

136. Article 82 Regulation (EU) 2016/679.

137. Council Regulation (EU) No 389/2012, 2 May 2012, on administrative cooperation in the field of excise duties and repealing Regulation (EC) 2073/2004. The Article 28.4 of the Regulation (EU) No 389/2012 establishes that «*All processing of personal data by Member States referred to in this Regulation shall be subject to the national provisions implementing Directive 95/46/EC.*

Member States shall, for the purpose of the correct application of this Regulation, restrict the scope of the obligations and rights provided for in Article 10, Article 11(1) and Articles 12 and 21 of Directive 95/46/EC to the extent necessary to safeguard the interests referred to in point (e) of Article 13(1) of that Directive. Such restrictions shall be proportionate to the interest in question».

138. Council Directive (2011/16/EU, 15 February 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. The Article 25.1 of the Directive 2011/16/EU provides that > All exchange of information pursuant to this Directive shall be subject to the provisions implementing Directive 95/46/EC. However, Member States shall, for the purpose of the correct application of this Directive, restrict the scope of the obligations and rights provided for in Article 10, Article 11(1), Articles 12 and 21 of Directive 95/46/EC to the extent required in order to safeguard the interests referred to in Article 13(1)(e) of that Directive.

139. Council Regulation (EU) No 904/2010, 7 October 2010, on administrative cooperation and combating fraud in the field of value added tax. The Article 55.5 of the Regulation (EU) No 904/2010 establishes that > All storage, processing or exchange of information referred to in this Regulation is subject to Regulations (EU) 2016/679 and (EC) No 45/2001 of the European Parliament and of the Council. However, Member States shall for the purpose of the correct application of this Regulation, restrict the scope of the obligations and rights provided for in Articles 12 to 15, 17, 21 and 22 of Regulation (EU) 2016/679. Such restrictions shall be limited to what is strictly necessary in order to safeguard the interests referred to in point (e) of Article 23(1) of that Regulation, in particular to: a) enable the competent authorities of the Member States to fulfil their tasks properly for the purposes of this Regulation; or b) avoid obstructing official or legal enquires, analyses, investigations or procedures for the purposes of this Regulation and to ensure that the prevention, investigation and detection of tax evasion and tax fraud is not jeopardized».

On the other hand, data processing that ignores the requirements of proportionality that emanates from article 5 can hardly be accepted. Accordingly, personal data must be «adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed» and must be kept «for no longer than necessary» for such purposes. The requirement of relevance must be put in relation to the necessary nature of the data, that is, with its tax significance. From this perspective, the tax importance, the tax relevance of the information, the «foresee relevance» of the information requested, must be respected in the exchange of information by both the requested State and the requesting State, in this case, as a manifestation of the so-called «principle of subsidiarity».[140]

In relation to the lawfulness of processing of personal data, it is convenient to highlight the requirement of the consent of the data subject. This requirement is directly related to the right to information. However, this consent is not necessary, and consequently, the right to information would remain in the background, when the processing of personal data is necessary «for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller».[141] Therefore, it seems clear that tax authorities are authorized to process personal data without the prior consent of the data subject.

4.5. The rights of defence of the data subject

The rights of the data subject may be limited by virtue of Article 23 of the Regulation (EU) 2016/679.

The *Right to be informed* is ruled in Articles 13 and 14, this right constitutes an essential element for the data subject to exercise the rest of his rights and to validly provide consent. However, the right of access, rectification, cancellation and opposition may be exercised independently of the right to be informed.

The regulation and content of the right to be informed is different depending on whether the personal data is collected from the data subject[142] or not.[143] In the latter case, the controller shall provide the information «if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed». The right to be informed can be restricted under Article 23 of the Regulation, however, this right cannot be eliminated or emptied of content. In my opinion, the maximum time limit, to inform the interested party that the principle of proportionality would require is the moment of communication of the information to another State. In this way, the ongoing investigation activities will not be hindered, nor will the exchange of information to another Member State. Once informed, the interested party could exercise their rights of access, rectification or cancellation of the data exchanged. In this case, the Administration transmitting the data has the obligation to inform the receiving administration about changes in the effectiveness and content of the data supplied, by virtue of the principle of data quality.

