EU and International
TAX COLLECTION NEWS

2017 - 2

Contents

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ACTIVITIES AND NEWS

EU

Interconnection of EU Member State insolvency registers on the European e-Justice Portal

Alexander IVANTCHEV
DG JUST, European Commission[1]

Since 2014 DG 'Justice and Consumers' of the European Commission is operating a real-time decentralised interconnection system of Member States' national insolvency registers[2] via the European e-Justice Portal.

The system presently provides a multi-lingual search experience in the registers of 9 Member States[3] and has been established on voluntary basis with the goal of facilitating access to justice in a cross-border context. End-users – citizens, businesses, public authorities and any other interested party can look for natural or legal persons against which insolvency proceedings have been initiated from a single access point without having to navigate foreign, and sometimes complex, national web sites.

The current arrangement does not lay down obligations upon Member States to standardise neither the search criteria, nor the data which is returned in response to a search. Hence, the available insolvency data depends on what each participant currently collects and provides, although in the usual case information such as the address of the debtor, the company registration number, the date on which the proceedings have been initiated, etc. are usually provided.

Moreover, the system introduces no changes with respect to national data protection schemes and their implementation, for example ones governing for how long information should be made available or what kind of criteria users have to satisfy to receive results concerning insolvent natural persons. At the same time, and although no insolvency data is stored on the e-Justice Portal, as a processor of personal data, the Commission remains responsible for the central access point on the e-Justice Portal, and, together with participants, for the security, integrity and confidentiality of the data while it is being transferred over the Internet.

As a next major evolutionary step, pursuant to Regulation (EU) 2015/848[4], all EU Member States (with the exception of Denmark) would have to interconnect their insolvency registers via the e-Justice Portal by mid-2019. The new Regulation also aims at making some substantial improvements to the current system, the key of which are summarised below:

- Harmonisation of common search criteria and, more importantly, a minimum set of data which every Member State would have to supply free of charge on insolvent legal and persons, such as: the date of opening of proceedings, the case reference number, the registered address of the debtor, the time limit for lodging claims, the name of the insolvency practitioner appointed in the proceedings, etc.
- Possibility for Member States to provide information concerning insolvencies of individuals not exercising an independent economic activity;
- Possibility for Member States to provide access to documents free of charge, and documents access to which is conditional upon payment of a fee;
- Possibility for users to request access to insolvency information on the basis of a justified interest.

Link: https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do

[1] Disclaimer: The content of this article does not reflect the official opinion of the European Commission. Responsibility for the information and views expressed herein lies entirely with the author.

[2] In some cases information on debtors comes from national business, commercial or other base registers.

[3] As of 26 July 2017: CZ, DE, EE, IT, LV, NL, AT, RO and SI.

[4] http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848

EU

Parliamentary question
International recovery of student loans

Question for written answer E-005789/2017
(and same issue in question E-005877/2017)
to the Commission

Subject: Collection of outstanding student loans from EU citizens

The current EU directive that makes it possible for unpaid tax and debts to be recovered does not cover student loans. The Danish Government maintains that outstanding student loans cannot be recovered from foreign students. Around 40% of student loans made to students from other EU countries are not repaid. Could the Commission come forward with proposals to make it possible for EU countries to collect money, of whatever kind, that is owed to the State?
Is the Commission going to propose amendments to the current directive? Or can the Commission make a statement to the effect that, under the current directive, it is possible to recover any monies citizens owe the State, regardless of their nationality or country of residence?

Answer given by Mr Moscovici
on behalf of the Commission
8.11.2017

Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures does not cover claims for the repayment of student loans. Such claims are not included in the scope, which is defined in Article 2 of this Directive.

Claims for repayment of students' loans can be regarded as civil claims and as such they can be pursued effectively throughout the EU by using the instruments for Judicial Cooperation in Civil and Commercial Matters. Even though Denmark does not take part in this cooperation, it concluded the 2005 Agreement between the European Community and the Kingdom of Denmark on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. On the basis of this agreement Denmark may use the mechanism of recognition and enforcement of judgments provided for in Regulation (EU) No 1215/2012.

Netherlands

New director's disqualification order rules

Cynthia LAMUR

As of July 1st 2016 the Dutch civil law rules on directors disqualification have come into force (Dutch Civil Code).

Introduction

The director's disqualification order (DQO) aims at fighting bankruptcy fraud. To be disqualified it is not necessary that criminal charges are filed concerning the managing director. A managing director may be disqualified if he has clearly not fulfilled his duties in a proper way.

Relevant elements of the Dutch DQO are as follows:

1. A director's disqualification becomes effective only as "an exceptional sanction in exceptional circumstances".

2. Directors of all types of legal entities governed by Dutch law may be disqualified. This includes legal entities incorporated pursuant to EU regulation having their corporate seat in the Netherlands. It may also be imposed upon natural persons with a business under their own name (sole proprietorship).

3. The disqualification only applies in case of insolvency.

4. The filing for Dqo must be done by the bankruptcy trustee or by the public prosecutor. Creditors cannot apply for disqualification, but they may however ask the supervisory Judge to instruct the bankruptcy trustee to apply for disqualification.

5. Managing directors (and former managing directors) of a bankrupt legal entity and persons who have actually managed the legal entity as if they were a managing director may be disqualified. Supervisory directors cannot be disqualified.

6. Managing directors may only be disqualified under special circumstances (view below).

7. The Court may disqualify a director but is not obliged to do so. The Court may also limit the scope and duration of a disqualification and such disqualification may not be imposed for a period more than 5 years.

8. During Dqo the director cannot serve as a managing or a supervisory director of a Dutch legal entity nor is he allowed to effectively manage Dutch legal entities as if he was a managing director.

9. A Dqo becomes effective after the appeal decision (Supreme or appeal) Court has expired and the judgment imposing the disqualification has become irrevocable.

10. Before a disqualification is ordered or before this becomes effective, the Court may suspend a (former) managing director as managing or supervisory director of other Dutch legal entities on which he serves.

What criteria apply?

A director's disqualification may only be ordered under specific circumstances during bankruptcy or during a period of three years before the bankruptcy:

a. the managing director has been held liable for negligent behavior (on the basis of Article 2:138 or 248 of the Dutch Civil Code by a final Court decision);

b. the managing director has been involved in actions of fraudulent conveyance (Articles 42 or 47 of the Dutch Bankruptcy Act) at the detriment of creditors which acts have been nullified by a final Court decision;

c. the managing director fails to fulfill his obligations towards the bankruptcy trustee to provide information and to cooperate with this bankruptcy trustee;

d. the managing director operating a business in his own name either as a managing director or as a natural person involved in bankruptcy of a legal entity at least on two occasions earlier can be personally held liable for such involvement; or

e. a severe tax penalty (ex Articles 67d, 67e or 67f of the General Act on national taxes) has been imposed on the legal entity or the managing director in that capacity and such penalty is no longer subject to appeal.

After disqualification

If a managing director or a supervisory director is suspended this is registered in the Trade Register. The Court may appoint a managing director or a supervisory director temporarily but the legal entity concerned may replace the temporarily appointed person.

Enforcement of disputed taxes, in particular customs duties

Luk VANDENBERGHE[1]

It is in the public interest that taxes are effectively collected. At the same time, it is important to guarantee the tax debtors' right to challenge tax claims. It is not easy to find the right balance between these principles. Is it possible for the tax authorities to recover a contested tax amount or should recovery be suspended pending the dispute? In this article, the above questions are analysed in more detail, taking account of ECHR and EU case law, and focusing on the provisions of what is currently the sole European tax, namely the EU customs duties.

Introduction: a right of defence, also for tax debtors

1 Despite the absence of specific legal provisions on the observance of the right of defence in tax matters, this principle has also found its way in decisions about tax disputes. Tax claims mostly involve tax penalties, and it is well-established in the case-law of the European Court of Human Rights that these administrative penalties fall within the scope of Article 6 ECHR – which guarantees the right of defence against criminal charges – if they can be considered to have a criminal nature within the meaning of that provision.[2]

Within the area of EU law, the EU Court of Justice has confirmed that observance of the right of defence is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect a person. This general principle must also be respected by the tax authorities.[3] On this point, reference can also be made to the growing use of the EU Charter of Fundamental Rights in taxation disputes.[4]

Moreover, the interpretation of other principles and provisions, e.g. with regard to the right to individual property, also confirms the need to respect the tax debtors' right of defence.[5]

This right of defence first of all includes a right to be heard before an unfavourable administrative decision is taken (as e.g. guaranteed by Article 22(6) of the Union Customs Code). In this article, the focus is however on the next stage, i.e. on the possibility for the tax debtor to lodge an appeal against the administrative decision, and on the conditions governing such an appeal.

2 As in other fields, the right of appeal in tax matters does not have an absolute character. According to the EU Court of Justice, fundamental rights, such as respect for the right of defence, do not appear as unfettered prerogatives, but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and that they do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which

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The author wishes to thank Jean-Michel Grave for his comments.
The views expressed in the 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 The right of defence is confirmed by Articles 6 and 13 ECHR, with regard to the determination of persons' civil rights and obligations or of any criminal charge against a person. Pure tax proceedings fall outside the scope of Article 6 ECHR (European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)*, 2013, p. 12, nr. 37).

3 E.g. CJEU 17 December 2015, C-419/14, WebMindLicenses, point 84 (with regard to a VAT case); CJEU 18 December 2008, C-349/07, Sopropé, point 36 (with regard to a customs claim); CJEU 22 October 2013, C-276/12, Sabou, point 38 (with regard to exchange of information between tax authorities in the field of direct taxation).

4 The right to an effective remedy and to a fair trial has been confirmed in Article 47 of the EU Charter of Fundamental Rights, with regard to persons whose rights and freedoms guaranteed by the law of the Union are violated; but the field of application of this Charter only covers Member States when they are implementing Union law (Article 51 of the Charter). The CJEU already confirmed that the provisions of this Charter apply to tax authorities controlling VAT (e.g. CJEU 17 December 2015, C-419/14, WebMindLicenses; cf. CJEU 26 February 2013, C-617/10, Åkerberg Fransson (with regard to Article 50 of this Charter, concerning the ne bis in idem principle), to tax authorities imposing a penalty on a person who refuses to supply information in the context of an exchange of information between tax authorities based on the provisions of Directive 2011/16 (CJEU 16 May 2017, C-682/15, Berlioz), or to tax authorities who have to refund taxes levied in breach of the Treaty on the Functioning of the EU (CJEU 30 June 2016, C-205/15, Toma); cf. opinion of advocate general Jääskinen in case C-69/14, point 30). With regard to the right of defence, mentioned in Article 48 of the EU Charter of Fundamental Rights, the CJEU decided that this provision can only be invoked by a person "who has been charged" (CJEU 17 December 2015, C-419/14, WebMindLicenses, point 83).

5 The property right is confirmed by Article 1 of the First Protocol to the ECHR and in Article 17 of the EU Charter of Fundamental Rights. See e.g. ECtHR 22 September 1994, Nr. 13616/88, Hentrich v France, relating to the right of the French tax authority to substitute itself for any purchaser, even one acting in perfectly good faith, in case of underestimated sale prices of real property. In this case, the ECtHR considered that "as a selected victim of the exercise of the right of pre-emption, Mrs Hentrich "bore an individual and excessive burden" which could have been rendered legitimate only if she had had the possibility - which was refused to her - of effectively challenging the measure taken against her; the "fair balance which should be struck between the protection of the right of property and the requirements of the general interest" was therefore upset" (point 49 of the judgement).

impairs the very substance of the rights guaranteed.[6] The European Court of Human Rights took the same approach with regard to the right of access to the courts secured by Article 6(1) ECHR. This court also confirmed that this right may be subject to limitations. In this respect, the State enjoys a certain margin of appreciation. However, the limitations applied should not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Further, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[7] Otherwise, the person concerned would be deprived of an effective remedy to protect his fundamental rights, contrary to Article 13 ECHR.

3 When it comes to the collection of contested tax claims, the proportionality of such limitations of the right of defence is a difficult issue. On the one hand, it is in the public interest that taxes are effectively collected and recovered, before the tax debtor possibly disappears or before he goes bankrupt. Therefore, the right to contest a tax claim before a court and the right to appeal against a judgement at first instance may be subject to restrictions and conditions, in order to avoid that the collection of the tax is impeded by the use – and possible abuse – of review and appeal procedures. Tax debtors may indeed try to use review and appeal procedures to delay the payment and/or recovery of the tax concerned. On the other hand, the fundamental right to genuinely contest a tax claim should be respected.[8]

4 Although tax procedure aspects are mainly dealt with at national level, the EU and ECHR (case)law give a useful indication of how fundamental EU and ECHR principles are interpreted and applied in tax disputes. In this article, I examine in more detail the EU approach with regard to the (possible) suspensive effect of tax disputes on the tax payment obligation or the tax recovery, as it is applied in the EU legislation concerning customs duties. The Union Customs Code contains some provisions dealing with appeals against customs claims. These provisions are analysed in the light of the fundamental principles of EU law and the ECHR:

- the applicable EU rules of the Union Customs Code (UCC) are analysed in part 1;
- part 2 deals with the competence of the judicial authorities to suspend recovery of contested customs claims;
- in part 3, attention is paid to the conditions under which suspension of the recovery measures can be granted;
- in part 4, the approach in the field of customs claims is compared to the EU approach with regard to other related claims.

1. The EU legislation concerning appeals in the field of customs duties: a strict view on debtors' rights

1.1. The Union Customs Code confirms the right to appeal...

5 The EU customs rules are laid down in Regulation 952/2013 of 9 October 2013 laying down the Union Customs Code (UCC).[9] The preamble of this regulation contains an explicit recital concerning the protection of the appeal right of the taxpayers: recital 26 provides that *"in order to secure a balance between, on the one hand, the need for customs authorities to ensure the correct application of the customs legislation and, on the other, the right of economic operators to be treated fairly, the customs authorities should be granted extensive powers of control and economic operators a right of appeal."*[10] This explanation is quite surprising. If the law grants extensive powers of control to customs authorities, the right of appeal cannot be considered to counterbalance the (correct) use of these extensive powers as such. Moreover, the EU Court of Justice has also accepted that the non-respect of specific rules on the tax authorities' control power does not automatically lead to the invalidity of the information obtained.[11] Under these circumstances, the right of appeal does not in itself guarantee a fair treatment of the economic operators.

6 The provisions on contesting customs claims are laid down in Articles 43-45 UCC. They provide some rules with regard to appeals against customs decisions, "concerning only a number of essential aspects relating to the protection of the traders concerned".[12] However, they do not impose a detailed procedure for appeals in this field. The reasons for this approach to merely regulate some aspects of the right of appeal – which was already adopted in the former customs regulations – were explained as follows: *"What makes harmonisation of rights of appeal special however is not only the differences between national procedures, which are in some cases considerable, but also the fact that they often apply uniformly to the*

6 CJEU 3 July 2014, C-129/13 and C-130/13, Kamino and Others, point 42; CJEU 26 September 2013, C-418/11, Texdata Software, point 84.

7 ECtHR 13 July 1995, 18139/91, Tolstoy Miloslavsky, point 59; ECtHR 21 September 1994, 17101/90, Fayed v. the United Kingdom, point 65.

8 See P. BAKER and P. PISTONE, *General report*, in *The practical protection of taxpayers' fundamental rights* (IFA 2015 Basel Congress), Vol. 100B, p. 51, point 6.5.

9 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast) OJ L 269/1 of 10 October 2013.

10 The same comment was made in recital 15 of the former Regulation 450/2008 laying down the Modernized Customs Code.

11 CJEU 17 December 2015, C-419/14, WebMindLicenses.

12 CJEU 11 January 2001, C-1/99, Kofisa, point 38.

whole field of national administrative and tax law so that the harmonisation of rights of appeal for the purposes of customs law only will fragment hitherto uniform national appeals procedures." [13]

7 Article 44(1) UCC provides that any person shall have the right to appeal against any decision taken by the customs authorities relating to the application of the customs legislation which concerns him or her directly and individually. Any person who has applied to the customs authorities for a decision and has not obtained a decision on that application within the time-limits referred to in Article 22(3) of the same regulation is also entitled to exercise the right of appeal. Article 44(2) UCC provides that the right of appeal may be exercised in at least two steps: (a) initially, before the customs authorities or a judicial authority or other body designated for that purpose by the Member States; (b) subsequently, before a higher independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States. According to Article 44(4) UCC, Member States shall ensure that the appeals procedure enables the prompt confirmation or correction of decisions taken by the customs authorities.

1.2. ... but an appeal only implies a suspension of the recovery under specific conditions

8 Article 45(1) UCC (corresponding to Article 244, first subparagraph of the former Customs Code Regulation 2913/92) provides that the submission of an appeal "shall not cause implementation of the disputed decision to be suspended". It means that contesting the customs claim in principle does not have a suspensive effect. The customs authorities can proceed with the recovery of their claim, despite the fact that the claim is challenged.

However, the authorities have to suspend their recovery actions where they have good reason to believe that the disputed decision is inconsistent with the customs legislation or that irreparable damage is to be feared for the person concerned (Article 45(2) UCC; corresponding to Article 244, second subparagraph, of the former Customs Code Regulation 2913/92). These two exceptions constitute two separate reasons, each one alone justifying suspension.[14]

In the view of the EU Court of Justice, the fact that the lodging of an appeal can only lead to a suspension under such specific conditions, is based on the general interest of the EU in recovering its own revenue as soon as possible.[15]

9 As regards the interpretation of the term 'irreparable damage', the Court has provided some clarification in case C-130/95, *Giloy*, where it confirmed that:

- this condition requires the judge hearing an application for interim measures to examine whether the possible annulment of the contested decision by the Court giving judgment in the main action would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed;
- the damage of a financial nature is, in prinicple, not considered to be serious and irreparable unless, in the event of the applicant's being successful in the main action, it could not be wholly recouped;[16]
- it is not necessary to be established with absolute certainty that harm is imminent. It is sufficient that the harm in question, particularly when it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability;
- if, despite suspension of implementation under this provision, the irreparable damage which justified suspension subsequently occurs for other reasons, the customs authorities may revoke the suspension.[17]

If immediate implementation of a contested measure may lead to the winding up of a company or require an individual to sell his flat or house, the condition concerning the existence of irreparable damage must, in those circumstances, be regarded as being satisfied.[18] In this situation, the Court considers that this damage cannot be wholly recouped. The Court further concluded that the debtor also suffers a financial loss that cannot be wholly recouped, where, once it has occurred, it cannot be quantified.[19]

10 The suspension of a customs decision is however conditional upon the provision of a guarantee, unless such a guarantee would be likely to cause the debtor serious economic or social difficulties (Article 45(3) UCC; corresponding to Article 244, third subparagraph of the former Customs Code Regulation 2913/92).

13 CJEU 11 January 2001, C-1/99, Kofisa, point 41.
14 CJEU 17 July 1997, C-130/95, Giloy, point 31.
15 CJEU 3 July 2014, C-129/13 and C-130/13, Kamino and Datema, point 68.
16 Cf. CJEU 9 November 1995, C-465/93, Atlanta Fruchthandelsgesellschaft, point 49.
17 CJEU 17 July 1997, C-130/95, Giloy, points 36-40.
18 CJEU 17 July 1997, C-130/95, Giloy, point 38.
19 CJEU, 23 May 1990, joined cases C-51/90 R and C-59/90 R, Comos Tank, Matex Nederland and Mobil Oil, point 24.

1.3. Admissibility of this EU approach

11 The basic principle of the EU approach is thus that the lodging of an appeal does not cause implementation of the disputed decision to be suspended. As such, this approach is not considered to be conflicting with the right of appeal itself, in so far as the exceptions (doubts on the validity of the tax authorities' claim or fear for irreparable damage) permit to ensure the proportionality of this measure. This need to ensure the proportionality was indeed confirmed in the case law of the European Court of Human Rights and the EU Court of Justice.

12 The European Court of Human Rights was requested to deal with such an issue in the *Loncke* judgement.[20] This case related to the Belgian owner of a second-hand car-shop. He was prosecuted for evasion of VAT, for an amount of more than EUR 3.7 million. The tax authorities also claimed penalties for an amount up to EUR 1.8 million. At the time of this trial, the Belgian law still provided that the tax authorities could require the deposit of the outstanding tax debt before an appeal could be deemed admissible. His appeal against the negative decision of the first judge was indeed declared inadmissible, as he was unable to fulfil the deposit request of the Belgian tax authorities.

The person concerned subsequently claimed a violation of his right of access to court. He referred to Article 6 ECHR and not to Article 2(1) of the Seventh Protocol to the ECHR (which guarantees the right of appeal following a conviction for a criminal offence), since the Belgian law at that time provided the possibility of such a deposit request at all instances of the court proceedings. The ECtHR confirmed that there had been a violation of Article 6 ECHR, as the amount of money requested for deposit was disproportionate to his actual financial situation.[21]

It is however important to note that the ECtHR did not completely exclude the use of this payment requirement. It seems that the use of such provisions in itself falls within the wide margin of discretion which is left to the States. In practice, however, the proportionality condition limits the situations where such payment requirement can be applied or maintained.

13 On this point, reference can also be made to a decision of the EU Court of Justice in the *Molenheide* case.[22] This judgement dealt with a Belgian law providing that VAT credits, which resulted from a VAT return where the deductible input VAT exceeded the VAT due for a particular period, were not refunded to the taxable person, but retained by the tax authorities as a preventive attachment, in cases where a VAT debt concerning previous periods was disputed or where the authorities had grounds for presumption or evidence of VAT debts of which the actual existence and amount was not yet established. That retention had effect as a preventive attachment until the dispute had been definitively resolved, either in the administrative procedure or by a final court judgment, or until the tax authorities had closed the verification of their presumptions without establishing another claim. Although these retentions of VAT credits were applied as a preventive attachment, their effect was that large amounts of money were retained by the tax authorities, during a long period of time, till there was a final decision about the disputes about the other VAT claims. In practice, these attachments had the same effect as a (gradual and partial) deposit or recovery of the disputed claims.

The EU Court of Justice held that, whilst it is legitimate for the 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. They may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct input VAT, which is a fundamental principle of the common system of VAT established by the relevant EU legislation.[23] On the basis of this proportionality condition, the Court of Justice decided in particular that:[24]

- provisions of laws or regulations which would prevent the judge hearing attachment proceedings from lifting in whole or in part the retention of the refundable VAT credit, even though there was evidence before him which would *prima facie* justify the conclusion that the findings of the official reports drawn up by the administrative authority with regard to other periods were incorrect, had to be regarded as going further than was necessary in order to ensure effective recovery and would adversely affect to a disproportionate extent the right of deduction of input VAT;
- provisions of laws or regulations which would make it impossible for the court adjudicating on the substance of the case to lift in whole or in part the retention of the refundable VAT credit before the decision on the substance of the case became definitive would be disproportionate;
- an impossibility for the taxable person to request a court to replace the retention by a different protective measure which was sufficient to

[20] ECtHR, Loncke v Belgium, 25 September 2007, 20656/03.

[21] In the meantime, this Belgian law has been amended. The deposit can only be requested in case of appeal against a negative first instance decision. The Belgian courts have confirmed that such a request is only acceptable if it respects proportionality, taking into account the specific circumstances of each case (cf. infra, point 29).

[22] CJEU 18 December 1997, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96, Molenheide and Others.

[23] Point 47-48 of the judgement.

[24] Points 56-59 of the judgement.

protect the interests of the Treasury but was less onerous for the taxable person, such as, for example, provision of a bond or a bank guarantee, would also exceed the bounds of what was necessary to guarantee recovery of any sums due, in that the substitution in question might mitigate the adverse effect on the right of deduction and the grant of such a measure should be amenable to review by a court.

14 In this regard, a comparison can also be made with the use of so-called "solve et repete" schemes, which affect even more the right of appeal, as they submit the admissibility of the appeal to the advance payment of the disputed amount. The use of such advance payment obligations was recently discussed in the United Kingdom, where Chapter 3 of the Finance Act 2014 entitles the tax authorities to impose upon persons suspected of tax avoidance an obligation to pay on account the amount the tax authorities consider represents understated tax.[25] Promoters of tax avoidance schemes must notify tax avoidance schemes to the tax authorities, which can then allocate a reference number to the scheme which taxpayers who are members of the scheme must then include on their tax returns. In this way the tax authorities are alerted to the fact that a taxpayer is party to a notified tax avoidance scheme. The Act requires parties to tax avoidance schemes to pay the disputed tax within a fixed period of time from receipt of an "accelerated payment notice" ("APN") which may be issued and payment required *before* the tax is assessed.[26] The express objective of this legislation was to alter the economics of tax avoidance by stripping from parties to such schemes all of the liquidity advantages that they, hitherto, enjoyed. An important consideration leading to the new provisions was the experience of the tax authorities of dealing with aggressive delaying tactics and strategies engaged in by tax avoidance scheme promoters. The unravelling of tax avoidance schemes could take many years prior to the tax authorities being in a position to assess a taxpayer's liability and then obtain payment. In the interim participants held money that the tax authorities considered was due to the State and promoters of tax avoidance schemes continued to be in a position to promote their schemes as having longevity.[27]

The legality of the APN system was challenged in several court cases.[28] It was argued, *inter alia,* that the system was unlawful because it infringed the fundamental right to property set out in Article 1 of the First Protocol to the ECHR. The UK courts however rejected this argument. They referred to the case-law of the European Court of Human Rights, which confirms that this provision requires that the interference with the property complies with the principle of lawfulness and pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised. In the area of taxation measures in particular, it was noted that the State enjoys a wide margin of appreciation.[29] In the UK courts' views, this UK measure indeed pursued a legitimate objective and respected the proportionality test. In this regard, it was observed in the *Rowe* case that the Parliament, within its wide margin of appreciation, had decided to remove the cash flow advantage of participating in such tax avoidance schemes. It was considered there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised by this measure.[30] In this regard, it could also be underlined that this measure only applies to specific situations, where the taxpayer knows in advance that the prior notification of the avoidance scheme may lead to this payment requirement.

In the *Walapu* case, it was also emphasized that it had not been suggested that an alternative equally effective but less intrusive mechanism could be adopted which would secure for the State the legitimate public interest advantages that it presently seeks to obtain. It was also decided that the law strikes a fair balance between the rights of the taxpayer and the State by the provision of interest payable to the taxpayer if the taxpayer's view ultimately prevails.[31]

15 The general conclusion from the above case-law is that a strict approach – whereby the appeal does not imply a suspension of the recovery – cannot be applied in all cases. On this point, it can be observed that the Union Customs Code respects the rights of the debtor, in so far as it obliges the authorities to suspend their recovery actions where they have good reason to believe that the disputed decision is inconsistent with the customs legislation or that irreparable damage is to be feared for the person concerned (Article 45(2) UCC; corresponding to Article 244, second subparagraph, of the former Customs Code Regulation 2913/92).

The above case-law also confirms that the use of advance recovery measures (which imply that the appeal does not suspend the implementation of the recovery measures), just as advance payment

25 Section 219(2)(a) of Finance Act 2014.

26 https://www.gov.uk/government/publications/compliance-checks-tax-avoidance-schemes-accelerated-payments-ccfs24.

27 Walapu v HM Revenue & Customs, 23 March 2016 [2016] EWHC 658, point 1.

28 In some cases the tax authorities had formally assessed the claimant's tax liability and from then onwards what was in dispute (through the appeal process) was a crystallised tax liability owed by the claimant to the tax authorities (Rowe and Others v HM Revenue & Customs, 31 July 2015 [2015] EWHC 2293). In another case, the person concerned had in his tax return claimed relief against past income tax assessments but he had not yet had the present claim formally assessed. The APN which had been imposed upon him required the payment on account of an unassessed tax liability that had not accrued (Walapu v HM Revenue & Customs, 23 March 2016 [2016] EWHC 658).

29 ECtHR, Bulves v Bulgaria, 22 January 2009, Nr. 3991/03.

30 Rowe and Others v HM Revenue & Customs, 31 July 2015 [2015] EWHC 2293, points 143, 146 and 147.

31 Walapu v HM Revenue & Customs, 23 March 2016 [2016] EWHC 658, point 121.

obligations (which imply that the amount of the disputed tax claim must be paid in order to make the appeal admissible), need to be balanced against the legitimate interests of the tax debtors. In this regard, it it important to limit the recovery measures to those situations where the interests of the Treasury cannot sufficiently be protected by other measures. The last comment of the EU Court of Justice in the *Molenheide* case, that there should be a possibility to replace the retention of the VAT credits by another measure "which is sufficient to protect the interests of the Treasury but is less onerous for the taxable person" is in line with the approach adopted in Article 45 of the UCC, namely to permit the suspension of implementation of the customs decision "*upon the provision of a guarantee".*

16 In practice, a debtor may nevertheless prefer to pay immediately the amount of the contested claim, in order to avoid the subsequent charging of interest. If the claim would afterwards be annulled or reduced, the tax authorities are under an obligation to repay not only the principal amount which had been unduly paid, but also the default interest on that amount. In evaluating the most interesting option, the debtor may also take account of the costs related to specific guarantees that he would have to lodge in order to obtain a suspension of the recovery measures. If the debtor decides himself not to comply with the payment obligation, but rather to provide e.g. a bank guarantee – if that option is offered or permitted by the tax authorities – he normally cannot ask the authorities to reimburse the costs of this bank guarantee if the tax authorities' claim is ultimately annulled or reduced.[32]

17 A final comment can be made with regard to the recovery of the administrative penalties included in the tax authorities' claim. According to the case-law of the European Court of Human Rights, such penalties may have a criminal character within the meaning of Article 6 ECHR, which guarantees the right to a fair trial in case of criminal charges. According to the second paragraph of this provision, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Hence, the question is whether the non-suspension of the recovery of a penalty relating to the contested claim respects the presumption of innocence. None of the above judgements paid attention to the question whether a specific treatment should be applied to the administrative penalties having a criminal character within the sense of Article 6 ECHR. Although it could be argued that a preventive deposit of the amount of these penalties – or another measure of conservancy – is not incompatible with the presumption of innocence,[33] the question can be raised whether the same can be held with regard to the actual recovery of the penalties that are included in a contested claim. It could indeed be argued that real recovery actions (going further than precautionary measures) with regard to these penalties infringe the presumption of innocence, enshrined in Article 6(2) ECHR.

2. The competence of the judicial authorities with regard to the suspension of the recovery

2.1. The mystery of Article 43 UCC

18 Insofar as Article 45 UCC provides that the authorities have to suspend their recovery actions "where they have good reason to believe" that the disputed decision is unlawful or that irreparable damage is to be feared for the person concerned, this wording gives the impression that the customs authorities have an exclusive and discretionary power with regard to the possible suspension of their recovery actions. At the same time, it is hard to imagine situations where customs authorities, on the basis of Article 45(2) UCC, will break rank and conclude that other customs authorities took decisions that were inconsistent with customs legislation, which should lead to a suspension of the recovery measures on the first ground (i.e. that the customs authorities have good reason to believe that the disputed decision is inconsistent with the customs legislation).[34] Under these circumstances, questions can be raised with regard to the role and the competence of the courts, in particular when courts have to deal with appeals lodged against the decisions of the customs authorities.

