

The CJEU's *Berlioz* Judgment: A New Milestone on Procedural Rights in EU Audits

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In this article, the authors discuss the Court of Justice of the European Union's recent *Berlioz* judgment and contend that, before any information exchange between tax authorities, the taxpayer whose information is to be exchanged should have the opportunity to dispute the request with full knowledge of the relevant facts and should be protected against the disclosure of trade, commerce, or business secrets.

In its May 16 judgment in the *Berlioz* case,¹ the Court of Justice of the European Union laid down important principles regarding procedural rights during audits in the European Union and information requests under the EU's cooperation directive². By its judgment, the CJEU accepted, in principle, the arguments in the opinion by Advocate General Melchior Wathelet dated January 10.³ Particularly, the Court confirmed his opinion regarding the Charter of Fundamental Rights of the European Union (charter) and its effect on audits and information exchanges in the EU.

¹ *Berlioz Investment Fund SA v. Directeur de l'Administration des Contributions Directes*, C-682/15 (CJEU 2017) (judgment).

² Council Directive 2011/16/EU of February 15, 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (the cooperation directive).

³ Opinion of Advocate General Melchior Wathelet at the European Court of Justice, in case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions Directes* (AG opinion).

From the judgment (Section I of this article), important conclusions can be drawn regarding EU audits. The ruling provides that a requested tax authority should, before any exchange of information, provide the subject company with sufficient information about the proposed exchange to allow the company to contest the propriety of the request (see Section II). Also, a tax authority should not be permitted to share any trade, commerce, or business secrets with the tax authority of another member state within the course of EU audits (see Section III). This applies to information requests, simultaneous controls, and joint controls under the cooperation directive.

I. *Berlioz*: Facts and CJEU's Conclusions

In the *Berlioz* case, a Luxembourg company (LuxCo) rejected the Luxembourg tax authorities' order to disclose the names and addresses of its members, the amount of capital held by each member, and the percentage of share capital held by each member. The French tax authorities had initiated an information request regarding a French subsidiary held by LuxCo and submitted the request to the Luxembourg tax authority.

LuxCo argued that the requested information was not foreseeably relevant for the taxation of the French subsidiary. The Luxembourg tax authorities imposed an administrative fine of €250,000 on LuxCo for not providing the requested information. During LuxCo's appeal of the fine before the *tribunal administratif* of Luxembourg (administrative tribunal), the tribunal requested a preliminary ruling of the CJEU.

In its judgment, the CJEU concluded:

- A person may rely on the right to an effective remedy and to a fair trial under article 47 of

the charter if a pecuniary penalty is imposed on him for refusing to provide information during an information exchange between tax authorities based on the cooperation directive.

- When a court is hearing an action against this type of penalty, the right to an effective remedy requires that the court is able to examine the legality of the underlying information request. This verification is not limited to an examination of its procedural regularity. But the court's review is limited to verifying that the requested information is not manifestly devoid of relevance.
- The information request must refer to information that is foreseeably relevant for taxation by the requesting EU member state.
- During an EU audit, a court must have access to the request for information addressed to the tax authority in the requested EU member state by the requesting EU member state. The third party in the requested EU member state, however, does not have a right to access the whole of that information request since the request remains a secret document under article 16 of the cooperation directive. It is sufficient that the third party has access to a minimum level of information, including the identity of the person under examination or investigation and the tax purpose for which the information is sought (article 20(2) of the cooperation directive).

II. Ability to Challenge Before Exchange

The CJEU's arguments lead to the conclusion that article 47 of the charter (right to an effective remedy and a fair trial) requires that a taxpayer have an effective judicial remedy if a penalty is imposed on it for failing to comply with an information notice given in pursuance of a requesting tax authority's request for information under the cooperation directive. We believe that this will, in practice, mean that sufficient information must be provided to the taxpayer as part of the information notice to enable him to determine whether or not to contest the propriety of the requesting tax authority's request (if necessary, at a specific hearing) before any actual exchange of information in an EU audit.

A. General Applicability of the Charter

The charter should apply to any information exchange based on the cooperation directive. The CJEU makes clear that EU law, including the charter (in particular, article 47), applies to the domestic law implementing the cooperation directive.

1. CJEU on Applicability of Charter

In the judgment, the CJEU states:

According to Article 47 of the Charter, entitled "Right to an effective remedy and to a fair trial", everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

The CJEU further specifies:

The second paragraph of Article 47 of the Charter recognizes that everyone is entitled to a fair hearing by an independent and impartial tribunal. Compliance with that right assumes that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body.

