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It can be found under the category "Tax Collection" (with free access).
EUROPA > European Commission > CIRCABC > Taxation & Customs Union > Tax Collection (public group)

It can also be accessed via the Europa-Taxud website:
http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/tax_recovery/index_en.htm

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LEGISLATION

EU

Directive (EU)2019/1 of 11 December 2018 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

Agreements and concerted pratices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited (Art. 101 TFEU). Any abuse of a dominant position in (a substantial part of) the internal market is also prohibited insofar as it may affect trade between Member States (Art. 102 TFEU).

A new directive should increase the effective enforcement of the fines imposed on companies that infringe the above provisions. Some provisions on mutual recovery assistance were copied from the tax recovery assistance Directive 2010/24 (e.g. Art. 27, relating to the use of a uniform instrument permitting enforcement in the requested Member State).

This Directive has been published in the Official Journal L 11/3 of 14 January 2019. Member States have to comply by 4 February 2021.

The text published below only contains some parts of the Directive, in particular the provisions relevant for recovery assistance.

DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 December 2018

to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

(…)

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter and scope

1. This Directive sets out certain rules to ensure that national competition authorities have the necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU so that competition in the internal market is not distorted and that consumers and undertakings are not put at a disadvantage by national laws and measures which prevent national competition authorities from being effective enforcers.

2. This Directive covers the application of Articles 101 and 102 TFEU and the parallel application of national competition law to the same case. As regards Article 31(3) and (4) of this Directive, this Directive also covers the application of national competition law on a stand-alone basis.

3. This Directive sets out certain rules on mutual assistance to safeguard the smooth functioning of the internal market and the smooth functioning of the system of close cooperation within the European Competition Network.

(…)

CHAPTER V

FINES AND PERIODIC PENALTY PAYMENTS

Article 13

Fines on undertakings and associations of undertakings

1. Member States shall ensure that national administrative competition authorities may either impose by decision in their own enforcement proceedings, or request in non-criminal judicial proceedings, the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU.

2. Member States shall ensure at a minimum that national administrative competition authorities may either impose by decision in their own enforcement proceedings, or, request in non-criminal judicial proceedings, the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings. Such fines shall be determined in proportion to their total worldwide turnover, where intentionally or negligently:

(a) they fail to comply with an inspection as referred to in Article 6(2);

(b) seals affixed by the officials or other accompanying persons authorised or appointed by the national competition authorities as referred to in point (d) of Article 6(1)) have been broken;

(c) in response to a question referred to in point (e) of Article 6(1), they give an incorrect, misleading answer, fail or refuse to provide a complete answer;

(d) they supply incorrect, incomplete or misleading information in response to a request referred to in Article 8 or do not supply information within the specified time limit;

(e) they fail to appear at an interview referred to in Article 9;

(f) they fail to comply with a decision referred to in Articles 10, 11 and 12.

3. Member States shall ensure that the proceedings referred to in paragraphs 1 and 2 allow for the imposition of effective, proportionate and dissuasive fines.

4. This Article is without prejudice to national laws allowing for the imposition of sanctions in criminal judicial proceedings provided that the application of such laws does not affect the effective and uniform enforcement of Articles 101 and 102 TFEU.

5. Member States shall ensure that for the purpose of imposing fines on parent companies and legal and economic successors of undertakings, the notion of undertaking applies.

Article 14

Calculation of fines

1. Member States shall ensure that national competition authorities have regard both to the gravity and to the duration of the infringement when determining the amount of the fine to be imposed for an infringement of Article 101 or 102 TFEU.

2. Member States shall ensure that national competition authorities may consider compensation paid as a result of a consensual settlement when determining the amount of the fine to be imposed for an infringement of Article 101 or 102 TFEU, in accordance with Article 18(3) of Directive 2014/104/EU.

3. Member States shall ensure that, where a fine for an infringement of Article 101 or 102 TFEU is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

4. Member States shall ensure that, where contributions referred to in paragraph 3 have not been made in full to the association of undertakings within the time limit fixed by national competition authorities, national competition authorities may require the payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies of that association. Where necessary to ensure full payment of the fine, after the national competition authorities have required payment from such undertakings, they may also require the payment of the outstanding amount of the fine by any of the members of the association which were active on the market on which the infringement occurred. However, payment under this paragraph shall not be required from undertakings which show that they did not implement the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the investigation started.

Article 15

Maximum amount of the fine

1. Member States shall ensure that the maximum amount of the fine that national competition authorities may impose on each undertaking or association of undertakings participating in an infringement of Article 101 or 102 TFEU is not less than 10 % of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision referred to in Article 13(1).

2. Where an infringement by an association of undertakings relates to the activities of its members, the maximum amount of the fine shall be not less than 10 % of the sum of the total worldwide turnover of each member active on the market affected by the infringement of the association. However, the financial liability of each undertaking in respect of the payment of the fine shall not exceed the maximum amount set in accordance with paragraph 1.

Article 16

Periodic penalty payments

1. Member States shall ensure that national administrative competition authorities may by decision impose effective, proportionate and dissuasive periodic penalty payments on undertakings and associations of undertakings. Such periodic penalty payments shall be determined in proportion to the average daily total worldwide turnover of such undertakings or associations of undertakings in the preceding business year per day and calculated from the date appointed by that decision in order to compel those undertakings or associations of undertakings at least:

(a) to supply complete and correct information in response to a request referred to in Article 8,

(b) to appear at an interview referred to in Article 9.

2. Member States shall ensure that national competition authorities may by decision impose effective, proportionate and dissuasive periodic penalty payments on undertakings and associations of undertakings. Such periodic penalty payments shall be determined in proportion to the average daily total worldwide turnover of such undertakings or associations of undertakings in the preceding business year per day and calculated from the date appointed by that decision in order to compel them at least:

(a) to submit to an inspection as referred to in Article 6(2);

(b) to comply with a decision referred to in Articles 10, 11 and 12.

(…)

CHAPTER VII

MUTUAL ASSISTANCE

Article 24

Cooperation between national competition authorities

1. Member States shall ensure that where national administrative competition authorities carry out an inspection or interview on behalf of and for the account of other national competition authorities pursuant to Article 22 of Regulation (EC) No 1/2003, officials and other accompanying persons authorised or appointed by the applicant national competition authority shall be permitted to attend and actively assist the requested national competition authority, under the supervision of the officials of the requested national competition authority, in the inspection or interview when the requested national competition authority exercises the powers referred to in Articles 6, 7 and 9 of this Directive.

2. Member States shall ensure that national administrative competition authorities are empowered in their own territory to exercise the powers referred to in Articles 6 to 9 of this Directive, in accordance with their national law on behalf of and for the account of other national competition authorities in order to establish whether there has been a failure by undertakings or associations of undertakings to comply with the investigative measures and decisions of the applicant national competition authority, as referred to in Articles 6 and 8 to 12 of this Directive. The applicant national competition authority and the requested national competition authority shall have the power to exchange and to use information in evidence for this purpose, subject to the safeguards set out in Article 12 of Regulation (EC) No 1/2003.

Article 25

Requests for the notification of preliminary objections and other documents

Without prejudice to any other form of notification made by an applicant authority in accordance with the rules in force in its Member State, Member States shall ensure that at the request of the applicant authority, the requested authority shall notify to the addressee on behalf of the applicant authority:

(a) any preliminary objections to the alleged infringement of Article 101 or 102 TFEU and any decisions applying those Articles;

(b) any other procedural act adopted in the context of enforcement proceedings which should be notified in accordance with national law; and

(c) any other relevant documents related to the application of Article 101 or 102 TFEU, including documents which relate to the enforcement of decisions imposing fines or periodic penalty payments.

Article 26

Requests for the enforcement of decisions imposing fines or periodic penalty payments

1. Member States shall ensure that at the request of the applicant authority, the requested authority shall enforce decisions imposing fines or periodic penalty payments adopted in accordance with Articles 13 and 16 by the applicant authority. This shall apply only to the extent that, after having made reasonable efforts in its own territory, the applicant authority has ascertained that the undertaking or association of undertakings against which the fine or periodic penalty payment is enforceable does not have sufficient assets in the Member State of the applicant authority to enable recovery of such fine or periodic penalty.

2. For cases not covered by paragraph 1 of this Article, in particular cases where the undertaking or association of undertakings against which the fine or periodic penalty payment is enforceable is not established in the Member State of the applicant authority, Member States shall provide that the requested authority may enforce decisions imposing fines or periodic penalty payments adopted in accordance with Articles 13 and 16 by the applicant authority, where the applicant authority so requests.

Point (d) of Article 27(3) shall not apply for the purposes of this paragraph.

3. The applicant authority may only request the enforcement of a final decision.

4. Questions regarding limitation periods for the enforcement of fines or periodic penalty payments shall be governed by the national law of the Member State of the applicant authority.

Article 27

General principles of cooperation

1. Member States shall ensure that the requests as referred to in Articles 25 and 26 are executed by the requested authority in accordance with the national law of the Member State of the requested authority.

2. Requests referred to in Articles 25 and 26 shall be executed without undue delay by means of a uniform instrument which shall be accompanied by a copy of the act to be notified or enforced. Such uniform instrument shall indicate:

(a) the name, known address of the addressee, and any other relevant information for the identification of the addressee;

(b) a summary of the relevant facts and circumstances;

(c) a summary of the attached copy of the act to be notified or enforced;

(d) the name, address and other contact details of the requested authority; and

(e) the period within which notification or enforcement should be effected, such as statutory deadlines or limitation periods.

3. For requests referred to in Article 26, in addition to the requirements set out in paragraph 2 of this Article, the uniform instrument shall provide the following:

(a) information about the decision permitting enforcement in the Member State of the applicant authority;

(b) the date when the decision became final;

(c) the amount of the fine or periodic penalty payment; and

(d) information showing the reasonable efforts made by the applicant authority to enforce the decision in its own territory.

4. The uniform instrument permitting enforcement by the requested authority shall constitute the sole basis for the enforcement measures taken by the requested authority, subject to the requirements of paragraph 2. It shall not be subject to any act of recognition, supplementing or replacement in the Member State of the requested authority. The requested authority shall take all necessary measures for the execution of this request, unless the requested authority invokes paragraph 6.

5. The applicant authority shall ensure that the uniform instrument is sent to the requested authority in the official language, or in one of the official languages, of the Member State of the requested authority, unless the requested authority and the applicant authority bilaterally agree on a case-by-case basis that the uniform instrument may be sent in another language. Where required under the national law of the Member State of the requested authority, the applicant authority shall provide a translation of the act to be notified or the decision permitting enforcement of the fine or periodic penalty payment into the official language, or into one of the official languages, of the Member State of the requested authority. This shall be without prejudice to the right of the requested authority and applicant authority to bilaterally agree, on a case-by-case basis, that such translation may be provided in a different language.

6. The requested authority shall not be obliged to execute a request referred to in Article 25 or 26 if:

(a) the request does not comply with the requirements of this Article; or

(b) the requested authority is able to demonstrate reasonable grounds showing how the execution of the request would be manifestly contrary to public policy in the Member State in which enforcement is sought.

If the requested authority intends to refuse a request for assistance referred to in Article 25 or 26 or requires additional information, it shall contact the applicant authority.

7. Member States shall ensure that, where requested by the requested authority, the applicant authority bears all reasonable additional costs in full, including translation, labour and administrative costs, in relation to actions taken as referred to in Article 24 or 25.

8. The requested authority may recover the full costs incurred in relation to actions taken as referred to in Article 26 from the fines or periodic penalty payments it has collected on behalf of the applicant authority, including translation, labour and administrative costs. If the requested authority is unsuccessful in collecting the fines or periodic penalty payments, it may request the applicant authority to bear the costs incurred.

Member States are free to provide that the requested authority may also recover the costs incurred in relation to the enforcement of such decisions from the undertaking against which the fine or periodic penalty payment is enforceable.

The requested authority shall recover the amounts due in the currency of its Member State, in accordance with the laws, regulations and administrative procedures or practices in that Member State.

The requested authority shall, if necessary, in accordance with its national law and practice, convert the fines or periodic penalty payments into the currency of the Member State of the requested

authority at the rate of exchange applying on the date on which the fines or periodic penalty payments were imposed.

Article 28

Disputes concerning requests for notification or enforcement of decisions imposing fines or periodic penalty payments

1. Disputes shall fall within the competence of the competent bodies of the Member State of the applicant authority, and shall be governed by the law of that Member State, where they concern:

(a) the lawfulness of an act to be notified in accordance with Article 25 or a decision to be enforced in accordance with Article 26; and

(b) the lawfulness of the uniform instrument permitting enforcement in the Member State of the requested authority.

2. Disputes concerning the enforcement measures taken in the Member State of the requested authority or concerning the validity of a notification made by the requested authority shall fall within the competence of the competent bodies of the Member State of the requested authority and shall be governed by the law of that Member State.

CHAPTER IX

GENERAL PROVISIONS

(…)

Article 33

The operation of European Competition Network

1. The costs incurred by the Commission in connection with the maintenance and the development of the central information system of the European Competition Network (European Competition Network System) and in connection with cooperation within the European Competition Network shall be borne by the general budget of the Union within the limit of the available appropriations.

2. The European Competition Network shall be able to develop and, where appropriate, publish best practices and recommendations on matters such as independence, resources, powers, fines and mutual assistance.

CHAPTER X

FINAL PROVISIONS

Article 34

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 4 February 2021. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

EU

Directive (EU)2019/1023 of 20 June 2019 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU)2017/1132 (Directive on restructuring and insolvency)

This new Directive on restructuring and insolvency issues has been published in the Official Journal L 172/18 of 26 June 2019.

DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 June 2019

on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee (1),

Having regard to the opinion of the Committee of the Regions (2),

Acting in accordance with the ordinary legislative procedure (3),

Whereas:

(1) The objective of this Directive is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. Without affecting workers' fundamental rights and freedoms, this Directive aims to remove such obstacles by ensuring that: viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.

(2) Restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes. Unless otherwise specifically provided for by national law, operational changes, such as the termination or amendment of contracts or the sale or other disposal of assets, should comply with the general requirements that are provided for under national law for such measures, in particular civil law and labour law rules. Any debt-to-equity swaps should also comply with safeguards provided for by national law. Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. Those frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole.

(3) Preventive restructuring frameworks should also prevent the build-up of non-performing loans. The availability of effective preventive restructuring frameworks would ensure that

action is taken before enterprises default on their loans, thereby helping to reduce the risk of loans becoming non-performing in cyclical downturns and mitigating the adverse impact on the financial sector. A significant percentage of businesses and jobs could be saved if preventive frameworks existed in all the Member States in which businesses' places of establishment, assets or creditors are situated. In restructuring frameworks the rights of all parties involved, including workers, should be protected in a balanced manner. At the same time, non-viable businesses with no prospect of survival should be liquidated as quickly as possible. Where a debtor in financial difficulties is not economically viable or cannot be readily restored to economic viability, restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole.

(4) There are differences between Member States as regards the range of the procedures available to debtors in financial difficulties in order to restructure their business. Some Member States have a limited range of procedures that allow the restructuring of businesses only at a relatively late stage, in the context of insolvency procedures. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be, or they are very formal, in particular because they limit the use of out-of-court arrangements. Preventive solutions are a growing trend in insolvency law. The trend favours approaches that, unlike the traditional approach of liquidating a business in financial difficulties, have the aim of restoring it to a healthy state or, at least, saving those of its units which are still economically viable. That approach, among other benefits to the economy, often helps to maintain jobs or reduce job losses. Moreover, the degree of involvement of judicial or administrative authorities, or the persons appointed by them, varies from no involvement or minimal involvement in some Member States to full involvement in others. Similarly, national rules giving entrepreneurs a second chance, in particular by granting them discharge from the debts they have incurred in the course of their business, vary between Member States in respect of the length of the discharge period and the conditions for granting such a discharge.

(5) In many Member States, it takes more than three years for entrepreneurs who are insolvent but honest to be discharged from their debts and make a fresh start. Inefficient discharge of debt and disqualification frameworks result in entrepreneurs having to relocate to other jurisdictions in order to benefit from a fresh start in a reasonable period of time, at considerable additional cost to both their creditors and the entrepreneurs themselves. Long disqualification orders, which often accompany a procedure leading to discharge of debt, create obstacles to the freedom to take up and pursue a self-employed, entrepreneurial activity.

(6) The excessive length of procedures concerning restructuring, insolvency and discharge of debt in several Member States is an important factor triggering low recovery rates and deterring investors from carrying out business in jurisdictions where procedures risk taking too long and being unduly costly.

(7) Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt translate into additional costs for investors when assessing the risk of debtors getting into financial difficulties in one or more Member States, or of investing in viable businesses in financial difficulties, as well as additional costs of restructuring enterprises that have establishments, creditors or assets in other Member States. This is most notably the case with restructuring international groups of companies. Investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another Member State as being one of the main reasons for not investing or not entering into a business relationship with a counterpart outside the Member State where they are based. That uncertainty acts as a disincentive which obstructs the freedom of establishment of undertakings and the promotion of entrepreneurship and harms the proper functioning of the internal market. Micro, small and medium-sized enterprises ('SMEs') in particular do not, for the most part, have the resources needed to assess risks related to cross-border activities.

(8) The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs.

(9) The additional cost of risk-assessment and of cross-border enforcement of claims for creditors of over-indebted entrepreneurs who relocate to another Member State in order to obtain a

discharge of debt in a much shorter period of time should also be reduced. The additional costs for entrepreneurs stemming from the need to relocate to another Member State in order to benefit from a discharge of debt should also be reduced. Furthermore, the obstacles stemming from long disqualification orders linked to an entrepreneur's insolvency or over-indebtedness inhibit entrepreneurship.

(10) Any restructuring operation, in particular one of major size which generates a significant impact, should be based on a dialogue with the stakeholders. That dialogue should cover the choice of the measures envisaged in relation to the objectives of the restructuring operation, as well as alternative options, and there should be appropriate involvement of employees' representatives as provided for in Union and national law.

(11) The obstacles to the exercise of fundamental freedoms are not limited to purely cross-border situations. An increasingly interconnected internal market, in which goods, services, capital and workers circulate freely, and which has an ever-stronger digital dimension, means that very few enterprises are purely national if all relevant elements are considered, such as their client base, supply chain, scope of activities, investor and capital base. Even purely national insolvencies can have an impact on the functioning of the internal market through the so-called domino effect of insolvencies, whereby a debtor's insolvency may trigger further insolvencies in the supply chain.

(12) Regulation (EU) 2015/848 of the European Parliament and of the Council (4) deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings as well as with the interconnection of insolvency registers. Its scope covers preventive procedures which promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons. However, that Regulation does not tackle the disparities between national laws regulating those procedures. Furthermore, an instrument limited only to cross-border insolvencies would not remove all obstacles to free movement, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of the potential financial difficulties of the debtor in the future. There is therefore a need to go beyond matters of judicial cooperation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs.

(13) This Directive should be without prejudice to the scope of Regulation (EU) 2015/848. It aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. It does not change the approach taken in that Regulation of allowing Member States to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A to that Regulation. Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments.

(14) The advantage of the application of Regulation (EU) 2015/848 is that it provides for safeguards against abusive relocation of the debtor's centre of main interests during cross-border insolvency proceedings. Certain restrictions should also apply to procedures not covered by that Regulation.

(15) It is necessary to lower the costs of restructuring for both debtors and creditors. Therefore, the differences between Member States which hamper the early restructuring of viable debtors in financial difficulties and the possibility of a discharge of debt for honest entrepreneurs should be reduced. Reducing such differences should bring greater transparency, legal certainty and predictability across the Union. It should maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence of restructuring and insolvency procedures should also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.

(16) Removing the barriers to effective preventive restructuring of viable debtors in financial difficulties contributes to minimising job losses and losses of value for creditors in the supply chain, preserves know-how and skills and hence benefits the wider economy. Facilitating a discharge of debt for entrepreneurs would help to avoid their exclusion from the labour market and enable them to restart entrepreneurial activities, drawing lessons from past experience. Moreover, reducing the length of restructuring procedures would result in higher recovery rates for creditors as the passing of time would normally only result in a further loss of value of the debtor or the debtor's business. Finally, efficient preventive restructuring, insolvency and discharge procedures would enable a better assessment of the risks involved in lending and borrowing decisions and facilitate the

adjustment for insolvent or over-indebted debtors, minimising the economic and social costs involved in their deleveraging process. This Directive should allow Member States flexibility to apply common principles while respecting national legal systems. Member States should be able to maintain or introduce in their national legal systems preventive restructuring frameworks other than those provided for by this Directive.

(17) Enterprises, and in particular SMEs, which represent 99 % of all businesses in the Union, should benefit from a more coherent approach at Union level. SMEs are more likely to be liquidated than restructured, since they have to bear costs that are disproportionately higher than those faced by larger enterprises. SMEs, especially when facing financial difficulties, often do not have the necessary resources to cope with high restructuring costs and to take advantage of the more efficient restructuring procedures available only in some Member States. In order to help such debtors restructure at low cost, comprehensive check-lists for restructuring plans, adapted to the needs and specificities of SMEs, should be developed at national level and made available online. In addition, early warning tools should be put in place to warn debtors of the urgent need to act, taking into account the limited resources of SMEs for hiring experts.

(18) When defining SMEs, Member States could give due consideration to Directive 2013/34/EU of the European Parliament and of the Council (5) or the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (6).

(19) It is appropriate to exclude from the scope of this Directive debtors which are insurance and re-insurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC of the European Parliament and of the Council (7), credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council (8), investment firms and collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013, central counterparties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012 of the European Parliament and of the Council (9), central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council (10) and other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU of the European Parliament and of the Council (11). Such debtors are subject to special arrangements and the national supervisory and resolution authorities have wide-ranging powers of intervention in relation to them. Member States should be able to exclude other financial entities providing financial services which are subject to comparable arrangements and powers of intervention.

(20) For similar considerations, it is also appropriate to exclude from the scope of this Directive public bodies under national law. Member States should also be able to limit the access to preventive restructuring frameworks to legal persons, since the financial difficulties of entrepreneurs may be efficiently addressed not only by means of preventive restructuring procedures but also by means of procedures which lead to a discharge of debt or by means of informal restructurings based on contractual agreements. Member States with different legal systems, where the same type of entity has a different legal status in those legal systems, should be able to apply one uniform regime to such entities. A preventive restructuring framework laid down pursuant to this Directive should not affect claims and entitlements against a debtor that arise from occupational pension systems if those claims and entitlements accrued during a period prior to the restructuring.

(21) Consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang. Furthermore, it is often not possible to draw a clear distinction between the debts incurred by entrepreneurs in the course of their trade, business, craft or profession and those incurred outside those activities. Entrepreneurs would not effectively benefit from a second chance if they had to go through separate procedures, with different access conditions and discharge periods, to discharge their business debts and other debts incurred outside their business. For those reasons, although this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for Member States to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt.

(22) The earlier a debtor can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in the case of a business the viability of which is permanently impaired, the more orderly and efficient the liquidation process would be. Clear, up-to-date, concise and user-friendly information on the available preventive restructuring procedures as well as one or more early warning tools should therefore be put in place to incentivise debtors that start to experience financial difficulties to

take early action. Early warning tools which take the form of alert mechanisms that indicate when the debtor has not made certain types of payments could be triggered by, for example, non-payment of taxes or social security contributions. Such tools could be developed either by Member States or by private entities, provided that the objective is met. Member States should make information about early warning tools available online, for example on a dedicated website or webpage. Member States should be able to adapt the early warning tools depending on the size of the enterprise and to lay down specific provisions on early warning tools for large-sized enterprises and groups that take into account their peculiarities. This Directive should not impose any liability on Member States for potential damage incurred through restructuring procedures which are triggered by such early warning tools.

(23) In an effort to increase the support of employees and their representatives, Member States should ensure that employees' representatives are given access to relevant and up-to-date information regarding the availability of early warning tools and it should also be possible for them to provide support to employees' representatives in assessing the economic situation of the debtor.

(24) A restructuring framework should be available to debtors, including legal entities and, where so provided under national law, natural persons and groups of companies, to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured. A restructuring framework should be available before a debtor becomes insolvent under national law, namely before the debtor fulfils the conditions under national law for entering collective insolvency proceedings, which normally entail a total divestment of the debtor and the appointment of a liquidator. In order to avoid restructuring frameworks being misused, the financial difficulties of the debtor should indicate a likelihood of insolvency and the restructuring plan should be capable of preventing the insolvency of the debtor and ensuring the viability of the business.

(25) Member States should be able to determine whether claims that fall due or that come into existence after an application to open a preventive restructuring procedure has been submitted or after the procedure has been opened are included in the preventive restructuring measures or the stay of individual enforcement actions. Member States should be able to decide whether the stay of individual enforcement actions has an effect on the interest due on claims.

(26) Member States should be able to introduce a viability test as a condition for access to the preventive restructuring procedure provided for by this Directive. Such a test should be carried out without detriment to the debtor's assets, which could take the form of, among other things, the granting of an interim stay or the carrying out without undue delay of the test. However, the absence of detriment should not prevent Member States from requiring debtors to prove their viability at their own cost.

(27) The fact that Member States can limit access to a restructuring framework with regard to debtors that have been sentenced for serious breaches of accounting or book-keeping obligations should not prevent Member States from also limiting the access of debtors to preventive restructuring frameworks where their books and records are incomplete or deficient to a degree that makes it impossible to ascertain the business and financial situation of the debtors.

(28) Member States should be able to extend the scope of preventive restructuring frameworks provided for by this Directive to situations in which debtors face non-financial difficulties, provided that such difficulties give rise to a real and serious threat to a debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months, or even longer, in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.

(29) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures. Where this Directive is implemented by means of more than one procedure within a restructuring framework, the debtor should have access to all rights and safeguards provided for by this Directive with the aim of achieving an effective restructuring. Except in the event of mandatory involvement of judicial or administrative authorities as provided for under this Directive, Member States should be able to limit the involvement of such authorities to situations in which it is necessary and proportionate, while taking into consideration, among other things, the aim of safeguarding the rights and interests of debtors and of affected parties, as well as the aim of reducing delays and the cost of the procedures. Where creditors or

employees' representatives are allowed to initiate a restructuring procedure under national law and where the debtor is an SME, Member States should require the agreement of the debtor as a precondition for the initiation of the procedure, and should also be able to extend that requirement to debtors which are large enterprises.

(30) To avoid unnecessary costs, to reflect the early nature of preventive restructuring and to encourage debtors to apply for preventive restructuring at an early stage of their financial difficulties, they should, in principle, be left in control of their assets and the day-to-day operation of their business. The appointment of a practitioner in the field of restructuring, to supervise the activity of a debtor or to partially take over control of a debtor's daily operations, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. Nevertheless, Member States should be able to determine that the appointment of a practitioner in the field of restructuring is always necessary in certain circumstances, such as where: the debtor benefits from a general stay of individual enforcement actions; the restructuring plan needs to be confirmed by means of a cross-class cram-down; the restructuring plan includes measures affecting the rights of workers; or the debtor or its management have acted in a criminal, fraudulent, or detrimental manner in business relations.

(31) For the purpose of assisting the parties with negotiating and drafting a restructuring plan, Member States should provide for the mandatory appointment of a practitioner in the field of restructuring where: a judicial or administrative authority grants the debtor a general stay of individual enforcement actions, provided that in such case a practitioner is needed to safeguard the interests of the parties; the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; it was requested by the debtor; or it is requested by a majority of creditors provided that the creditors cover the costs and fees of the practitioner.

(32) A debtor should be able to benefit from a temporary stay of individual enforcement actions, whether granted by a judicial or administrative authority or by operation of law, with the aim of supporting the negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of its estate during the negotiations. Where so provided by national law, it should also be possible for the stay to apply for the benefit of third-party security providers, including guarantors and collateral givers. However, Member States should be able to provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not fulfil the objective of supporting the negotiations. Grounds for refusal might include a lack of support by the required majorities of creditors or, where so provided under national law, the debtor's actual inability to pay debts as they fall due.

(33) In order to facilitate and accelerate the course of proceedings, Member States should be able to establish, on a rebuttable basis, presumptions for the presence of grounds for refusal of the stay, where, for example, the debtor shows conduct that is typical of a debtor that is unable to pay debts as they fall due — such as a substantial default vis-à-vis workers or tax or social security agencies — or where a financial crime has been committed by the debtor or the current management of an enterprise which gives reason to believe that a majority of creditors would not support the start of the negotiations.

(34) A stay of individual enforcement actions could be general, in that it affects all creditors, or it could apply only to some individual creditors or categories of creditors. Member States should be able to exclude certain claims or categories of claims from the scope of the stay, in well-defined circumstances, such as claims which are secured by assets the removal of which would not jeopardise the restructuring of the business or claims of creditors in respect of which a stay would cause unfair prejudice, such as by way of an uncompensated loss or depreciation of collateral.

(35) In order to provide for a fair balance between the rights of the debtor and those of creditors, a stay of individual enforcement actions should apply for a maximum period of up to four months. Complex restructurings may, however, require more time. Member States should be able to provide that, in such cases, extensions of the initial period of the stay can be granted by the judicial or administrative authority. Where a judicial or administrative authority does not take a decision on the extension of a stay before it lapses, the stay should cease to have effect upon expiry of the stay period. In the interest of legal certainty, the total period of the stay should be limited to 12 months. Member States should be able to provide for an indefinite stay where the debtor becomes insolvent under national law. Member States should be able to decide whether a short interim stay pending a judicial or administrative authority's decision on access to

the preventive restructuring framework is subject to the time limits under this Directive.

(36) To ensure that creditors do not suffer unnecessary detriment, Member States should provide that judicial or administrative authorities can lift a stay of individual enforcement actions if it no longer fulfils the objective of supporting negotiations, for example if it becomes apparent that the required majority of creditors does not support the continuation of the negotiations. The stay should also be lifted if creditors are unfairly prejudiced by it, where Member States provide for such a possibility. Member States should be allowed to limit the possibility to lift the stay to situations where creditors have not had the opportunity to be heard before it came into force or before it was extended. Member States should also be allowed to provide for a minimum period during which the stay cannot be lifted. In establishing whether there is unfair prejudice to creditors, judicial or administrative authorities should be able to take into account whether the stay would preserve the overall value of the estate, and whether the debtor acts in bad faith or with the intention of causing prejudice or generally acts against the legitimate expectations of the general body of creditors.

(37) This Directive does not cover provisions on compensation or guarantees for creditors of which the collateral is likely to decrease in value during the stay. A single creditor or a class of creditors would be unfairly prejudiced by the stay if, for example, their claims would be made substantially worse-off as a result of the stay than if the stay did not apply, or if the creditor is put more at a disadvantage than other creditors in a similar position. Member States should be able to provide that, whenever unfair prejudice is established in respect of one or more creditors or one or more classes of creditors, the stay can be lifted in respect of those creditors or classes of creditors or in respect of all creditors. Member States should be able to decide who is entitled to request the lifting of the stay.

(38) A stay of individual enforcement actions should also result in the suspension of a debtor's obligation to file for, or the opening at a creditor's request of, an insolvency procedure which could end in liquidation of the debtor. Such insolvency procedures should, in addition to those limited by law to having as the only possible outcome the liquidation of the debtor, also include procedures that could lead to a restructuring of the debtor. The suspension of the opening of an insolvency procedure at the request of creditors should apply not only where Member States provide for a general stay of individual enforcement actions covering all creditors, but also where Member States provide for the option of a stay of individual enforcement actions covering only a limited number of creditors. Nevertheless, Member States should be able to provide that insolvency proceedings can be opened at the request of public authorities which are not acting in a creditor capacity, but in the general interest, such as a public prosecutor.

(39) This Directive should not prevent debtors from paying, in the ordinary course of business, claims of unaffected creditors, and claims of affected creditors that arise during the stay of individual enforcement actions. To ensure that creditors with claims that came into existence before the opening of a restructuring procedure or a stay of individual enforcement actions do not put pressure on the debtor to pay those claims, which otherwise would be reduced through the implementation of the restructuring plan, Member States should be able to provide for the suspension of the obligation on the debtor with respect to payment of those claims.

(40) When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so-called ipso facto clauses, entitling them to terminate the supply contract solely on account of the insolvency, even if the debtor has duly met its obligations. Ipso facto clauses could also be triggered when a debtor applies for preventive restructuring measures. Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay.

(41) Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential supplies such as gas, electricity, water, telecommunication and card payment services are concerned. Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its

obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long-term supply contracts and franchise agreements.

(42) This Directive lays down minimum standards for the content of a restructuring plan. However, Member States should be able to require additional explanations in the restructuring plan, concerning for example the criteria according to which creditors have been grouped, which may be relevant in cases where a debt is only partially secured. Member States should not be obliged to require an expert opinion regarding the value of assets which need to be indicated in the plan.

(43) Creditors affected by a restructuring plan, including workers, and, where allowed under national law, equity-holders, should have a right to vote on the adoption of a restructuring plan. Member States should be able to provide for limited exceptions to this rule. Parties unaffected by the restructuring plan should have no voting rights in relation to the plan, nor should their support be required for the approval of any plan. The concept of 'affected parties' should only include workers in their capacity as creditors. Therefore, if Member States decide to exempt the claims of workers from the preventive restructuring framework, workers should not be considered as affected parties. The vote on the adoption of a restructuring plan could take the form of a formal voting process or of a consultation and agreement with the required majority of affected parties. However, where the vote takes the form of an agreement with the requisite majority, affected parties which were not involved in the agreement could nevertheless be offered the opportunity to join the restructuring plan.

(44) To ensure that rights which are substantially similar are treated equitably and that restructuring plans can be adopted without unfairly prejudicing the rights of affected parties, affected parties should be treated in separate classes which correspond to the class formation criteria under national law. 'Class formation' means the grouping of affected parties for the purposes of adopting a plan in such a way as to reflect their rights and the seniority of their claims and interests. As a minimum, secured and unsecured creditors should always be treated in separate classes. Member States should, however, be able to require that more than two classes of creditors are formed, including different classes of unsecured or secured creditors and classes of creditors with subordinated claims. Member States should also be able to treat types of creditors that lack a sufficient commonality of interest, such as tax or social security authorities, in separate classes. It should be possible for Member States to provide that secured claims can be divided into secured and unsecured parts based on collateral valuation. It should also be possible for Member States to lay down specific rules supporting class formation where non-diversified or otherwise especially vulnerable creditors, such as workers or small suppliers, would benefit from such class formation.

(45) Member States should be able to provide that debtors that are SMEs, can, on account of their relatively simple capital structure, be exempted from the obligation to treat affected parties in separate classes. In cases where SMEs have opted to create only one voting class and that class votes against the plan, it should be possible for debtors to submit another plan, in line with the general principles of this Directive.

(46) Member States should in any case ensure that adequate treatment is given in their national law to matters of particular importance for class formation purposes, such as claims from connected parties, and that their national law contains rules that deal with contingent claims and contested claims. Member States should be allowed to regulate how contested claims are to be handled for the purposes of allocating voting rights. The judicial or administrative authority should examine class formation, including the selection of creditors affected by the plan, when a restructuring plan is submitted for confirmation. However, Member States should be able to provide that such authority can also examine class formation at an earlier stage should the proposer of the plan seek validation or guidance in advance.

(47) Requisite majorities should be established by national law to ensure that a minority of affected parties in each class cannot obstruct the adoption of a restructuring plan which does not unfairly reduce their rights and interests. Without a majority rule binding dissenting secured creditors, early restructuring would not be possible in many cases, for example where a financial restructuring is needed but the business is otherwise viable. To ensure that parties have a say on the adoption of restructuring plans proportionate to the stakes they have in the business, the required majority should be based on the amount of the creditors' claims or equity holders' interests in any given class. Member States should, in addition, be able to require a majority in the number of affected parties in each class. Member States should be able to lay down rules in relation to affected parties with a right to vote which do not exercise that right in a correct manner or are not represented, such as rules allowing those

affected parties to be taken into account for a participation threshold or for the calculation of a majority. Member States should also be able to provide for a participation threshold for the vote.

(48) Confirmation of a restructuring plan by a judicial or administrative authority is necessary to ensure that the reduction of the rights of creditors or interests of equity holders is proportionate to the benefits of the restructuring and that they have access to an effective remedy. Confirmation is particularly necessary where: there are dissenting affected parties; the restructuring plan contains provisions on new financing; or the plan involves a loss of more than 25 % of the work force. Member States should, however, be able to provide that confirmation by a judicial or administrative authority is necessary also in other cases. A confirmation of a plan which involves the loss of more than 25 % of the work force should only be necessary where national law allows preventive restructuring frameworks to provide for measures that have a direct effect on employment contracts.

(49) Member States should ensure that a judicial or administrative authority is able to reject a plan where it has been established that it reduces the rights of dissenting creditors or equity holders either to a level below what they could reasonably expect to receive in the event of the liquidation of the debtor's business, whether by piecemeal liquidation or by a sale as a going concern, depending on the particular circumstances of each debtor, or to a level below what they could reasonably expect in the event of the next-best-alternative scenario where the restructuring plan is not confirmed. However, where the plan is confirmed through a cross-class cram-down, reference should be made to the protection mechanism used in such scenario. Where Member States opt to carry out a valuation of the debtor as a going concern, the going-concern value should take into account the debtor's business in the longer term, as opposed to the liquidation value. The going-concern value is, as a rule, higher than the liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders and clients, continues to generate revenues, and limits the impact on workers.

(50) While compliance with the best-interests-of-creditors test should be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground in order to avoid a valuation being made in every case, Member States should be able to provide that other conditions for confirmation can be examined ex officio. Member States should be able to add other conditions which need to be complied with in order to confirm a restructuring plan, such as whether equity holders are adequately protected. Judicial or administrative authorities should be able to refuse to confirm restructuring plans which have no reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business. However, Member States should not be required to ensure that such assessment is made ex officio.

(51) Notification to all affected parties should be one of the conditions for confirmation of a restructuring plan. Member States should be able to define the form of the notification, to identify the time when it is to be made, as well as to lay down provisions for the treatment of unknown claims as regards notification. They should also be able to provide that non-affected parties have to be informed about the restructuring plan.

(52) Satisfying the 'best-interest-of-creditors' test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed. Member States should be able to choose one of those thresholds when implementing the best-interest-of-creditors test in national law. That test should be applied in any case where a plan needs to be confirmed in order to be binding for dissenting creditors or, as the case may be, dissenting classes of creditors. As a consequence of the best-interest-of-creditors test, where public institutional creditors have a privileged status under national law, Member States could provide that the plan cannot impose a full or partial cancellation of the claims of those creditors.

(53) While a restructuring plan should always be adopted if the required majority in each affected class supports the plan, it should still be possible for a restructuring plan which is not supported by the required majority in each affected class to be confirmed by a judicial or administrative authority, upon the proposal of a debtor or with the debtor's agreement. In the case of a legal person, Member States should be able to decide if, for the purpose of adopting or confirming a restructuring plan, the debtor is to be understood as the legal person's management board or a certain majority of shareholders or equity holders. For the plan to be confirmed in the case of a cross-class cram-down, it should be

supported by a majority of voting classes of affected parties. At least one of those classes should be a secured creditor class or senior to the ordinary unsecured creditors class.

(54) It should be possible that, where a majority of voting classes does not support the restructuring plan, the plan can nevertheless be confirmed if it is supported by at least one affected or impaired class of creditors which, upon a valuation of the debtor as a going concern, receive payment or keep any interest, or, where so provided under national law, can reasonably be presumed to receive payment or keep any interest, if the normal ranking of liquidation priorities is applied under national law. In such a case, Member States should be able to increase the number of classes which are required to approve the plan, without necessarily requiring that all those classes should, upon a valuation of the debtor as a going concern, receive payment or keep any interest under national law. However, Member States should not require the consent of all classes. Accordingly, where there are only two classes of creditors, the consent of at least one class should be deemed to be sufficient, if the other conditions for the application of a cross-class cram-down are met. The impairment of creditors should be understood to mean that there is a reduction in the value of their claims.

(55) In the case of a cross-class cram-down, Member States should ensure that dissenting classes of affected creditors are not unfairly prejudiced under the proposed plan and Member States should provide sufficient protection for such dissenting classes. Member States should be able to protect a dissenting class of affected creditors by ensuring that it is treated at least as favourably as any other class of the same rank and more favourably than any more junior class. Alternatively, Member States could protect a dissenting class of affected creditors by ensuring that such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the 'absolute priority rule'). Member States should have discretion in implementing the concept of 'payment in full', including in relation to the timing of the payment, as long as the principal of the claim and, in the case of secured creditors, the value of the collateral are protected. Member States should also be able to decide on the choice of the equivalent means by which the original claim could be satisfied in full.