The EUCJ[144]has ruled that the limitations laid down in Article 13 when they apply to Articles 10 and 11 of Directive 95/46/EC do not allow the establishment of national rules empowering the public administrative body of one Member State to transfer personal data to another public administrative body and the subsequent processing of such data, without the data subjects having been informed of such transfer or processing.

140. Article 54, Council Regulation (UE) No 904/2010, 7 October 2010, on administrative cooperation and combating fraud in the field of value added tax; Article 25, Council Regulation (EU) No 389/2012, 2 May 2012, on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004, and Article 17, Council Directive 2011/16/EU, 15 February 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

141. Article 6 Lawfulness of processing, Regulation (UE) 67972016.

142. Article 13 Regulation (EU) 2016/679.

143. Article 14 Regulation (EU) 2016/679.

144. ECJ Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14

The right to be informed is directly related to the possibility of notifying the interested party of the request for information made by a Member State. This possibility was initially regulated in the field of VAT in Article 8 of Regulation (EEC) 218/92 and of the excises in Article 15 *ter* of Directive 92/12/EEC, but this possibility was not reproduced in subsequent regulations. In any case, EU law does not preclude Member States from establishing such an obligation to notify, as in the case of the Netherlands or Portugal.

The *Right of access* by the data subject.[145] The data subject shall the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information necessary for exercise his o hers rights: the purposes of the processing, categories of personal data concerned; the recipients to whom the personal data have been o will be disclosed, in particular recipients in third countries or international organizations, in this case, the data subject has the right to be informed of the appropriate safeguards pursuant to Article 46; the period for which the personal data will be stored, where the personal data are not collected from the data subject, any available information as to their source.

The *Right to rectification*.[146] The data subject shall have the right to obtain form the controller without undue delay the rectification of inaccurate personal data or the right to have incomplete personal data completed.

The *Right to erasure*[147] ("right to be forgotten"). The data subject shall have the right to obtain from the controller the erasure of personal data without undue delay.

The *Right to restriction of processing*.[148] The data subject shall have the right to obtain from the controller restriction of processing, where the accuracy of personal data is contested by the data subject; the processing is unlawful and the data subject opposes the erasure of personal data and requests the restriction of their use instead; the controller no longer needs the personal data for the purposes of the processing but they are required by the data subject for the establishment, exercise or defence of the data subject; and finally, the data subject has objected to processing pursuant to Article 21 pending the verification whether the legitimate grounds of the controller override those of the data subject.

The controller shall communicate any rectification, erasure of personal data or restriction of processing carried out in accordance with Articles 16,17 and 18 to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The Controller shall inform the data subject about those recipients if data subject requests it.[149] This obligation arises as a consequence of the exercise of rights by the data subject, and should not be confused with the obligation of the Administration to communicate such changes under the principle of data quality, which would be an ex officio communication by administrations.

The *Right to object*.[150] The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

145. Article 15 Regulation (EU) 2016/679.

146. Article 16 Regulation (EU) 2016/679.

147. Article 17 Regulation (EU) 2016/679. Also, the controller shall have the obligation to erase personal data without undue delay under some circumstances.

148. Article 18 Regulation (EU) 2016/679.

149. Article 19 Regulation (EU) 2016/679, Notification obligation regarding rectification or erasure of personal data or restriction of processing.

150. Article 20 Regulation (EU) 2016/679.

The data subject shall have the *Right not to be to a decision based solely on automated processing* which produces legal effects concerning him or her or similarly significantly affects him or her. This right shall not apply if the decision is authorized by UE or Member State law to which the controller is subject an which also lays down suitable measures to safeguard the data subject's rights and freedoms a legitimate interest.[151]

Finally, the data subject who has suffered material or non-material damage as result of an infringement of this Regulation shall have the *Right to receive compensation* from the controller for the damage suffered.[152]

5. Closing remarks

According to the case law of the European Court of Justice, the EU regulations on the exchange of tax information do not contain rights of individuals affected by such exchange. However, this does not preclude finding in EU law legal protection for such individuals, as it is for each Member State, when applying EU law, by virtue of the principle of procedural autonomy, to define the content and scope of the rights of defence guaranteed by EU law, unless the matter is regulated by Union law.