Thus, the court concludes that:

a Member State implements EU law . . . and that the Charter is therefore applicable, when that Member State makes provision in its legislation for a pecuniary penalty to be imposed on a relevant person who refuses to supply information in the context of an exchange between tax authorities based . . . on . . . the Directive.

2. Conclusions

From the CJEU's holdings, it follows that the right to an effective remedy under the charter applies to any exchange of information between tax authorities of EU member states within the scope of the cooperation directive. National laws involving information requests between the tax authorities of EU member states, as well as any simultaneous or joint controls of EU member states based on the cooperation directive, serve to implement EU law. Article 51 of the charter

stipulates that any implementation of EU law is subject to the rights and restrictions of the charter. Therefore, a taxpayer who is subject to an information exchange under these laws may rely on article 47 of the charter.

B. Hearing Before Any Information Exchange

From the CJEU's statements, it also follows that article 47 of the charter requires that the taxpayer be provided with an effective judicial remedy should a penalty be imposed on him for failing to comply with an information notice given as part of a requested state's effort to fulfill a requesting tax authority's request for information under the cooperation directive. We believe that, in practice, this means that sufficient information must be provided to the taxpayer as part of the information notice to enable the taxpayer to establish whether or not to contest the propriety of the requesting tax authority's request (if necessary, at a hearing) before any exchange of information. This remedy must ultimately include access to a court or tribunal hearing in the event of a dispute or the taxpayer would not have the right to an effective remedy and to a fair trial as required under article 47 of the charter.

1. CJEU's Statements to Article 47

The CJEU found that under article 47 of the charter, the competent national court "must be able to examine the legality of [the] information order" submitted from the local tax authority to the local taxpayer following an information request. Although the requesting authority "has a discretion to assess the foreseeable relevance of the requested information," courts must:

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

2. Conclusions

According to these principles, it follows that a specific hearing by the requested tax authority may be required before an exchange of

information. Only then could the competent court be capable of verifying the legality of an information request.

In any event, we believe that the taxpayer must be provided with sufficient information to give it an understanding of the nature of the request from the requesting authority. Without this information, the taxpayer cannot evaluate whether or not to bring an action to the appropriate tribunal. Thus, the taxpayer must be provided with all relevant information regarding the intended information exchange to allow it to form a legal opinion on the information exchange. Otherwise, no legal protection — in particular, no interim legal protection — could be obtained from a competent court.

Notably, this means that a third party in another EU member state could receive information on the involved taxpayer without a prior opportunity for the taxpayer whose information is transmitted to another tax authority to prevent such exchange by an action to the competent court. Intervention by the taxpayer could be necessary to safeguard its rights in various cases — for example, in the event that a tax authority intends to share trade, commerce, or business secrets with another tax authority or in the event that the information request is based on illegally obtained information.⁴ The third party is any taxpayer in another EU member state. It could be — but is not necessarily — the taxpayer audited. The term "third party" refers to any person that could receive information that was transmitted by a tax authority to another EU tax authority. This information could therefore be disclosed to the "third party." The rights provided by article 47 of the charter would potentially be without effect and therefore violated in that case.

While the CJEU refers to a "national court" protecting the rights guaranteed by article 47 of the charter, these conclusions should also apply to administrative appeals as an integral preliminary step and prerequisite to seeking an effective remedy.

⁴Cf. Leo Neve, "Use of Stolen Information as a Basis for an Administrative Assistance Request," *Tax Notes Int'l*, May 8, 2017, p. 521.

This course of action is also in compliance with article 41(2)(a) of the charter, which requires that every person has the right to be heard before any individual measure that would adversely affect him or her is taken. Unlike article 47, however, the wording of article 41(1) of the charter only refers to institutions, bodies, offices, and agencies of the EU and not to the tax authorities of the member states.

C. Investigation Period Versus Contentious Stage

The principles stated above are not restricted by those developed by the CJEU in the 2013 *Sabou* decision.⁵

1. Background and Interpretation of *Sabou*

In *Sabou*, the Czech tax authority had submitted an information request to the Hungarian tax authority for information regarding expenses that a Czech taxpayer claimed on his income tax return in connection with business activities in Hungary. The Czech taxpayer claimed that the Czech tax authorities received the information about him illegally because, *inter alia*, they did not inform him before requesting the information. He claimed this meant he had no opportunity to take part in formulating the content of the information request.