(56) Member States should be able to derogate from the absolute priority rule, for example where it is considered fair that equity holders keep certain interests under the plan despite a more senior class being obliged to accept a reduction of its claims, or that essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors. Member States should be able to choose which of the above-mentioned protection mechanisms they put in place.

(57) While shareholders' or other equity holders' legitimate interests should be protected, Member States should ensure that they cannot unreasonably prevent the adoption of restructuring plans that would bring the debtor back to viability. Member States should be able to use different means to achieve that goal, for example by not giving equity holders the right to vote on a restructuring plan and by not making the adoption of a restructuring plan conditional on the agreement of equity holders that, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied. However, where equity holders have the right to vote on a restructuring plan, a judicial or administrative authority should be able to confirm the plan by applying the rules on cross-class cram down notwithstanding the dissent of one or more classes of equity holders. Member States that exclude equity holders from voting should not be required to apply the absolute priority rule in the relationship between creditors and equity holders. Another possible means of ensuring that equity holders do not unreasonably prevent the adoption of restructuring plans would be to ensure that restructuring measures that directly affect equity holders' rights, and that need to be approved by a general meeting of shareholders under company law, are not subject to unreasonably high majority requirements and that equity holders have no competence in terms of restructuring measures that do not directly affect their rights.

(58) Several classes of equity holders can be needed where different classes of shareholdings with different rights exist. Equity holders of SMEs that are not mere investors, but are the owners of the enterprise and contribute to the enterprise in other ways, such as managerial expertise, might not have an incentive to restructure under such conditions. For this reason, the cross-class cram-down should remain optional for debtors that are SMEs.

(59) The restructuring plan should, for the purposes of its implementation, make it possible for equity holders of SMEs to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts.

(60) Throughout the preventive restructuring procedures, workers should enjoy full labour law

protection. In particular, this Directive should be without prejudice to workers' rights guaranteed by Council Directives 98/59/EC (12) and 2001/23/EC (13), and Directives 2002/14/EC (14), 2008/94/EC (15) and 2009/38/EC (16) of the European Parliament and of the Council. The obligations concerning information and consultation of employees under national law transposing those Directives remain fully intact. This includes obligations to inform and consult employees' representatives on the decision to have recourse to a preventive restructuring framework in accordance with Directive 2002/14/EC.

(61) Employees and their representatives should be provided with information regarding the proposed restructuring plan in so far as provided for in Union law, in order to allow them to undertake an in-depth assessment of the various scenarios. Furthermore, employees and their representatives should be involved to the extent necessary to fulfil the consultation requirements laid down in Union law. Given the need to ensure an appropriate level of protection of workers, Member States should be required to exempt workers' outstanding claims from any stay of individual enforcement actions, irrespective of the question of whether those claims arise before or after the stay is granted. A stay of enforcement of workers' outstanding claims should be allowed only for the amounts and for the period for which the payment of such claims is effectively guaranteed at a similar level by other means under national law. Where national law provides for limitations on the liability of guarantee institutions, either in terms of the length of the guarantee or the amount paid to workers, workers should be able to enforce any shortfall in their claims against the employer even during the stay period. Alternatively, Member States should be able to exclude workers' claims from the scope of the preventive restructuring frameworks and provide for their protection under national law.

(62) Where a restructuring plan entails the transfer of a part of an undertaking or business, workers' rights arising from a contract of employment or from an employment relationship, in particular the right to wages, should be safeguarded in accordance with Articles 3 and 4 of Directive 2001/23/EC, without prejudice to the specific rules applying in the event of insolvency proceedings under Article 5 of that Directive and in particular the possibilities provided for in Article 5(2) of that Directive. This Directive should be without prejudice to the rights to information and consultation, which are guaranteed by Directive 2002/14/EC, including on decisions likely to lead to substantial changes in work organisation or in contractual relations with a view to reaching an agreement on such decisions. Furthermore, under this Directive, workers whose claims are affected by a restructuring plan should have the right to vote on the plan. For the purposes of voting on the restructuring plan, Member States should be able to decide to place workers in a class separate from other classes of creditors.

(63) Judicial or administrative authorities should only decide on the valuation of a business — either in liquidation or in the next-best-alternative scenario, if the restructuring plan was not confirmed — if a dissenting affected party challenges the restructuring plan. This should not prevent Member States from carrying out valuations in another context under national law. However, it should be possible that such a decision also consists of an approval of a valuation by an expert or of a valuation submitted by the debtor or another party at an earlier stage of the process. Where the decision to carry out a valuation is taken, Member States should be able to provide for special rules, separate from general civil procedural law, for a valuation in restructuring cases, with a view to ensuring that it is carried out in an expedited manner. Nothing in this Directive should affect the rules on burden of proof under national law in the case of a valuation.

(64) The binding effects of a restructuring plan should be limited to the affected parties that were involved in the adoption of the plan. Member States should be able to determine what it means for a creditor to be involved, including in the case of unknown creditors or creditors of future claims. For example, Member States should be able to decide how to deal with creditors that have been notified correctly but that did not participate in the procedures.

(65) Interested affected parties should be able to appeal a decision on the confirmation of a restructuring plan issued by an administrative authority. Member States should also be able to introduce the option of appealing a decision on the confirmation of a restructuring plan issued by a judicial authority. However, in order to ensure the effectiveness of the plan, to reduce uncertainty and to avoid unjustifiable delays, appeals should, as a rule, not have suspensive effects and therefore not preclude the implementation of a restructuring plan. Member States should be able to determine and limit the grounds for appeal. Where the decision on the confirmation of the plan is appealed, Member States should be able to allow the judicial authority to issue a preliminary or summary decision that protects the execution and implementation of the plan against the consequences of the pending appeal being

upheld. Where an appeal is upheld, judicial or administrative authorities should be able to consider, as an alternative to setting aside the plan, an amendment of the plan, where Member States provide for such a possibility, as well as a confirmation of the plan without amendments. It should be possible for any amendments to the plan to be proposed or voted on by the parties, on their own initiative or at the request of the judicial authority. Member States could also provide for compensation for monetary losses for the party whose appeal was upheld. National law should be able to deal with a potential new stay or extension of the stay in event of the judicial authority deciding that the appeal has suspensive effect.

(66) The success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation. Financial assistance should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period. Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures.

(67) National insolvency laws providing for avoidance actions of interim and new financing or providing that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties could jeopardise the availability of financing necessary for the successful negotiation and implementation of a restructuring plan. This Directive should be without prejudice to other grounds for declaring new or interim financing void, voidable or unenforceable, or for triggering civil, criminal or administrative liability for providers of such financing, as laid down in national law. Such other grounds could include, among other things, fraud, bad faith, a certain type of relationship between the parties which could be associated with a conflict of interest, such as in the case of transactions between related parties or between shareholders and the company, and transactions where a party received value or collateral without being entitled to it at the time of the transaction or in the manner performed.

(68) When interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority. To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected. Furthermore, this Directive should not prevent Member States from introducing an ex ante control mechanism for interim financing. Member States should be able to limit the protection for new financing to cases where the plan is confirmed by a judicial or administrative authority and for interim financing to cases where it is subject to ex ante control. An ex ante control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring, by a creditor's committee or by a judicial or administrative authority. Protection from avoidance actions and protection from personal liability are minimum guarantees that should be granted to interim financing and new financing. However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures.

(69) In order to promote a culture that encourages early preventive restructuring, it is desirable that transactions which are reasonable and immediately necessary for the negotiation or implementation of a restructuring plan also be given protection from avoidance actions in subsequent insolvency procedures. Judicial or administrative authorities should be able, when determining the reasonableness and immediate necessity of costs and fees, for instance, to consider projections and estimates submitted to affected parties, a creditor's committee, a practitioner in the field of restructuring or the judicial or administrative authority itself. To this end, Member States should also be able to require debtors to provide and update relevant estimates. Such protection should enhance certainty in respect of transactions with businesses that are known to be in financial difficulties and remove the fear of creditors and investors that all such transactions could be declared void in the event that the restructuring fails. Member States should be able to provide for a point in time prior to the opening of a preventive restructuring procedure and to the granting of the stay of individual enforcement actions, from which fees and costs of negotiating,

adopting, confirming or seeking professional advice for the restructuring plan start to benefit from protection against avoidance actions. In the case of other payments and disbursements and the protection of the payment of workers' wages, such a starting point could also be the granting of the stay or the opening of the preventive restructuring procedure.

(70) To further promote preventive restructuring, it is important to ensure that directors are not dissuaded from exercising reasonable business judgment or taking reasonable commercial risks, particularly where to do so would improve the chances of a restructuring of potentially viable businesses. Where the company experiences financial difficulties, directors should take steps to minimise losses and to avoid insolvency, such as: seeking professional advice, including on restructuring and insolvency, for instance by making use of early warning tools where applicable; protecting the assets of the company so as to maximise value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; refraining from committing the company to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; continuing to trade in circumstances where it is appropriate to do so in order to maximise going-concern value; holding negotiations with creditors and entering preventive restructuring procedures.

(71) Where the debtor is close to insolvency, it is also important to protect the legitimate interests of creditors from management decisions that may have an impact on the constitution of the debtor's estate, in particular where those decisions could have the effect of further diminishing the value of the estate available for restructuring efforts or for distribution to creditors. It is therefore necessary to ensure that, in such circumstances, directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of stakeholders, and avoid agreeing to transactions at below market value, or taking actions leading to unfair preference being given to one or more stakeholders. Member States should be able to implement the corresponding provisions of this Directive by ensuring that judicial or administrative authorities, when assessing whether a director is to be held liable for breaches of duty of care, take the rules on duties of directors laid down in this Directive into account. This Directive is not intended to establish any hierarchy among the different parties whose interests need to be given due regard. However, Member States should be able to decide on establishing such a hierarchy. This Directive should be without prejudice to Member States' national rules on the decision-making processes in a company.

(72) Entrepreneurs exercising a trade, business, craft or independent, self-employed profession can run the risk of becoming insolvent. The differences between the Member States in terms of opportunities for a fresh start could incentivise over-indebted or insolvent entrepreneurs to relocate to a Member State other than the Member State where they are established, in order to benefit from shorter discharge periods or more attractive conditions for discharge, leading to additional legal uncertainty and costs for the creditors when recovering their claims. Furthermore, the effects of insolvency, in particular the social stigma, the legal consequences, such as disqualifying entrepreneurs from taking up and pursuing entrepreneurial activity, and the continual inability to pay off debts, constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have become insolvent have more chances of being successful the next time.

(73) Steps should therefore be taken to reduce the negative effects of over-indebtedness or insolvency on entrepreneurs, in particular by allowing for a full discharge of debt after a certain period of time and by limiting the length of disqualification orders issued in connection with a debtor's over-indebtedness or insolvency. The concept of 'insolvency' should be defined by national law and it could take the form of over-indebtedness. The concept of 'entrepreneur' within the meaning of this Directive should have no bearing on the position of managers or directors of a company, which should be treated in accordance with national law. Member States should be able to decide how to obtain access to discharge, including the possibility of requiring the debtor to request discharge.

(74) Member States should be able to provide for the possibility to adjust the repayment obligations of insolvent entrepreneurs when there is a significant change in their financial situation, regardless of whether it improves or deteriorates. This Directive should not require that a repayment plan be supported by a majority of creditors. Member States should be able to provide that entrepreneurs are not prevented from starting a new activity in the same or different field during the implementation of the repayment plan.

(75) A discharge of debt should be available in procedures that include a repayment plan, a realisation of assets, or a combination of both. In implementing those rules, Member States should be able to choose freely among those options. If

more than one procedure leading to discharge of debt is available under national law, Member States should ensure that at least one of those procedures gives insolvent entrepreneurs the opportunity of having a full discharge of debt within a period that does not exceed three years. In the case of procedures which combine a realisation of assets and a repayment plan, the discharge period should start, at the latest, from the date the repayment plan is confirmed by a court or starts being implemented, for example from the first instalment under the plan, but it could also start earlier, such as when a decision to open the procedure is taken.

(76) In procedures that do not include a repayment plan, the discharge period should start, at the latest, from the date when a decision to open the procedure is taken by a judicial or administrative authority, or the date of the establishment of the insolvency estate. For the purposes of calculating the duration of the discharge period under this Directive, Member States should be able to provide that the concept of 'opening of procedure' does not include preliminary measures, such as preservation measures or the appointment of a preliminary insolvency practitioner, unless such measures allow for the realisation of assets, including the disposal and the distribution of assets to creditors. The establishment of the insolvency estate should not necessarily entail a formal decision or confirmation by a judicial or administrative authority, where such decision is not required under national law, and could consist in the submission of the inventory of assets and liabilities.

(77) Where the procedural path leading to a discharge of debt entails the realisation of an entrepreneur's assets, Member States should not be prevented from providing that the request for discharge is treated separately from the realisation of assets, provided that such request constitutes an integral part of the procedural path leading to the discharge under this Directive. Member States should be able to decide on the rules on the burden of proof in order for the discharge to operate, which means that it should be possible for entrepreneurs to be required by law to prove compliance with their obligations.

(78) A full discharge of debt or the ending of disqualifications after a period no longer than three years is not appropriate in all circumstances, therefore derogations from this rule which are duly justified by reasons laid down in national law might need to be introduced. For instance, such derogations should be introduced in cases where the debtor is dishonest or has acted in bad faith. Where entrepreneurs do not benefit from a presumption of honesty and good faith under national law, the burden of proof concerning their honesty and good faith should not make it unnecessarily difficult or onerous for them to enter the procedure.

(79) In establishing whether an entrepreneur was dishonest, judicial or administrative authorities might take into account circumstances such as: the nature and extent of the debt; the time when the debt was incurred; the efforts of the entrepreneur to pay the debt and comply with legal obligations, including public licensing requirements and the need for proper bookkeeping; actions on the entrepreneur's part to frustrate recourse by creditors; the fulfilment of duties in the likelihood of insolvency, which are incumbent on entrepreneurs who are directors of a company; and compliance with Union and national competition and labour law. It should also be possible to introduce derogations where the entrepreneur has not complied with certain legal obligations, including obligations to maximise returns to creditors, which could take the form of a general obligation to generate income or assets. It should furthermore be possible to introduce specific derogations where it is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors, such as where the creditor is a natural person who needs more protection than the debtor.

(80) A derogation could also be justified where the costs of the procedure leading to a discharge of debt, including the fees of judicial and administrative authorities and of practitioners, are not covered. Member States should be able to provide that the benefits of that discharge can be revoked where, for example, the financial situation of the debtor improves significantly due to unexpected circumstances, such as winning a lottery, or coming in the possession of an inheritance or a donation. Member States should not be prevented from providing additional derogations in well-defined circumstances and when duly justified.

(81) Where there is a duly justified reason under national law, it could be appropriate to limit the possibility of discharge for certain categories of debt. It should be possible for Member States to exclude secured debts from eligibility for discharge only up to the value of the collateral as determined by national law, while the rest of the debt should be treated as unsecured debt. Member States should be able to exclude further categories of debt when duly justified.

(82) Member States should be able to provide that judicial or administrative authorities can verify, either ex officio or at the request of a person

with a legitimate interest, whether entrepreneurs have fulfilled the conditions for obtaining a full discharge of debt.

(83) If an entrepreneur's permit or licence to carry on a certain craft, business, trade or profession has been denied or revoked as a result of a disqualification order, this Directive should not prevent Member States from requiring the entrepreneur to submit an application for a new permit or licence after the disqualification has expired. Where a Member State authority adopts a decision concerning a specifically supervised activity, it should be possible to also take into account, even after the expiry of the disqualification period, the fact that the insolvent entrepreneur has obtained a discharge of debt in accordance with this Directive.

(84) Personal and professional debts that cannot be reasonably separated, for example where an asset is used in the course of the professional activity of the entrepreneur as well as outside that activity, should be treated in a single procedure. Where Member States provide that such debts are subject to different insolvency procedures, coordination of those procedures is needed. This Directive should be without prejudice to Member States being able to choose to treat all the debts of an entrepreneur in a single procedure. Member States in which entrepreneurs are allowed to continue their business on their own account during insolvency proceedings should not be prevented from providing that such entrepreneurs can be made subject to new insolvency proceedings, where such continued business becomes insolvent.

(85) It is necessary to maintain and enhance the transparency and predictability of the procedures in delivering outcomes that are favourable to the preservation of businesses and to allowing entrepreneurs to have a second chance or that permit the efficient liquidation of non-viable enterprises. It is also necessary to reduce the excessive length of insolvency procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates. Finally, given the enhanced cooperation mechanisms between courts and practitioners in cross-border cases, set up under Regulation (EU) 2015/848, the professionalism of all actors involved needs to be brought to comparable high levels across the Union. To achieve those objectives, Member States should ensure that members of the judicial and administrative authorities dealing with procedures concerning preventive restructuring, insolvency and discharge of debt are suitably trained and have the necessary expertise for their responsibilities. Such training and expertise could be acquired also during the exercise of the duties as a member of a judicial or administrative authority or, prior to appointment to such duties, during the exercise of other relevant duties.

(86) Such training and expertise should enable decisions with a potentially significant economic and social impact to be taken in an efficient manner, and should not be understood to mean that members of a judicial authority have to deal exclusively with matters concerning restructuring, insolvency and discharge of debt. Member States should ensure that procedures concerning restructuring, insolvency and discharge of debt can be carried out in an efficient and expeditious manner. The creation of specialised courts or chambers, or the appointment of specialised judges in accordance with national law, as well as concentrating jurisdiction in a limited number of judicial or administrative authorities would be efficient ways of achieving the objectives of legal certainty and effectiveness of procedures. Member States should not be obliged to require that procedures concerning restructuring, insolvency and discharge of debt be prioritised over other procedures.

(87) Member States should also ensure that practitioners in the field of restructuring, insolvency, and discharge of debt that are appointed by judicial or administrative authorities (‘practitioners’) are: suitably trained; appointed in a transparent manner with due regard to the need to ensure efficient procedures; supervised when carrying out their tasks; and perform their tasks with integrity. It is important that practitioners adhere to standards for such tasks, such as obtaining insurance for professional liability. Suitable training, qualifications and expertise for practitioners could also be acquired while practising their profession. Member States should not be obliged to provide the necessary training themselves, but this could be provided by, for example, professional associations or other bodies. Insolvency practitioners as defined in Regulation (EU) 2015/848 should be included in the scope of this Directive.

(88) This Directive should not prevent Member States from providing that practitioners are chosen by a debtor, by creditors or by a creditors' committee from a list or a pool that is pre-approved by a judicial or administrative authority. In choosing a practitioner, the debtor, the creditors or the creditors' committee could be granted a margin of appreciation as to the practitioner's expertise and experience in general and the demands of the particular case. Debtors who are natural persons could be exempted from such a duty altogether. In cases

with cross-border elements, the appointment of the practitioner should take into account, among other things, the practitioner's ability to comply with the obligations, under Regulation (EU) 2015/848, to communicate and cooperate with insolvency practitioners and judicial and administrative authorities from other Member States, as well as their human and administrative resources to deal with potentially complex cases. Member States should not be prevented from providing for a practitioner to be selected by other methods, such as random selection by a software programme, provided that it is ensured that in using those methods due consideration is given to the practitioner's experience and expertise. Member States should be able to decide on the means for objecting to the selection or appointment of a practitioner or for requesting the replacement of the practitioner, for example through a creditors' committee.

(89) Practitioners should be subject to oversight and regulatory mechanisms which should include effective measures regarding the accountability of practitioners who have failed in their duties, such as: a reduction in a practitioner's fee; the exclusion from the list or pool of practitioners who can be appointed in insolvency cases; and, where appropriate, disciplinary, administrative or criminal sanctions. Such oversight and regulatory mechanisms should be without prejudice to provisions under national law on civil liability for damages for breach of contractual or non-contractual obligations. Member States should not be required to set up specific authorities or bodies. Member States should ensure that information about the authorities or bodies exercising oversight over practitioners is publicly available. For instance, a mere reference to the judicial or administrative authority should be sufficient as information. It should be possible, in principle, to attain such standards without the need to create new professions or qualifications under national law. Member States should be able to extend the provisions on the training and supervision of practitioners to other practitioners not covered by this Directive. Member States should not be obliged to provide that disputes over remuneration of practitioners are to be prioritised over other procedures.

(90) To further reduce the length of procedures, to facilitate better participation of creditors in procedures concerning restructuring, insolvency and discharge of debt and to ensure similar conditions among creditors irrespective of where they are located in the Union, Member States should put in place provisions enabling debtors, creditors, practitioners and judicial and administrative authorities to use electronic means of communication. Therefore, it should be possible that procedural steps such as the filing of claims by creditors, the notification of creditors, or the lodging of challenges and appeals, can be carried out by electronic means of communication. Member States should be able to provide that notifications of a creditor can only be performed electronically if the creditor concerned has previously consented to electronic communication.

(91) Parties to procedures concerning restructuring, insolvency and discharge of debt should not be obliged to use electronic means of communication if such use is not mandatory under national law, without prejudice to Member States being able to establish a mandatory system of electronic filing and service of documents in procedures concerning restructuring, insolvency and discharge of debt. Member States should be able to choose the means of electronic communications. Examples of such means could include a purpose-built system for the electronic transmission of such documents or the use of email, without preventing Member States from being able to put in place features to ensure the security of electronic transmissions, such as electronic signature, or trust services, such as electronic registered delivery services, in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council (17).

(92) It is important to gather reliable and comparable data on the performance of procedures concerning restructuring, insolvency and discharge of debt in order to monitor the implementation and application of this Directive. Therefore, Member States should collect and aggregate data that are sufficiently granular to enable an accurate assessment of how the Directive is working in practice and should communicate those data to the Commission. The communication form for the transmission of such data to the Commission should be established by the Commission assisted by a Committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council (18). The form should provide a shortlist of the main outcomes of procedures that are common to all Member States. For example, in the case of a restructuring procedure, those main outcomes could be the following: the plan being confirmed by a court; the plan not being confirmed by a court; the restructuring procedures being converted to liquidation procedures or closed because of the opening of liquidation procedures before the plan was confirmed by a court. Member States should not be required to provide a break-down by types of outcome in respect of the procedures which end before any relevant measures are taken, but could instead provide a common

number for all procedures which are declared inadmissible, rejected or withdrawn before being opened.

(93) The communication form should provide a list of options which could be taken into account by the Member States when determining the size of a debtor, by reference to one or more of the elements of the definition of SMEs and large enterprises common to all Member States. The list should include the option of determining the size of a debtor based on the number of workers only. The form should: define the elements of average cost and average recovery rates for which Member States should be able to collect data voluntarily; provide guidance on elements which could be taken into account when Member States make use of a sampling technique, for example on sample sizes to ensure representativeness in terms of geographical distribution, size of debtors and industry; and include the opportunity for Member States to provide any additional information available, for example on the total amount of assets and liabilities of debtors.

(94) The stability of financial markets relies heavily on financial collateral arrangements, in particular, when collateral security is provided in connection with the participation in designated systems or in central bank operations and when margins are provided to central counterparties. As the value of financial instruments given as collateral security may be very volatile, it is crucial to realise their value quickly before it goes down. Therefore, the provisions of Directives 98/26/EC (19) and 2002/47/EC (20) of the European Parliament and of the Council and Regulation (EU) No 648/2012 should apply notwithstanding the provisions of this Directive. Member States should be allowed to exempt netting arrangements, including close-out netting, from the effects of the stay of individual enforcement actions even in circumstances where they are not covered by Directives 98/26/EC, 2002/47/EC and Regulation (EU) No 648/2012, if such arrangements are enforceable under the laws of the relevant Member State even if insolvency proceedings are opened.

This could be the case for a significant number of master agreements widely used in the financial, energy and commodity markets, both by non-financial and financial counterparties. Such arrangements reduce systemic risks especially in derivatives markets. Such arrangements might therefore be exempt from restrictions that insolvency laws impose on executory contracts. Accordingly, Member States should also be allowed to exempt from the effects of the stay of individual enforcement actions statutory netting arrangements, including close-out netting arrangements, which operate upon the opening of insolvency procedures. The amount resulting from the operation of netting arrangements, including close-out netting arrangements should, however, be subject to the stay of individual enforcement actions.

(95) Member States that are parties to the Convention on international interests in mobile equipment, signed at Cape Town on 16 November 2001, and its Protocols should be able to continue to comply with their existing international obligations. The provisions of this Directive regarding preventive restructuring frameworks should apply with the derogations necessary to ensure an application of those provisions without prejudice to the application of that Convention and its Protocols.

(96) The effectiveness of the process of adoption and implementation of the restructuring plan should not be jeopardised by company law. Therefore, Member States should be able to derogate from the requirements laid down in Directive (EU) 2017/1132 of the European Parliament and of the Council (21) concerning the obligations to convene a general meeting and to offer on a pre-emptive basis shares to existing shareholders, to the extent and for the period necessary to ensure that shareholders do not frustrate restructuring efforts by abusing their rights under that Directive. For example, Member States might need to derogate from the obligation to convene a general meeting of shareholders or from the normal time periods, for cases where urgent action is to be taken by the management to safeguard the assets of the company, for instance through requesting a stay of individual enforcement actions and when there is a serious and sudden loss of subscribed capital and a likelihood of insolvency. Derogations from company law might also be required when the restructuring plan provides for the emission of new shares which could be offered with priority to creditors as debt-to-equity swaps, or for the reduction of the amount of subscribed capital in the event of a transfer of parts of the undertaking. Such derogations should be limited in time to the extent that Member States consider such derogations necessary for the establishment of a preventive restructuring framework. Member States should not be obliged to derogate from company law, wholly or partially, for an indefinite or for a limited period of time, if they ensure that their company law requirements do not jeopardise the effectiveness of the restructuring process or if Member States have other, equally effective tools in place to ensure that shareholders do not unreasonably prevent the adoption or

implementation of a restructuring plan which would restore the viability of the business. In this context, Member States should attach particular importance to the effectiveness of provisions relating to a stay of individual enforcement actions and confirmation of the restructuring plan which should not be unduly impaired by calls for, or the results of, general meetings of shareholders. Directive (EU) 2017/1132 should therefore be amended accordingly. Member States should enjoy a margin of appreciation in assessing which derogations are needed in the context of national company law in order to effectively implement this Directive, and should also be able to provide for similar exemptions from Directive (EU) 2017/1132 in the case of insolvency proceedings not covered by this Directive but which allow for restructuring measures to be taken.

(97) In respect of the establishment of, and subsequent changes to, the data communication form, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011.

(98) A study should be carried out by the Commission in order to evaluate the necessity of submitting legislative proposals to deal with the insolvency of persons not exercising a trade, business, craft or profession, who, as consumers, in good faith, are temporarily or permanently unable to pay debts as they fall due. Such study should investigate whether access to basic goods and services needs to be safeguarded for those persons to ensure that they benefit from decent living conditions.

(99) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents (22), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(100) Since the objectives of this Directive cannot be sufficiently achieved by the Member States because differences between national restructuring and insolvency frameworks would continue to raise obstacles to the free movement of capital and the freedom of establishment, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(101) On 7 June 2017, the European Central Bank delivered an opinion (23),

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down rules on:

(a) preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor;

(b) procedures leading to a discharge of debt incurred by insolvent entrepreneurs; and

(c) measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

2. This Directive does not apply to procedures referred to in paragraph 1 of this Article that concern debtors that are:

(a) insurance undertakings or reinsurance undertakings as defined in points (1) and (4) of Article 13 of Directive 2009/138/EC;

(b) credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013;

(c) investment firms or collective investment undertakings as defined in points (2) and (7) of Article 4(1) of Regulation (EU) No 575/2013;

(d) central counter parties as defined in point (1) of Article 2 of Regulation (EU) No 648/2012;

(e) central securities depositories as defined in point (1) of Article 2(1) of Regulation (EU) No 909/2014;

(f) other financial institutions and entities listed in the first subparagraph of Article 1(1) of Directive 2014/59/EU;

(g) public bodies under national law; and

(h) natural persons who are not entrepreneurs.

3. Member States may exclude from the scope of this Directive procedures referred to in paragraph 1 that concern debtors which are financial entities, other than those referred to in paragraph 2, providing financial services which are subject to special arrangements under which the national supervisory

or resolution authorities have wide-ranging powers of intervention comparable to those laid down in Union and national law in relation to the financial entities referred to in paragraph 2. Member States shall communicate those special arrangements to the Commission.

4. Member States may extend the application of the procedures referred to in point (b) of paragraph 1 to insolvent natural persons who are not entrepreneurs.

Member States may restrict the application of point (a) of paragraph 1 to legal persons.

5. Member States may provide that the following claims are excluded from, or are not affected by, preventive restructuring frameworks referred to in point (a) of paragraph 1:

(a) existing and future claims of existing or former workers;

(b) maintenance claims arising from a family relationship, parentage, marriage or affinity; or

(c) claims that arise from tortious liability of the debtor.

6. Member States shall ensure that preventive restructuring frameworks have no impact on accrued occupational pension entitlements.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions apply:

(1) 'restructuring' means measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements;

(2) 'affected parties' means creditors, including, where applicable under national law, workers, or classes of creditors and, where applicable, under national law, equity holders, whose claims or interests, respectively, are directly affected by a restructuring plan;

(3) 'equity holder' means a person that has an ownership interest in a debtor or a debtor's business, including a shareholder, in so far as that person is not a creditor;

(4) 'stay of individual enforcement actions' means a temporary suspension, granted by a judicial or administrative authority or applied by operation of law, of the right of a creditor to enforce a claim against a debtor and, where so provided for by national law, against a third-party security provider, in the context of a judicial, administrative or other procedure, or of the right to seize or realise out of court the assets or business of the debtor;

(5) 'executory contract' means a contract between a debtor and one or more creditors under which the parties still have obligations to perform at the time the stay of individual enforcement actions is granted or applied;

(6) 'best-interest-of-creditors test' means a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed;

(7) 'new financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan;

(8) 'interim financing' means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business;

(9) 'entrepreneur' means a natural person exercising a trade, business, craft or profession;

(10) 'full discharge of debt' means that enforcement against entrepreneurs of their outstanding dischargeable debts is precluded or that outstanding dischargeable debts as such are cancelled, as part of a procedure which could include a realisation of assets or a repayment plan or both;

(11) 'repayment plan' means a programme of payments of specified amounts on specified dates by an insolvent entrepreneur to creditors, or a periodic transfer to creditors of a certain part of entrepreneur's disposable income during the discharge period;

(12) 'practitioner in the field of restructuring' means any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks:

(a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan;

(b) supervising the activity of the debtor during the negotiations on a restructuring plan, and

reporting to a judicial or administrative authority;

(c) taking partial control over the assets or affairs of the debtor during negotiations.

2. For the purposes of this Directive, the following concepts are to be understood as defined by national law:

(a) insolvency;

(b) likelihood of insolvency;

(c) micro, small and medium-sized enterprises (‘SMEs’).

Article 3

Early warning and access to information

1. Member States shall ensure that debtors have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay.

For the purposes of the first subparagraph, Member States may make use of up-to-date IT technologies for notifications and for communication.

2. Early warning tools may include the following:

(a) alert mechanisms when the debtor has not made certain types of payments;

(b) advisory services provided by public or private organisations.

(c) incentives under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to flag to the debtor a negative development.

3. Member States shall ensure that debtors and employees' representatives have access to relevant and up-to-date information about the availability of early warning tools as well as of the procedures and measures concerning restructuring and discharge of debt.

4. Member States shall ensure that information on access to early warning tools is publicly available online and that, in particular for SMEs, it is easily accessible and presented in a user-friendly manner.

5. Member States may provide support to employees' representatives for the assessment of the economic situation of the debtor.

TITLE II

PREVENTIVE RESTRUCTURING FRAMEWORKS

CHAPTER 1

Availability of preventive restructuring frameworks

Article 4

Availability of preventive restructuring frameworks

1. Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.

2. Member States may provide that debtors that have been sentenced for serious breaches of accounting or bookkeeping obligations under national law are allowed to access a preventive restructuring framework only after those debtors have taken adequate measures to remedy the issues that gave rise to the sentence, with a view to providing creditors with the necessary information to enable them to take a decision during restructuring negotiations.

3. Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets.

4. Member States may limit the number of times within a certain period a debtor can access a preventive restructuring framework as provided for under this Directive.

5. The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law.

Member States shall ensure that such restructuring framework affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner.

6. Member States may put in place provisions limiting the involvement of a judicial or administrative authority in a preventive restructuring framework to where it is necessary and proportionate while ensuring that rights of any affected parties and relevant stakeholders are safeguarded.

7. Preventive restructuring frameworks provided for under this Directive shall be available on application by debtors.

8. Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that

requirement to obtain the debtor's agreement to cases where debtors are SMEs.

CHAPTER 2

Facilitating negotiations on preventive restructuring plans

Article 5

Debtor in possession

1. Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.

2. Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.

3. Member States shall provide for the appointment of a practitioner in the field of restructuring, to assist the debtor and creditors in negotiating and drafting the plan, at least in the following cases:

(a) where a general stay of individual enforcement actions, in accordance with Article 6(3), is granted by a judicial or administrative authority, and the judicial or administrative authority decides that such a practitioner is necessary to safeguard the interest of the parties;

(b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11; or

(c) where it is requested by the debtor or by a majority of the creditors, provided that, in the latter case, the cost of the practitioner is borne by the creditors.

Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

(a) enforcement is not likely to jeopardise the restructuring of the business; or

(b) the stay would unfairly prejudice the creditors of those claims.

5. Paragraph 2 shall not apply to workers' claims.

By way of derogation from the first subparagraph, Member States may apply paragraph 2 to workers' claims if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection.

6. The initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months.

7. Notwithstanding paragraph 6, Member States may enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

(a) relevant progress has been made in the negotiations on the restructuring plan;

(b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or

(c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.

8. The total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.

Where Member States choose to implement this Directive by means of one or more procedures or measures which do not fulfil the conditions for notification under Annex A to Regulation (EU) 2015/848, the total duration of the stay under such procedures shall be limited to no more than four

months if the centre of main interests of the debtor has been transferred from another Member State within a three-month period prior to the filing of a request for the opening of preventive restructuring proceedings.

9. Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:

(a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;

(b) at the request of the debtor or the practitioner in the field of restructuring;

(c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or

(d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor.

Member States may limit the power, under the first subparagraph, to lift the stay of individual enforcement actions to situations where creditors had not had the opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority.

Member States may provide for a minimum period, which does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

Article 7

Consequences of the stay of individual enforcement actions

1. Where an obligation on a debtor, provided for under national law, to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of that stay.

2. A stay of individual enforcement actions in accordance with Article 6 shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor.

3. Member States may derogate from paragraphs 1 and 2 in situations where a debtor is unable to pay its debts as they fall due. In such cases, Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions, if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors.

4. Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill.

The first subparagraph shall not preclude Member States from affording such creditors appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph.

Member States may provide that this paragraph also applies to non-essential executory contracts.

5. Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:

(a) a request for the opening of preventive restructuring proceedings;

(b) a request for a stay of individual enforcement actions;

(c) the opening of preventive restructuring proceedings; or

(d) the granting of a stay of individual enforcement actions as such.

6. Member States may provide that a stay of individual enforcement actions does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets, even in circumstances where Article 31(1) does not apply, if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting arrangement.

The first subparagraph shall not apply to contracts for the supply of goods, services or energy necessary for the operation of the debtor's business, unless such contracts take the form of a position traded on an exchange or other market, such that it can be substituted at any time at current market value.

7. Member States shall ensure that the expiry of a stay of individual enforcement actions without the

adoption of a restructuring plan does not, of itself, give rise to the opening of an insolvency procedure which could end in the liquidation of the debtor, unless the other conditions for such opening laid down by national law are fulfilled.

CHAPTER 3

Restructuring plans

Article 8

Content of restructuring plans

1. Member States shall require that restructuring plans submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10, contain at least the following information:

(a) the identity of the debtor;

(b) the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets, a description of the economic situation of the debtor and the position of workers, and a description of the causes and the extent of the difficulties of the debtor;

(c) the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;

(d) where applicable, the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class;

(e) where applicable, the parties, whether named individually or described by categories of debt in accordance with national law, which are not affected by the restructuring plan, together with a description of the reasons why it is proposed not to affect them;

(f) where applicable, the identity of the practitioner in the field of restructuring;

(g) the terms of the restructuring plan, including, in particular:

(i) any proposed restructuring measures as referred to in point (1) of Article 2(1);

(ii) where applicable, the proposed duration of any proposed restructuring measures;

(iii) the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law;

(iv) where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar;

(v) the estimated financial flows of the debtor, if provided for by national law; and

(vi) any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan;

(h) a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring if such a practitioner is appointed.

2. Member States shall make available online a comprehensive check-list for restructuring plans, adapted to the needs of SMEs. The check-list shall include practical guidelines on how the restructuring plan has to be drafted under national law.

The check-list shall be made available in the official language or languages of the Member State. Member States shall consider making the check-list available in at least one other language, in particular in a language used in international business.

Article 9

Adoption of restructuring plans

1. Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties.

Member States may also provide that creditors and practitioners in the field of restructuring have the right to submit restructuring plans, and provide for conditions under which they may do so.

2. Member States shall ensure that affected parties have a right to vote on the adoption of a restructuring plan.

Parties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan.

3. Notwithstanding paragraph 2, Member States may exclude from the right to vote the following:

(a) equity holders;

(b) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal

ranking of liquidation priorities; or

(c) any related party of the debtor or the debtor's business, with a conflict of interest under national law.

4. Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan.

Member States may also provide that workers' claims are treated in a separate class of their own.

Member States may provide that debtors that are SMEs can opt not to treat affected parties in separate classes.

Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.

5. Voting rights and the formation of classes shall be examined by a judicial or administrative authority when a request for confirmation of the restructuring plan is submitted.

Member States may require a judicial or administrative authority to examine and confirm the voting rights and formation of classes at an earlier stage than that referred to in the first subparagraph.

6. A restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.

Member States shall lay down the majorities required for the adoption of a restructuring plan. Those majorities shall not be higher than 75 % of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class.

7. Notwithstanding paragraphs 2 to 6, Member States may provide that a formal vote on the adoption of a restructuring plan can be replaced by an agreement with the requisite majority.

Article 10

Confirmation of restructuring plans

1. Member States shall ensure that at least the following restructuring plans are binding on the parties only if they are confirmed by a judicial or administrative authority:

(a) restructuring plans which affect the claims or interests of dissenting affected parties;

(b) restructuring plans which provide for new financing;

(c) restructuring plans which involve the loss of more than 25 % of the workforce, if such loss is permitted under national law.

2. Member States shall ensure that the conditions under which a restructuring plan can be confirmed by a judicial or administrative authority are clearly specified and include at least the following:

(a) the restructuring plan has been adopted in accordance with Article 9;

(b) creditors with sufficient commonality of interest in the same class are treated equally, and in a manner proportionate to their claim;

(c) notification of the restructuring plan has been given in accordance with national law to all affected parties;

(d) where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test;

(e) where applicable, any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors.

Compliance with point (d) of the first subparagraph shall be examined by a judicial or administrative authority only if the restructuring plan is challenged on that ground.

3. Member States shall ensure that judicial or administrative authorities are able to refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business.

4. Member States shall ensure that where a judicial or administrative authority is required to confirm a restructuring plan in order for it to become binding, the decision is taken in an efficient manner with a view to expeditious treatment of the matter.

Article 11

Cross-class cram-down

1. Member States shall ensure that a restructuring plan which is not approved by affected parties, as provided for in Article 9(6), in every voting class, may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions:

(a) it complies with Article 10(2) and (3);

(b) it has been approved by:

(i) a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class or is senior to the ordinary unsecured creditors class; or, failing that,

(ii) at least one of the voting classes of affected parties or where so provided under national law, impaired parties, other than an equity-holders class or any other class which, upon a valuation of the debtor as a going concern, would not receive any payment or keep any interest, or, where so provided under national law, which could be reasonably presumed not to receive any payment or keep any interest, if the normal ranking of liquidation priorities were applied under national law;

(c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class; and

(d) no class of affected parties can, under the restructuring plan, receive or keep more than the full amount of its claims or interests.

