

# Editorial

## *Towards a More Coordinated Approach of the Relation Between the Taxpayer and Tax Administrations: The European Taxpayers' Code*

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In its Communication of 27 June 2012<sup>1</sup> the European Commission stated that an increase in efficiency and effectiveness of the administration of tax collection is crucial in fighting tax fraud and evasion. As a follow-up of this Communication the Commission adopted an Action Plan<sup>2</sup> on 6 December 2012. This plan contained thirty-four practical actions, one of which deals with improving tax compliance in Member States. In view of that specific action the Commission announced the development of a taxpayers' code setting out best practices for enhancing cooperation, trust and confidence between tax administrations and taxpayers, for ensuring greater transparency in the rights and obligations of taxpayers and encouraging a service-oriented approach by tax administrations. In order to realize this Code the Commission has also launched a public consultation on this action, the results of which have been published on 12 September 2013.<sup>3</sup>

Finally – on 24 November 2016 – the European Commission issued Guidelines for a Model for a European Taxpayers' Code (ETC).<sup>4</sup> It is a non-binding document to be considered as a model to follow and to which Member States can add or adapt elements to meet national needs or context. Although the model is not binding, it is an interesting document that deserves more attention than it got so far. The model contains a list of guidelines to ensure a fair balance between the rights and obligations of both taxpayers and tax administrations.

At a time when – also at a European level – tax administrations are increasingly developing a strong legal framework to fight tax fraud and evasion, as well as rules against avoidance practices,<sup>5</sup> more cooperation in the field of exchange of information<sup>6</sup> and more mutual assistance for the recovery of claims relating to taxes,<sup>7</sup> it is necessary to pay sufficient attention to an adequate protection of the rights of taxpayers.<sup>8</sup> The increasing use by Member States of these means of combating tax evasion inevitably raises the question of the balance between, on the one hand, administrative efficiency and, on the other hand, respect for citizens' rights, including the right to an effective remedy.

The recent preliminary ruling request from Luxembourg's Court Administrative (Administrative Court) to the Court of Justice in the Berlioz Investment Fund case, is a prime example of the latter question, which is worth discussing before going more into detail about the ETC.<sup>9</sup> The Berlioz-case concerns the interpretation of Article 1 (1) and Article 5 of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and of Article 47 of the Charter of Fundamental Rights of the European Union. Berlioz Investment SA governed by Luxembourg law, had received dividends from its French subsidiary (Cofima) exempted from withholding taxes. A request

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<sup>1</sup> COM(2012) 351 final of 27 June 2012, Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including to third countries.

<sup>2</sup> COM (2012) 722 final of 6 Dec. 2012, Communication from the Commission to the European Parliament and the Council. An Action Plan to strengthen the fight against tax fraud and tax evasion.

<sup>3</sup> Brussels, 12 Sept. 2013 TAXUD.D.2 (Ares 2013) 3252439, <https://circabc.europa.eu/sd/a/cd4ef106-a576-4dce-9737-557ff5964a6e/TPC%20-%20report%20-%20-%20en.pdf> (accessed 16 May 2017).

<sup>4</sup> [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/guidelines\\_for\\_a\\_model\\_for\\_a\\_european\\_taxpayers\\_code\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines_for_a_model_for_a_european_taxpayers_code_en.pdf) (accessed 16 May 2017).

<sup>5</sup> E.g. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1, 19 July 2016.

<sup>6</sup> E.g. Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64/1, 11 Mar. 2011; Council Directive 2014/107/EU of 9 Dec. 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ, L 359/1, 16 Dec. 2014. Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation OJ, L 146/8, 3 June 2016.

<sup>7</sup> E.g. Council Directive 2010/24/EU of 16 Mar. 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ, L 84/1, 31 Mar. 2010.

<sup>8</sup> On this topic see also: P. Baker & P. Pistone, *The Practical Protection of Taxpayers' Fundamental Rights*, General Report, IFA-Report, 2015 Basel Congress, vol. 100 B, 17–68 (The Hague, Netherlands: sdu Uitgevers 2015).

