CFE

*CFE ECJ Task Force**

Opinion Statement ECJ-TF 2/2014 of the CFE on the Decision of the European Court of Justice in *Sabou* (Case C-276/12), Concerning Taxpayer Rights in Respect of Exchange of Information upon Request

This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on *Sabou* (Case C-276/12).

1. The Facts and the Preliminary Questions

(1) This case involved a request for a preliminary ruling in tax proceedings; it was made by the Czech Court *Nejvyšší správní soud*.

(2) Mr Sabou, a professional footballer, claimed in his income tax return for 2004 in the Czech Republic to have incurred expenditure in several Member States with a view to a possible transfer to one of the football clubs in those Member States.

(3) However, the Czech tax authorities raised doubts over the truthfulness of that expenditure and carried out an inspection involving requests for information from tax authorities of several Member States. It followed from the replies of those authorities that none of the clubs allegedly approached knew either Mr Sabou or his agent.

(4) Subsequently, the amount of tax owed was increased by the Czech tax authorities in an additional notice of assessment from approximately EUR 1,100 to 9,800 and, following a challenge by Mr Sabou, even further to approximately EUR 11,000.

(5) Mr Sabou challenged that assessment. He claimed that the Czech tax authorities had illegally obtained information about him. Firstly, they had not informed him of their request for assistance to other authorities and, therefore, 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.

(6) Before the referring court, the question arose as to whether a taxpayer has a right to take part in exchanges of information between the authorities under the Mutual Assistance Directive (77/799)[2] (the Directive; the predecessor to the Mutual Assistance Directive (2011/16)),[3] and to what extent fundamental rights, as guaranteed by the Charter of Fundamental Rights of the European Union (the Charter), have any bearing on the existence of that right.

(7) The referring court pointed out that, if such a right were denied to the taxpayer, this would result in a reduction of his procedural rights compared to those guaranteed by Czech law in national tax proceedings.

(8) Therefore, the Czech court referred the following questions to the ECJ for a preliminary ruling:

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

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

3. Are the tax authorities in the requested Member State obliged, when providing information in accordance with Directive [77/799], to observe a

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1. The members of the Task Force are: Paul Farmer, Alfredo Garcia Prats, Daniel Gutmann, Volker Heydt, Eric Kemmeren, Georg Kofler (Chair), Michael Lang, Franck Le Mentec, Pasquale Pistone, Albert Rädler†, Stella Raventos-Calvo, Isabelle Richelle, Friedrich Roedler and Kelly Stricklin-Coutinho. Although the Opinion Statement was drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group.

2. Mutual Assistance Directive (1977): Council Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Taxation of Insurance Premiums, as amended by Council Directive 2006/98/EC of 20 November 2006, EU Law IBFD.

3. EU Mutual Assistance Directive (2011): Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64 (2011), EU Law IBFD.

certain minimum content of their answer, so that it is clear from what sources and by what method the requested tax authorities have obtained the information provided? May the taxpayer challenge the correctness of the information thus provided, for example on grounds of procedural defects of the proceedings in the requested state which preceded the provision of the information? Or does the principle of mutual trust and cooperation apply, according to which the information provided by the requested tax authorities may not be called in question?

2. The Judgment of the Grand Chamber

(9) The Grand Chamber of the ECJ dealt jointly with questions 1 and 2. It declared that the Directive does not confer on the taxpayer any of the rights referred to in the preliminary questions.

(10) Before answering the questions, the Grand Chamber of the ECJ stated that it had jurisdiction in this case in respect of all questions, but with some limitations.[4] It held:

- The Charter, as it came into force on 1 December 2009, does not apply to the assistance procedure that led to the additional notice of assessment of 28 May 2009.
- As regards the Mutual Assistance Directive (77/799), the fact that the requesting Member State was not bound to submit a request for assistance to another Member State, did not mean that the rules relating to the request for information and the use of the information obtained by that Member State could be considered to be outside the scope of EU law. Where a Member State decides to make use of that assistance, it must comply with the rules laid down in the Directive.
- The rights of the defence, which include the right to be heard, are among the fundamental rights that form an integral part of the EU legal order. Where national legislation comes within the scope of EU law, the Court must provide all the criteria of interpretation required by the national court to determine whether that legislation is compatible with fundamental rights.[5]

(11) In substance, the Court decided as follows:[6]

- EU law, as it results from the Directive, in particular, and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State 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;
  - to take part in formulating the request addressed to the requested Member State; or
  - to take part in examinations of witnesses organized by the requested Member State.
- The Directive does not:
  - govern the question of the circumstances in which the taxpayer may challenge the accuracy of the information conveyed by the requested Member State; or
  - impose any particular obligation with regard to the content of the information conveyed.