By way of derogation from the first subparagraph, Member States may limit the requirement to obtain the debtor's agreement to cases where debtors are SMEs.

Member States may increase the minimum number of classes of affected parties or, where so provided under national law, impaired parties, required to approve the plan as laid down in point (b)(ii) of the first subparagraph.

2. By way of derogation from point (c) of paragraph 1, Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.

Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

Article 12

Equity holders

1. Where Member States exclude equity holders from the application of Articles 9 to 11, they shall ensure by other means that those equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan.

2. Member States shall also ensure that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan.

3. Member States may adapt what it means to unreasonably prevent or create obstacles under this Article to take into account, inter alia: whether the debtor is an SME or a large enterprise; the proposed restructuring measures touching upon the rights of equity holders; the type of equity holder; whether the debtor is a legal or a natural person; or whether partners in a company have limited or unlimited liability.

Article 13

Workers

1. Members States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework:

(a) the right to collective bargaining and industrial action; and

(b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC, in particular:

(i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms;

(ii) information to employees' representatives about any preventive restructuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions;

(iii) information to and consultation of employees' representatives about restructuring plans before they are submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10;

(c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC.

2. Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases.

Article 14

Valuation by the judicial or administrative authority

1. The judicial or administrative authority shall take a decision on the valuation of the debtor's business only where a restructuring plan is challenged by a dissenting affected party on the grounds of either:

(a) an alleged failure to satisfy the best-interest-of-creditors test under point (6) of Article 2(1); or

(b) an alleged breach of the conditions for a cross-class cram-down under point (ii) of Article 11(1)(b).

2. Member States shall ensure that, for the purpose of taking a decision on a valuation in accordance with paragraph 1, judicial or administrative authorities may appoint or hear properly qualified experts.

3. For the purposes of paragraph 1, Member States shall ensure that a dissenting affected party may lodge a challenge with the judicial or administrative authority called upon to confirm the restructuring plan.

Member States may provide that such a challenge can be lodged in the context of an appeal against a decision on the confirmation of a restructuring plan.

Article 15

Effects of restructuring plans

1. Member States shall ensure that restructuring plans that are confirmed by a judicial or administrative authority are binding upon all affected parties named or described in accordance with point (c) of Article 8(1).

2. Member States shall ensure that creditors that are not involved in the adoption of a restructuring plan under national law are not affected by the plan.

Article 16

Appeals

1. Member States shall ensure that any appeal provided for under national law against a decision to confirm or reject a restructuring plan taken by a judicial authority is brought before a higher judicial authority.

Member States shall ensure that an appeal against a decision to confirm or reject a restructuring plan taken by an administrative authority is brought before a judicial authority.

2. Appeals shall be resolved in an efficient manner with a view to expeditious treatment.

3. An appeal against a decision confirming a restructuring plan shall have no suspensive effects on the execution of that plan.

By way of derogation from the first subparagraph, Member States may provide that judicial authorities can suspend the execution of the restructuring plan or parts thereof where necessary and appropriate to safeguard the interests of a party.

4. Member States shall ensure that, where an appeal pursuant to paragraph 3 is upheld, the judicial authority may either:

(a) set aside the restructuring plan; or

(b) confirm the restructuring plan, either with amendments, where so provided under national law, or without amendments.

Member States may provide that, where a plan is confirmed under point (b) of the first subparagraph, compensation is granted to any party that incurred monetary losses and whose appeal is upheld.

CHAPTER 4

Protection for new financing, interim financing and other restructuring related transactions

Article 17

Protection for new financing and interim financing

1. Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor:

(a) new financing and interim financing shall not be declared void, voidable or unenforceable; and

(b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 shall only apply to new financing if the restructuring plan has been confirmed by a judicial or administrative authority, and to interim financing which has been subject to ex ante control.

3. Member States may exclude from the application of paragraph 1 interim financing which is granted after the debtor has become unable to pay its debts as they fall due.

4. Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims.

Article 18

Protection for other restructuring related transactions

1. Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of a debtor, transactions that are reasonable and immediately necessary for the negotiation of a restructuring plan are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

2. Member States may provide that paragraph 1 only applies where the plan is confirmed by a judicial or administrative authority or where such transactions were subject to ex ante control.

3. Member States may exclude from the application of paragraph 1 transactions that are carried out after the debtor has become unable to pay its debts as they fall due.

4. Transactions referred to in paragraph 1 shall include, as a minimum:

(a) the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan;

(b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring;

(c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law;

(d) any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c).

5. Without prejudice to Article 17, Member States shall ensure that, in the event of any subsequent insolvency of the debtor, transactions that are reasonable and immediately necessary for the implementation of a restructuring plan, and that are carried out in accordance with the restructuring plan confirmed by a judicial or administrative authority, are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.

CHAPTER 5

Duties of directors

Article 19

Duties of directors where there is a likelihood of insolvency

Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following:

(a) the interests of creditors, equity holders and other stakeholders;

(b) the need to take steps to avoid insolvency; and

(c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

TITLE III

DISCHARGE OF DEBT AND DISQUALIFICATIONS

Article 20

Access to discharge

1. Member States shall ensure that insolvent entrepreneurs have access to at least one procedure that can lead to a full discharge of debt in accordance with this Directive.

Member States may require that the trade, business, craft or profession to which an insolvent entrepreneur's debts are related has ceased.

2. Member States in which a full discharge of debt is conditional on a partial repayment of debt by the entrepreneur shall ensure that the related repayment obligation is based on the individual situation of the entrepreneur and, in particular, is proportionate to the entrepreneur's seizable or disposable income and assets during the discharge period, and takes into account the equitable interest of creditors.

3. Member States shall ensure that entrepreneurs who have been discharged from their debts may benefit from existing national frameworks providing for business support for entrepreneurs, including access to relevant and up-to-date information about these frameworks.

Article 21

Discharge period

1. Member States shall ensure that the period after which insolvent entrepreneurs are able to be fully discharged from their debts is no longer than three years starting at the latest from the date of either:

(a) in the case of a procedure which includes a repayment plan, the decision by a judicial or administrative authority to confirm the plan or the start of the implementation of the plan; or

(b) in the case of any other procedure, the decision by the judicial or administrative authority to open the procedure, or the establishment of the entrepreneur's insolvency estate.

2. Member States shall ensure that insolvent entrepreneurs who have complied with their obligations, where such obligations exist under national law, are discharged of their debt on expiry of

the discharge period without the need to apply to a judicial or administrative authority to open a procedure additional to those referred to in paragraph 1.

Without prejudice to the first subparagraph, Member States may maintain or introduce provisions allowing the judicial or administrative authority to verify whether the entrepreneurs have fulfilled the obligations for obtaining a discharge of debt.

3. Member States may provide that a full discharge of debt does not hinder the continuation of an insolvency procedure that entails the realisation and distribution of assets of an entrepreneur that formed part of the insolvency estate of that entrepreneur as at the date of expiry of the discharge period.

Article 22

Disqualification period

1. Member States shall ensure that, where an insolvent entrepreneur obtains a discharge of debt in accordance with this Directive, any disqualifications from taking up or pursuing a trade, business, craft or profession on the sole ground that the entrepreneur is insolvent, shall cease to have effect, at the latest, at the end of the discharge period.

2. Member States shall ensure that, on expiry of the discharge period, the disqualifications referred to in paragraph 1 of this Article cease to have effect without the need to apply to a judicial or administrative authority to open a procedure additional to those referred to in Article 21(1).

Article 23

Derogations

1. By way of derogation from Articles 20 to 22, Member States shall maintain or introduce provisions denying or restricting access to discharge of debt, revoking the benefit of such discharge or providing for longer periods for obtaining a full discharge of debt or longer disqualification periods, where the insolvent entrepreneur acted dishonestly or in bad faith under national law towards creditors or other stakeholders when becoming indebted, during the insolvency proceedings or during the payment of the debt, without prejudice to national rules on burden of proof.

2. By way of derogation from Articles 20 to 22, Member States may maintain or introduce provisions denying or restricting access to discharge of debt, revoking the benefit of discharge or providing for longer periods for obtaining a full discharge of debt or longer disqualification periods in certain well-defined circumstances and where such derogations are duly justified, such as where:

(a) the insolvent entrepreneur has substantially violated obligations under a repayment plan or any other legal obligation aimed at safeguarding the interests of creditors, including the obligation to maximise returns to creditors;

(b) the insolvent entrepreneur has failed to comply with information or cooperation obligations under Union and national law;

(c) there are abusive applications for a discharge of debt;

(d) there is a further application for a discharge within a certain period after the insolvent entrepreneur was granted a full discharge of debt or was denied a full discharge of debt due to a serious violation of information or cooperation obligations;

(e) the cost of the procedure leading to the discharge of debt is not covered; or

(f) a derogation is necessary to guarantee the balance between the rights of the debtor and the rights of one or more creditors.

3. By way of derogation from Article 21, Member States may provide for longer discharge periods in cases where:

(a) protective measures are approved or ordered by a judicial or administrative authority in order to safeguard the main residence of the insolvent entrepreneur and, where applicable, of the entrepreneur's family, or the essential assets for the continuation of the entrepreneur's trade, business, craft or profession; or

(b) the main residence of the insolvent entrepreneur and, where applicable, of the entrepreneur's family, is not realised.

4. Member States may exclude specific categories of debt from discharge of debt, or restrict access to discharge of debt or lay down a longer discharge period where such exclusions, restrictions or longer periods are duly justified, such as in the case of:

(a) secured debts;

(b) debts arising from or in connection with criminal penalties;

(c) debts arising from tortious liability;

(d) debts regarding maintenance obligations arising from a family relationship, parentage, marriage or affinity;

(e) debts incurred after the application for or opening of the procedure leading to a discharge of debt; and

(f) debts arising from the obligation to pay the cost of the procedure leading to a discharge of debt.

5. By way of derogation from Article 22, Member States may provide for longer or indefinite disqualification periods where the insolvent entrepreneur is a member of a profession:

(a) to which specific ethical rules or specific rules on reputation or expertise apply, and the entrepreneur has infringed those rules; or

(b) dealing with the management of the property of others.

The first subparagraph shall also apply where an insolvent entrepreneur requests access to a profession as referred to in point (a) or (b) of that subparagraph.

6. This Directive is without prejudice to national rules regarding disqualifications ordered by a judicial or administrative authority other than those referred to in Article 22.

Article 24

Consolidation of proceedings regarding professional and personal debts

1. Member States shall ensure that, where insolvent entrepreneurs have professional debts incurred in the course of their trade, business, craft or profession as well as personal debts incurred outside those activities, which cannot be reasonably separated, such debts, if dischargeable, shall be treated in a single procedure for the purposes of obtaining a full discharge of debt.

2. Member States may provide that, where professional debts and personal debts can be separated, those debts are to be treated, for the purposes of obtaining a full discharge of debt, either in separate but coordinated procedures or in the same procedure.

TITLE IV

MEASURES TO INCREASE THE EFFICIENCY OF PROCEDURES CONCERNING RESTRUCTURING, INSOLVENCY AND DISCHARGE OF DEBT

Article 25

Judicial and administrative authorities

Without prejudice to judicial independence and to any differences in the organisation of the judiciary across the Union, Member States shall ensure that:

(a) members of the judicial and administrative authorities dealing with procedures concerning restructuring, insolvency and discharge of debt receive suitable training and have the necessary expertise for their responsibilities; and

(b) procedures concerning restructuring, insolvency and discharge of debt are dealt with in an efficient manner, with a view to the expeditious treatment of procedures.

Article 26

Practitioners in procedures concerning restructuring, insolvency and discharge of debt

1. Member States shall ensure that:

(a) practitioners appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt (‘practitioners’) receive suitable training and have the necessary expertise for their responsibilities;

(b) the conditions for eligibility, as well as the process for the appointment, removal and resignation of practitioners are clear, transparent and fair;

(c) in appointing a practitioner for a particular case, including cases with cross-border elements, due consideration is given to the practitioner's experience and expertise, and to the specific features of the case; and

(d) in order to avoid any conflict of interest, debtors and creditors have the opportunity to either object to the selection or appointment of a practitioner or request the replacement of the practitioner.

2. The Commission shall facilitate the sharing of best practices between Member States with a view to improving the quality of training across the Union, including by means of the exchange of experiences and capacity building tools.

Article 27

Supervision and remuneration of practitioners

1. Member States shall put in place appropriate oversight and regulatory mechanisms to ensure that the work of practitioners is effectively supervised, with a view to ensuring that their services are provided in an effective and competent way, and, in relation to the parties involved, are provided impartially and independently. Those mechanisms shall also include measures for the accountability of practitioners who have failed in their duties.

2. Member States shall ensure that information about the authorities or bodies exercising oversight over practitioners is publicly available.

3. Member States may encourage the development of and adherence to codes of conduct by practitioners.

4. Member States shall ensure that the remuneration of practitioners is governed by rules that are consistent with the objective of an efficient resolution of procedures.

Member States shall ensure that appropriate procedures are in place to resolve any disputes over remuneration.

Article 28

Use of electronic means of communication

Member States shall ensure that, in procedures concerning restructuring, insolvency and discharge of debt, the parties to the procedure, the practitioner and the judicial or administrative authority are able to perform by use of electronic means of communication, including in cross-border situations, at least the following actions:

(a) filing of claims;

(b) submission of restructuring or repayment plans;

(c) notifications to creditors;

(d) lodging of challenges and appeals.

TITLE V

MONITORING OF PROCEDURES CONCERNING RESTRUCTURING, INSOLVENCY AND DISCHARGE OF DEBT

Article 29

Data collection

1. Member States shall collect and aggregate, on an annual basis, at national level, data on procedures concerning restructuring, insolvency and discharge of debt, broken down by each type of procedure, and covering at least the following elements:

(a) the number of procedures that were applied for or opened, where such opening is provided for under national law, and of procedures that are pending or were closed;

(b) the average length of procedures from the submission of the application, or from the opening thereof, where such opening is provided for under national law, to their closure;

(c) the number of procedures other than those required under point (d), broken down by types of outcome;

(d) the number of applications for restructuring procedures that were declared inadmissible, were rejected or were withdrawn before being opened.

2. Member States shall collect and aggregate, on an annual basis, at national level, data on the number of debtors which were subject to restructuring procedures or insolvency procedures and which, within the three years prior to the submission of the application or the opening of such procedures, where such opening is provided for under national law, had a restructuring plan confirmed under a previous restructuring procedure implementing Title II.

3. Member States may collect and aggregate, on an annual basis, at national level, data on:

(a) the average cost of each type of procedure;

(b) the average recovery rates for secured and unsecured creditors and, where applicable, other types of creditors, separately;

(c) the number of entrepreneurs who, after having undergone a procedure under point (b) of Article 1(1), launch a new business;

(d) the number of job losses linked to restructuring and insolvency procedures.

4. Member States shall break down the data referred to in points (a) to (c) of paragraph 1 and, where applicable and available, the data referred to in paragraph 3 by:

(a) the size of the debtors that are not natural persons;

(b) whether debtors subject to procedures concerning restructuring or insolvency are natural or legal persons; and

(c) whether the procedures leading to a discharge of debt concern only entrepreneurs or all natural persons.

5. Member States may collect and aggregate the data referred to in paragraphs 1 to 4 through a sample technique that ensures that the samples are representative in terms of size and diversity.

6. Member States shall collect and aggregate the data referred to in paragraphs 1, 2, 4 and, where applicable, paragraph 3, for full calendar years ending on 31 December of each year, starting with the first full calendar year following the date of application of implementing acts referred to in paragraph 7. The data shall be communicated annually to the Commission, on the basis of a standard data communication form, by 31 December of the calendar year following the year for which data are collected.

7. The Commission shall establish the communication form referred to in paragraph 6 of this Article by way of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 30(2).

8. The Commission shall publish on its website the data communicated in accordance with paragraph 6 in an accessible and user-friendly manner.

Article 30

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Where the committee delivers no opinion, the Commission shall not adopt the draft implementing

act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

TITLE VI

FINAL PROVISIONS

Article 31

Relationship with other acts and international instruments

1. The following acts shall apply notwithstanding this Directive:

(a) Directive 98/26/EC;

(b) Directive 2002/47/EC; and

(c) Regulation (EU) No 648/2012.

2. This Directive shall be without prejudice to the safeguarding requirements of funds for payment institutions laid down under Directive (EU) 2015/2366 of the European Parliament and of the Council (24) and for electronic money institutions laid down under Directive 2009/110/EC of the European Parliament and of the Council (25).

3. This Directive shall be without prejudice to the application of the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment, signed at Cape Town on 16 November 2001, to which some Member States are party at the time of the adoption of this Directive.

Article 32

Amendment of Directive (EU) 2017/1132

In Article 84 of Directive (EU) 2017/1132, the following paragraph is added:

'4. Member States shall derogate from Article 58(1), Article 68, Articles 72, 73, and 74, point (b) of Article 79(1), Article 80(1) and Article 81 to the extent and for the period that such derogations are necessary for the establishment of the preventive restructuring frameworks provided for in Directive (EU) 2019/1023 of the European Parliament and of the Council (*1).

The first subparagraph shall be without prejudice to the principle of equal treatment of shareholders.

Article 33

Review clause

No later than 17 July 2026 and every five years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application and impact of this Directive, including on the application of the class formation and voting rules in respect of vulnerable creditors, such as workers. On the basis of that assessment, the Commission shall submit, if appropriate, a legislative proposal, considering additional measures to consolidate and harmonise the legal framework on restructuring, insolvency and discharge of debt.

Article 34

Transposition

1. Member States shall adopt and publish, by 17 July 2021, the laws, regulations and administrative provisions necessary to comply with this Directive, with the exception of the provisions necessary to comply with points (a), (b) and (c) of Article 28 which shall be adopted and published by 17 July 2024 and the provisions necessary to comply with point (d) of Article 28 which shall be adopted and published by 17 July 2026. They shall immediately communicate the text of those provisions to the Commission.

They shall apply the laws, regulations and administrative provisions necessary to comply with this Directive from 17 July 2021, with the exception of the provisions necessary to comply with points (a), (b) and (c) of Article 28, which shall apply from 17 July 2024 and of the provisions necessary to comply with point (d) of Article 28, which shall apply from 17 July 2026.

2. By way of derogation from paragraph 1, Member States that encounter particular difficulties in implementing this Directive shall be able to benefit from an extension of a maximum of one year of the implementation period provided for in paragraph 1. Member States shall notify to the Commission the need to make use of this option to extend the implementation period by 17 January 2021.

3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 35

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 36

This Directive is addressed to the Member States.

Done at Brussels, 20 June 2019.

For the European Parliament

The President

A. TAJANI

For the Council

The President

G. CIAMBA

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(1) OJ C 209, 30.6.2017, p. 21.

(2) OJ C 342, 12.10.2017, p. 43.

(3) Position of the European Parliament of 28 March 2019 (not yet published in the Official Journal) and decision of the Council of 6 June 2019.

(4) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).

(5) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

(6) Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

(7) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

(8) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

(9) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

(10) Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

(11) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

(12) Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p. 16).

(13) Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

(14) Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

(15) Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ L 283, 28.10.2008, p. 36).

(16) Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees (OJ L 122, 16.5.2009, p. 28).

(17) Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

(18) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

(19) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

(20) Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

(21) Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017, p. 46).

(22) OJ C 369, 17.12.2011, p. 14.

(23) OJ C 236, 21.7.2017, p. 2.

(24) Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

(25) Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7).

EU

Commission implementing Regulation (EU)2019/917 of 4 June 2019 establishing technical specifications, measures and other requirements required for the system of interconnection of insolvency registers

This Regulation was published in the Official Journal L 146/100 of 5 June 2019.

The interconnection of EU Member State insolvency registers on the European e-Justice Portal has already been commented in *EU & Int. Tax Coll. News* 2017-2, p. 27.

COMMISSION IMPLEMENTING REGULATION (EU) 2019/917

of 4 June 2019

establishing technical specifications, measures and other requirements required for the system of interconnection of insolvency registers in accordance with Article 25 of Regulation (EU) 2015/848 of the European Parliament and of the Council

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [1], and in particular Article 25(2)(a) to (f) thereof,

Whereas:

(1)In order to establish the system of interconnection of insolvency registers, it is necessary to define and adopt technical specifications, measures and other requirements which ensure uniform conditions for the implementation of the system.

(2)The technical specifications, measures and other requirements provided for in this Regulation are in accordance with the opinion of the Committee on Insolvency Proceedings,

HAS ADOPTED THIS REGULATION:

Article 1

The technical specifications, measures and other requirements which ensure uniform conditions for the implementation of the system of interconnection of insolvency registers referred to in Article 25(2)(a) to (f) of Regulation (EU) 2015/848 shall be as set out in the Annex.

The insolvency registers shall be interconnected according to these technical specifications, measures and other requirements by 30 June 2021.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all the Member States in accordance with the Treaties.

Done at Brussels, 4 June 2019.

For the Commission

The President

Jean-Claude JUNCKER

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[1] OJ L 141, 5.6.2015, p. 19.

ANNEX

SETTING OUT THE TECHNICAL SPECIFICATIONS, MEASURES AND OTHER REQUIREMENTS REFERRED TO IN ARTICLE 1

1. Subject matter

The Insolvency Registers Interconnection system (IRI) is a decentralised system interconnecting the national registers and the European e-Justice Portal. IRI serves as a central search service making available all of the mandatory information on insolvency set by Regulation (EU) 2015/848 along with any other information or documents included in the national registers.

2. Definitions

(a)'HyperText Transport Protocol Secure' or 'HTTPS' means encrypted communication and secure connection channels;

(b)'Insolvency record' means the set of information concerning insolvency proceedings of one debtor referred to in Article 24 of Regulation (EU) No 2015/848 that is to be published in the national electronic insolvency registers and available via the central public electronic access point (the European e-Justice Portal), as set out in Article 25 of Regulation (EU) 2015/848;

(c)'MS IR end-point' means the source of the insolvency record information; acting as the owner of this information, a MS IR end-point is consulted

by the e-Justice Portal and provides the requested data;

(d)‘National Registration Number’ means the register number under which the legal entity is registered in the Commercial Register or Comparable register or the Personal Identification Number or equivalent for individuals.

(e)‘Non-repudiation of origin’ means the measures providing the proof of the integrity and proof of origin of the data through methods such as digital certification, public key infrastructure and digital signatures;

(f)‘Non-repudiation of receipt’ means the measures providing the proof of the receipt of the data to the originator by the intended recipient of the data through methods such as digital certification, public key infrastructure and digital signatures;

(g)‘Platform’ means the central search system part of the e-Justice Portal;

(h)‘Registers’ means insolvency registers as set out in article 24 of Regulation (EU) 2015/848;

(i)‘Simple Object Access Protocol’ means, as per the standards of World Wide Web Consortium, a messaging protocol specification for exchanging structured information in the implementation of web services in computer networks;

(j)‘Web service’ means a software system designed to support interoperable machine-to-machine interaction over a network; it has an interface described in a machine-processable format.

3. Methods of communication

3.1. IRI shall use service-based methods of electronic communication, such as Web-services or other reusable Digital Service Infrastructures, for the purpose of interconnection of registers.

3.2. The communication between the e-Justice Portal and the platform, and between a MS IR end-point and the platform, shall be one-to-one communication. The communication from the platform to the registers may be one-to-one communication or one-to-many communication.

4. Communication protocols

4.1. Secure internet protocols, such as HTTPS, shall be used for the communication between the portal, the platform, the registers and the optional access points.

4.2. Standard communication protocols, such as Simple Object Access Protocol, shall be used for the transmission of structured data and metadata.

5. Security standards

For the communication and distribution of information via IRI, the technical measures for ensuring minimum information technology security standards shall include:

(a)measures to ensure confidentiality of information, including by using secure channels (HTTPS);

(b)measures to ensure the integrity of data while being exchanged;

(c)measures to ensure the non-repudiation of origin of the sender of information within IRI and the non-repudiation of receipt of information;

(d)measures to ensure logging of security events in line with recognized international recommendations for information technology security standards;

(e)measures to ensure the authentication and authorisation of any registered users and measures to verify the identity of systems connected to the portal, the platform or the registers within IRI;

(f)measures to protect against automated searches, such as using the captcha module, and copying of registers, such as limiting the results returned by each register to a maximum number.

6. Data to be exchanged between registers and IRI

6.1. The common set of information with the same structure and types for all registers in the Member States is referred to as ‘core insolvency record’

Each Member State shall have the possibility to extend the core insolvency record with specific information. The data from the insolvency record shall be modelled based on the established interface specification.

6.2. The exchange of information shall also include messages necessary for the acknowledgement of receipt, logging and reporting.

7. Structure of the standard message format

The exchange of information between the registers, the platform and the portal shall be based on standard data-structuring methods and shall be expressed in a standard message format such as XML.

8. Data for the platform

8.1. Interoperability requirements mandate that the services to be exposed by each Register are unified and present the same interface so that the calling application, such as the e-Justice portal has to interact with one single kind of interface exposing a common set of data elements. This approach requires that Member States align their internal data structure to

meet the interface specifications provided by the Commission.

8.2. The following type of data shall be provided for the platform to perform its functions:

(a) data allowing for the identification of systems that are connected to the platform; those data could consist of URLs identifying each system within IRI;

(b) any other operational data that is necessary for the platform to ensure the proper and efficient functioning of the search service and the interoperability of registers; those data may include code lists, reference data, glossaries and related translations of those metadata, as well as logging and reporting data.

8.3. The data and metadata handled by the platform shall be processed and stored in line with the security standards outlined in section 5 of this Annex.

9. Methods of operation of the system and information technology services provided by the platform

9.1. For the distribution and exchange of information, the system shall be based on the following technical method of operation:

(a) for the delivery of messages in the relevant language version, the platform shall provide reference data artefacts, such as code lists, controlled vocabularies and glossaries;

(b) where relevant, the terms from the vocabularies and glossaries shall be translated into the EU official languages; where possible, recognised standards and standardized messages shall be used.

9.2. The Commission will share with Member States the details on the technical method of operation and the implementation of the information technology services provided by the platform.

10. Search criteria

10.1. At least one country must be selected when running a search via IRI.

10.2. The Portal shall provide the following harmonised criteria for the search:

(a) name,

(b) national Registration Number

These two criteria can be used alternatively and additionally.

10.3. Further search criteria may be available on the Portal.

11. Payment modalities

11.1. For the documents and particulars for which Member States charge fees and which are made available on the e-Justice portal via IRI, the system shall allow users to pay online by using widely used payment modalities such as credit and debit cards.

11.2. The system may also provide alternative online payment methods, such as bank transfers or virtual wallets (deposit).

12. Availability of services

12.1. The service time frame shall be 24/7days, with an availability rate of the system of at least 98 % excluding scheduled maintenance.

12.2. Member States shall notify the Commission of maintenance activities as follows:

(a)	five working days in advance for maintenance operations that may cause an unavailability period of up to 4 hours;
(b)	10 working days in advance for maintenance operations that may cause an unavailability period of up to 12 hours;
(c)	30 working days in advance for infrastructure computer room maintenance, which may cause up to six days unavailability period per year.

To the extent possible, maintenance operations shall be planned outside working hours (19:00h-8:00h CET).

12.3. Where Member States have fixed weekly service windows, they shall inform the Commission of the time and day of the week when such fixed weekly windows are planned. Without prejudice to the obligations in points (a) to (c) of point 12.2, if Member States systems become unavailable during such a fixed window, Member States may choose not to notify the Commission on each occasion.

12.4. In case of unexpected technical failure of the Member States systems, Member States shall inform the Commission without delay of their system unavailability, and, if known, of the projected resuming of the service.

12.5. In case of any change that may affect the connection with the central platform, the Member State shall inform the Commission in advance, as soon as sufficient technical details in relation to the change are available.

12.6. In case of unexpected failure of the central platform or of the portal, the Commission shall inform the Member States without delay of the platform or portal unavailability, and if known, of the projected resuming of the service.

13. Rules of Transcription and transliteration

Each Member State implementation shall support the national standards of transcription, romanisation and transliteration in relation to the usage of special characters, the search input and the returned results.

OPINIONS AND ARTICLES

Cross-border insolvency proceedings and tax recovery (case law overview)

Luk Vandenberghe[1]

Coordination of the measures to be taken regarding an insolvent debtor's assets has resulted in a specific EU Regulation: Regulation 2015/848 of 20 May 2015 on insolvency proceedings.[2] This Regulation is a recast of Regulation 1346/2000.[3] As illustrated by several judgments, this Regulation is also of interest for tax authorities. Insolvency situations may interfere with tax recovery, both in domestic situations and in cross-border situations.

1. The rights of foreign tax authorities in insolvency proceedings in other Member States

1.1. Lodging of tax claims in insolvency proceedings in other Member States

1. If insolvency proceedings are opened in a Member State, tax authorities of other Member can also participate in these proceedings. Insolvency Regulation 2015/848 explicitly confirms that tax authorities, acting as a 'foreign creditor', may lodge their claims in the insolvency proceedings in other Member States (Articles 2(12), in conjunction with Articles 45(1) and 53 of Regulation 2015/848). They may lodge their claims in the main insolvency proceedings and in any secondary insolvency proceedings in other Member States.[4] This can be done by any means of communication which are accepted by the law of the State of the opening of proceedings (Article 53 of Regulation 2015/848).

Article 2(12) mentions that 'foreign creditors' include *"the tax authorities and social security authorities of Member States"*. This does not mean that tax authorities at regional or local level are excluded. Decentralised authorities also qualify as authorities "of Member States". Moreover, it should be noted that Article 2(12) only mentions these *"tax and social security authorities of Member States"* as examples.[5] As confirmed by recital 63 of the preamble, "any creditor" which has his habitual residence, domicile or registered office in the Union has the right to lodge its claims in each of the insolvency proceedings pending in the Union.

2. Tax authorities of one Member State may also take the initiative to launch a petition for winding up a company in another Member State. This was illustrated in the *Cedarlease* case. On 14 March 2005, the Irish High Court accepted a petition submitted by the UK tax authorities, seeking that an Irish company *Cedarlease* be wound up by the Irish Court, since the company was unable to pays its VAT debts in the UK. The High Court observed that if proceedings to wind up the company had been initiated on the petition of a third party, the UK tax authorities would have been entitled to prove for their claim in the winding-up proceedings. Under these circumstances, the Court decided that, while the Insolvency Regulation (then Regulation 1346/2000) did not expressly provide that a creditor located in another Member State had the right to initiate insolvency proceedings, it would defeat the purpose of that Regulation if that were not the case.[6]

It is interesting to note that the company itself argued that the UK VAT authorities should have availed themselves of a request for mutual recovery assistance, in accordance with the tax recovery assistance Directive (then Directive 1976/308, as amended). The High Court however rejected this argument, and agreed with the view of the UK VAT authorities, that the use of the Insolvency Regulation was not precluded by the existence of the EU arrangements for tax recovery assistance between tax authorities of different Member States.

3. Does this imply that the court in the other Member State, where the insolvency proceedings are opened, is entitled to consider whether the foreign tax claim is valid? That question was raised in an insolvency case before the Bankruptcy High Court in the UK in the *Smart* case. Referring to earlier case-law, this Court held that it did not have the competence to adjudicate on the validity of the tax debt, this being a matter solely for the courts or authorities of the Member State where the tax had been assessed.[7] In my

[1] Professor at the University of Antwerp; Head of sector Tax enforcement, Directorate general Taxation and Customs Union, at the European Commission. The views expressed in this text are the private views of the author and may not, under any circumstances, be interpreted as stating an official position of the European Commission.
[2] *OJ* L 141/19 of 5 June 2015.
[3] *OJ* L 160/1 of 30 June 2000.
[4] Just as other creditors, foreign tax authorities may be represented in such insolvency proceedings, e.g. by the tax authorities of the Member State where the insolvency proceedings are opened.
[5] G. Cuniberti, P. Nabet and M. Raimon, *Droit européen de l'insolvabilitié*, LGDJ Lextenso, Issy-les-Moulineaux, France, 2017, p. 189.
[6] High Court of Ireland, 8 March 2005, Cedarlease [2005] IEHC 67. Cf. B. Wessels, International Insolvency Law, Part II European Insolvency Law, Wolters Kluwer, Deventer, 2017, No 10913.
[7] Bankruptcy High Court UK, 23 June 2016, *EU & Int. Tax Coll. News* 2017/2, p. 198.

view, this judgment is not contrary to Article 7(2)(h) of Regulation 2015/848, which provides that the law of the State of the opening of proceedings shall determine *"the rules governing the (…) verification (…) of claims"*. Indeed, that provision does not state that the courts of the State of the opening of proceedings have to verify the validity and the amount of all claims. With regard to foreign tax claims, it is not surprising that the rules of the Member State of the opening of the insolvency proceedings determine that the validity and the amount of these claims can only be challenged before the courts of the Member States from which these tax claims originate, since that is the rule imposed by Article 14(1) of the tax recovery assistance Directive 2010/24.[8]

4. In order to be able to lodge their claims, foreign tax authorities of course have to be informed about the fact that insolvency proceedings have been opened in another Member State (unless they take the initiative themselves). In this regard, the Insolvency Regulation provides that, as soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the insolvency practitioner appointed by that court shall immediately inform the known foreign creditors (Article 54(1) of Regulation 2015/848). It is important for the debtor concerned not to conceal his foreign tax debts, in view of obtaining a decision that can be opposed to all debtors (*cf. infra*; section 3.1.1.). If tax authorities already requested tax recovery assistance from the tax authorities of the Member State where the insolvency proceedings are opened, they will normally also be informed about this opening by their colleagues of the latter Member State. Further, it can be mentioned that Member States are obliged to establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published ('insolvency registers')[9] and that an electronic system for the interconnection of these national insolvency registers is set up at EU level, through the European e-Justice Portal (Article 25 of Regulation 2015/848).[10]

1.2. The ranking of foreign tax claims

5. Article 7(2) of Regulation 2015/848 provides that: *"The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: (…) (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off"*.

6. In this regard, it first needs to be assessed whether domestic tax claims are (still) given a preferential treatment in the Member State of opening of the proceedings. Some EU Member States have removed the preferential status of tax claims (and also of social security claims).[11]

Further, it needs to be assessed whether the law of that Member State also grants the same preferential status to other Member States' tax claims. Indeed, the fact that foreign tax authorities have the right to lodge their tax claims in insolvency proceedings in another Member State does not necessarily imply that these foreign tax claims benefit from the same privileges in those insolvency proceedings.[12]

7. Some authors have argued that not granting the same preferential status to foreign tax claims would go directly against the *ratio* of the rule that foreign tax claims can be lodged in the insolvency proceedings.[13] Given the fact that the national preferential treatment is granted to foreign creditors under the Directives on winding-up of credit institutions and insurance companies,[14] they consider it would be contrary to the

[8] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, *OJ* L 84, 31 March 2010, p. 1.

[9] That information has to be published as soon as possible after the opening of such proceedings (Article 24(1) of Regulation 2015/848).

[10] See A. Ivantchev, "Interconnection of EU Member State insolvency registers on the European e-Justice Portal", *EU & Int. Tax Coll. News* 2017/2, p. 27. See also Commission implementing Regulation 2019/917, *EU & Int. Tax Coll. News* 2019/2, p. 40.

[11] See G. McCormack, A. Keay and S. Brown, *European Insolvency Law. Reform and Harmonization*, Elgar, Cheltenham, 2017, p. 121. According to these authors, Austria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Germany and Sweden have removed the preferential status of tax claims.

[12] G. Cuniberti, P. Nabet and M. Raimon, *Droit européen de l'insolvabilité*, LGDJ Lextenso, Issy-les-Moulineaux, France, 2017, p. 189, footnote 77; G. Moss, I. Fletcher and S. Isaacs, *The EU Regulation on insolvency proceedings*, Oxford University Press, Oxford, 2016, p. 409, No. 8.444 ; B. Wessels, *International Insolvency Law, Part II European Insolvency Law*, Wolters Kluwer, Deventer, 2017, No 10913e.

[13] M. Virgós and F. Garcimartín, The European Insolvency Regulation : Law and Practice, Kluwer, The Hague, 2004, p. 150. Concerns with regard to discrimination are also expressed by R. Pereira, "EC Cross-Border Insolvency Regulation – Tax Horizon – Watch the Present, It is not what it was !", *European Taxation* 2008, 366-367.
Differences in national approaches with regard to the attribution of preferential status may result in situations where preferences are given to foreign tax claims in the State of opening of insolvency proceedings, although such preference would not have been attributed to these claims in the Member State from which they originate.

[14] Article 16(2) of the Credit Institutions Winding-up Directive 2001/24 provides that: *"The claims of all creditors whose domiciles, normal places of residence or head offices are in Member States other than the home Member State shall be treated in the same way and accorded the same ranking as claims of an equivalent nature which may be lodged by creditors having their domiciles, normal places of residence, or head offices in the home Member State"* (Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, *OJ L 125, 5 May 2001, p. 15).*
Article 16(2) of the Insurance Companies Winding-up Directive 2001/17 (now repealed) provided that: *"The claims of all creditors who have their normal place of residence, domicile or head office in a Member State other than the home Member State, including the aforementioned authorities, shall be treated in the same way and*

coherence of the EU law system to allow any other solution in the context of the Insolvency Regulation (in the past Regulation 1346/2000 ; now Regulation 2015/848).

In my view, that coherence argument is however not sufficient to conclude that tax claims of one Member State, lodged in the insolvency proceedings in another Member State, should always be granted the same (preferential) treatment as domestic tax claims of that other Member State.[15] Article 13(1), third subparagraph of the tax recovery assistance Directive 2010/24 explicitly provides that *"the requested member State shall not be obliged to grant other Member States' claims preferences accorded to similar claims arising in that Member State, except where otherwise agreed between the Member States concerned or provided in the law of the requested Member State. A Member State which grants preferences to another Member State's claims may not refuse to grant the same preferences to the same or similar claims of other Member States on the same conditions"*.[16] On this point, the finally adopted text of this Directive clearly deviates from the initial Commission proposal.[17]

The concrete situation with regard to the (non) preferential treatment of other Member States' tax claims thus depends on the national law of the Member State where the insolvency proceedings are opened.

As already observed, the EU Directives on winding-up of credit institutions and insurance companies provide for exceptions to this general Member State's freedom with regard to the (non) preferential treatment of other Member States' tax claims. On this point, it can also be observed that the general EU approach with regard to tax claims has not been followed in the area of social security claims: the obligation to apply the same privileges has been accepted for social security contributions, under Article 84(3) of Regulation 883/2004.[18]

2. Effects of insolvency proceedings in one Member State on the recovery assistance for foreign tax claims

2.1. Effects of insolvency proceedings in one Member State on tax recovery actions in another Member State

8. Tax authorities should be aware that insolvency proceedings opened in another Member State may have consequences for the recovery of their own tax related claims, even in their own territory.

9. This was clearly illustrated by the *Probud* judgment of the EU Court of Justice.[19] A Polish court ordered that insolvency proceedings be opened in respect of *Probud*, an undertaking in the building sector whose registered office was in Poland but which engaged in construction work in Germany through the activities of a branch. Two days later, at the request of a German customs office, a German court ordered attachment of that same undertaking's assets held by banks in the amount of EUR 50.000 and of various claims of the undertaking against German parties with whom it had entered into contracts. There was no opening of secondary insolvency proceedings in Germany.[20] The Polish Court asked the EU Court of Justice whether the attachment effected by the German authorities was lawful since Polish law, which was the law applicable to the insolvency proceedings because Poland was the State of the opening of those proceedings[21], would not allow such attachment after the undertaking had been declared insolvent.

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accorded <u>the same ranking</u> as claims of an equivalent nature lodgeable by creditors who have their normal place of residence, domicile or head office in the home Member State" (Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, *OJ* L 110 of 20 April 2001, p. 28). This Directive 2001/17 has been replaced by Di**rective** 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II Directive) (*OJ* L 335 of 17 December 2009, p. 1). Article 282 of this Directive also provides that: *"1. Any creditor, including public authorities of Member States, whose habitual residence, domicile or head office is situated in a Member State other than the home Member State shall have the right to lodge claims or to submit written observations relating to claims.*
2. The claims of all creditors referred to in paragraph 1 shall be treated in the same way and given <u>the same ranking</u> as claims of an equivalent nature which may be lodged by creditors whose habitual residence, domicile or head office is situated in the home Member State. Competent authorities shall therefore operate without discrimination at Community level".

