JUDGMENT OF THE COURT (Grand Chamber)

22 October 2013 (*)

(Directive 77/799/EEC – Mutual assistance by the authorities of the Member States in the field of direct taxation – Exchange of information on request – Tax proceedings – Fundamental rights – Limit on the scope of the obligations of the requesting and the requested Member States towards the taxpayer – No obligation to inform the taxpayer of the request for assistance – No obligation to invite the taxpayer to take part in the examination of witnesses – Taxpayer's right to challenge the information exchanged – Minimum content of the information exchanged)

In Case C-276/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Czech Republic), made by decision of 3 April 2012, received at the Court on 4 June 2012, in the proceedings

Jiří Sabou

v

Finanční ředitelství pro hlavní město Prahu,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, M. Ilešič, M. Safjan and C.G. Fernlund (Rapporteur), Presidents of Chambers, J. Malenovský, E. Levits, A. Ó Caoimh, J.-C. Bonichot, D. Šváby, M. Berger, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Greek Government, by M. Tassopoulou and G. Papagianni, acting as Agents,

– the Spanish Government, by A. Rubio González, acting as Agent,

– the French Government, by G. de Bergues, D. Colas and J.-S. Pilczer, acting as Agents,

– the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

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

– the European Commission, by C. Barslev, M. Šimerdová and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129) (‘Directive 77/799’), considered in the light of fundamental rights.

2 The request has been made in proceedings between Mr Sabou, a professional footballer, and Finanční ředitelství pro hlavní město Prahu (Tax Directorate for the City of Prague), concerning the amount of his taxable income for 2004.

Legal context

European Union law

Directive 77/799

3 Directive 77/799 was repealed by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799 (OJ 2011 L 64, p. 1). However, bearing in mind the date of the facts in the main proceedings, those proceedings are still governed by Directive 77/799.

4 The first and second recitals in the preamble to Directive 77/799 read as follows:

‘Whereas practices of tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of conditions of competition; whereas they therefore affect the operation of the common market;

Whereas, for these reasons the Council adopted on 10 February 1975 a resolution on the measures to be taken by the Community in order to combat international tax evasion and avoidance …’.

5 The fifth and sixth recitals in the preamble to Directive 77/799 read as follows:

‘Whereas the Member States should, on request, exchange information concerning particular cases; whereas the State so requested should make the necessary enquiries to obtain such information;

Whereas the Member States should exchange, even without any request, any information which appears relevant for the correct assessment of taxes on income and on capital …’

6 Article 1 of Directive 77/799, entitled ‘General provisions’, provided the following in paragraph 1:

‘In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital …’

7 Under Article 2 of Directive 77/799, entitled ‘Exchange on request’:

‘1. The competent authority of a Member State may request the competent authority of another

Member State to forward the information referred to in Article 1(1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilised, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.

2. For the purpose of forwarding the information referred to in paragraph 1, the competent authority of the requested Member State shall arrange for the conduct of any enquiries necessary to obtain such information.

In order to obtain the information sought, the requested authority or the administrative authority to which it has recourse shall proceed as though acting on its own account or at the request of another authority in its own Member State.'

8 Article 6 of Directive 77/799, entitled 'Collaboration by officials of the State concerned', provided the following:

'For the purpose of applying the preceding provisions, the competent authority of the Member State providing the information and the competent authority of the Member State for which the information is intended may agree, under the consultation procedure laid down in Article 9, to authorise the presence in the first Member State of officials of the tax administration of the other Member State. The details for applying this provision shall be determined under the same procedure.'

9 Article 8 of Directive 77/799, entitled 'Limits to exchange of information', provided in paragraph 1:

'This Directive does not impose any obligation upon a Member State from which information is requested to carry out inquiries or to communicate information, if it would be contrary to its legislation or administrative practices for the competent authority of that State to conduct such inquiries or to collect the information sought.'

Czech law

10 Law No 253/2000 on international assistance in tax administration and amending Law No 531/1990 on territorial tax authorities, as amended, transposed the provisions of Directive 77/799 into Czech law.

11 Articles 16 and 31 of Law No 337/1992 on the administration of taxes and fees provides as follows:

'Article 16

Tax Inspection

...

(4) A taxpayer who is the subject of a tax inspection has the right, in respect of the tax official,

(e) to put questions to witnesses and experts at the hearing and the on-the-spot investigation,

...

Article 31

Measures of inquiry

...

(2) ... The tax authority shall inform the taxpayer in good time of the taking of evidence from witnesses, if there is no danger in delay.'

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

12 In his income tax return for 2004 in the Czech Republic, Mr Sabou claimed 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. That expenditure would have reduced his taxable income by the corresponding amount. His income tax liability for 2004 was thus set at 29 700 Czech crowns (CZK) (approximately EUR 1 100).

13 The Czech tax authorities, however, raised doubts over the truthfulness of that expenditure and carried out an inspection involving requests for information from the tax authorities of the Member States concerned, acting in particular on the basis of Law No 253/2000 and Directive 77/799. Thus they sought assistance from the Spanish, French and United Kingdom tax authorities, asking them in particular for the views of the football clubs concerned. It follows from the replies of those authorities that none of the clubs allegedly approached knew either Mr Sabou or his agent.