19 On this point, a further complication is caused by Article 43 UCC, which deals with 'decisions taken by a judicial authority'. According to this provision:

"Articles 44 and 45 shall not apply to appeals lodged with a view to the annulment, revocation or amendment of a decision relating to the application of the customs legislation taken by a judicial authority, or by customs authorities acting as judicial authorities."

Insofar as the latter provision excludes the application of Article 44 UCC, it could be understood as denying the right of appeal against the first decision that is taken by a judicial authority "or by customs

[32] Cf. EU Court of first instance, 21 April 2005, T-28/03, Holcim v Commission, points 117 and 122-123; EU Court of first instance, 12 December 2007, T-113/04, Atlantic Container Line and Others v Commission, point 38 and 43 (relating to the repayment of the cost of bank guarantees provided in order to defer payment of a fine imposed by the Commission in cases of violation of the EU competition rules).

[33] This is comparable to the freezing of the proceeds of an offence, in order to provisionally prevent the transfer or disposal of these assets, with a view to a possible confiscation, to be imposed by a court at the end of the criminal proceedings, when the person concerned is convicted for the criminal offence.

[34] T. WALSH, *European Union Customs Code*, Kluwer, Alphen aan den Rijn, 2015, p. 137.

authorities acting as judicial authorities".[35] This interpretation would be conflicting with the text of Article 44(2) UCC, which provides that the right of appeal may be organised initially before (*inter alia*) a judicial authority and subsequently before a higher independent body. Moreover, it should be noted that customs claims normally include penalties for non-compliance with the customs legislation. Under these circumstances, refusing a right of appeal against the first judgement would be contrary to Article 2 of Protocol No. 7 to the ECHR, which guarantees that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.[36] Irrespective of what is (not) foreseen in the UCC Regulation, it must be emphasized that the national law must anyhow respect the fundamental rights of the tax debtor. On this point, it can also be noted that the Council of the EU did not preclude that national customs law might authorise a trader to lodge an appeal directly before an independent authority (judge).[37]

20 Insofar as Article 43 UCC excludes the application of Article 45 UCC with regard to appeals against a judicial decision – or a decision taken by customs authorities acting as judicial authorities – this provision creates uncertainty about the question whether the submission of that appeal may have a suspensive effect or not.

One could try to find some clarification and guidance in the initial Commission proposal concerning customs appeal provisions. This initial proposal was presented to the Council on 29 January 1981.[38] According to Article 7 of this proposal, the lodging of an appeal should not cause implementation of the disputed decision to be suspended, but the customs authority could suspend enforcement of this decision in whole or in part if it had good reason to believe that the disputed decision was inconsistent with the customs rules. The proposal also provided: *"Suspension of enforcement may, where appropriate, be subject to the lodging of a security."*

Article 2, paragraph 3, of the same proposal mentioned:

"The right of appeal referred to in paragraphs 1 and 2 may be exercised:

(i) initially, before the customs authority designated for this purpose;

(ii) subsequently, before the authority referred to in Article 12(1) (i.e. an authority which is independent of the customs authority and which is empowered by virtue of its structure to refer the matter to the Court of Justice. This independent authority could be a judicial authority or a specialized body, depending on the provisions in force in the Member States)."

In the preamble of this proposal, the Commission explicitly noted: *"Whereas, although precise provisions can be laid down with regard to the appeal procedure in its initial stage, as Community law stands at present, the organization of the appeal procedure in its second stage should be left to the discretion of the Member States"*. It could be argued that this idea is reflected in the text of what is now Article 43 UCC: the intention of this provision is not to confirm that the right of appeal and the possibility of suspension are excluded with regard to decisions taken by a judicial authority or by customs authorities acting as judicial authorities, but merely to confirm that the Union Customs Code does not regulate these issues (appeal and suspension of implementation) for decisions taken by a judicial authority or by customs authorities acting as judicial authorities. Article 43 UCC is just meant to confirm that this appeal, and the possible suspension of the decision contested in appeal, are regulated by national law.

It should however be noted that there is no direct and clear link between the Commission proposal of 29 January 1981 and Article 43 UCC. The text of this Article 43 UCC was copied from the former Article 22 of Council Regulation 450/2008. The correlation table attached to Regulation 450/2008 indicates that this Article 22 corresponded to Article 246 of Regulation 2913/92. The text of the latter provision was however quite different, as it said*: "This title shall not apply to appeals lodged with a view to the annulment or revision of a decision taken by the customs authorities on the basis of criminal law."*

Hence, although the initial Commission proposal sheds some light on the real intention of Article 43 UCC, the previous versions of this provision do not completely take away the above uncertainty concerning the precise meaning of this provision, which seems to be conflicting with the text of Articles 44 and 45 UCC.

21 Anyhow, there is no justification for refusing a court of appeal to analyse the circumstances of a customs dispute in the same way as a court of first instance, and to permit a suspension under the same conditions as the ones that are applied by the customs authorities or by a lower court.[39] In order to give a

[35] It can be doubted whether the condition of impartiality can always be fulfilled by "customs authorities acting as judicial authorities". (Cf. M. CADESKY, I. HAYES and D. RUSSELL, "Towards greater fairness in taxation. A model taxpayer charter", http://www.taxpayercharter.com/topics.asp?id=102, point 4.15.)

[36] Article 2(2) of this Protocol No. 7 provides that this right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. However, these exceptional circumstances do not apply to normal customs disputes.

[37] CJEU, C-1/99, Kofisa, point 39.

[38] Proposal for a Council Directive on the harmonization of provisions laid down by law, regulation or administrative action concerning the exercise of the right of appeal in respect of customs matters, *OJ* C 33/2 of 14 February 1981.

[39] In a recent Belgian case, the Court of Appeal of Brussels took this approach, taking account of its general competence (in

useful interpretation to these provisions – i.e. an interpretation not affecting their validity – it can be concluded that, when adopting Article 45 UCC, the EU legislature intended to regulate administrative appeals (at the level of the customs authorities) and did not focus on appeals before judicial authorities,

Of course, judicial authorities must also dispose of the competence to suspend the implementation of a disputed decision. This was explicitly confirmed by the EU Court of Justice in the judgment reported in the next paragraph.

2.2. "Exclusive" tax authorities' competence of Art. 45(2) UCC does not exclude the competence of the courts

22 In two Italian cases, *Kofisa* and *Siples*, a local court raised the preliminary question whether it was allowed to suspend the recovery of customs claims, despite its national law (which did not give this competence to the ordinary courts).[40] The EU Court of Justice confirmed that it follows from the wording of Article 45(2) UCC (at that time: Article 244, second subparagraph, of the Customs Code Regulation 2913/92) that this provision confers the power to suspend the recovery exclusively on the customs authorities.[41] The Court however emphasized that this provision cannot restrict the right to effective judicial protection. The Court held that the requirement of judicial control of any decision of a national authority reflected a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR. Therefore, the Court concluded *"that a court seised of a dispute governed by Community law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law"*.[42] This case-law thus confirms that the customs authorities' decision with regard to the suspension of their claim is subject to judicial review.[43]

23 The EU Court of Justice further observed that Article 44(2) UCC (at that time: Article 243, second subparagraph of the former Customs Code Regulation 2913/92) provides that the right of appeal may be exercised initially before the customs authorities and subsequently before an independent body, which may be a judicial authority. The Court of Justice concluded that there was nothing in the wording of that provision to indicate that the appeal before the customs authority is a mandatory stage prior to lodging an appeal before the independent body.[44] Under these circumstances, the Court of Justice concluded that the local court was also competent to suspend the recovery of the contested claim, despite the fact that this was not foreseen under national law. With regard to this judicial competence, the Court did not refer to the circumstances – nor to the limiting conditions – of the customs code, but only to the general need to ensure the full effectiveness of the EU law.[45]

3. Conditions for suspension of the recovery of the customs claims

3.1. A wide interpretation of the conditions for suspension

24 The EU Court of Justice emphasized that the national provisions implementing the conditions for the suspension of the recovery, namely the existence of good reasons to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned (Art. 45(2) UCC), should not be applied or interpreted restrictively.[46]

3.2. No automatic suspension before the moment the debtor is heard

25 A further clarification of this provision was requested by the Supreme Court of the Netherlands in the *Kamino and Datema* cases. The Dutch authorities found that the customs classifications declared by these companies were incorrect, and the authorities requested the payment of additional customs duties. The companies were not heard before the demands for payment were issued. They lodged an objection with the tax inspector, who dismissed their objections. Both companies then appealed to the Dutch courts. The EU Court of Justice accepted that the parties

accordance with the national Judicial Code) to impose provisional measures in a court dispute (judgement of 15 February 2017).

40 CJEU 11 January 2001, C-226/99, Siples, point 9; EUCJ 11 January 2001, C-1/99, Kofisa, point 9. The *Kofisa* case related to a VAT claim (including penalties) levied on importation of goods. The national law referred, in regard to disputes and penalties relating to VAT levied on importation, to the provisions of the customs legislation. In this case, the debtor challenged the claim of the customs authorities before a national court, without first lodging an administrative appeal.

41 CJEU 11 January 2001, C-226/99, Siples, point 20; CJEU 11 January 2001, C-1/99, Kofisa, point 45.

42 CJEU 11 January 2001, C-1/99, Kofisa, points 46 and 48; CJEU 11 January 2001, C-226/99, Siples.

43 T. WALSH, *European Union Customs Code*, Kluwer, Alphen aan den Rijn, 2015, p. 1017.

44 CJEU, 11 January 2001, C-1/99, Kofisa, point 36.

45 Point 48 of the Kofisa judgement; point 19 of the Siples judgement; cf. CJEU 19 June 1990, Factortame, point 21.

46 CJEU, 3 July 2014, C-129/13 and C-130/13, Kamino and Datema, point 70.

concerned should not necessarily be heard by the authorities before the assessment of the claim. The fact that they could express their views during the subsequent administrative objection stage was sufficient to ensure observance of the right to be heard.[47] However, the Court further decided that the right of defence was infringed – even though the debtor could express his views during a subsequent administrative objection stage – if national legislation did not allow the addressees of such demands, in the absence of a prior hearing, to obtain a suspension until the possible amendment of these claims. Such was the case, in any event, if the national administrative procedure restricted the grant of such suspension, even though there was good reason to believe that the disputed decision was inconsistent with customs legislation or that irreparable damage was to be feared for the person concerned.[48]

In this case, the Court did not follow the opinion of the advocate general, who considered that the Dutch rules did not 'in a sufficiently automatic manner' suspend the legal effects of the demand for payment until the debtor had been able to exercise his right to be heard.[49] The advocate general had come to this conclusion as it was apparent from other case-law of the Court that the automatic suspensory effect was a factor of decisive importance when considering possible justifications for restricting the right to be heard prior to the adoption of an adverse decision.[50-51]

3.3. Requirement to provide a guarantee

26 Article 45(3) UCC (corresponding to Article 244, third subparagraph, of the former Customs Code Regulation 2913/92) provides that the suspension of implementation of the customs decision *'shall be conditional upon the provision of a guarantee, unless it is established, on the basis of a documented assessment, that such a guarantee would be likely to cause the debtor serious economic or social difficulties'*.

27 The question has been raised – in a situation where it was considered that irreparable damage may be suffered by the person concerned in the event of immediate implementation of the disputed decision – whether this circumstance necessarily prevents the customs authorities from making suspension of execution subject to provision of security. This question was raised by a German court with regard to the initial German version of Article 244, third subparagraph of the Customs Code Regulation 2913/92. That initial German text – as well as the initial Italian translation – provided that the provision of security 'could not be requested' if such a guarantee was likely to cause the debtor serious economic or social difficulties. At the time when the Court of Justice delivered its judgement, the German and Italian version of this provision had already been amended, in order to bring them into line with the other language versions, which provided that, in such circumstances, the customs authorities could decide not to request the lodging of security.

The Court of Justice decided that it was clear from the wording of all the other language versions of this provision that the customs authorities 'are always entitled' to make suspension of implementation conditional upon the lodging of security, and that these authorities 'are free to decide' not to require such security to be lodged if the requirement to lodge security is likely, owing to the debtor's circumstances, to cause serious economic or social difficulties.[52]

The Court also confirmed that in determining whether requiring a debtor to lodge security would be likely to cause him such difficulties, the customs authorities must take account of all the person's circumstances, in particular those concerning his financial situation.[53] Making suspension of implementation of a disputed customs decision subject to the lodging of security would be likely to 'cause serious economic or social difficulties' for a debtor who does not have sufficient means to provide such a security.[54]

The Court finally decided that where suspension of a disputed customs decision is subject to the lodging of security, the amount of that security must be set at the precise amount of the debt or, if this cannot be

47 See points 54-55 of the judgement. Cf. CJEU 7 December 2000, C-213/99, de Andrade, point 32.
In earlier case-law relating to other areas, not related to customs, the Court of Justice held that every person should have the right to be heard before the adoption of a decision capable of adversely affecting him (CJEU 24.10.1996, C-32/95 P, point 30; concerning a Commission Decision to reduce financial assistance initially granted). In other areas, granting a right to be heard before a decision is taken may affect the effectivity of the decision concerned (see e.g. with regard to the freezing of funds and economic resources in the context of anti-terrorism measures: CJEU, joined cases C-402/05 P and C-415/05 P-Kadi and Al Barakaat International Foundation, point 336).

48 Point 73 of the judgement.

49 Point 67 of the opinion of advocate general Wathelet of 25 February 2014.

50 Point 74 of the opinion of the advocate general, with reference to the Texdata Software case (C-418/11, point 85). In this case, the Court had decided that the imposition of an initial penalty of EUR 700 without prior notice or any opportunity for the debtor to make known his views before the penalty was imposed, did not impair the substance of the fundamental right to be heard, 'since the submission of a reasoned objection against the decision imposing the penalty immediately rendered that decision inoperable and triggered an ordinary procedure under which there was a right to be heard'.

51 With regard to the time period that should be granted for submitting observations, see CJEU 18 December 2008, C-349/07, Sopropé; EUCJ, 21.09.2000, C-462/98 P, Mediocurso, point 38 (with regard to a decision to reduce the financial assistance granted under the European Social Fund).

52 CJEU 17 July 1997, C-130/95, Giloy, points 48, 49 and 53.

53 CJEU 17 July 1997, C-130/95, Giloy, point 51.

54 CJEU 17 July 1997, C-130/95, Giloy, point 54.

established with certainty, at the maximum amount of the debt which has been, or may be, incurred,[55] unless the requirement to provide security is likely to cause the debtor serious economic or social difficulties; if that is the case, the amount of security may be set, taking into account the debtor's financial situation, at an amount less than the total amount of the debt concerned.[56]

28 In my view, it is regrettable that the Court of Justice's judgement did not go more deeply into some issues of the customs authorities' competence with regard to the guarantee that they can require from the debtor. First, in its decision on the customs authorities' power to require a security to be lodged, the Court of Justice could have emphasized – as it already did with regard to Article 45(2) UCC (Article 244, second subparagraph, of the former Customs Code Regulation 2913/92) (cf. supra, point 22) – that the power of the customs authorities to require a security or to relieve the debtor of lodging a security cannot restrict the right to effective judicial protection, so that the courts must be in a position to revise also that decision of the customs authorities, if needed. Such a revision possibility is indeed justified in case the customs authorities reject the debtor's arguments with regard to the serious economic or social difficulties that would follow from an obligation to lodge a security. The exercise of the right of defence in accordance with the principle of effectiveness then implies that the judge sets a time-limit for providing the guarantee, if he comes to the conclusion that the authorities have good reasons to require a guarantee.

29 Next, the Court of Justice's judgement clearly indicates that the security which is requested from the debtor should take account of his (financial) possibilities. However, instead of judging that where the debtor cannot provide security, the customs authorities '**are entitled**' not to make suspension of implementation of a disputed decision subject to provision of security, the Court should have confirmed more explicitly that under such economic circumstances, there should be no other option for the customs authorities than to waive the security requirement, and the debtor's appeal should be declared admissible despite the lack of security. There may indeed be situations where the economic difficulties of the debtor make it impossible for him to lodge a security. In that case, it cannot be accepted that the customs authorities 'are free to decide' not to require such security to be lodged.

In this regard, reference can also be made to a decision of the Belgian Constitutional Court with regard to the Belgian rule which enables the tax authorities to require the deposit of the VAT amounts which a debtor is condemned to pay following a court decision in first instance. The purpose of this rule is to avoid that tax debtors enter an appeal to the judgement of the lower court, with the sole aim to delay the execution of that first judicial decision. The Constitutional Court decided that a debtor who does not have the means to fulfil the deposit obligation would be discriminated against, if this circumstance would make it impossible for him to exercise his right to have his sentence reviewed by a higher court.[57] The Belgian Supreme Court (Cassation) also decided that it is contrary to Article 6 ECHR to oblige the debtor to deposit this amount if he does not have the financial means to do so.[58]

30 Moreover, the Court of Justice could have paid more attention to the possible conflict between, on the one hand, its answer to the second question, that the customs authorities may 'always' make suspension of implementation conditional upon the lodging of security (unless such a guarantee would be likely to cause the debtor serious economic or social difficulties) and, on the other hand, its answer to the first question, that suspension 'must be granted' where there is a risk of irreparable damage for the person concerned or where there is a reason to believe that the disputed decision is inconsistent with customs legislation. It is true that this conflict risk is imbedded in the text of the second and third paragraph of Article 45 UCC (and Article 244 of the former Regulation 2913/92). Here the question can be raised why the Council of the EU did not provide a possibility not to require a security to be lodged in situations where there are good reasons to believe that the disputed decision is unlawful, and why this possibility was limited to cases of serious economic or social difficulties (which can be considered to be broader – and thus to cover – the risk of irreparable damage).

On this point, it can be observed that the latter approach – taking account of the seriousness of the claim when deciding on the guarantee to be provided – was already supported by the EU Court of Justice in its *Molenheide* judgement (cf. supra, point 13), in a dispute about preventive attachments of VAT amounts that blocked by way of a precautionary measure the refundable VAT credit where either there were serious grounds for presumption of tax evasion or there was a VAT debt claimed by the tax authority, that debt being contested by the taxable person.

[55] The Court of Justice came to this conclusion, taking into account Article 192, first paragraph, of Regulation 2913/92, which required the amount of a compulsory security to be equal to the precise amount of a debt or, if that amount could not be established with certainty, to the maximum amount of the debt which had been, or could be, incurred (points 56-57 of the judgement). The above provision was copied in Article 57(1) of Regulation 450/2008, which however emphasized that a compulsory guarantee should be at the level of the precise amount of the customs debt "and of other charges" which have been or may be incurred. The latter wording is now repeated in Article 90(1) UCC.

[56] CJEU 17 July 1997, C-130/95, Giloy, point 63.

[57] Belgian Constitutional Court 6 June 1995, Case 44/95 and 9 November 1995, case 75/95.

[58] Belgian Supreme Court (Cassation) 4 June 2015, Case F.12.0098.F.

According to the Belgian legislation, such retention of VAT credits operated as a preventive attachment until the dispute had been finally determined, either by administrative measure or by a judgement which had become definitive. In this case, the Court of Justice decided that:

"(…) provisions of laws or regulations which would prevent the judge hearing attachment proceedings from lifting in whole or in part the retention of the refundable VAT balance, ***even though there is evidence before him which would prima facie justify the conclusion that the findings of the official reports drawn up by the administrative authority were incorrect, should be regarded as going further than is necessary in order to ensure recovery*** *(…).*

Similarly, provisions of laws or regulations which would make it impossible for the court adjudicating on the substance of the case to lift in whole or in part the retention of the refundable VAT balance before the decision on the substance of the case becomes definitive would be disproportionate." [59]

In this regard, it should also be noted that lodging a security may entail costs for the debtor. The burden of this security may become very high. This cost adds to the cost of the proceedings themselves. Lengthy proceedings over many years are very costly. Cost and delay often force a tax debtor to give up and settle.[60]

The EU Court of Justice's approach in the *Molenheide* case was confirmed in another VAT case, relating to a Polish law which permitted the VAT authorities to postpone refunds of VAT credits to taxable persons who had started their VAT activities less than 12 months before they notified the tax authority of their first intra-Community supply or acquisition.[61] In such cases, the normal period for refunds of VAT credits was extended from 60 days to 180 days, unless the taxable person lodged a guarantee to the value of approximately 60.000 €. The Polish government argued that the lengthening of the refund period was justified by the fact that the persons concerned were taxable persons newly liable to VAT, in relation to whom the VAT authorities had to make more extensive inquiries in order to prevent any tax evasion and avoidance. The Court of Justice however rejected the argument of the Polish government. The Court held that the national legislation did not respect the proportionality principle. Taxable persons were not permitted to demonstrate the absence of tax evasion or avoidance in order to take advantage of less restrictive VAT refund conditions. As regards the possibility offered to the taxable persons to lodge a security deposit in order to obtain VAT refunds within the normal refund period, the Court also considered that the security deposit was not proportionate either to the amount of the excess VAT to be repaid or to the economic size of the taxable person. The Court emphasized that the amount of the security deposit implied a considerable financial burden, in particular for new companies. Therefore, the Court concluded that this Polish legislation was not in confirmity with the VAT Directive and the principle of proportionality.

31 As already observed, the Union Customs Code does not regulate the issues of appeal and suspension of implementation for decisions in customs matters taken by a judicial authority (cf. supra, points 19-20). Of course, the right of defence should also be respected in this next stage of appeal.

In this regard, it should be taken into account that tax claims (including customs claims) mostly include a substantial amount of administrative penalties, which may be considered to have a criminal nature within the sense of the European Convention on Human Rights. Article 2(1) of the Seventh Protocol to the ECHR provides that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. This provision is complementary to Article 6(1) ECHR. In the introduction, it was already observed that the limitations to the right of access to the courts, which is secured by this Article 6(1), should not restrict or reduce this access in such a way or to such an extent that the very essence of that right is impaired.

According to Article 2(1) of the Seventh Protocol to the ECHR, the exercise of this right of appeal against decisions involving sanctions with a criminal nature, including the grounds on which it may be exercised, shall be governed by law. States have a lot of discretion on how this provision is implemented so long as they do not destroy the essence of the right. Thus, they do not have to allow an appeal on the merits of the judgement, may restrict the right of appeal to points of law only and may require that leave to appeal be sought first.[62] However, restrictions to the right of appeal, just as restrictions to the general right of access to a court, must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Consequently, when the higher court applies its national legislation to decide on the suspension of the implementation of the lower court's decision concerning the customs claim, it should check the proportionality of the measures requested by the tax authorities, which implies that they also take account of the above criteria, relating to the (lack of) serious character of the appeal claim, the debtor's ability to pay or to provide a guarantee and the risk for the tax authorities.

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59 CJEU 18 December 1997, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96, Garage Molenheide and Others, points 55-57.

60 Cf. M. CADESKY, I. HAYES and D. RUSSELL, "Towards greater fairness in taxation. A model taxpayer charter", http://www.taxpayercharter.com/topics.asp?id=102, point 4.15.

61 CJEU 10 July 2008, C-25/07, Sosnowska.

62 http://www.coe.int/en/web/echr-toolkit/protocole-7.

This was illustrated by the judgement of the European Court of Human Rights in the *Loncke* case, about a car dealer who was prosecuted for evasion of VAT (cf. supra, point 12).[63] His appeal against the conviction by the first judge was declared inadmissible, as he was unable to fulfil the deposit request of the Belgian tax authorities. The European Court of Human Rights considered that this inadmissibility decision of the court of appeal did not respect the appeal right of the person concerned.

4. The approach with regard to customs related claims

4.1. A similar approach ...

32 The basic principles of the approach in the customs legislation correspond to the principles set out by the EU Court of Justice in related areas. An important judgement related to the effects of disputes about the validity of a Council Regulation of 1987 introducing a special levy in the sugar sector, to eliminate the losses suffered by the European Community due to the high export refunds which the Community was required to pay in order to ensure that excess sugar production within the Community could be disposed of in non-member countries. Two debtors lodged an objection against such claims imposed by national customs offices. They argued that these claims were based on a European regulation which was invalid. The national court asked the Court of Justice for a preliminary ruling with regard to its competence to suspend, by way of an interim measure, the operation of the national decisions based on the contested Council regulation. The Court of Justice observed that the need to ensure the full effectiveness of the European regulations in all the Member States did not constitute an obstacle to the legal protection which Community law conferred on individuals. This legal protection implied that the national court which had referred questions on the interpretation or the validity of EU legislation to the Court of Justice, had to be able to grant interim relief and to suspend the application of the disputed national measures which were based on that EU legislation, until such time as the national court could deliver its judgement on the basis of the decision of the Court of Justice.[64]

The national court also wanted to know under what conditions national courts may order the suspension of enforcement of a national administrative measure based on a Community regulation, in view of the doubts which they may have as to the validity of that regulation. On this point, the Court of Justice decided that this interim relief can be ordered by a national court only if:

- that court entertains serious doubts as to the validity of the EU act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice (as suspension of enforcement must retain the character of an interim measure);
- there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief. With regard to the nature of the damage, purely financial damage cannot be regarded in principle as irreparable.

33 The same conclusions can be found in a judgement about a domestic administrative decision demanding for repayment of export refunds.[65] The Court of Justice confirmed that a national court is entitled to suspend implementation of such a domestic administrative decision if it has doubts as to the validity of the EU act which serves as its basis.[66]

The Court of Justice also took the same approach with regard to the suspension of national measures implementing a Council regulation on the allocation of import quotas for third-country bananas. In the *Atlanta* case, the Court of Justice confirmed that the above conditions must also be observed when a national court orders a 'positive' interim measure (which in this case implied: rendering the regulation whose validity was challenged provisionally inapplicable as regards the company concerned, allowing that company to disregard the provisional import quota).[67]

34 In the above cases, the Court of Justice further empasized that:

- in its assessment of all the conditions for the interim measures, the national court should respect any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the EU act or on an application for interim measures seeking similar interim relief at EU level; and[68]
- the national court should take due account of the EU interest, namely that the EU legislation concerned should not be set aside without proper guarantees. In order to comply with that obligation, the national court to which an application for interim measures has been made should first examine whether the EU act in

63 ECtHR 25 September 2007, 20656/03, Loncke v Belgium.

64 CJEU 21 February 1991, Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen ad Zuckerfabrik Soest, points 16-21, with references to CJEU 22 October 1987, 314/85, Foto-Frost and 19 June 1990, C-213/89, Factortame and Others.

65 It was decided that Article 45 UCC (Article 244 of the former Community Customs Code Regulation 2913/92) is not applicable to demands for repayment of export refunds.

66 CJEU 17 July 1997, C-334/95, Krüger, point 44.

67 CJEU 9 November 1995, C-465/93, Atlanta Fruchthandelsgesellschaft.

68 CJEU 17 July 1997, C-334/95, Krüger, point 44.

question would be deprived of all effectiveness if not immediately implemented, and must take account in that respect of the damage which may be caused to the legal regime established by the regulation for the EU as a whole. It also means that if the grant of interim relief represents a financial risk for the EU, the national court must be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security.[69]

4.2. ... but not an identical approach?

35 It should be emphasized that the above case-law does not oblige the national court always to require a guarantee.[70] The Court of Justice only decided that the national judge must have the possibility to do so, taking into account the financial risk for the EU as a whole. However, this does not prevent the local judge from taking account of other elements, namely the financial, economic and social situation of the debtor (as confirmed in Article 45(3) UCC with regard to customs claims) and/or the serious character of the arguments invoked by this debtor (not confirmed in Article 45(3) UCC).

36 It was mentioned before that Article 43 UCC could be interpreted in such a way that it does not regulate the issues of appeal and suspension of implementation for decisions in customs matters taken by a judicial authority or by customs authorities acting as judicial authorities. According to a former Commission proposal, the organization of the appeal procedure in its second stage had to be left to the discretion of the Member States (see point 20). However, that view is not in line with the approach of the Court of Justice with regard to customs related claims. In the *Zuckerfabrik* cases, the Court of Justice expressed the opinion that national differences concerning the powers of judges to order the suspension of enforcement of administrative measures may jeopardize the uniform application of EU law.[71] In this regard, it should make no difference whether the dispute is raised before a court of first instance or a court of appeal.

5. Comparison with recovery of unlawful state aid

37 The above approach with regard to customs duties is similar to the EU policy with regard to the implementation of decisions of the European Commission ordering the recovery of state aid which is considered unlawful and incompatible with EU law. The purpose of such recovery is to re-establish the competitive situation that existed on the market prior to the granting of the unlawful state aid. The Commission's recovery decision imposes a recovery obligation upon the Member State concerned. It requires the Member State concerned to recover a certain amount of aid from a beneficiary or a number of beneficiaries within a given time frame.

The Commission may also adopt a decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market ('recovery injunction'), if all the following criteria are fulfilled:

(a) according to an established practice there are no doubts about the aid character of the measure concerned;

(b) there is an urgency to act;

(c) there is a serious risk of substantial and irreparable damage to a competitor (Article 13(2) of Regulation 2015/1589.

With regard to the execution of the Commission's decisions, Article 16(3) of Council Regulation (EU) 2015/1589 provides that: *"Without prejudice to any order of the Court of Justice of the European Union pursuant to Article 278 TFEU, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law".*[72] This provision is in line with the text of Article 14(3) of the former procedural

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69 CJEU 9 November 1995, C-465/93, Atlanta Fruchthandelsgesellschaft, points 42-45; EUCJ 21 February 1991, Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest, points 30-32. (See also CJEU, 17 July 1997, C-334/95, Krüger, points 45 and 46, about the national court's task to obtain all relevant information on the EU act concerned).

70 As clearly confirmed in the German – which was the language of all these cases – and the French language version of point 47 of the *Atlanta* judgement and point 32 of the *Zuckerfabrik* judgement.

71 Points 25-27 of this judgement.

72 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, *OJ* L 248, 24.9.2015, p. 9.
It should be noted that the beneficiary of the aid (who may become the debtor in case of recovery of that aid) is informed if the Commission decides to initiate a formal investigation procedure. As an interested party, he will be invited to submit comments (in accordance with Article 6 of Regulation (EU) 2015/1589, or he may even be required to provide information (in accordance with Article 7 of the same Regulation). However, this possibility to be heard does not in itself guarantee a full right of defence for this interested party.

regulation concerning state aid (Regulation 659/1999).[73]

38 The impact of this provision was discussed in case C-232/05, Commission v France.[74] In 2000, the European Commission had taken a decision ordering France to recover some illegal aid. Following the Commission's decision, the French authorities issued several assessments, which were contested before a French court.[75] According to French law, these actions challenging the authorities' assessments had automatic suspensory effect.