[15] This approach should not be different if tax authorities of different EU Member States would accept to act as each other's representative to lodge the other's tax claims in the insolvency proceedings opened in their respective countries.

[16] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, *OJ L 84, 31.3.2010, p. 1.*

[17] According to Article 22 of Commission proposal COM(2009)28 of 2 February 2009, the requested Member State should apply the same privileges to claims arising in its own Member State and to claims from other Member States.

[18] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166 of 30 April 2004, p. 1. Article 84(3) of this Regulation provides that: *"Claims of an institution of one Member State shall in enforcement, bankruptcy or settlement proceedings in another Member State enjoy the same privileges as the legislation of the latter Member State accords to claims of the same kind."*

[19] EUCJ 21 January 2010, C-444/07, Probud.

[20] Where main insolvency proceedings have been opened by a court of a Member State and recognised in another Member State, a court of that other Member State may open secondary insolvency proceedings in that Member State, in accordance with Art. 34 of Regulation 2015/848 (Article 27 of former Regulation 1346/2000) (*cf. infra*; section 3.1.2.).

[21] In accordance with Art. 7 of Regulation 2015/848 (Art. 4 of former Regulation 1346/2000).

The EU Court of Justice observed that the universal effect of the main insolvency proceedings opened in Poland also had an impact in Germany, since the liquidator appointed by the Polish court which had jurisdiction pursuant to Article 3(1) of Regulation 1346/2000 (now Article 3(1) of Regulation 2015/848) could exercise in another Member State all the powers conferred on him, as long as no other insolvency proceedings had been opened there. Only the opening of secondary proceedings in Germany was capable of restricting the universal effect of the main insolvency proceedings.[22] The Court also confirmed that the law applicable to the insolvency proceedings and to their effects was that of the Member State within the territory or which such proceedings were opened, i.e. Poland.[23] That Polish law determined the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits already pending.[24] The judgements of the Polish court had to be recognised in Germany, except where this would be manifestly contrary to the public policy of the latter Member State (*cf. infra*; section 3.1.1.).[25] Given that the Polish insolvency law did not permit enforcement proceedings relating to the pool of assets in the insolvency to be brought against the debtor after insolvency proceedings had been opened – and since no other exceptions permitted under the Regulation could be applied in this case – the competent German authorities could not validly order, pursuant to German legislation, enforcement measures relating to *Probud*'s assets situated in Germany.

10. A similar problem was brought before the EU Court of Justice in the *ENEFI* case.[26] *ENEFI* was a company in Hungary which possessed an establishment in Romania. In December 2012, insolvency proceedings were launched against that company in Hungary and the opening of the proceedings was notified to a Romanian tax authority in January 2013. The Romanian tax authority lodged two claims in the insolvency proceedings. However, given that it had not observed the applicable time limit and had failed to pay the registration fees, those claims could not be taken into account in the insolvency proceedings. In May 2013, the Romanian tax authority was notified of this refusal decision. Subsequently, while the insolvency proceedings were still pending, the Romanian tax authority carried out a tax inspection at the premises of *ENEFI*'s establishment in Romania. In June 2013, the Romanian tax authority issued a tax notice concerning liability to VAT. However, it did not lodge the claim relating to that tax notice in the insolvency proceedings. In August 2013, an enforcement order was issued by the Romanian authorities, and they subsequently initiated enforcement proceedings. In September 2013, prior to the closure of the insolvency proceedings in Hungary, *ENEFI* brought an action against the enforcement initiated in Romania. The company took the view that it was not obliged to pay the VAT that the tax notice indicated as being owed. In the company's view, the enforcement in Romania was illegal, given that, on the date on which the tax inspection leading to the issuance of the tax notice had occurred, *ENEFI* had already been the subject of insolvency proceedings opened in Hungary. As a consequence of this, *ENEFI* argued that the Romanian tax authority should have lodged its claim in these insolvency proceedings. According to the company, the claim not produced in the context of the insolvency proceedings in Hungary was forfeited.

The Court of Justice observed that Article 4(2)(g) and (h) of Regulation 1346/2000 (now Article 7(2)(g) and (h) of Regulation 2015/848) provide that the *lex fori concursus* (i.e. the law of the Member State where the insolvency proceedings are opened) determines which claims must be lodged against the debtor's estate, the treatment of claims arising after the opening of insolvency proceedings, and the rules governing the lodging, verification and admission of claims. The Court decided that in order not to render these provisions ineffective, the consequences of a failure to respect the rules of the *lex fori concursus* concerning the filing of claims and, in particular, the time limits laid down in that regard must also be assessed on the basis of that *lex fori concursus*.[27] While it was true that Article 4(2) of Regulation 1346/2000 made no specific reference to creditors who did not participate in the insolvency proceedings and, consequently, the effects of those proceedings (or of their closure) on the rights of those creditors, the Court decided that there could be no doubt that those effects had to be assessed on the basis of that *lex fori concursus*.[28] The Court thus accepted that the law of the State in which the insolvency proceedings were opened applied in accordance with Article 4 of Regulation 1346/2000, even in so far as that law provided, in relation to a creditor who had not taken part in the insolvency proceedings, for the forfeiture of his right to pursue his claim or for the suspension of the enforcement of such a claim in another Member State. With regard to the proceedings initiated by the Romanian authorities seeking the enforcement of their claim in Romania, the Court of Justice emphasized that this was not to be considered as a "lawsuit pending" in the sense of Article 15 of Regulation 1346/2000 (now Article 18 of Regulation 2015/848) which would be governed solely by the law of the Member State in which that lawsuit was pending, but as "proceedings brought by

[22] Paragraphs 23-24 of the judgment.
[23] Art. 7(1) of Reg. 2015/848 (Art. 4(1) of former Reg. 1346/2000).
[24] Art. 7(2)(f) of Reg. 2015/848 (Art. 4(2)(f) of former Reg. 1346/2000).
[25] Art. 33 of Reg. 2015/848 (Art. 26 of former Reg. 1346/2000).
[26] EUCJ 9 November 2016, C-212/15, ENEFI.
[27] Point 18 of the judgment.
[28] Point 20 of the judgment.

individual creditors" in the sense of Article 4(2)(f) of Regulation 1346/2000 (now Article 7(2)(f) of Regulation 2015/848), governed by the single *lex fori concursus*.[29]

11. The national court referring this case to the EU Court of Justice also raised the question whether it was relevant that the claim at stake was a tax claim. The Court of Justice however decided that the tax nature of the claim was not relevant in this regard. The provisions of the insolvency Regulation do not give the claims of tax authorities of a Member State other than the State of the opening of proceedings any preferential status, in that they should be capable of being subject to enforcement proceedings even after the opening of insolvency proceedings.[30]

2.2. Effect on tax recovery actions in the State of the insolvency proceedings, following a request for tax recovery assistance to that State

12. In 2012, the Estonian Tax authorities sent a request for recovery assistance to the Finnish tax authorities, pursuant to Article 10 of tax recovery assistance Directive 2010/24, with regard to a tax claim to be recovered from *Metirato*. In February 2013, *Metirato* voluntarily paid a part of this claim to the Finnish enforcement authorities. In May 2013, a Finnish court ordered the liquidation of *Metirato*, following an application made by the company itself. In September 2013, the Estonian tax authorities sent a second request for recovery which included, *inter alia*, the outstanding balance from the first recovery assistance request. The Finnish tax authorities lodged the Estonian tax claims, in addition to their own tax claims, in the insolvency proceedings.

In May 2014, the administrator of *Metirato*'s insolvency estate brought an action against the Finnish State and its tax authorities before a Finnish court, seeking the restitution to the insolvency estate of all the sums paid by *Metirato*. His action was based on the Finnish insolvency law, which provided that the payment of a debt made less than three months prior to the reference date of the insolvency proceedings was to be set aside if the amount of the debt paid appeared to be substantial in relation to the amount of the insolvency estate, unless the payment concerned was a customary practice.

The Finnish authorities challenged the action of the administrator of the insolvency estate. They argued that since the disputed sum was received by Estonia, his action should be brought against the Estonian State. In the view of the Finnish authorities, they had simply acted as an agent of the Estonian authorities, and their task was completed when they had transferred the amounts paid by *Metirato*.

The Estonian State also challenged the action of the administrator of the insolvency estate. In the view of the Estonian tax authorities, the administrator's request related to an amount recovered by the Finnish authorities, so that only the Finnish authorities could be regarded as the defendant in these proceedings for restitution.

The EU Court of Justice started by confirming that the dispute challenging the conduct and outcome of the recovery proceedings had to be brought before the competent court of the State that was requested to provide recovery assistance, in accordance with Article 14(2) of Directive 2010/24 on mutual tax recovery assistance. The Court noted that the wording of that provision did not indicate whether the applicant Member State or the requested Member State was the defendant in such a dispute. The Court however considered that it was apparent from the general scheme and purpose of Directive 2010/24 that the administrator's action had to be brought against the requested Member State, even if such a dispute formed part of a procedure for the restitution of assets to the insolvency estate of a company established in that Member State. In the Court's view, the issue whether the amount recovered had been separated from the assets of the requested Member State or merged with them was irrelevant in this regard.

The Court of Justice further added that if the administrator successfully challenged the recovery measure at stake, it was, in principle, for the applicant Member State to reimburse all amounts recovered and remitted to it by the requested Member State.

13. This issue of the *EU & International Tax Collection Newsletter* further contains a judgment of the Tax Court of Baden-Württemberg of 7 November 2016, which confirms that the legal effect of a residual debt discharge decision is also binding on foreign tax authorities, who requested recovery assistance from the tax authorities of the Member State where the insolvency proceedings took place.[31] A similar decision was taken by the District Court of 's Hertogenbosch in 2007: a tax debtor had obtained a debt rescheduling in Dutch insolvency proceedings. The result was that after three years, all claims were unenforceable against him. The Court decided that this also applied to his tax debt in Germany.[32]

[29] Point 32 of the judgment.

[30] Point 40 of the judgment.

[31] Tax Court Baden-Württemberg, 7 November 2016, *EU & Int. Tax Coll. News* 2019/1, p. 98.

[32] District Court 's Hertogenbosch (the Netherlands), 29 January 2007, ECLI:NL:RBSHE:2007:AZ7355.

3. Limitations to the effect of insolvency proceedings on the recovery measures initiated by tax authorities of other Member States

3.1. General limitations

3.1.1. The public policy exception

14. An important limitation to the basic principle of recognition of the insolvency proceedings openened in another Member State can be found in Article 33 of Regulation 2015/848: *"Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual"*.

15. The decision of the German federal tax court of 27 January 2016[33] offers a clear example of such a case: a German tax consultant had moved his centre of main interests to the UK. Subsequently, he requested a court in London to be declared insolvent. One year later, he there obtained a discharge of residual debt. One month later, a German tax office filed a petition to a German court to open insolvency proceedings against the same person. The tax consultant argued that the opening of insolvency proceedings in the UK had to be recognized in Germany and that the same applied to the discharge of residual debt granted by the English court. The German federal tax court however decided that the tax consultant could not in Germany rely on the discharge of the residual debt waiver granted in the UK, because this would be contrary to the public policy reservation (Article 26 of Regulation 1346/2000; now Article 33 of Regulation 2015/848). The Court found that the person concerned had only fictitiously relocated his center of main interests to the UK, in order to take advantage of the insolvency proceedings in that country.[34] In reality, his center of main interests was still in Germany, and the German federal tax court decided that the tax consultant had provided false information to the English court about his status, his activities, his assets and his debts.[35] He had concealed his German tax debts, so that the German tax office had not been heard in the English insolvency proceedings, although the German tax authorities should have been involved in these proceedings. The right of creditors or their representatives to participate in the insolvency proceedings is indeed a fundamental right, and the non-respect of this right constituted a manifest breach of a fundamental rule of law in the German legal order.[36]

3.1.2. Territorial secondary insolvency proceedings in another Member State

16. Where the centre of the debtor's main interests is situated within the territory of a Member State, the

[33] *EU & Int. Tax Coll. News* 2019/1, p. 94.

[34] Article 3(1) of Regulation 2015/848 provides that the courts of the Member State within the territory of which the centre of the debtor's main interests is situated have jurisdiction to open (main) insolvency proceedings. The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties (Art. 3(1) of Regulation 2015/848, in line with EUCJ 2 May 2006, C-341/04, Eurofood, para. 31, referring to the 13th recital of Regulation 1346/2000). The question whether the centre of the debtor's main interestes is ascertainable by third parties is particularly important for the creditors (EUCJ 20 October 2011, C-396/09, Interedil, para. 49), in view of ensuring their right to be involved in insolvency proceedings. Recital 28 of the preamble of Regulation 2015/848 therefore provides that in the event of a shift of the centre of main interests, debtors may be required to inform creditors of the new location from which the debtor is carrying out his activities.

[35] A wrong presentation of the centre of main interests is indeed an element of abuse (see L. Schneider, *Der Rechtsmissbrauchsgrundsatz im Europäischen Insolvenzrecht*, Duncker & Humblot, Berlin, 2015, p. 161 e.s.). It was however also observed that the mere move of the centre of main intrests is in itself permitted and thus not contrary to public policy, even if this move is inspired by a wish to benefit from a more advantageous jurisdiction in another Member State (C. Paulus, *Europäische Insolvenzverordnung*, Verlag Recht unde Wirtshaft, Frankfurt, 2008, p. 233). See also G. Khairallah, "The 'Centre of the Debtor's Main Interests' : Comments on the Eurofood Judgment of the ECJ", in W.-G. Ringe, L. Gullifer and P. Théry (eds.), *Current Issues in European Financial and Insolvency Law. Perspectives from France and the UK*, Hart, Oxford, 2009, p. 111-122 ; F. Garcimartín, "The EU Insolvency Regulation Recast : Scope, Jurisdiction and Applicable Law", *ZEuP* 2015, p. 704-712.

[36] The non-respect of the right to be heard is a typical example of a situation where public policy can be invoked to refuse the recognition of a foreign decision (cf. C. Paulus, *Europäische Insolvenzverordnung*, Verlag Recht und Wirtschaft, Frankfurt, 2008, p. 232).
It has however been held that even if some national insolvency proceedings limit the creditors' right to be heard, they may still have to be considered as not violating the public policy of another Member State if they are listed in Annex A of Regulation 2015/848, as insolvency proceedings explicitly covered – and admitted – by this Regulation (S. Smid, *Deutsches und Europäisches Internationales Insolvenzrecht*, Verlag Kohlhammer, Stuttgart, 2004, p. 114). In this regard, it is true that recital 9 of the preamble to Regulation 2015/848 indicates that *"in respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met"*. However, the same recital also indicates that *"national insolvency procedures not listed in Annex A should not be covered by this Regulation"*. If the Regulation were to be interpreted in such a way that national procedures mentioned in Annex A automatically fulfil all the requirements resulting from the fundamental legal principles, the public policy exception of Article 33 would be irrelevant. This provision should therefore be interpreted in such a way that although the insolvency proceedings listed in Annex A in principle respect the fundamental legal principles, their application in a specific case may not (or not sufficiently) respect these fundamental principles, in particular the right to be heard.
In any case, limitations of the rights of creditors should be justified and should respect proportionality requirements. E.g. their right to be heard may be limited in situations where urgent measures are required, but their right to challenge these measures should not be totally excluded. (See also S. Bariatti, "Recent case-law concenring jurisdiction and the recognition of judgments under the European Insolvency Regulation", *RabelsZ* 2009, (vol. 73), p. 644).

courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those (secondary[37]) proceedings in another Member State shall be restricted to the assets of the debtor situated in the territory of that other Member State (Articles 3(2) and 34 of Regulation 2015/848).

Where insolvency proceedings have been opened in the Member State where the centre of the debtor's main interests is situated, any proceedings opened subsequently in another Member State are called "secondary insolvency proceedings" (Article 3(3) of Regulation 2015/848).

17. Article 20(2) of Regulation 2015/848 specifies that the effects of the proceedings referred to in Article 3(2) – i.e. such (secondary) proceedings in other Member States than the Member State where the centre of the main interests of the debtor is situated – may not be challenged in other Member States. Any restriction of creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

In practice, this means that tax authorities and other creditors in secondary insolvency proceedings in a Member State should in principle obtain an unrestricted satisfaction of their claims from the assets situated in that Member State; the effects of the main insolvency proceedings opened in another Member State should not restrict their rights on those assets, unless these creditors would have given their consent to such a restriction.

18. This limitation of the restriction of these creditor's rights, as well as the fact that foreign tax claims do not necessarily enjoy the same priority as other (tax) claims in the Member State where the main insolvency proceedings are opened (*cf. supra*; section 1.2.) has led to the conclusion that tax authorities of other Member States will probably request, whenever possible, the opening of secondary proceedings in order to preserve their priority rights at least in relation to the local assets.[38]

3.2. Specific limitations

3.2.1. Third parties' rights *in rem* and set-off

19. The opening of insolvency proceedings does not affect the rights *in rem* of creditors or third parties in respect of tangible, movable or immovable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings (Article 8(1) of Regulation 2015/848). The aim of this rule is to allow credit to be obtained under conditions that would not be possible without this type of guarantee.[39]

Article 8(2) and (3) of this Regulation gives some indication of these rights *in rem*, but it does not contain an exhaustive list of examples.[40] According to Article 8(2), these rights mean 'in particular':

- the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
- the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
- the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
- a right *in rem* to the beneficial use of assets.

20. The notion of a 'right *in rem*' was also clarified by the EU Court of Justice in a tax related case, *Senior Home*.[41] *Senior Home*, a real estate company under French law, was the owner of real property located in Wedemark (Germany). By decision of 6 May 2013, the company was put into court-supervised administration by a French court. On 15 May 2013 the Wedemark local authority applied for the compulsory sale of the immovable property in Germany by public auction in order to recover arrears of real property tax for the period from October 2012 to June 2013. The administrator appointed by the French court brought an action before a German court, contesting the compulsory sale by auction of the property. The German court observed that, in accordance with Article 4 of Regulation 1346/2000 (now Article 7 of

[37] The territorial insolvency proceedings in another Member State may be opened prior to the opening of main insolvency proceedings in the Member State where the main centre of interests is situated, if the opening of these territorial insolvency proceedings in another Member State is requested by a public authority – including a tax authority – which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings. When main insolvency proceedings are opened at a later stage, the territorial insolvency proceedings then become secondary insolvency proceedings (Art. 3(4) of Regulation 2015/848).

[38] G. Moss, I. Fletcher and S. Isaacs, *The EU Regulation on insolvency proceedings*, Oxford University Press, Oxford, 2016, p. 409, No. 8.444 ; B. Wessels, *International Insolvency Law, Part II European Insolvency Law*, Wolters Kluwer, Deventer, 2017, No 10913e.

[39] See A. Pieckenbrock, « Article 5 EIR : Thid Parties' rights in rem », in B. Hess, P. Oberhammer, T. Pfeiffer, A. Pieckenbrock en C. Seagon, *European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report*, Beck-Hart-Nomos, München 2014, p. 177.

[40] Cf. G. Moss, I. Fletcher and S. Isaacs, *The EU Regulation on insolvency proceedings*, Oxford University Press, Oxford, 2016, p. 79, No 4.17.

[41] EUCJ, 26 October 2016, C-195/15, SCI Senior Home v Gemeinde Wedemark, *EU & Int. Tax Coll. News* 2017/2, p. 112.

Regulation 2015/848), the insolvency proceedings brought against *Senior Home* were governed by French law. Under French law, the opening of the court-supervised administration procedure normally precluded the compulsory sale at issue. However, the opening of insolvency proceedings did not affect the rights *in rem* of creditors or third parties in respect of assets belonging to a debtor which were situated within the territory of another Member State.[42] Under German law, debts due in respect of real property taxes were public charges on real property which were rights *in rem*, and the owner of the encumbered real property had to accept enforcement of the instrument recording those debts against that property. However, the German court submitted a request for a preliminary decision to the EU Court of Justice, asking whether the issue of the existence of a right *in rem* had to be assessed in accordance with German law, or whether, on the contrary, the notion of a 'right *in rem*' had to be interpreted independently.

The EU Court of Justice accepted this qualification to be made on the basis of the national law. The Court decided that Article 5 of Regulation 1346/2000 (now Article 8 of Regulation 2015/848) had to be interpreted to the effect that security created by virtue of a provision of national law, such as that at issue in the main proceedings, by which the real property of a person owing real property taxes was, by operation of law, to be subject to a public charge and that property owner had to accept enforcement of the decision recording that tax debt against that property, constituted a 'right *in rem'* for the purposes of that article. This judgment is in line with earlier case law, where it was decided that in order to enable a creditor to assert his right *in rem* effectively, that creditor must be able to exercise that right after the opening of the insolvency proceedings, in principle under the *lex causae,* i.e. the law which governs the dispute concerning the contested legal transaction.[43]

With regard to the fact that the existence of a right *in rem* was relied upon by the local tax-levying authority, the Court considered that an interpretation to the effect that the exception only covered rights *in rem* created in the context of commercial or credit transactions would lead to unfavourable treatment of the owners of rights *in rem* granted in the context of "transactions" other than commercial transactions.[44]

3.2.2. Set-off

21. Article 9(1) of Regulation 2015/848 provides that *"The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim"*.

This provision could certainly be relied upon by tax authorities if they have the possibility to set off their tax claims with amounts that should normally be refunded to the tax debtor, e.g. VAT credits that should normally be refunded to the same person.

4. Conclusion

22. This overview of recent case law demonstrates the importance of the Insolvency Regulation for the work of tax recovery authorities. The rules on insolvency proceedings may influence tax recovery actions with regard to a Member State's own taxes and recovery actions taken in the execution of requests for mutual tax recovery assistance.

The increasing number of cross-border tax/insolvency disputes demonstrates the growing awareness and attention that has to be paid to this EU legislation and to the developments in this area.[45]

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[42] Article 5 of Regulation 1346/2000; now Article 8 of Regulation 2015/858.

[43] EUCJ 16 April 2015, C-557/13, *Lutz v Bäuerle*, paras. 40-42. Cf. G. McCormack and R. Bork, *Security rights and the European Insolvency Regulation*, Intersentia, Cambridge, 2017, p. 16.

[44] EUCJ 16 April 2015, C-557/13, *Lutz v Bäuerle*, para. 30.

[45] In the meantime, a new preliminary question with regard to the interpretation of the notion 'privilege' (preference) (relating to the former EU Directives on mutual tax recovery assistance) has been submitted to the EU Court of Justice (case C-19/19, Belgium v. Pantochim).

Fair tax collection and VAT double taxation within the EU

Luk Vandenberghe[1]

It may take a long time before VAT double taxation disputes are solved. In the meantime, taxpayers are confronted with uncertainty about the payment and recovery of the VAT claims of the Member States concerned, and about default interest or administrative penalties imposed.
In this regard, questions can also be raised about the ways to respect the neutrality of VAT, taking account of the possibility to pass on the VAT to customers and the influence of the right to deduct input VAT.

1. Introduction

1.1. Legal basis for consultations between tax authorities on VAT double taxation within the EU

2. A single transaction should only be subject to VAT once, in one Member State.[2] If two (or more) EU Member States claim VAT on a single transaction, this leads to a double taxation which is contrary to the fundamental principles of the EU VAT system. In practice, however, situations of double taxation may occur where Member States have conflicting views with regard to their respective taxing rights. Different interpretations of the EU VAT rules or differences in the national implementation of the EU VAT rules may indeed lead to such unfortunate situations of VAT double taxation.

3. In October 2003 the European Commission presented a communication which set out the initiatives which it intended to take over the next few years.[3] That communication listed introduction of a mechanism for eliminating VAT double taxation in individual cases as one of the topics for future work. In the beginning of 2007, the Commission launched an online public consultation to ascertain the views of the public and business on the possible introduction of a dispute resolution mechanism to tackle VAT double taxation of intra-EU transactions.[4]

Several years later, the EU VAT Forum[5] decided to revisit the issue of VAT double taxation, in the interest of both business and tax authorities. First a pilot project was launched to permit taxable persons to obtain advance rulings on the VAT treatment of complex cross-border transactions: taxable persons envisaging cross-border transactions between two or more of the participating Member States can request for such a ruling with regard to the VAT treatment of their planned transactions.[6] So far, the success of this initiative is rather limited: only 18 Member States volunteered to participate in this pilot project; it is not widely known by the busineses and tax practitioners; there is no deadline for the dialogue between the tax authorities concerned; and an agreement between these authorities on a VAT treatment which prevents double taxation is not guaranteed.

In 2015, responding to another EU VAT Forum discussion, 12 Member States confirmed their willingness to support a dialogue between their tax authorities in case of VAT double taxation.[7] According to the information note of 14 October 2015, published on the European Commission's website, *"the purpose is to help the taxable persons to solve problems of double taxation, but the aim is not to promote an agreement where one of the Member States gives up its legitimate taxing right – which is at the same time a taxing "obligation" – under its national law. There is no obligation for the Member States concerned to come to a mutual agreement nor to start some kind of arbitration procedure in case of unresolved situations."*

4. At that time, only a minority of Member States explicitly accepted that a taxable person can ask the tax authorities of the Member States concerned to enter into a dialogue with the aim of avoiding or solving a specific VAT double taxation case by mutual agreement.

A few weeks after the EU VAT Forum's initiative in favour of the taxable persons, the EU Court of Justice rendered a judgement with regard to the Member States' obligation to deal with such situations. A Hungarian company *WebMindLicenses* had contested the Hungarian tax authorities' VAT claim on a transaction VAT on which had already been paid in

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[2] It cannot be excluded that parts of one transaction may have to be split up, in line with the allocation of taxing rights under the VAT Directive. See e.g. EUCJ 29 March 2007, C-111/05, Aktiebolaget NN: *"Article 8(1)(a) of Sixth Directive 77/388 must be interpreted as meaning that the right to tax the supply and laying of a fibre-optic cable linking two Member States and sited in part outside the territory of the Community is held by each Member State pro rata according to the length of cable in its territory with regard both to the price of the cable itself and the rest of the materials and to the cost of the services relating to the laying of the cable".*

[3] COM(2003) 614 final, see http://eurlex.europa.eu/LexUriServ/site/en/com/2003/com2003_0614en01.pdf.

[4] https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations/vat-possible-introduction-a-mechanism-eliminating-double-taxation-individual-cases_en.

[5] https://ec.europa.eu/taxation_customs/business/vat/eu-vat-forum_en.

[6] https://ec.europa.eu/taxation_customs/business/vat/vat-cross-border-rulings-cbr_en.

[7] https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/key_documents/eu_vat_forum/dialogue_tax_administrations_ms_en.pdf.

Portugal. The Hungarian court asked the EU Court of Justice for a preliminary ruling with regard to the question whether the tax authorities of the EU Member States concerned had to cooperate in order to determine where VAT was due. The EU Court of Justice confirmed that Regulation 904/2010 on administrative cooperation in the field of VAT indeed imposes an obligation on Member States to cooperate in order to avoid or solve VAT double taxation: *"Regulation No 904/2010, which, as provided in Article 1, lays down the conditions under which the competent national authorities are to cooperate with each other and with the European Commission and lays down rules and procedures to that end, does not specify the circumstances in which the tax authorities of a Member State might be required to send a request for administrative cooperation to the tax authorities of another Member State. However, having regard to the duty, set out in recital 7 in the preamble to that regulation, to cooperate to help ensure that VAT is correctly assessed, such a request may prove expedient, or even necessary".* The Court thus concluded that this Regulation 904/2010 must indeed be interpreted *"as meaning that the tax authorities of a Member State which are examining whether VAT is chargeable in respect of supplies of services that have already been subject to that tax in other Member States are required to send a request for information to the tax authorities of those other Member States when such request is useful, or even essential, for determining that VAT is chargeable in the first Member State"*.[8]

This obligation is in line with the requirement of sincere cooperation, expressed in Article 4(3) of the Treaty on European Union (TEU), which obliges the Member States to take any appropriate measure and to assist each other in facilitating the achievement of the Union's tasks and to refrain from any measure which could jeopardise the attainment of the Union's objectives.

5. The Court of Justice thus confirmed that this Regulation 904/2010 offers a legal basis for consultations to resolve cases of intra-EU VAT double taxation. The dispute resolution process is a matter for the tax authorities concerned, although the taxable persons affected have the right to be heard in this process, since this is an essential element of their right to good administration (Article 41(2)(a) and Article 51 of the Charter of Fundamental Rights of the EU).

6. Regulation 904/2010 however does not impose any strict rules or requirements with regard to the outcome of the discussions between the authorities concerned. In the same *WebMindLicenses* judgement, the EU Court of Justice confirmed that the tax authorities concerned do not necessarily have to agree: *"The fact that VAT has been paid in the other Member State in accordance with its legislation does not preclude an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located"*.[9] Hence the question can be raised whether any other specific dispute resolution mechanism can be agreed and applied, independently from Regulation 904/2010, to deal with these VAT double taxation problems.

Article 60(1) of Regulation 904/2010 provides that: *"This Regulation shall be without prejudice to the fulfilment of any wider obligations in relation to mutual assistance ensuing from other legal acts, including bilateral or multilateral agreements".* It is however doubtful whether Member States can conclude any agreements on "wider obligations" in this specific field, since Member States are not permitted to set up any mechanism leading to a binding decision on the interpretation of the VAT rules that would disregard the competence of the EU Court of Justice, in particular its competence to deal with requests for preliminary rulings on VAT questions.[10]

If tax authorities of different Member States continue to have different approaches, the national courts have the possibility – or even the obligation – to submit these divergences in the interpretation of the VAT law to the EU Court of Justice. In its Marcandi judgment, the Court held that: *"When interpreting the relevant provisions of EU and national law, courts of a Member State that find that the same transaction has been the object of a different tax treatment for the purposes of VAT in another Member State have the power, or even – depending on whether there is a judicial remedy under national law against its decisions – an obligation, to refer a request for a preliminary ruling to the Court"*.[11]

1.2. VAT double taxation in relations with third countries?

7. It is not excluded that a single transaction is taxable within the EU, while it is also subject to VAT in a third country. Different qualifications or different rules on the place of supplies may have such an effect, or double taxation may result from conflicting factual views on how the EU-based VAT rules and the VAT rules of the third country apply to specific transactions and schemes.

8. Insofar as the double taxation is caused by conflicting EU rules (including national rules implementing the EU Directive) and third country rules, both imposing VAT because they both imply that the transaction concerned takes place in the respective territory, Member States' tax authorities in

[8] EUCJ 17 December 2015, C-419/14, *WebMindLicenses*.

[9] EUCJ 17 December 2015, C-419/14, *WebMindLicenses*, para. 54. See also case C-276/18, *Krak Vet Marek Bratko*, now pending before the EUCJ.

[10] EUCJ 6 March 2018, C-284/16, *Achmea*.

[11] EUCJ 5 July 2018, C-544/16, *Marcandi*, para. 66.

principle do not have any margin to give up their taxing right/obligation under the EU Directive.

Member States indeed have to respect the rules agreed at EU level, even if they would conflict with the tax levied by a third country. Such situations of VAT double taxation can only be addressed by Member States insofar as permitted by the the EU VAT Directive 2006/112:

- this VAT Directive provides for some flexibility, permitting Member States to adapt the place of supply in order to prevent double taxation; e.g. Article 59a of Directive 2006/112 (as amended by Council Directive 2008/8) : *"In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Articles 44, 45, 56, 58 and 59 : (a) consider the place of supply of any or all of those services, if situated within the territory, as being outside the Community if the effective use and enjoyment of the services takes place outside the Community ; (...)"* ;

- the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to conclude with a third country or an international body an agreement which may contain derogations from the VAT Directive (Article 396(1) of Directive 2006/112). It is clear that such derogations are limited to particular cases, where it is difficult to apply the normal VAT rules. Typical examples relate to the VAT on construction works relating to bridges or tunnels between an EU Member State and a third country.

9. Given the above rules, there is little room for bilateral arrangements between an EU Member State and a third country with regard to the avoidance of VAT double taxation. The tax authorities concerned may have such discussions (if there is a valid legal basis for this administrative cooperation with the third country concerned), in order to clarify each other's understanding of the facts and to discuss different interpretations with regard to how the respective VAT rules apply to these specific facts. However, each Member State is obliged to ensure that any common understanding with a third country respects the EU VAT rules, insofar as these EU rules imply that the transaction concerned is considered to take place within the VAT territory of an EU Member State. Moreover, a joint decision of the tax authorities of both countries cannot be fully binding for the taxpayer, as this would be contrary to the EU Court of Justice's competence in the field of VAT (cf. supra).

1.3. Specific issues analysed in this paper

10. Taxable persons may ask the VAT authorities of the respective Member States to consult each other in cases of VAT double taxation (cf. supra), or they may wish to submit their VAT double taxation disputes to a national court, which can submit a preliminary request to the EU Court of Justice in order to solve the dispute between the Member States concerned. Member States may also wish to submit such cases for discussion to the VAT Committee of the EU, set up in accordance with Article 398 of the VAT Directive.

11. In any case, any initiative to solve the VAT double taxation dispute will normally take time. It is important for the taxpayers to know how this will affect their rights and obligations, pending the VAT dispute and pending the administrative or judicial dispute resolution process. Several questions can be raised with regard to these consequences for the taxpayers concerned:

- What about the payment or recovery of the VAT ?
- What about interest ?
- What about administrative penalties ?

12. This paper focuses on the situations where the double taxation results from divergent views of Member States' tax autorities. Situations of tax fraud and evasion or gross negligence of taxpayers are not covered.

2. Collection of VAT pending the dispute about the respective Member States' taxing rights ?

No immediate need to take collection measures

13. If a taxable person has paid VAT in one Member State, in line with the view of the tax authorities of that State, and is confronted with a second VAT claim, in another Member State, on the same transaction, the question can be raised whether the other Member State can require this taxable person to pay the second VAT claim, pending the dispute about the respective Member States' taxing right. It has been argued that a payment or guarantee requirement would anyhow be unnecessary and thus disproportionate if the dispute is not caused by the unwillingness of the person concerned to pay the tax – insofar as it was effectively paid in one of the countries concerned – but by the disagreement of two countries about their respective taxing rights.[12] If it would result from the final decision on this dispute that the tax was effectively paid in the wrong country, there could still be a transfer of the amount unduly paid in that State to the other State.

On this point, reference can also be made to the EU Court of Justice's case law with regard to guarantees imposed as a condition to defer the payment of exit taxes. The Court of Justice acknowledged that the obligation to provide guarantees facilitated the

[12] L. Vandenberghe, "The limits to arbitration posed by the natural judge theory (due process of law) and cross-border tax disputes", topical report for the EATLP Congress 2019, point 31.

collection of tax from a non-resident, but decided that tax collection measures should not go beyond what is strictly necessary in order to ensure the functioning and effectiveness of the national tax system, taking into account the possibilities to request recovery assistance from other Member States under Directive 2010/24.[13] *A fortiori*, the recovery of VAT claims which are in dispute between two Member States can certainly be considered as going beyond what is strictly necessary, insofar as one of the mutually exclusive VAT claims has already been paid in one of the Member States concerned. Indeed, if it would appear that the VAT is due in the other Member State, recovery assistance under Directive 2010/24 would imply that the latter State can ask for the transfer of the VAT already paid.[14]

14. If a cross-border dispute would relate to a double taxation in the field of VAT, the tax authorities of the first State – where the VAT was initially paid – may argue that there is no transferable amount, e.g. if the VAT paid in the first State was also deducted by, or refunded to a taxable person. Under such circumstances, it can however be expected that the VAT due in that other State would also be deductible or refundable in that other State, which implies that there is no need to require the payment or deposit in order to protect the revenue of that other State. As the EU Court of Justice has decided, whilst it is legitimate for the VAT collection measures adopted by the Member States to seek to preserve the rights of the Treasury as effectively as possible, they must not go further than is necessary for that purpose.[15]

No immediate need for recovery assistance

15. Mutual assistance for the recovery of VAT appears to be excluded in situations where the VAT on a transaction has been paid in one Member State, while another Member State claims that the same transaction should have been subject to VAT in its territory, as long as the double taxation dispute exists.[16] Article 14(4), 4th subparagraph of Directive 2010/24 only provides for a possible exception to this rule in case of immediate urgency because of fraud or insolvency.

[13] EUCJ 7 June 2006, C-470/04, *N.*, paras. 51-53.

[14] In accordance with Article 11(2)(b) of Directive 2010/24. (See L. Vandenberghe, "The limits to arbitration posed by the natural judge theory (due process of law) and cross-border tax disputes", topical report for the EATLP Congress 2019, point 31).

[15] EUCJ 18 December 1997, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96, *Molenheide and Others*, points 47-48.

[16] See L. Vandenberghe, "The limits to arbitration posed by the natural judge theory (due process of law) and cross-border tax disputes", topical report for the EATLP Congress 2019, points 32-33.

3. (Re)payment of VAT once the place of supply has been definitively established

16. If it finally appears that the VAT was paid in the right Member State, i.e. the Member State that had the taxing right, the claim of the other Member State must be dropped.

If it appears that the VAT was wrongly paid in one Member State, while the VAT should have been paid in another Member State, then corrections have to be made: the VAT levied in the wrong Member State should in principle be repaid, and the other Member State should receive the VAT due in that Member State.

3.1. Situations where the customer is a taxable person with a right to deduct input VAT

17. Insofar as the VAT concerned would be deductible or refundable, there is no loss for the tax authorities of the Member State where the VAT was not paid before. Indeed, if the VAT had been paid to that State, it would have been deducted or the refund of the VAT would have been requested by the taxable person claiming a deduction or refund of input VAT. Under such circumstances, this Member State could easily abstain from exercising its claim, at least with regard to past transactions (cf. infra, point 18). There is however no obligation for this Member State to give up its taxing right. In this regard, reference can be made to the EUCJ case law with regard to the comparable situations of incorrect (non)application of the reverse charge (within a national context), for instance in the *Farkas* judgment.[17] A Hungarian taxable person, Mr *Farkas*, bought a mobile hangar from another Hungarian taxable person. He received an invoice which included the VAT relating to that supply. He paid the price and the VAT indicated by the seller, who effectively paid that VAT to the Hungarian tax authority. Afterwards, the Hungarian tax authority rejected his deduction of this input VAT, since the VAT should have been paid under the reverse charge system. The Court of Justice accepted that the tax authority could request the taxable persons to rectify their error. The Court also confirmed that the tax authority could refuse the deduction of the wrongfully invoiced VAT. The reasoning behind this apparently formalistic approach seems to be that Member States may insist on the correct use of the reverse charge mechanism in order to avoid that negligent taxpayers pay VAT to a taxable person who does not transfer that VAT to the tax authorities. The use of the reverse

[17] EUCJ 26 April 2017, C-564/15, *Tibor Farkas*. See also EUCJ 6 February 2014, C-424/12, *Fatorie*; EUCJ 13 December 1989, C-342/7, *Genius* ; EUCJ 19 September 2000, C-454/98, *Schmeink & Cofreth and Strobel*.

charge intends to avoid this risk of loss of tax revenue for the Member State concerned.[18]

18. If the VAT would appear to be due in the Member State of the customer, while it was paid in the Member State of the supplier, correction of the VAT treatment may imply that VAT is due by the customer, under the reverse charge rules, if that is a taxable person. Insofar as the customer is entitled to deduction of the input VAT, this payment of the VAT should not be a problem, as and insofar as the VAT woud still be deductible despite the fact that it was paid late to that Member State.[19]

If the customer had obtained a deduction or refund of the VAT initially paid to his supplier, this deducted or refunded amount would in principle have to be repaid to the Member State of the supplier, and the supplier should reimburse the corresponding amount to that customer, and the supplier would also obtain a refund of the VAT unduly paid VAT to the tax authorities in his Member State.[20]

In fact, this means that the (re)payment obligations would lead to an end result that would correspond to the outcome of the initial VAT payment and reimbursement, ensuring the neutrality of the VAT for the taxable persons (see figure 1 below).