<sup>9</sup> Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*.

for information by the French competent authority was sent to the Luxembourg tax authority concerning that exemption. The French tax authorities wanted to ascertain whether the relevant conditions of French law had been fulfilled. The requested information from Luxembourg on behalf of the French authorities concerned in particular whether the company has a place of effective management in Luxembourg, a list of employees with link to the company's registered office, contractual relations between Berlioz and Cofima, information on shareholdings, the amount of capital held by participants with the percentage of capital held by each member etc. In response to the Luxembourg tax authorities' request, Berlioz provided all the information sought except for 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. Berlioz objected to providing this information based on its lacking 'foreseeable relevance' within the meaning of Directive 2011/16, for the checks carried out by the French tax administration. As a consequence the Luxembourg Director imposed an administrative fine on Berlioz. As part of the domestic litigation in Luxembourg, Berlioz brought an appeal to the Administrative Court in Luxembourg alleging breach of Article 6 ECHR. The Administrative Court filed a preliminary ruling to the CJEU bringing in on its own motion Article 47 of the EU Charter of Fundamental Rights, which as binding EU law guarantees the right to an effective judicial remedy and to a fair trial. In its judgment of 16 May 2016 the CJEU has decided on this case.<sup>10</sup> In line with the opinion of Advocate General M. Wathelet,<sup>11</sup> the Court decided that in view of Article 47 of the EU Charter of Fundamental Rights, the taxpayer has the right to challenge a request for information issued by Luxembourg pursuant to Directive 2011/16, at the request of the French competent authority. First of all, the requested authority must be in a position to determine whether the requested information is 'foreseeably relevant' for the purposes of the tax investigation in the Member State seeking it. According to the Court, Member States are not at liberty to engage in fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of the taxpayer concerned. The requested tax authority in Luxembourg must not confine itself to a brief and formal verification of the regularity of the request of information. The verification must also enable this tax authority to satisfy itself that the information sought is not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to

provide the information, and to the requirements of the tax investigation concerned.<sup>12</sup> In the second place there must be a possibility for judicial review of the legality of the information on which the fine was based. According to the Court, 'that review may not only relate to the proportionality of that penalty and lead, where appropriate, to its being varied, but may also concern the legality of that information order'.<sup>13</sup> Finally the Court of Justice considers that, if the national court of the requested State is to be able to conduct its judicial review, it must have access to the request for information and to any additional information which the authorities of the requested State may have been able to obtain from the authorities of the requesting State. The person to whom the information order is addressed may however be barred from having access to the request for information, because it is necessary to take into account the secrecy attached to the request of information in accordance with Article 16 of Directive 2011/16.<sup>14</sup> Nevertheless, in order to be given a fair hearing, that person must have access to key information in the request for information (such as the identity of the taxpayer concerned and the tax purpose for which the information is sought), and if it considers that this key information is not sufficient, the national court may provide that person with certain other information.

It seems clear that mutual assistance must facilitate the work of tax authorities, but without undermining the rights of taxpayers to an effective legal remedy in line with the standard enshrined in the EU Charter of Fundamental Rights.

For the purpose of the ETC the notion taxpayer is not too strictly interpreted. It also comprises representatives and third parties such as employers, banks, jointly liable persons, notaries and other tax practitioners.<sup>15</sup> The Code is envisaged to apply to all kinds of tax-related interactions between taxpayers and Member States' competent tax authorities.

According to its own wording the ETC expects 'to provide European citizens with a convenient source of knowledge on the main rights and obligations they can expect when dealing with a tax administration in a Member State other than their State of residence'.<sup>16</sup>

In a separate Chapter (Chapter 3.1) the Code sets out nine general principles on which the relationship between tax payers and tax administration should be based in view of an effective taxation: lawfulness and legal certainty; non-discrimination and equality of taxpayers; presumption of honesty; courtesy and consideration; respect of law; impartiality and independence; fiscal secrecy and data protection; privacy and finally representation.

<sup>10</sup> CJEU C-682/15, 16 May 2017, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*.

<sup>11</sup> Opinion 10 Jan. 2017, Adv. Gen. M. Wathelet, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*.

<sup>12</sup> CJEU C-682/15, 16 May 2017, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*, nbr. 82.

<sup>13</sup> *Ibid.*, nbr. 83.

<sup>14</sup> *Ibid.*, nbr. 93.

<sup>15</sup> ETC, 5, fn. 1.

<sup>16</sup> ETC, 7, point 2.2.3.