The EU Court of Justice decided that the French law could not be considered to allow the 'immediate and effective' execution of the Commisison's decision. On the contrary, by granting the suspensory effect, the contestation procedure could considerably delay the recovery of the aid. In the view of the Court of Justice, this situation prolonged the unfair competitive advantage resulting from the unlawful aid at issue. Accordingly, the court ordered that the French rule providing for the suspensory effect of the action brought against the demand for repayment of the state aid should be left unapplied.[76]

In the same case, the company concerned also brought an action for annulment of the Commission's decision before the Court of First Instance of the European Communities. However, the company had not requested that the application of that Commission's decision be suspended under Article 278 TFEU (ex Art. 242 TEC), which provides that: *"Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended."* Suspension of such a decision can thus only be granted if the application for suspension states the circumstances giving rise to urgency and contains the pleas of fact and law establishing a prima facie case for the interim measures being applied for.[77]

In a communication of 2007, the Commission analysed the possible consequences of litigation before the EU courts and before national courts, and the conditions for obtaining an interim relief of the national measures to implement the Commission's recovery decision.[78] With regard to these conditions, the Commission explicitly referred to the conditions established by the Court of Justice in the cases *Zuckerfabrik* [79] and *Atlanta Fruchthandelsgesellschaft* [80]: "*According to settled case-law, interim relief can be ordered by the national court only if:*

1. that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

2. there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

3. the court takes due account of the Community interest; and

4. in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level."

6. Conclusions

37 The strict approach of the EU legislature with regard to the possibility to suspend the recovery of contested customs claims appears to be inspired by the fact that customs duties constitute own resources for the EU budget. It is indeed reasonable, for customs duties as well as for other taxes, that tax authorities request guarantees to ensure the recovery of disputed customs or other tax claims. The same approach is also followed in other areas, such as the recovery of unlawful state aid.

Of course, there must be a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[81] As the right of defence is a fundamental right, tax authorities should respect the right of tax debtors to contest tax claims. Therefore, there should be a clear and effective mechanism for providing or requesting an interim suspension of payment or collection of disputed taxes in duly justified cases.[82]

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73 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (*OJ* L 83, 27.3.1999, p. 1). Article 14(3) of this Regulation specified that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision.'

74 EUCJ, 5 October 2006, C-232/05, Commission v France (the *Scott* case).

75 In fact, the Commission initially made an error in the calculation of the amount of the aid and the Commission had to rectify its decision.

76 Points 51-53 of this judgement.

77 Cf. Notice of the Commission, Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (2007/C 272/05), *OJ* C 272/4 of 15.11.2007, point 25.

78 Notice of the Commission, Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (2007/C 272/05), *OJ* C 272/4 of 15.11.2007, section 3.2.3., points 55-59.

79 Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen and Others.

80 Case C-465/93, Atlanta Fruchthandelsgesellschaft mbH a.o.

81 ECtHR, 25 October 2011, Valkov and Others v Bulgaria, 2033/04 and others, point 91.

82 P. BAKER and P. PISTONE, General report, in *The practical protection of taxpayers' fundamental rights* (IFA 2015 Basel Congress), Vol. 100B, p. 51, point 6.5.

With regard to customs claims, it appears that the Union Customs Code Regulation 952/2013 only sets out some rules concerning the effect of disputes on the recovery of customs claims. The provisions for the implementation of the appeals procedure are largely to be determined by the Member States.[83]

The above analysis shows that this part of the Council regulation – in particular Article 43 UCC – is somewhat unclear with regard to the important aspect of the judicial authority's competence. However, the limited provisions of the Union Customs Code do not exclude the debtors' right to a fair trial, and this right should also be guaranteed beyond any possibly restrictive rule of national laws implementing this Union Customs Code.[84]

It can be deplored that this Council regulation did not pay attention to some possibilities to improve the tax debtor's right of appeal by explicitly providing for a possibility for the debtor to have the recovery replaced by less onerous guarantees, or for a possibility for the authorities to waive guarantees if there are doubts about the validity of the customs claims. On these points, the case-law of the EU Court of Justice with regard to (suspension of) recovery of VAT claims or other customs related claims may also be exemplary for the approach to be followed in customs disputes.

At the same time, the EU Court of Justice could have confirmed more explicitly that the provision of a security cannot be imposed if the debtor is simply unable to execute that request.

83 CJEU 3 July 2014, C-129/13 and C-130/13, Kamino and Datema, point 57.

84 Cf. CJEU 21 September 2000, C-462/98 P, Mediocurso v Commission, point 36.

CASE LAW

EU

Court of Justice

Commission v. Portugal

21 December 2016

Case number: C-503/14

Guarantees for tax collection – Exit taxation of individuals – Taxation of natural persons on capital gains resulting from a share exchange – Immediate recovery – Differential treatment based on the place of residence – No proportionality

Summary

The Portuguese taxation of capital gains resulting from a transfer of all the assets used in the exercise of a business or professional activity goes beyond what is necessary in order to achieve the objective relating to the balanced allocation of the power to impose taxes between Member States in so far as the relevant provisions of national law do not leave the choice to the taxable person who transfers his residence from the Portuguese territory to another Member State to opt between, on the one hand, the immediate payment of the amount of the tax on capital gains resulting from the exchange of shares and, on the other hand, the deferred payment of that amount, which necessarily involves an administrative burden for the taxable person, in connection with tracking the transferred assets, and accompanied by a bank guarantee.

1 By its application, the European Commission asks the Court to declare that the Portuguese Republic has failed to fulfil its obligations under Articles 21, 45 and 49 TFEU and Articles 28 and 31 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, 'the EEA Agreement') in adopting and maintaining in force Articles 10 and 38 of the Código do Imposto sobre o Rendimento das Pessoas Singulares (Code on income tax of natural persons, the 'CIRS') which provides that a taxable person who exchanges shares and who transfers his place of residence to a State other than Portugal or transfers assets and liabilities relating to an activity carried out on an individual basis in return for shares in a non-resident company must, in the former case, include, in relation to the transactions in question, any income not taxed in the last fiscal year in which the taxable person was still regarded as a resident taxpayer and, in the latter case, he is not entitled to a deferral of taxation resulting from the transaction in question.

I – **Legal context**

A – ***The EEA Agreement***

2 Article 28 of the Agreement stipulates that:

'1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

4. The provisions of this Article shall not apply to employment in the public service.

5. Annex V contains specific provisions on the free movement of workers.'

3 Article 31 of the EEA agreement is worded as follows:

'1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment.'

B – *Portuguese Law*

4 According to Article 10 of the CIRS, entitled 'Capital gains':

'1. Capital gains are any gains, other than those regarded as business or professional income, capital income or income from immovable property, arising from:

(a)the transfer for valuable consideration of rights in rem in immovable property or from the use of any private assets for the purposes of the business or professional activities pursued on an individual basis by the owner of such assets;

(b) the transfer for valuable consideration of shares, including their redemption and depreciation with reduction of capital, and of other securities, and the value attributed to partners following distribution, which is considered a capital gain for the purposes of Article 81 of the [Código do Imposto sobre o Rendimento das Pessoas Coletivas (Corporate Taxation Code)];

…

3. Gains shall be deemed to have arisen at the time when any of the acts referred to in paragraph 1 is effected …

…

4. A gain that is subject to personal income tax shall be made up of:

(a)the difference between the realisation value and the acquisition value, less any part that may be treated as capital income, in the cases referred to at (a), (b) and (c) in paragraph 1;

…

8. In the case of an exchange of shares on the terms referred to in Article 73(5) and Article 77(2) of the Corporate Taxation Code, the allocation, by virtue of that exchange, of the securities representing the company's capital to the members of the company acquired shall not entail taxation of those securities if they continue to value the new shares at the level of the old ones for tax purposes. That value shall be determined in accordance with the provisions of this code, without prejudice to the taxation of any cash equivalent values that may be assigned to them.

9. In the case referred to in the foregoing paragraph, it should also be noted that:

(a)if a member ceases to have the status of resident in the Portuguese territory, the amount which, pursuant to paragraph 8, was not taxed when the shares were exchanged and which represents the difference between the actual value of the shares received and the value of the older shares at the time of their purchase, determined in accordance with the provisions of this code, shall be reckoned as a capital gain for the purposes of taxation for the year in which resident status is lost;

(b)Article 73(10) of the Corporate Taxation Code shall apply mutatismutandis.

10. The provisions of paragraphs 8 and 9 shall also apply mutatismutandis to the allocation of shares in the case of mergers or the division of companies to which Article 74 of the Corporate Taxation Code.

…'

5 Article 38 of the CIRS, entitled 'Contribution of assets to form company capital' provides as follows:

'1. No taxable result shall be calculated concerning the formation of company capital resulting from the transfer by a natural person of all the assets used in the exercise of a business or professional activity, provided all the following conditions are satisfied:

(a)the entity to which the assets are transferred is a company and has its head office and effective management in Portugal;

(b)the natural person who makes the transfer holds at least 50% of the company's capital and the company's activity is essentially identical to that exercised on an individual basis;

(c)the assets and liabilities transferred are taken into account for the purposes of that transfer at the values recorded in the natural person's accounts or business records, that is those resulting from the application of the provisions of this code or revaluations undertaken in accordance with tax legislation;

(d)the capital holdings received in return for the transfer are valued, for the purposes of taxation of profits or losses on their subsequent transfer, at the net value of the assets and liabilities transferred, determined in accordance with the preceding paragraph;

(e)the company referred to at (a) undertakes, by way of declaration, to comply with the provisions of Article 77 of the Corporate Taxation Code; that declaration must be attached to the natural person's periodic declaration of income for the financial year of the transfer.

2. The provisions of the preceding paragraph shall not apply if the assets transferred include assets for which taxation of profits has been deferred for the purposes of Article 10(3)(b).

3. The profits resulting from the transfer for valuable consideration, on whatever basis, of the capital holdings received in return for the transfer referred to in paragraph 1 shall, within five years of the date of transfer, be classed as business and professional income and regarded as net income under Category B. During that period, no transactions in shares benefiting from neutrality arrangements shall be made, failing which the profits shall be deemed to have been made from the date of such transactions and shall be increased by 15% for each year or part of year since the assets were contributed to the formation of the company's capital

and be added to the income for the year in which the transactions were recognised.'

6 Article 77(1) of the Corporate Tax Code provides:

'Where the regime set out in Article 38(1) of the [CIRS] applies, the assets and liabilities which make up the property transferred shall be recorded in the accounts by the recipient company at the values mentioned in paragraph 1(c) and in determining the taxable profit of the company the following shall apply:

(a) the results relating to assets which make up the property transferred shall be calculated as if no such transfer had taken place;

(b) the write-downs and depreciation of the fixed assets shall be carried out in accordance with the method that was used for determining the taxable income of the natural person;

(c) the provisions have been transferred shall remain, for tax purposes, subject to the regime applicable to them for purposes of determining the taxable income of the natural person'.

II – **Pre-litigation procedure**

7 On 17 October 2008, the Commission sent the Portuguese Republic a letter of formal notice, in which it expressed the view that that Member State had failed to fulfil its obligations under Articles 18, 39 and 43 EC which have become Articles 21, 45 et 49 TFEU, and Articles 28 and 31 of the EEA Agreement by taxing unrealised capital gains in the case of exchanges of shares where a natural person transfers his residence to another Member State or in the case of transfer to a company of assets and liabilities connected with the exercise by a natural person of an economic or professional activity if the company to which the assets and liabilities were transferred has its head office or effective management in another State.

8 The Portuguese Republic responded to that letter of formal notice by a letter dated 15 May 2009 disputing the Commission's position.

9 Unconvinced by that response, on 3 November 2009 the Commission issued a reasoned opinion to the Portuguese Republic, in which it held that the Portuguese Republic had failed to fulfil its obligations by adopting and maintaining in force Articles 10 and 38 of the CIRS, pursuant to which a taxable person who transfers his residence to another State or who transfers assets and liabilities related to an activity carried out on an individual basis in exchange for shares of a company with its head office or effective management in the territory of another State must include any income not taxed in the last fiscal year in which the taxable person was still regarded as a resident taxpayer. The Commission also called upon the Portuguese Republic to take the necessary steps to comply with that reasoned opinion within two months of its receipt.

10 The Portuguese Republic replied to the reasoned opinion by stating that the Commission's complaints were unfounded.

11 On 28 October 2011, the Commission sent that Member State a additional letter of formal notice, in which it referred to the updated version of Article 10(9)(a) of the CIRS, indicating that the position expressed in the letter of formal notice and in the reasoned opinion remained unchanged. It also reiterated its position on Article 38 of the CIRS, as set out in the letter of formal notice and the reasoned opinion.

12 Following the Portuguese Republic's response to that additional letter of formal notice, in which that Member State continued to contend that the Commission's complaints were unfounded, the Commission sent, on 22 November 2012, an additional reasoned opinion to that Member State in which it, first, reiterated its complaint that Articles 10 and 38 of the CIRS infringed Articles 21, 45 and 49 TFEU and Articles 28 and 31 of the EEA Agreement and, second, invited that Member State to comply with that additional reasoned opinion within two months.

13 Since, in its reply of 23 January 2013, the Portuguese Republic repeated that the Commission's position was incorrect, the Commission decided to bring the present action.

III – **The action**

A – *The alleged lack of precision and rigor in the delimitation of the subject matter of the dispute*

1. Arguments of the parties

14 Without formally raising an objection of inadmissibility of the action, the Portuguese Republic submits that the changes made by the Commission to the form of order set out in the application when compared to the objections set out in the reasoned opinion and the additional reasoned opinion go beyond mere clarifications and constitute substantial amendments to the original subject matter of the dispute as set out in those reasoned opinions. In the view of that Member State, the complaints in those reasoned opinions did not correspond to the wording of Articles 10 and 38 of the CIRS, on which the Commission relied, such that it was not possible for there to have been a failure to fulfil its obligations.

15 The Commission states that it has made minor changes to the form of order sought in its application in relation to those set out in its additional reasoned opinion in order to incorporate the clarifications sent by the Portuguese Republic during the administrative procedure and, in particular, in its reply to the additional reasoned opinion. It considers that those amendments do not alter the meaning and scope of the complaints raised against that Member State and that the rights of defence of that Member State were perfectly respected.

2. Findings of the Court

16 It must be recalled that, according to the Court's settled case-law, although it is true that the subject matter of proceedings brought under Article 258 TFEU is circumscribed by the pre-litigation procedure provided for in that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same objections, that requirement cannot go so far as to mean that in every case exactly the same wording must be used in both, where the subject matter of the proceedings has not been extended or altered. Accordingly, in its application the Commission may clarify its initial complaints provided, however, that it does not alter the subject matter of the dispute (see judgment of 21 January 2016, *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraphs 12 and 13 and the case-law cited).

17 In the present case, the Commission made it clear both in the pre-litigation procedure and before the Court that it contended that the Portuguese Republic, by adopting and maintaining in force Articles 10 and 38 of the CIRS, had failed to fulfil the obligations arising under Articles 21, 45 and 49 TFEU and Articles 28 and 31 of the EEA Agreement.

18 In addition, a reading of the operative part of the reasoned opinion and the additional reasoned opinion in conjunction with Articles 10 and 38 of the CIRS enabled the Portuguese Republic to understand, first, the situations, provided for by the provisions, referred to by the Commission in those reasoned opinions and, second, the legal consequences arising from those provisions in respect of those situations, which the Commission considered to be contrary to EU law.

19 It follows that the Commission has neither extended nor amended the subject matter of the action as circumscribed by the pre-litigation procedure.

20 In those circumstances, the Portuguese Republic's argument, based on the alleged lack of precision and rigor in the delimitation of the subject matter of the dispute, is not such as to call in question the admissibility of the action and must therefore be rejected.

B – *Substance*

21 First, the Commission complains that the Portuguese Republic, by adopting and maintaining in force Article 10 of the CIRS, by virtue of which a taxable person who exchanges shares and transfers his residence to another EU Member State or another Member State of the European Economic Area (EEA) must include, for the transactions in question, any income not taxed in the last fiscal year in which the taxable person was still regarded as a resident taxpayer, failed to fulfil its obligations under Articles 21, 45 and 49 TFEU and Articles 28 and 31 of the EEA Agreement.

22 Second, the Commission complains that that Member State, by adopting and maintaining in force Article 38 of the CIRS, according to which a taxable person who transfers assets and liabilities related to an activity carried out on an individual basis in exchange for shares of a company with its head office or its effective management in the territory of another Member State or of another EEA State may not benefit from a deferral of taxation resulting from the transaction in question, failed to fulfil its obligations under Articles 49 TFEU and 31 of the EEA Agreement.

23 Those complaints must be assessed separately.

1. Capital gains resulting from an exchange of shares

(a) Arguments of the parties

24 The Commission submits that, as regards the taxation of capital gains resulting from an exchange of shares, Article 10 of the CIRS provides less favourable tax treatment for taxable persons who leave Portugal in comparison to those who maintain their residence in Portugal. A shareholder or a member would become liable, owing solely to the transfer of his residence outside Portugal, to a tax on capital gains in question corresponding to the difference between the actual value of the shares received and the value of the older shares at the time of their purchase. By contrast, if that shareholder or partner maintains his residence in Portugal, the value of the shares received is the same as that of the shares disposed. Thus, if he continues to reside in Portugal, the shareholder or the partner is taxed only at the time of the definitive disposal of the shares received, unless an additional cash payment is made.

25 The Commission considers that the advantage of the deferral of taxation on capital gains resulting from an exchange of shares in respect of taxable persons residing in Portugal creates a difference in treatment between those taxable persons and taxable persons who decide to transfer their residence to another EU Member State or to an EEA State, which is not compatible with Articles 21, 45 and 49 TFEU or with Articles 28 and 31 of the EEA Agreement.

26 In that regard, it relies on the judgments of 11 March 2004, *deLasteyrie du Saillant* (C-9/02, EU:C:2004:138), and of 7 September 2006, *N* (C-470/04, EU:C:2006:525) which relate to the exit taxation of natural persons, which it considers applicable to the present case. By contrast, in the Commission's view, the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785), in which the Court acknowledged for the first time that national legislation can be justified by the aim of ensuring a balanced allocation of the power to impose taxes between the Member States, is not applicable in the present case since it relates only to taxation of legal persons.

27 Even though the Commission recognises the legitimacy of the aim pursued by the Portuguese legislature to ensure the effectiveness of the tax system, it considers that the national provision at issue is not proportional since EU law, and in particular Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p.1) and 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) already provides for information mechanisms between the competent authorities of the Member States and the mutual assistance for the recovery of tax claims allowing that objective to be achieved without having to restrict the fundamental freedoms enshrined in the FEU Treaty.

28 In addition, the Portuguese Republic could, for example, ask the taxable person who is leaving Portugal to provide regular information on the shares received in order to verify whether he still holds them. Taxation could accordingly be applied to capital gains only when the taxable person who left Portugal disposed of the shares which he had received.

29 The Portuguese Republic contends that Article 10 of the CIRS does not infringe Articles 21, 45 and 49 TFEU or Articles 28 and 31 of the EEA Agreement. The very limited situation to which the provision of the CIRS in question relates concerns the end of the deferral of the taxation of capital gains actually realised in the context of an earlier exchange of shares, as a result of the transfer of the residence of the taxable person outside Portugal. Consequently, the judgment of 11 March 2004 in *Lasteyrie du Saillant* (C-9/02, EU:C:2004:138) relating to the taxation of as yet unrealised capital gains in the case of the transfer of the tax residence of a taxable person to another Member State, is not applicable to the present case.

30 According to the Portuguese Republic, a possible restriction on freedom of movement resulting from Article 10 of the CIRS is justified, first of all, by the aim of ensuring a balanced allocation of the power to impose taxes between the Member States, in accordance with the principle of fiscal territoriality, which was recognised by the Court in the case giving rise to the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 45). It points out that, applying national legislation in conjunction with the double taxation agreements concluded by it with all Member States, the power to tax capital gains resulting from an exchange of shares belongs, in principle, exclusively to the Member State of residence of the taxable person selling the shares, namely, in the present case, the Portuguese Republic. Consequently, the Portuguese Republic considers that an obligation not to impose such capital gains on the transfer of the residence of the taxable person to another State would result in it permanently losing its right to tax such capital gains, thus compromising its right to exercise its tax jurisdiction in relation to the activities carried out in its territory (see, to that effect, judgments of 29 March 2007, *Rewe Zentralfinanz*, C-347/04, EU:C:2007:194, paragraph 42, and of 8 November 2007, *Amurta*, C-379/05, EU:C:2007:655, paragraph 58).

31 The Portuguese Republic then relies on reasons relating to the coherence of the tax system. According to that Member State, a direct link between a tax advantage and the offsetting of such a benefit by a particular tax levy exists in the present case since the objective of the provision in question is to prevent the tax advantage granted to the taxable person in the form of a tax deferral of capital gains realised from subsequently making the effective taxation of those same capital gains impossible in Portugal. It is essential for the proper functioning of the tax deferral regime for certain assets that the granting of the tax advantage at a given point in time corresponds to the actual taxation of those assets at a later point in time.

32 Finally, the Portuguese Republic relies on the justification based on the need to ensure the effectiveness of fiscal supervision and the prevention of tax avoidance and evasion.

33 The Federal Republic of Germany considers that the possible restriction on freedom of movement resulting from Article 10 of the CIRS is justified in so far as that article seeks to tax profits generated in Portugal before the Portuguese Republic loses the power to impose taxes on them. According to the Federal Republic of Germany, the principles identified by the Court in the judgment of 29 November 2011, *National Grid Indus* (C-371/10, C:2011:785, paragraph 45) are valid, whether or not the exit tax regime is applicable to natural or legal persons.

(b) Findings of the Court

34 It is necessary to examine the tax regime provided for in Article 10 of the CIRS in the light of Articles 21, 45 and 49 TFEU before examining it in the light of Articles 28 and 31 of the EEA Agreement.

(i) Complaints alleging infringement of Articles 21, 45 et 49 TFEU

35 According to the Court's case-law, Article 21 TFEU, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 45 TFEU in relation to freedom of movement for workers and Article 49 TFEU in relation to the freedom of establishment (see, to that effect, judgment of 12 July 2012, *Commission* v Spain, C-269/09, EU:C:2012:439, paragraph 49 and the case-law cited).

36 The tax regime at issue must be examined first in the light of Articles 45 and 49 TFEU before being examined in the light of Article 21 TFEU so far as concerns persons moving from one Member State to

another Member State in order to settle there for reasons not connected with the pursuit of an economic activity.

– The existence of restrictions of Articles 45 et 49 TFEU

37 All the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the EU, and preclude measures which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 51 and the case-law cited).

38 Even though those provisions, according to their wording, are directed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, it must be stated that, in that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order to pursue an economic activity there (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 52 and the case-law cited).

39 Rules which preclude or deter a national of a Member State from leaving his country of origin in order to exercise either his right to freedom of movement or his right to freedom of establishment therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the national concerned (see, to that effect, judgments of 27 September 1988, *Daily Mail and General Trust*, 81/87, EU:C:1988:456, paragraph 16, and of 12 July 2012, *Commission* v *Spain*, C 269/09, EU:C:2012:439, paragraph 53 and the case-law cited).

40 Furthermore, it is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of movement and the freedom of establishment must be regarded as restrictions on that freedom (see judgment of 12 July 2012, *Commission* v Spain, C-269/09, EU:C:2012:439 paragraph 54 and the case-law cited).

41 In the present case, Article 10(8) of the CIRS provides that, in the case of an exchange of shares, the allocation, by virtue of that exchange, of the securities representing the company's capital to the members of the company acquired does not entail taxation of those securities if they continue to value the new shares at the level of the old ones for tax purposes, without prejudice to the taxation of any cash equivalent values that may be assigned to them. As confirmed by the Portuguese Republic at the hearing, the tax on capital gains resulting from such an exchange is to be recovered from the taxable person only in the event of a definitive disposal of the shares received on such exchange and at the moment of that exchange.

42 By way of derogation from that rule, Article 10(9)(a) of the CIRS requires that taxable persons transferring their residence to a State other than the Portuguese Republic include in the taxable income, for the calendar year in which the transfer of the place of residence took place, the amount which, pursuant to Article 10(8) of the CIRS, had not been taxed at the time of the exchange of the shares.

43 Consequently, while taxable persons who continue to reside in Portugal benefit from a tax deferral on the capital gains resulting from the exchange of the shares until the subsequent disposal of the shares received upon the exchange, taxable persons who transfer their residence outside Portugal are obliged, as a result of that transfer, to pay the capital gains tax resulting from that exchange immediately.

44 That difference in treatment as regards the time of taxation of the capital gains at issue constitutes a cash-flow disadvantage for the taxable person who wishes to transfer his residence outside Portugal as compared to a taxable person who maintains his residence in that territory. While the former becomes liable, simply by reason of such a transfer, to a tax on a capital gain which has not yet been realised and which he therefore does not have at his disposal, the latter taxable person will have to pay that tax only when, and to the extent that, the capital gains have actually been realised (see, by analogy, judgment of 11 March 2004, *de Lasteyrie du Saillant*, C-9/02, EU:C:2004:138, paragraph 46).

45 In this connection, according to the Court's case-law, the exclusion of a cash-flow advantage in a cross-border situation where it is available in an equivalent domestic situation is a restriction on the free movement of workers and the freedom of establishment (see, to that extent, judgment of 12 July 2012, *Commission* v Spain, C-269/09, EU:C:2012:439, paragraphs 59 and 61).

46 There is nothing in the documents before the Court showing that that difference of treatment can be explained by an objective difference of situation and, moreover, the Portuguese Republic has not at any time argued before the Court that that was the case. From the point of view of legislation of a Member State aiming to tax capital gains generated in its territory, the situation of a person who transfers his residence from that Member State to another Member State is similar to that of a person who maintains his residence in the first Member State, as regards the taxation of the capital gains relating to the assets which were generated in the first Member State before the transfer of the residence (see, by analogy, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 38).

47 It follows that the difference in treatment, with regard to taxation of capital gains resulting from an exchange of shares under Article 10(9)(a) of the CIRS, affecting a taxable person who transfers his residence outside Portugal compared to a taxable person who maintains his residence in Portugal constitutes a restriction on freedom of movement for workers or to freedom of establishment within the meaning of Articles 45 and 49 TFEU.

– The justification of the restrictions on the freedoms enshrined in Articles 45 and 49 TFEU

48 It must be examined whether the restriction on the freedoms enshrined in Articles 45 and 49 TFEU, resulting from Article 10(9)(a) of the CIRS, is justified by overriding reasons in the public interest. It is further necessary, in such a case, that that restriction be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it (see, inter alia, judgments of 18 January 2007, *Commission* v *Sweden*, C-104/06, EU:C:2007:40, paragraph 25, and of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 42).

49 In that regard, it must be borne in mind that it is for the Member State to demonstrate, first, that its legislation meets an objective of public interest and, second, that that legislation complies with the principle of proportionality (see, to that effect, judgment of 13 September 2007, *Commission* v *Italy*, C-260/04, EU:C:2007:508, paragraph 33 and the case-law cited).

50 The Portuguese Republic relies on justifications based on, first, the necessity of safeguarding the balanced allocation of powers to impose taxes between the Member States, in accordance with the principle of territoriality, second, the need to preserve the cohesion of the tax system and, third, the need to ensure the effectiveness of fiscal supervision and the prevention of tax avoidance and evasion.

51 As regards, in the first place, the objective of ensuring the balanced allocation of powers to impose taxes between Member States, it should be recalled, first, that that is a legitimate objective recognised by the Court, and that, second, it is settled case-law that, in the absence of any unifying or harmonising measures of the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, with a view to eliminating double taxation (judgment of 16 April 2015, *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 64 and the case-law cited).

52 However, the Commission submits that the Portuguese Republic cannot rely on the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785), to justify the restriction of fundamental freedoms by the need to ensure a balanced allocation of the power to impose taxes between the Member States, since that judgment relates to the taxation of companies on unrealised capital gains and not to that of natural persons on those gains. It contends that, on the contrary, it is the judgments of 11 March 2004, *deLasteyrie du Saillant* (C-9/02, EU:C:2004:138), and of 7 September 2006, *N* (C-470/04, EU:C:2006:525), which are relevant in the present context, which concerned the taxation of unrealised capital gains of natural persons in the event of a transfer of residence from the territory of a Member State to the territory of another Member State.

53 Although it is true that the judgment of 29 November 2011, *National Grid Indus*(C-371/10, EU:C:2011:785), was adopted in the context of the taxation of capital gains on companies, the Court subsequently transposed the principles laid down in that judgment also to the taxation on capital gains of natural persons (see judgment of 12 July 2012, *Commission* v Spain, C-269/09, EU:C:2012:439, paragraphs 75 to 78, and of 16 April 2015, *Commission* v Germany, C-591/13, EU:C:2015:230, paragraphs 65 to 67).

54 In that regard, the fact that the latter two judgments concerned realised capital gains rather than, as in the present case, unrealised capital gains is irrelevant. What is of importance is that, as regards one or other of those capital gains, similar transactions, carried out in the purely domestic context of a Member State, unlike a cross-border transaction, would not have resulted in the immediate taxation of those capital gains (see, to that effect, judgment of 16 April 2015, *Commission* v Germany, C-591/13, EU:C:2015:230, paragraph 71).

55 Moreover, in so far as the Commission questions the legitimacy of the objective of ensuring a balanced allocation of the power to impose taxes between Member States with regard to the exit taxation of natural persons' unrealised capital gains on the ground that any capital losses realised after the transfer of residence to another Member State cannot be deducted by them in that other Member State, suffice it to recall that the Court has already held that a possible omission by the host Member State to take account of decreases in value does not impose any obligation on the Member State of origin to revalue, at the time of the definitive disposal of the new shares, a tax debt which was definitively determined at the time when the taxable person, because of the transfer of its residence, ceased to be subject to tax in the Member State of origin (see, by analogy, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 61).

56 Accordingly, there is no objective reason for distinguishing, for the purposes of the justification deriving from the objective of ensuring a balanced distribution of the power to impose taxes between Member States, between the exit taxation of natural persons and that of legal persons in respect of unrealised capital gains.

57 Next, it must be pointed out that Article 10(9)(a) of the CIRS is capable of ensuring the preservation of the distribution of the power to impose taxes between the Member States concerned. The final settlement tax levied at the time of the transfer of a residence is intended to subject the unrealised capital gains — which arose within the ambit of that State's power of taxation before the transfer of that residence — to the Member State of origin's tax on profits. Capital gains realised after that transfer of the residence are taxed exclusively in the host Member State in which they have arisen, thus avoiding double taxation (see, by analogy, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 48).