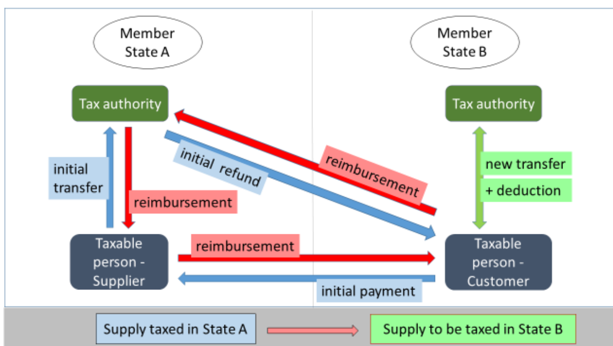

Figure 1

The end result of the correction would also be the same, guaranteeing VAT neutrality for the taxable persons, if the VAT was initially paid to the Member State of establishment of the taxable person receiving the supply (see figure 2 below).

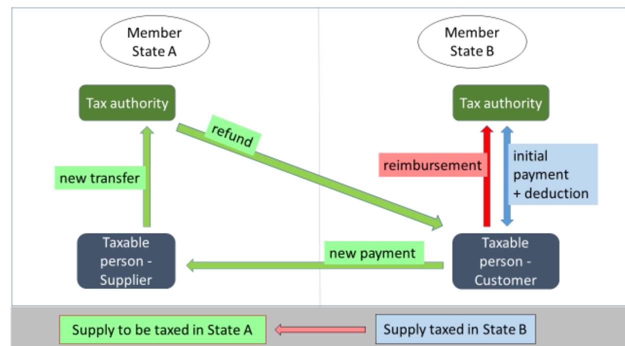

Figure 2

Under these circumstances, it may be recommended that tax authorities simply abstain from imposing the rectification for past transactions, insofar as the customer is a taxable person with a right to deduct input VAT. On this point, it should be noted that the logic that applied to reverse charge corrections (cf. supra, point 17) cannot be transposed here, insofar as the taxable persons cannot be blamed for the taxing right dispute between Member States.

3.2. Situations where the customer is not a taxable person with a right to deduct input VAT

19. In this situation, the tax authority that received the payment could reimburse the erroneously received VAT to the taxable person, who could pay it to the tax authority of the other Member State (see option ❶ in figure 3 below). Another option – to be preferred from a tax collection perspective – would be that the money is transferred directly from one Member State to another Member State (see option ❷ in figure 3 below).

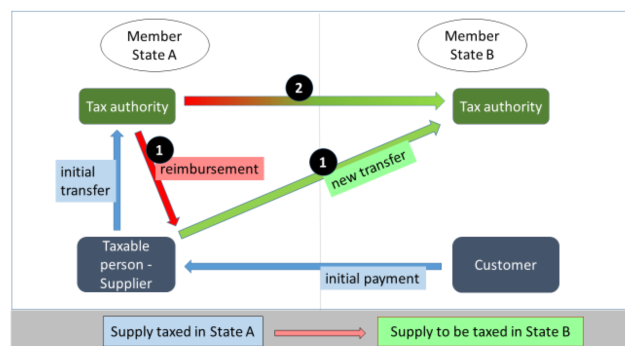

Figure 3

Effect of different VAT rates ?

20. The situation may however be more problematic if the VAT rate initially applied in the first Member State differs from the VAT rate that applies in the other Member State, where the VAT is due.

If the amount of the VAT claimed by the other State would be higher (resulting from a higher VAT rate), it could be left to the discretion of the taxpayer to

[18] EUCJ 26 April 2017, C-564/15, *Tibor Farkas*, para. 46 ; EUCJ 6 February 2014, C-424/12, *Fatorie*, para. 38.
[19] If the customer is a taxable person with a right to deduct input VAT, he would be entitled to the deduction of the (additional) VAT paid at that later moment (Cf. EUCJ 12 April 2018, C-8/17, *Biosafe* ; EUCJ 21 March 2018, C-533/16, *Volkswagen*).
[20] However, to the extent that reimbursement of the unduly invoiced VAT by the seller to the purchaser would have become impossible or excessively difficult, in particular in the case of the insolvency of the seller, the principles of fiscal neutrality, effectiveness and proportionality require that the purchaser be able to address his application for reimbursement to the tax authority directly (paras. 53 and 57 of the *Farkas* judgment, with reference to EUCJ 15 March 2007, C-35/05, *Reemtsma Cigarettenfabrieken*, para. 41).

possibly pay or deposit the difference between the amount already paid in the first State and the amount claimed by the other State. However, it can be considered unreasonable to expect the taxpayer to collect the higher VAT amount from his customer at the moment of supply; the latter would even be impossible if the double taxation is only revealed at a later moment.

If the VAT rate finally due is higher, it is also uncertain whether the taxable person concerned would still be able to recover this difference from his customer at the moment where the double taxation dispute is ended by a final decision confirming the taxing right of the other Member State. Although situations where the individual recipients of the taxable person's supplies are no longer retracable will usually not be so complex that they may lead to double taxation, later charging an additional amount of VAT to private customers, possibly with regard to frequently repeated transactions, and obtaining the payment of these additional VAT amounts may not always be easy. On this point, it should also be taken into account that the VAT double taxation dispute may only be solved after a long period of time.

Nevertheless, that is normally not an excuse for not paying the right amount of VAT – at the higher VAT rate – that finally appears to be due in the other Member State. On this point, the above situation can be seen as the reverse of the situation where the VAT due in the other Member State is to be charged at a lower rate than the VAT initially charged and paid in the wrong Member State. In the latter situation, the taxable person would be entitled to a refund of the overpaid VAT amount.[21]

21. However, it cannot be excluded that in particular circumstances, where the taxable person can no longer reasonably be expected to pass on the additional VAT due (because of the higher VAT rate in the other Member State) to his customers, the Court of Justice would decide that the neutrality principle would prevent the tax authorities from requesting this additional VAT from the taxable persons if they cannot shift this burden to the final consumer. In fact, such a situation would mirror the situation where the reimbursement of erroneously paid VAT is refused if it would lead to unjust enrichment of the taxable person.[22]

22. The influence of this neutrality principle should also be considered in the light of the proportionality principle and the need to respect the taxable person's reasonable expectations. In this regard, it can be noted that the EU Court of Justice has already decided that in the framework of the common system of VAT, national tax authorities are obliged to respect the principle of protection of legitimate expectations, which implies that VAT claims should not be enforced if the taxable person "could reasonably have believed" that he was entitled to a VAT exemption – or to a lower VAT rate – on the basis of the explanations or the instructions given to him by a competent authority.[23] It may indeed be the case that the taxable person relied on information provided by the VAT authorities of the Member State where he initially paid the VAT, and that he had no reasons to doubt about the validity of the opinion expressed by these authorities.

This example of the impact of "reasonable expectations" shows that EU law does not always require the payment of the correct amount or rate of VAT. Accordingly, it could be recommended that if there is a situation of VAT double taxation where the taxpayer cannot "reasonably be expected" to know for certain where he should pay the VAT, the Member State whose taxing right is finally confirmed should refrain from claiming a higher VAT amount, due to a higher rate than the rate that was applied in the Member State where the VAT was initially paid, at least if it is not obvious that the correct VAT amount can still be charged to the customer.

No special State liability

23. Would it be possible for the taxable person to invoke the liability of the Member State where the VAT was unduly paid, for the damage that would be caused to him if he would be requested to pay a higher VAT rate in the other Member State, without being able to still charge the additional VAT to his customers? The EU Court of Justice has already confirmed the principle of the State liability for loss and damage caused to persons as a result of breaches of EU law for which the State can be held responsible.[24] This State liability applies irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive.[25] However, the breach of law must be sufficiently serious.[26] The fulfilment of the latter condition will normally be problematic in situations of VAT double taxation: if the taxable person would argue that the error of the tax authorities was inexcusable (in order to invoke the State liability), it could be counterargued that the taxable person should

[21] In fact, if the VAT was paid in the wrong Member State, that Member State should in principle reimburse all that VAT to the taxable person, unless this would lead to an unjust enrichment. There is of course no unjust enrichment to the extent that VAT (at a lower rate) would be due in the other Member State. The difference caused by the different VAT rates should normally be reimbursed to the customers. In some situations, it may however be dificult to retrieve the customers or to reimburse to them the overpaid VAT.

[22] See previous footnote.

[23] EUCJ 14 September 2006, C-181/04 to C-183/04, *Elmeka*, paras. 31-36.

[24] EUCJ *Francovich and Others*, para. 35 ; EUCJ C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, para. 31.

[25] EUCJ C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, para. 34.

[26] EUCJ C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, para. 51; C-446/04, *Test Claimants in the FII Group Litigation*, para. 212-213.

then also have noticed that the opinion of the tax authorities concerned was manifestly not correct, so that he should have paid the VAT correctly from the start.

4. Interest

24. If two (or more) Member States claim VAT on the same transaction and VAT is paid in one of them, this leads to questions about interest due if it finally appears that this VAT was paid in the wrong Member State:

- what about interest on the repayment of the VAT by the tax authorities of the Member State where that VAT was levied?
- what about interest due by the taxable person to the Member State where the VAT was not paid before?

This seems to be a rather complex issue, since:

- the VAT paid in one Member State and the VAT due in the other Member State may be levied at a different VAT rate, which leads to a difference in the VAT amount due (see however the comments raised under points 20-22);
- the VAT paid in one Member State and the VAT due in the other Member State may be deductible or refundable as input VAT, for its full amount or partially;
- the interest rate in the Member States concerned may be different.

25. In the absence of EU harmonisation, Member States retain the power to apply their own interest rules with regard to VAT debts and repayments. They must, however, exercise that power in accordance with EU law and its general principles:

- in a situation of repayment of a tax levied by a Member State in breach of EU law, the national interest rules should not lead to depriving the taxpayer of an adequate indemnity for the loss sustained through the undue payment of the tax;[27]
- the interest charged by tax authorities should compensate for the financial loss caused to the public budget. It is however also considered to have a deterrent and punitive purpose (which explains why this interest can in principle be set at a level that is higher than the level needed to meet the compensation purpose. [28]

4.1. Situations where the customer is a taxable person with a right to deduct input VAT

26. Insofar as the VAT concerned is deductible/refundable, there is no loss for the tax authorities of the Member State where the VAT was not paid. Indeed, if the VAT would have been paid immediately to that State, it would have been deducted or the refund of the VAT would have been requested by the taxable person claiming a deduction or refund of that input VAT. In that case:

- no interest should be charged by the tax authorities of the Member State where the VAT is finally to be paid, because there was no financial loss for the public budget, given the deductibility of the VAT concerned;
- no interest should be paid by the Member State where the VAT was initially paid, since the taxable person supplying the goods or the service did not face any loss (insofar as he charged the VAT and received it from his customer).

Any deterrent and punitive element in the nature of the interest (see point 25) should not lead to another conclusion, since the taxpayer is not to be blamed for the Member States' dispute about their respective taxing rights.

4.2. Situations where the customer is not a taxable person with a right to deduct input VAT

27. Insofar as the VAT concerned is not deductible/refundable, the Member State who has the taxing right may have suffered a financial loss if VAT was paid to another Member State. The VAT itself should still be paid to the Member State where it is really due. What about the interest on the late payment of VAT to that State?

Effect of a higher interest rate in the Member State where the VAT is finally due ?

28. In principle, the Member State that has received an amount of VAT not due to that State should reimburse this VAT with interest.[29] The taxable person concerned would then be expected to pay the VAT to the other Member State, with interest.[30] He may however be confronted with a situation where the interest rate in that other Member State is higher than

[27] EUCJ 18 April 2013, C-565/11, *Irimie*, para. 26 ; EUCJ 19 July 2012, C-591/10, *Littlewoods*, para. 29.

[28] I. De Troyer, 'Interest on VAT claims', *EC Tax Review* 2018/2, p. 89, point 18, and p. 91, point 24. See also Constitutional Court Belgium 29 November 2018 ; Constitutional Court Spain Nr. 76/1990.

[29] This may only be refused where it is established that the charge has been borne in its entirety by someone other than the taxable person concerned and that reimbursement would constitute unjust enrichment (EUCJ, joined cases C-192/95 to C-218/95, *Comateb*, para. 27). Normally, however, such an unjust enrichment does not occur in these situations where VAT is due in another Member State, unless the VAT rate in the other Member State is lower and the difference is not reimbursed by the taxable person to his customer.

[30] A direct transfer of the VAT concerned could be considered (see point 19).

the rate of the interest which he receives on the amount reimbursed by the Member State where he initially paid the VAT.

It can however be argued that the taxable person should not pay interest at the (higher) rate normally applying in the Member State where the VAT is finally due. In a situation where the VAT on a transaction was erroneously paid to another State than the State where the transaction is finally considered to take place, the taxable person did not necessarily avail himself of an unjustified financial advantage, even though there may be a financial loss for the Member State who has the taxing right. Under these circumstances, imposing an additional interest burden (i.e. at a higher rate than the interest rate accorded by the Member State reimbursing the initially paid VAT) on that taxable person may be considered as a non-proportionate sanction. [31]

Indeed, if the VAT is effectively paid in one of the Member States, the taxable person does no longer dispose of that money. The attribution of the taxing right and the possible transfer of this VAT amount between the Member States concerned can then be considered to be their own business.[32] This will even become more obvious from 1 January 2021, when the current VAT MOSS (Mini One Stop Shop) system will be extended. Member States will permit any taxable person carrying out intra-Community distance sales of goods and any taxable person not established in the Member State of consumption supplying services to a non-taxable person, to use this special One Stop Shop scheme (Article 369b of Directive 2006/112, as amended by Directive 2017/2455). The taxable person making use of this special scheme shall submit his VAT return by electronic means to the Member State of identification (Article 369f) and pay the corresponding VAT to that Member State (Article 369i). The Member State of identification shall transfer the VAT amounts to the Member State(s) of consumption to which the payment is due (Article 47f of Regulation 904/2010, as amended by Regulation 2017/2454).

In this scenario, it would rather be for the Member State who erroneously collected/received the VAT or kept it too long before transferring it, to compensate for the financial loss suffered by the other Member State.

The interest rate to be applied should then be the interest due in accordance with the law of the Member State who initially collected/received the VAT while it was not due there. This would be in line with the approach adopted in Directive 2010/24 on tax recovery assistance: if taxes are recovered in another EU Member State, following a request for recovery assistance, the default interest charged on the amounts for which recovery was requested – to be transferred to the applicant Member State – is calculated in accordance with the laws in force in the requested Member State (Article 13(3) of Directive 2010/24), irrespective of any possible difference between the default interest rate applicable in that requested State and the default interest rate that would have applied in the applicant Member State if that tax claim would have been recovered in the latter State.[33]

Effect of a higher interest rate in the Member State where the VAT was initially paid ?

29. It can be noted that the interest rate on the reimbursed VAT may be higher in the Member State where the VAT was initially paid then the interest rate in the Member State where the VAT is finally to be paid. In that case, the payment of interest on the VAT amounts directly transferred between the authorities of the different Member States could be advantageous for the Member State finally receiving the VAT.

5. Administrative penalties

30. In the absence of harmonisation of EU legislation in the field of sanctions applicable where conditions laid down by the VAT legislation are not complied with, Member States remain empowered to choose the sanctions which seem to them to be appropriate. Nevertheless, the Member States must exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principles of effectiveness and proportionality. Thus, such penalties must not go beyond what is necessary to attain the objectives of ensuring the correct levying and collection of the tax and preventing fraud. In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken inter alia of the nature and the degree of seriousness of the infringement which the penalty seeks to sanction, and of the means of establishing the amount of the penalty.[34]

31. The above principles were confirmed in the *Farkas* judgment (cf. supra, point 17), where the EU Court of Justice has decided that this principle of proportionality precludes national authorities from imposing on a taxable person a national tax penalty of 50 % of the amount of VAT which he is required to pay to the tax authority, where those authorities suffered

[31] See I. De Troyer, 'Interest on VAT claims', *EC Tax Review* 2018/2, p. 94, point 31.

[32] Even if the transfer would be done via a repayment to the taxable person, who would be requested to pay the VAT in the other Member State.

[33] See L. Vandenberghe, "The limits to arbitration posed by the natural judge theory (due process of law) and cross-border tax disputes", topical report for the EATLP Congress 2019, point 29.

[34] EUCJ 26 April 2017, C-564/15, *Tibor Farkas*, paras. 59-60, with reference to earlier case-law

no loss of tax revenue and there is no evidence of tax evasion, this being a matter for the referring court to determine.[35]

It should be emphasized that the loss of tax revenue is not the sole and primary criterion. For instance, in the *Rodopi-M 91* case, the EU Court of Justice did not exclude that a Member State could apply penalties in a situation where there was finally no loss for the tax authorities, since the taxable person had subsequently remedied the initial non-declaration and paid all the VAT due, together with interest. The EU Court of Justice accepted that a penalty could be imposed, as an incentive to ensure timely declaration and payment of VAT. However, The Court also observed that, taking account of the proportionality requirement, the national court had to determine whether the specific penalty imposed went beyond what was necessary to attain the objectives of ensuring the correct collection of tax and preventing evasion. [36]

32. When it comes to situations where the taxable person is confronted with a disagreement between Member States concerning the place of the transaction, it is obvious that the taxable person should not be negatively affected by such conflicts between Member States' tax authorities about the place where transactions should be taxed. If a transaction was timely declared in one of the Member States concerned, in line with the views of the tax authorities of that Member State, the other Member State should not blame the taxable person concerned for not immediately paying VAT on the same transaction in that other Member State, as soon as the tax authority of that other Member State claims that the transaction should be considered to have occurred in that other State. Hence, the other Member State should not impose a penalty on the taxpayer who is confronted with this uncertainty about the Member State where the VAT should be paid. The general principle of legal certainty, which is a fundamental principle of Union law, indeed requires that rules should be clear and precise, so that all persons may ascertain unequivocally what their (rights and) obligations are and may take steps accordingly.[37] This principle of legal certainty thus requires that rules imposing charges on a taxpayer be clear and precise so that he may be able to ascertain unequivocally what his rights and obligations are and take steps accordingly,[38] and that these rules define clearly offences and the penalties which they attract (*nullum crimen, nulla poena sine lege (certa)*).[39] This requirement also applies to administrative penalties imposed by tax authorities. The Court has indeed held on numerous occasions that a penalty, '**even of a non-criminal nature'**, cannot be imposed unless it rests on a clear and unambiguous legal basis.[40]

The mere fact that Member States' tax authorities disagree on the VAT treatment of a transaction demonstrates that the law concerned[41] is not sufficiently clear to generate (administrative) penalties for non-respect of that law in one of the Member States concerned.

6. Conclusions

33. Regrettably, resolving situations of VAT double taxation sometimes takes a lot of time, in particular when Member States' tax authorities take a different view on how VAT rules should be applied to a specific case. The VAT treatment may indeed not be obvious, especially for complex transactions.

Long-lasting disputes about Member States' respective taxing rights should however not be detrimental do the interests of the taxable persons, who are collecting the VAT on behalf of the VAT authorities.

The purpose of the above presentation is to offer a framework that provides some legal certainty for the taxable persons, ensuring that their interests are respected during the administrative or judicial VAT dispute resolution proceedings.

[35] EUCJ 26 April 2017, C-564/15, *Tibor Farkas*, para. 60 ; EUCJ 8 May 2019, C-712/17, EN.SA., para. 40.

[36] The fact that there is no loss for the tax authorities is not the single criterion. (EUCJ 20 June 2013, C-259/12, Rodopi-M, paras. 38-39).

[37] E.g. EUCJ 3 June 2008, C-308/06, *Intertanko*, para. 69 ; EUCJ C-110/03, *Belgium v Commission*, para. 30.

[38] EUCJ 12 February 2004, C-236/02, *Slob*, para. 37; EUCJ 17 July 1997, C-354/95, *National Farmers' Union and Others*, para. 57 ; EUCJ 13 February 1996, C-143/93 *Van Es Douane Agenten*, para. 27; EUCJ 22 February 1989, Joined Cases 92/87 and 93/87, *Commission v France and United Kingdom*, para. 22; EUCJ 9 July 1981, 169/80 *Gondrand Frères*, para. 17.

[39] EUCJ 3 June 2008, C-308/06, *Intertanko*, paras. 70-71 ; EUCJ 3 May 2007, C-303/05, *Advocaten voor de Wereld*, paras. 49-50.

[40] EUCJ, 25 September 1984, 117/83 *Könecke*, para. 11; EUCJ 18 November 1987, 137/85, *Maizena*, para. 15; EUCJ 14 December 2000, C-110/99, *Emsland-Stärke*, para.56; EUCJ 11 July 2002, C-210/00 *Käserei Champignon Hofmeister*, para. 52; EUCJ 6 April 2006, C-274/04, ED & F Man Sugar, para. 15; EUCJ 28 October 2010, C-367/09, *Belgisch Interventie- en Restitutiebureau v SGS Belgium, Firme Derwa and Achmea*, para. 61.

[41] The EU VAT Directive or the national laws or practices adopted for the implementation of the EU Directive.

CASE LAW

EU

Court of Justice

Wind 1014 and Kurt Daell

18 January 2018

Case number: C-249/15

Guarantees for tax collection – Registration tax on a car leased from a leasing company in another Member State – Registration tax calculated proportionately to the duration of use of the car – Requirement to pay the full amount in advance, with provision made for repayment of the surplus paid, plus interest, if and when the taxpayer is eventually authorised by the tax authorities to pay the proportionate registration tax calculated – Unjustified restriction to the free movement of leasing services

Summary

Under the Danish legislation, cars must be registered before being used in Denmark. The registration of a car in Denmark is subject to the payment of a registration tax. As regards cars leased by residents in Denmark for a temporary use in Denmark, the tax authorities may authorise payment of the proportionate registration tax. The authorisation procedure takes about one month (but it may be longer in complex cases).

The possibility for a resident of Denmark to make immediate use of a vehicle leased from a leasing company established in another Member State is subject to the requirement of an advance payment of the full amount of registration tax. If the taxpayer is eventually authorised to pay the proportionate registration tax, the surplus is repaid, with interest.

The Court of Justice considers that this requirement to pay the full amount in advance constitutes an unjustified restriction to the free movement of leasing services. The Court rejects the arguments of the Danish authorities, relating to the need to safeguard the State's powers of taxation and to prevent fraud and abuse.

Request for a preliminary ruling under Article 267 TFEU from the Østre Landsret (Eastern Regional Court of Appeal, Denmark), made by decision of 22 May 2015, received at the Court on 28 May 2015, in the proceedings

Wind 1014 GmbH,

Kurt Daell

v

Skatteministeriet,

THE COURT gives the following judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU.

2 The reference has been made in two sets of proceedings between, on the one hand, Wind 1014 GmbH ('Wind') and M. Kurt Daell and, on the other, the Skatteministeriet (Ministry of Taxation, Denmark) concerning, in the first set of proceedings, the refusal by the tax authorities to authorise the use, in Denmark, of a vehicle covered by a leasing contract signed by Mr Daell with Wind, established in another Member State, before those authorities approved the application submitted by Wind and Mr Daell seeking to have the registration tax on the vehicle calculated proportionately to the time of use in Danish territory and, in the second set of proceedings, those same authorities' refusal to approve that application.

Danish law

3 The Lov om registrering af køretøjer (Law on Registration of Vehicles), in the version thereof applicable to the facts in the main proceedings, provides in Paragraph 2 that motor vehicles *'must be registered in the motor vehicle registry and equipped with number plates before the vehicle is put to use within the meaning of the [færdselsloven (Road Traffic Law)], subject to Paragraphs 3 and 5 and Paragraph 7(5)'*.

4 Paragraph 1(1) of the Lov om registreringsafgift af motorkøretøjer (Law on Registration Tax for Motor Vehicles), in the version thereof applicable to the facts in the main proceedings, provides:

'A tax shall be paid to the State on motor vehicles which must be registered in the registry of vehicles pursuant to the Law on Registration of Vehicles, including trailers and semi-trailers of such vehicles. No tax shall however be payable on vehicles registered with export plates or test plates. The tax shall be payable upon the first registration of a vehicle, unless otherwise provided for herein.

…'

5 Paragraph 3b of the Law on Registration Tax for Motor Vehicles is worded as follows:

'1. The customs and tax authorities may, upon application, grant authorisation for the tax on leasing vehicles subject to registration with a view to temporary use in Denmark to be paid under subparagraphs 2 and 3 when the vehicle belongs to a business or a permanent place of business in Denmark

or elsewhere and when the vehicle is leased for a fixed period of time under a written contract to a natural or legal person resident in Denmark. The contract must contain detailed information on the agreed-upon leasing period. The application shall be submitted either by the leasing company or by the person leasing the vehicle.

2. A tax shall be paid on vehicles subject to registration under the Law on Registration of Vehicles. The registration obligation and therefore obligation to pay the appurtenant tax arises on the date when the vehicle is first used in Denmark by a person resident in Denmark. The tax shall be levied for the entire leasing period under the contract. The tax shall be calculated as follows:

(1) for vehicles between zero and three months old, calculated from the time of first registration or use, whether in Denmark or elsewhere, 2% of the calculated registration tax per month begun following the time of first registration or use during the first three months;

(2) for vehicles which, at the time the registration obligation arises, are more than three months old at the time of first registration or use in Denmark or elsewhere, 1% of the calculated registration tax per month begun during the following 33 months; and

(3) for vehicles which, at the time the registration obligation arises, are more than 36 months old at the time of first registration or use in Denmark or elsewhere, 0.5% of the calculated registration tax per month begun during the following months.

3. At the time of payment, interest shall be added to that portion of the calculated registration tax remaining after payment. Interest shall be calculated at the average lending rate granted by banks to non-financial corporations, as published most recently on 1 January or 1 July, as the case may be, by Danmarks Statistik (Statistics Denmark) as at the date of calculation of the tax.

…

9. Leased vehicles on which tax must be paid under subparagraphs 2 and 3 must be covered by a written leasing contract. The contract must state how the vehicle is being leased and include specific information enabling identification of the vehicle, the name and address of the leasing company and the lessee, as well as the leasing amount. The contract must also contain information on whether an option or purchasing obligation has been agreed upon and also the terms thereof. The leasing contract must state specifically the duration of the lease. All users must be referred to in the leasing contract. The type and accessory equipment of the vehicle must be attached to the contract.'

6 Under that legislation, the Danish administrative practice, as described in an administrative information circular from the Danish tax authorities of 13 January 2011, consists in making the authorisation to pay the registration tax calculated in accordance with Paragraph 3b(2) and (3) of the Law on Registration Tax for Motor Vehicles, that is to say, proportionate to the duration of use of the vehicle concerned in Danish territory ('the proportionate registration tax') subject to a check by the tax authorities of compliance with the formal and substantive conditions of the leasing contract concerning that vehicle. Under that administrative practice, a vehicle in respect of which an application to pay the proportionate registration tax has been made may not be used in Denmark while that application is being processed by the tax authorities, unless the full amount of registration tax has been paid beforehand, in which case the surplus paid by the taxpayer, plus interest, will be repaid to the taxpayer if and when those authorities authorise the payment of the proportionate registration tax.

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

7 Mr Daell, a resident of Denmark, signed a leasing contract covering a motor vehicle ('the vehicle in question') for the period from 15 June to 15 November 2010. The contract was signed with Wind, a leasing company established in Germany whose sole activity consisted in having concluded that contract with Mr Daell.

8 Previously, Mr Daell had signed — also with Wind — a leasing contract pertaining to the vehicle in question, although on behalf of the company Harald Nyborg A/S and for the periods from 27 August to 27 October 2008 and 1 July to 3 November 2009. In both cases, the tax authorities had given Mr Daell and Wind authorisation to pay, for the relevant periods, the tax on the vehicle in question under the proportionate registration tax scheme. The vehicle had then been registered in Denmark for those periods.

9 On 9 June 2010, Wind once again applied for authorisation to pay the tax on the vehicle in question under the proportionate registration tax scheme. At the time of the application, the vehicle was no longer registered in any Member State.

10 On 12 July 2010, whilst the first application was still being processed by the tax authorities, which had requested certain additional information from Wind, Mr Daell submitted a second application to those authorities, seeking authorisation to use the vehicle in question while the first application was being processed.

11 After the tax authorities refused that second application, Mr Daell and Wind instituted legal proceedings against the Ministry of Finance. Those proceedings led to the first set of proceedings before the referring court, the Østre Landsret (Eastern Regional Court of Appeal, Denmark).

12 In the meantime, by decision of 21 October 2010, the tax authorities rejected the first application

seeking authorisation to pay proportionate registration tax on the vehicle in question. Those authorities took the view that the substantive conditions for paying the proportionate tax were not met in the present case, on grounds relating to the actual situation of the leasing arrangement.

13 By decision of 29 June 2011, the Landsskatteretten (National Tax Tribunal, Denmark) ruled that the tax authorities' refusal decision of 21 October 2010 was valid.

14 Mr Daell and Wind challenged the decision before the referring court, which decided to join the two cases.

15 The referring court has questions about the compatibility with Union law of the prior approval scheme for registration of leased motor vehicles, as provided for under Paragraph 3b of the Law on Registration Tax for Motor Vehicles and as implemented in Danish administrative practice, under which a leased vehicle can be used temporarily in Danish territory only if — and only as of the time when — the tax authorities have given authorisation for payment of the proportionate registration tax ('the prior approval'), unless the entire amount of that tax has been paid at the outset, in which case the taxpayer will be refunded the surplus paid, plus interest, if the application is successful.

16 In those circumstances, the Østre Landsret (Eastern Regional Court of Appeal), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it consistent with EU law, including Article 56 TFEU, that a vehicle covered by a leasing agreement between a leasing company domiciled in one Member State and a lessee resident or domiciled in another Member State (please see question 2 below) basically cannot begin being used on the roads of the latter Member State while the authorities process an application for permission to pay proportionate registration tax on that vehicle in respect of the period for which it is desired to use the vehicle in that Member State?

(2) Is it compatible with EU law, including Article 56 TFEU, that a national measure serving as a prerequisite for the registration/proportionate adjustment of tax on a vehicle for only temporary, not permanent, use requires prior approval or means that:

(i) the authorities require full payment of Danish registration tax as a prerequisite for immediate use, and that the difference between the full amount of tax and the proportionate amount of tax that has been calculated is to be repaid with interest if permission is subsequently given; and/or that;

(ii) the authorities require full payment of the registration tax as a prerequisite for immediate use, and this is not adjusted, and the surplus is not repaid when temporary use ceases, in the event that permission is not given?'

Consideration of the questions referred

17 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding a Member State's legislation and administrative practice, such as those at issue in the main proceedings, under which:

– use by a resident in that Member State of a vehicle leased from a leasing company established in another Member State for the purpose of temporary use of that vehicle in the first Member State, in return for payment of a proportionate registration tax calculated proportionately to the duration of that use, is subject to prior approval of that payment by that Member State's tax authorities, without which the vehicle may not, in principle, be used in its territory, and

– the possibility of making immediate use of such a vehicle in that first Member State whilst the taxpayer's application to pay a proportionate registration tax on that vehicle based on the duration of use in that first Member State is being processed, is subject to advance payment of the full amount of registration tax, with provision made for repayment of the surplus paid, plus interest, if and when the taxpayer is eventually authorised by the tax authorities to pay the registration tax calculated proportionately.

18 It must be determined whether such legislation and administrative practice entails a restriction on the freedom to provide services and, if so, whether such a restriction can be justified.

Restriction on the freedom to provide services

19 First of all, it should be noted that, apart from certain exceptions not relevant to the main proceedings, taxation of motor vehicles has not been harmonised at European Union level. The Member States are thus free to exercise their powers of taxation in that area provided that they do so in compliance with EU law (judgment of 19 September 2017, *Commission* v *Ireland*, C-552/15, EU:C:2017:698, paragraph 71 and the case-law cited).

20 Leasing is a 'service' within the meaning of Article 56 TFEU (judgment of 21 March 2002, *Cura Anlagen*, C-451/99, EU:C:2002:195, paragraph 18).

21 According to the Court of Justice's settled case-law, restrictions on the freedom to provide services enshrined in Article 56 TFEU are those measures which prohibit, impede or render less attractive the exercise of that freedom (see, to that effect, judgment of 14 January 2016, *Commission* v *Greece*, C-66/15, not published, EU:C:2016:5, paragraph 24 and the case-law cited).

22 In the present case, under the Danish legislation, motor vehicles must be registered and equipped with number plates before being used in Denmark. The registration of a vehicle in Denmark is subject to the payment of a registration tax.

23 As regards vehicles leased by residents in Denmark for the purpose of temporary use of those vehicles in Denmark, the tax authorities may, when application is made for them to do so, authorise payment of the proportionate registration tax.

24 It is apparent from the case file submitted to the Court that, under the Danish administrative practice, that authorisation is issued by the tax authorities at the end of a procedure aimed at verifying compliance with the substantive and formal conditions laid down in the Law on Registration Tax for Motor Vehicles. That procedure takes about one month in the more straightforward cases, although it may be longer in more complex cases.

25 Moreover, under that same administrative practice, while that procedure is ongoing, the vehicle concerned is not to be used in Denmark unless the full amount of registration tax has been paid beforehand, in which case the surplus paid, plus interest, will be repaid to the taxpayer, if and when the application for the proportionate registration tax has been successful.

26 It is appropriate to begin by considering whether, in circumstances such as those referred to in paragraphs 22 to 24 above, the prior approval scheme gives rise to a restriction on the freedom to provide services before then examining whether the conditions in which such a vehicle may be used immediately, such as those referred to in the preceding paragraph, also give rise to such a restriction.

The prior approval scheme

27 As evidenced by paragraphs 22 to 24 of this judgment, under the Danish legislation and administrative practice, use by a resident of Denmark of a vehicle leased from a leasing company established in another Member State for the purpose of temporary use of that vehicle in Denmark, in return for payment of a proportionate registration tax, is subject a prior approval procedure of that payment, the purpose of which is to allow the tax authorities to verify compliance with the conditions laid down in the Law on Registration Tax for Motor Vehicles.

28 It is true that the prior approval scheme also applies where a resident of Denmark wishes to use, in the same conditions, a vehicle leased from a leasing company established in Denmark.

29 However, the derogation provided for in Paragraph 3b of the Law on Registration Tax for Motor Vehicles is used more for vehicles leased from companies established in other Member State, as those vehicles are, as a rule, intended to be used temporarily in Denmark, than for vehicles leased by residents of Denmark from Danish companies and used in Denmark, which are, as a rule, intended essentially to be used permanently in that Member State's territory and which accordingly were registered in that Member State after the full amount of registration tax was paid.

30 The Court has held previously that the obligation to register in the Member State where they are used vehicles which have been leased from an undertaking established in another Member State has the effect of making cross-border leasing activities more difficult, with the result that such an obligation amounts to a restriction (see, to that effect, judgment of 21 March 2002, *Cura Anlagen*, C-451/99, EU:C:2002:195, paragraphs 37 and 38).

31 The same finding holds true in respect of a prior approval scheme, such as the one at issue in the main proceedings. In the present case, where no authorisation has been given by the tax authorities, a vehicle leased by a resident from a leasing company established in another Member State cannot be registered or used in Denmark unless the full amount of registration tax has been paid beforehand. A fortiori is this the case when one considers that the prior approval is not a mere formality, due mainly to the time involved in obtaining it, which can be a month or sometimes longer.

32 It follows from the foregoing considerations that a Member State's legislation and practice, such as described in paragraphs 22 to 24 of this judgment, are liable to impede and make less attractive the pursuit of leasing activities in the territory of that State by leasing companies established in other Member States and discourage residents of the first Member State from calling on those providers' services. It follows that such legislation and practice constitute a restriction on the freedom to provide services, prohibited in principle by Article 56 TFEU.

The conditions for immediate use of a vehicle leased by a resident of one Member State from a company established in another Member State for the purpose of temporary use

33 It follows from the Danish legislation and administrative practice, the respective scopes of which have, in essence, been discussed above in paragraphs 22 to 25, that the possibility for a resident of Denmark to make immediate use of a vehicle leased from a leasing company established in another Member State whilst the taxpayer's application to pay a proportionate registration tax is being processed is subject to advance payment by that taxpayer of the full amount of registration tax on that vehicle, with provision made for repayment of the surplus paid, plus interest, if and when the taxpayer is eventually authorised by the tax authorities to pay a proportionate registration tax.

34 The Court has held in that regard in paragraphs 77 and 78 of its judgment of 19 September

2017, *Commission* v *Ireland* (C-552/15, EU:C:2017:698), that the obligation imposed on persons resident or established in a Member State who rent or lease a vehicle in another Member State, even for a limited period that is known in advance, to pay an amount of tax identical to that applicable where the vehicle is imported permanently is liable to render the rental or leasing of vehicles from a company established in another Member State more onerous than when the rental or leasing contract is entered into with a company established in the first Member State, in the light, in particular, of the discriminatory nature of such an obligation with respect to amortisation of the tax, to the detriment of rental or leasing undertakings established in another Member State. In the case that gave rise to that judgment, the national legislation requiring payment of the full amount of registration tax applied equally to residents of the Member State who rented or leased a vehicle from a company established in its territory.

35 Such considerations apply with even greater force in a situation where the immediate use of such a vehicle is subject to advance payment of the full amount of registration tax.

36 It is irrelevant in that regard that, under the Danish administrative practice, the surplus registration tax paid is repaid together with interest if and when authorisation is granted for payment of the proportionate registration tax.

37 Given the very high amount of registration tax due upon first registration of a vehicle in Denmark, which, according to the explanations provided by the Danish Government, amounts to 105% of the taxable value of the vehicle on the first 81 700 Danish Crowns (DKK) (around EUR 10 980) and 180% of the remaining taxable value of the vehicle over that amount, the obligation to pay the full amount of registration tax in advance entails the freezing of substantial funds and therefore represents a considerable cash-flow disadvantage for the person liable to pay the tax (see, by analogy, judgment of 19 September 2017, *Commission* v *Ireland* (C-552/15, EU:C:2017:698, paragraphs 80 and 81).

38 Making immediate use of a vehicle leased by the residents of one Member State from a leasing company established in another Member State subject to advance payment of the full amount of registration tax is, therefore, liable to deter both residents of the first Member State from calling on vehicle leasing services offered by service providers established in other Member States and those service providers from offering vehicle rental or leasing services to those residents. Such an obligation thus constitutes a restriction on the freedom to provide services, prohibited, in principle, by Article 56 TFEU (see, by analogy, judgment of 19 September 2017, *Commission* v *Ireland* (C-552/15, EU:C:2017:698, paragraph 82).

Justification for the restrictions on the freedom to provide services

39 According to the Court's settled case-law, restrictions on the freedom to provide services are allowed only by way of exception as expressly provided for in Article 52 TFEU, which applies here by virtue of Article 62 TFEU, or only if justified by overriding reasons relating to the public interest, provided that they are suitable for securing the attainment of the objective which they pursue and do not go beyond what is strictly necessary in order to attain it (see, to that effect, judgment of 21 March 2002, *Cura Anlagen*, C-451/99, EU:C:2002:195, paragraphs 31 and 32 and the case-law cited).

40 As regards, more specifically, vehicle registration taxes, it is settled case-law of the Court that a Member State may levy a registration tax on a vehicle made available to a person residing in that State by a company established in another Member State when that vehicle is intended to be used essentially in the first Member State on a permanent basis or is in fact used in that way (judgment of 19 September 2017, *Commission* v *Ireland* (C-552/15, EU:C:2017:698, paragraph 72 and the case-law cited).

41 On the other hand, if the conditions set out in the previous paragraph are not satisfied, the connection with the territory of the first Member State is weaker, so that another justification for the taxation is necessary (judgment of 19 September 2017, *Commission* v *Ireland* (C-552/15, EU:C:2017:698, paragraph 73 and the case-law cited).

42 Even if such a justification, founded on an overriding reason in the public interest, exists, it is also necessary for the tax to comply with the principle of proportionality (judgment of 19 September 2017, *Commission* v *Ireland* (C-552/15, EU:C:2017:698, paragraph 74 and the case-law cited).

43 In the present case, none of the parties concerned who have lodged observations before the Court and the referring court considers that the restrictions of the freedom to provide services arising under the legislation and administrative practice at issue in the main proceedings may be justified on grounds of public policy, public security or public health.

44 It must then be considered whether those restrictions may be justified by overriding reasons relating to the public interest, consistently with the Court's case-law.

45 The Danish Government highlights two points: (i) safeguarding the Danish State's powers of taxation; and (ii) the need to prevent circumvention of the taxation rules as well as fraud or abuse.