(12) In its reply to questions 1 and 2, in line with earlier case law, the ECJ found that the Directive was adopted in order to govern cooperation between the tax authorities of the Member States with the aim of combatting international tax evasion and avoidance.[7] In this context, it referred specifically to the first two recitals in the preamble to and articles 2 and 8 of the Directive. It coordinated the transfer of information between competent authorities by imposing certain obligations on the Member States.[8]

(13) Referring to previous case law, the ECJ also emphasized that the Directive did *not* confer specific rights on the taxpayer. In particular, it did *not* lay down any obligation for the competent authorities of the Member States to consult the taxpayer.[9]

(14) Subsequently, the Court found that a taxpayer also cannot derive from the rights of defence a right to participate in the exchange of information between the competent authorities.

(15) In this context, the Court made a distinction in tax inspection procedures between the *investigation stage*, during which information is collected and which includes the request for information by one tax authority to another and the *contentious stage*, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment.[10] Subsequently, it ruled that:

- where the authorities gather information, they are not required to notify the taxpayer of this or to obtain his point of view;[11]
- a request for assistance made by the tax authorities under the Directive is part of the process of collecting information;[12] and
- the same applies to the reply made by the requested tax authorities and the inquiries

4. CZ: ECJ, 22 Oct. 2013, Case C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, paras. 23-29, EU Law IBFD.
5. *See also*, for example, PT: ECJ, 18 Dec. 2008, Case C-349/07, *Sopropé* [2008] ECR I-10369, paras. 33, 34 and 36.
6. *See Sabou* (C-276/12), paras. 30-46.
7. *See Sabou* (C-276/12), para. 32. *See also*, for example, NL: ECJ, 27 Sept. 2007, Case C-184/05, *Twoh International BV v. Staatssecretaris van Financiën*, paras. 30 and 31, ECJ Case Law IBFD.
8. *See Sabou* (C-276/12), para. 36.
9. *See Sabou* (C-276/12), para. 36 and, for example, *Twoh* (C-184/05), para. 31.
10. *See Sabou* (C-276/12), para. 40.
11. *See Sabou* (C-276/12), para. 41.
12. *See Sabou* (C-276/12), para. 42.

carried out to that end by those authorities, including the examination of witnesses.[13]

(16) However, the Court also observed that there is nothing to prevent a Member State from extending the right to be heard to other parts of the investigation stage, by involving the taxpayer in various stages of the gathering of information, in particular the examination of witnesses.[14]

(17) In its reply to question 3, the ECJ observed that the Directive did not address the taxpayer's right to challenge the accuracy of the information conveyed. It did not impose any particular obligation with regard to the content of the information conveyed. As a result, only national laws can lay down the relevant rules. The taxpayer may challenge the information concerning him conveyed to the tax authorities of the requesting Member State in accordance with the rules and procedures applicable in the Member State in question.[15]

(18) While the decision of the ECJ is basically in line with the Opinion of Advocate General Kokott, she suggested a different solution to question 3:[16] Advocate General Kokott argued that although the Directive did not contain any rules governing the formal content of information to be supplied under article 2 of the Directive, the mere notification of the findings from the requested state to the requesting state without noting on what that information is based would not be sufficient to enable the assessment of income tax in the requesting state, in principle, since the probative value of such information would, as a rule, be severely restricted. Furthermore, she argued that an obligation on the requested Member State to indicate the sources of information was also not precluded by any provisions of the Directive.