58 As regards the question whether that provision, which provides, upon the transfer of the residence of the taxable person from Portugal to another State, for the immediate taxation of unrealised capital gains resulting from an exchange of shares, does not go beyond what is necessary in order to achieve the objective of allocation of the power to impose taxes, it must be recalled that, in the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 52), the Court has already held that legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer is disproportionate, by reason of the fact that measures existed which were less restrictive of the freedom of establishment than the immediate recovery of that tax (see, to that effect, judgments of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 73 and 85, and of 16 April 2015, *Commission* v Germany, C-591/13, EU:C:2015:230, paragraph 67 and the case-law cited).

59 In that regard, the Court has found that national legislation offering a company which transfers its place of effective management to another Member State the choice between, first, immediate payment of the tax and, second, deferred payment of that tax, possibly together with interest in accordance with the applicable national legislation, would constitute a measure less harmful to freedom of establishment than the immediate recovery of that tax (see judgments of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 73 and 85, and of 16 April 2015, *Commission* v Germany, C-591/13, EU:C:2015:230, paragraph 67 and the case-law cited). Moreover, the Court held that it is permissible for the Member State to take account of the risk of non-recovery of the tax, which increases with the passage of time, in its national legislation applicable to deferred payment of tax liabilities, by measures such as the provision of a bank guarantee (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 74).

60 Having regard to the case-law cited in the two preceding paragraphs, it must be held that Article 10(9)(a) of the CIRS goes beyond what is necessary in order to achieve the objective relating to the balanced allocation of the power to impose taxes between Member States in so far as the relevant provisions of national law do not leave the choice to the taxable person who transfers his residence from Portuguese territory to another Member State to opt between, on the one hand, the immediate payment of the amount of the tax on capital gains resulting from an exchange of shares and, on the other hand, the deferred payment of that amount, which necessarily involves an administrative burden for the taxable person, in connection with tracing the transferred assets, and accompanied by a bank guarantee (see, par analogy, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 73 and 74).

61 It follows that the need to ensure the allocation of the power to impose taxes between the Member States cannot justify the restriction of the freedoms enshrined in Articles 45 and 49 TFEU which results from Article 10 (9) (a) of the CIRS.

62 As regards, in the second place, the justification based on the need to maintain the cohesion of a national tax system it must be recalled that the Court has acknowledged that this constitutes an overriding reason in the public interest. In order for an argument based on such a justification to succeed, the Court requires that the existence of a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, to that effect, judgment of 16 April 2015, *Commission* v Germany, C-591/13, EU:C:2015:230, paragraph 74 and the case-law cited).

63 In the present case, the Portuguese Republic submits that the national provision in question is necessary in order to ensure such cohesion, since the tax advantage granted in the form of a tax deferral ends when the subsequent taxation becomes impossible, because the beneficiary taxable person loses his status as a resident in Portugal. According to that Member State, it is essential for the proper functioning of the tax deferral regime that there is a correspondence, in respect of the same taxable person and the same taxation, between the granting of an advantage in the form of tax deferral and the effective taxation of capital gains at a later date.

64 In that regard, it must be held that the Portuguese Republic has not shown that there is a direct link between the tax advantage provided for in Article 10(8) of the CIRS and the offsetting of that advantage by a particular tax levy. Although, in a cross-border situation, as provided for in Article 10(9)(a) of the CIRS, the tax advantage granted in accordance with Article 10(8) of the CIRS is offset by a tax levy, since the amount of the tax due is necessarily recovered at the time of transfer of the taxable person's residence outside Portugal, this is not the case when the situation is purely internal, as

provided for in Article 10(8) of the CIRS. It is clear from the examination of that provision that the recovery of the tax on capital gains resulting from an exchange of shares takes place only in the eventuality of a definitive disposal of the shares received during that exchange. As pointed out by the Advocate General in point 60 of his Opinion, so long as he does not dispose of the shares that he has received, a taxable person who maintains his residence in Portugal can still claim the benefit of the tax advantage granted under Article 10(8) of the CIRS, thus making the recovery of the tax from him no more than a future possibility. It follows that the alleged link between the tax advantage granted to the taxable person and tax treatment of that advantage is not certain (see, by analogy, judgment of 26 October 2006, *Commission* v *Portugal*, C-345/05, EU:C:2006:685, paragraph 27).

65 Consequently, the Portuguese Republic's argument that the provision at issue is objectively justified by the need to maintain the cohesion of the national tax system must be rejected.

66 As regards, in the third place, the justification based on the effectiveness of fiscal supervision and the prevention of tax avoidance and evasion, it must be held that the Portuguese Republic, in its defence, merely mentioned that justification without developing it any further.

67 It follows that such a justification cannot be accepted.

68 In those circumstances, it must be held that Article 10(9)(a) of the CIRS constitutes a restriction prohibited by Articles 45 TFEU and 49 TFEU and that the Commission's claim alleging that the Member State concerned had failed to fulfil its obligations under the FEU Treaty is well founded.

– Complaint alleging infringement of Article 21 TFEU

69 As regards citizens of the Union wishing to move within the EU on grounds not related to the pursuit of an economic activity, the same conclusion applies, for the same reasons, to the complaint alleging infringement of Article 21 TFEU (see, to that effect, judgment of 12 July 2012, *Commission* v Spain, C-269/09, EU:C:2012:439, paragraph 91).

(ii) The existence of a restriction in Articles 28 and 31 of the EEA Agreement

70 First of all, it should be observed that Articles 28 and 31 of the EEA Agreement are analogous to Articles 45 and 49 TFEU (see judgment of 12 July 2012, *Commission* v Spain, C-269/09, EU:C:2012:439, paragraph 95).

71 Admittedly, EU case-law which relates to restrictions on the exercise of freedom of movement within the European Union cannot be transposed in its entirety to the freedoms guaranteed by the EEA Agreement, since those latter freedoms are exercised within a different legal context (judgment of 16 April 2015, *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 81 and the case-law cited).

72 In the present case, however, the Portuguese Republic has not explained why the findings relating to the lack of a justification for the restrictions on the exercise of the freedoms of movement guaranteed by the Treaty leading to the findings in paragraphs 61, 65 and 66 above cannot apply in the same way to the freedoms guaranteed by the EEA Agreement.

73 In those circumstances, it must be held that Article 10(9)(a) of the CIRS constitutes a restriction prohibited by Articles 28 and 31 of the EEA Agreement and that the Commission's complaint, alleging that the Member State concerned had failed to fulfil its obligations under those provisions of the EEA Agreement, is well founded.

2. The transfer to a company of all the assets connected with an activity carried out on an individual basis

(a) Arguments of the parties

74 The Commission maintains that, in the event of a transfer to a company of assets and liabilities by a natural person in exchange for shares, Article 38 of the CIRS provides for less favourable tax treatment depending on whether the transfer is made to a company which has its head office and its effective management in Portugal or to a company which has its head office and its effective management outside that territory. In the first case, the taxation of capital gains only takes place when these assets and liabilities have been disposed of by the company which received them, provided that other conditions are also met. By contrast, in the second case, the taxation of capital gains is immediate. The Commission considers that the Portuguese Republic should apply the same rule, regardless of whether or not the company to which the assets and liabilities have been transferred has its head office and its effective management in Portugal.

75 It therefore considers that Article 38 of the CIRS is contrary to Article 49 TFEU and Article 31 of the EEA Agreement and, for the reasons set out in its complaint concerning Article 10 of the CIRS, goes beyond what is necessary to ensure the effectiveness of the tax system. The Portuguese Republic could, for example, regularly request information under Directive 2011/16 from the competent authorities of the Member State in which the head office or the effective management of the company to which the transfer of assets and liabilities is situated, with a view to verifying whether it still holds them. It is only when it is established that the transferred assets and liabilities have been disposed by that company that, according to the Commission, the capital gains concerned should be taxed. The Commission also refers to Directive 2010/24, which would also be relevant in situations where the capital gains tax has not been paid.

76 The Portuguese Republic submits that Article 38 of the CIRS provides for the deferral of the taxation of capital gains relating to the formation of companies or to the majority shareholding in companies already in existence by means of the contribution of all the assets allocated to the exercise of a business or professional activity of a natural person. The purpose of this provision is to make it possible to modify the legal form under which an economic activity is carried out without taxing the capital gains resulting from the contribution of assets at the time of such contribution. Allowing a tax deferral up to the time of the subsequent disposal of the transferred assets, subject to compliance by the transferee company with certain requirements relating to accounting entries for the transferred assets, guarantees compliance with principle of economic continuity, so as to ensure the taxation of the corresponding income. The condition relating to the place of the head office or effective management of the transferee company is necessary in order to ensure, in the absence of measures of harmonisation, compliance with the principle of economic continuity and the subsequent imposition of the assets or liabilities transferred, since the jurisdiction for the taxation of a company with its head office or effective management outside Portugal territory no longer lies with the Portuguese Republic but with the State in whose territory that company has its head office or effective management.

77 The measure at issue is therefore compatible with the fiscal principle of territoriality and is justified by the need to ensure a balanced distribution of the power to impose taxes between the Member States.

(b) Findings of the Court

78 It is necessary to examine the tax system provided for in Article 38 of the CIRS in the light of Article 49 TFEU before examining it in the light of Article 31 of the EEA Agreement.

(i) Complaint alleging infringement of Article 49 TFEU

79 As a preliminary point, it must be borne in mind that, according to the case-law of the Court of Justice, Article 49 TFEU applies to any resident of a Member State, whatever his nationality, who has a shareholding in the capital of a company established in another Member State, which gives him definite influence over the company's decisions and allows him to determine its activities (see judgment of 18 December 2014, *X*, C-87/13, EU:C:2014:2459, paragraph 21 and the case-law cited).

80 In the present case, it must be held that the benefit of the tax deferral provided for in Article 38(1) of the CIRS is subject, under point (b) of that provision, to the condition that the natural person who transfers all the assets used in the exercise of a business or professional activity to a company holds at least 50% of its capital.

81 Accordingly, Article 38(1) of the CIRS falls within the scope of the freedom of establishment.

82 That provision provides that it is not necessary to determine a taxable result by virtue of the realisation of the share capital resulting from the transfer of all the assets used in the exercise of a business or professional activity by a person, where the conditions in Article 38(1)(a) to (e) of the CIRS are met. In accordance with Article 38(1) (a) of the CIRS, the entity to which the assets in question are transferred must be a company which has its head office and effective management in Portugal. As the Portuguese Republic confirmed at the hearing, in such a case the tax is recovered from the transferee company at the time of the subsequent disposal of the assets in question. By contrast, if the transferee company does not have its head office and its effective management in Portugal, the natural person making the transfer is excluded from the benefit of the tax advantage provided for in Article 38(1) CIRS, and is therefore immediately liable to capital gains tax.

83 It follows that, in the case of natural persons who transfer all the assets in question to a company with its head office and effective management in Portugal, the capital gains tax must be paid by the transferee company at the time of the subsequent disposal of the assets, whereas natural persons transferring all of those assets to a company with its head office or effective management in the territory of a State other than the Portuguese Republic become liable to capital gains tax at the time of such a transfer.

84 It must be observed that such a tax system results in a cash-flow disadvantage for a taxable person who transfers all the assets in question to a company with its head office or effective management outside Portugal, compared to a taxable person who transfers the same assets to a company with its head office and effective management in Portugal, and thus constitutes a restriction on the exercise of the right of establishment within the meaning of the case-law referred to in paragraphs 37 to 40 above.

85 Furthermore, there is nothing in the documents before the Court showing that that difference can be explained by an objective difference in situation and, moreover, the Portuguese Republic has not at any time argued before the Court that that was the case.

86 In order to justify the restriction on freedom of establishment guaranteed by the Treaty under the provision in question, the Portuguese Republic relies on, on the one hand, the need to ensure a balanced distribution of the power to impose taxes between Member States, in accordance with the principle of territoriality, and, on the other hand, the need to ensure economic continuity.

87 As regards, first, the objective of ensuring a balanced distribution of the power to impose taxes between the Member States, it must be held, in the light of what has been pointed out in paragraph 59

above, that Article 38(1)(a) of the CIRS goes beyond what is necessary to achieve the objective pursued, because of the existence of measures which are less restrictive of the freedom of establishment than immediate taxation.

88 In those circumstances, the restriction on freedom of establishment resulting from Article 38(1)(a) of the CIRS cannot be justified by the need to ensure the allocation of the power to impose taxes between Member States.

89 As regards, second, the justification for the need to guarantee economic continuity, the Portuguese Republic refers to the necessity of making the benefit of tax deferral subject to certain requirements for the transferee company in respect of registration of the transferred assets. According to that Member State, compliance with such requirements cannot be ensured, in the absence of measures of harmonisation, with regard to companies whose head office or effective management is in the territory of another State, since they are under the jurisdiction not of the Portuguese Republic but of the State of residence.

90 In that regard, it must be observed that the requirement for a transferee company to have its head office and effective management in Portugal is therefore ultimately intended to ensure that the Portuguese State can tax the capital gains in question. As pointed out in paragraphs 87 and 88 above, that objective cannot justify the different treatment of natural persons, depending on whether they transfer all the assets in question to a company with its head office and effective management in the territory of the Portuguese Republic or to a company with its head office or effective management in the territory of another State, since such an objective may be ensured without the need to distinguish between a purely internal situation and a cross-border situation. Thus, for the reasons given in those paragraphs, the restriction on freedom of establishment resulting from Article 38(1)(a) of the CIRS is disproportionate to that objective.

91 In those circumstances, it must be held that Article 38(1)(a) of the CIRS constitutes a restriction prohibited by Article 49 TFEU and that the Commission's complaint, alleging that the Member State concerned has failed to fulfil its obligations under that article of the FEU Treaty, is well founded.

(ii) The complaint of a breach of Article 31 of the EEA Agreement

92 The Portuguese Republic has not set out the reasons why the findings relating to the lack of a justification for the restrictions on the exercise of the freedoms of establishment guaranteed by the Treaty leading to the findings in paragraphs 87 to 90 above cannot apply in the same way to the freedom of establishment guaranteed by the EEA Agreement.

93 In those circumstances, it must be held that Article 38(1)(a) of the CIRS constitutes a restriction prohibited by Article 31 of the EEA Agreement and that the Commission's complaint, alleging that the Member State concerned had failed to fulfil its obligations under those provisions of the EEA Agreement, is well founded.

94 In view of all the foregoing considerations, it must be found that:

– by adopting and maintaining in force Article 10(9)(a) of the CIRS, according to which, for a taxable person who loses his status as a resident in Portugal, for taxation purposes for the year of such loss of residence status, the amount which, under Article 10(8) of the CIRS, was not taxed when the shares were exchanged is to be reckoned as a capital gain, the Portuguese Republic has failed to fulfil its obligations under Articles 21, 45 and 49 TFEU and Articles 28 and 31 of the EEA Agreement, and

– by adopting and maintaining in force Article 38(1)(a) of the CIRS, which reserves entitlement to the tax deferral provided for by that provision to natural persons who transfer all the assets used in the exercise of a business or professional activity to a company which has its head office or effective management in Portugal, the Portuguese Republic has failed to fulfil its obligations under Article 49 TFEU and Article 31 of the EEA Agreement.

On those grounds, the Court (Fourth Chamber) hereby

Declares that, by adopting and maintaining in force Article 10(9)(a) of the Código do Imposto sobre o Rendimento das Pessoas Singulares (Code on income tax of natural persons), according to which, for a taxable person who loses his status as a resident in Portugal, for taxation purposes for the year of such loss of residence status, the amount which, under Article 10(8) of that code, was not taxed when the shares were exchanged is to be reckoned as a capital gain, the Portuguese Republic has failed to fulfil its obligations under Articles 21, 45 and 49 TFEU and Articles 28 and 31 of the Agreement on the European Economic Area of 2 May 1992;

Declares that, by adopting and maintaining in force Article 38(1)(a) of the same code, which reserves entitlement to the tax deferral provided for by that provision to natural persons who transfer all the assets used in the exercise of a business or professional activity to a company which has its head office or effective management in Portugal, the Portuguese Republic has failed to fulfil its obligations under Article 49 TFEU and Article 31 of the Agreement on the European Economic Area.

United Kingdom

England and Wales High Court (Administrative Court)

Walapu v HM Revenue & Customs

23 March 2016

Case number: CO/1948/2015
[2016] EWHC 658

Guarantees for tax collection – Disputed tax debt relating to notified tax avoidance schemes – Advance payment obligation – Legitimate objective and respecting proportionality – No violation of fundamental rights

Summary

Promotors of specific tax avoidance schemes had an obligation to notify these schemes to the tax authorities. Parties to these tax avoidance schemes had to pay on account the amount the tax authorities consider represents understated tax. This was a condition for the admissibility of their appeal.

This measure was considered to be lawful, to pursue a legitimate objective and to respect the proportionality test.

A. Introduction: Issues and conclusion

1. This claim for judicial review concerns the scope and effect of Chapter 3 of the Finance Act 2014 which entitles the Defendant ("*HMRC*" or the "*Revenue*") to impose upon persons suspected of tax avoidance an obligation to, in effect, pay on account the amount the Revenue considers represents understated tax. Under existing rules promoters of tax avoidance schemes must notify the schemes to HMRC which can then allocate a reference number to the scheme which taxpayers who are members of the scheme must then include on tax returns. In this way the Revenue is alerted to the fact that a taxpayer is party to a notified tax avoidance scheme. The Act requires parties to tax avoidance schemes to pay the disputed tax within a fixed period of time from receipt of an "accelerated payment notice" ("APN") which may be issued and payment required *before* the tax is assessed. The express objective of the Chancellor of the Exchequer, in promoting this legislation, was to alter the economics of tax avoidance by stripping from parties to such schemes all of the liquidity advantages that they, hitherto, enjoyed. An important consideration leading to the new provisions was the experience of HMRC of dealing with aggressive delaying tactics and strategies engaged in by tax avoidance scheme promoters. Documentary evidence placed before this Court by the Revenue showed that, not infrequently, the unravelling of tax avoidance schemes could take many years prior to HMRC being in a position to assess a taxpayer's liability and then obtain payment. In the interim participants held money that HMRC considered was due to the State and promoters of tax avoidance schemes continued to be in a position to promote their schemes as having longevity.

2. The legality of the APN system introduced by the Finance Act 2014 was challenged by a taxpayer who had been formally assessed but which was subject to appeal in *Rowe et ors v The Commissioners for HM Revenue & Customs* [2015] EWHC 2293 (Admin) ("*Rowe*"). In that case it was argued that the system was unlawful because, in essence, it violated legitimate expectations, defeated natural justice, infringed Article 6 of the European Convention on Human Rights ("*ECHR*"), denied citizens access to the courts, and infringed the fundamental right to property set out in Article 1 of the First Protocol to the ECHR ("*A1P1*"). In a cogent and careful judgment Mrs Justice Simler rejected all of these arguments. A further, and particular, aspect of the scheme was considered by the Court of Appeal in *R(on the application of De Silva) v The Commissioners for Her Majesty's Revenue & Customs* [2016] EWCA Civ 40 where the Court of Appeal upheld the position adopted by the Revenue.

3. There is however an important factual distinction between the present case and those that have preceded it. In these earlier cases the Revenue had formally assessed the claimant's tax liability and from then onwards what was in dispute (through the appeal process) was a crystallised tax liability owed by the Claimant to HMRC. In the present case, the Claimant has in his tax return claimed relief against past income tax assessments but he has not yet had the present claim formally assessed. The APN which has been imposed upon him requires – he submits - the payment on account of an unassessed tax liability that has not accrued. It is argued that this is a fundamentally different position to the case of an assessment which is under appeal. Mr David Southern QC, who appeared for the Claimant, argued that to require a citizen to pay to the Revenue a sum which was not a sum assessed for tax constituted a profound violation of the citizen's private rights. The new system created by the Finance Act 2014 conferred a draconian power upon the HMRC which they now deployed in relation to a targeted segment of society (tax avoiders) in an unfair and unjust way which involves diluted and ineffective procedural protections. Mr Southern QC did not shy away from seeking a declaration of incompatibility of the new system with the Human Rights Act 1998 ("HRA 1998").

4. I should, before going on, say a word about the manner in which the present dispute has evolved. In its initial form the claim for judicial review was, in substantial part, identical to that addressed in *Rowe* and the importance of the distinction between an APN issued during an enquiry, on the one hand, and an APN issued following assessment but pending appeal, on the other hand, featured only lightly. However, in the light of the case law referred to above the Claimant's case changed and a new case emerged only shortly prior to the oral hearing of this judicial review. The Revenue, pragmatically, has taken the view that it is better to address the new arguments now instead of seeking an adjournment to permit the case properly to be pleaded and particularised with the concomitant delay in clarification of the law. In the event, the Claimant was allowed considerable latitude and, indeed, one argument (concerning the scope and effect of the transitional arrangements relating to notifiable tax avoidance schemes) only took real shape halfway through the hearing. Again, the Revenue agreed to address the argument and gave "overnight" disclosure to the Claimant of certain documents in order that a properly formulated written submission could be prepared and served. The emergence of the point necessitated a second oral hearing to address the issue. I am grateful to the Revenue for the sensible approach it has adopted to the resolution of this dispute.

5. The conclusion that I have arrived at is that the claim, in its various forms, fails. The reasons are analogous to those articulated by Simler J in *Rowe*. However, given the differences in the factual context and the evolved nature of the arguments advanced, I have not simply followed the ruling in *Rowe*. I have arrived at my own conclusions, though having full regard to the logic of the judgment in *Rowe*.

6. Mr Southern QC described the nub of his client's objections as "*due process*". He accepted that his various Grounds were, in material respects, different ways of advancing a single core objection. It is, in this regard, helpful to stand back from the *minutiae* of the argument. The Claimant does not (nor could) challenge the legitimacy of the objective pursued by Chapter 3 of the Finance Act 2014, namely to alter the economics of tax avoidance. The Treasury estimates that tax avoided amounts to c. £14 billion. One way of attacking tax avoidance schemes is to unravel them individually by assessing the tax due and then fighting the scheme promoters through the Courts and Tribunals in protracted litigation. But an alternative approach is, *ex ante*, to negate the incentive for such schemes to be entered into in the first place. HMRC says that they win over 80% of the cases that they fight to a litigated conclusion and settle many more along the way. They have now introduced a detailed and systematic internal process designed to enable them, at a much earlier stage, to form a clear conclusion as to the understated tax. They are confident in the robustness of the procedure devised. By imposing the APN before a full assessment the Revenue conveys the signal to potential participants in tax avoidance schemes that: (a) the ultimate prospects of success are small; and (b), there will be no, or at least a greatly reduced, liquidity benefit from participating in a scheme pending a final determination of the legality of the scheme through litigation.

7. By this new system, the Revenue seeks to reduce the incentive for taxpayers to subscribe to tax avoidance schemes. Lawyers, accountants and others advising upon such schemes will be bound, in accordance with their professional obligations, to advise promoters and their prospective clients of this different state of affairs. The experience of the HMRC is that the effect of the Finance Act 2014 has already led to a substantial downturn in the number of new tax avoidance schemes being notified to it.

8. The new arrangements thus: pursue a legitimate objective; are targeted precisely upon the class of persons who engage in the activity sought to be suppressed; and incorporate a vigorous process whereby the APN is likely to correlate to the actual tax position. These factual conclusions go a long way to answering the Claimant's criticisms. However, some Grounds are more specific and concern an alleged omission of particular procedural rights within the legislative scheme. Specifically, the Claimant objects to the absence of a right of representation prior to the issuance of the APN and the absence of a right of appeal. Neither argument is, in my judgment, sustainable. Both the statutory framework and the internal procedures introduced by HMRC provide ample opportunity for addressees of APNs to make their views known comprehensively to the Revenue. There is nothing deficient or unfair in these arrangements which could, remotely, amount to a denial of a right of representation. As to the alleged deficiency of the right of appeal there is, again, nothing in the point. If a taxpayer is aggrieved by the issuance of the APN procedure he may seek judicial review of it, or, compel (via the procedure laid down in Section 28A(4) Taxes Management Act 1970 ("TMA 1970")) HMRC to issue a closure notice within a specified period, upon which occurrence the normal rights of appeal are engaged.

9. In any event, in relation to both of these Grounds, the Claimant has identified nothing upon the particular facts of his *own* case which raise even an arguable complaint that *he* has been denied the chance to put *anything* that he wished to advance to HMRC and/or that he has an argument which he has been unable to advance before the High Court in this judicial review or that he would (in the event that he wished to take this matter to appeal) be denied the right to put any grievance that he has to the appellate tribunal. The arguments thus take form and shape at the level of abstraction, but not reality.

10. The other argument advanced (cf. Section H, Ground 5 below) is a technical argument and, in essence, questions whether the particular tax avoidance scheme that the Claimant participated in is substantially the same as an earlier scheme that was notified to the HMRC and, for that reason, is now exempt from being notifiable. If the Claimant is correct it would prevent the Revenue from issuing APNs in respect of over 1000 individuals whom the Revenue estimate have understated tax to the extent of about £220 million. If the Claimant is right the Revenue must instead proceed by what the Claimant considers to be the normal route, namely an assessment followed by statutory appeals. For the reasons that I have set out later in this judgment. I do not accept the submission. Accordingly, the Revenue had the right to issue an APN to the Claimant in the present case.

B. The facts

(i) The Disclosure of Tax Avoidance Schemes regime – "DOTAS"

11. The central mechanism used by the Revenue to alert it to tax avoidance schemes is the "DOTAS" regime. The Disclosure of Tax Avoidance Schemes ("DOTAS") regime was introduced by Part 7 of the Finance Act 2004 entitled "Disclosure of Tax Avoidance Schemes". Pursuant to these provisions certain persons, normally the promoters of tax avoidance schemes, were required to provide HMRC with information about "arrangements" and "proposals for arrangements" (i.e. the tax avoidance schemes): where that arrangement or proposal might be expected to provide a person with a tax advantage in relation to a specified tax; where the tax advantage might be expected to be the main benefit, or one of the main benefits, of using the scheme; and, where the scheme fell within certain descriptions contained within the Regulations. There have been changes to the Regulations since 2004 and the scheme now in force was introduced in 2006.

12. In circumstances where a scheme is notifiable the promoter is required to provide specified information to HMRC. The obligation to notify normally accrues within 5 days of the marketing of the scheme or the making of the scheme available to clients for implementation. HMRC may issue a Scheme Reference Number ("SRN"). If so the promoter is required to pass the SRN on to the scheme users who, in turn, are obliged to notify HMRC of their use of the scheme. They do this normally by including the SRN upon their tax return. This enables HMRC to identify the users of a particular scheme.

(ii) The position of the Claimant

13. The Claimant was, prior to retirement, a consultant in public health. He retired in August 2013 but had previously spent 27 years working within the NHS as a doctor. In early 2008 he was introduced to a business opportunity known as "Liberty Syndicate 21" ("*the Syndicate Scheme*"). The promoter of this scheme was the Mercury Tax Group ("*the Promoter*"). The introduction was made by his accountant who was also his appointed tax agent and he completed the Claimant's self-assessment tax return. The Claimant was aware when he entered into the Syndicate Scheme that it was a tax avoidance scheme. However, he was informed that the favourable opinion of leading counsel had been obtained upon its efficacy for tax purposes. He was also aware that the basic model for the Syndicate Scheme had been notified to the Revenue at an earlier point in time. The Syndicate Scheme commenced on 1st February 2008 and ended on 20th March 2008. During this period, the scheme made a net business loss attributable to the Claimant for tax purposes of £370,688. The Claimant was notified that the scheme had been allocated the SRN: 55413422.

14. When completing his self-assessment tax return for the year ended 5th April 2008, and in accordance with guidance given by the Revenue, his accountant entered the scheme reference number on to the self-assessment tax return. After the end of the tax year the Promoter supplied the Claimant's accountants with the entries for his tax year for the year ending 5th April 2008. The self-employment pages of the return were completed and in box 75, under the heading "losses", the sum of £370,688.00 was inserted. In addition, in box 76, in relation to "loss from this tax year set-off against other income for 2007" the figure of £50,475.00 was inserted. In box 77, in relation to "loss carried back to previous year(s) and set-off against income (or capital gains)" a sum of £277,127.00 was inserted. And in box 78, in relation to "total loss to carry forward after all other set-offs", a figure of £43,086.00 was inserted. Under the heading "any other information" the Claimant set out the basis upon which he claimed £327,602.00 as being available for sideways relief.

15. As Mr David Southern QC, for Dr Walapu, candidly explained during the course of his submissions:

"If one looks at Dr Walapu's tax return it could not have been plainer that there was something funny going on".

The return showed that a repayment of £106,016.74 was due to Dr Walapu.

16. The return was submitted electronically on 5th September 2008. A "free standing credit" of £86,706.66 was entered by the Revenue on the Claimant's statement of account and the sum of £106,016.74 was repaid to him. This included a further £19,309.86 claimed as an overpayment of tax for 2007/08.

17. The circumstances giving rise to the payment are of relevance to some of the grounds advanced by the Claimant. Evidence before the Court on this was given in the form of a Witness Statement from Mr Walker, Technical Lead, Counter-Avoidance Directorate,

HMRC. He explained that the repayments came to be made:

"5. Dr Walapu's Tax Return for the year ended 5 April 2008 was filed online with HMRC on 5 September 2008.

6. The repayment of £106,016.74 was made to Dr Walapu by Payable Order on 8 September 2008.

7. A repayment is automatically issued, unless either a computer signal has been set on the taxpayer's self-assessment record to prevent the repayment or the repayment is selected for a security repayment check. This is under the "process now, check later" approach of self-assessment.

8. At the time that Dr Walapu's repayment was made, a signal had not been set on his self-assessment record to prevent the repayment arising from his participation in the Liberty Avoidance scheme.

9. Subsequently on 23 September 2009 a note was placed on Dr Walapu's self-assessment record: "Do not repay any losses arising from scheme 55413422, trading in financial instruments." A signal was set to prevent any repayment from that date.

10. An enquiry was opened into Dr Walapu's 2008 Tax Return under Section 9A TMA 1970 on 9 February 2009.

11. The repayment was made due to the short delay in setting the signal on Dr Walapu's self-assessment account to prevent a repayment being issued. The signal was set just a little under 3 weeks after the Tax Return had been filed online.

12. The letter opening the enquiry on 9 February 2009 clearly set out that HMRC was enquiring into Dr Walapu's return. This was reiterated in the subsequent letters issued to Dr Walapu dated 2 September 2011 and 19 November 2012".

18. Work conducted by HMRC has revealed that payments were made in a number of cases additional to that of Dr Walapu. Payments were issued in ten cases (including that of Dr Walapu) with the sum of these repayments totalling £529,309.64 which includes the payment of £106,016.74 to Dr Walapu. All but two of the other nine repayments in Liberty Syndicate 21 were made automatically within a few days of the receipt of the individual's tax return before a signal had been set to prevent repayment. The total number of payments represents 9.43 % of all Liberty Syndicate 21 users and the actual amount paid represents 3.5 % of the tax at stake in relation to this syndicate.