46 The Danish Government submits in that regard that Paragraph 3b of the Law on Registration Tax for Motor Vehicles on the proportionate registration tax

departs from the general rules which require, as part of that Member State's powers of taxation in this area, payment of the full amount of registration tax before a vehicle is used in Danish territory. The purpose of the prior approval scheme is to enable the tax authorities to ensure, before the vehicle is used, that the conditions for payment of the proportionate registration tax are met and, therefore, to ensure compliance with the Danish State's powers of taxation. The system is also aimed at preventing residents from concluding artificial leasing contracts for vehicles that are actually intended for long-term use in Denmark and/or actually are theirs, thereby avoiding payment of the full amount of registration tax. The Danish Government observes in that regard that the verification of duration of use and actual leasing arrangement, which are points covered in the examination procedure for prior approval, is inherent in the principle of payment of a tax, such as the proportionate registration tax, the amount of which is calculated proportionately to that duration (see, to that effect, judgment of 21 March 2002, *Cura Anlagen*, C-451/99, EU:C:2002:195, paragraph 69).

47 As regards the conditions under which a vehicle leased by a resident of Denmark from a company established in another Member State for the purpose of temporary use in Denmark may be used immediately in Denmark, the Danish Government submits that the prohibition on such use for as long as the taxpayer has not been authorised to pay the proportionate registration tax is the natural corollary to the Danish legislation under which, first, vehicles used in Danish territory must be registered there and, second, payment of the proportionate registration tax on leased vehicles is subject to prior approval. The Danish Government states that the objective pursued by the authorisation scheme, as set out in the preceding paragraph, would be undermined if the leased vehicle could be used in Denmark simply upon payment of the proportionate registration tax, before the outcome of the procedure aimed at ascertaining compliance with the conditions laid down in the national legislation for payment of that tax, and payment of the full amount of registration tax on that vehicle would thus be avoided.

48 As regards, firstly, the objective of safeguarding the Danish State's powers of taxation, as evidenced by paragraph 19 of this judgment, although Member States are free to exercise their powers of taxation in the area of taxation of vehicles, they must do so in compliance with EU law.

49 The fact that vehicle taxation falls within the Danish State's powers of taxation cannot therefore justify the restriction on the freedom to provide services (see, by analogy, judgment of 19 September 2017, *Commission* v *Ireland* (C-552/15, EU:C:2017:698, paragraph 87).

50 Secondly, regarding the need to prevent circumvention of the taxation rules as well as fraud or abuse, it is apparent from the Court's settled case-law that a restriction on the freedom to provide services can be justified by the need to prevent abusive practices where it specifically targets wholly artificial arrangements which do not reflect economic reality and whose only purpose is to obtain a tax advantage (judgment of 22 December 2010, *Tankreederei I*, C-287/10, EU:C:2010:827, paragraph 28 and the case-law cited).

51 In the case of the prior approval scheme, as evidenced by paragraphs 45, 46 and 50 of this judgment, it is aimed at preventing circumvention of the taxation rules as well as fraud or abuse which, according to the Court's case-law, is an objective that may justify a restriction on the freedom to provide services.

52 It should be noted that a prior approval scheme, such as that at issue in the main proceedings, may be held to be suitable for ensuring attainment of the objective referred to in the preceding paragraph. In the present case, in the course of the administrative procedure leading, where successful, to prior approval, the tax authorities verify whether the conditions of application of the proportionate tax are met, including the duration of the leasing contract and the identity of the actual owner of the vehicle in question. That check enables the amount of the tax to be calculated according to the duration of the lease in question and, therefore, the planned period of use of the vehicle in Danish territory. In that regard, the Court's case-law is to the effect that, in order to be consistent with the principle of proportionality, the national legislation laying down the detailed rules for calculating such a tax must take into account the period of use of a vehicle leased from a company established in another Member State in the territory of the Member State in question (see, to that effect, judgment of 19 September 2017, *Commission* v *Ireland* (C-552/15, EU:C:2017:698, paragraph 95 and the case-law cited).

53 However, the fact that a resident of Denmark uses temporarily in Danish territory a vehicle leased from a leasing company established in another Member State does not by itself provide the basis for a general presumption that there is an abusive practice and justify a measure undermining the exercise of a fundamental freedom guaranteed by the FEU Treaty (see, by analogy, judgment of 4 December 2008, *Jobra*, C-330/07, EU:C:2008:685, paragraph 37 and the case-law cited).

54 It must be emphasised in that context that the requirement of prior approval applies to any vehicle leased by a resident of Denmark from a leasing company established in another Member State for the purpose of temporary use in Danish territory, notwithstanding the complete lack of objective factors liable to establish the existence of a purely artificial construct.

55 As evidenced by paragraph 25 of this judgment, under the Danish legislation and administrative practice, the possibility of making immediate use of a vehicle leased by a resident of Denmark from a company established in another Member State for the purpose of temporary use of that vehicle in Danish territory is subject to payment of the full amount of registration tax, with provision made for subsequent repayment of any surplus paid, plus interest.

56 It should be observed in that regard that that possibility, provided for under the Danish legislation and administrative practice, takes no account of the duration of use of the vehicle in question in Denmark.

57 As rightly observed by the Commission at the hearing, a national measure under which the use of vehicles leased by residents of the Member State in question from a leasing company established in another Member State for the purpose of temporary use of those vehicles in the first Member State is permitted upon payment of a tax calculated proportionately to the duration of use of such a vehicle in the first Member State, upon notification of the lease to the tax authorities, with the contract stating, as applicable, information such as that required under Article 3b(9) of the Law on Registration Tax for Motor Vehicles and, subject to a subsequent verification by those authorities, of compliance with the conditions of application of that tax, is a less restrictive measure than those resulting from a Member State's legislation and administrative practice, such as described in paragraphs 22 to 25 of this judgment. As part of such a measure, the Member State in question may also limit the validity of the registration to the duration of the leasing contract. Such measures comprising, where necessary, in proven cases of circumvention of the tax rules or abuse, an obligation for the resident of Denmark, alone or, as the case may be, jointly and severally with the relevant leasing company, to pay the difference between the proportionate registration tax registration and the full amount of the registration tax, and also appropriate criminal sanctions, give the Member State in question the means to prevent and combat the risk referred to in paragraph 46 of this judgment.

58 As regards the concern expressed by the Danish Government that, upon expiry of the lease, the vehicle will be exported without the amount of registration tax due actually being paid, the preceding paragraph makes it clear that, in proven cases of circumvention of the tax rules or abuse, the State would be entitled to require its resident, alone or, as the case may be, jointly and severally with the relevant leasing company, to pay the registration tax in full, and also to provide for appropriate criminal sanctions.

59 Accordingly, the conclusion is that a Member State's legislation and administrative practice, such as described in paragraphs 22 to 25 of this judgment, go beyond what is necessary to achieve the objectives pursued by that legislation and practice.

60 In the light of the foregoing considerations, the answer to the questions referred is that Article 56 TFEU must be interpreted as precluding a Member State's legislation and administrative practice, such as those at issue in the main proceedings, under which:

– use by a resident in that Member State of a vehicle leased from a leasing company established in another Member State for the purpose of temporary use of that vehicle in the first Member State, in return for payment of a proportionate registration tax calculated proportionately to the duration of that use, is subject to prior approval of that payment by that Member State's tax authorities, without which the vehicle may not, in principle, be used in its territory, and

– the possibility of making immediate use of such a vehicle in that first Member State whilst the taxpayer's application to pay a proportionate registration tax on that vehicle based on the duration of use in that first Member State is being processed, is subject to advance payment of the full amount of registration tax, with provision made for repayment of the surplus paid, plus interest, if and when the taxpayer is eventually authorised by the tax authorities to pay the registration tax calculated proportionately.

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

Article 56 TFEU must be interpreted as precluding a Member State's legislation and administrative practice, such as those at issue in the main proceedings, under which:

– use by a resident in that Member State of a vehicle leased from a leasing company established in another Member State for the purpose of temporary use of that vehicle in the first Member State, in return for payment of a proportionate registration tax calculated proportionately to the duration of that use, is subject to prior approval of that payment by that Member State's tax authorities, without which the vehicle may not, in principle, be used in its territory, and

– the possibility of making immediate use of such a vehicle in that first Member State whilst the taxpayer's application to pay a proportionate registration tax on that vehicle based on the duration of use in that first Member State is being processed, is subject to advance payment of the full amount of registration tax, with provision made for repayment of the surplus paid, plus interest, if and when the taxpayer is eventually authorised by the tax authorities to pay the registration tax calculated proportionately.

EU

Court of Justice

Sofina, Rebelco and Sidro

22 November 2018

Case number: C-575/17

Guarantees for tax collection – Withholding tax on dividends paid to non-resident companies – Different treatment of dividends paid to a resident company – Justification – Effective collection of tax – Proportionality – Discrimination

Summary

Articles 63 and 65 TFEU, relating to the free movement of capital, must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends.

Justification of the national legislation at issue in the main proceedings in the effective collection of tax cannot be accepted.

1 This request for a preliminary ruling concerns the interpretation of Articles 63 and 65 TFEU.

2 The request was made in the context of a dispute between, on the one hand, Sofina SA, Rebelco SA and Sidro SA, companies incorporated under Belgian law, and, on the other, the Ministre de l'Action et des Comptes publics (Minister for the Public Sector and Public Accounts, France) regarding the latter's refusal to reimburse the withholding tax levied on the dividends paid to those companies between 2008 and 2011.

Legal context

French law

3 Under Article 38(1) of the Code général des impôts (French General Tax Code) ('CGI'):

'… the taxable profit is the net profit, calculated on the basis of the results of all transactions of every kind performed by undertakings, including, in particular, all transfers of assets, either during or at the end of operations.'

4 Article 39(1) of the CGI states:

'The net profit is established after deduction of all charges …'

5 Article 119*bis*(2) of the CGI provides in particular that the income referred to in Articles 108 to 117*bis* of the CGI gives rise to the levying of a withholding tax, the rate of which is fixed in Article 187 of that code when such income is received by persons who have their tax residence or registered office in France.

6 Dividends are included in the income referred to in Articles 108 to 117*bis* of the CGI.

7 In the version applicable at the material time, Article 187(1) of the CGI sets the rate of withholding tax at 25%.

8 In the version applicable until 21 September 2011, the third subparagraph of Article 209(1) of the CGI stated:

'… If a loss is sustained during a financial year, it shall be treated as a charge in the following financial year and shall be deducted from the profit recorded for that year. If that profit is insufficient for the deduction to be made in full, the excess loss shall be carried forward to subsequent financial years.'

9 Since 21 September 2011, the third subparagraph of Article 209(1) of the CGI has been worded as follows:

'… If a loss is sustained during a financial year, it shall be treated as a charge in the following financial year and shall be deducted from the profit recorded for that year up to a maximum amount of [EUR] 1 000 000 increased by 60% of the amount corresponding to the taxable profit for that year exceeding the first amount. If that profit is insufficient for the deduction to be made in full, the excess loss shall be carried forward under the same conditions to subsequent financial years. The same shall apply to the portion of the excess not eligible for deduction under the first sentence of this subparagraph.'

The France-Belgium Tax Convention

10 Article 15(1) and (2) of the Convention signed in Brussels on 10 March 1964 between France and Belgium seeking to avoid double taxation and to establish mutual administrative and legal rules of assistance in the field of income tax, as amended by the Additional Agreements of 15 February 1971, 8 February 1999, 12 December 2008 and 7 July 2009 ('the France-Belgium Tax Convention'), states:

'(1) Dividends originating in a Contracting State which are paid to a resident of the other Contracting State are taxable in that other State.

(2) However, subject to the provisions of paragraph 3, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, in accordance with the law of that State, but the tax so charged shall not exceed:

(a) 10[%] of the gross amount of the dividends if the recipient is a company which has had exclusive ownership of at least 10[%] of the capital of the company distributing the dividends since the beginning of the last financial year of that company closed before the distribution;

(b) 15[%] of the gross amount of the dividends in all other cases.

This paragraph shall not concern the taxation of the company in respect of the profits out of which the dividends are paid.'

11 Article 19A of the France-Belgium Tax Convention provides, in particular:

'Double taxation shall be avoided as follows:

(A) As regards Belgium:

(1) Income and proceeds from investment capital which fall within the set of rules in paragraphs 2 to 4 of Article 15, which have actually been taxed at source in France and which are received by Belgian resident companies liable for corporation tax, shall, in return for payment of withholding tax at the normal rate on their amount of French tax, be exempt from corporation tax and distribution tax under the conditions laid down by Belgian domestic law.

…'

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

12 Between 2008 and 2011 Sofina, Rebelco and Sidro received dividends as shareholders in French companies.

13 Pursuant to Article 119*bis*(2) of the CGI, read in conjunction with Article 15(2) of the France-Belgium Tax Convention, those dividends were subject to withholding tax at a rate of 15%.

14 Since the financial years for the appellants in the main proceedings between 2008 and 2011 were loss-making, they submitted claims to the French tax authority, seeking reimbursement of the withholding tax levied on dividends paid during those financial years.

15 When those claims were dismissed, the appellants in the main proceedings brought actions before the competent courts which, at first instance and on appeal, dismissed their applications for reimbursement.

16 The appellants in the main proceedings then brought an appeal on a point of law before the referring court.

17 The Conseil d'État (Council of State, France) notes, first, that the application of withholding tax so far as concerns solely the dividends paid to loss-making non-resident companies with respect to their holdings in resident companies creates for those companies a cash-flow disadvantage as compared with loss-making resident companies. The referring court seeks, however, to ascertain whether that fact constitutes in itself a difference in treatment to be classified as a restriction on the free movement of capital, which is prohibited, in principle, by Article 63 TFEU.

18 On the assumption that the national legislation at issue in the main proceedings does constitute such a restriction, the Conseil d'État (Council of State) is uncertain, secondly, whether that restriction might be justified, in the light of the objective of that legislation, that is, the effective collection of tax.

19 Thirdly, and in the alternative, if the principle of a withholding tax at issue in this case were to be accepted, the referring court seeks to ascertain, in the first place, whether the fact that the loss-making resident company which ceases trading thereby obtains a de facto exemption from the taxation of dividends which it received in the loss-making financial years is liable to have an influence on the examination of whether the national legislation at issue in the main proceedings is compatible with Articles 63 and 65 TFEU.

20 In the second place, the Conseil d'État (Council of State) states that the differences in the way the base for taxing dividends is calculated, depending on whether the recipient company is resident or non-resident, may also constitute a restriction on the free movement of capital. Where the withholding tax provided for in Article 119*bis* of the CGI is calculated on the gross amount of the dividends, the expenses linked to their actual receipt are deducted from the base for calculating the tax chargeable on dividends paid to a resident company.

21 In those circumstances, the Conseil d'État (Council of State) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Articles [63 and 65 TFEU] be interpreted as meaning that the cash-flow disadvantage resulting from the application of withholding tax to dividends paid to loss-making non-resident companies, while loss-making resident companies are not taxed on the amount of the dividends they receive until the year when, if at all, they return to profitability, constitutes in itself a difference in treatment characterising a restriction on the free movement of capital?

(2) Must the potential restriction on the free movement of capital referred to in the preceding question, in view of the requirements resulting from Articles [63 and 65 TFEU], be regarded as being justified by the need to ensure the effective collection of tax, since non-resident companies are not subject to the supervision of the French tax authorities, or by the need to safeguard the allocation of the power to impose taxes between the Member States?

(3) If application of the withholding tax at issue may in principle be accepted with regard to the free movement of capital:

– Do those provisions preclude the collection of withholding tax on dividends paid by a resident company to a loss-making non-resident company of another Member State where the latter ceases to trade without returning to profitability, while a resident company placed in that situationis not in fact taxed on such dividends?

– Must those provisions be interpreted as meaning that where taxation rules apply which treat dividends differently depending on whether they are paid to residents or non-residents, it is appropriate to compare the actual tax burden borne by each of them in respect of those dividends, so that a restriction on the free movement of capital resulting from the fact that those rules preclude for non-residents alone the deduction of expenses which are directly linked to the actual receipt of the dividends may be regarded as being justified by the difference in the rate of tax between the general tax payable in a subsequent year by residents and the withholding tax levied on dividends paid to non-residents, where that difference compensates, with regard to the amount of tax paid, for the difference in the taxable base?'

Consideration of the questions referred

The first and second questions, together with the first part of the third question

22 By its first and second questions, together with the first part of its third question, which it is appropriate to examine together, the referring court is asking, in essence, whether Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends distributed by a resident company are subject to a withholding tax when they are received by a non-resident company whereas, when such dividends are received by a resident company, under the general corporation tax rules, they are subject to taxation at the end of the financial year in which they were received only if the latter company was profit-making in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without having become profitable after receiving those dividends.

The existence of a restriction on the free movement of capital, for the purposes of Article 63(1) TFEU

23 It is settled case-law of the Court that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (judgments of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 15; of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 44; and of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 27).

24 Specifically, the less favourable treatment by a Member State of dividends paid to non-resident companies, compared to the treatment of dividends paid to resident companies, is liable to deter companies established in a Member State other than that first Member State from undertaking investments in that same first Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU (judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 28 and the case-law cited).

25 Pursuant to the national legislation at issue in the main proceedings, companies which hold shares in a company established in France are subject, so far as concerns the dividends paid to them in that capacity, to two different sets of tax rules, the application of which depends on their status as resident or non-resident on the territory of that Member State.

26 It is apparent from the order for reference that, pursuant to Article 119*bis*(2) of the CGI, dividends paid to non-resident companies by a French company are subject to a withholding taxof 25% on the gross amount thereof; that rate may, however, be reduced pursuant to a double taxation agreement, irrespective of their financial results. As stated by the referring court, the dividends received by the appellants in the main proceedings were subject to a 15% withholding tax pursuant to such an agreement, that is, the France-Belgium Tax Convention.

27 By contrast, dividends paid to a resident company are included in that company's tax base and subject to the general tax rules, that is, corporation tax at a rate of 33.33%, in accordance with Article 38 of the CGI. In the event of losses being incurred at the end of the relevant financial year, the third subparagraph of Article 209(1) of the CGI, in the version applicable at the material time, provided for a deferral of that tax to a subsequent profit-making year, with the recorded losses carried forward to the following financial year being set against the amount of the dividends received.

28 It follows that, whereas the dividends paid to a non-resident company are subject to immediate and definitive taxation, the tax imposed on dividends paid to a resident company depends on whether the latter's financial year is net loss-making or net profit-making. Thus, where losses are made, the taxation of those dividends is not only deferred to a subsequent profit-making year, thus procuring a cash-flow advantage for the resident company, but is also thereby uncertain, since that tax will not be levied if the resident company ceases trading before becoming profitable.

29 First, the exclusion of a cash-flow advantage in a cross-border situation when it is granted in an equivalent situation on national territory constitutes a restriction on the free movement of capital (see, by analogy, judgments of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 33, and of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 59).

30 Secondly, the assessment of whether there exists a potentially less favourable treatment of the dividends paid to non-resident companies must be undertaken for each tax year, taken individually (judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 41).

31 Since the dividends received by a non-resident company are taxed at the time when they are distributed, the financial year in which the distribution of those dividends occurs must be taken into account in order to compare the tax burden on such dividends and that on dividends paid to a resident company.

32 It should be noted that there is no such tax burden when the resident company is loss-making at the end of such a financial year.

33 Thirdly, such a deferral of taxation will be a definitive exemption of the dividends paid to a resident company if the latter does not become profitable before it ceases trading.

34 Accordingly, the national legislation at issue in the main proceedings is liable to procure an advantage for loss-making resident companies, since it gives rise, at the very least, to a cash-flow advantage, or even an exemption in the event of that company ceasing trading, whereas non-resident companies are subject to immediate and definitive taxation irrespective of their results.

35 The French Government states, in that connection, that the dividends paid to a non-resident company are subject, pursuant to the provisions of Article 119*bis*(2) of the CGI read in conjunction with Article 15 of the France-Belgium Tax Convention, to a tax burden of 15%, whereas dividends paid to a resident company are subject, pursuant to Article 38 of the CGI, to a tax burden of 33.33%.

36 However, it must be said in that regard that the mere fact that the dividends paid to a non-resident company are subject to a 15% withholding tax in France does not preclude the Kingdom of Belgium also taxing those dividends, on the basis of the powers of taxation conferred by Article 15(1) of the France-Belgium Tax Convention, within the limits laid down in Article 19A(1) of that convention.

37 Furthermore, the circumstance set out in paragraph 35 of the present judgment cannot, in any case, nullify the less favourable treatment of dividends paid to non-resident companies.

38 In the first place, unfavourable tax treatment that is contrary to a fundamental freedom cannot be regarded as compatible with EU law because of the potential existence of other advantages (judgments of 18 July 2007, *Lakebrink and Peters-Lakebrink*, C 182/06, EU:C:2007:452, paragraph 24 and the case-law cited, and of 13 July 2016, *Brisal and KBC Finance Ireland*, C 18/15, EU:C:2016:549, paragraph 32).

39 In the second place, the less favourable tax rate relied upon by the French Government so far as concerns dividends paid to a resident company is, in any case, irrelevant since those dividends are subject to a tax exemption when the resident company ceases trading without having become profitable following the receipt of those dividends. The Court has previously held that the fact that the applicable national rules place non-residents at a disadvantage cannot be compensated for by the fact that, in other situations, that same legislation does not discriminate between non-residents and residents (judgments of 18 July 2007, *Lakebrink and Peters-Lakebrink*, C-182/06, EU:C:2007:452, paragraph 23, and of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 38).

40 Such a difference in tax treatment of dividends dependent on the place of residence of the companies receiving those dividends is liable to deter (i) non-resident companies from investing in companies established in France, and (ii) investors residing in France from purchasing holdings in non-resident companies.

41 It follows that the national legislation at issue in the main proceedings constitutes a restriction on the free movement of capital, which is, in principle, prohibited by Article 63(1) TFEU.

42 It is necessary, however, to examine whether that restriction might be justified in the light of the provisions of the FEU Treaty.

The existence of a justification for the restriction on the free movement of capital under Article 65 TFEU

43 The French Government argues that, although the national legislation at issue in the main proceedings constitutes a restriction, (i) the positions of resident and non-resident companies are objectively different, and (ii) that legislation is justified by the necessity of ensuring that tax is collected and therefore corresponds to the allocation

of powers of taxation between the Member State of residence and the Member State in which the dividends are paid.

44 Under Article 65(1)(a) TFEU, 'the provisions of Article 63 [TFEU] shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'.

45 In so far as that provision is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or of the Member State in which they invest their capital is automatically compatible with the Treaty. The derogation provided for in Article 65(1)(a) TFEU is itself restricted by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]' (judgment of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 63).

46 A distinction must therefore be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. It is clear from the Court's case-law that, before national tax legislation can be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (judgment of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 64).

– *Comparability of the situations in question*

47 It is settled case-law of the Court that as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident taxpayers but also of non-resident taxpayers from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of resident taxpayers (judgments of 20 October 2011, *Commission* v *Germany*, C-284/09, EU:C:2011:670, paragraph 56, and of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 67 and the case-law cited).

48 Relying on the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), the French, Belgian, German and United Kingdom Governments contend, however, that legislation laying down solely the various arrangements for the collection of tax on the basis of the location of the registered offices of the recipient company is justified on account of a difference in the objective situation of resident and non-resident companies.

49 Thus, the application of different taxation arrangements depending on the place of residence of the recipient of the dividends is, it is argued, a reflection of the objective difference in the situations of non-resident and resident companies; the French State acts, with regard to non-resident companies, as the Member State in which the dividends are paid and not as the Member State of residence of the recipients of those dividends, a fact which restricts its collection capacity so far as concerns the latter category of companies and justifies the application of a withholding tax to the dividends paid to those companies.

50 However, that argument cannot be accepted.

51 Although the Court held, in paragraph 41 of the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that a difference in treatment consisting in the application of different taxation arrangements on the basis of the place of residence of the taxable person relates to situations which are not objectively comparable, it nevertheless made clear, in paragraphs 43 and 44 of that judgment, that the income at issue in the case which gave rise to that judgment was, in any event, subject to tax irrespective of whether it was received by a resident or non-resident taxable person.

52 As is clear from paragraph 33 of the present judgment, the national legislation at issue in the main proceedings is not limited to laying down different arrangements for the collection of tax on the basis of the place of residence of the recipient of the nationally sourced dividends, but is liable to result in a deferral of taxation of the dividends to a subsequent tax year in the event of a resident company making a loss, or even an exemption in the event of that company ceasing trading in the absence of a return to profitability (see, by analogy, judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 43).

53 Accordingly, since that legislation procures a substantial tax advantage for loss-making resident companies which is not granted to loss-making non-resident companies, it cannot be claimed that the difference in treatment in the taxation of dividends that depends on whether those dividends are received by a resident or non-resident company is restricted to the arrangements for the collection of tax.

54 It follows that that difference in treatment is not justified by an objective difference in situation.

– *Justification based on the balanced allocation of powers of taxation between the Member States*

55 The French Government argues that the withholding tax to which only those dividends

received by a non-resident company are subject is the sole means by which the French State may tax that income without its tax revenue being reduced because of losses arising in another Member State.

56 In that connection, the Court has accepted that the preservation of the balanced allocation of taxation powers between Member States constitutes a legitimate objective and that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation (judgment of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 35).

57 Such a justification can be accepted where, inter alia, the rules at issue are intended to prevent behaviour capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory (judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 77).

58 In the present case, the French State has chosen to tax the dividends paid to a non-resident company by means of a withholding tax at a rate fixed in a double taxation agreement, while not taxing dividends paid to a resident company that is loss-making.

59 However, in the main proceedings, the deferral of the taxation of dividends received by a loss-making non-resident company would not mean that the French State has to waive its right to tax income generated on its territory. The dividends distributed by the resident company would, in fact, be subject to taxation once the non-resident company became profitable during a subsequent tax year, in the same way as is the case for a resident company in a similar situation.

60 Admittedly, if the non-resident company were to fail to become profitable prior to ceasing trading, this would result in an effective exemption of the income generated by the dividends and give rise to tax losses for the Member State of taxation.

61 However, it is settled case-law of the Court that a reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is, in principle, contrary to a fundamental freedom (judgment of 20 October 2011, *Commission* v *Germany*, C-284/09, EU:C:2011:670, paragraph 83).

62 Further, where Member States make use of the freedom to tax revenue generated on their territory, they are required to respect the principle of equal treatment and the freedoms of movement guaranteed by primary EU law (see, to that effect, judgment of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 36).

63 The French Government cannot claim that the loss of tax revenue associated with the taxation of dividends received by non-resident companies in the event of their ceasing trading is of such a nature as to justify a withholding tax on that income so far as concerns solely those companies, when the French State consents to such losses when resident companies cease trading without returning to profitability.

64 In those circumstances, the justification of the national legislation at issue in the main proceedings by the need to maintain the balanced allocation of powers of taxation between the Member States cannot be accepted.

– *Justification on the grounds of the effective collection of tax*

65 The French Government also argues that submitting dividends, paid to a non-resident company, to a withholding tax is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State in which the dividends are paid.

66 The withholding tax to which the dividends paid to non-resident companies are subject serves, it is argued, to minimise the administrative formalities associated with the obligation on those companies to submit a tax return to the French tax authority at the end of the financial year.

67 In that connection, the Court has held that the need to ensure the effective collection of tax is a legitimate objective capable of justifying a restriction on fundamental freedoms, provided, however, that that restriction is applied in such a way as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, to that effect, judgment of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 39).

68 Furthermore, the Court has previously held that retention at source is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation (judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 39).

69 In that connection, it should be recalled that the restriction on the free movement of capital arising from the national legislation at issue in the main proceedings rests, as is clear from paragraph 34 of the present judgment, in the fact that, unlike loss-making resident companies, non-resident companies which are also loss-making do not benefit from the deferral of taxation on the dividends which they receive.

70 Granting the benefit of that deferral to non-resident companies, while necessarily eliminating that restriction, would not undermine the achievement of the aim of the effective collection of the tax owed by those companies when they receive dividends from a resident company.

71 In the first place, the rules on the deferral of taxation in the event of losses constitute, inherently, a derogation to the principle of taxation during the tax year in which the dividends are distributed, so that those rules are not intended to apply to the majority of companies which receive dividends.

72 In the second place, it should be pointed out that it would be the duty of non-resident companies to provide the relevant evidence to allow the tax authorities of the Member State of taxation to determine that the conditions, laid down in the legislation, for benefiting from such a deferral have been met.

73 In the third place, the mutual assistance mechanisms existing between the authorities of the Member States are sufficient to enable the Member State in which the dividends are paid to check the accuracy of the evidence put forward by non-resident companies wishing to claim a deferral of taxation of dividends which they have received (see, to that effect, judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 68).

74 In that connection, 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 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), repealed and replaced 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), allows a Member State to apply to the competent authorities of another Member State for all the information required to allow it to ascertain the correct amount of income tax.

75 Further, Article 4(1) of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28), repealed and replaced by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1), provides that 'at the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim'. That directive therefore allows the Member State in which dividends are paid to obtain, from the Member State of residence, the information necessary to allow it to recover a tax liability which arose when the dividends were distributed.

76 Thus, Directive 2008/55 provides the authorities of the Member State in which dividends are paid with a framework of cooperation and assistance that allows them actually to recover a tax liability in the Member State of residence (see, to that effect, judgments of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 78, and of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraphs 70 and 71).

77 Accordingly, if the advantage associated with the deferral of taxation on dividends distributed were also granted to loss-making non-resident companies, that would have the effect of eliminating any restriction on the free movement of capital, but would not thereby impede the achievement of the aim pursued by the national legislation at issue in the main proceedings.

78 In those circumstances, justification of the national legislation at issue in the main proceedings in the effective collection of tax cannot be accepted.

79 In the light of the foregoing, the answer to the first and second questions, together with the first part of the third question, is that Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends.

The second part of the third question

80 In the light of the answer given to the first and second questions, together with the first part of the third question, there is no need to answer the second part of the third question.

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

Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends.

EU

Court of Justice

Deutsche Post

16 January 2019

Case number: C-496/17

Guarantees for tax collection – Granting of AEO (Authorised Economic Operator) status for customs purposes – Collection of personal data – Persons affected

Summary

Authorised Economic Operators (AEO) benefit from certain customs simplifications. One of the criteria for the granting of the AEO status is the absence of any serious infringement or repeated infringements of customs legislation and taxation rules, including no record of serious criminal offences relating to the economic activity of the applicant. Where the operator is not a natural person, the above criterion must be fulfilled by the applicant, the person in charge of the applicant or exercising control over the management of the company, and the employee(s) in charge of the company's customs matters (Art. 24(1) of Regulation 2015/2447).

It seems right that, before the grant of such status to an applicant, which amounts to delegating to the applicant functions that are properly exercised by the customs authorities, it should be necessary for those authorities to ascertain not only whether the applicant complies with the customs legislation, but also whether, having regard to their level of responsibility within that applicant's organisation, the natural persons mentioned above have not, themselves, committed any serious infringement or repeated infringements of that legislation or of the tax rules, whether or not those infringements have any connection to the economic activity of that applicant.

Consequently, the collection by the customs authorities of the tax identification numbers of these natural persons and the details of the tax offices responsible for the taxation of those persons is permissible, but only to the extent that that data enables those authorities to obtain information on serious or repeated infringements of the customs legislation or of tax rules or on serious criminal offences, committed by those natural persons and related to their economic activity.

The above verifications should not affect the members of the advisory boards or supervisory boards of legal persons, divisional heads, other than those in charge of the applicant's customs matters, accounting managers and persons whose duties involve dealing with customs matters.

Request for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), made by decision of 9 August 2017, received at the Court on 17 August 2017, in the proceedings

Deutsche Post AG

v

Hauptzollamt Köln,

THE COURT (Third Chamber), gives the following judgment.

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 24(1) of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ 2015 L 343, p. 558).

2 The request has been made in proceedings where the opposing parties are Deutsche Post AG and the Hauptzollamt Köln (Principal Customs Office, Cologne, Germany; 'the Hauptzollamt'), concerning the nature and extent of the personal data of third parties that must be submitted in order that an undertaking can qualify for the status of an authorised economic operator, provided for in Article 39 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1; 'the Customs Code').

Legal context

European Union law

The *customs legislation;*

3 Title I of the Customs Code contains a Chapter 2, headed 'Rights and obligations of persons with regard to the customs legislation', which contains a Section 4, headed 'Authorised economic operator' ('AEO'), within which are Articles 38 to 41.

4 Article 38 of that code provides:

'1. An economic operator who is established in the customs territory of the Union and who meets the criteria set out in Article 39 may apply for the status of an [AEO].

The customs authorities shall, if necessary following consultation with other competent authorities, grant that status, which shall be subject to monitoring.

2. The status of [AEO] shall consist in the following types of authorisations:

(a) that of an [AEO] for customs simplifications, which shall enable the holder to benefit from certain simplifications in accordance with the customs legislation; or

(b) that of an [AEO] for security and safety that shall entitle the holder to facilitations relating to security and safety.

…

5. Customs authorities shall, on the basis of the recognition of the status of [AEO] for customs simplifications and provided that the requirements related to a specific type of simplification provided for in the customs legislation are fulfilled, authorise the operator to benefit from that simplification. Customs authorities shall not re-examine those criteria which have already been examined when granting the status of [AEO].

6. The [AEO] referred to in paragraph 2 shall enjoy more favourable treatment than other economic operators in respect of customs controls according to the type of authorisation granted, including fewer physical and document-based controls.

…'

5 Article 39 of that code provides:

'The criteria for the granting of the status of [AEO] shall be the following:

(a) the absence of any serious infringement or repeated infringements of customs legislation and taxation rules, including no record of serious criminal offences relating to the economic activity of the applicant;

…'

6 The first subparagraph of Article 41 of that code states:

'The Commission shall adopt, by means of implementing acts, the modalities for the application of the criteria referred to in Article 39'.

7 Title I of Implementing Regulation 2015/2447 contains a Chapter 2, headed 'Rights and obligations of persons with regard to the customs legislation', which contains a Section 3, headed 'Authorised economic operator', within which are Articles 24 to 35.

8 The second subparagraph of Article 24(1) of that regulation provides:

'Where the applicant is not a natural person, the criterion laid down in Article 39(a) of the Code shall be considered to be fulfilled where, over the last 3 years, none of the following persons has committed a serious infringement or repeated infringements of customs legislation and taxation rules or has had a record of serious criminal offences relating to his economic activity:

(a) the applicant;

(b) the person in charge of the applicant or exercising control over its management;

(c) the employee in charge of the applicant's customs matters.'

9 Recital 9 of Commission Delegated Regulation (EU) 2016/341 of 17 December 2015 supplementing Regulation No 952/2013 as regards transitional rules for certain provisions of the Union Customs Code where the relevant electronic systems are not yet operational and amending Delegated Regulation (EU) 2015/2446 (OJ 2016 L 69, p. 1) states:

'Since the electronic system which is necessary for the application of the provisions of the [Customs] Code governing both the application for and the authorisation granting the status of an [AEO] is yet to be upgraded, the currently used means, in paper and electronic form need to continue to be used until the system is upgraded.'

10 Article 1 of that regulation provides:

'1. This Regulation lays down transitional measures on the means for the exchange and storage of data referred to in Article 278 of the [Customs] Code until the electronic systems which are necessary for the application of the provisions of [that] Code are operational.

2. Data requirements, formats, and codes, which are to be applied for the transitional periods set out in this Regulation, in [Commission] Delegated Regulation (EU) 2015/2446 [of 28 July 2015 supplementing Regulation No 952/2013 as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1)] and in Implementing Regulation [2015/2447] are laid down in the Annexes to this Regulation.'

11 Delegated Regulation 2016/341 contains a Chapter 1 headed 'General provisions', which contains a Section 3 headed 'Application for the status of AEO', within which Article 5 of that regulation provides:

'1. Until the date of the upgrading of the AEO system referred to in the Annex to [Commission] Implementing Decision 2014/255/EU [of 29 April 2014 establishing the Work Programme for the Union Customs Code (OJ 2014 L 134, p. 46)], customs authorities may allow for means other than electronic data-processing techniques to be used for applications and decisions relating to AEO or for any subsequent event which may affect the original application or decision.

2. In the cases referred to in paragraph 1 of this Article, the following shall apply:

(a) applications for the status of AEO shall be lodged using the format of the form set out in Annex 6; and

…'

12 Part of Annex 6 to that regulation is headed 'Explanatory Notes'. Point 19 of those notes, on the name, date and signature of the applicant, states the following:

'…

Number of annexes*: the applicant shall provide the following general information:*

1. Overview of the principal owners/shareholders, stating names and addresses and their proportional interests. Overview of the members of the board of directors. Are owners known by the customs authorities for previous non-compliant behaviour?

2. The person responsible in the applicant's administration for customs matters.

…

8. The names of the key office-holders (managing directors, divisional heads, accounting managers, head of customs division etc.). Description of the adopted routines in situation when the competent employee is not present, temporarily or permanently.

9. The names and the position within the organisation of the applicant who have specific customs expertise. Assessment of the level of knowledge of these persons in regards of the use of IT technology in customs and commercial processes and general commercial matters.

…'

The right to protection of personal data

13 Article 2 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), provided:

'For the purposes of this Directive

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" (processing) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

…'

14 Article 6 of that directive was worded as follows:

'1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. …

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

…

2. It shall be for the controller to ensure that paragraph 1 is complied with.'

15 Article 7 of that directive provided:

'Member States shall provide that personal data may be processed only if:

…

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

…'

16 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1), entered into force on 24 May 2016. That regulation repeals Directive 95/46 with effect from 25 May 2018.

17 Article 4 of that regulation provides, in particular, the following definitions:

'For the purposes of this Regulation:

(1) "personal data" means any information relating to an identified or identifiable natural person (…); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

(2) "processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;

…'

18 Article 5 of that regulation, headed 'Principles relating to processing of personal data' provides:

'1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency");

(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; …

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimisation");

…

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ("accountability").'

19 Article 6 of that regulation, headed 'Lawfulness of processing', provides:

'1. Processing shall be lawful only if and to the extent that at least one of the following applies:

…

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

…

3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:

(a) Union law, or

(b) Member State law to which the controller is subject.

The purpose of the processing shall be determined in that legal basis … That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

…'

German law

20 Paragraph 139a(1) of the Abgabenordnung (the Fiscal Code of Germany; 'the AO'), in the version applicable to the main proceedings, provides:

'For the purposes of unambiguous identification in taxation procedures, the Federal Central Tax Office shall issue each taxpayer a uniform and permanent means of recognition (identifier); the taxpayer, or third parties who must submit that taxpayer's data to the tax authorities, shall include that identifier on applications, declarations or notifications addressed to the tax authorities. The identifier shall consist of a series of digits that may not be constructed or derived from other data relating to the taxpayer; the final digit shall be a check digit …'

21 Paragraph 139b of the AO, headed 'Identification number', provides:

'(1) A natural person may not receive more than one identification number …

(2) The tax authorities may only collect and use the identification number provided that this is necessary for them to fulfil their legal duties or a legal provision expressly requires or permits the collection or use of the identification number. Other public or non-public offices may

1. only collect or use the identification number provided that this is necessary to allow data to be transmitted between them and the tax authorities, or a legal provision expressly requires or permits the collection and use of the identification number,

…

3. use the legally collected identification number of a taxpayer to fulfil all of their reporting requirements vis-à-vis the tax authorities, provided that the respective reporting requirements relate to the same taxpayer and the collection and use of the identification number are permissible under [point 1]

…'

22 Paragraph 38(1) and (3) of the Einkommensteuergesetz (Law on Income Tax; 'the EStG'), in the version applicable to the dispute in the main proceedings, are worded as follows:

'(1) In the case of income from wages for work, income tax shall be levied by being deducted at source from a person's wage (wage tax) where the wage is paid by an employer

…

(3) The employer shall deduct the wage tax from an employee's wages on his behalf every time wages are paid.'