14 The Czech tax authorities also contacted the Hungarian tax authorities about a number of invoices submitted by Mr Sabou concerning services allegedly provided by a company established in Hungary. The requested authorities replied that that company was only an intermediary of a company established in a non-member country, and that only an inspection carried out in that country would make it possible to obtain reliable answers.

15 Following their inspection the Czech tax authorities, on 28 May 2009, issued an additional notice of assessment setting the amount of the income tax owed by Mr Sabou for 2004 at CZK 251 604 (approximately EUR 9 800). Mr Sabou challenged that notice of assessment before the Finanční ředitelství pro hlavní město Prahu, which adjusted the notice by setting the amount of the tax at CZK 283 604 (approximately EUR 11 000).

16 Mr Sabou brought an action challenging the adjusted notice before the Městský soud v Praze (City Court, Prague) which dismissed his action in a judgment of 27 July 2011. Mr Sabou then appealed on a point of law to the Nejvyšší správní soud (Supreme Administrative Court).

17 Before that court, 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.

18 In the order for reference, the Nejvyšší správní soud mentions that the Czech tax authorities did not ask the requested authorities to examine witnesses. It states that, if the Czech authorities had made such a request, they would have informed Mr Sabou of this, so that he could take part in the examination if that was permitted by the laws of the requested Member States.

19 As regards the content of the replies provided, the referring court mentions that some requested authorities identified the names of the persons questioned, while others merely identified the clubs which provided the information. Furthermore, it was not specified whether the information was

obtained by telephone, electronically or in the course of a hearing.

20 The referring court is unsure whether a taxpayer has a right to take part in exchanges of information between the authorities under Directive 77/799, and is uncertain 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.

21 The referring court points out that, if such a right were denied to the taxpayer, that would result in a reduction of his procedural rights compared with those guaranteed by Czech law in national tax proceedings. It refers to two of its judgments dated 30 January 2008 and 26 March 2009 respectively. In the first of these, it held that, as regards the examination of a witness, 'ensuring a genuine opportunity [for the taxpayer] to participate in [that examination] is one of the key parameters of assessing the lawfulness of taking such evidence, and it is necessary rigorously to prevent any circumvention of it'. In the second, concerning tax proceedings in the Czech Republic involving recourse to assistance from another Member State under Directive 77/799 and the examination of a witness in that other Member State, the referring court found that only if the requested State's authorities refused to allow the Czech taxpayer to take part in the hearing, under their own law, would the Czech tax authorities have been authorised to use as evidence information from the witness's testimony taken in accordance with the law of the requested State.

22 In those circumstances, the Nejvyšší správní soud decided to stay the proceedings and to refer the following questions to the Court 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 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?'

The jurisdiction of the Court of Justice

23 As a preliminary point, the European Commission submits that, by its questions relating to the procedural rights of the taxpayer in circumstances where the tax authorities have decided to make use of the mutual assistance procedure under Directive 77/799, the referring court is seeking to determine whether the taxpayer has certain rights under the Charter. According to the Commission, in actual fact those questions concern, in part, the application of the Charter in conjunction with national law, and the Court therefore has no jurisdiction to reply to those questions.

24 Thus the Commission notes, first, that the purpose of a request for assistance is the correct assessment of income tax, an area not harmonised by European Union law, and, secondly, that Directive 77/799 does not state how the requesting State is to deal with the information it receives with a view to assessing that tax. The Commission adds that that directive simply gives the Member States the possibility of seeking assistance from other Member States. Consequently, whether the requesting Member State is bound to inform the taxpayer of the request for assistance which it has made is an issue not of European Union law but only of national law.

25 First, as regards the Charter, it must be pointed out that, as it came into force on 1 December 2009, it does not apply to the assistance procedure which led to the additional notice of assessment of 28 May 2009.

26 Next, as regards the Court's jurisdiction in this case to interpret Directive 77/799, the fact that the requesting Member State is not bound to submit a request for assistance to another Member State does not mean that the rules relating to the request for information and the use of the information obtained by that Member State can be considered to be outside the scope of European Union law. Where a Member State decides to make use of that assistance, it must comply with the rules laid down in Directive 77/799. It is clear, in particular from the fifth recital in the preamble to that directive, that Member States must respect certain obligations in the context of mutual assistance.

27 Consequently, the questions referred relating to the obligations of the requesting Member State with regard to the taxpayer concern the implementation of European Union law, and the Court has jurisdiction to examine the application, in this context, of fundamental rights, in particular the right to be heard.

28 It is clear from the case-law of the Court that the rights of the defence, which include the right to be heard, are among the fundamental rights that form an integral part of the European Union legal order (see, to that effect, inter alia, Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraphs 33 and 36). Where national legislation comes within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the criteria of interpretation required by the national court to determine whether that legislation is compatible with fundamental rights (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42, and *Sopropé*, paragraphs 33 and 34).