(iii) HMRC raises an inquiry in relation to Dr Walapu's tax return

19. On 9th February 2009 the Revenue wrote to Dr Walapu informing him that an enquiry was to be conducted into his tax return. The letter stated:

"My enquiry is into your claim to loss relief of £370,688.00 arising from your trading in financial instruments. This is a tax avoidance scheme (disclosure reference: 55413422) and will be considered by a joint team of inspectors…

As you are a participant in a disclosed tax avoidance scheme I intend to exercise my discretion not to give effect to your claim by repayment until this enquiry is complete".

20. The letter stated that Dr Walapu had a right to appeal against the part of the Notice requiring the disclosure of documents within 30 days of receipt and the appeal was required to be in writing and to state the Grounds of any such appeal. It was explained that his appeal would be referred to the independent Appeal Commissioners who would decide whether the requirements set out in the Notice were reasonable. Further details were set out as to the process of appeal. He was, in addition, given an address within the Special Civil Investigations Unit, Leeds, for correspondence. He was given the name of a specific individual with whom to correspond.

21. On 2nd September 2011 the Revenue wrote to the Claimant to update him on the investigation. It confirmed that the Revenue did not accept that the scheme was effective. It explained that a small sample of participants had been selected for in-depth investigation under the terms of a Representative Sample Arrangement ("RSA") (see below). The letter then stated:

"On 2 June 2011 a formal notice was issued to an entity which participated in an earlier variant of Liberty, signalling the completion of HMRC's enquiries into that earlier variant. On 27 June 2011 Mercury lodged formal appeal against the said notice. I am hoping therefore that we shall know soon when the appeal against this earlier variant of the Liberty scheme will be heard by First Tier Tribunal. The majority of HMRC's challenges to that earlier variant are likely to have equal application to your participation in a Liberty syndicate. Thus, whereas it will be necessary to prepare for litigation of the sample members participation in the Liberty syndicates, inevitably future conduct of the litigation may well be influenced by the Tribunal's findings in relation to that earlier variant.

Additional liabilities which may arise when the appeal becomes final

You will be conscious of the fact that should HMRC be successful in the litigation then, to the extent that you have had the benefit of any of the disputed tax relief, either by repayment or set-off, there will be interest bearing charges which will be recoverable from you with interest running potentially from the original dates for the relevant tax year. Moreover the tax becoming due will be liable to surcharges if it is not paid within the prescribed statutory period.

I am reminding you of this fact in case you wish to take steps now to mitigate any exposure you may have to these prospective charges and would suggest that you consult your professional adviser on this if you need any further advice on the matter".

22. The Claimant was informed that should he have queries regarding the investigation he should contact HMRC and was given a contact name and number.

23. On 19th November 2012 HMRC provided a further update. The letter recalled that the Claimant had signed a RSA with HMRC, through the Promoter, when he first participated in the Syndicate Scheme. A copy of the original RSA was provided to the Claimant for information. The letter, in addition, sought confirmation that the Claimant wished to continue to accept the terms of the RSA given that HMRC was preparing for possible litigation in relation to the Syndicate scheme. The letter stated as follows:

"As part of the preparation for possible litigation of the Syndicate scheme, I wish to seek your confirmation that you will continue to accept the terms of the Representative Sampling Arrangement you previously signed up to. In other words, I wish to have your signed agreement that you accept that the findings of law in the sample litigation of individual users will apply equally in settling the enquiry into your own participation in the Syndicate scheme. For HMRC's part, we are satisfied that your participation in the scheme is the same, in all material aspects, to all other individual participants in the Syndicate scheme. By giving and maintaining your written agreement to abide by the decision on any sample litigation for individual participants in the Syndicate scheme you will, at the same time, obtain HMRC's agreement not to separately litigate your involvement in the Liberty Syndicate scheme. You would, therefore, be required to do nothing other than await the outcome of any sample litigation on the Syndicate scheme. You must not, however, dispose of any documents relating to your participation in the Syndicate scheme until the enquiry or enquiries into your use of the Liberty Syndicate scheme have been settled.

Please note that if you indicate that you do not wish to be bound by any sample litigation on the Syndicate scheme, either by expressly saying so on the form or by failing to respond by the stated date, then I shall have to approach you and third parties to produce documents and provide information in relation to the Syndicate scheme, with a view to bringing separate litigation regarding your participation in the Liberty Syndicate scheme.

I attach a form to enable you to provide your answer. Please ensure that this is returned to me by 19 December 2012. Clearly, I hope that you will respond by indicating your intention to be bound by the sample litigation, so that the material costs that would be involved for both sides in repeat litigation can be avoided".

24. Once again, HMRC provided the Claimant with a contact name and number should he wish to discuss the matter further. Finally, he was warned that should HMRC prevail in litigation then to the extent that the Claimant had enjoyed the benefit of the disputed tax relief either by repayment or set-off, there would be interest bearing charges which could be recoverable from him with interest running, potentially, from the original dates of the relevant tax year. Further, that the tax becoming due would be liable to surcharges if it was not paid within the prescribed statutory period.

25. On 27th November 2012 the Claimant re-signed the RSA confirming his desire to remain bound by the original RSA. In so doing he accepted that legal findings in relation to the sample of individual cases chosen under the RSA in respect of this type of scheme would apply equally to his own participation in the Syndicate Scheme.

(iv) The issuance by HMRC of an APN to Dr Walapu

26. Dr Walapu received a warning letter on 15th January 2015 from the Revenue. The letter stated as follows:

"We are writing to tell you that you will soon need to make a payment of the amount that relates to your use of the tax avoidance scheme shown in this letter.

Tax legislation that affects users of tax avoidance schemes was introduced on 17 July 2014.

The legislation means that those who have used the tax avoidance scheme may have to pay the amount that relates to their use of the scheme **before** the final amount has been agreed, or determined by a tribunal or court. Such payments are known as "accelerated payments"".

27. It was explained to the Claimant that he would, within the next 1-4 weeks receive an APN setting out the amount which the Revenue believed related to his use of the tax avoidance scheme. It was stated that the APN would explain to the Claimant how the Revenue had worked out the amount in question. The letter then stated:

"Once you receive the Notice, you will be legally required to pay the amount shown in it within 90 days of the date that you receive it. That date may change if you make representations objecting to the Notice".

28. The letter went on to explain the possibility for the Claimant to settle his tax affairs without the enquiry proceeding. It emphasised that whether he settled or not was entirely a matter for him but that if he did not wish to settle "*...the current compliance check will remain open*". It was explained that there was no right of appeal against the APN but that if he disagreed with the notice he could make representations to the Revenue objecting. He was directed to an information brochure which explained how to make representations. In relation to formal rights of appeal the letter stated as follows:

"About your appeal rights for the current compliance check

The legislation introduced on 17 July 2014 does not affect your appeal rights to the tribunals and courts in

relation to your tax liability. This means that, when you pay the amount due on the accelerated payment Notice, you will still have your full appeal rights if you do not agree with the outcome of the current compliance check.

If you pay the amount shown on the accelerated payment Notice and a tribunal or court later decides that this scheme does produce the intended tax advantage, we would normally repay the amount that you have paid in respect of the Notice; with any interest due…".

29. The letter explained that if the Claimant had any problems paying then he should contact the Revenue immediately. Further, if there was anything about his health or personal circumstances which made it difficult for him to deal with the matter, he was, again, urged to let the Revenue know.

30. On 30th January 2015 an APN was issued to the Claimant showing the amount due of £106,842.02. Accompanying the APN were tax calculations for the 4 years ended 5th April 2008 which purported to calculate the tax advantage for each year.

31. In a Witness Statement served by Dr Walapu he has explained that due to altered personal and financial circumstances he is not in a position to pay the amount demanded in the APN together with the interest associated with it.

(v) The loss schemes

32. I turn now to the details of the loss schemes in issue in these proceedings. At issue in the present proceedings are two DOTAS notifications. The first was notified by Mercury Tax Strategies Limited (i.e. the Promoter) and I refer to it hereafter as the "Partnership Scheme". It was confirmed that the scheme amounted to a "Loss scheme" within the meaning of Regulation 12 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006. Regulation 12(b) defines a loss scheme as, *inter alia*, one whereby:

"(b) The arrangements are such that an informed observer (having studied them) could reasonably conclude –

i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and

ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax".

33. Under the heading "Summary" in the notification the Promoter described the arrangement in the following terms:

"An individual joins a partnership as a limited partner. The partnership acquires rights to dividends payable to a company registered in the BVI. The dividends are distributions declared by a subsidiary of the BVI Company. The subsidiary is registered in Cayman".

34. Under the heading "Explanation", the following is stated:

"The acquisition of the dividend rights by the partnership is part of its normal trading activity and this is carried out in the UK. s730(1) ICTA 1988 says that the rights to the dividends remain the income of the BVI Company, as the shareholder, for all the purposes of taxation and therefore whilst the distribution received by the partnership is income as part of its trade it is not income of the partnership for the purposes of taxation as it is held by s730 to be income of the BVI Company and it cannot be income of any one else at the same time. As such whilst the partnership makes a profit on the dividend trades the profit for tax purposes must exclude the dividend income and so there is a loss for tax purposes. (This is because the cost of acquiring the dividend rights is part of the normal trading experience and so taken into account in the tax computation but the income is excluded)".

35. It is further explained that the individuals who participate in the scheme, as partners of the partnership, are allocated a proportion of any overall trading profit and any tax loss in ratio to their capital invested in the partnership and, pursuant to Sections 380 or 381 ICTA 1988, the individual is able to claim loss as appropriate.

36. On 20th March 2007 the Promoter notified the second tax avoidance scheme with the title "Liberty 2 (Syndicate)" – i.e. the Syndicate Scheme. Under the summary and explanation the Promoter gave, in more or less identical terms, a description matching that of the earlier Partnership Scheme.

37. It was in a version of the later Syndicate scheme that Dr Walapu participated. The actual Syndicate Scheme trade in which the Claimant was involved commenced on 1st February 2008 and ceased on 20th March 2008.

(vi) Decision of the Special Commissioners in relation to the Partnership Scheme (2009)

38. HMRC laid an Information against the Promoter of the Partnership Scheme upon the basis that as the promoter of a tax avoidance scheme it had failed properly to notify the same pursuant to Section 308 Finance Act 2004 and the Tax Avoidance Schemes (Information) Regulations 2004. HMRC sought the imposition of a financial penalty. In *The Commissioners for Her Majesty's Revenue and Customs v Mercury Tax Group Limited* (SPC00737, 17th February 2009) (the *"Mercury case*") the Special Commissioner held, however, that the Partnership Scheme was not notifiable pursuant to the legislation as it was then in force. The Commissioner described the Partnership Scheme in terms which are materially similar to those

described in both of the notification forms themselves to which I have made reference above. He stated:

"2. The scheme in outline consists of high income individuals forming a Jersey Limited partnership (Liberty 1) for carrying on a financial trade and contributing capital equal to the tax loss they wish to create. An offshore parent company (SPV 1) has a subsidiary (SPV 2). SPV 2 declares a large dividend out of its share premium account. SPV 1 sells the right to the dividend to Liberty 1 for an amount equal to the dividend, which is paid for by the partner's contributions, following which Liberty 1 receives the dividend. The scheme is said to work (it is no part of these proceedings to decide whether it does work) because s730 of the Taxes Act 1988 provides that the seller of the right to the dividend (SPV 1) is taxable on it and not the recipient (Liberty 1), while the cost of purchasing the dividend is deductible on general principles as being an expenditure incurred in the course of the financial trade of Liberty 1. The issue in these proceedings is whether the scheme is notifiable within the Regulations (which have been superseded by 2006 Regulations)".

39. It is not necessary to delve further into the decision of the Commissioner. As observed, he concluded that, though the issue was not free from doubt (ibid paragraph [11]), the Partnership Scheme was not notifiable under the terms of the Regulations as they then stood (viz the 2004 Regulations). Accordingly, there could be no penalty imposed (ibid. paragraph [12]).

(vii) HMRC process for determining whether to issue an APN and the computation of the amount

40. The actual process by which HMRC arrives at a decision to issue an APN is relevant to a number of grounds advanced and in this section I set out a summary of the procedure now adopted in enquiry cases.

41. In late July 2014 (the week following the coming into force of the Finance Act 2014) HMRC put in train procedures for the processing of APNs during the inquiry stage. According to documents before the Court HMRC was, at that point in time, contemplating issuing approximately 50,000 APNs. HMRC proposed to phase the issuance of the notices over a 20 month period. By October 2014 HMRC proposed to issue approximately 2,500 per month. An internal document identified the logistical problems facing HMRC:

"Even with this phasing, there are considerable numbers to issue; decisions around which notices to issue [which] will need careful consideration and the computations for calculating the amount to be entered on each notice can be complex. We have therefore been putting in place strong governance around the processes for issuing notices so that we can assure proportionate use of these new powers.

We will also be looking closely at the outcomes of issuing notices – in some cases there will be JR challenges, and in others the issue of a notice will prompt requests for closure notices. So that neither we, nor the Tribunals, are swamped with particular types of outcomes, we will be using the Governance Controls to regulate what types of notices are issued at what stage".

42. Decisions, of a governance nature, surrounding the issuance of APN, and their timing and the principles to be applied in determining the calculation of amounts to be used in relation to each scheme, were to be overseen by a Workflow Governance Group comprising senior civil servants from HMRC. In relation to the computation of the sum to be included in the APN the procedure to be followed was described in the following way:

"This will be signed off by the technical lead for…each scheme – always at G6 level. Second, under the relevant legislation, there was one task which needs to be carried out by a "designated officer" – determining the exact amount to be entered on each accelerated payment notice. This needs to be done in relation to all the estimated 50,000 notices. The computations themselves will be done by a team working to the designated officer, and the officer will be responsible for agreeing these amounts.

In reality, the designated officer role will be limited to agreeing the precise amount to be entered on to the notice in each case, taking into account the individual circumstances of each case (for example, the marginal tax rate), but based on principles agreed by the senior Governance Group and detailed instructions in respect of the particular scheme set down by the G6 officer in charge of technical issues for that scheme".

The schedule of users of the Syndicates Scheme submitted to the Workflow Governance Board totalled 1,100 users with only two cases being appeal cases and all the rest enquiry cases. The enquiry cases therefore represented 99.81% of the total Syndicate Scheme users.

43. The role of "Designated Officer" is mandated by the Finance Act 2014 (under Section 220(3)). Within HMRC two Commissioners were appointed to approve the role of the Designated Officer.

44. In order to process notifications upon an efficient basis HMRC produced guidance notes covering the prioritisation of the issuance of APNs. The prioritisation process required the relevant official to complete a computerised "survey" under 19 different headings. It is evident from the documentation before the Court that the officials were required to address themselves to, *inter alia*: whether the nature of the tax advantage was "*well understood*"; the number of persons who were covered by particular notified schemes; the number of such enquiries which were closed; whether full documentation in relation to the scheme had been obtained; whether legal and technical advice on the scheme had been obtained; whether the scheme was a DOTAS scheme; whether there were positive judicial

decisions upon the scheme (whether final or not); whether the scheme was "*a closely related variant*" to a scheme still being sold; whether the scheme had been fully investigated; whether there were current settlement opportunities; whether there were settlements opportunities which were now closed; and, the point in time when HMRC last had contact with the users of the scheme.

45. In relation specifically to the Syndicate Scheme documents before the Court show that the officer described the exercise of calculating the size of the liability in individual enquiries as "*straightforward*". He confirmed that full documentation had been obtained and that the scheme was a DOTAS scheme. The officer considered that the scheme was not still being sold. He confirmed that it had been fully investigated but that there were no settlement opportunities. He identified the tax outstanding as £186.81 million. At the end of the form, the official stated:

"The tax outstanding figure is an estimate based on experience; we do not hold accurate figures for this. Calculation of tax will be straightforward, but identifying whether the FSC has been given on carry-back cases will take time. Technical and legal opinions have not been obtained (tech submission is imminent), but have been obtained on a very closely-related earlier variant which is currently awaiting FTT hearing".

46. At the end of the form the officer gave an "Assessment Score" of 51 which rating was then used as part of the prioritisation process.

47. Pulling the threads together HMRC have identified a six-stage process leading up to the issuance of an APN. I summarise the stages as follows:

i) Stage 1: HMRC publishes upon its website a list of DOTAS schemes on which advanced payments might be charged. HMRC excludes from that list schemes which are accepted to be effective, and obsolete schemes with no users. The first list was published on 15th July 2014 and has been updated subsequently on 30th October 2014 and on 30th January 2015.

ii) Stage 2: The officer responsible for overseeing the investigation of a particular scheme completes the internal "survey". The survey requires answers to questions designed to enable HMRC to rank the scheme according to its suitability for the earlier issue of APNs. The details of the survey are referred to above at paragraphs [44] – [46].

iii) Stage 3: Schemes are then ranked into a preliminary order and placed into categories according to the range within which their score falls. Thereafter, schemes are prioritised within categories by reference to the answers to particular survey questions.

iv) Stage 4: Each identified scheme is then subject to a more detailed review the purpose of which is to identify any reasons why notices should not be issued to users including whether the particular circumstance of any user are such that, exceptionally, no APN should be issued. In the present case no circumstances were identified in relation to the Claimant. Copies of the Detailed Review Template ("DRT") used for this exercise were before the Court.

v) Stage 5: Following the completion of the detailed review each scheme is considered by the Workflow Governance Group. The minutes of the meetings of this Group relevant to the schemes in issue were also before the Court. The Group exercises, from the perspective of a wide range of expert disciplines, supervision of the information collection process ensuring good governance.

vi) Stage 6: The Designated Officer thereafter determines the amount of the understated tax to the best of his/her information and belief. The officer reviews a "Designated Officer Authorisation form" and computations provided by the official responsible for issuing the APN. If satisfied the official countersigns the Designated Officer Authorisation form. The relevant forms relating to the Claimant were once again before the Court. These set out the understated tax. The document has attached to it a "Calculation Summary". This provides the details of the computation. The Claimant was provided with tax calculations relating to all relevant tax years when he was issued with the APN.

C. The anti-avoidance measures contained within the Finance Act 2014: Policy considerations

48. I turn now to the policy underlying the introduction of the Finance Act 2014. As set out in the introduction to this judgment the Finance Act 2014 introduced significant changes to the existing tax avoidance regime. The reasons which lie behind the Act are relevant to a number of the Claimant's Grounds of challenge. In this section I set out the basis and rationale for the legislation.

49. The Revenue estimates that tax avoidance amounts to in excess of £3 billion per annum. The Finance Act 2014 is designed to bring forward the payment of tax in dispute by those engaged in avoidance schemes. The avowed objective is to alter, fundamentally, the economics of tax avoidance so that disputed tax sits with the Exchequer rather than the taxpayer pending formal assessment or settlement. Put bluntly, it seeks to strip from the putative taxpayer the liquidity benefit of entering into tax avoidance schemes.

50. The rationale behind the introduction of new statutory measures was explained in the Witness Statement of Ms Julie Elsey, Deputy Director (Policy and Technical) of Counter Avoidance Directorate, which is part of Enforcement and Compliance within the Revenue. She is the senior responsible officer for the implementation of the Accelerated Payment regime which is under challenge in this litigation. In

her Witness Statement she encapsulated the issue in the following way:

"7. There is a particular problem in relation to marketed tax avoidance schemes. In short, promoters devise schemes which are often complex and contrived and attempt to exploit certain features of the tax system. The high level of complexity means that the schemes are difficult to analyse and challenge. Although at the end of the day HMRC succeeds in around 80% of cases in which the taxpayer chooses to press the point to litigation (many taxpayers settle before litigation), success often follows several years of enquiry, investigation and litigation during which time the majority of the taxpayers involved have been able to enjoy the use of the tax that they were seeking to avoid. The total value of the tax under dispute by HMRC related to marketed avoidance cases is estimated to be around £14 billion. There is no established principle that the tax should sit with the taxpayer during the course of a dispute – as set out above, for taxpayers subject to PAYE tax, the process would be for them to make a repayment claim, which HMRC would not pay in cases of suspected avoidance. In relation to VAT, before a taxpayer could take a case to Tribunal to settle the merits of a claim to VAT avoidance, the tax due would need to be paid up front. The Government therefore decided to introduce legislation which would, if passed, remove the cash flow benefit created by the processes I have described above".

51. It became apparent that the DOTAS regime introduced by the Finance Act 2004 could be improved. In the course of 2012 and 2013 the Government consulted on a series of proposals to improve and strengthen the regime. In particular, it focused upon two tax avoidance issues. The first concerned "high-risk promoters"; and the second was focused upon taxpayers who had used avoidance schemes which had been defeated in litigation brought by third parties (so-called "Follower" cases). In relation to Follower cases the view of the Government was that the taxpayer should amend their returns accordingly to reflect the litigated result. They proposed to impose a tax geared penalty upon taxpayers who could not demonstrate that there was a reasonable explanation for not making an amendment.

52. In the 2013 Autumn Statement (December 2013) the Chancellor announced that he would impose "pay now" notices to "Follower" taxpayers whose schemes had already been defeated but that he would, in addition, consult upon the scope for widening the criteria for "pay now" notices.

53. On 24th January 2014 HMRC issued a consultation document entitled "Tackling Marketed Tax Avoidance". In the foreword the following was stated:

"Around 65,000 people and businesses have used marketed tax avoidance schemes that need to be investigated and litigated. But when an avoidance scheme is challenged in court, the tax system currently allows taxpayers to hold on to the disputed tax, no matter how tenuous their scheme and how unlikely they are to succeed. The taxpayers and scheme promoters are incentivised to sit back and delay as long as possible – despite evidence that in the vast majority of cases, when the dispute is resolved, tax is due.

Our proposals to tackle "High Risk Promoters" were one step in addressing these behaviours. At Autumn Statement 2013 the Chancellor announced another: new measures to require taxpayers to pay the tax they owe if they have used the same avoidance scheme (or similar scheme) as one which a court or tribunal has already ruled against. If they continue the dispute in the face of the evidence they risk a penalty.

This is a start, but there is more to do. This consultation puts forward possible ways to extend the accelerated payment proposals. The measures we propose would change the economics of engaging in tactical tax avoidance promoted by some advisors".

54. The consultation paper explained, explicitly, that HMRC intended to fundamentally change the economics of tax avoidance. The approach was to be aggressive and pragmatic. HMRC explained that it had a successful track record of challenging and counteracting marketed avoidance and that over 80% of avoidance cases heard in the courts and tribunals had been won by HMRC in the last financial year. In addition:

"...piloting of behavioural change work has resulted in hundreds of users approaching HMRC to withdraw from avoidance arrangements, some as early as the start of HMRC's investigation".

The more aggressive stance adopted by HMRC had led to ever more tenuous schemes being advanced which stood, in HMRC's view, little chance or prospect of achieving their aim of avoiding tax. However, the tax system currently permitted taxpayers to hold on to the disputed tax until the matter was resolved "*...creating little incentive for the taxpayer or promoter in question to progress or resolve the dispute*". As of January 2014 HMRC was currently investigating approximately 65,000 individuals and small businesses that had used marketed avoidance schemes. An important consideration was the long tail of legacy cases which remained unresolved. Approximately 85% of the avoidance occurred more than 4 years earlier reflecting the vibrancy of the market for avoidance products that had been active in earlier years and the ability of promoters to use delaying tactics to keep schemes alive. The 65,000 taxpayers had deployed a wide range of avoidance schemes to reduce their liability to SDLT, Capital Gains Tax, Corporation Tax, Income Tax and National Insurance Contributions. The largest areas of legacy avoidance included partnership losses whereby individuals borrowed money to invest in a partnership and claimed tax loss upon the whole investment.

55. On 27th March 2014 the Government published its Summary of Responses to the Consultation. The document explained the rationale for accelerated payments in the following way:

"At its heart is the proposition that there is no presumption that the taxpayer should hold disputed tax while an avoidance dispute is being resolved, particularly in the light of increasing evidence that those disputes will be resolved against the taxpayers involved".

56. In his budget speech on 19th March 2014 the Chancellor announced that those who had carried out or implemented disclosed tax avoidance schemes would be required to pay their taxes up front and that this would also apply to schemes covered by the GAAR.

57. The Office for Budget Responsibility set out in the Budget Report (Treasury Red Book) the final impact of these changes. The extension of the accelerated payment regime to DOTAS regimes and the GAAR was calculated to result in an expected yield of £340[1] million in 2014-15; £1.23 billion in 2015-16; and £1.3 billion in 2016-17.

58. The Finance Act 2014 which introduced the APN system received Royal Assent upon 17th July 2014.

D. Ground 1: Natural Justice - Failure to accord a proper right to representation

(i) The issue: Claimant's submissions

59. The first ground advanced is that the rules in Chapter 3 Finance Act 2014 fail to confer a lawful right of representation. Mr Southern QC submitted that in the present case to be full and lawful the right had to exist prior to the APN being issued. Since the APN was issued before any right of representation was granted then the APN was unlawful. The Finance Act 2014 took away important civil rights and the denial of a right to be heard was offensive to the rule of law and to natural justice, especially where, as here, draconian power was now vested in an executive agency and the absence of a right of representation was coupled with no right of appeal. This new regime has excited comment. As Ms Shabana Mahmood MP (Lab) observed:

"Our legal system has well established principles of natural justice and procedural fairness, which retrospection would, in its nature, offend.

One of our biggest concerns about the balance of power relates to the removal of a right of appeal".

60. Michael Conmarty MP observed on 1st July 2014:

"Under this legislation, once the decision has been made, there is no appeal … The system will not be fair, but completely and utterly repressive – designed to give all power to HMRC and the Government but none to the private individual".

61. In enquiry cases, given that HMRC has not committed itself to any definite course of action before issuing the payment notice fairness required and compelled that the person concerned should have an opportunity of making representations before its issuance and before HMRC pre-emptively required the sum to be paid on account of tax. The principle governing the right to make representations was not in dispute:

"The decided cases on this subject establish the principle that the courts will readily imply terms where necessary to ensure fairness of procedure for the protection of parties who may suffer a detriment in consequence of administrative action".

(R v Secretary of State for the Environment, ex p. Hammersmith and Fulham LBC [1991] AC 521 at paragraphs [598D-G])

(ii) The law

62. There is no real dispute about the legal principles to be applied. Where an administrative action is prone to cause material disadvantage to a person then *prima facie* that person should be given notice that the adverse decision is to be taken, and, a chance to make representations: See e.g. *R v Secretary of State for the Environment ex parte Hammersmith and Fulham LBC* [1991] AC 521 at page [598D-G]. Unless an Act expressly or by implication excludes the right of representation it will, usually, be implied into the Act. However, the ultimate litmus test is fairness and what is fair is fact and context specific.

63. In *Bank Mellat v HM Treasury* [2014] AC 700 Lord Sumption summarised the basic and familiar "*Doody*" ground rules:

"29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In Cooper v Board of Works for the Wandsworth District (1863) 14 CB (NS) 180 143 ER 414, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application an founded upon the plainest principles of justice.

30. In R v Secretary of State for the Home Department Ex p Doody [1994] 1 AC 531, 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case-law as follows:

My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament

confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made".

64. In *Bank Mellat* the factual circumstances which led the Supreme Court to strike down the administrative act in question (the imposition of sanctions upon a bank said to be providing financial services to interests in Iran connected with nuclear proliferation) were: (i) the number of people affected and the highly specific targeting of the measure in question; (ii) the extent of the harm imposed by the administrative act in question; (iii) the degree of notice given before the measure became effective; (iv) the extent to which the giving of notice would have created practical difficulties; and (v), the extent to which notice and a right to make representations might or would have improved the quality of the administrative decision being made. The facts were extreme as can be seen from the analysis of those facts by Lord Sumption in paragraph [32]:

"In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found".

65. In the present case the Claimant relies further on *R (Khatun) v Newham LBC* [2005] QB 37 at paragraph [30] – [31] for the proposition that where the administrative decision in question takes something away from a citizen (such as his money) as opposed to where the citizen is applying for something (such as a future licence), then the presumption that notice of the decision to be taken and a right of representation be granted before the decision is a very strong and, it was submitted, compelling one. However, *Khatun* did not create any sort of hard and fast rule. It merely highlighted, as Laws LJ made clear (ibid paragraph [31]), what might in any event be thought of as common sense, namely that as a matter of fact the case for implying a right of representation will generally be stronger in a case of deprivation than of grant. But the test remains one of elementary fairness which is fact and context sensitive. And indeed the principle could

work the other way around, again as was recognised by the Court of Appeal: "*There may be cases where refusal of the application (for example, the refusal of a passport) will carry adverse implications for other rights or interests which the applicant may expect to enjoy*" (ibid).

(iii) Analysis and conclusion

66. I do not accept the Claimant's submission. In my judgment in context the provisions in the Finance Act 2014 are perfectly fair and adequate. There is no need for the Court even to consider the need for supplementation through the implication of additional duties.

67. First, the Finance Act 2014 creates a statutory right of consultation. This does *not* take effect prior to the APN being issued but it *does* afford the addressee a right of representation *prior* to the APN becoming effective. The procedure is set out in section 222 Finance Act 2014. This provides:

"222 Representations about a notice

This section has no associated Explanatory Notes

(1) This section applies where an accelerated payment notice has been given under section 219 (and not withdrawn).

(2) P has 90 days beginning with the day that notice is given to send written representations to HMRC—

(a) objecting to the notice on the grounds that Condition A, B or C in section 219 was not met, or

(b) objecting to the amount specified in the notice under section 220(2)(b) or section 221(2)(b).

(3) HMRC must consider any representations made in accordance with subsection (2).

(4) Having considered the representations, HMRC must—

(a) if representations were made under subsection (2)(a), determine whether—

(i) to confirm the accelerated payment notice (with or without amendment), or

(ii) to withdraw the accelerated payment notice, and

(b) if representations were made under subsection (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount ought to have been specified under section 220(2)(b) or section 221(2)(b), and then—

(i) confirm the amount specified in the notice, or

(ii) amend the notice to specify a different amount,

and notify P accordingly".

68. According to this scheme the addressee can make representation about all of the matters which go to the computation of the tax and this therefore includes the applicability of Conditions A, B or C and all matters going to quantum. The Revenue has a duty to consider such matters. And then the Revenue is under a duty to determine whether to confirm the APN or amend it or withdraw it.

69. Second, issuance of an APN is not a bolt from the blue (as it was in *Bank Mellat*). In cases such as the present, involving DOTAS notifications, it is, systemically, "on the cards". The subject matter of the dispute is a scheme which fits the statutory definition of tax avoidance. Scheme promoters must notify their arrangements under the DOTAS Regulations. The forms used for that notification enable promoters to describe their scheme and set out facts upon which they rely in order to persuade the Revenue that the scheme is effective and not tax avoiding. When a taxpayer submits a tax return which (as in this case) seeks to claim relief from tax already paid on the basis of a notifiable scheme that taxpayer inevitably knows and expects HMRC to become professionally interested. Indeed the taxpayer must include the SRN on the return to highlight the fact that the return may reveal tax avoidance. As I have already observed Mr Southern QC candidly accepted that on the face of the Claimant's tax return itself there was "*something funny going on*" (see paragraph [15] above). In these circumstances there is no question of administrative action coming out of the blue.