The CJEU held that the asserted right did not exist. The Court distinguished between the investigation stage, during which information is gathered, and the contentious stage, which only begins when the authority sends the taxpayer a proposed adjustment. Only during the latter stage, the Court found, may a hearing be required. Specifically, the CJEU declared: “Where the authorities gather information, they are not required to notify the taxpayer of this or to obtain his point of view.”

In *Berlioz*, the CJEU made clear that the facts underlying *Sabou* were not comparable with those in *Berlioz*. The instant case involved a taxpayer in the EU member state of the *requested* authority, while in the *Sabou* case the taxpayer of the *requesting* member state was involved. Also, the advocate general distinguished both the stage of

the requests and the parties involved in the two matters. The advocate general opinion states that the distinction between the investigation stage and the contentious stage in *Sabou* “cannot be upheld, since the taxpayer under investigation [the French company] and the requested third party [LuxCo] are not in comparable situations.” The third party being asked to provide information would not be involved in the second stage of the tax control procedure. Therefore, such party would not be able to rely on his rights in that stage. Consequently, the requested third party needed to be protected by a hearing by a competent court during the investigative phase of the audit.

2. Conclusions

From the advocate general opinion and *Berlioz* judgment, it follows that the limitations as set out in *Sabou* should not apply to a transfer of information by a tax authority to another tax authority within the course of an EU audit.

The CJEU’s opinion in *Sabou* is based on the assumption that a taxpayer can safeguard his rights during the contentious stage of an audit. In the event of an EU audit under the cooperation directive, by contrast, there is no similar protection for the requested entity against an information exchange that violates its rights. The company whose information is transferred may not be a party to the procedure in the other member state and thus may be unable to influence the scope of information transmitted to the requesting state during the audit itself. Also, a legal action by the requested entity regarding the information exchange during the contentious stage would arrive too late to prevent damage potentially caused by an illegal information exchange. This is particularly true when trade, commerce, or business secrets are involved.

Therefore, the limitations set forth in the *Sabou* judgment do not apply in this situation — among other things, a request made to a nonparty by the requested member state as part of an information exchange under the cooperation directive.

III. Preventing Exchange of Business Secrets

As noted above, the CJEU in *Berlioz* found that the fundamental rights under the charter apply during EU audits under the cooperation directive.

⁵ *Jiří Sabou v. Czech Republic*, C-276/12 (CJEU 2013).

In accordance with these fundamental rights, a tax authority is not permitted to share any trade, commerce, or business secrets with a tax authority located in a different jurisdiction of the European Union.

A. CJEU on Protecting Personal Information

In the judgment, the CJEU states: “As to whether the relevant person [the third party] has a right of access to the request for information, it is necessary to take into account the secrecy attached to that document in accordance with Article 16 of [the Cooperation] Directive.” Article 16(1) of the cooperation directive stipulates: “Information communicated between Member States in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it.” Regarding the extent of information disclosure to a third-party taxpayer, the CJEU also made clear: “It is sufficient that that person has access to the minimum information referred to in Article 20(2) of [the Cooperation] Directive . . . , that is to say, the identity of the taxpayer concerned and the tax purpose for which the information is sought.” According to the CJEU, only a court can ask for more information beyond the limited disclosures noted above, and only if the information was required to assess the foreseeable relevance of the request. The disclosure obligations are necessary to satisfy the principle of equality of arms, which, the CJEU explains, “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.”

B. Charter Forbids Exchange of Protected Secrets

In our view, the charter prohibits any exchange of trade, commerce, or business secrets between tax authorities in the European Union. As is set forth below, this is in line with the conclusions that might be drawn from the judgment. Further, these secrets are protected by the charter and any exchange of trade, commerce, or business secrets would constitute an (unjustifiable) interference with those rights. German constitutional law could provide

additional guidance regarding how to interpret the fundamental rights under the charter.

1. Conclusions From *Berlioz* Judgment

Based on the judgment of the CJEU, we conclude that the cooperation directive does not permit any exchange of trade, commerce, or business secrets between tax authorities of EU member states. The CJEU cited article 16 of the cooperation directive, which protects the secrecy of information communicated between member states.