23 Under Paragraph 39(1) of the EStG, headed 'Individual data for the calculation of the wage tax to be deducted at source':

'For the implementation of the deduction at source of the wage tax, individual data for the calculation of the wage tax to be deducted at source shall be established at the behest of the wage-earning employee …'

24 Paragraph 39e of the EStG, headed 'Procedure for the establishment and use of the individual electronic data for the calculation of the wage tax to be deducted at source':

'(1) The Federal Central Tax Office shall establish, for every wage-earning employee, generally in automated form, the tax bracket, and, and as regards children to be taken into account with respect to tax brackets I to IV, the amount of child relief … as individual data for the

calculation of the wage tax to be deducted at source (Paragraph 39(4), first sentence, points 1 and 2) … Where the tax authority establishes, in accordance with Paragraph 39, individual data for the calculation of the wage tax to be deducted at source, it shall transmit that data to the Federal Central Tax Office so that the data will be available for automated retrieval by the employer …

(2) In order to make available to employers the individual data for the calculation of the wage tax to be deducted at source, which is automatically retrievable, the Federal Central Tax Office shall store the individual data for the calculation of the wage tax to be deducted at source, accessible by identification number, and, for each taxpayer, the following data, in addition to the data mentioned in Paragraph 139b(3) of the [AO]:

1. affiliation de jure to a tax-collecting religious community, and the date of joining and withdrawal,

2. registered marital status, and the date of creation or dissolution of that marital status and, in the case of married persons, identification number of the spouse,

3. children, with reference to their identification number …

…

(4) When commencing employment, for the purpose of retrieving individual data for the calculation of the wage tax to be deducted at source, a wage-earning employee shall inform each of his employers

1. of his identification number and date of birth …

…

At the start of the employment relationship, the employer shall retrieve the individual electronic data for the calculation of the wage tax to be deducted at source for the employee from the Federal Central Tax Office via remote data transmission and shall incorporate that data in the employee's wage records.'

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

25 Deutsche Post has the status of an authorised consignee and the status of an authorised consignor, and has authorisation for the use of a comprehensive guarantee, which constitute EU customs system simplifications.

26 When the Customs Code altered the particular conditions for the granting of customs authorisations, the Hauptzollamt, by letter dated 19 April 2017, requested of Deutsche Post that it reply to a self-evaluation questionnaire, in which Deutsche Post was to identify in detail the members of its advisory and supervisory boards, its principal managers (managing directors, divisional heads, accounting managers, those in charge of customs matters, etc.) and the persons in charge of managing customs matters or those responsible for dealing with such matters, by sending, inter alia, the tax identification numbers of all those natural persons and the details of the tax offices responsible for their taxation.

27 The Hauptzollamt stated to Deutsche Post that, if there was no cooperation, it would be impossible to determine whether the authorisation conditions laid down in the Customs Code were satisfied and that, if or to the extent that those conditions were no longer satisfied, it would revoke the authorisations held by Deutsche Post.

28 By means of the action brought by it before the referring court, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), Deutsche Post challenges the obligation to send to the Hauptzollamt the tax identification numbers of the persons concerned and the details of the tax offices responsible for their taxation.

29 Deutsche Post claims that the group of individuals within its undertaking affected by the questions raised by the Hauptzollamt is very large, that some of those individuals are unwilling to agree to the transmission of their personal data and that that group is larger than the group of persons referred to in the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447. Deutsche Post considers that the situation of its wage-earning employees with respect to income tax does not assist an assessment of whether serious or repeated infringements of customs legislation or of tax rules, or serious criminal offences, have been committed in the context of its economic activity. According to Deutsche Post, the collection of tax identification numbers is neither necessary nor appropriate for the purpose of determining its reliability in term of customs law, and the verification of the individual tax situation of all the individuals affected is disproportionate in relation to that objective.

30 The Hauptzollamt contends that that action should be dismissed. Its main argument is that the transmission of the tax identification numbers is necessary to ensure unmistakeable identification of the persons concerned in a request for information that it might submit to the responsible tax office, that an exchange of information is provided for, on a case-by-case basis, only if that office is in possession of evidence of serious and repeated infringements of the tax legislation, no account being taken of administrative procedures leading to fines or criminal prosecutions that are abandoned, and that repeated infringements of the tax legislation are taken into account only when their frequency is disproportionate in relation to the nature and size of the commercial activity of the applicant for authorisation. The Hauptzollamt considers that the group of individuals affected by the questions raised is compatible with the EU customs legislation.

31 According to the referring court, the outcome of the dispute in the main proceedings depends on the

interpretation of the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447, read in the light of Article 8 of the Charter of Fundamental Rights of the European Union and of Regulation 2016/679, since the tax identification numbers of the persons concerned and the details of the tax offices responsible for their taxation constitute personal data.

32 First, the referring court is uncertain as to whether the transmission of such data constitutes lawful processing with regard to Implementing Regulation 2015/2447. Second, the referring court questions the necessity of having access to the personal data of Deutsche Post's wage-earning employees and members of the its supervisory board, data that was collected for the purpose of levying income tax by deducting tax at source from wages.

33 The referring court considers that the personal data of those wage-earning employees has no direct link with the assessment of Deutsche Post's reliability in terms of the provisions of customs law and has no connection with its economic activity.

34 The referring court seeks to ascertain whether, in the light of Article 8(1) of the Charter of Fundamental Rights and the principle of proportionality, the customs authority can request personal data, such as the tax identification numbers of data subjects and the details of the tax offices responsible for the assessment of income tax payable by those persons. The referring court points out that the members of the supervisory board are not mentioned in Annex 6 to Delegated Regulation 2016/341 and that, like divisional heads and accounting managers, they are not responsible for dealing with issues relating to customs legislation.

35 In those circumstances the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) decided to stay proceedings and seek a preliminary ruling from the Court on the following question:

'Is the second subparagraph of Article 24(1) of [Implementing Regulation 2015/2447] to be interpreted as meaning that this provision permits the customs authority to request the applicant to inform it of the tax identification numbers issued by the Federal Central Tax Office for the purpose of income tax collection and the tax offices responsible for the income tax assessment of the members of the applicant's supervisory board, its managing directors, divisional heads, accounting managers, head of the customs department as well as those individuals responsible for customs matters and those dealing with customs matters employed by the applicant?'

Consideration of the question referred

Preliminary observations

36 In order to address aspects of the response to the question referred, the interested parties, with the exception of the Commission, rely on Regulation 2016/679, to which the referring court also makes reference.

37 The Commission argues, in that regard, that, since the material time in the main proceedings was April 2017, Directive 95/46 is applicable to the resolution of the dispute in those proceedings.

38 That said, having regard to the declaratory nature of the action (*Feststellungsklage*) brought before the national court, it is conceivable that that regulation is applicable *ratione temporis* to the resolution of the dispute in the main proceedings, that point not being clarified by oral argument at the hearing.

39 The question referred must therefore be answered having regard to both Directive 95/46 and Regulation 2016/679.

Substance

40 By its question, the referring court seeks, in essence, to ascertain whether the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447, read in the light of Directive 95/46 and Regulation 2016/679, must be interpreted as meaning that the customs authorities may require an applicant for AEO status to send to it the tax identification numbers, allocated for the purposes of collection of income tax, concerning the members of its supervisory board and its wage-earning employees who hold posts as directors, divisional heads, and accounting managers, with responsibility for customs matters, including those who are responsible for the management of customs matters and those in charge of dealing with such matters, as well as details of the tax offices responsible for the taxation of all those persons.

41 In the first place, it must be stated that the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447 provides that, when the applicant for AEO status is not a natural person, the criterion laid down in Article 39(a) of the Customs Code is to be considered to be fulfilled where, over the preceding three years, none of the persons whom that provision specifies has committed a serious infringement or repeated infringements of customs legislation or taxation rules or has had a record of serious criminal offences relating to his economic activity.

42 The persons specified are solely the applicant, the person in charge of the applicant or exercising control over its management, and the employee in charge of the applicant's customs matters. The reading of that provision indicates that that list is exhaustive.

43 Consequently, it cannot be accepted that the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447 may be interpreted as concerning natural persons other than those who are in charge of the applicant, who exercise control over

its management or who are in charge of the applicant's customs matters. Accordingly, that provision does not affect the members of the advisory boards or supervisory boards of legal persons, divisional heads, other than those in charge of the applicant's customs matters, accounting managers and persons whose duties involve dealing with customs matters.

44 The managing directors, for their part, may be obliged to comply with the requirements laid down in that provision if, in a situation such as that in the main proceedings, they were to be regarded as being in charge of the applicant or as exercising control over its management.

45 Admittedly, Delegated Regulation 2016/341 provides, in point 19 of the Explanatory Notes in Annex 6 thereto, that an applicant for AEO status should provide, annexed to the prescribed form for an application for that status, the names and positions within the applicant's organisation of a more extended list of natural persons than that to be found in the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447.

46 However, suffice it to state, in that regard, that Delegated Regulation 2016/341 cannot be interpreted as having as either its object or effect a derogation from the first subparagraph of Article 41 of the Customs Code, which provides that the Commission is to adopt, by means of implementing acts, the modalities for the application of the criteria, referred to in Article 39 of that code, which have to be examined in order to determine whether an applicant can be granted AEO status.

47 Consequently, Delegated Regulation 2016/341 cannot have any effect on the scope of the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447.

48 Further, the fact that that provision states that the requirements that it imposes apply to the 'the person' in charge of the applicant or exercising control over its management and 'the employee' in charge of the applicant's customs matters cannot lead to a conclusion that those requirements apply only to one person in charge of the applicant or exercising control over its management and one employee in charge of the applicant's customs matters.

49 It is not inconceivable that, within an undertaking's organisation, a number of natural persons may be jointly in charge of it or may jointly exercise control over its management and that a number of other natural persons may be in charge of the undertaking's customs matters, particularly on a territorial basis.

50 Consequently, the natural persons affected by the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447 are all those who, within the applicant's organisation, are in charge of it or who exercise control over its management as well as those who are in charge of its customs matters.

51 In the second place, in order that the customs authorities may respond to an application for AEO status, that provision implies that they should be permitted access to data that makes it possible to establish that none of the natural persons specified in that provision have committed any serious infringements or repeated infringements of customs legislation and taxation rules and or have any record of serious criminal offences relating to his economic activity.

52 In this case, the German customs authorities request the communication of the tax identification numbers of the natural persons listed in paragraph 50 of the present judgment and the details of the tax offices responsible for the taxation of those persons.

53 In such a situation, it is important that, if the practice of those authorities involves the processing of personal data, within the meaning of Article 2(a) of Directive 95/46 or Article 4(2) of Regulation 2016/679, EU legislation on the protection of that data must be respected.

54 In that regard, that legislation entails that respect for the right to private life with regard to processing of such data concerns any information relating to a natural person who is identified or identifiable (see, to that effect, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 52, and of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraph 26).

55 It is apparent, also, from the Court's case-law that tax data constitutes 'personal data' within the meaning of Article 2(a) of Directive 95/46 (see, to that effect, judgments of 1 October 2015, *Bara and Others*, C-201/14, EU:C:2015:638, paragraph 29, and of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 41).

56 A tax identification number constitutes, by its very nature, tax data relating to an identified or identifiable natural person and, therefore, personal data. Further, because of the link between the tax identification number of a specifically identified individual and the information as to the tax office responsible for the taxation of that individual, made by the customs authorities, that information must also be deemed to be personal data.

57 All processing of personal data must comply, first, with the principles relating to data quality set out in in Article 6 of Directive 95/46 or in Article 5 of Regulation 2016/679 and, second, with one of the criteria governing the legitimacy of data processing listed in Article 7 of that directive or in Article 6 of that regulation (see, to that effect, judgments of 20 May 2003, *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294,

paragraph 65, and of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 71).

58 More particularly, the personal data must, under Article 6(1)(b) and (c) of Directive 95/46 or Article 5(1)(b) and (c) of Regulation 2016/679, be collected for specified, explicit and legitimate purposes and must be adequate, relevant and not excessive in relation to those purposes, the processing of that data being lawful, under Article 7(c) of that directive or Article 6(1)(c) of that regulation, only if it is necessary for compliance with a legal obligation to which the controller is subject.

59 Further, it must be borne in mind that the requirement that processing of personal data be fair, laid down in Article 6 of Directive 95/46 or in Article 5 of Regulation 2016/679, entails an obligation to inform the data subjects of the transfer of that data by customs authorities for the purposes of its subsequent processing (see, to that effect, judgment of 1 October 2015, *Bara and Others*, C-201/14, EU:C:2015:638, paragraph 34).

60 As regards the situation at issue in the main proceedings, it is apparent, first, that the tax identification numbers of natural persons were, initially, collected by the employer of those persons in order to ensure compliance with income tax legislation and, more specifically, to ensure that the employer can fulfil his obligation to collect by means of deduction at source the tax due on the income of each of those natural persons from their paid work.

61 Second, the subsequent collection of that personal data by the customs authorities in order to make a decision on an application for AEO status is clearly necessary to comply with a legal obligation that is incumbent on those authorities pursuant to the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447 and the conditions that provision imposes on the granting of that status. To that extent, that data is collected, and therefore processed, for specified, explicit and legitimate purposes.

62 That is also true of the collection, by the customs authorities, of the details of the tax offices responsible for the assessment for income tax of those natural persons, since the aim of such a collection is again to enable those authorities to respond to an application for AEO status.

63 Accordingly, in a situation such as that in the main proceedings, the data collected by the customs authorities, namely the tax identification numbers of natural persons and the details of the tax offices responsible for the assessment of income tax due by them is, as is apparent from paragraph 58 of the present judgment, adequate, relevant and not excessive in relation to the purposes for which that data is collected.

64 As stated by the Advocate General in point 66 of his Opinion, the fact of the customs authorities granting AEO status to an operator is the equivalent, in reality, of delegating to that operator some of the customs legislation control functions. Consequently, it is important that, before that status is granted, those authorities can obtain information on the reliability of the applicant for that status with regard to compliance with the customs legislation and on the reliability of the natural persons mentioned in the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447 with regard to their compliance with the customs legislation and the tax rules applicable to them.

65 Consequently, the collection of the tax identification numbers of only the natural persons mentioned in that article and the details of the tax offices responsible for their taxation constitutes an adequate and relevant measure to enable the customs authorities to determine that one of the infringements or offences specified in that article has not been committed by one of those persons.

66 Further, the personal data thus collected by those authorities appears limited to what is necessary for achieving the objective specified in the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447, in that that data is restricted and does not, by itself, reveal to the customs authorities sensitive information on personal circumstances, such as marital status or religious affiliation, or the income of the natural persons concerned.

67 While, as stated by the referring court, the collection of the tax identification numbers of the natural persons listed in that article and of details of the tax offices responsible for their taxation may, in principle, enable the customs authorities to have access to personal data that has no connection with the economic activity of the applicant for AEO status, it is clear that the infringements of tax rules, mentioned in that article, are not limited to those relating to the economic activity of the applicant for AEO status.

68 In that regard, it seems right that, before the grant of such status to an applicant, which, as is stated in paragraph 64 of the present judgment, amounts to delegating to the applicant functions that are properly exercised by the customs authorities, it should be necessary for those authorities to ascertain not only whether the applicant complies with the customs legislation, but also whether, having regard to their level of responsibility within that applicant's organisation, the natural persons mentioned in the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447 have not, themselves, committed any serious infringement or repeated infringements of that legislation or of the tax rules, whether or not those infringements have any connection to the economic activity of that applicant.

69 Consequently, the collection by the customs authorities of the tax identification numbers of the natural persons exhaustively listed in the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447 and the details of the tax offices responsible for the taxation of those persons is permissible only to the extent that that data enables those authorities to obtain information on serious or repeated infringements of the customs legislation or of tax rules or on serious criminal offences, committed by those natural persons and related to their economic activity.

70 Having regard to the foregoing, the answer to the question referred is that the second subparagraph of Article 24(1) of Implementing Regulation 2015/2447, read in the light of Directive 95/46 and Regulation 2016/679, must be interpreted as meaning that the customs authorities may require an applicant for AEO status to send to them the tax identification numbers, allocated for the purposes of collection of income tax, concerning solely the natural persons who are in charge of the applicant or who exercise control over its management and those who are in charge of the applicant's customs matters, and the details of the tax offices responsible for the taxation of all those persons, to the extent that that data enables those authorities to obtain information on serious or repeated infringements of customs legislation or taxation rules or on serious criminal offences, committed by those natural persons and relating to their economic activity.

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

The second subparagraph of Article 24(1) of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, read in the light of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), must be interpreted as meaning that the customs authorities may require an applicant for AEO status to send to them the tax identification numbers, allocated for the purposes of collection of income tax, concerning solely the natural persons who are in charge of the applicant or who exercise control over its management and those who are in charge of the applicant's customs matters, and the details of the tax offices responsible for the taxation of all those persons, to the extent that that data enables those authorities to obtain information on serious or repeated infringements of customs legislation or taxation rules or on serious criminal offences, committed by those natural persons and relating to their economic activity.

EU

Court of Justice

Metirato Oy

14 March 2019

Case number: C-695/17

Insolvency proceedings – Administrator of the insolvency estate requesting the restitution of sums recovered by the tax authorities of that State, in the execution of a request for tax recovery assistance from another Member State – Determination of the defendant in those proceedings

Summary

1. Article 13(1) and Article 14(2) of the tax recovery assistance Directive 2010/24 apply to proceedings seeking restitution, to the insolvency estate of a company established in the requested Member State, of claims which were recovered at the request of the applicant Member State, if those proceedings are based on disputes concerning the enforcement measures, within the meaning of Article 14(2).

2. The requested Member State must be regarded as the defendant in those proceedings. The fact that the amount represented by those claims has been separated from the assets of that Member State or merged with them is irrelevant in that regard.

1 This request for a preliminary ruling concerns the interpretation of Article 13(1) and Article 14(2) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1).

2 The request has been made in proceedings between Metirato Oy and Suomen valtio/Verohallinto (Finnish State — Tax Authority) and Eesti Vabariik/Maksu- ja Tolliamet (Estonian State — Tax Authority) concerning an application from the administrator of that company's insolvency estate seeking the restitution to the insolvency estate of claims recovered by the Finnish authorities at the request of the Estonian authorities.

Legal context

European Union law

3 Recitals 1 to 4 of Directive 2010/24 state:

'(1) Mutual assistance between the Member States for the recovery of each others' claims and those of the Union with respect to certain taxes and other measures contributes to the proper functioning of the internal market. It ensures fiscal neutrality and has allowed Member States to remove discriminatory protective measures in cross-border transactions designed to prevent fraud and budgetary losses.

(2) Arrangements for mutual assistance for recovery were first set out in Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties [(OJ 1976 L 73, p. 18)]. That Directive and the acts amending it were codified by Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures [(OJ 2008 L 150, p. 28)].

(3) Those arrangements, however, while providing a first step towards improved recovery procedures within the Union by approximating applicable national rules, have proved insufficient to meet the requirements of the internal market as it has evolved over the last 30 years.

(4) To better safeguard the financial interests of the Member States and the neutrality of the internal market, it is necessary to extend the scope of mutual assistance for recovery to claims relating to taxes and duties not yet covered by mutual assistance for recovery, whilst in order to cope with the increase in assistance requests and to deliver better results, it is necessary to make assistance more efficient and effective and to facilitate it in practice. In order to fulfil these objectives, important adaptations are necessary, whereby a mere modification of the existing Directive 2008/55/EC would not be sufficient. The latter should therefore be repealed and replaced by a new legal instrument which builds on the achievements of Directive 2008/55/EC but provides for clearer and more precise rules where necessary.'

4 Article 1 of the directive provides:

'This Directive lays down the rules under which the Member States are to provide assistance for the recovery in a Member State of any claims referred to in Article 2 which arise in another Member State.'

5 Article 10 of the directive is worded as follows:

'1. At the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the applicant Member State.

2. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority, it shall forward it to the requested authority.'

6 Article 13 of Directive 2010/24 provides:

'1. For the purpose of the recovery in the requested Member State, any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State, except where otherwise provided for in this Directive. The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State applying to claims concerning the same or, in the absence of the same, a similar tax or duty, except where otherwise provided for in this Directive.

…

The requested Member State shall not be obliged to grant other Member States' claims preferences accorded to similar claims arising in that Member State, except where otherwise agreed between the Member States concerned or provided in the law of the requested Member State. A Member State which grants preferences to another Member State's claims may not refuse to grant the same preferences to the same or similar claims of other Member States on the same conditions.

…

5. Without prejudice to Article 20(1), the requested authority shall remit to the applicant authority the amounts recovered with respect to the claim and the interest referred to in paragraphs 3 and 4 of this Article.'

7 According to Article 14 of that directive:

'1. Disputes concerning the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State and disputes concerning the validity of a notification made by a competent authority of the applicant Member State shall fall within the competence of the competent bodies of the applicant Member State. If, in the course of the recovery procedure, the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State is contested by an interested party, the requested authority shall inform that party that such an action must be brought by the latter before the competent body of the applicant Member State in accordance with the laws in force there.

2. Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by a competent authority of the requested Member State shall be brought before the competent body of that Member State in accordance with its laws and regulations.

3. Where an action as referred to in paragraph 1 has been brought before the competent body of the applicant Member State, the applicant authority shall inform the requested authority thereof and shall indicate the extent to which the claim is not contested.

4. As soon as the requested authority has received the information referred to in paragraph 3, either from the applicant authority or from the interested party, it shall suspend the enforcement procedure, as far as the contested part of the claim is concerned, pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the third subparagraph of this paragraph.

At the request of the applicant authority, or where otherwise deemed to be necessary by the requested authority, and without prejudice to Article 16, the requested authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the requested Member State allow such action.

The applicant authority may, in accordance with the laws, regulations and administrative practices in force in the applicant Member State, ask the requested authority to recover a contested claim or the contested part of a claim, in so far as the relevant laws, regulations and administrative practices in force in the requested Member State allow such action. …

…'

8 The first subparagraph of Article 16(1) of that directive provides:

'At the request of the applicant authority, the requested authority shall take precautionary measures, if allowed by its national law and in accordance with its administrative practices, to ensure recovery where a claim or the instrument permitting enforcement in the applicant Member State is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the applicant Member State, in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant Member State.'

Finnish law

9 According to Paragraph 5(1) of the Laki takaisinsaannista konkurssipesään (Law on the restitution of assets to the insolvency estate), in the version applicable to the dispute in the main proceedings, a legal transaction must be set aside, inter alia, if alone or in combination with other measures it unfairly benefits one creditor to the detriment of the other creditors. The requirements for setting aside a transaction are that the debtor was insolvent when the legal transaction was concluded or that that legal transaction contributed to the debtor's insolvency.

10 Paragraph 10 of that law provides, inter alia, that the payment of a debt made less than three months prior to the reference date is to be set aside if the amount of the debt paid appears to be substantial in relation to the amount of the insolvency estate. However, in that situation the payment is not to be set

aside if, taking account of the circumstances, it may be considered to be customary practice.

11 Under Paragraph 23 of that law, the administrator of the insolvency estate or a creditor who has entered its claim or whose claim is otherwise taken into account in the schedule of claims may request restitution by bringing legal proceedings or by challenging the filing of a claim. The action may be brought before the district court which opened insolvency proceedings.

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

12 On 18 April 2012, the Tax and Customs Administration of the Republic of Estonia sent a request for recovery to the Finnish Tax Authority, pursuant to Article 10 of Directive 2010/24, concerning taxes and interest due on that tax, in the amount of EUR 28 754.50, to be recovered from Metirato.

13 Pursuant to that request, the Finnish Tax Authority sent both its own claims and those of the Estonian State to the Finnish enforcement authorities responsible for the implementation of the procedures for the forced recovery of the claims.

14 On 12 February 2013, Metirato voluntarily paid EUR 17 500 to that authority, EUR 15 837.67 of which was sent to the Finnish Tax Authority, which paid EUR 15 541.67 to the Estonian State, pursuant to that request for recovery.

15 On 23 April 2013, Metirato voluntarily paid a further EUR 17 803 to the Finnish Tax Authority.

16 On 8 May 2013, the Helsingin käräjäoikeus (District Court, Helsinki, Finland) ordered the liquidation of Metirato further to an application made by the company itself.

17 On 10 September 2013, the Estonian Tax Authority sent the Finnish Tax Authority a second request for recovery which included, inter alia, the outstanding balance from the first request for recovery of EUR 8 840.17. On 17 September 2013, the Finnish Tax Authority relied on that second claim to file, in addition to its own claims, the claims of the Estonian State against Metirato.

18 On 8 May 2014, the administrator of Metirato's insolvency estate brought an action against the Finnish State and its tax authority before the Helsingin käräjäoikeus (District Court, Helsinki) seeking the restitution to the insolvency estate of all the sums paid in accordance with Paragraphs 5 and 10 of the Law on the restitution of assets to the insolvency estate.

19 That action is based on the arguments, first, that the Finnish Tax Authority was unduly favoured to the detriment of other creditors by the payments of long overdue taxes at a time when Metirato was already insolvent and that authority should have known of the insolvency and, second, during the critical period, between 25 January and 8 May 2013, Metirato had repaid a large proportion of the tax debt as compared with the amount of the insolvency estate.

20 That action is directed against the Finnish State and its tax authority and, if they are not regarded as the proper defendants with respect to the sum of EUR 15 541.67, against the Estonian State.

21 The Finnish State challenged the proceedings brought by the administrator of Metirato's insolvency estate, arguing, inter alia, that since the disputed sum was received by the Estonian State, that action should be brought against the latter. The Finnish State submits that, by providing administrative assistance to the Estonian authorities, in accordance with Article 10 of Directive 2010/24, it acted simply as an agent of the Estonian authorities, at no time did it take possession of that amount, and that its task was completed when the restitution was made, so that the request from the administrator of Metirato's insolvency estate regarding that amount must be addressed to the Estonian Tax Authority.

22 For its part, the Estonian State has challenged that action on the ground that, in its view, it is clear from the provisions of Article 13(1) and Article 14(2) of Directive 2010/24 that, as the request of the administrator of Metirato's insolvency estate concerns an amount recovered by the Finnish authority, only the latter can be regarded as the defendant in the proceedings for restitution at issue.

23 In those circumstances, the Helsingin käräjäoikeus (District Court, Helsinki) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) *Must the provisions of Article 13(1) of Directive [2010/24], according to which claims to be recovered pursuant to a request for recovery are to be treated by the requested State as being the claims of that State, be interpreted as meaning that:*

(a) *the requested Member State is also a party to the legal proceedings concerning the restitution to the insolvency estate of sums paid following a recovery, or*

(b) *that the involvement of the requested State is limited to the recovery of the debt by enforcement and the lodgement of the claim in the insolvency proceedings, and that it is the applicant State which is the defendant in a request for recovery concerning the extent of the assets covered by the liquidation?*

(2) *Must Directive [2010/24] be interpreted as meaning that the debts of another Member State are to be recovered using the same means, while remaining separate and distinct from the assets of the requested State, or must the directive be*

interpreted as meaning that those debts are to be recovered together with the debts of the requested State, in which case they are merged with the debts of the requested State. In other words: does the directive aim exclusively to prohibit the discrimination of debts of another Member State?

(3) Is it possible for a dispute concerning restitution of assets to the insolvency estate to be treated as a dispute concerning enforcement measures within the meaning of Article 14(2), and can it be inferred that, according to the directive, that the requested State is also a defendant in such a dispute?'

Consideration of the questions referred

24 By its questions, which it is appropriate to examine together, the referring court asks essentially whether Article 13(1) and Article 14(2) of Directive 2010/24 must be interpreted as meaning that they apply to proceedings seeking the restitution, into the insolvency estate of a company established in the requested Member State, of claims which were recovered at the request of the applicant Member State, where those proceedings are based on a dispute concerning the enforcement measure, within the meaning of Article 14(2) and that the requested Member State, within the meaning of those provisions, must be regarded as the defendant in those proceedings and whether the fact that the amount represented by those claims has been separated from the assets of that Member State or merged with them is relevant in that regard.

25 In the present case, it must be recalled that, by his action, the administrator of Metirato's insolvency estate challenges the validity, under Finnish law, of the recovery of claims by the Finnish authority responsible for the enforcement of State claims for the purpose of recovering claims owed by that company to the Finnish State and the Estonian State.

26 In so far as that forced recovery procedure was brought in order to enforce a request for recovery addressed to the Finnish authorities by the Estonian authorities, pursuant to Directive 2010/24, it constitutes an enforcement measure taken in the requested Member State, within the meaning of Article 14(2) thereof.

27 Therefore, according to that provision, a dispute seeking to challenge the conduct and outcome of those proceedings, such as that at issue in the main proceedings, is a dispute concerning an enforcement measure taken in the requested Member State and must be brought before the competent court of that Member State, in the present case, the Republic of Finland, in accordance with the applicable laws and regulations.

28 However, since the wording of that provision does not indicate whether the applicant Member State or the requested Member State is the defendant in such a dispute, it must be determined whether the defendant may be identified having regard to the general scheme and purpose of Directive 2010/24.

29 As is clear from recitals 1 to 4 of that directive, it seeks to extend the scope of Directive 76/308, codified by Directive 2008/55, to claims which are not covered in order to better safeguard the financial interests of the Member States and the neutrality of the internal market and to make mutual assistance more efficient and effective and to facilitate it in practice, in order to cope with growing number of assistance requests.

30 In accordance with Article 1 of Directive 2010/24, the directive lays down the rules under which the Member States are to provide assistance for the recovery in a Member State of any claims which arise in another Member State.

31 As regards the measures taken by the requested Member State for the purposes of recovery, in that Member State, of a claim which is the subject of a recovery request, the requested authority must, in accordance with Article 13(1) of Directive 2010/24, make use of the competences and procedures provided under the laws, regulations or administrative provisions of that Member State since any claims which are the subject of such a request is, except where otherwise provided for in that directive, to be treated as a claim of the requested Member State.

32 Likewise, Article 14(4), second subparagraph, and Article 16(1) of Directive 2010/24 provide for the possibility for the requested authority, at the request of the applicant authority, to take precautionary measures in order to ensure recovery of a claim that is disputed, provided that the national law of the requested Member State so permits.

33 Furthermore, Article 14 of Directive 2010/24 provides for a division of powers between the courts of the applicant Member State and the requested Member State to hear disputes concerning, on one hand, the claim, the initial instrument permitting enforcement in the applicant Member State, the uniform instrument permitting enforcement in the requested Member State or disputes concerning the validity of a notification given by a competent authority of the applicant Member State, and on the other hand, the enforcement measures taken in the requested Member State or the validity of the notification given by a competent authority of the latter.

34 That division of powers results from the fact that the claim and the instrument permitting enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, whilst, for enforcement measures in the Member State in which the requested authority is situated, the latter applies according to its national law (see, as regards Directive 76/308, judgment of

14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 40).

35 Thus, pursuant to Article 14(1) of Directive 2010/24, any dispute of that claim, initial instrument permitting enforcement in the applicant Member State, uniform instrument permitting enforcement in the requested Member State or notification made by a competent authority of the applicant Member State must be brought before the competent bodies of that Member State and not before those of the requested Member State, whose power of review is expressly limited by Article 14(2) to acts of the requested Member State (judgment of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraphs 43 and 44).

36 On the other hand, where it is the enforcement measures taken in the Member State in which the requested authority is situated or the validity of a notification given by the requesting authority that is being contested, the action is to be brought before the competent body of that Member State in accordance with its laws and regulations, that body being the best placed to interpret its national law and to determine whether an act is lawful on the basis of that law (see, as regards as regards Directive 76/308, judgment of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraphs 39, 40 and 49).

37 Therefore, it is clear from the provisions of Directive 2010/24 that, first, enforcement measures adopted by the requested Member State are governed by the legislation applicable in that Member State and, second, that disputes concerning those measures must be brought before the competent court of the requested Member State which must examine them in the light of the provisions of its national law.

38 The fact that such a dispute arises in the context of proceedings seeking the restitution of assets to the insolvency estate of a company established in the requested Member State cannot call into question the rules relating to the resolution of that dispute laid down by the EU legislature, if the latter has not, for the purpose of those rules, made a distinction according to the nature of the proceedings in which that dispute arises.

39 Therefore, as the Advocate General observed, in substance, in points 45 to 47 of his Opinion, it is apparent from the general scheme and purpose of Directive 2010/24 that an action, such as that in the main proceedings, contesting, before the competent body of the requested Member State, the validity, in the light of the law of that Member State, of an enforcement procedure for recovery brought, in accordance with that law, by the authorities of that Member State in order to recover, pursuant to that directive, claims of the applicant Member State, must be brought against the requested Member State, even if such a dispute forms part of a procedure for the restitution of assets to the insolvency estate of a company established in that Member State.

40 Furthermore, in the absence of any determination, by Directive 2010/24 of the details rules for conserving the amounts recovered by the requested Member State before their transfer to the applicant Member State, that falls within the competence of the Member States, provided that the obligation to transfer the amounts recovered and the applicable interested are observed.

41 Therefore, the fact that the amount represented by those claims recovered by the requested Member State, on the basis of a request for recovery pursuant to that directive, has been separated from the assets of that Member State or merged with them has no effect on the interpretation set out in paragraph 38 of the present judgment.

42 Furthermore, it must be recalled that Directive 2010/24 is based on the principle of mutual trust (judgment of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 41).

43 Therefore, as the Advocate General observed in point 54 et seq. of his Opinion, where an enforcement measure, such as that at issue in the main proceedings, taken in the requested Member State in order to recover a claim of the applicant Member State, is successfully challenged before the competent court of the requested Member State, it is, in principle, for the applicant Member State to reimburse all amounts recovered, pursuant to that measure, which were remitted to it by the requested Member State.

44 In those circumstances, the answer to the questions referred is that Article 13(1) and Article 14(2) of Directive 2010/24 must be interpreted as meaning that , first, they apply to proceedings seeking restitution, to the insolvency estate of a company established in the requested Member State, of claims which were recovered at the request of the applicant Member State, if those proceedings are based on disputes concerning the enforcement measures, within the meaning of Article 14(2) and, second, the requested Member State, within the meaning of those provisions, must be regarded as the defendant in those proceedings, the fact that the amount represented by those claims has been separated from the assets of that Member State or merged with them being irrelevant in that regard.

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

Article 13(1) and Article 14(2) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures must be interpreted as meaning that, first, they apply to proceedings seeking restitution, to the insolvency estate of a company established in the requested Member State, of claims which were recovered at the request of the applicant Member State, if those proceedings are based on disputes concerning the

enforcement measures, within the meaning of Article 14(2) and, second, the requested Member State, within the meaning of those provisions, must be regarded as the defendant in those proceedings, the fact that the amount represented by those claims has been separated from the assets of that Member State or merged with them being irrelevant in that regard.

EU

Court of Justice

ENEFI

9 November 2016

Case number: C-212/15

Insolvency proceedings – Creditor not taking part in these proceedings – Forfeiture of the creditor's right to pursue his claim in another Member State – Application to tax claims of another Member State

Summary

The domestic law provisions of the Member State on the territory of which insolvency proceedings are opened which provide, in relation to a creditor who has not taken part in those proceedings, for the forfeiture of its right to pursue its claim or for the suspension of the enforcement of such a claim in another Member State, can be applied to tax claims of another Member State.

1 This request for a preliminary ruling concerns the interpretation of Article 4 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

2 The request has been made in proceedings between ENEFI Energiahatékonysági Nyrt ('ENEFI'), formerly E-Star Alternatív Energiaszolgáltató Nyrt, and the Direcția Generală Regională a Finanțelor Publice Brașov (Regional Directorate-General of Public Finances of Brașov, Romania; 'DGRFP Brașov'), relating to the enforcement of a tax claim at the request of the DGRFP Brașov.

Legal context

EU law

3 Recitals 12, 20, 21 and 23 of Regulation No 1346/2000 state:

'(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

…

(20) … In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated …

…

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (lex concursus). … the lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.'

4 Article 3 of Regulation No 1346/2000, entitled 'International jurisdiction', provides:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

…'

5 Article 4 of that regulation, entitled 'Law applicable', provides:

'1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

…

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

…

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

…'

6 Article 15 of Regulation No 1346/2000, entitled 'Effects of insolvency proceedings on lawsuits pending', states:

'The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.'

7 Article 20 of that regulation, entitled 'Return and imputation', provides:

'1. A creditor who, after the opening of the proceedings referred to in Article 3(1), obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.

2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.'

8 Article 39 of Regulation No 1346/2000, entitled 'Right to lodge claims', is worded as follows:

'Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.'

Hungarian law

9 Article 20(3) of the 1991. évi XLIX. törvény, a csődeljárásról és a felszámolási eljárásról (Law No XLIX of 1991 on proceedings for bankruptcy and liquidation) states:

'Where the time limit prescribed [by] the present law is not observed, a creditor cannot participate in the conclusion of the composition and the effects of the composition do not extend to the creditor. A person with a claim which is not registered due to a failure to observe the time limits for the declaration of claims cannot bring that claim against the debtor, but he may lodge his claim, since it is not yet registered, in insolvency proceedings opened by another creditor. …'

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

10 ENEFI is a company whose registered office is in Hungary and which possessed, at the time of the events in the main proceedings, an establishment in Romania. On 13 December 2012, insolvency proceedings were commenced against that company in Hungary and the opening of the proceedings was notified on 7 January 2013 to the DGRFP Brașov.

11 In January 2013, the DGRFP Brașov lodged two claims in the insolvency proceedings. However, given that it had not observed the applicable time limit and had failed to pay the registration fees, those claims could not be taken into account in those proceedings, a fact of which the DGRFP Brașov was notified on 2 May 2013.

12 Subsequently, while the insolvency proceedings were still pending, the DGRFP Brașov carried out a tax inspection at the premises of ENEFI's establishment in Romania. On 25 June 2013, the DGRFP Brașov issued a tax notice ('the tax notice') concerning liability to value added tax (VAT). However, it did not lodge the claim relating to that tax notice in the insolvency proceedings.

13 ENEFI did not initially challenge the tax notice. Consequently, on 7 August 2013, an enforcement order was issued against it by the Romanian authorities, which subsequently initiated enforcement proceedings.

14 Prior to the closure of the insolvency proceedings in Hungary on 7 September 2013, ENEFI brought an action against the enforcement initiated in

Romania. It took the view that it was not obliged to pay the VAT that the tax notice indicated as being owed and expressed the view that the associated enforcement was illegal, given that, on the date on which the tax inspection leading to the issuance of the tax notice had occurred, ENEFI had already been the subject of insolvency proceedings opened in Hungary. As a consequence of this, ENEFI argues that the DGRFP Brașov ought to have lodged its claim in those insolvency proceedings. However, under Hungarian law, which it argues is conclusive pursuant to Article 4 of Regulation No 1346/2000, claims not produced in the context of insolvency proceedings are, in principle, forfeited.

15 In those circumstances, the Tribunalul Mureș (Regional Court, Mureș, Romania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) For the interpretation of Article 4(1) and Article 4(2)(f) and (k) of Council Regulation No 1346/2000, may the effects of the insolvency proceedings governed by the law of the State in which proceedings are opened include forfeiture of the right of a creditor, which has not taken part in the insolvency proceedings, to pursue its claim in another Member State or suspension of the enforcement of that claim in that other Member State?

(2) Is it relevant that the claim pursued by means of enforcement in a Member State other than the State in which the proceedings are opened is a fiscal claim?'

Consideration of the questions referred for a preliminary ruling

The first question

16 By its first question, the referring court asks, in essence, whether Article 4 of Regulation No 1346/2000 must be interpreted as meaning that provisions of domestic law of the State of the opening of proceedings, which provide, in relation to a creditor who has not taken part in the insolvency proceedings, for the forfeiture of its right to pursue its claim or for the suspension of the enforcement of such a claim in another Member State, come within its scope of application.

17 In that regard, firstly, it is clear from Article 4(1) of Regulation No 1346/2000 that, save as otherwise provided in that regulation, the law applicable to insolvency proceedings and their effects is that of the State of the opening of proceedings ('*lex fori concursus*'). Thus, as is apparent from recital 23 of that regulation, the *lex fori concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.

18 More specifically, Article 4(2)(g) and (h) of Regulation No 1346/2000 provide that the *lex fori concursus* determines which claims must be lodged against the debtor's estate, the treatment of claims arising after the opening of insolvency proceedings, and the rules governing the lodging, verification and admission of claims. However, in order not to render those provisions ineffective, the consequences of a failure to respect the rules of the *lex fori concursus* concerning the filing of claims and, in particular, the time limits laid down in that regard must also be assessed on the basis of that *lex fori concursus* (see, by analogy, judgment of 10 December 2015, *Kornhaas*, C-594/14, EU:C:2015:806, paragraph 19).

19 As regards the effects of the closure of insolvency proceedings, in particular by way of composition, as well as the rights of creditors after the closure of insolvency proceedings, it must be recalled that those effects and those rights are, as expressly stated in Article 4(2)(j) and (k), also determined by the *lex fori concursus*.