3. Comments

(19) From a taxpayer's perspective, the result of this case is disappointing, as the taxpayer's position on the exchange of information procedure under the Directive has not been strengthened. The Court's decision is in line with the wording of the Directive. Despite the Court's broad language that it cannot derive taxpayer rights from "European Union law" in general, however, it nevertheless remains an open question whether the Charter, procedural guarantees[17] or even possibly the fundamental freedoms can strengthen the taxpayer's rights in this context.[18] As for the Charter, it could not be applied in this case, as the additional notice of assessment was handed down before the Charter came into force. However, without doubt, more cases will reach the courts in due course and the ECJ will eventually have to decide on the impact of the Charter on taxpayer rights in exchange of information procedures.

(20) The ECJ held that the Directive did not provide a sufficient legal basis to confer rights on taxpayers at the European level in respect of the exchange of information procedure at the investigation stage. In respect of this stage, the Directive only stipulated explicit rights and obligations enforceable between Member States and not between Member States and taxpayers. The competence to confer rights on taxpayers in the investigation stage still belongs to the Member States. There are examples that show that Member States are more inclined to weaken taxpayer rights than to strengthen them. For example, the Netherlands recently deleted the notification procedure with regard to the information supplier in respect of exchange of information upon request, mandatory spontaneous exchange of information and presence in administrative offices of and participation in administrative inquiries by officials of a requesting state.[19]

(21) Along with the Member States that made submissions to the Court, the ECJ made a distinction between the investigation stage, during which information is collected and that includes the request for information and the contentious stage of tax proceedings, which begins when the taxpayer is sent the proposed adjustment.[20] It could have decided otherwise. In respect of the contentious stage, the ECJ has acknowledged in earlier case law the rights of persons, even though the EU law applicable did not expressly provide for such rights.[21] On the basis of the general EU law principle of the rights of the defence, it conferred rights on the persons involved. For example, in respect of decisions to be taken by authorities of Member States that come within the scope of EU law, the ECJ conferred the right to addressees of decisions that significantly affect their interests to make effectively known their views as regards the information on which the authorities intend to base their decision. Therefore, the ECJ could have taken the same liberty to strengthen taxpayer rights in the investigation stage of the exchange of information procedure. It can be argued that the fact that no specific rules were available is *per se* not a hindrance to recognizing rights based on other sources of EU law of taxpayers in the investigation stage of an exchange of information procedure.

13. *See Sabou* (C-276/12), para. 43.
14. *See Sabou* (C-276/12), para. 45.
15. *See Sabou* (C-276/12), paras. 48-49.
16. *See* CZ: Opinion of Advocate General Kokott, 22 Oct. 2013, Case C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, paras. 78-82, EU Law IBFD.
17. Indeed, as stated in the facts, Mr Sabou, under Czech law, would enjoy much broader rights in similar domestic proceedings, for example, he would be invited to take part in the examination of witnesses. As such, the denial of such rights in a cross-border proceeding results in a reduction of his procedural rights compared to those guaranteed by Czech law in domestic proceedings. This may raise an issue in the context of the equivalence principle, as implied by the request of the national court (*see Sabou* (C-276/12), para. 21).
18. *Sabou* (C-276/12), paras. 31 and 37 dealing with the applicability of the Directive and the Charter.
19. *See* NL: Act on other tax measures 2014 (*Wet Wijziging van enkele belastingwetten en enige andere wetten* (Overige fiscale maatregelen 2014)), 18 December 2013, Staatsblad 566.
20. *Sabou* (C-276/12), para. 40.
21. *See*, for example, ECJ, 24 Oct. 1996, Case C-32/95 P, *Commission v. Lisrestal and Others* [1996] ECR I-5373, para. 21; *Sopropé* (C-349/07), paras. 35-38; NL: ECJ, 10 Sept. 2013, Case C-383/13, *PPU G and R* [2013] ECR I-0000, para. 35 to which the ECJ itself refers. *See Sabou* (C-276/12), para. 38.