As to the scope of disclosure, the CJEU distinguished between the third party in the member state of the requested tax authority and a national court in that member state. The CJEU restricted the third party’s access to the information request to the minimum level stipulated in article 20(2) of the cooperation directive — specifically, the identity of the person under examination or investigation and the tax purpose for which the information is sought.

According to the CJEU, tax authorities are not authorized to share any data with third parties beyond the minimum information set out in article 20(2). The risk of economic damage caused by the disclosure of trade, commerce, or business secrets to the third party prohibits any transfer of those secrets to the requesting tax authority.

2. Protection by the Charter

In the EU, trade, commerce, and business secrets of a taxpayer are protected either by the freedom to conduct a business (article 16 of the charter) and the respect for private and family life (article 7 of the charter).

a. Freedom to Conduct a Business (Article 16 of the Charter). Article 16 of the charter provides for the “freedom to conduct a business in accordance with Community law and national laws and practices.” In a previous case, the CJEU held that “the protection afforded by Article 16 of the charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition.”⁶ The Court has concluded, for example, that the financial

⁶ *Sky Österreich GmbH v. Österreichischer Rundfunk*, C-283/11 (CJEU 2013).

statements of a private limited partnership⁷ and the names of suppliers of a steel and metal scrap trading company⁸ are among the type of secrets generally protected by EU law.

According to these principles, article 16 of the charter protects any EU taxpayer against a disclosure of trade, commerce, or business secrets. The right of a taxpayer to exercise a business includes the ability to make decisions regarding how to conduct that activity. These decisions have an important impact on the success of a commercial activity. Trade, commerce, and business secrets are information that the respective individual has chosen to keep secret from the public and, in particular, competitors. Therefore, article 16 of the charter protects the decision of a taxpayer to keep trade, commercial, and business secrets closed from the public.

b. Right to Respect for Private and Family Life (Article 7 of the Charter). Article 7 of the charter also protects trade, commerce, and business secrets, and this protection is not precluded by article 16 of the charter.⁹ Under article 7, everyone has the right to respect for his or her private and family life, home, and communications. Regarding article 8 of the European Charter of Human Rights (ECHR) — which protects, *inter alia*, all individuals' private lives as provided for in article 7 of the charter — the CJEU has stated that “the notion of ‘private life’ cannot be taken to mean that the professional or commercial activities of either natural or legal persons are excluded.”¹⁰ In the same judgment, the CJEU also stated that “the protection of business secrets is a general principle.” As courts and commentators have observed, the notion of “private life” under article 7 of the charter protects, among other rights, the decision of an individual as to what relationships

he wants to establish with other individuals¹¹ and, in particular, what information he wants to share with the public.¹²

Thus, the trade, commerce, and business secrets of a taxpayer are protected by article 7 of the charter. These secrets are part of the information that a taxpayer intends to keep secret from competitors and the general public. It makes no difference whether the taxpayer is a natural person or a legal entity. The decision not to disclose these secrets must be respected by tax authorities under article 7 of the charter.

3. Interference With Protected Rights

An exchange of trade, commerce, or business secrets would interfere with the rights provided by articles 16 and 7 of the charter.

a. Interference With the Freedom to Conduct a Business (Article 16 of the Charter). A transfer of trade, commerce, or business secrets would interfere with the right to freedom to conduct a business as provided by article 16 of the charter. As set forth in the 1998 CJEU ruling in *Metronome Musik GmbH*, interference exists, *inter alia*, when legal provisions “have either the object or the effect” of distorting business conduct.¹³ However, a legal provision is not necessarily required to constitute interference with the rights provided by article 16 of the charter. In fact, any serious impairment of the protections afforded under article 16 of the charter by any authority constitutes an interference with these rights and requires a justification.¹⁴

Therefore, any exchange of trade, commerce, or business secrets between tax authorities constitutes an interference with the rights to freedom to conduct a business under article 16 of the charter and requires justification.

b. Interference With the Right to Respect for Private and Family Life (Article 7 of the Charter). An exchange of trade, commerce, or business secrets

⁷ *Axel Springer AG v. Zeitungsverlag Niederrhein GmbH & Co. Essen KG*, C-435/02 (CJEU 2004).

⁸ *Interseroh Scrap and Metals Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, C-1/11 (CJEU 2012).

⁹ See Hans D. Jarass, *Charta der Grundrechte der Europäischen Union* [Charter of Fundamental Rights of the European Union], article 7, No. 9 (3rd ed., 2016).