20 While it is true in this regard that Article 4(2) of Regulation No 1346/2000, which contains a list of the matters falling under the *lex fori concursus*, makes no specific reference to creditors who have not participated in the insolvency proceedings and, consequently, the effects of those proceedings, or of its closure, on the rights of those creditors, there can, however, be no doubt that those effects must also be assessed on the basis of that *lex fori concursus*.

21 On the one hand, the list of matters coming within the scope of application of Article 4 of Regulation No 1346/2000, listed in paragraph 2 thereof, is not exhaustive, as is clear from its very wording, namely through the use of the term 'in particular'.

22 On the other hand, it must be stated that an interpretation to the effect that the *lex fori concursus* determines the effects of the closure of the insolvency proceedings, in particular by composition, and the rights of creditors after that closure, but not the effects on the rights of creditors who did not participate in those proceedings, would risk seriously undermining the effectiveness of those proceedings.

23 The interpretation referred to in paragraph 22 of the present judgment would mean that creditors not participating in the insolvency proceedings could, after the closure of the proceedings, request the full amount of their claims, which would thus give rise to unequal treatment between creditors. Moreover, and above all, that interpretation would have the effect of frustrating all compositions or any of the debtor's other comparable restructuring measures, in that the debtor, who must meet the claims of the creditors who did not participate in the insolvency proceedings, would lack the necessary means to pay, pursuant to such a composition or any other measures, the debts owed to other creditors, those debts being generally rescheduled and/or reduced in line with the financial means actually available to the debtor.

24 For partially similar reasons, it is necessary to reject the argument, put forward by the referring court in that context, to the effect that a provision of the *lex fori concursus* applicable to the main insolvency proceedings which limits or excludes the possibility of submitting a claim which had not been lodged in the context of that procedure, would limit the possibility of requesting the opening of secondary insolvency proceedings, provided for under Regulation No 1346/2000.

25 On the one hand, such a provision of the *lex fori concursus*, contrary to what the referring court appears to imply, does not preclude the opening of secondary insolvency proceedings as such, but only the admission of a request seeking the opening of such proceedings brought by a creditor who has failed to observe the time limit for the lodging of his claim, such as it was set by the *lex fori concursus* applicable to the main insolvency proceedings. By contrast, any request submitted by a creditor consisting of a claim that has not yet been forfeited, or brought by the liquidator in the main insolvency proceedings, would remain admissible.

26 On the other hand, although Regulation No 1346/2000 provides for the possibility of opening secondary insolvency proceedings, subject to certain conditions, the Court has previously stated that the opening of such proceedings, which, pursuant to Article 3(3) of that regulation, must be winding-up proceedings, may run counter to the purpose served by main proceedings, which are of a protective nature, and that the regulation therefore sets out a number of mandatory rules of coordination intended to ensure, as expressed in recital 12 thereof, the unity required in the European Union. In that system, the main proceedings have a dominant role in relation to the secondary proceedings, as stated in recital 20 of the regulation (see, to that effect, judgment of 22 November 2012, *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraphs 59 and 60).

27 In view of this dominant role of the main insolvency proceedings, it seems entirely consistent that national legislation could, on the basis of the forfeiture of the claims lodged outside of the time limit prescribed, exclude all requests brought by the person holding those claims seeking the opening of secondary insolvency proceedings, given that the opening of such proceedings would make it possible to circumvent the forfeiture provided for by the *lex fori concursus*. Furthermore, by analogy with the considerations set out in paragraph 23 above, such legislation prevents a creditor who did not participate in the main insolvency proceedings from being capable of frustrating a composition or any of the debtor's comparable restructuring measures adopted in the context of that procedure by requesting the opening of secondary insolvency proceedings.

28 In view of the foregoing, it is therefore necessary to hold that a provision of the domestic law of the State of the opening of proceedings which provides, in relation to a creditor who has not taken part in the insolvency proceedings, for the forfeiture of its right to pursue its claim comes within the scope of Article 4 of Regulation No 1346/2000.

29 Next, having regard to the finding in paragraph 28 above, it must be stated that the *lex fori concursus* may also provide for the suspension of enforcement of a claim which has not been lodged within the time limit prescribed. As explained by the Advocate General in points 46 and 47 of his Opinion, since the forfeiture of unregistered claims is, in principle, allowed, Regulation No 1346/2000 must, *a fortiori*, also allow a rule of the *lex fori concursus* which merely suspends enforcement proceedings relating to those claims.

30 Furthermore, it should be added that, due to the fact that Regulation No 1346/2000 does not bring about harmonisation of the time limits for the lodging of claims in cases of insolvency coming within the scope of its application, it is for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy, provided, however, that the rules relating thereto are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 28 and the case-law cited). In the absence of sufficient information in that regard emerging, in particular, from the parties' submissions, it will be for the national court to determine whether those criteria are fulfilled as regards Article 20(3) of Law No XLIX of 1991.

31 Finally, it must be stated that the conclusion in paragraphs 28 and 29 above is not called into question by the fact that Article 15 of Regulation No 1346/2000 provides that the effects of insolvency proceedings on a 'lawsuit pending' concerning an asset or a right of which the debtor has been divested are to be governed solely by the law of the Member State in which that lawsuit is pending.

32 That provision must be read in conjunction with Article 4(2)(f) of Regulation No 1346/2000, which distinguishes 'lawsuits pending' from other proceedings brought by individual creditors. Thus, the effects of insolvency proceedings on proceedings brought by individual creditors other than 'lawsuits pending' are in any event governed by the single *lex fori concursus*. As the Advocate General explained in points 67 to 78 of his Opinion, proceedings seeking the enforcement of a claim come within the latter category.

33 On that last point, it should be added that Regulation No 1346/2000 is guided by the principle

that the requirement of equal treatment of creditors, which, *mutatis mutandis*, underpins all insolvency proceedings, precludes, in general, proceedings brought by individual creditors by means of enforcement proceedings, introduced and conducted while insolvency proceedings against the debtor are pending. Thus, Article 20(1) of Regulation No 1346/2000 requires a creditor who obtains, 'in particular through enforcement', satisfaction with regard to its claim on the assets belonging to the debtor situated within the territory of a Member State other than the State of the opening of proceedings to return to the liquidator that which has been obtained.

34 It would be contradictory to interpret Article 15 of Regulation No 1346/2000 as also covering enforcement proceedings, with the consequence that the effects of the opening of insolvency proceedings would thus come within the scope of the law of the Member State in which such enforcement proceedings are pending, while, in parallel, Article 20(1) of that regulation, by explicitly requiring the return to the liquidator of everything obtained 'through enforcement', would render Article 15 ineffective.

35 Consequently, it is necessary to find that enforcement proceedings do not come within the scope of application of Article 15 of Regulation No 1346/2000.

36 In light of the foregoing, the answer to the first question is that Article 4 of Regulation No 1346/2000 must be interpreted as meaning that provisions of domestic law of the State of the opening of proceedings which provide, in relation to a creditor who has not taken part in the insolvency proceedings, for the forfeiture of its right to pursue its claim or for the suspension of the enforcement of such a claim in another Member State come within its scope of application.

The second question referred

37 By its second question, the referring court asks, in essence, whether the fact that a claim pursued by means of enforcement in a Member State other than the State in which the proceedings were opened is a fiscal claim has any bearing on the answer to be given to the first question.

38 In that regard, recital 21 of Regulation No 1346/2000 states that any creditor who has his habitual residence, domicile or registered office in the European Union should have the right to lodge his claims in each of the insolvency proceedings pending in the European Union relating to the debtor's assets, and that this should also apply to tax authorities and social insurance institutions. However, that recital adds that, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. With this in mind, Article 39 of that regulation provides, in essence, that the tax authorities of Member States other than the State of the opening of proceedings have the right, on the same basis as any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, to lodge claims in the insolvency proceedings in writing.

39 It therefore follows from those provisions that Regulation No 1346/2000 precludes provisions of national law under which claims of the tax authorities in Member States other than the State of the opening of proceedings cannot be lodged in insolvency proceedings. It is also clear from the same provisions that that regulation does not distinguish between public and private law creditors.

40 In those circumstances, it must be held that the provisions of Regulation No 1346/2000 do not give the claims of tax authorities of a Member State other than the State of the opening of proceedings any preferential status, in that they should be capable of being subject to enforcement proceedings even after the opening of insolvency proceedings. Consequently, as regards the facts at issue in the main proceedings, the fact that the claims pursued by means of enforcement proceedings are fiscal claims does not mean that they would, by virtue of that fact, come solely under domestic Romanian law, or that the effects provided for by the *lex fori concursus*, in the present case Hungarian insolvency law, would not extend to them.

41 In those circumstances, the answer to the second question is that the fiscal nature of the claim pursued by means of enforcement in a Member State other than the State of the opening of proceedings, in a situation such as that at issue in the main proceedings, has no bearing on the answer to be given to the first question.

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

1. Article 4 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that provisions of domestic law of the Member State on the territory of which insolvency proceedings are opened which provide, in relation to a creditor who has not taken part in those proceedings, for the forfeiture of its right to pursue its claim or for the suspension of the enforcement of such a claim in another Member State come within its scope of application.

2. The fiscal nature of the claim pursued by means of enforcement in a Member State other than that on the territory of which the insolvency proceedings are opened, in a situation such as that at issue in the main proceedings, has no bearing on the answer to be given to the first question referred for a preliminary ruling.

Germany

Federal Tax Court (Bundesfinanzhof)

27 January 2016

X.

Case number: VII B 119/15

Insolvency proceedings in another EU Member State – Tax debts in the own Member State being concealed – Non-respect of the tax authorities' right to be heard – Contrary to the public policy of the own Member State – No recognition of the residual debt discharge granted in the other State

Summary

An abusive and fictitious transfer of residence to another Member State may be contrary to the State's public policy and lead to a refusal to recognise insolvency proceedings opened in that other Member State. The debtor cannot invoke a discharge of residual debt granted in the other Member State, if he partially provided false information in the context of the insolvency proceedings in that other Member State.

Facts

1. **I.** The applicant has been working as a tax consultant in B since 1991. He has tax debts to tax office B, for the years 1991 to 2000. According to the settlement notice of 13 April 2015, these tax debts amount to EUR 1,172,972.25. This settlement notice is contested by the applicant. The tax office has not yet decided on the contestation and the simultaneous application for suspension of the execution of this settlement notice. Enforcement against the applicant has so far been without any result.

2. On 8 July 2009, the tax office filed a petition to open bankruptcy proceedings before the Bankruptcy Court A. On 12 August 2009, this Bankruptcy Court rejected that request, as it decided that the request was inadmissible.

3. On 10 September 2009, the tax office filed a petition to open insolvency proceedings on the applicant's assets at the district court B. The applicant reacted to this by bringing an action before the tax court, applying for an interim injunction.

4. Shortly before the tax office first filed the petition for bankruptcy in A and then B, it became known to this tax office that, at the request of the applicant, a main bankruptcy proceeding had already been brought before the High Court of Justice in London on 11 August 2008, in accordance with Article 3 of Council Regulation (EC) No 1346/2000, in which the applicant was granted discharge on 11 August 2009. The tax office had not been heard during this main bankruptcy procedure.

5. On 8 July 2010, the tax office applied to the High Court of Justice, asking for the annulment of the discharge. It appears from the tax office's explanation before the tax court that these proceedings before the High Court of Justice were not carried on, for reasons that cannot be explained anymore.

6. On 30 September 2014, the tax office again requested the High Court of Justice in London to revoke the bankruptcy order of 11 August 2008, on the grounds that the applicant had never really lived in England. His center of main interests had never been in England. According to the tax office, an oral hearing was scheduled for 1 and 2 February 2016 before the High Court of Justice.

7. By decision of 28 August 2015, the tax court concluded that the application for interim measures was admissible and well founded. The applicant was entitled to the withdrawal of the application for the opening of secondary insolvency proceedings dated 10 September 2009 to the district court B, since the main insolvency proceedings had already been terminated by the waiver of residual debt granted in England on 11 August 2009. It was seriously doubtful whether an application for the opening of secondary insolvency proceedings could still be filed following the granting of the discharge in the main insolvency proceedings, since the effect of the secondary insolvency proceedings was dependent on the main insolvency proceedings.

The discharge of the residual debt was to be recognized without any further formalities if the conditions were met, provided that there was no violation of public policy. On the basis of the findings of the tax office, the tax court was convinced that the applicant had abused the jurisdiction of the High Court of Justice to open the insolvency proceedings.

However, it was doubtful whether the abusive use of the English jurisdiction was a violation of public policy, implying that the waiver of residual debt, granted in England, could not be recognized in the Federal Republic of Germany.

In fact, in case of abuse the foreign court should not exercise any competence. However, if that foreign court would consider that it is competent, recognition of the jurisdiction of that court could not be denied. In that case, the jurisdiction of the foreign court could be contested by appeal procedures in that other country.

8. Essentially, the appeal of the tax office is based on the following: the applicant's discharge of residual debt, granted by the High Court of Justice in England on 11 August 2009 cannot be opposed to the tax office. The recognition of the opening of insolvency proceedings in another Member State presupposes that the insolvency debtor had the center of his main interests in another Member State, which was not the situation in the present case.

On the contrary, the applicant abusively seized the English court. Under these circumstances, the application for the opening of secondary insolvency proceedings can also be regarded as an application for the opening of insolvency proceedings. Moreover, the tax office has not been heard in the insolvency proceedings in England. It should also be borne in mind that the applicant has been trying for years to evade his responsibility and that he consistently conceals his residence.

9. Further, the opening of insolvency proceedings over the assets of a tax adviser does not directly lead to the revocation of the order. Rather, the competent tax consultant chamber must initiate a procedure for checking the revocation of the order. Incidentally, the insolvency proceedings in England have not yet led to a cancellation of the order.

10. The tax office accordingly requests that the suspensive effect of the appeal be ordered for the duration of the appeal proceedings, that the preliminary ruling be set aside and that the application for interim measures for the withdrawal of the bankruptcy petition at district court B be rejected.

11. The applicant requests that the applications be rejected, for the following reasons:

12. It is not explained why a possibly erroneous assumption of its competence by the English court would produce in Germany a situation manifestly incompatible with public policy. Rather, the opening of insolvency proceedings by the English court should be acknowledged, irrespective of whether the own international jurisdiction was rightly accepted or not.

The argument about the infringement of the right to a fair hearing cannot be accepted, as a notice of the insolvency decision was also published in a newspaper and the London Gazette. Nor did the tax office explain how a competence in its favor would have existed in 2008, because at that time the head office of the applicant's law firm was in A, while in B he only had an ancillary activity in a counseling center. It was only after the application in England that the tax office A and the tax office B agreed on a competence of the tax office B. Furthermore, he had already lived apart from his wife at the time of the application before the High Court of Justice. The tax office did not show that he possessed assets in England at the time of the application, which he subsequently transferred to his wife. Since the application for bankruptcy on 11 September 2009, the tax office has not engaged in any actions in accordance with Section 231 (1) sentence 1 of the Tax Code. The tax office's application of 30 September 2014 to the High Court of Justice in London does not contain a demand for payment addressed to the taxpayer.

13. There is also a reason for ordering, because the application for insolvency of the tax office is inadmissible and a revocation of his - the applicant's - authorization would have fatal consequences for him. On the other hand, the tax office is free to file for insolvency again at any time.

Considerations of the Court

14. **II.** The appeal of the tax office is well founded.

(…)

19. a) Pursuant to Article 3 of Insolvency Regulation No 1346/2000, main insolvency proceedings were opened against the applicant on 11 August 2008 before the High Court of Justice in London. These were insolvency proceedings as described in Art. 2(a) and Annex A of the Insolvency Regulation. The opening of insolvency proceedings in the United Kingdom is to be recognized in Germany, in accordance with Art. 16(1) of Regulation 1346/2000 (see also Art. 17(1° of Regulation 1346/2000). Pursuant to Article 25(1) of this Regulation, the same applies to the discharge of residual debt granted to the applicant on 11 August 2009. Regardless of the extent to which the so-called discharge from bankruptcy is comparable to the residual debt exemption under § 286 of the German Insolvency Act, it leads to the termination of the insolvency procedure, in accordance with Section 278(b) of the Insolvency Act 1986.

20. A recognition of the discharge of residual debt under English law does not preclude that the applicant may have relocated his center of main interests to the UK only for a short time. For Article 16(1) of Regulation 1346/2000 is to be interpreted as meaning that the insolvency proceedings opened by a court of a Member State must be recognized by the courts of the other Member States, without a possibility for the latter to review the jurisdiction of the court of the State where these insolvency proceedings are opened (Judgments of the Court of Justice of the European Union - Eurofood IFSC of 2 May 2006 C-341/04, EU: C: 2006: 281, paragraph 42, MG Probud of 21 January 2010 C-444/07, EU: C: 2010: 24, paragraph 29; Bank Handlowy and Adamiak of 22 November 2012 C-116/11, EU: C: 2012: 739, paragraph 41; see the decision of the Federal Court of Justice (Bundesgerichtshof) of 18 September 2001 IX ZB 51/00, Neue Juristische Wochenschrift -NJW- 2002, 960 and the judgment of the Federal Court of Justice of 10 September 2015 IX ZR 304/13, Zeitschrift für Wirtschaftsrecht -ZIP- 2015, 2331, with regard to Article 102 (1) (1) of the Act implementing the Insolvency rules). Where appropriate, questions concerning jurisdiction must be clarified in the context

of remedies against the opening decision which are available in the Member State of opening of the insolvency proceedings (see ECJ judgment Eurofood IFSC, EU: C: 2006: 281, paragraph 43).

21. b) According to a summary assessment, it follows from the circumstances of the present case that the applicant cannot in Germany rely on the discharge of the residual debt waiver granted by the High Court of Justice, because this would be contrary to the public policy reservation under Article 26 of Regulation 1346/2000 or in any event contrary to the principle of good faith, which is fully recognized in tax law as a general principle of law (see Federal Tax Court judgment of 8 February 1996 VR 54/94, BFH/NV 1996, 733).

22. Under Article 26 of Regulation 1346/2000, any Member State may refuse to recognise insolvency proceedings opened in another Member State insofar as that recognition would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. This is an exception rule which, according to the case law of the EUCJ, applies only where the recognition of a decision given in a Member State infringes a fundamental principle of law and therefore constitutes an unacceptable contradiction to the legal system of the Member State that would have to recognise the insolvency proceedings opened in another Member State. The infringement would have to constitute a manifest breach of a fundamental rule of law in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental within that legal order (EUCJ judgment Eurofood IFSC, EU: C: 2006: 281, paragraph 62 et seq.; see also EUCJ judgment MG Probud, EU: C: 2010: 24, paragraph 33 et seq.; EUCJ judgment flyLAL-Lithuanian Airlines of 23 October 2014 C-302/13, EU: C: 2014: 2319, paragraph 49, Federal Court of Justice (BGH) decision in NJW 2002, 960, Federal Court of Justice (BGH) judgment in ZIP 2015, 2331). In the context of insolvency proceedings, the right of creditors or their representatives to participate in the procedure, taking into account the principle of equality of arms, has special significance.

23. The mere possibility of a faster discharge of residual debt in the United Kingdom is not enough to affirm the requirements of Article 26 of Regulation No 1346/2000. However, a violation of the German public policy ("ordre public") in the sense of an abuse of rights may result from the fact that a temporary transfer of residence (or a temporary relocation of the main interests) to another state only takes place to obtain in that other State easier conditions for a discharge of residual debt (see Federal Court of Justice (BGH) decision in NJW 2002, 960). In the event of an abusive and fictitious transfer of residence to another State, the application of the foreign law may under these circumstances seem unacceptable under domestic legal concepts (see Federal Court of Justice (BGH) decision in NJW 2002, 960).

24. The tax office has substantiated that the applicant has only fictitiously relocated his center of main interests to the UK in order to take advantage of UK insolvency proceedings, in the form of a more rapid discharge of residual debt.

25. An actual relocation of the center of main interests to Great Britain at least six months before the application on 11 August 2008 is contradicted by the fact that the applicant in April 2008 still founded the partnership "..." (registered in the partnership register of the district court A under Nr. ...) with a representative office in B and that he has worked for them. His activity as a tax consultant, partly in B, was confirmed by the hearing of witness C by the tax investigation department of the tax office E (see note dated 8 April 2014), according to which he signed letters in his office in B. Witness D also declared that in the time period concerned, the applicant was usually one or two days in the office and not away for more than one or two weeks (see document of the investigation department of tax office E of 8 April 2014). He has been active in Germany as tax advisor. He has had consultations and has performed mandates. Furthermore, the applicant also looked after clients in countries other than Great Britain. The witness F also told the tax office E on 8 April 2014 that in 2008 and 2009, the applicant was active as a managing director of a limited liability company and as a tax consultant in Germany and that he was a few days a week in B.

26. Furthermore, before the High Court of Justice, the applicant has incorrectly identified his marital status as "single", while the interim report by Attorney G to the insolvency court of 4 September 2014 shows that the applicant was married at that time.

27. Finally, an actual relocation of the center of main interests to Great Britain is contradicted by the fact that, in the months before the petition to the High Court of Justice, the applicant has carried out numerous appointments in Germany, as evidenced by a summary examination (see the testimony of Mrs. H of 12 September 2014, before the Hight Court of Justice, in connection with the tax office's application for annulment or revocation of the decision of 11 August 2008 to open the insolvency).

28. c) The applicant cannot rely on the discharge of residual debt because he has made some false statements in the context of the insolvency procedure, which indicates that the so-called discharge has been granted to him wrongly.

29. *Inter alia*, in April 2008, he did not mention the establishment of the partnership "..." in the property information submitted to the High Court of Justice.

30. He also did not disclose various activities as managing director in the last five years prior to the

application. This concerns three companies established in Switzerland, namely the Institute I-GmbH, the Institute J-AG and the K-AG, from which he left in 2007 (see the commercial register extracts contained in the file). In addition, the applicant did not specify his activities as co-managing director of the tax consultancy firm L-GmbH with registered office in A and his shares in company M-GmbH in the list of assets submitted to the High Court of Justice.

31. The applicant's information on his estate was also incomplete in that he was the owner of an apartment abroad at the time of filing for insolvency in the High Court of Justice. The ownership of this apartment is demonstrated by the payment of the property tax and the statement of this apartment in his own declaration of 13 May 2008.

32. d) Finally, objections to a recognition of the discharge of residual debt also result from the fact that the applicant has concealed his debts to the tax office from the High Court, so that the tax office has not been heard in the English insolvency proceedings in accordance with the procedure under Article 40 of Regulation No 1346/2000, although there is much to suggest that it should have been involved.

33. The applicant's reference to a notice of the insolvency decision in the press is not such as to compensate for the breach of hearing, because that does not replace a formal communication from the English court under Article 40 of Regulation No 1346/2000.

34. The competence of the tax office B or another tax office, in particular the tax office A, which he has presented to the High Court of Justice as sole creditor, has not yet been clarified. So far, the applicant's presentation is not substantiated enough to check the competence of another tax office.

35. e) In the context of the main proceedings, it should also be made clear why there was no follow-up to the request for withdrawal of the discharge of the debts, submitted to the High Court of Justice on 8 July 2010, and whether this is due to an omission of the tax office within the period of limitation.

(...)

41. Whether insolvency proceedings can actually be opened is not yet decided in the dispute. The insolvency court has to examine whether the legal prerequisites exist and whether any withdrawal of the residual debt exemption after the February 2016 hearing in the High Court of Justice pursuant to Section 375 (1) Insolvency Act 1986 precludes this. In this context, it also depends on whether the bankruptcy procedure implemented in the United Kingdom remains binding.

42. Finally, it should be noted that more than six years ago, the tax office had already filed the application for insolvency proceedings. It is not clear ho the economic or personal existence fo the person concerned could now be threatened.

(...)

Germany

Tax Court (Finanzgericht) Baden-Württemberg

7 November 2016

A.

Case number: 1 V 2137/16

Insolvency proceedings – Decision on residual debt discharge – Binding for tax authority of another Member State that requests recovery assistance – Requirement that the claim was already created at the time of the opening of the insolvency proceedings

Summary

The legal effect of the residual debt discharge decision is also binding on foreign creditors. According to Article 16(1) of Insolvency Regulation 1346/2000, the opening of insolvency proceedings by a court of a Member State with jurisdiction pursuant to Article 3 of the Regulation is recognised in all other Member States, provided the decision is effective in the State of the court where the proceedings are opened. The decisions delivered for execution and termination of insolvency proceedings are equally recognised without further formalities if they have been delivered by a court whose decision on opening proceedings is recognised pursuant to Article 16 of Insolvency Regulation 1346/2000 (Article 25(1) Insolvency Regulation 1346/2000).

The decision on residual debt discharge made by the insolvency court is thus also in principle binding on the tax authority of another Member State, acting as a foreign creditor.

The foreign tax claim is considered as an insolvency claim if it was established before the opening of the insolvency proceedings, i.e. if the underlying facts giving rise to the tax claim had already materialised before the opening of the insolvency proceedings.

Facts of the case

I. The applicant objects to a recovery request made by the Greek State for tax claims which are enforced by the German tax authorities through mutual assistance by means of an attachment or recovery order.

The applicant is a Greek national living in Germany. He is divorced and has one daughter. The applicant had operated a petrol station with a workshop in Greece in 2001 and 2002 and subsequently returned to Germany.

In January 2007, the Local Court *x* opened insolvency proceedings against the applicant's assets. The insolvency proceedings were terminated in September 2007 and discharge from the residual debt was granted to the applicant in January 2013.

By e-mail dated 14 March 2016, the Federal Central Tax Office forwarded a request for mutual assistance from the Greek State, in the form of the Local Tax Office of *y*, to the defendant (Tax Office *w*), in whose district the applicant had moved in November 2015. Before the move, the recovery had been entrusted to the Tax Office *x*, which had informed the applicant in October 2015 of the claims made against him by the Greek State.

The request for mutual assistance is based on the Act of 7 December 2011 on the implementation of mutual assistance for the recovery of claims relating to taxes, duties and other measures between the Member States of the European Union (Bundesgesetzblatt — BGBl — I 2011, 2592, hereinafter 'EU Recovery Law') and Council Directive 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ L 84, 31.03.2010, hereinafter 'the EU Recovery Directive'), underlying this EU Recovery Law.

The request for mutual assistance relates to the recovery of claims lodged against the applicant in Greece (the so-called uniform instrument permitting enforcement). The enforcement order relates to a claim accrued in 2002 and established on 8 November 2013 at an amount of xxx.xxx,xx EUR for tax evasion of VAT and income tax ('Administrative fine of Books & Records Code regarding tax evasion of VAT and Income Tax', see sheet 4 of the enforcement file), as well as another tax related claim accrued in 2015 and established on 18 February 2015, with regard to 'Administrative Enforcement Expenses' at an amount of xxx.xxx,xx EUR (see sheet 5 of the enforcement file). This resulted in a total amount, together with additional claims, of xxx.xxx,xx EUR.

By letter of 3 May 2016, the Tax Office asked the applicant to pay the requested amount by 20 May 2016 and announced the initiation of enforcement measures in case of non-payment. The applicant's objection that the alleged claim of 2002 had expired due to the insolvency proceedings and the discharge of residual debt in January 2013 was countered by the Tax Office by pointing out that objections to the claim or its enforceability could only be raised before the competent authority of the other Member State.

On 16 June 2016, the Tax Office issued an attachment and recovery order for the recovery of xxx.xxx,xx EUR against Volksbank *x*, where the applicant has an account. The Volksbank *x* replied in its third-party debtor statement of 21 June 2016 that the applicant's

bank account was held as an account exempt from attachment.

On 18 July 2016, the applicant submitted a request for suspension of execution of the request for enforcement. He claims that following the discharge of the residual debt in January 2013, all claims of all creditors who had an entitlement towards him at the opening of the insolvency proceedings in January 2007 had expired. These included the alleged claims, accrued in 2002, from the Greek authorities. To this day, he had no tax notice against which he could defend himself in Greece.

The applicant requests to suspend execution of the enforcement request of the Local Tax Office of *y* until a decision in the complaint proceedings in Greece, without security payment, and to be granted legal aid for that purpose.

The Tax Office requests to dismiss the request as inadmissible. The application is inadmissible because German authorities have to comply with recovery requests issued by another Member State on the basis of the EU Recovery Directive, without verifying the accuracy of the request. According to the EU Recovery Directive, the requested State does not have to examine the claim or the enforcement instrument of the applicant State as to substance. This could be done solely by the applicant State in accordance with its legal system.

Grounds

II. The admissible request for suspension is justified. There is a serious doubt as to whether the attachment and recovery order, contested in its substance, is legal because the enforcement of the foreign tax claim might be contrary to the domestic discharge of the residual debt.

1. The request for suspension is admissible.

a) The Senate assumes that the applicant for a suspension of the 'enforcement request', in accordance with § 96 par. 1 cl. 2 sub-cl. 1, § 113 par. 1 of the Code of Procedure of Fiscal Courts (FGO), is requesting that the Fiscal Court suspends the implementation of the attachment and recovery order of 16 June 2016 and not the enforcement request on which that order is based. Indeed, it would not be legally possible to suspend the execution of the foreign enforcement request.

aa) According to § 9 par. 1 cl. 1 and 2 EU Recovery Law, claims for which an enforcement order exists in another Member State shall be executed in the same way as a domestic claim. The uniform instrument permitting enforcement, which is attached to the foreign recovery request, whose substance is essentially equivalent to that of the initial instrument permitting enforcement (Art. 12 par. 1 cl. 2 of the EU Recovery Directive), is regarded as an enforceable administrative act (§ 9 par. 1 cl. 3 EU Recovery Law). Against this fiction of an administrative act, there is no domestic legal protection.

As is clear from § 13 par. 2 cl. 1 EU Recovery Law, neither the claim nor the original enforcement order or its confirmation by the uniform instrument permitting enforcement may be verified as to substance in the requested State. The verification shall be carried out by the State of origin and shall be governed by its legal system. Accordingly, § 13 par. 2 cl. 2 EU Recovery Law contains only the possibility of suspending enforcement for the period in which the debtor proceeds in the country of origin against the enforcement order as such or against its confirmation in the uniform instrument permitting enforcement. Whether the decision in the State of origin is based on a procedural infringement because, for example, the original enforcement order was not served, as the applicant claims in the dispute, cannot be verified in the requested State. As long as the original enforcement order, confirmed as uniform instrument permitting enforcement in the requested State, has not been revoked by the State of origin, enforcement shall be carried out. Thus it can occur that the debtor – as possibly in this dispute the applicant – is informed of the existence of the original enforcement order only at the moment of execution. It seems that the legislature has accepted this, with confidence in the respect of other Member States' administrative and judicial procedures for the rule of law. This trust implies that only the court of the State of origin may assess whether the conditions for the confirmation of the enforcement order as a uniform instrument permitting enforcement are present.

bb) The exclusion of domestic legal protection against the claim underlying the enforcement (enforcement order) does not exclude, however, domestic legal protection against the enforcement itself. (…) The party concerned may proceed in the applicant State against the enforcement order and in the requested State against the enforcement measure taken on the basis of the recovery request. The contestable enforcement measure is therefore solely the attachment and recovery order of 16 June 2016.

While the applicant, according to the wording of his application, objects to the "request for recovery", in his justification he also refers to "his objections to the attachment order". The applicant has thus made it sufficiently clear that he objects to the attachment and recovery order that implements the recovery request. Given the indications of the Tax Office, the applicant was aware that the validity of the request for recovery, as well as the foreign tax claim on which the request was based, cannot be verified in the requested State. The request for legal protection against the recovery request therefore covers the enforcement measure taken on the basis of the recovery request, i.e. the attachment and recovery order of 16 June 2016.

b) The request for suspension, interpreted in a pertinent manner, is admissible. The attachment order pursuant to § 309 of the Tax Code is, just as the collection order pursuant to § 314 of the Tax Code, an enforceable administrative act which, in accordance with § 69 par. 3 cl. 1 in conjunction with § 69 par. 2, cl. 2 to 6 FGO, may be suspended by the tax court as court of the main proceedings.

aa) The attachment and recovery order of 16 June 2016 is a 'contested' administrative act within the meaning of § 69 par. 3, cl. 1 in conjunction with par. 2, cl. 2 FGO, against the enforcement of which suspension can be sought directly at the tax court in accordance with § 69 par. 4, cl. 2 (2) FGO, without prior request to the financial authority. This is because enforcement is impending whenever a request for suspension is directed immediately against an administrative act in the enforcement procedure.

According to the present enforcement file, the applicant did not contest the attachment and recovery order dated 16 June 2016 and notified to the third party on 18 June 2016, through an objection against the defendant. However, the suspension request made at the Financial Court on 18 July 2016, as well as the request for suspension itself, are to be interpreted as an objection – providing legal protection – to the attachment and recovery order of 16 June 2016, because the applicant also objects to the attachment and recovery order.

bb) The objection is timely. On 19 July 2016, the Tax Court forwarded by fax the application dated 18 July 2016, interpretable as objection, to the defendant. The one-month deadline for lodging the appeal against the attachment and recovery order, notified to the applicant as 'copy for the judgment debtor' dated 16 June 2016 (sheet 25 of the Court file), is therefore upheld. In accordance with § 122 par. 2 of the Tax Code, an administrative act transmitted by postal mail is deemed to have been notified on the third day following that on which it is posted, unless it has not been received or has been received at a later date. The third day after a posting presumed to have been made no earlier than 16 June 2016 would be 19 June 2016 (Sunday). The objection period could therefore expire on 20 July 2016 at the earliest, one day after the defendant was informed by the tax court of the request for legal protection.

2. The request for suspension is justified.

a) According to § 69 par. 3 cl. 1 in conjunction with par. 2 cl. 2 to 6 FGO, the court of main proceedings may suspend, in whole or in part, the enforcement of a contested administrative act. Enforcement is to be suspended if there are serious doubts as to the validity of the administrative act (§ 69 par. 2 cl. 2 FGO). This is the case where the summary examination of the administrative act reveals serious circumstances creating indetermination as to the assessment of relevant questions of law or ambiguity as to the assessment of relevant facts (settled case-law, see e.g. the decision of the Federal Tax Court — BFH — of 11 June 2003 IX B 16/03, BFHE 202, 53, BStBl II 2003, 663, with further references). Concerns about the unlawfulness of the administrative act do not have to predominate (BFH decision of 28 November 1974, V B 44/74, BStBl. II 1975, 240). If the factual and legal situation is unclear, the summary procedure should not be final but, at least as a rule, suspend the execution (BFH decision of 3 February 2005 I B 208/04, BStBl II 2005, 351).

b) The validity of the contested attachment and recovery order is seriously questionable, because the enforcement could be contrary to the residual debt discharge granted to the applicant.

aa) The attachment and recovery order (§§ 309 and 314 of the Tax Code) is based on the uniform instrument permitting enforcement of the Greek tax authorities and thus on an enforceable administrative act (§ 251 par. 1 Tax Code in conjunction with § 9 par. 1 cl. 3 EU Recovery Law). Claims which may be recovered by mutual assistance include not only tax claims (§ 1 par. 1 cl. 1 (1) EU Recovery Law), but also fines, penalties, fees and surcharges in respect of these claims (§ 1 par. 2 (1) EU Recovery Law). Since the uniform instrument permitting enforcement is 'the sole basis for the recovery and precautionary measures to be taken' (§ 10 par. 3 cl. 1 EU Recovery Law), there is no need for a payment request within the meaning of § 254 par. 1 Tax Code (Cologne Tax Court, judgment of 30 September 2015, 14 K 2097/13, EFG 2016, 494; see also BFH decision of 30 August 2010 VII B 48/10, BFH/NV 2010, 2235 on the non-contestability of a domestic payment request for the enforcement of foreign claims).

bb) Although the general conditions for enforcement under § 251 par. 1 Tax Code are met, enforcement could be contrary to the applicant's residual debt discharge because according to § 251 par. 2 cl. 1 Tax Code the provisions of the Insolvency Code remain unaffected.

The remaining debt discharge granted to the applicant is effective, in accordance with § 286 and § 301 par. 1 cl. 1 Insolvency Code, against all insolvency creditors who, at the time of the opening of the insolvency proceedings, had a substantiated claim against the debtor. This also applies to creditors who have not registered their claims (§ 301 par. 1 cl. 2 Insolvency Code). If the debtor is granted discharge from residual debt by a decision in accordance with § 300 Insolvency Code, the insolvency claims are converted into imperfect liabilities that can still be paid but are no longer enforceable. Enforcement is inadmissible.

This legal effect of the residual debt discharge is also binding on foreign creditors. Under Article 16 par. 1 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (EIR, Official Journal of the European Union — OJ L 160/1), the opening of

insolvency proceedings by a court of a Member State competent under Article 3 of that regulation is recognised in all other Member States as soon as the decision in the State of the opening of proceedings is effective. Without further formalities, decisions taken to implement and terminate insolvency proceedings will also be recognised if they have been taken by a court whose opening decision is recognised under Article 16 EIR (Article 25 (1) EIR). The decision of the district court - Insolvency Court - *x* on the discharge of residual debt is therefore in principle also binding on the Greek tax authorities as a foreign creditor (see, to the reverse case of the recognition of a foreign debt discharge in Germany, the decision of the Federal Tax Court (BFH) of 27 January 2016 VII B 119/15, BFH/NV 2016, 1586).

In the case of the question – to be assessed under domestic law – of whether tax debt claims are insolvency claims and thus whether they are comprised in the residual debt discharge, it is decisive whether the principal amount of the debt was essentially incurred already before the opening of insolvency proceedings. It does not matter whether the entitlement at the time of the insolvency proceedings was incurred in the sense of tax law, but whether, at that time, the legal grounds for entitlement had already been laid down under insolvency law (Federal Tax Court (BFH) decision of 6 October 2005 VII B 309/04, BFH/NV 2006, 369). Therefore, a tax claim shall be an insolvency claim within the meaning of § 38 Insolvency Code when it has been established before the opening of the proceedings in such a way that the underlying facts giving rise to the tax claim have already materialised before the opening of the insolvency proceedings (cf. Federal Tax Court (BFH) decision of 1 April 2008 X B 201/07, BFH/NV 2008, 925).

In line with the above rules, the claim underlying the recovery request and, consequently, the attachment and recovery order had already been created in 2002 when the applicant was operating in Greece on a commercial basis. Therefore, the claim made in the recovery request had, under insolvency law, already been created at the time of the opening of the insolvency proceedings on 15 January 2007. This is also reflected in the recovery request form, in which, under the text field 'Description of the claim(s)', a period from 1 January 2002 to 31 December 2002 is mentioned for the claim established on 8 August 2013 (cf. sheet 13 of the enforcement file). The fact that the claim to be enforced was set in Greece on 17 January 2013, i.e. only after the liquidation proceedings had been terminated and the discharge of the residual debt had been granted, does not change the earlier origin of the claim, under insolvency law, in 2002.

The claim accrued in Greece in 2002 would also participate in the discharge of residual debt in 2013 if this debt was the result of a tax offence. The form of the uniform instrument permitting enforcement contains the complementary remark (cf. sheet 13 of the enforcement file) that the claim is based on a fine for tax evasion of VAT and income tax, which is why there is currently a criminal prosecution in Greece. Even if the claim results from tax evasion, this would not change the discharge from the residual debt as long as the applicant has not been convicted by a final judgment. According to § 302 (1) Insolvency Code in the version in force since 1 July 2014, based on the Act on the shortening of the residual debt discharge procedure and the strengthening of the rights of creditors of 15 July 2013 (BGB. I 2013, 2379), the discharge of residual debt does not affect liabilities of the debtor arising from an intentional illicit act or from a tax liability relationship, provided that the debtor has been convicted by final judgment in connection with it for a tax offence under §§ 370, 373 or 374 of the Fiscal Code. In the absence of a final judgment, the link with a tax offence does not exclude the discharge from the residual debt. However, evaded taxes do not count among the liabilities arising from an unauthorised act committed with intent (Federal Tax Court (BFH) judgment of 19 August 2008 VII R 6/07, BFHE 222, 199, BStBl II 2008, 947).

Because of the doubts, resulting from the discharge of residual debt, about the enforceability of the claim to be recovered, the applicant was to be granted a suspension of enforcement of the attachment and recovery order. This includes the amount relating to 'Administrative Enforcement Expenses' of xx,xx EUR. The Senate assumes that this claim is inextricably linked to the principal claim arising from tax evasion.