70. Third, the fact that the APN is issued without a right of representation is not in itself significant, given that it does not become effective until after representations have been made and considered. Indeed, there is practical merit in the right of representation post-dating issuance. I find it difficult to see how the addressee could make realistic representations without first having had sight of the notice and the calculations which accompany it which explain the HMRC calculation and workings. Given that this information is necessary to enable the addressee to know how it should make representation on Conditions A, B or C and/or especially as to computation, the issuance of an APN with the accompanying information is an important first step in the ability to make effective representations. There is an analogy to be drawn here with Government consultations where in law a distinction is drawn between predisposition (which is perfectly valid) and predetermination (which is not). The former is valid because for the decision maker to set out in the consultation paper its provisional view (the predisposition) and the information and evidence it is relying upon for this provisional view gives consultees a target to aim at and this has been held to improve the quality of the consultative exercise and process.

71. Fourth, there is no reason to extend the statutory representation process by implying into it further common law duties. There are before the Court some striking internal HMRC documents which evidence the aggressive nature of scheme promoters who pro-actively seek to delay and deter the Revenue

from taking decisions and this was also evident from the pre-legislative consultation exercise. The statutory procedure provides a 90 day period for representations and it has not been suggested that this is too short. In my judgment it is a fair period. It strikes a balance between making the right of representation a genuine one and preventing addressees from engaging in undue delay tactics.

72. Fifth, Mr Southern QC submitted that the scope of the right of representation was in fact overly narrow. This was a highly abstract argument and not one backed up with evidence. When asked for illustrations of this fairness deficit he gave by way of example the following matters that a person might wish to make representation about: personal circumstances; time to pay; abuse arguments for instance complaining that HMRC was seeking to avoid issuing an assessment, etc. There is in my view nothing in this point. The evidence is that HMRC are ready to listen to "personal circumstances" concerns and will, in a proper case, consider alternative payment arrangements. This already happens quite independently of the statutory representation process. Mr Akash Nawbatt, for the Revenue, drew my attention to the explanation given by the Revenue in *Rowe* and recorded in the judgment by Mrs Justice Simler at paragraph [65] which he submitted applied equally to APNs issued during the course of an enquiry:

"65. Moreover the scope of representations (extending to the statutory basis for the PPN and the amount, as identified in Schedule 32 paragraph 5) is adequate to ensure that fairness is preserved. This allows representations to be made challenging the rationality of the designated officer's determination, based on his information and belief, both as to the efficacy of the tax avoidance arrangements and as to the amount. For example, as Mr Eadie QC submitted, if there was clear judicial authority (at whatever level) that a particular tax scheme was legally effective to produce the tax advantage asserted, that would be a basis for challenging the rationality of the officer's determination in relation to a PPN involving the identical tax scheme. However, it does not allow representations on the wider basis contended for by the claimants, in effect challenging the merits of the decision by reference to the efficacy of the tax avoidance scheme itself. The merits of the underlying tax dispute is a matter to be dealt with in the statutory appeal. I agree with Mr Eadie that affording such a right would be inconsistent both with the purpose of the preserved statutory appeal rights, and the limited nature of the representations allowed under FA 2014. It is no part of the statutory scheme that before giving a PPN, there must be some final determination of the merits of the underlying tax avoidance scheme itself".

73. In this paragraph Simler J is recording her acceptance of the argument that the right to make representation would include any arguments that touch upon the statutory ground but which may also be couched in recognisable public law grounds such as irrationality. The example she gives is irrational behaviour going to "*efficacy*" (i.e. of the tax scheme) and to computation. She does however carefully differentiate such arguments from those going to the ultimate merits. An APN is, by its nature, a provisional decision which may be rescinded (and the moneys obtained repaid with interest) if the final decision favours the taxpayer. As the Judge inferred, to permit the representation process to become in effect the test bed for the final result would run counter to the objective of the Finance Act 2014 and to the retained appeal structure which follows on from the assessment.

74. In any event (and I deal more fully with this point at Section F Ground 3 below), the remedy of judicial review exists if the representation process is in actual fact inadequate and does not enable a genuinely aggrieved addressee of an APN to make representations about some justiciable public law error on the part of HMRC.

75. Sixth, there are additional facts and matters which support the above conclusion. The facts of this case show quite clearly that from the outset HMRC formally communicated to the Claimant its determination to object to the Syndicate Schemes: See paragraphs [19] – [29] above. When the Finance Act 2014 came into force in July 2014 it must surely have been only a matter of time before APNs were issued and the Syndicate schemes were exactly the sort of arrangement that was in the Treasury's aim. It can also be seen from the correspondence that HMRC did not operate behind a closed door and was perfectly willing to accept comments and representations from the Claimant. In each letter the Claimant was told how to make contact with relevant officials. I was also informed by Mr Southern QC that the Syndicate Scheme Promoter had in actual fact made representations to the HMRC upon issuance of the relevant notices and no argument was advanced to me that the exercise of this right was ineffective or inadequate. Plainly the HMRC did not accept the validity of whatever was submitted by the Promoter; but that is a different point going to the *merits* of the substantive decision and it does not go to the question of the *ability* to make effective representations.

76. Similar arguments were advanced to the High Court in *Rowe* in relation to post-assessment APNs issued in relation to Partnership Schemes which are governed by Finance Act 2014 Schedule 32. But the underlying principles are the same. Simler J also rejected the argument. Having described the relevant statutory regime (cf. ibid. paragraph [58]) she made the following points which apply, *mutatis mutandis*, to the pre-assessment enquiry stage APNs. First, the accelerated payment does not involve any determination of final liability, but rather, addresses where the tax should be held pending resolution of the

dispute. Parliament has specifically addressed procedural fairness, and prescribed a procedure whereby there is a right to make representations before any payment obligation arose (ibid. paragraph [61]). Second, the notices do not deprive the claimants of their statutory right to challenge the underlying tax liabilities by way of appeal to the First Tier Tribunal ("FTT") and do no more than temporarily deprive the claimants of the benefit of keeping the money pending resolution of the underlying appeal (ibid. paragraph [62]). Third, the requirement to make an accelerated payment does not itself deter the exercise of appeal rights. Fourth, there is also protection available to a recipient of a notice through the availability of judicial review to challenge the lawfulness of the decision to give a PPN (ibid paragraph [68]). Finally, Parliament had enacted a statutory scheme intended to operate broadly across a wide range of tax avoidance schemes to remove the cash flow advantage pending appeal. The recognition of additional common law requirements would frustrate the purpose of the statutory scheme and cut across its practical operation.

77. For all of the above reasons this ground fails.

E. Ground 2: Violation of the Claimant's legitimate expectation/non-retroactivity

(i) The issue

78. The Claimant argues that the APN frustrates his legitimate expectations and operates in an unlawfully retrospective manner. The nature of the legitimate expectation asserted by the Claimant evolved during argument. In its final form the Claimant advanced two factual propositions as the basis for his complaints. First, that because of the delay between the furnishing of the return and the issuance of the APN during which the Revenue failed to take action, the Claimant was entitled to expect that the Revenue would not impose any payment notice until such time as it had made a formal assessment of the tax claim. The second submission was that because the Revenue made payment to him (see paragraphs [16] – [17] above) he was entitled to expect that the disputed sum would only be required to be repaid following a formal assessment.

(ii) Observations upon the factual premises: identification of real issue

79. I start with observations about these evidential submissions.

80. With regard to the suggestion that the Revenue was quiescent and that during this period the Claimant came to expect that he could enjoy the use of the money pending a formal assessment it is clear from the facts as set out above (see paragraphs [19] – [30]) that this is simply not so. At all times the Revenue made clear to the Claimant that it challenged his tax return and that it was only the complexity of unravelling the scheme and the exigencies of litigation which prevented earlier action by HMRC. There can never, on any rational or sensible basis, have been any expectation (legitimate or otherwise) on the part of the Claimant that the passage of time was relevant or significant to the question as to *when* HMRC would seek payment. The Claimant knew that the Revenue challenged his tax return and that in all likelihood it would at some point seek repayment. It is true that when he submitted his return the law *then* was that payment could be sought only after an assessment but that is a different issue relating to retroactivity (addressed at paragraph [97] below) which has nothing to do with the amount of time taken by the Revenue to process the return.

81. As to the fact that repayment of the claimed sums was made, again, this has nothing to do with the point in time at which payment to the Revenue of the disputed sum might be sought. HMRC has explained that the repayments were made automatically and, in effect, due to the APN scheme not having adequately been factored in to the automatic repayment mechanism. Following the repayment the Revenue continued to send letters and communications to the Claimant making it plain that they challenged the Syndicate Scheme. The payments were procedural; they did not, nor could reasonably have been construed as, amounting to a course of conduct that even came remotely close to any form or promise or practice that the Revenue would not in due course seek to recoup those payments under the legislation that applied. In my view the Claimant mischaracterises the nature of the repayments; they carried with them no form of promise or representation.

82. The nub of the Claimant's point must in reality boil down to a submission that the Claimant had a legitimate expectation that the Government would: (a) not change the law; and/or (b), if the Government *could* change the law it nonetheless could not do so to the prejudice of those who had entered into notifiable schemes or submitted tax returns *prior* to the law change.

(iii) The law

83. A legitimate expectation can be procedural or substantive: *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 ("*Coughlan*") at paragraphs [88]-[99]. However for a justifiable legitimate expectation of any type to arise there must exist a settled course of conduct which exhibits a sufficient degree of certitude. It must amount to *"... a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured": Bhatt Murphy v Independent Assessor* [2008] EWCA Civ 755 per Lord Justice Laws at paragraph [43]. He also observed that (paragraph [46]) that previous case law illustrated "... *the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced"*. In *Preston* [1985] AC 835 at pages 866 –

867 Lord Templeman referred to *"conduct ... equivalent to a breach of contract or breach of representations".* In *Ex p Baker* [1995] 1 AER 73 reference was made to a "*clear and unambiguous representation".* In *R (on the application of Wheeler) v Office of the Prime minister et ors* [2008] EWHC 1409 (Admin) Lord Justice Richards said:

"39.... In order to found a legitimate expectation, a representation must in general be "clear, unambiguous and unqualified" (R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1570B). As stated in R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] QB 1397, at para 72, "it is clear that it will only be in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation". The implied representation relied on here depends for its application on an essentially political judgment as to whether, in the context of a decision as to the holding of a referendum, a later treaty is substantially similar to, or materially different from, the Constitutional Treaty. Such a representation, however, lacks the precision that is needed if it is to be capable of being enforced by the courts as a matter of public law; and there is nothing exceptional about the case that could enable the claim to succeed in the absence of a clear and unequivocal representation".

84. When what is being attacked is the abrogation or a change of a policy the starting point is that once a policy is promulgated and said to be settled there needs to be a rational ground for terminating it: *Bhatt Murphy* (ibid paragraph [34]). See also *R (Solar Energy Holdings Limited et ors) v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) paragraph [72] upheld on appeal [2016] EWCA Civ 117 ("*Solar Energy*") at paragraphs [49], [50]. But there is no presumption that policy cannot change; on the contrary it plainly can do so and frequently does. So the issue becomes whether there can be identified a representation of sufficient certitude that the policy will *not* be changed *regardless* of surrounding circumstances howsoever compelling they might be.

85. And *even if* a sufficiently certain promise or representation has been made that a policy *will* continue in force there is a balance *still* to be struck between the retention of that policy and the strength of the (*ex hypothesi*) rational policy grounds which have arisen and which now are said to necessitate a reversal to or change of that prior representation or promise. The litmus test is fairness and whether the change amounts to an abuse of power. In *Bhatt Murphy* Lord Justice Laws stated (at paragraph [42]):

" ... In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations – the two kinds of legitimate expectation we are now considering – something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in Ex p Unilever at 690f, that "[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage".

86. In determining whether it is fair to change a policy the size of the affected group of persons is a relevant consideration. The smaller and more focussed the group to whom a representation or promise has been made the more likely it is that the change of policy will be unfair. The converse is that a change of policy adopted towards a larger group of persons is more likely to be fair, provided it is based on rational, sound, policy reasons: *Bhatt Murphy* (ibid) paragraph [46]:

"46. ... I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class".

87. In *Ex p Coughlan* (paragraph [71]) Lord Woolf MR stated: "*...the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of...*".

88. In *Ex p Begbie* Lord Woolf said*:* (paragraphs [1130G] –[1131B]):

"In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare Wednesbury basis, without themselves donning the garb of policy-maker, which they cannot wear... In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players... The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes".

89. In *R (Department of Education and Employment) ex parte Begbie* [2000] 1 WLR 1115 Lord Justice Peter Gibson concluded that whilst detrimental reliance was

not an essential component of a legitimate expectation it would be "*very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation*" (page [1124B]). It was said that detrimental reliance could be relevant (i) as part of the evidence establishing the existence or the extent of the expectation; and, (ii) to the decision of the authority whether to revoke the representation.

(iv) Analysis and conclusion

90. I reject the submissions that the issuance of the APN thwarts the Claimant's legitimate expectation either generally or in the light of the repayments; but even if it did I would conclude that the thwarting was in any event lawful and not an abuse of power or otherwise unfair.

91. First, there has never been any promise or representation that the policy of imposing payment notices only following assessment or in Follower cases would not be expanded. The succession of consultation exercises in this field makes very clear that the game of hide and seek played between scheme promoters and the Revenue is one of long duration and is a game the rules of which are well understood by those who devise and promote such schemes. Common sense indicates that in this particular context legislative and other policy changes *will* be put in place to counter new types of tax avoidance scheme as they evolve. As already observed the two facts asserted by the Claimant do not establish any sort of promise or representation of the type required.

92. Second, the Treasury consulted all affected persons on the proposal to empower the issuance of payment notices during inquiries and thereby change the payment regime. No one has suggested that the consultation was unfair or in any way inadequate. All procedural expectations were honoured.

93. Third, the affected group is large; said to amount to about 65,000 persons engaged in tax avoidance. Chapter 3 of the Finance Act 2014 serves a legitimate and important purpose and Treasury estimates are that the funds affected run into billions.

94. Fourth, in relation to the particular issue surrounding repayment no promise was ever made or could be deduced or inferred from the facts that an APN would not be issued to require repayment of the repaid sums. The most that can be said is that the Claimant was the temporary beneficiary of a failure on the part of HMRC efficiently to apply joined up thinking to the repayment system and the self-assessment. Further, there was no detrimental reliance. This dispute concerns liquidity only; if the Revenue is correct and the Syndicate Scheme is an unlawful tax avoidance scheme then the Claimant will have to pay the sum anyway, together with interest. And if it is not then the Revenue will have to repay the disputed sum, again together with interest. In his Witness Statement the Claimant has complained that he does not have the money required by the APN to be paid over to the Revenue. But this is nothing to the point. First, there is in any event no statement of means to support the contention and it is bare assertion. Second, there is no suggestion that the Claimant's financial difficulties are connected to the APN or would in any way be different if the HMRC were to continue to an assessment and then issue an APN to him. Thirdly, if and in so far as there are difficulties, it has always been the position of the HMRC that it is prepared to enter into appropriate payment arrangements, for example periodic payments.

95. Fifth, even if a legitimate expectation of a general or a specific nature did arise, in my judgment it is fair, and not an abuse of power, for it to be thwarted. Tax avoidance is a substantial problem and the provisions of the Finance Act are specifically designed to attack, at source, a longstanding problem which includes numerous "legacy" cases (see paragraph [54] above). On balance, the policy reasons far outweigh the relatively limited private interest in retention of the money pending formal assessment. If the Claimant's purported legitimate expectations were to trump the obligation to "pay now", then Parliament's legitimate policy would be defeated.

96. For these reasons I reject any suggestion that the Government was not allowed to change the law or apply an APN following repayment.

97. The Claimant also argued that the change was unfairly retroactive. I will deal with this briefly. HMRC submits that it is not retroactive since the basis for the imposition of tax has not changed; all that is new is the point in time at which payment must be made. In my judgment the change in the Finance Act 2014 is retroactive only in the very limited sense that there are new payment rules being applied which alter the position that taxpayers hitherto were subject to. It is doubtful whether this is properly to be categorised in law as retroactivity since it merely changed the consequences of acts and/or omissions from those which would have been expected at the time (see by way of analogy per Floyd LJ in *Solar Energy* (ibid.) at paragraph [71]). But even if it is retrospective it operates at the very lowest point of severity. In the context of tax avoidance it is a change justified by a legitimate policy and it is fair and reasonable in all the circumstances (see *Solar Energy* at paragraphs [91] – [98] in the High Court, endorsed as the test in the Court of Appeal at paragraphs [73], [74]). Indeed, as already observed, it would defeat in a substantial way the Parliamentary purpose of introducing the legislation which covered "legacy" disputes if it could not be applied to extant notified schemes. The principle is also said to be, at heart, one of statutory construction. On this basis there can be little doubt but that in the Finance Act 2014 Parliament intended the new regime to apply to extant legacy tax avoidance schemes.

98. In *Rowe* Simler J set out analogous reasons for rejecting a legitimate expectation in respect of post-assessment notices pending appeal: See ibid paragraphs [88] – [96]. In *Rowe* the Revenue had also made repayments (see ibid paragraph [92]). As to these the Judge stated:

"94. I do not accept these arguments. First there is simply no evidence of a practice that was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to the claimants of continued treatment in accordance with it. Even if HMRC made "carry back" repayment claims in circumstances where it was open to HMRC not to do so, this did not prevent HMRC from opening (either then or subsequently) actual or deemed (by virtue of s.12AC(6) TMA) s.9A TMA enquiries into those losses contained in partner returns to challenge the efficacy of the tax planning. I have already concluded that such enquiries are sufficient to challenge any claims for loss relief flowing from such losses (whether sideways or carry back). Indeed, as recognised at paragraph 14(6) of Appendix II to the claimants' skeleton argument, simply because the claimants received a set-off or a repayment of tax did not give rise to any expectation that this was conclusive. Rather as they accept they "understood that the relief claimed could be disputed if enquired into". The position in relation to the tax represented by the repayment remained open to challenge, and there is no evidence of anything said or done by HMRC to suggest otherwise".

99. For all the above reasons, I reject the submissions made on the basis of legitimate expectations or any rule or presumption against retrospection.

F. <u>Ground 3: Denial of right of access to a Court (Article 6 ECHR)</u>

(i) The issue: Claimant's submissions

100. The Claimant next argues that Chapter 3 Finance Act 2014 violates Article 6 ECHR. Article 6(1) provides (in summary) that in the determination of a person's civil rights and obligations, or any criminal charge against him, a person is entitled to a fair trial before an independent and impartial tribunal.

101. The Article 6 argument was linked in substance to the omission from the Finance Act 2014 of a right of appeal against the issuance an APN.

102. For there to be a violation of Article 6 two conditions must be met. First, the dispute in question must be capable of being categorised as "civil". Secondly, if it is, then there must be a denial of the right of access to a court or to a fair hearing.

(ii) Analysis and conclusion

103. In my judgment this ground is not sustainable. First, this is not a "civil" dispute; but secondly, even if it is, there is no substantive violation of the duty.

104. First, in my judgment no "civil" right is engaged in the dispute. This is because under Article 6 it is recognised that tax matters form part of the hard core of public authority prerogatives, with the *public* nature of the relationship between the taxpayer and the tax authority predominating. In *Ferrazzini v Italy* (Application 44759/98) [2001] ECHR 464 the European Court of Human Rights held (by a 11:6 majority):

"26. The Convention is, however, a living instrument to be interpreted in the light of present-day conditions (see, among other authorities, Johnston and Others v. Ireland, judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53), and it is incumbent on the Court to review whether, in the light of changed attitudes in society as to the legal protection that falls to be accorded to individuals in their relations with the State, the scope of Article 6 § 1 should not be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions.

27. Relations between the individual and the State have clearly evolved in many spheres during the fifty years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations. This has led the Court to find that procedures classified under national law as being part of "public law" could come within the purview of Article 6 under its "civil" head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages (see, among other authorities, Ringeisen v. Austria, judgment of 16 July 1971, Series A no. 13, p. 39, § 94; König, cited above, p. 32, §§ 94-95; Sporrong and Lönnroth v. Sweden, judgment of 23 September 1982, Series A no. 52, p. 29, § 79; Allan Jacobsson v. Sweden (no. 1), judgment of 25 October 1989, Series A no. 163, pp. 20-21, § 73; Benthem v. the Netherlands, judgment of 23 October 1985, Series A no. 97, p. 16, § 36; and Tre Traktörer AB v. Sweden, judgment of 7 July 1989, Series A no. 159, p. 19, § 43). Moreover, the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as "civil" (see, among other authorities, Feldbrugge v. the Netherlands, judgment of 29 May 1986, Series A no. 99, p. 16, § 40; Deumeland v. Germany, judgment of 29 May 1986, Series A no. 100, p. 25, § 74; Salesi v. Italy, judgment of 26 February 1993, Series A no. 257-E, pp. 59-60, § 19; and Schouten and Meldrum, cited above, p. 24, § 60).

28. However, rights and obligations existing for an individual are not necessarily civil in nature. Thus, political rights and obligations, such as the right to stand for election to the National Assembly (see Pierre-

Bloch, cited above, p. 2223, § 50), even though in those proceedings the applicant's pecuniary interests were at stake (ibid., § 51), are not civil in nature, with the consequence that Article 6 § 1 does not apply. Neither does that provision apply to disputes between administrative authorities and those of their employees who occupy posts involving participation in the exercise of powers conferred by public law (see Pellegrin, cited above, §§ 66-67). Similarly, the expulsion of aliens does not give rise to disputes (contestations) over civil rights for the purposes of Article 6 § 1 of the Convention, which accordingly does not apply (see Maaouia, cited above, §§ 37-38).

29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the "civil" sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, mutatis mutandis, Gasus Dosier- und Fördertechnik GmbH v. the Netherlands, judgment of 23 February 1995, Series A no. 306-B, pp. 48-49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer".

105. Given the close run nature of the judgment in *Ferrazzini* the domestic courts, perhaps not surprisingly, have looked with some caution at the judgment: see for instance the observations of Lord Walker in *Begum v London Borough of Tower Hamlets* [2003] UKHL 5 at paragraphs [108] – [111]. He stated that further developments in the case law could be expected in this area (ibid paragraph [112]). Nonetheless *Ferrazzini* is still treated as stating the law: see e.g. "The Law of Human Rights" Clayton & Tomlinson (2008, 2nd ed.) paragraph [11.351] page [836]; "Administrative Law", Wade & Forsyth (2014, 11th Ed,) p.380, f44. See for a recent illustration of the now routine endorsement of *Ferrazzini* by the Strasbourg Court: *AK v Liechtenstein* [2015] ECHR 655 at paragraph [46].

106. Applying this principle to the facts of the present case the dispute concerns a claim for relief against income tax *already* paid (by way of PAYE) and as such is a paradigm example of a tax dispute as to the sum that is owed by the taxpayer to the state. In this regard it is convenient to record the classic formulation of when a liability to tax arises by Lord Dunedin in *Whitney v Inland Revenue Commissioners* [1926] AC 37 at page [52] ("*Whitney*"):

"My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable; and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay".

107. This case might be said to fall within the first stage identified by Lord Dunedin in that it is accepted by the Claimant that he, in accordance with ordinary principles of income tax, is subject to tax and that the quantum thereof is governed by statute and, objectively speaking, that the computation is ascertainable by reference to the statutory criteria. As such there is an existing liability to tax. Putting the analysis in this way simply assists to explain why in the present case there is a tax dispute pre-assessment which on the basis of case law is not a "civil" dispute but a "public" dispute between citizen and state. As such Article 6 is not engaged.

108. If, contrary to the above, the present dispute is "civil" then there is nonetheless no violation of Article 6. The Claimant is not denied rights of access to a Court either at all or within a reasonable period of time. First, the remedy of judicial review is available. The issuance of an APN involves the taking of an administrative decision by HMRC. This decision is taken following a staged process of evidence collection and evaluation. There is therefore undoubtedly a "decision" in the administrative law sense which in principle is capable of being subjected to judicial review, just as it has been in the present case. Judicial review is, it is now trite to observe, context specific and it will also take account of the existence of other remedies. This might mean that judicial review will be refused until a person has exhausted other remedies, such as an appeal procedure; or it might limit the scope and intensity of review taking into account the existence of other remedies. The important point is that judicial review will provide whatever level of judicial protection is needed to ensure that an individual's Article 6 rights are protected. Secondly, and in any event, by virtue of section 28A(4) TMA 1970 the Claimant can at any time compel the HMRC to make an assessment of the tax liability thereby

triggering rights of appeal. Nothing in the Finance Act 2014 takes those existing rights away. In short, the Claimant is surrounded by rights of challenge and he has not identified any particular respect in which it can be said that any of these routes is ineffective or inadequate.

109. Next, in the present case (and consistent with the practice of the Revenue) the Claimant entered into an RSA pursuant to which he has agreed to await the outcome of HMRC's investigation into sample syndicate cases. That investigation is currently on hold awaiting the outcome of HMRC's investigation into sample syndicate cases. That investigation is currently on hold awaiting the outcome of pending litigation involving a Liberty Partnership scheme (*in casu* an appeal to the FTT which was heard in 2015 and in respect of which judgment is awaited as of the date of this judgment – see paragraphs [21] – [23] above). The advantage of this is that the Claimant does not personally have to engage in litigation with the Revenue. To this extent, on the facts, the Claimant has addressed himself to his right of access to a court and is exercising it by, as it were, proxy via the RSA.

110. In conclusion there has been no substantive violation of Article 6.

111. In *Rowe*, in relation to post-assessment payment notices Simler J took the same position: see ibid paragraphs [149] – [154].

G. Ground 4: Violation the Claimant's property rights: ECHR A1P1 / proportionality

(i) The issue: Claimant's submissions

112. The Claimant submits that the money being demanded is an asset belonging to him and that the APN deprives him of that money. Mr Southern QC submitted: "*The extension of the APN legislation to enquiry cases is a bridge too far, and to the extent that the legislation pushes out the boundaries of Payment Notices from cases where there is a tax liability to cases where there is none is incompatible with rights protected ... by ... Appendix 1 Protocol 1 of the ECHR*". He submitted that a potential or provisional tax liability is not a tax liability. It is merely a liability to hypothetical tax. For a tax liability to arise there must at least be a determinate sum claimed by the tax authority to be payable. It is also said that the APN is disproportionate.

(ii) A1P1

113. Article 1 Protocol No.1 provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

114. A1P1 contains two basic obligations. The first is a prohibition of deprivation or control of use. The second, which is implicit but not express in A1P1, is that if deprivation or control of use is allowed it may have to be accompanied by compensation. In this case only the first obligation is in issue. It is to be noted that A1P1 explicitly singles out tax as an exception. The logic is plain which is that tax is a debt owed by the citizen to the state. A1P1 does not however distinguish between an established tax liability and a disputed claim for payment which is not yet a settled tax liability.

(iii) The law

115. First, is a tax dispute an interference with a person's possessions? It is established in case law that an asset can be a possession and it is obvious that money can be a possession. However, where money is a debt owed to another person then it is not the possession of the debtor, but that of the creditor, albeit that it remains in the possession of the debtor. What is the position where there is a dispute over liability? In *Kopecký v Slovakia* (2005) 41 EHRR 43 the European Court of Human Rights held (at paragraphs [42] - [52]) that, in principle, an existing asset or a claim could amount to a possession. However, for a disputed claim to be a "*possession*" it had to be more than merely arguable. Case law does not accept that the mere existence of a "genuine dispute" or an "arguable claim" is the litmus test for determining whether there is a right protected by A1P1. More must be shown: "*where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it*": (ibid.) paragraph [52]. This has been elaborated upon in domestic law.

116. In *APVCO 19 Ltd and others v HM Treasury & Anor* [2015] EWCA Civ 648 Lord Justice Vos held that a claim that was subject to an arguable claim by the Revenue was not a "possession": See paragraph [46]:

"Of course, the money is a possession in one sense, but it is a possession impressed with an arguable claim by HMRC, which prevents it being properly regarded as a possession for A1P1 purposes".

117. In *ToTel v FTT* [2011] STC 1485 Simon J (as he then was) rejected a challenge under A1P1 to the obligation to pay VAT as a pre-condition of bringing an appeal. The decision was subsequently reversed by the Court of Appeal ([2012] EWCA Civ 1401) on different grounds (that the delegated legislation in question was *ultra vires* the enabling legislation). The Court of Appeal did not address the issue under A1P1. Simon J held (at paragraph [21]):

"Whether or not the claimant has complied with all the conditions for claiming input tax is the substantive issue

between the claimant and the Commissioners. Until that issue is resolved it is difficult to see how the claimant can have a legitimate interest which could amount to a property right".

118. In *Huitson v HMRC* [2011] EWCA Civ 893, the Court of Appeal addressed an argument that the first instance court erred in not finding that the claimant had a proprietary interest in a sufficiently established claim to tax relief recognisable under A1P1. Lord Justice Mummery explained at paragraph [68] that the issue on appeal had changed and the case advanced now addressed the alleged unlawful deprivation by retrospective legislation of the claimant's possession in the form of the alleged proprietary interest in the nature of his claim to tax relief. However, in relation to the status of disputes over tax liabilities he stated (ibid. paragraph [69]):

"The 'claim' to tax relief under the DTA is one which has neither been accepted by HMRC nor has it been made out in any tribunal or court. All that has been established is the existence of a genuine dispute about whether the scheme based on the claim for tax relief under the DTA worked".

(iv) Analysis and conclusion

119. In my judgment the argument fails, on many levels.

120. First, the present dispute is a classic "tax dispute" whereby the Revenue, after a detailed evaluative process, has concluded that there is understated tax. A dispute about tax suffices to take the sums in question out of the notion of "possessions". Here a dispute has arisen, prior to a final assessment. As set out above, in *APVCO 19 Ltd and others v HM Treasury & Anor* (ibid.) the Court of Appeal referred to "*an arguable claim*" as excluding A1P1; in *ToTel v FTT* (ibid.) Mr Justice Simon referred to the point in time when the *"issue*" (i.e. the dispute) was "*resolved*" as being the time when the asset emerged; and in *Huitson v HMRC* the Court of Appeal spoke of a "*genuine dispute*" as not giving rise to an asset protectable under A1P1. The principle, in my judgment, applies both before and after assessment. This conclusion is consistent with Lord Dunedin's classic formulation of a tax liability in *Whitney* (cf. paragraphs [106] and [107] above). HMRC has gone through a protracted and thorough procedure to calculate the understated tax and it is confident of its assessment: See paragraphs [40] – [47] above. There can, in my judgment, be no doubt but that the Revenue claim is, at the least, seriously arguable.