Each principle is then illustrated by a description of the thereon based expectations the taxpayer as well as the tax administration may cherish. Some examples:

In view of the general principle of *representation* taxpayers can expect the right to be assisted or represented in dealing with their tax affairs and the tax administrations will expect taxpayers:

- to inform them of their arrangement for representation;
- to understand that they may be contacted directly where necessary; and
- to remain responsible for their tax affairs according to law.

In view of the general principle of *impartiality and independence* taxpayers can expect tax administrations to conduct their functions neutrally and free from any inappropriate influence. Tax administrations will expect taxpayers to respect their impartiality and independence and not to seek to influence their consideration or the conduct of taxpayers' affairs inappropriately.

In view of *fiscal secrecy and data protection* taxpayers can expect tax administrations to protect their personal information and to adhere strictly to the law in this regard. Tax administrations from their side will expect taxpayers to respect their right to hold, disclose and withhold taxpayers' information where this is permitted by law.

According to the Code tax administrations should also comply with some key service standards. Although the Code recognizes that these standards may vary across the Member States because of the different tax systems, they should include some qualitative and quantitative elements. According to the guidelines these taxpayers' key service standards may comprise, among others, average time to process requests for information and adjustments and percentages and timescales for processing correspondence, phone calls, rulings and interpretations.<sup>17</sup> The Code mentions a lot of quality standards tax administrations must comply with.<sup>18</sup> Taxpayers can for instance expect tax administrations to provide them with accurate and timely information to enable them to meet their tax obligations. They can also expect tax administrations to keep the information up-to-date, to improve their knowledge and understanding of taxpayers in order to be able to focus pro-active guidance on different types of taxpayers or target groups (e.g. start-up companies) and to communicate in a tailored way to meet the needs of these target groups. Tax administrations should also take into consideration that new, digital channels of communication might not be easy for all taxpayers to use and that derogation for their use can be foreseen according to law.

As far as procedures are concerned (starting from the tax declaration over the taxpayers' assessment, the audit process and the payment till the debt collection) tax administrations should seek to reduce the administrative burden on taxpayers and protect the compliant from unfair competition based on tax fraud, tax evasion and tax avoidance.<sup>19</sup> During all these procedures tax administrations should respect taxpayers' rights and taxpayers should fulfil fairly their obligations and act in such a manner that they do not obstruct the procedures. Tax administrations should use risk management to target tax control at the right taxpayer groups. They should adapt control measures to the size of the risk and to the nature of the taxpayers.

The ETC also contains a number of guidelines concerning dispute settlement.<sup>20</sup> Taxpayers should e.g. be informed about when and how they can challenge tax administrations' decisions and actions including their right to court or tribunal review where legal appeal rights exist.

Part 4 of the ETC focuses on some best practices that are implemented in some Member States and that could be considered for further exploration and development. In that respect the ETC mentions the following issues:

- Electronic administration and online services, e.g. electronic tax declarations, electronic payment methods (such as the BillPay service in the UK, smart-phone application etc.).
- Using innovative approaches to improve voluntary compliance, based on a behavioural approach or on collaborative compliance (based on enhanced relationships between taxpayers and tax administrations as developed e.g. in the Netherlands (Tax Control Framework) and in France ('*Relation de Confiance*').
- Availability of information in several languages (e.g. in Ireland and Sweden) and promotion of a commonly used foreign language (e.g. in Spain and in France, where the national websites also contains information in English).
- Greater transparency for both the taxpayer and the tax administration is also seen as a way to decrease tax fraud, tax evasion and tax avoidance. On the side of the taxpayer the guidelines mention Sweden and Finland as examples. In Sweden information on taxes due, on social contributions and other types of information are fully available and in Finland an open database of businesses exists on the internet with data on the taxed income and the amount of taxes to be paid. On the side of tax administrations a system should exist in order to properly assess whether the tax administrations deliver their objectives. For instance more accountability could be

<sup>17</sup> ETC, 11, fn. 8.

<sup>18</sup> ETC, 11, point 3.2.

<sup>19</sup> ETC, 13, point 3.3.

<sup>20</sup> ETC, 15, point 3.4.

reached through the publication of their activities (publication of statistics and periodical reports).

It is clear that this Code is only a first and modest step in order to provide European citizens with a convenient source of knowledge on the main rights

and obligations they can expect when dealing with a tax administration in a Member State other than their State of residence. However, in the end it remains the responsibility of the Member States to pay due attention to these guidelines.