From this, however, it cannot be concluded that the protection that the EU gives to these individuals is limited to that offered by each Member State in isolation — as is the case in international law — therefore without taking into account the provision of mutual tax assistance as a whole.

From this perspective we can make the following considerations:

(1) It can be said that the EU rules governing mutual tax assistance between Member States are based on the principle of loyal cooperation[153] and the principle of mutual trust. The EUCJ has stated that «by virtue of the principle of cooperation in good faith, the Member States are required truly to engage in the exchange of information provided for under Directive 77/799».[154] The recitals of Directive 2011/16/EU state that «it is indispensable to develop new administrative cooperation between the Member States' tax administrations» to this end, «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».

The EUCJ has also stated that Directive 2010/24 is based on «the principle of mutual trust», «the implementation of the system of mutual assistance established by that directive depends on the existence of such trust between the national authorities concerned».[155] The requested Member State is thus in principle required to trust the applicant Member State and execute any request for recovery coming from the latter.[156]

The principle of mutual trust implies that «save in exceptional circumstances» Member States must consider that «all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU Law».[157]

151. Article 22 Regulation (EU) 2016/679.

152. Article 82 Regulation (EU) 2016/679.

153. Such considerations can be realised in spite of the wording of Article 4.3 of the Treaty on the Functioning of the EU., see F. Fernández Marín, *Il principio di cooperazione tra le amministrazione finanziarie*, in A. DI PIETRO and T. TASSANI (Directors) *I principi europei del diritto tributario*. Padova. 2014. ECJ Judgments, 4 October 1979, *France v. United Kingdom*, C-141/78; 22 March 1983, *Commission v France*, C-42/82, paragraph 36; 27 September 1988, *Matteucci*, C-235/87, paragraph 19; 11 June 1991, *Athnasopoulos et alli*, C-251/89, paragraph 57; 18 July 2007, *Commission v Germany*, C-490/04, paragraph 53; Opinion Advocate General *Geelhold*, 3 February 2005, *HLH Warenvertrieb* C-211/03, paragraph 50; Opinion Advocate General *Kokott*, 15 July 2010, *Répertoire Culinaire Ltd*. C-163/90, paragraph 90.

154. ECJ Judgment 20 October 2010, *Établissement Rimbaud*, C-72/09, paragraph 48.

155. ECJ Judgments, 26 April 2018, *Donnellan*, C-34/17, paragraph 41, 14 March 2019, *Meritato*, C-695/17, paragraph 42.

156. Opinion Advocate General *Bobek*, 22 November 2018, *Meritato*, C-695/17, paragraph 56.

157. Opinion Advocate General *Tanchev*, 8 March 2018, *Donnellan*, paragraph 49.

From this perspective, the principle of mutual trust together with the principle of procedural autonomy make each Member State, when applying mutual tax assistance, competent to guarantee in its actions and its territory the respect of and compliance with the fundamental rights and general principles of the EU. However, like procedural autonomy, the principle of mutual trust may be limited, although any limitations must be interpreted restrictively.[158]

This means that Member States must not only respect the fundamental rights and general principles of the EU when providing mutual tax assistance, but also have to verify, on an exceptional basis, whether the previous activity of a Member state requesting tax assistance — which, as we have seen, gives rise in the required Member state to the obligation to provide such tax assistance — has been carried out in compliance with those rights and principles, before proceeding to provide the assistance.

Thus, the requested State has been allowed to refuse to provide tax assistance because it considers that the prior proceedings carried out by the requesting State are not in conformity with the fundamental rights and general principles of the EU.