121. Secondly, even if the dispute does entail property of the Claimant there was no deprivation but only a requirement that *pro tem* the Claimant pay the money to the Revenue. If he wins it is returned with interest and if he loses it is rightly retained by the state. There is hence no deprivation of the property. In my judgment this is much more akin the control of use case under A1P1 (cf. A1P1 - "*...to control the use of property in accordance with the general interest*"). I was not addressed on this line of authority. I will accordingly summarise the law only very briefly. In control of use cases provided the State acts proportionately then a control of use in the general interest is not treated as violative of A1P1. In this case there is no challenge to the overall objective sought to be pursued by the Government namely the creation of an alteration in the economics of tax avoidance by removing liquidity advantages from taxpayers and promoters engaging in tax avoiding schemes; and even if there had been such a challenge I would have held in favour of the Revenue, taking into account that in cases such as this the case law accords to the decision maker a broad margin of appreciation. Accordingly the measure pursues a legitimate objective. As to the proportionality of the measure in my view it meets the four part test in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at paragraph [20]. In short my reasons are as follows:

i) The measure was introduced fairly following a consultation about which no objection was taken and it is clearly and definitively laid down in primary legislation. The objective is legitimate.

ii) It is a measure targeted precisely at the class of persons whose actions are disapproved of viz., tax avoiders. The class is large and the potential revenue advantage lost to the State through tax avoidance is substantial. The Revenue has a good track record of prevailing in litigation with tax avoiders (c. 80%). The Revenue has a discretion under the Finance Act 2014 to issue APNs and applies it through a well thought out and rigorous procedure in order to calculate the understated tax and, without suggesting that there can ever be certainty, the issuance of a APN is on the evidence before the Court likely to reflect an accurate assessment of the actual sums owed to the Revenue. As such the procedure adopted guards against any arbitrary exercise of the power. There is a full and fair right of representation provided to the addressee of the APN, effective judicial supervision exercised via judicial review; and a statutory appellate structure which is available to the taxpayer. The measure is rationally connected to the objective and contains legitimate and effective safeguards to prevent arbitrary application.

iii) It has not been suggested that there is an alternative equally effective but less intrusive mechanism which could be adopted which would secure for the State the legitimate public interest advantages that it presently seeks to obtain;

iv) The Act strikes a fair balance between the rights of the taxpayer and the State by the provision of interest payable to the taxpayer if the taxpayer ultimately prevails.

122. In *Rowe* (ibid.) Simler J also rejected this argument in relation to post-assessment notices: see paragraphs [111] – [148].

H. Ground 5: The Syndicate Scheme was not notifiable and therefore there was no power on the part of HMRC to issue the APN

(i) The issue

123. I turn now to the Claimant's final ground which is that the APN issued to the Claimant was *ultra vires*. It is submitted that the Syndicate Scheme was not notifiable under the Finance Act 2004 and/or the DOTAS Regulations 2006 and as such there was no power on the part of the HMRC to issue the APN. The gravamen of the issue turns upon whether the Syndicate Schemes are substantially the same as the Partnership Schemes. This flows from an exemption from the duty to notify in Section 308(5) Finance Act 2004. This provides:

"(5) Where a person is a promoter in relation to two or more notifiable proposals or sets of notifiable arrangements which are substantially the same (whether they relate to the same parties or different parties), he need not provide information under subsection (1) or (3) if he has already provided information under either of those subsections in relation to any of the other proposals or arrangements".

The premise underlying the Claimant's argument is that the Syndicate Schemes did not need to be notified because they are substantially similar to the Partnership Schemes which were notified under the DOTAS Regulations on 15th September 2006. The reasons why each of the Partnership and Syndicate Schemes are the same are: (i) because the mechanism giving rise to the loss is exactly the same (the purchase of the dividend which gives rise to a trading loss, and the non-taxability of the dividend under section 730 ICTA); and (ii), because the partnership aspect was not the reason for the tax advantage or the DOTAS notification and there is nothing of relevance about the partnership which is transparent for tax purposes as its members are treated as carrying on its activity and the profits or losses are deemed to arise to them.

124. Accordingly because the Partnership Scheme was notified the Syndicate Schemes did not fall to be notified and was not a "notifiable" arrangement under Section 219 Finance Act 2014 and, accordingly, no APN can be imposed.

(ii) The Statutory framework governing the duty to notify

125. I turn now to the relevant statutory provisions.

126. **Finance Act 2014**: An APN may be issued to any person if Conditions A to C are met: cf. section 219(1) Finance Act 2014. Condition A is that a tax enquiry is in progress into a return or claim made by a person in relation to a relevant tax. Condition B is that the return or claim is made on the basis that a "*particular*" tax advantage ("the asserted advantage") results from *"particular*" arrangements ("the chosen arrangements"). There is no doubt that Conditions A and B are met in the present case.

127. Condition C is satisfied if one or more specified requirements are met. One of the specified requirements is that the chosen arrangements are "*DOTAS arrangements*". Section 219(5) provides:

"(5) "DOTAS arrangements" means—

(a) ***notifiable arrangements*** *to which HMRC has allocated a reference number under section 311 of FA 2004,*

(b) ***notifiable arrangements*** *implementing a* ***notifiable proposal*** *where HMRC has allocated a reference number under that section to the proposed notifiable arrangements, or*

(c) arrangements in respect of which the promoter must provide prescribed information under section 312(2) of that Act by reason of the arrangements being substantially the same as notifiable arrangements within paragraph (a) or (b)".

(Emphasis added)

It is common ground in this case that the dispute centres on (a) and (b) (not (c)) and concerns the concepts of "*notifiable arrangements*" and "*notifiable proposal*".

128. **Finance Act 2004**: Other statutory provisions of relevance are found in Section 306-319 Finance Act 2004. Section 306(1) provides that "*notifiable arrangements*" means any arrangements which:

"(a) fall within any description prescribed by the Treasury by regulations,

(b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and

(c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage".

129. Section 306(2) provides that a ""*notifiable proposal*" means a *proposal for arrangements* which, if entered into would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it).

130. Section 308(1) is concerned with the duties on promoters in relation to "*proposals*". It requires promoters to provide HMRC with "*prescribed information*" in relation to a "*notifiable proposal"* within a defined period after the earlier of (i) the date on which the promoter first makes the notifiable proposal available for implementation by any other person; or (ii) the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal. The duty is in the following terms:

"(1) The promoter must, within the prescribed period after the relevant date, provide the Board with prescribed information relating to any notifiable proposal."

131. Section 308(3) imposes a duty on the promoter of notifiable arrangements to provide HMRC with prescribed information relating to those arrangements within a prescribed period after the date on which it first becomes aware of any transaction forming part of the notifiable arrangements unless those arrangements implement a proposal in respect of which notice has been given under subsection (1). It provides:

"(3)The promoter must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of any notifiable arrangements, provide the Board with prescribed information relating to those arrangements, unless those arrangements implement a proposal in respect of which notice has been given under subsection (1)."

132. However, Section 308(5) (set out at paragraph [125] above) provides in its effect that the promoter is not under a section 308(1) or (3) duty if it has already provided information under section 308(1) or (3) in relation to other notifiable proposals or arrangements that are "*substantially the same*" as the new otherwise notifiable proposals or sets of arrangements.

133. Section 311 provides that where a person complies (or purports to comply) with, *inter alia*, section 308(1) or (3) the Revenue "*may*" allocate a reference number (the SRN) to the notifiable arrangements or proposed notifiable arrangements.

134. Section 312 provides that where a promoter provides services to any client in connection with notifiable arrangements it must within 30 days of the relevant date provide the client with, inter alia, the SRN number that has been notified by HMRC in relation to (a) the notifiable arrangements; or (b) any arrangements substantially the same as the notifiable arrangements (whether involving the same or different parties).

135. Section 319 contains transitional provisions which exempt promoters from their section 308 duties in respect of notifiable proposals and notifiable arrangements, *inter alia*, where the notifiable proposal was first made available for implementation prior to 18th March 2004 or the notifiable arrangements include any transaction entered into before 18th March 2004. This provision is relevant to the present case in that HMRC draws a contrast between this provision and the transitional arrangements included in the 2006 DOTAS Regulations (see below). Section 319(3) provides:

"(3) Section 308 does not apply to a promoter in the case of— "

(a) any notifiable proposal as respects which the relevant date, as defined by subsection (2) of that section, fell before 18th March 2004,

(b) *any notifiable arrangements which implement such a proposal,* or

(c) any notifiable arrangements which include any transaction entered into before 18th March 2004.

(Emphasis added)

136. **Relevant DOTAS Regulations**: I turn now to the 2006 DOTAS regulations. The regulations which prescribe (under section 306(1)(a) Finance Act 2004) the descriptions of arrangements were the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2004 which came into force on 1 August 2004. These were revoked and replaced by the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 which came into force on 1 August 2006 ("the DOTAS Regulations").

137. Regulation 12 of the DOTAS Regulations prescribes "Loss Schemes". These were not prescribed by the 2004 Regulations but as from 1st August 2006. Loss Schemes were notifiable proposals and arrangements within the meaning of section 306 and, moreover, their promoters were under a statutory duty to notify them to HMRC unless they fell within the transitional provisions of the 2006 Regulations.

138. The transitional provisions are found in Regulation 1(2) and provide (so far as is relevant):

"(2) These Regulations do not have effect—

(a) for the purposes of section 308(1) of FA 2004 (duties of promoter relating to any notifiable proposal), if the relevant date falls before 1st August 2006;

(b) for the purposes of section 308(3) of FA 2004 (duties of promoter relating to any notifiable arrangements), if the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements falls before 1st August 2006".

139. The "relevant date" for the purposes of section 308(1) is the earlier of the date on which the promoter makes the notifiable proposal available for implementation by any other person or the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal.

(iii) HMRC case

140. HMRC's case is straightforward. They say that the Syndicate Schemes were properly notifiable because they meet the relevant statutory criteria. The Liberty Syndicate 21 scheme, which was the Syndicate Scheme specifically entered by the Claimant, was subject to the APN provisions of the Finance Act 2014 because: (i) it implemented a notifiable proposal within the meaning of section 306(2) Finance Act 2004; (ii) it was made first available after 1st August 2006; (iii) it is not excluded by any other statutory provision; (iv) it therefore amounted to a "DOTAS arrangement" within the meaning of section 219(5)

Finance Act 2014; and (v), it therefore fell within the scope of section 219 Finance Act 2014, and an APN could in principle be issued, because all three Conditions (A to C) were met.

141. HMRC rejects the Claimant's analysis upon the basis that nothing in the legislative regime applicable to the Partnership Schemes provides an exemption from the duty to notify applicable to the Syndicate Schemes.

(iv) Some key facts relevant to the issue

142. Certain important parts of the chronology are common ground:

i) Pre-August 2006: The Partnership Schemes are first proposed and implemented; they are not notifiable under the 2004 Finance Act / 2004 DOTAS Regulations (cf. the *Mercury* case set out at paragraphs [38] and [39] above);

ii) 1st August 2006: 2006 DOTAS Regulations become effective and prescribed Loss Schemes became notifiable;

iii) 15th September 2006: The Partnership Schemes were notified by the Promoter to HMRC under the 2006 DOTAS Regulations and were allocated the SRN 84823780;

iv) 2nd March 2007: Section 113 ITA 2007 becomes effective and renders the Partnership Schemes ineffective as a means of avoiding tax;

v) 20th March 2007: Syndicate Scheme proposals were notified to HMRC and allocated SRN 55413422;

vi) 20th March 2007 - 12th March 2008: The Liberty Syndicate Schemes 9-23 were formed. The Claimant entered into Liberty Syndicate 21 in February 2008;

vii) 12th March 2008: Section 60 and Schedule 21 of the Finance Act 2008 becomes effective[2] and render the Syndicate Loss Schemes ineffective as a means of avoiding tax.

viii) 17th February 2009: The Special Commissioner concluded that the Partnership Syndicate Schemes were not notifiable under section 308 Finance Act 2004 the 2004 DOTAS regulations

(v) Legal consequences which flow from the chronology in the light of the statutory framework: Scope and effect of section 308(5) Finance Act 2004

143. There are two key issues to resolve. The first concerns the correctness of HMRC's submission that issues of substantiality under section 308(5) Finance Act 2004 do not arise. The second concerns the analysis of substantiality upon the alternative premise that such issues do arise.

144. I start with my conclusions on the analysis of section 308(5). Section 308(1) is the provision which applies the duty on the promoter to notify in the present case because Mercury (the Promoter) was concerned with the Syndicate Schemes which were *proposals* at the time the 2006 DOTAS Regulations first applied (see paragraphs [156] – [160] below). Section 308(3) was capable of applying to the schemes which implemented the notified Syndicate Scheme but the promoter was relieved from the duty to notify the implementations because (see paragraphs [130] - [133] above) the duty does not apply where the subsequent arrangement implements a proposal in respect of which notice has been given under subsection (1). It follows that there was no duty in this case imposed by section 308(3) for the specific Syndicate Scheme entered into by the Claimant to be notified. Section 308(5) therefore does not apply because it has application *only* where there *is* a duty imposed upon a promoter by section 308(3) but it necessarily follows that if there is no duty imposed by section 308(3) then there is nothing to be relieved from by the operation of section 308(5).

145. Mr Southern QC submitted that section 308(5) was more than a relieving provision but also imposed obligations. I am unable to accept this construction. It is in my view quite clear from the statutory language that section 308(5) simply serves to disapply the duty in section 308(1) or (3) in certain limited defined circumstances. This can be seen from the structure of section 308(5). It has three components: (i) a defined scenario (cf. where the promoter is a promoter in relation to two or more notifiable arrangements or sets of arrangements etc); followed by (ii) the relieving measure which relieves the promoter in the defined scenario from the duties in section 308(1) and (3) ("*he need not provide information*"); but which relief is (iii) subject to conditions attached to the availability of the relief (only where he has already provided a notice under section 308(1) or (3)).

146. In the light of this and the chronology set out above certain consequences in law flow. The Partnership Schemes as proposed and implemented prior to 1st August 2006 did not have to be notified under the transitional arrangements in Regulation 1(2)(a) DOTAS Regulations. Further, this extended to any of the Partnership Schemes which were *already in existence* as at 1st August 2006.

147. However, the Promoter was under a duty imposed by section 308(3) to notify to HMRC the *subsequent* Partnerships Schemes that it entered. It did this on 15th September 2006. In this regard, I reject the submission of Mr Southern QC that Regulation 1(2)(b) 2006 DOTAS Regulations provides an exemption for all *future* Partnership Schemes provided they remained, as it were, within the tramlines of the previous old, non-notifiable, schemes. To construe the Regulation this way would create a gaping hole in the efficacy of the Regulations. It would mean that even though specific legislation had been promulgated to enable HMRC to learn about and challenge partnership Loss Schemes, via the back door of the transitional arrangements the old, non-notified, schemes could continue *in perpetuity* (or until new

legislation was promulgated to plug the lacuna). A promoter could continue to use the old scheme and provided it was not changed such that a new scheme came into existence it would continue to be effective. This would be so even though any new partnership Loss Scheme which was economically the same as the old scheme would have to be notified. If this were the law then no one (in their right mind and/or properly advised) would do anything other than continue with the old schemes. In my judgment the transitional arrangements make sense only if they are limited to schemes which were extant as at the date of the law change and thereby protect those individuals who had participated in such schemes at a point in time when the law did not recognise such scheme types as avoidance. Such persons are in an altogether different category relative to new members who enter into such schemes knowing that the prevailing legislation treats such schemes as objectionable tax avoidance and ineffective. Support for this conclusion can be found in section 319 Finance Act 2004 (see above at paragraphs [137]). In the 2004 Act the legislature provided an express transitional exemption for all schemes including those which subsequently implemented schemes entered into before the law rules became effective. In other words Parliament addressed itself quite deliberately to the question whether to create transitional arrangements for future implementation of past schemes. However, Regulation 1(2) DOTAS Regulations contains no equivalent exemption. There are, in my view, sound policy reasons for not extending the transitional exemptions in this way and in the absence of an express extension it would be wrong to adopt a construction which does so.

148. In relation to the Syndicate Schemes the Promoter notified the proposed arrangements on 20th March 2007 and the SRN 55413422 was allocated by HMRC to the proposed scheme. The Claimant entered into a subsequent iteration of the proposal (Liberty Syndicate 21). However, there was no obligation for that "*particular*" scheme to be notified because it was the implementation of a prior proposal in respect of which a notice had been sent to the Revenue and therefore the Section 308(3) duty did not apply.

149. In my judgment HMRC is therefore correct. Section 308(5) does not apply. The notification of the Syndicate schemes was in accordance with the law. The subsequent iterations did not need to be notified. However, they all amount to DOTAS arrangements and Condition C in section 219(4) is satisfied and HMRC had the power to issue the APN.

(vi) Substantiality: Are the Syndicate Schemes and the Partnership Schemes substantially similar?

150. If I am wrong in my first conclusion about the inapplicability of section 308(5) then I need to consider the application of that provision to the facts of the case.

151. In my judgment it is clear that the Syndicate Schemes were not substantially similar to the Partnership Schemes. The reasons can be stated very shortly. I accept Mr Southern QC's argument that economically and financially and by reference to the way in which the losses were generated and then distributed the two schemes were very similar. But this overlooks the key point which is that *legally* they are fundamentally different. This is because Parliament drew a distinction between partnerships and syndicates, challenging the former but ignoring the latter. For this very reason the Promoter obtained leading counsel's opinion and it is perfectly clear that counsel advised that by transmogrifying the partnerships into syndicates in the various schemes this would create a sufficient difference radically to alter the legal position: arrangements that were ineffective after the coming into force of section 113 ITA 2007 would be effective henceforward. The difference in the perceived benefit to promoters and their clients could not have been greater.

152. In such circumstances to say that the syndicate arrangements are substantially similar to the earlier partnership schemes and that the later arrangements did not need to be notified and subjected to scrutiny involves focusing the spotlight only on a portion of the arrangements and, with Nelsonion acuity, overlooking that which in fact makes them fundamentally different. It is necessary to look at this concept contextually. The DOTAS arrangements are a set of administrative measures designed to impose on promoters a duty (subject to serious sanctions if not observed) to provide advance warning to HMRC of tax avoiding schemes. The purpose is so that HMRC can then analyse the arrangements from a substantive legal perspective (through an enquiry) and, if appropriate, issue APNs to the participants. The essence of the scheme is thus to enable HMRC to apply the law to new types of arrangements as they emerge. Set in this context it is clear that a difference that is substantial (at the very least) includes one that changes or might change the legal analysis of the *effectiveness* of the arrangement and it is hence artificial to exclude from consideration or to discount the very legal analysis that differentiates between the effectiveness of two arrangements.

153. I turn now to set out the detailed reasons behind this conclusion.

154. **Contextual facts**: On 12 March 2008 legislation was introduced to prevent individuals taking advantage of these types of Syndicate Schemes (See paragraph [142(vii)] above). However in the period between the proposal being notified on 20 March 2007 and 12 March 2008 fifteen syndicates were formed (Liberty Syndicates 9 to 23) to implement the notified proposal. The Revenue estimate that about 1,150 people participated in the fifteen Syndicates and the total alleged understated and disputed tax was about £220 million.

155. The Syndicate Schemes came into being because the Government plugged what it perceived to be a loophole in relation to "*contrived*" partnership Schemes. An Explanatory Ministerial Statement was issued in relation to Partnership Schemes on 2nd March 2007:

"The Paymaster General (Dawn Primarolo): *This Government are determined to ensure that all individuals pay the proper amount of tax on their employment income, other non-employment income and capital gains. Despite the Government's focus on tackling tax avoidance schemes, there are a minority who continue to seek ways to avoid paying an appropriate share of tax, which is unfair on the majority of taxpayers and can undermine funding of public services.*

The Government have continued to see evidence of schemes that use partnerships to generate losses that can be offset by individuals against other income or capital gains using sideways loss relief. HMRC's compliance activity in this area and the disclosures that have been received, following the extension of disclosure rules to cover loss creation schemes from 1 August 2006, have highlighted that this type of avoidance activity is still widespread. Despite the introduction of extensive anti-avoidance legislation in this area, scheme providers are continuing to devise and operate more contrived schemes.

Prompt and decisive action is required to ensure that all taxpayers pay their fair share of tax. The Government are therefore announcing with effect from today two changes to the rules for sideways loss relief.

Currently, the amount of a partnership's trading losses for a tax year for which a non-active partner can claim sideways loss relief is restricted broadly to the amount of capital that the partner has contributed to the partnership. The Government propose to introduce new legislation to exclude certain capital contributions from this amount. The capital contributions to be excluded will be those paid by non-active partners on or after 2 March 2007 where the main purpose, or one of the main purposes, for contributing the capital to the partnership is for the partner to obtain a reduction in tax liability by means of sideways loss relief.

The Government also propose to introduce an annual limit of £25,000 on the amount of trading losses for a tax year for which an individual who is a non-active partner in a partnership can claim sideways loss reliefs. The new limit will apply to trading losses sustained as a non-active partner on or after 2 March 2007.

Legislation will be included in this year's Finance Bill. A technical note with full details of this measure will be issued on HMRC's website today."

156. In the 2005/2006 and 2006/2007 tax years 895 individuals joined the eleven Liberty partnerships. Section 113A ITA 2007 was enacted with effect from 2nd March 2007 to block these partnership arrangements and the effect was that non-active partners could no longer claim side-ways loss relief in respect of capital contributions where the main purpose (or a main purpose) for contributing capital to the partnership was for the non-active partner to have access to losses for which sideways loss could then be claimed.

157. The law change did not, however, come as a surprise to scheme promoters who were ready and poised to translate old Partnership Schemes into new Syndicate Schemes. For example, an e-mail was sent to the Mercury partnership clients on 9th March 2007 in which it was accepted that the partnerships that the members had entered into might be affected by the new law. The email then said:

"However, we have had for some time a revised structure that avoids using a partnership and so is not caught by the changes HMRC have implemented. This is by way of a syndicated structure and we are using this to transact further Liberty trades. As you are part of Liberty 9 partnerships, we will re-assign your interest into Liberty Syndicate 9.... You will need to resign from Liberty 9 partnership and we therefore attach a mandate that confirms your resignation..."

158. The new Syndicate Schemes were made the subject of a favourable opinion from Leading Counsel. It is clear that the opinion approved of the change from partnership to syndicates as a viable way around the new legislation. The alteration of the entities through which the trading losses were generated from partnerships to syndicates was – as the email indicates - considered to be pivotal to the continued effectiveness of the transactions and to the analysis of the dividends generating the alleged losses. In this way, by turning partnerships into syndicates, the arrangements were altered to circumvent the new anti-avoidance measures.

159. I turn now to consider the parties' submissions.

160. **HMRC submissions**: HMRC submits that the Syndicate Schemes were not substantially similar to the earlier Partnership Schemes.

161. By becoming a member of a Syndicate the Claimant's loss claims were not subject to the rules relating to partnerships in: (i) Section 104 Income Tax 2007 (restricting reliefs for limited partners); (ii) Section 113A Income Tax Act 2007 (excluding amounts contributed to access relief) which brought into force the targeted anti-avoidance rule announced on 2 March 2007; and (iii) Section 103C Income Tax Act 2007 (limit on reliefs in any tax year not to exceed cap for tax year) which introduced the £25,000 annual cap on losses in cases where section 113A did not apply. The Revenue identified the following differences between the Partnership and Syndicate Schemes:

Liberty Partnerships (84823870)	Liberty Syndicates (55413422)
1. Partnership scheme was organised into Limited Partnerships. Each individual participant in the scheme was a limited partner.	The Syndicate scheme comprised groups of individuals purporting to trade on their own account (sole traders) with a small number of corporate participants.
2. The Liberty Partnership variant ceased following the enactment of s113A ITA 2007 with effect from 2 March 2007.	The Liberty Syndicate variant came into being as an attempt to circumvent s113A ITA 2007, which blocked the Liberty Partnership scheme (a further legislative fix for individuals using schemes such as Liberty Syndicates was then introduced on 12 March 2008 by s74(B) ITA 2007).
3. The Dividend Purchase Agreement is entered into by the General Partner of each Limited Partnership	The Dividend Purchase Agreement is entered into with each member of the syndicate listed as a purchaser.
4. All the limited partners simultaneously sell their partnership shares to a single third party. They use the proceeds to repay the loans obtained to fund their capital contributions. This step was used to avoid being caught by anti-avoidance legislation.	This step was not required in the Liberty Syndicate variant.
5. Partners are not able to opt out of any transaction. As limited partners, they would be unable to do this without partnership losing its limited liability status under the law, and without the limited partner becoming liable as a general partner.	According to the Information Memorandum, which was circulated to each member before they applied to join a Liberty Syndicate, participants are able to opt out of any transaction.

162. **Claimant's submissions:** The Claimant's case concentrates upon the structural and economic similarities between the Partnership and the Syndicate Schemes. It is argued that both entail six identical steps and in both the cash flows are identical: (i) Step 1: the participants take loans from Bank 2 (B2), and the funds so obtained (1,000) are pooled in a partnership or syndicate [LP/LS]; (ii) Step 2: an offshore company [BVI] borrows 1,000 from Bank 1 [B1] and uses those funds to capitalise a subsidiary [BVI2]; (iii) Step 3: BVI sells the right to a dividend from BVI2 to LP/LS for 1,000; (iv) Step 4: BVI repays the B1 loan; (v) Step 5: BVI2 pays a dividend of 1,000 to LP/LS; (vi) Step 6: LP/LS repays the B2 loan.

163. It is also submitted that the cash flows for participants are identical (assuming in each case that the individual partner or individual contributes 100, i.e. the same amount).

164. And it is further submitted that the tax saving effect is the same in that: (i) The member is carrying on a financial trade so the cost of the dividend at Step 3 is a deductible expense; (ii) BVI is non-resident and accordingly no tax charge under section 730(1) is incurred at Step 3; (iii) no tax charge is incurred by the member at Step 5 either by reason of section 730(1); (iv) the economic loss for the member is zero but that member has a tax loss of (100) which can then be set off against taxable income for the same tax year or carried back to the three previous years. Finally, it is said that all of the above is confirmed by the fact that the descriptions of the Partnership and Syndicate schemes in the DOTAS notifications was identical.

165. It is accepted that there are points of dissimilarity but it is contended that these are distinctions without difference. It is, for instance, argued that "*other than for legal reasons*" the concept of a partnership and a syndicate are the same. In relation to tax law the distinction is immaterial because:

"English partnerships always have been and are transparent for tax purposes. Each member of a partnership is treated as a sole trader, just like a membership of a syndicate. The rule is now in Income Tax (Trading and Other Income) Act 2005, s 852(1):

'(1) For each tax year in which a firm carries on a trade (the "actual trade"), each partner's share in the trading profits or losses is treated for the purposes of Chapter 15 of Part 2 (basis periods) as profits or losses of a trade carried on by the partner alone (the "notional trade")".

See also Section 848 of the 2005 Act.

166. Mr Southern QC ultimately submitted that in the context of tax legislation as a whole what mattered was economic substance, not legal niceties. The fact that there were some legal differences was immaterial to the broader question of substantiality.

167. **Analysis**: The expression "*substantially the same*" in section 308(5) must be interpreted by reference to its context which concerns (i) administrative obligations relating to notification of tax avoidance schemes and payments on account of sums said to represent understated tax; and (ii) tax avoidance legislation. It is designed (as is section 308(3)) to streamline the notification procedure and to reduce the administrative burden on both promoters and HMRC: There is simply no point in the repetitive notification of proposals and arrangements in order to bring to the attention of HMRC insubstantial changes which do not matter. Viewed thus a scheme or proposal is substantially the same if the differences that exist are immaterial to the analysis of whether it is tax avoidance. But, *a fortiori*, a change or difference in a scheme which is considered to be material, for instance because it renders an ineffective scheme into an effective scheme must be substantially different to its notified predecessors. To conclude otherwise would defeat the obvious purpose of the provision. This conclusion is consistent with normal rules of construction. I have already cited (at paragraph [106] above) the famous dictum of Lord Dunedin in *Whitney* that "*a statute is designed to be workable*". Another, perhaps more modern way of expressing the same sentiment is that statutes should be construed purposively.

168. The facts of this case are stark: I accept Mr Southern QC's submission that the two schemes are very similar economically and financially; but they are fundamentally different in their legal consequences. As such it is possible to form a clear view as to the merits of this issue which is that HMRC was correct. However, it is necessary (in particular because in other cases the facts might not be so clear cut) to remember that this is a judicial review. There is no statutory appeal which applies to the issuance of an APN. The decision to issue an APN is however susceptible to judicial review and hence the question necessarily arises whether in principle a court should decide the point by reference: (i) to its black and white substantive merits; or (ii), to a rationality test which accords to HMRC an appropriate margin of appreciation.

169. Mr Southern QC accepted that HMRC did have a margin of appreciation in this area but he said that in context since there was a choice between only two alternatives and the compass of the evidential dispute was so narrow as to be virtually non-existent that the margin of appreciation was a very narrow one indeed. In substance the Court should decide the case for itself.

170. On the facts of this case that has been possible. But it might well not be so clear cut in another case. This is not an issue which involves wider policy considerations of an economic or political nature. Deciding whether one scheme is substantially similar to another is a decision of a largely administrative nature. But it does require the exercise of some degree of skilled judgment. There is no definition of the phrase in the legislation. In my view HMRC has a modest margin of appreciation to exercise judgment over what is and is not substantially similar. The Court will oversee that decision and will bear in mind that if a promoter fails to interpret the concept correctly that person risks substantial financial penalties. This might, in a proper case, involve the court in looking closely at the facts but the Court might ultimately decide a case on rationality grounds rather than black and white merits. However, these sorts of considerations do not arise in this case and I refer to them to avoid any risk that in forming a definitive conclusion I am to be taken as having rejected a conclusion that HMRC has a margin of appreciation. The issue in this case is stark and based upon essentially common grounds facts and, as such, susceptible to a clear cut definitive answer.

171. I reject this ground of challenge.

I. Conclusion

172. For all of the above reasons, the application for judicial review fails.

Note 1 The figures set out in this Judgment were provided to the Court by the Revenue after verification and correction of certain figures earlier contained in the Red Book. I am satisfied that the figures recorded in the Judgment are the most up to date and accurate estimates.

Note 2 Section 60 is entitled: "Restrictions on trade loss relief for individuals". It reads: "Schedule 21 contains provision restricting relief for losses made by individuals who, otherwise than in partnership, carry on trades in a non-active capacity." Schedule 21 introduces, *inter alia*, a new section 74B into the ITA 2007. This provides that if "(a) during a tax year an individual carries on a trade, otherwise than as a partner in a firm, in a non-active capacity …, (b) the individual makes a loss in the trade in that tax year, and (c) the loss arises directly or indirectly in consequence of, or otherwise in connection with, relevant tax avoidance arrangements" then no sideways relief or capital gains relief may be given to the individual for the loss.