¹⁰ *Varec SA v. Belgian State*, C-450/06 (CJEU 2008). See also opinion of Advocate General Melchior Wachelet at the European Court of Justice, in case C-419/14, *WebMindLicenses Kft. v. Nemzeti Adó-és Vámhivatal Kiemelt Adó-és Vám Főigazgatóság* (Sept. 16, 2015), at No. 111.

¹¹ See *Pretty v. United Kingdom*, ECtHR, 2346/02 (2002).

¹² See Christian Calliess and Matthias Ruffert, *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* [TEU/TFEU: The Constitutional Law of the European Union and European Charter of Fundamental Rights], article 7, No. 3 (5th ed., 2016).

¹³ See *Metronome Musik GmbH v. Music Point Hokamp GmbH*, C-200/96 (CJEU 1998).

¹⁴ See Jarass, *supra* note 9

between tax authorities would also constitute an interference with the right to respect for private life under article 7 of the charter. Interference lies in any limitation on an individual's decision if and to what extent he wants to share any personal information with the public.¹⁵

In relation to the similar article 8 of the ECHR, the CJEU stated that a transfer of data:

infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 of the Convention. To establish the existence of such an interference, it does not matter whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way.¹⁶

Thus, any exchange of trade, commerce, or business secrets between tax authorities or between a tax authority and a third party affects the decision of the taxpayer to protect that data from disclosure. In particular, competitors might be provided with insights on sensitive data, even though the taxpayer decided to avoid sharing that information. Therefore, an interference with the rights granted by article 7 of the charter is caused by the data exchange.

4. No Justification of Interference

In our view, the interference with the fundamental rights granted by articles 7 and 16 could not be justified in cases involving the exchange of trade, commerce, or business secrets. Applying to the principles detailed below, the objectives of the exchange would be disproportionate to the damages caused. German domestic law on the cooperation directive underscores this position.

a. Applicable Principles. To justify the interference with article 7 and article 16 rights, a measure must have a legal basis, have an objective

of general interest, meet the requirements of the principle of proportionality, and must not interfere with the essence of the respective fundamental right.¹⁷

In *Metronome Musik GmbH*, the CJEU explained that article 16 of the charter “may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the [European Union] and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.”

The key factor here is the principle of proportionality. As the CJEU explains in a 2011 decision, the principle:

requires that measures adopted by Member States . . . do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.¹⁸

b. Objectives of General Interest. The primary objective of an information exchange under the cooperation directive (including an exchange that may involve trade, commerce, or business secrets) may be rooted in a desire to increase tax transparency within the EU. Recitals 1, 2, and 29 of the cooperation directive explain that the directive is intended to improve the efficiency of administrative cooperation between the EU member states and thus overcome the “negative effects” of increasing globalization on the internal market.

Although not expressly mentioned in the recitals of the cooperation directive, generating public revenues is also a goal of any information exchange under the cooperation directive. This purpose may be regarded as one of general interest since tax revenues are generally used to fulfill the public responsibilities of the EU and its member states.

¹⁵ See Calliess and Ruffert, *supra* note 12.

¹⁶ *Rechnungshof v. Österreichischer Rundfunk and Others and Neukomm and Lauerermann v. Österreichischer Rundfunk*, joined cases C-465/00, C-138/01, and C-139/01 (CJEU 2003).

¹⁷ See, e.g., Jarass, *supra* note 9, at article 52, No. 19.

¹⁸ *Azienda Agro-Zootecnica Franchini Srl, Eolica di Altamura Srl v. Regione Puglia*, C-2/10 (CJEU 2011).

c. Disproportionate Interference. We do not believe that an exchange of trade, commerce, or business secrets is an appropriate tool for attaining the objectives of enhanced tax transparency or increased public revenues. The damages resulting from the transfer of secrets would exceed the general utility of the exchange.

In their efforts to increase tax transparency, the member states are attempting to account for the effect of globalization. Arguably, an information exchange between tax authorities could, among other things, help member states correctly assess the tax liability of multinationals. The criteria for an exchange is the foreseeable relevance of the information to the taxation of a taxpayer in the country of the requesting EU member state.