29 Consequently, it is necessary to reply to all the questions referred by the national court.

Consideration of the questions referred

The first two questions

30 By its first two questions, which should be examined together, the referring court asks, in essence, whether European Union law, as it results in particular from Directive 77/799 and the fundamental right to be heard, confers on a taxpayer from a Member State the right to be informed of a request for assistance from that Member State addressed to another Member State, to take part in formulating the request addressed to the requested Member State, and to take part in an examination of witnesses organised by the requested Member State.

31 First, it must be ascertained whether the mutual assistance procedure under Directive 77/799 establishes such a right for a taxpayer.

32 As the Court found in Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraphs 30 and 31, it is clear from the first two recitals in the preamble to Directive 77/799 that the aim of the directive is to combat international tax evasion and avoidance, and that it was therefore adopted in

order to govern cooperation between the tax authorities of the Member States.

33 The Court also mentioned that, under Article 2(1) of Directive 77/799, the tax authorities of a Member State 'may' request the tax authorities of another Member State for the information which they cannot obtain themselves. The Court thus pointed out that, by using the term 'may,' the European Union legislature indicated that national tax authorities have the possibility of making such a request, but are not in any way obliged to do so (see, to that effect, *Twoh International*, paragraph 32).

34 On the other hand, following a request from the competent authority in accordance with Article 2 of Directive 77/799, the requested Member State is, in principle, bound to respond to that request, and, if appropriate, to make the necessary enquiries in accordance with Article 2 of Directive 77/799.

35 It follows from Article 2(2) and Article 8 of Directive 77/799 that the competent authority of the requested State when replying to such a request, is to apply its national law and in particular its own rules of procedure.

36 It is thus apparent from an examination of Directive 77/799, the purpose of which is to govern cooperation between the tax authorities of Member States, that it coordinates the transfer of information between competent authorities by imposing certain obligations on the Member States. The directive does not, however, confer specific rights on the taxpayer (see *Twoh International*, paragraph 31), and in particular it does not lay down any obligation for the competent authorities of the Member States to consult the taxpayer.

37 That being the case, it is necessary to consider, secondly, whether the taxpayer may nevertheless derive from the rights of the defence a right to participate in the exchange of information between the competent authorities.

38 The Court has previously ruled that observance of the rights of the defence is a general principle of European Union law which applies where the authorities are minded to adopt a measure which will adversely affect an individual (see *Sopropé*, paragraph 36). In accordance with that principle, the addressees of decisions which significantly affect their interests must therefore 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 (see, inter alia, C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21, and *Sopropé*, paragraph 37). The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of European Union law, even though the European Union legislation applicable does not expressly provide for such a procedural requirement (see *Sopropé*, paragraph 38, and Case C-383/13 PPU *G and R* [2013] ECR, paragraph 35).

39 The question arises as to whether the decision of a competent authority of a Member State to request assistance from a competent authority of another Member State and the latter's decision to examine witnesses for the purposes of responding to that request constitute acts which, because of their consequences for the taxpayer, make it necessary for him to be heard.

40 All the Member States which submitted observations to the Court argued that a request for information by one Member State sent to the tax authorities of another Member State does not constitute an act giving rise to such an obligation. They rightly consider that, in tax inspection procedures, the investigation stage, during which information is collected and which includes the request for information by one tax authority to another, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the

proposed adjustment.

41 Where the authorities gather information, they are not required to notify the taxpayer of this or to obtain his point of view.

42 A request for assistance made by the tax authorities under Directive 77/799 is part of the process of collecting information.

43 The same applies to the reply made by the requested tax authorities and the inquiries carried out to that end by those authorities, including the examination of witnesses.

44 It follows that respect for the rights of the defence of the taxpayer does not require that the taxpayer should take part in the request for information sent by the requesting Member State to the requested Member State. Nor does it require that the taxpayer should be heard at the point when inquiries, which may include the examination of witnesses, are carried out in the requested Member State or before that Member State sends the information to the requesting Member State.

45 None the less, 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.

46 Accordingly, the answer to the first and second questions is that European Union law, as it results in particular from Directive 77/799 and 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 organised by the requested Member State.

The third question

47 By its third question, the referring court asks, in essence, whether Directive 77/799 must be interpreted as meaning that, first, the taxpayer may challenge the information concerning him conveyed to the tax authorities of the requesting Member State, and, secondly, when the tax authorities of the requested Member State convey the information gathered, they are bound to mention the sources of the information and how that information was obtained.

48 It must be observed that Directive 77/799 does not address the taxpayer’s right to challenge the accuracy of the information conveyed, and it does not impose any particular obligation with regard to the content of the information conveyed.

49 In those circumstances, 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.

50 The answer to the third question is therefore that Directive 77/799 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, and it does not impose any particular obligation with regard to the content of the information conveyed.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending

before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **European Union law, as it results in particular from 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, and 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 organised by the requested Member State.**

2. **Directive 77/799, as amended by Directive 2006/98, 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, and it does not impose any particular obligation with regard to the content of the information conveyed.**

[Signatures]

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* Language of the case: Czech.