The right of defence allows the requested State to refuse the request for recovery of a tax credit if it is contrary to the public policy of the requested State. This has been considered in relation to a pecuniary sanction imposed in another Member State, since the person concerned has not been duly notified of the decision imposing that sanction before submitting the request for recovery to the requested authority pursuant to Directive 2010/24.[159] This also has been the case where the notification of an instrument permitting enforcement has not been made in an official language of the Member state in which the requested authority is situated.[160]

In the same way, but with a character no longer so exceptional, as results from the Berlioz case, the right of defense, the exchange of tax information requires that the Judge and the Administration of the requested State examine the foreseeable relevance of the request for the exchange of information, which, moreover, constitutes a requirement of validity of the actions to be carried out by the requested State.

From these limitations on the principle of mutual trust, it can in no case be inferred that acts carried out by the requesting State can be prosecuted by the requested State, nor can the burden of knowing the law of the requesting State be imposed on this State. However, the requested State may refuse to provide mutual tax assistance when the prior proceedings carried out by the requesting State do not comply with the minimum standard of the content of fundamental rights in the EU.

Indeed, the regulation of such rights and general principles by the requested State, as we have seen, cannot prevent the provision of assistance. Therefore, in order to derogate from the application of the principle of mutual trust, recourse is had to the fact that such activities are contrary to public policy, that is to say, or to the minimum content of a fundamental right of the EU.

Consequently, it can be stated that the right of defence of the person affected by a provision of tax assistance, despite the principle of mutual trust, requires the tax administration or the judge to be able to examine whether the previous proceedings carried out by the requesting State do not violate the right of defence and therefore that the requested State is obliged to provide assistance.

(2) Once it has been verified that the fundamental rights and general principles are respected by both the requesting State and the requested State in mutual tax assistance, the effectiveness of the exchange of tax information cannot be conditioned by the diverse regulation of such rights and principles in those States.

158. ECJ Judgment of 26 April 2018, *Donnellan*, C-34/17, paragraph 40. See, inter alia, judgments of 14 November 2013, *Baláž*, C-60/12, paragraph 29; of 16 July 2015, *Diageo Brands*, C-681/13, paragraph 41; of 25 May 2016, *Meroni*, C-559/14, paragraph 38; and of 23 January 2018, *Piotrowski*, C-367/16, paragraph 48.

159. ECJ Judgment of 26 April 2018, *Donnellan*, C-34/17

160. ECJ Judgment of 14 January 2010, *Kyrian*, C-233/08

In the field of mutual tax assistance (whether it is aimed at the exchange of tax information or the collection of taxes) there are at least two Member States which, in exercising their procedural autonomy, must, when applying EU law, guarantee the right of defence of the person affected by the provision of mutual assistance, in all cases respecting the protection threshold set by the EU, without the varying degree of protection of the States becoming an obstacle to the effectiveness of the provision of such assistance.

In these cases, the determination of the content and scope of the right of defence is guided by EU law through the principles that inform the provision of mutual assistance, in our case the exchange of tax information. These principles indicate the appropriate intensity of protection of fundamental rights and general principles to ensure the effectiveness of the exchange of tax information regulated by the EU, or in other words to guarantee the principle of effectiveness of EU law.

Respected by a Member State a minimum standard of fundamental rights and general principles required by the EU, the effectiveness of such regulation may have consequences by linking and limiting the effectiveness of fundamental rights and general principles established by another Member State that, in exercise of its procedural autonomy, may have afforded such fundamental rights and general principles greater protection. This limitation of a State's procedural autonomy is a consequence of the overall perception of the exchange of tax information under EU law, therefore different from the state partial solution.