(22) Moreover, the ECJ did not explain why the decisions of the tax authorities in the investigation stage cannot significantly affect the interests of the taxpayer involved.[22] For example, a request for information that may lead to an investigation in the requested state of a client of the taxpayer situated in the requesting state may cause reputation damage for the taxpayer and this may significantly affect his business with the client in the requested state. Therefore, the taxpayer may have a significant interest in effectively making known his views as regards the information on which the requesting authorities intend to base their decision to request information from the requested state. Of course, there may be compelling reasons why a taxpayer should not be involved in the investigation procedure, such as the material risk that essential information representing a major financial interest may be destroyed, but such an exception to a general rule of involvement could be included.[23]

(23) As noted, it is not entirely clear why the ECJ made a distinction between the investigation and contentious stages of the exchange of information process. A possible reason may have been that it wanted to confer taxpayer rights only in relation to the requesting state and not to connect such rights with the requested state, because it may complicate the information gathering process. However, the ECJ did not accept this argument. Furthermore, where the national law of the requested state seeks to confer procedural rights on a taxpayer, the ECJ has explicitly decided that the requested state is free to do so. Starting to build a European system was apparently a bridge too far, although it would have contributed to creating a more level playing field also in procedural matters and, consequently, also to the establishment of the internal market. The procedural opportunities and compliance cost would be more on par.

(24) In this respect, Advocate General Kokott's Opinion in respect of the formal content of information to be supplied under article 2 of the Directive would have contributed more to the taxpayer's rights. In substance, Advocate General Kokott argued that the mere notification of the findings is insufficient to enable the assessment of income tax in the requesting Member State.[24] An obligation on the requested Member State to indicate the sources of information would have contributed to more objective fact-finding and might have strengthened the taxpayer's legal protection. So while Advocate General Kokott found a sufficient legal basis in the Directive to strengthen the respective taxpayer rights in an exchange of information procedure, the ECJ did not.

(25) Recent developments show the increasing importance and use of exchange of information. Not only has the volume of exchanges of information increased and will continue to do so, the standards have also changed. Whereas the global standard was previously exchange of information upon request, the new global standard, especially in respect of financial account information, is automatic exchange of information.[25] The focus of these changes is on strengthening the interests of the states and recent examples show that Member States' national laws have a tendency to erode legal protection rather than strengthen it. Overall, the legal protection of taxpayers appears to be neglected. The Mutual Assistance Directive (2011/16), which replaced the Mutual Assistance Directive (77/99), does not contribute to strengthening the legal protection of taxpayers either. These developments have lead to an imbalanced situation, which we hope the ECJ will address in the future. Moreover, as these developments may adversely affect the establishment of the internal market, it is within the European Commission's remit to propose changes to the Mutual Assistance Directive (2011/16) in order to strengthen the legal protection of taxpayers, including in the investigation stage of exchange of information procedures.

4. The Statement

(26) The Confédération Fiscale Européenne places a strong emphasis on the importance of taxpayer rights under the rule of law[26] and welcomes the fact that the ECJ has accepted jurisdiction on this matter.

(27) The Confédération Fiscale Européenne would have welcomed recognition of taxpayer rights by the ECJ also in the investigation stage, of which exchange of information procedures form a part.

(28) The Confédération Fiscale Européenne hopes that future case law will find that the Charter, procedural guarantees or the fundamental freedoms will strengthen taxpayer rights in exchange of information procedures.

(29) The Confédération Fiscale Européenne would welcome a proposal of the European Commission to amend the Mutual Assistance Directive (2011/16) in order to strengthen taxpayer rights in exchange of information procedures, bearing in mind the establishment of the internal market and the rule of law. Such a proposal would concur with the European Commission's intention to publish a European Taxpayer's Code "[…] for ensuring greater transparency on the rights and obligations of taxpayers and encouraging a service-oriented approach".[27]

22. *Sabou* (C-276/12), paras. 40-44.
23. For example, such an exception was included in the deleted Netherlands notification rule in article 5, paragraph 5 of NL: Act of rendering international assistance with the levying of taxes (*Wet internationale bijstandverlening bij de heffing van belastingen*).
24. AG Opinion in *Sabou* (C-276/12), para. 80.
25. *See*, for example, OECD, Standard for Automatic Exchange of Financial Account Information, Common Reporting Standard, OECD, Paris 2014, and Statement by President of the European Council Herman Van Rompuy on savings taxation, Brussels, 20 March 2014, EUCO 66/14, PRESSE 173, PR PCE 59.
26. *See*, for example, the joint publication by CFE, AOTCA and STEP, *Towards greater fairness in taxation – A Model Taxpayer Charter* (2013), available at http://www.cfe-eutax.org/node/3134.
27. Communication from the Commission to the European Parliament and the Council: An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final (6 Dec. 2012), Action 17, EU Law IBFD.