As the CJEU explains in *Berlioz*, tax authorities have discretion to assess the foreseeable relevance of the information requested. Often, the authorities may apply low thresholds for foreseeable relevance because information could be deemed to be in some way relevant to taxation. In that event, it might be uncertain if the exchange truly advances the objective of increasing tax transparency. For the taxpayer, however, the risk from the exchange is significant because any disclosure of trade, commerce, or business secrets may affect the conduct of its business and cause competitive disadvantages that could lead to serious financial damages. Consequently, the foreseeable relevance of an information request cannot justify the possible damages. The advantages for the general public by increasing tax transparency are simply too vague to justify the likelihood of serious damage to the disclosing taxpayer.

Likewise, the purpose of generating public revenues should not be considered sufficient to justify an exchange of trade, commerce, or business secrets.

d. Guidance From the Adoption Under German Law. The German version of the cooperation directive underscores our conclusion that no trade, commerce, or business secrets of a taxpayer should be shared between tax authorities.

Under section 4(3) No. 3 of the German EU Administrative Assistance Act (EU-Amtshilfegesetz), German tax authorities must not transmit information to the tax authorities of

EU member states if trade, commerce, or business secrets or procedures would be disclosed. In contrast to the wording of article 17(4) of the EU's cooperation directive, German tax authorities do not have the discretion to make this type of disclosure. Further, any unlawful and intentional disclosure of business secrets by a public official (*Amtsträger*) may constitute a crime.¹⁹

Germany's version of article 17(4) of the cooperation directive illustrates that a national legislature shares our concern and recognizes the potential harm for taxpayers and economic damage that could result from an exchange of trade, commerce, or business secrets.

5. German Constitutional Law

Germany's constitutional law can also provide useful guidance for interpreting the fundamental rights granted by the charter. In particular, the fundamental right to informational self-determination (*Grundrecht auf informationelle Selbstbestimmung*) guaranteed under article 2(1) in connection with article 1(1) of the German Constitution (*Grundgesetz*) and developed by the German Federal Constitutional Court (*Bundesverfassungsgericht*, or *BVerfG*) is illustrative.²⁰

This fundamental right, developed in a member state, could have a direct effect on the interpretation of the fundamental rights under the EU charter. In accordance with article 52(4) of the charter, because the fundamental rights recognized by the charter stem from the constitutional traditions common to the member states, they should be interpreted "in harmony with those traditions." Conceptually, therefore, a member state's fundamental rights are a relevant source for interpreting the fundamental rights granted by the charter.²¹ This supports our conclusion that, when interpreting articles 7 and

¹⁹ See section 355 of the German Criminal Code (*Strafgesetzbuch*, or *StGB*).

²⁰ *Bundesverfassungsgericht (BVerfG)* [Federal Constitutional Court], Dec. 15, 1983, *Entscheidungen des Bundesverfassungsgerichts* 65(1); and *BVerfG*, July 28, 2016, *Neue Juristische Wochenschrift* 2017 (466).

²¹ See Jarass, *supra* note 9, at article 52, No. 66; and Calliess and Ruffert, *supra* note 12, at article 52, No. 39.

16 of the charter, *inter alia*, the German principles should be considered and should help establish a high level of protection for the fundamental rights under the charter.²²

According to the Federal Constitutional Court, the German fundamental right to informational self-determination (*Grundrecht auf informationelle Selbstbestimmung*) “provides an individual with the power to determine the disclosure and the use of his personal data.”²³ This protection also applies to legal entities.²⁴ It prohibits, *inter alia*, the unlimited transfer of personal data. As the Federal Constitutional Court declared in 1983, “The freedom of anyone to plan and decide from self-determination may be violated if such person could not control the information known related to him in specific areas of his social environment.”²⁵ Therefore, a transfer of personal data may only be permitted based on specific regulations and in compliance with the principle of proportionality.

While German tax authorities must comply with the law as developed by the Federal Constitutional Court, these guidelines may also be taken into account for the interpretation of the fundamental rights guaranteed in the charter. Articles 7 and 16 of the charter provide protection for sensitive data regarding business activities much like that provided by German law. This protection includes the general right of an entity (or individual) to make any decision about sharing trade, commerce, or business secrets for itself. Also, as the advocate general opinion in *Berlioz* states and as is noted above, the principle of proportionality is a key part of the interpretation of fundamental rights in the EU, just as it is in Germany.

Applying these guidelines, an exchange of trade, commerce, or business secrets may in general not be not justified during a tax information exchange under the cooperation directive. Those secrets are the basis of a company’s competitive advantage. Under the principle of proportionality, any exchange requires an objective of high significance to justify the substantial damages stemming therefrom. As discussed in Section III.B.4.c above, no sufficiently weighty objective can be identified to justify an exchange of trade, commerce, or business secrets during an information exchange under the cooperation directive.