This applies to the *principle of confidentiality*, principle relating to the use of the information exchanged. In this case, the requested State that is going to transmit the requested tax information cannot oppose the transmission of the tax information due to the fact that the requesting State (or State receiving the information) regulates the principle of confidentiality with less protection, as long as this regulation of the Requesting State complies with the minimum standards established by the EU. This avoids that the greater protection of the rights of individuals affected by the exchange of information in a Member State could become an obstacle that impedes its effectiveness.[161]

The same conclusion could be reached by analysing the so-called *principle of acting on its own initiative* in order to obtain information. The requesting State, which has regulated the right of defence in a more guarantee way by virtue of its procedural autonomy, cannot require the requested State to apply the same guarantees and precautions established in the requesting State, in effect the requested State will act respecting the fundamental rights and general principles of the EU, in accordance with the regulation given to them in accordance with its procedural autonomy, and the information exchanged will have to be used in the requesting Member State without this circumstance being an impediment to the effectiveness of the exchange of tax information.[162]

(3) Respect for fundamental rights by the States involved in the exchange of tax information is sometimes not enough to guarantee the right of defence of the individual affected by an exchange of tax information. Indeed, as we have seen, although this criterion has been set by the ECtHR,[163] regarding an exchange of tax information developed under an EU law, the information exchanged must be proportionate. Proportionality is materialized by the fact that the information exchanged can be obtained by the requesting State. The question in this case is what is exchanged and not, as we have seen in relation to the principle of acting on one's own account, how the information that is exchanged has been obtained. From a partial perspective, the requested State would have been able to obtain the information to be exchanged in a correct manner and with due respect for the right of defence. However, from a global perspective of the exchange of tax information, the use by the requesting State of an exchanged tax information which could not have been obtained by this Member State would not respect the proportionality and consequently the right of defence of the individual concerned by an exchange of information.

161. For more information on this issue, see Fernández Marín, F., La tutela de la Unión Europea al contribuyente en el intercambio de información tributaria. Ed. Atelier. Barcelona. 2007. Page 47.

162. This was one of the consequences seen when analyzing the Sabou case.

163. European Commission of Human Rights Decision *F.S. v Germany*, 27 November 1996, application no. 30128/96.

(4) Another example of the global vision of the exchange of tax information in the EU is the determination of when the right of defence can be exercised, which in turn determines before which Member State it should be exercised. In this case, the EUCJ has adopted the criterion of distinguishing between the investigation phase and the contentious phase.[164] This criterion has also been assumed by the ECtHR,[165] in cases of exchange of tax information. The validity of this criterion, in my opinion, is based on the doctrine of the ECtHR, which considers that it is not necessary for the right to a defence to be respected in all procedural phases, it is sufficient for the right to a defence to be respected taking into consideration all procedural actions.[166]

Obviously, the answer will vary depending on the type of tax obligation being demanded, the type of subject affected by the exchange of information and in which State the tax legal relations are circumscribed.

From this premise, the different solutions found by the EUCJ and the ECtHR in the cases of Sabou, Berlioz and Othymia, respectively, are coherent.[167]

In the Sabou case, we are dealing with a taxpayer whose state of residence, the Requesting State, wishes to verify the tax data declared by Sabou, requesting tax assistance from other Member States. The EUCJ considers that the right of defence should be exercised and guaranteed in the requesting State.

In the Berlioz case, we are dealing with a company that is affected for a request for exchange of tax information. In this case, the requested State, the State where this company resides, requires such company to provide information on a third party (resident in the requesting State) with whom it has a relevant tax relationship, for the purpose of providing tax assistance.

This request for information constitutes an autonomous tax liability, independent of the taxpayer's tax liability, which arises and is limited to the requested State, and therefore only in the requested State can and must guarantee its right of defence.

In the Othymia case we are dealing with a company whose state of residence, the requested State will provide the requesting State with information in its possession that was provided by OThymia in compliance with its tax obligations to the requested State. In this case, the ECtHR considers that the company does not have the right to be notified before the exchange of the tax information provided by the company has taken place. All of the above without prejudice to Othymia's right to be informed once such exchange has taken place, as established by the EUCJ[168] and as derived from Articles 13 and 14 of Council Regulation (EU) 2016/679.

(5) The unlimited jurisdiction required by the principle of a fair trial is another element confirming the overall vision adopted by EU legislation on the exchange of tax information.

