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Automatic exchange of information

Federal Court restricts access to administrative courts

Par Teymour Brander le 24 July 2023

To what extent can a person whose data is subject to an automatic exchange of information demand that the Federal Tax Administration (FTA) issue a challengeable act ? The Federal Supreme Court addresses this question for the first time in its ruling 2C_946/2021 of June 6, 2023, which is intended for publication.

Information relating to a trust and its two settlors (both Argentine residents) was transmitted to the FTA as part of an automatic exchange of information in tax matters. Believing that the transmission of the information and its presumed flight to Argentina would put them personally at risk, the settlors requested the FTA to issue a decision, subject to appeal, opposing the transmission.

The automatic exchange of information is a material act : in principle, the exchange is carried out without any prior decision on the part of the FTA. However, art. 19 para. 2 second sentence LEAR grants a right to a decision on a material act (art. 25a PA) when “the transmission of data entails […] an unreasonable prejudice due to a lack of guarantees of the rule of law”. It is the meaning of this last notion that the Federal Court must clarify in this case.

There are two opposing interpretations. The first – adopted by the Federal Administrative Court – limits the right to a challengeable act to cases of violation of public policy. A second view – advocated by the settlors and legal scholars – extends the scope of art. 19 para. 2 second sentence LEAR to any violation of the right of access to a judge (art. 29a Cst.) and of the right to respect for private life (art. 8 ECHR) combined with the right to an effective remedy (art. 13 ECHR).

On the basis of an examination of the travaux préparatoires of the LEAR, the Federal Court confirms the interpretation adopted by the TAF : only a violation of public order entitles a person to a decision on a material act. The Federal Court also justifies this restrictive interpretation on the grounds that it is required by the international conventions governing the automatic exchange of information (MAC and MCAA).

With regard to the scope of the public policy reservation, the Federal Court refers to a decision handed down on the subject of exchange of information on request (2C_750/2020 of March 25, 2021). In essence, only manifest violations of the fundamental principles of the Swiss legal system constitute acts contrary to public policy (and not any derogation from mandatory Swiss provisions). The most eloquent principles of jus cogens (prohibition of torture, genocide and

slavery) are mentioned as examples.

In other words, and to answer the initial question, a person can require the FTA to issue a decision subject to appeal when he or she demonstrates that the automatic exchange of information will “concretely” expose him or her to acts contrary to public policy. Arguing that the transmission of information would result in a violation of the right to respect for private life (art. 8 ECHR) is not enough.

Finally, our High Court affirms that such an interpretation of art. 19 al. 2 second sentence LEAR does not contravene the right of access to a judge (art. 13 ECHR) in connection with the obligations of States deriving from art. 8 ECHR to guarantee the right to privacy of litigants. The Federal Court points out that the civil action provided for in art. 6 of the LPD remains open ; individuals therefore have a legal remedy to complain of a possible violation of art. 8 ECHR by the requesting authority.

Returning to the case in point, the Federal Court swept aside the appellants’ criticisms of the lack of data protection in Argentina, and in any event found no potential violation of public policy.

This ruling clarifies the admissible grievances, depending on the legal route taken by the litigant to oppose an automatic exchange of information. Recourse to the administrative judge is reserved for the most serious cases, i.e. those involving a breach of public policy. For all other objections to the transmission of information (particularly when it can be demonstrated that this would result in a violation of the right to privacy), the civil courts are the appropriate place to turn (by taking action against the financial institution).

A number of authors have questioned the appropriateness of the legislative choice of broad recourse to the civil courts in administrative cases involving automatic exchanges of information. By adopting a restrictive interpretation of art. 19 al. 2 second sentence LEAR, the Federal Court ignores these concerns and further closes the doors of access to the administrative courts.