C. Liability Cases

If, however, a member state’s tax authority does exchange information and disclose trade, commerce, or business secrets to the tax authority of another member state, the disclosing state may be liable for any loss and damages incurred by the respective taxpayer. This view is supported by the CJEU cases *Francoovich* and *Brasserie du Pêcheur*.

1. General Liability Principles

According to the CJEU in *Francoovich*, a 1991 decision, a member state is liable for damages for not implementing an EU directive if three conditions are met:

The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State’s obligation and the loss and damage suffered by the injured parties.²⁶

Furthermore, in *Brasserie du Pêcheur*, the CJEU explained that a member state could be held liable for the “infringement of a right directly conferred

²² See Jürgen Meyer, *Charta der Grundrechte der Europäischen Union* [Charter of Fundamental Rights of the European Union], article 52, No. 44c (4th ed. 2014).

²³ BVerfG, Feb. 27, 2008, *Neue Juristische Wochenschrift*, 2008(822).

²⁴ BVerfG, June 13, 2007, *Entscheidungen des Bundesverfassungsgerichts* 118(168). All transaction in this article are by the authors.

²⁵ BVerfG, Dec. 15, 1983, *Entscheidungen des Bundesverfassungsgerichts* 65(1).

²⁶ *Andrea Francoovich and Danila Bonifaci and others v. Italian Republic*, C-6/90 and C-9/90 (CJEU 1991), at No. 40.

by a Community provision upon which individuals are entitled to rely before the national courts.”²⁷ Altering the list slightly, the Court held that:

Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

2. Liability for Exchange of Secrets

There are sound arguments for concluding that the infringement of articles 7 and 16 of the charter caused by the exchange of trade, commerce, or business secrets between EU member states during a tax audit under the cooperation directive render a member state liable to the taxpayer whose rights have been violated.

Articles 7 and 16 of the charter constitute EU primary law²⁸ that confer rights on individuals. According to the CJEU, as established in Section II.A of this report, taxpayers can rely on article 47 of the charter during EU audits under the cooperation directive. Likewise, taxpayers should be able to rely on articles 7 and 16 during those procedures. Thus, if a member state violates these warranties by exchanging trade, commerce, or business secrets, the state violates a right upon which individuals are entitled to rely before national courts.

A violation of these rights could constitute a sufficiently serious damage to warrant liability. According to the CJEU in *Brasserie du Pêcheur*, this depends on:

whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

Because the tax authorities could cause substantial and irrevocable damages to a taxpayer by an exchange of trade, commerce, or business secrets, the exchange constitutes, in our view, an inexcusable error of law. Article 17(4) of the cooperation suggests the potential harm from inappropriate disclosure and limits the discretion of the EU member states accordingly, stating that “the provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.” Article 17(4) of the charter should be interpreted in light of articles 7 and 16 of the charter, underscoring that an exchange of trade, commerce, or business secrets constitutes sufficiently serious damage to support liability.

Thus, an EU member state may be liable for any damage arising from an exchange of protected secrets. As suggested in *Francoovich*, this claim should be brought in the relevant member state’s national courts under the relevant national law as interpreted in the light of EU law.²⁹

IV. Summary

Any exchange of information between two EU member states within the scope of an EU audit should be preceded by appropriate disclosures to any taxpayer whose information may be

²⁷ *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport*, C-46/93 and C-48/93 (CJEU 1996), at No. 22.

²⁸ See generally Jarass, *supra* note 9, at No. 12.

²⁹ *Andrea Francoovich and Danila Bonifaci and others*, at No. 42.

exchanged. These disclosures should inform the taxpayer of the existence and nature of the underlying request. It may also require access to a specific hearing before the exchange is made. These steps may be required by the principles outlined in article 47 of the charter.

Further, the sharing of trade, commerce, or business secrets among EU member states during an EU audit is a violation of the charter. Article 16 of the charter (freedom to conduct a business) and

article 7 of the charter (respect for private life) both protect these secrets from being disclosed to other tax authorities or other taxpayers. Interference with these rights may not be justified and constitute a disproportionate interference with the taxpayer's rights.

Any exchange of information that is forbidden under the charter may lead to the member state being liable to the taxpayer for any loss or damage caused by the exchange. ■