This is the case, without prejudice to other manifestations of this unlimited jurisdictional competence, where the judge is empowered to examine the way in which the tax information that has been exchanged was obtained, to determine whether it can be used in criminal proceedings, or whether information obtained in criminal proceedings can be used in tax proceedings, because of the differ-

164. ECJ Judgments, 22 October 2013, *Sabou*, C-276/12, 16 May 2017, *Berlioz Investment Fund*, C-682/15. Opinion Advocate General Bobek, 5 June 2019, Glencore, C-189/18, Opinion Advocate General Bobek, 7 September 2017, *Ispas*, C-298/16. These two opinions regard about the exercise of the right to access a file.

165. ECtHR Decision, *Othymia Investments BH v the Netherlands*, application no. 75292/10, 16 June 2015.

166. ECJ Judgment of 17 December 2015, *WebMindLicenses*, C-419/14, paragraph 78. ECtHR, Judgment Smirnov v Russia, application no. 71362/01, paragraph 45.

167. Requejo Pagés, J.L. «Control de legalidad de las solicitudes de información fiscal dirigidas por un estado miembro» Actualidad Administrativa. No7, julio-agosto 2017. In this sense this author also pronounces on the judgments Sabou and Berlioz.

168. ECJ Judgment of 1 October 2015, *Smaranda Bara and Others*, C-201/14

ent rights, guarantees, legal principles and obligations that assist the individual in one area and in the other.[169]

From the foregoing, it can be stated that under EU law an «*ex ante*» control of the Exchange of Tax Information characteristic of the rights of participation (notification, hearing and intervention) inherent in the international order can be waived.

This is possible, since EU law takes into account as a whole this exchange of tax information. Logically, this global vision must ensure, in any event, whether in one or the other Member State or both, that the right of defence of the parties involved in the exchange of tax information is respected. Such respect is guaranteed, beyond a specific manifestation of the right of defence through some fundamental rights, by the configuration of the right of defence as a general principle — which is applicable even where it is not foreseen — a logical consequence of the conception of the European Union as a union based on the rule of law.

From this perspective, the subject affected by an exchange of tax information cannot be harmed in his right of defence, by the concurrence of the different legal systems of the Member States involved in it and by the assertion that the regulations governing the exchange of information only contemplate rights and obligations between the Members States.

In this way, the EU legal system can recognise a right to be informed or notified that the exchange of tax information has taken place. Therefore, the data subject may also be granted the rights of access, rectification, erasure and the other rights recognised in the Regulation (EU) 2016/679.

Furthermore, individuals, by virtue of the principle of personal data quality, could require the State, which has supplied personal data which do not comply with that principle, to prevent the requesting State from using such data, thus facilitating the individual's right of defence.

Consequently, it is difficult to deny the subjects affected by an exchange of tax information a right of injunction Member States to use the rules regulating the exchange of information to guarantee and ensure their right of defence. However, unfortunately in the current state of development of the legal system of the EU, this has not been the position of the EUCJ in the *Enteco* case where it has considered that in the field of VAT that the Regulation 904/2010 that «in the absence of any express provision in the regulation to that effect, the regulation does not confer on a taxable person any specific right to request the transmission of information where he is unable himself to produce evidence capable of showing that he is entitled to an exemption from VAT».[170]

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169. In this sense, we refer to the observations made when analyzing «*2.1 The right to a fair trial on tax matters*» about the ECJ Judgment of 17 December 2015, *WebMindLIcenses*, C-419/14, the Opinion Advocate General Bobek, 5 June 2019, Glencore, C-189/18 and the ECtHR, Decision, *Van Veerlet v the Netherlands*, application no. 784/14.

170. ECJ Judgment of 20 June 2018, Enteco, C-108/17, paragraph 105. In the same way see Opinion Advocate General Mengozzi, 22 March 2018, Enteco, C-108/17 paragraph 114 « A fortiori, I consider that EU law on the exchange of information and administrative cooperation between Member States in the field of VAT does not require national authorities to collect, at the request of a taxable person, information from undertakings of other Member States, where that taxable person cannot himself provide the evidence necessary to demonstrate that the right to dispose, as owner, of the goods which have been imported and supplied has been transferred to the purchaser and, more generally, to demonstrate that the importations or supplies by that taxable person are exempt from VAT».