EU

Court of Justice

X.

15 Februrary 2017

Case number: C-317/15

Guarantees for tax collection – Extension of the recovery period in the case of assets held outside the Member State of residence – Financial assets held in a Swiss bank account – Free movement of capital

Summary

Article 64(1) TFEU applies to national legislation which imposes a restriction on the movements of capital referred to in that provision, such as an extended recovery period, even where that restriction can also be applied to situations which have nothing to do with direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

The opening of a securities account by a resident of a Member State with a banking institution outside the European Union comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.

3. The possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the main proceedings, are not related to either the provider of the services or the conditions and mechanisms of the provision of services.

Request for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) (…)

1 The present request for a preliminary ruling concerns the interpretation of Article 64(1) TFEU.

2 The request has been made in proceedings between X, a natural person, and the Staatssecretaris van Financiën (State Secretary for Finance, the Netherlands) concerning additional assessments for recovery in relation to income tax and social insurance contributions for the tax years from 1998 to 2006.

Legal context

EU law

3 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) provides:

'Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.'

4 Among the capital movements listed in Annex I to Directive 88/361 are, under Heading VI, 'operations in current and deposit accounts with financial institutions', which include 'operations carried out by residents with foreign financial institutions'.

Netherlands law

5 Article 16 of the Algemene Wet inzake Rijksbelastingen (General Law relating to national taxation; 'AWR') provides as follows:

'1. If any fact provides grounds for the assumption that an assessment has wrongly not been issued or has been issued at too low an amount, … the Inspector may recover the unpaid tax …

…

3. The authority to issue an additional assessment for recovery shall lapse five years after the date on which the tax debt arose. …

4. If too little tax has been levied on components of the subject matter of any tax which have been held or have arisen abroad, the authority to recover the underpaid tax shall lapse, in derogation from the first sentence of paragraph 3, 12 years after the date on which the tax debt arose.'

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

6 In May 2002 a complaint was brought regarding an infringement of the Wet toezicht effectenverkeer (Law on the supervision of security transactions). A criminal investigation was subsequently opened, in the course of which X was questioned several times.

7 By letter of 13 January 2009, X provided the Netherlands tax authorities with information relating to an account which he had held in a banking institution in Switzerland, under a codename, until the beginning of 2004 and to an account which he had held in a banking institution in Luxembourg since the beginning of 2004, neither of which he had included in his tax declarations for the years preceding that letter.

8 On 27 July 2010, the Officier van Justitie (Netherlands Public Prosecution Service) forwarded the results of the criminal investigation to the tax

authorities. The additional assessments for the years 1998 to 2006 were imposed on 30 November 2010.

9 X brought proceedings against those additional assessments before the Rechtbank te Breda (District Court, Breda, the Netherlands). By decision of 12 September 2012, that court found that the additional assessments covering the years up to and including 2004, imposed pursuant to the extended recovery period under Article 16(4) of the AWR, had not been effected with the diligence required by the judgment of 11 June 2009, *X and Passenheim-van Schoot* (C-155/08 and C-157/08, EU:C:2009:368). Nevertheless, that court held, on the basis of the standstill clause in Article 64(1) TFEU, that the free movement of capital, and accordingly the case-law resulting from that judgment, was not applicable to the additional assessment in so far as the recovery related to the Swiss bank account. On those grounds, it upheld the additional assessments for the years up to and including 2003 — apart from a correction in relation to the distribution of income between X and his spouse — and reduced the additional assessment for 2004 by the amount of tax relating to the Luxembourg bank account.

10 The tax inspector lodged an appeal against the decision of the Rechtbank te Breda (District Court, Breda) before the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch, the Netherlands), in so far as that decision related to the additional assessment for 2004, and disputed the contention that he had not exercised the requisite diligence. Meanwhile, X lodged a cross-appeal against that decision before the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) in so far as the decision related to the additional assessments for all of the years in dispute before the Rechtbank te Breda (District Court, Breda) and, in that context, challenged the contention that the standstill clause in Article 64(1) TFEU implied that the free movement of capital was not applicable in as much as the recovery related to his Swiss bank account.

11 The Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) dismissed the main appeal lodged by the tax inspector as unfounded. As regards the cross-appeal brought by X, that court deemed it to be inadmissible in so far as it concerned the additional assessments for the years up to and including 2003 as well as for the years 2005 and 2006, but held that it was well founded in so far as it related to the additional assessment for 2004. In that regard, that court took the view that the recovery in respect of the Swiss bank account came fully within the scope of the case-law resulting from the judgment of 11 June 2009, *X and Passenheim-van Schoot* (C-155/08 and C-157/08, EU:C:2009:368). It took the view that Article 64(1) TFEU was not applicable to the main proceedings since the measure referred to in Article 16(4) of the AWR is a general measure that can be applied in situations that have nothing to do with direct investment, the provision of financial services or the admission of securities to capital markets, which are the categories expressly mentioned in Article 64(1) TFEU.

12 X and the State Secretary for Finance brought appeals on a point of law against the judgment of the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The State Secretary for Finance submits that the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) erred in taking the view that Article 64(1) TFEU does not cover measures such as the additional assessment for 2004 in respect of the Swiss bank account with the application of the extended recovery period provided for in Article 16(4) of the AWR.

13 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) expresses doubt, in the first place, as to whether the scope *ratione materiae* of Article 64(1) TFEU is delineated by the purpose of the corresponding national legislation or by the transaction restricted by that national legislation. In that regard, it notes, on the one hand, that the reference to the 'application' of restrictions set out in Article 64(1) TFEU appears to be an argument in favour of the latter interpretation. In addition, it takes the view that the first interpretation could have the consequence of divesting that provision of much of its practical effect. On the other hand, it observes that an argument in favour of the former interpretation might be found in the judgment of 14 December 1995, *Sanz de Lera and Others* (C-163/94, C-165/94 and C-250/94, EU:C:1995:451). It states that, in that judgment, the Court held that Article 73c(1) of the EC Treaty (now Article 64(1) TFEU) does not cover rules that apply generally to all exports of coins, banknotes or bearer cheques, including those which do not involve, in third countries, direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

14 In the second place, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) expresses doubt as to whether Article 64(1) TFEU must be interpreted as covering only national law which applies to financial service providers and determines the conditions or mechanisms of the provision of services. In that regard, it notes, on the one hand, that, in the case which was pending on the date of the order for reference and subsequently gave rise to the judgment of 21 May 2015, *Wagner-Raith* (C-560/13, EU:C:2015:347), the referring court and the Commission had both advocated such an interpretation. On the other hand, it observes that it could be argued that the wording of Article 64(1) TFEU contains nothing to support that interpretation and that the actual meaning of Article 64(1) TFEU would thereby be greatly restricted.

15 In the third place, and lastly, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) expresses doubt as to whether the phrase 'restrictions … in respect of the movement of capital to or from third countries involving … the provision of financial services' in Article 64(1) TFEU covers the application of Article 16(4) of the AWR in connection with the bank account held by X with a bank in Switzerland. In that regard, it observes that, although it may be possible to categorise the holding of a securities account as a financial service in the light of the judgment of 11 June 2009, *X and Passenheim-van Schoot* (C-155/08 and C-157/08, EU:C:2009:368), that judgment concerns the interpretation of Article 49 EC and Article 56 EC (now Article 56 TFEU and Article 63 TFEU) and it is doubtful whether Article 64(1) TFEU has to be interpreted in the same way.

16 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does the respect for the application to third countries of restrictions, as provided for in Article 64(1) TFEU, extend also to the application of restrictions existing under national rules, such as the extended recovery period at issue in the case in the main proceedings, which rules can also be applied in situations that have nothing to do with direct investment, the provision of financial services or the admission of securities to capital markets?

2. Does the respect for the application of restrictions relating to the movement of capital involving the provision of financial services, as provided for in Article 64(1) TFEU, concern also restrictions that, like the extended recovery period at issue in the case in the main proceedings, are not directed at the provider of the services and do not determine either the conditions or the mechanisms of the provision of services?

3. Does a situation such as that in the case in the main proceedings, in which a resident of a Member State has opened a (securities) account with a banking institution outside the European Union, also come within the definition of "the movement of capital … involving … the provision of financial services" within the meaning of Article 64(1) TFEU, and does it matter in this connection whether (and if so, to what extent) that banking institution carries out activities for the benefit of the account holder?'

Consideration of the questions referred

Preliminary observations

17 The questions referred for a preliminary ruling concern the interpretation of Article 64(1) TFEU, which provides that Article 63 TFEU is to be without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or EU law in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets.

18 It should be noted, first, that those questions are based on the assumption that the legislation at issue in the main proceedings, which provides for an extended recovery period, constitutes a restriction on the movement of capital within the meaning of Article 63 TFEU.

19 Secondly, the order for reference states that that legislation entered into force on 8 June 1991. Thus, that legislation was in force before 31 December 1993, the relevant deadline under Article 64(1) TFEU, and therefore satisfies the temporal criterion laid down in that article.

The first question

20 By its first question, the referring court asks, in essence, whether Article 64(1) TFEU, must be interpreted as applying to national legislation which imposes a restriction on the capital movements referred to in that article, such as the extended recovery period at issue in the main proceedings, where that restriction also applies in situations which bear no relation to direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

21 In that regard, it should be noted, first, that it is apparent from the wording of Article 64(1) TFEU that that provision contains a derogation from the prohibition laid down in Article 63(1) TFEU in favour of the 'application' of any restrictions which existed on 31 December 1993 under national law adopted in respect of the movement of capital involving direct investment, establishment, the provision of financial services or the admission of securities to capital markets. Thus, the applicability of Article 64(1) TFEU depends, not on the purpose of the national legislation containing such restrictions, but on its effect. That provision applies to the extent to which that national legislation imposes a restriction on movements of capital involving direct investment, establishment, the provision of financial services or the admission of securities to capital markets. Accordingly, the fact that that legislation may also apply to other situations is not such as to preclude Article 64(1) TFEU from being applicable in the circumstances which it covers.

22 Secondly, that interpretation is confirmed by the Court's case-law. According to that case-law, a restriction on capital movements, such as a less favourable tax treatment of foreign-sourced dividends, comes within the scope of Article 64(1) TFEU, inasmuch as it relates to holdings acquired with a view to establishing or maintaining lasting and direct economic links between the shareholder and the company concerned and which allow the shareholder to participate effectively in the management of the

company or in its control (judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 78 and the case-law cited). Similarly, according to the Court, a restriction is covered by Article 64(1) TFEU as being a restriction on the movement of capital involving direct investment in so far as it relates to investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity (see, to that effect, judgment of 20 May 2008, *Orange European Smallcap Fund*, C-194/06, EU:C:2008:289, paragraph 102). It is clear from those judgments, and, in particular, from their use of the phrases 'inasmuch as' and 'in so far as', that the scope of Article 64(1) TFEU does not depend on the specific purpose of a national restriction, but on its effect on the movements of capital referred to in that provision.

23 That interpretation of Article 64(1) TFEU is not called into question by the judgment of 14 December 1995, *Sanz de Lera and Others* (C-163/94, C-165/94 and C-250/94, EU:C:1995:451), cited by the referring court. It is true that, having stated, in paragraph 33 of that judgment, that the physical export of means of payment cannot itself be regarded as a capital movement, the Court held in paragraphs 35 and 36 of that judgment that national legislation which applies generally to all exports of coins, banknotes or bearer cheques, including those which do not involve, in non-member countries, direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets do not come within the scope of Article 73c(1) of the EC Treaty (now Article 64(1) TFEU). However, in paragraph 37 of that judgment, the Court held that Member States are entitled to verify the nature and reality of the transactions and transfers in question, with a view to satisfying themselves that such transfers will not be used for the purposes of the capital movements which are specifically covered by the restrictions authorised by Article 73c(1) of the EC Treaty. It follows from the judgment of 14 December 1995, *Sanz de Lera and Others* (C-163/94, C-165/94 and C-250/94, EU:C:1995:451), that Member States can rely on Article 64(1) TFEU in so far as the national rules apply to the movements of capital referred to in that provision.

24 Thirdly, it should be pointed out that an interpretation according to which Article 64(1) TFEU applies only where the national legislation at issue relates solely to the movements of capital referred to in that article would undermine the practical effectiveness of that provision. As the Netherlands Government has noted in its observations submitted to the Court, such an interpretation would have had the consequence of compelling all the Member States, in order to be able to apply the restrictions set out in Article 64(1) TFEU, to revise their national legislation and adapt it very precisely to the scope of that provision before the deadline of 1 January 1994. As the Netherlands Government has noted in its observations submitted to the Court, under such an interpretation, all Member States would have been compelled, in order to be able to apply the restrictions set out in Article 64(1) TFEU, to revise their national legislation and adapt it very precisely to the scope of that provision before the deadline of 1 January 1994.

25 Accordingly, the answer to the first question is that Article 64(1) TFEU must be interpreted as applying to national legislation which imposes a restriction on the movements of capital referred to in that provision, such as the extended recovery period at issue in the main proceedings, even where that restriction can also be applied to situations which have nothing to do with direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

The third question

26 By its third question, which it is appropriate to examine before the second question, the referring court essentially asks whether the opening of a securities account by a resident of a Member State with a banking institution outside the European Union, such as that at issue in the main proceedings, comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.

27 In that regard, it should first be pointed out that, in the absence of a definition of 'movement of capital' in the TFEU, the Court has recognised the nomenclature that constitutes Annex I to Directive 88/361 as having indicative value, it being understood that, as pointed out in the introduction to that annex, the list which it contains is not exhaustive (judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 23 and the case-law cited). Nevertheless, as the Commission observed in its observations submitted to the Court, that annex makes reference, under Heading VI, to 'operations in current and deposit accounts with financial institutions', which include 'operations carried out by residents with foreign financial institutions'. Accordingly, the opening of a securities account with a banking institution, such as that at issue in the main proceedings, comes within the concept of 'movement of capital'.

28 Secondly, the Court has held that, in order to be capable of being covered by the derogation provided for in Article 64(1) TFEU, the national measure must relate to capital movements that have a sufficiently close link with the provision of financial services, which requires that there be a causal link between the movement of capital and the provision of financial services (see, to that effect, judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraphs 43 and 44).

29 In that regard, it should be pointed out that the capital movements resulting from the opening of a securities account with a banking institution involve the provision of financial services. First, it is common ground that that banking institution carries out, for the benefit of the account holder, account-management services, which must be regarded as constituting a provision of financial services.

30 Secondly, there is a causal link between the capital movements concerned and the provision of financial services given that the holder places his capital in a securities account by reason of the fact that, in return, he benefits from the management services which he receives from the banking institution. Accordingly, in a situation such as that at issue in the main proceedings, there is a sufficiently close link between the capital movements and the provision of financial services.

31 It follows that the answer to the third question is that the opening of a securities account by a resident of a Member State with a banking institution outside the European Union, such as that at issue in the main proceedings, comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.

The second question

32 By its second question, the referring court asks whether the possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the case in the main proceedings, are not related to either the provider of the services or the conditions or mechanisms of the provision of services.

33 In that regard, it should be noted that the decisive criterion for the application of Article 64(1) TFEU is concerned with the causal link between the capital movements and the provision of financial services and not with the personal scope of the contested national measure or its relationship with the provider, rather than the recipient, of such services. The field of application of that provision is defined by reference to the categories of capital movements which are capable of being subject to restrictions (judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 39).

34 Consequently, the fact that a national measure concerns first and foremost the investor and not the provider of a financial service cannot preclude that measure from coming within the scope of Article 64(1) TFEU (judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 40). Likewise, the fact that a national measure bears no relation to the conditions or mechanisms of the provision of a financial service cannot preclude that measure from coming within the scope of that provision.

35 It follows that the answer to the third question is that the possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the main proceedings, are not related to either the provider of the services or the conditions and mechanisms of the provision of services.

(…)

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

1. Article 64(1) TFEU must be interpreted as applying to national legislation which imposes a restriction on the movements of capital referred to in that provision, such as the extended recovery period at issue in the main proceedings, even where that restriction can also be applied to situations which have nothing to do with direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

2. The opening of a securities account by a resident of a Member State with a banking institution outside the European Union, such as that at issue in the main proceedings, comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.

3. The possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the main proceedings, are not related to either the provider of the services or the conditions and mechanisms of the provision of services.

EU

Court of Justice

BB Construct

26 October 2017

Case number: C-534/16

Guarantees for tax collection – National law requiring provision of a guarantee for VAT debts at the time of the registration for VAT purposes

Summary

The EU VAT Directive and the principle of equal treatment do not preclude national provisions under which a taxable person, of which the director was formerly the director or associate member of another legal person which had not complied with its tax obligations, may be required, at the time of his registration for VAT purposes, to provide a guarantee, the amount of which could reach EUR 500 000, provided that the guarantee required from that taxable person does not go further than is necessary in order to attain the objectives of Article 273 of this Directive, i.e. to ensure the correct collection of VAT and to prevent evasion.

Request for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic), (…)

1 This request for a preliminary ruling concerns the interpretation of Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive') and the concept of 'freedom to conduct a business', the principle of equal treatment, the principle *ne bis in idem* and the principle of non-retroactivity of offences and penalties, enshrined in the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between the Finančné riaditeľstvo Slovenskej republiky (Tax Directorate of the Slovak Republic, 'the tax directorate') and BB construct s. r. o. concerning a guarantee required at the time of registration of the latter for the purposes of value added tax (VAT).

Legal context

EU law

3 The first paragraph of Article 273 of the VAT Directive provides:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

Slovak law

4 The first sentence of Paragraph 4(1) of Law No 222/2004 on value added tax in the version applicable to the main proceedings ('the Law on VAT') lays down an obligation for taxable persons to register in the following terms:

'A taxable person who has his seat, place of business or fixed establishment within Slovakia … and who has achieved a turnover of EUR 49 790 over the 12 preceding consecutive calendar months, shall be obliged to file a tax registration application with a tax office.'

5 In the version cited by the referring court, Paragraph 4c of that law, entitled 'Tax guarantee', provides:

'(1) The taxable person that has filed a tax registration application pursuant to Paragraph 4(1) and (2) is required to lodge a tax guarantee in the form of a cash deposit made to the account of the tax office, or in the form of a bank guarantee provided by a bank without reservations for a period of 12 months, at the disposal of the tax office and in the amount of the tax guarantee specified …, if:

…

(c) the executive officer or an associate member of that taxable person is a natural or legal person that is or was an executive officer or associate member of another legal person,

1. which has, or had at the date of its dissolution, an outstanding tax debt of [EUR] 1 000 or more which accumulated over the period in which that natural or legal person was its executive officer or an associate member thereof, and which has not been paid by the date of submission of the tax registration application,

…

(2) The tax office shall issue a decision specifying the amount of the tax guarantee applicable to the applicant for registration referred to in subparagraph (1), which shall be no less than [EUR] 1 000 and no more than [EUR] 500 000. When determining the amount of the tax guarantee, the tax office shall take into consideration the risk of the taxable person failing to pay tax that falls due. The applicant for registration is required to provide the tax guarantee within 20 days of

the notification of the decision requiring the provision of a guarantee.'

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

6 Having attained a turnover of at least EUR 49 790, BB construct applied to be registered for the purposes of VAT. On the basis of Paragraph 4c, subparagraphs 1 and 2 of the Law on VAT, the tax directorate ordered it to provide a guarantee for a period of 12 months. The amount of that guarantee was EUR 500 000, and it was required to be provided within a period of 20 days. The provision of such a guarantee was justified, according to the tax directorate, because of the VAT arrears of another company, with which the director or associate member of BB construct had a personal or proprietorial connection.

7 BB construct applied for the annulment or the reduction of that guarantee before the Krajský súd v Bratislave (Bratislava Regional Court, Slovakia). It is clear from the file before the Court that that court annulled the decision requiring the provision of that guarantee and that the tax directorate brought an appeal against that decision before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).

8 That court states that the guarantee laid down in Paragraph 4c of the Law on VAT was adopted on the basis of Article 273 of the VAT Directive in order to prevent fraud and tax evasion. The Slovak legislature sought to encourage the tax directorate to make registration for VAT dependent upon the requirement of providing that guarantee. Such a guarantee would enable that directorate to recover the amounts due if they are not paid by a new taxable person, in the course of the financial year following his registration.

9 According to the statements provided by the tax directorate before that court, in each case, the amount of the guarantee provided for in Paragraph 4c of the Law on VAT is automatically calculated by an information technology system, without any possibility of amending that amount. Thus, each application was the object of individual and objective treatment.

10 BB construct disputes, before the referring court, the amount of the guarantee at issue in the main proceedings. It submits that the guarantee is disproportionate in view of its turnover, to the point that it interferes with the freedom to conduct a business. That guarantee therefore resembles a retroactive sanction, based on past facts.

11 Having regard to those arguments, the referring court wonders whether that guarantee is compatible with EU law.

12 That court observes inter alia that the system established by the Slovak legislature leads to different treatment of, on the one hand, a taxable person who does not comply with its obligation to register for the purposes of VAT which exposes it to penalties of up to EUR 20 000 and, on the other hand, a taxable person who complies with that obligation and must, in certain circumstances, provide a guarantee of an amount ranging from EUR 1 000 to EUR 500 000. It also observes that applicants that have existing debts other than tax debts are not subject to such an obligation of providing a guarantee.

13 That court notes in addition that, taking into account the substantial amount of that guarantee compared with the financial capacity of the company concerned, it may be wondered whether that tax guarantee does not become an indirect fiscal penalty within the meaning of the case-law of the European Court of Human Rights.

14 In those circumstances, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it possible to interpret as in accordance with the objective of Article 273 of [the VAT Directive], that is, the prevention of VAT evasion, an approach on the part of a national body which considers the fact that the current director of a legal person was also the director of another legal person which has outstanding tax liabilities to be a ground under national law for requiring payment of a tax guarantee of up to the value of EUR 500 000?

(2) May it be held that the abovementioned tax guarantee, given its amount, which may be up to the value of EUR 500 000, as in the case in the main proceedings, is consistent with the freedom to conduct a business under Article 16 of [the Charter], does not directly force the taxable person to declare bankruptcy, does not constitute discrimination under Article 21(1) of [the Charter] and does not constitute a breach, in the area of the levying of VAT, of the principle *ne bis in idem* or of the prohibition on retroactivity under Article 49(1) and (3) of the Charter?'

Consideration of the questions referred

Admissibility

15 The Slovak Government and the tax directorate consider that the questions referred are devoid of any connection with the dispute in the main proceedings. They submit, in essence, that in the context of the appeal before it, the referring court is called upon to give a ruling not on the legality of the guarantee which is the object of those questions, but only on formal aspects connected with the reasoning. Therefore, according to the Slovak Government, the questions, which lack any relevance and are hypothetical, are inadmissible.

16 In that regard, it is necessary to recall that questions concerning EU law enjoy a presumption of

relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 30 and the case-law cited).

17 In the present case, the referring court stated that the legality of the procedure that led to the imposition of the guarantee at issue in the main proceedings depends upon the responses to be given to the questions referred.

18 In those circumstances, those questions do not appear to be manifestly hypothetical or devoid of any connection with the facts or purpose of the dispute in the main proceedings. The questions are, therefore, admissible.

Substance

19 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 273 of the VAT Directive, Article 16, Article 21(1) and Article 49(1) and (3) of the Charter, or the principle *ne bis in idem* enshrined in Article 50 of the Charter, must be interpreted as precluding a tax authority from requiring, at the time of registration for the purposes of VAT, a taxable person, the director of which was formerly the director or associate member of another legal person which had not complied with its tax obligations, to provide a guarantee, the amount of which could reach EUR 500 000.

20 In that regard, in the first place, it must be recalled that the first paragraph of Article 273 of the VAT Directive provides that Member States may impose other obligations that they deem necessary for the correct collection of VAT and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons, provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

21 The Court has held that, outside the limits laid down therein, Article 273 of the VAT Directive does not specify either the conditions or the obligations which the Member States may impose and therefore gives the Member States a margin of discretion with regard to the means of ensuring collection of all the VAT due on their territory and for combating fraud (see, to that effect, judgment of 5 October 2016, *Maya Marinova*, C-576/15, EU:C:2016:740, paragraph 43 and the case-law cited).

22 In the present case, it is clear from the order for reference and the observations submitted to the Court that the statutory rule at issue in the main proceedings was adopted pursuant to Article 273 of the VAT Directive in order to ensure the correct collection of VAT and to prevent tax fraud. It enables the tax directorate to require a new taxable person, which presents a risk of unpaid taxes owing to its links with another legal person that has tax debts, to provide a guarantee for a period of 12 months. The amount of that guarantee is determined by an information technology system and falls within the range of EUR 1 000 to EUR 500 000.

23 It follows that a statutory rule, such as that at issue in the main proceedings, is intended to attain the objectives referred to in Article 273 of the VAT Directive and appears capable of attaining them, where there is a real risk of unpaid tax.

24 However, the measures which the Member States may adopt under Article 273 of the VAT Directive to ensure the correct collection of the tax and to prevent evasion must not go further than is necessary to attain those objectives and must not undermine the neutrality of VAT (judgments of 21 October 2010, *Nidera Handelscompagnie*, C-385/09, EU:C:2010:627, paragraph 49 and the case-law cited, and of 5 October 2016, *Maya Marinova*, C-576/15, EU:C:2016:740, paragraph 44 and the case-law cited).

25 It is for the referring court to determine whether that statutory rule is compatible with the requirements stated in the preceding paragraph, having regard to all the circumstances of the case in the main proceedings. Nevertheless, in accordance with settled case-law, the Court may provide the referring court with all indications which may assist it in resolving the dispute before it (see, to that effect, judgments of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraph 36 and the case-law cited, and of 5 October 2016, *Maya Marinova*, C-576/15, EU:C:2016:740, paragraph 46).

26 First, as regards the principle of proportionality, it must be observed, first, that, for the purposes of the application of the statutory rule, the risk of unpaid tax is calculated by an information technology system that automatically generates the amount of the guarantee sought from the taxable person concerned, apparently without that taxable person having any means of knowing the data used by the tax authority for the purposes of that calculation and without it being possible to amend the amount in accordance with information provided, as the case may be, by that taxable person.

27 The obligation to provide a guarantee, in such circumstances, could lead, in certain cases, to an outcome going beyond what is necessary to ensure the correct collection of VAT and the prevention of tax evasion (see, by analogy, judgment of 10 July 2008,

Sosnowska, C-25/07, EU:C:2008:395, paragraph 24 and the case-law cited).

28 Second, it is clear from the information in the case file before the Court that the amount of the guarantee required can reach, as it did in the main proceedings, EUR 500 000, namely the maximum amount provided for. In that regard, it must be noted that the principle of proportionality requires that the amount of the guarantee must be in correlation to the risk of non-payment in the future and the amount of the earlier tax debts. Furthermore, it is also necessary to take into account both the role played by the associate member or director of the legal person with tax debts in the constitution and management of the legal person from which the guarantee is sought, and the role that he played in the constitution and management of the earlier legal person in which he was an associate member or a director.

29 Secondly, as regards the principle of fiscal neutrality, which was intended by the EU legislature to reflect, in matters relating to VAT, the general principle of equal treatment, it must be held that taxpayers who have not complied with their tax obligations, in particular their obligation to register, are not in a situation comparable to that of taxpayers who comply with their obligation to register (see, by analogy, judgment of 5 October 2016, *Maya Marinova*, C-576/15, EU:C:2016:740, paragraph 49). Therefore, the principle of fiscal neutrality cannot be interpreted as precluding the obligation of providing a guarantee, such as that at issue in the main proceedings.

30 It must be noted, in the second place, that the referring court also asks the Court as to the interpretation to be given, in circumstances such as those in the main proceedings, to Article 49(1) and (3) of the Charter, the principle *ne bis in idem* enshrined in Article 50 of the Charter, the concept of 'freedom to conduct a business' protected by Article 16 of the Charter and the principle of equal treatment guaranteed by Article 21 of the Charter.

31 In that regard, it must be recalled that Article 49 of the Charter enshrines the principles of legality and proportionality of criminal offences and penalties, according to which, inter alia, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed; and that, in accordance with the principle *ne bis in idem* laid down in Article 50 of the Charter, no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in the European Union in accordance with the law. The application of that principle presupposes that the measures which have already been adopted against a person by means of a decision that has become final are of a criminal nature (judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 33).

32 The aim of an obligation to provide a guarantee, such as that in the main proceedings, is not enforcement, given that it is common ground that the legal person applying to be registered has not committed any offence and that the aim of the provision at issue is to ensure the correct collection of VAT in the future. The fact, put forward by the referring court, that, due to its amount, the provision of such a guarantee could be a very heavy burden for the newly established legal person, does not in itself enable, in the present case, that guarantee to be regarded as a criminal penalty for the purposes of Articles 49 and 50 of the Charter.

33 In those circumstances, as submitted by the tax directorate, the Slovak Government and the European Commission, it must be held that Articles 49 and 50 of the Charter are not applicable in the present case.

34 As regards the freedom to conduct a business, it should be recalled that Article 16 of the Charter provides that that freedom is recognised in accordance with Union law and national laws and practices.

35 The protection conferred by Article 16 covers the freedom to exercise an economic or commercial activity, and the freedom of contract and free competition (judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 42).

36 According to the case-law of the Court, the freedom to conduct a business is not absolute. It may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest (judgment of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, paragraph 28; see also, to that effect, judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 45 and 46).

37 In accordance with Article 52(1) of the Charter, any limitation on the exercise of the freedom to conduct a business must be provided for by law and respect the essence of that right and, in compliance with the principle of proportionality, is permissible only if it is necessary and actually meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

38 In the present case, it is clear from the information in case file before the Court that the obligation to provide the guarantee at issue in the main proceedings imposed on the taxable person a constraint which restricted the unhindered use of the financial resources at his disposal and, thus, constitutes an interference with his freedom to conduct a business.

39 It is common ground that that guarantee is provided for by the Law on VAT and is justified by the legitimate objectives of ensuring the correct collection of that tax and prevent tax evasion.

40 However, the referring court states that the guarantee amounts to EUR 500 000 and that it is likely, in view of the amount, to compel BB construct to declare itself insolvent.

41 It must be held that, since the provision of a guarantee — having regard to the fact that it is for a significant amount — would deprive, without justification, the company concerned of its resources from the moment of its creation and would prevent it from developing its economic activities, that guarantee is a manifestly disproportionate interference with the freedom to conduct a business.

42 It is nevertheless for the referring court to determine, taking into account all the elements set out in paragraphs 26 to 28 of this judgment, whether the provision of a guarantee of EUR 500 000 goes, in the circumstances of the case in the main proceedings, beyond what is necessary in order to attain the objective of ensuring the correct collection of VAT and the prevention of tax evasion.

43 As regards the principle of equal treatment, it must be noted that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. The elements which characterise various situations, and hence their comparability, must in particular be determined and assessed in the light of the subject matter of the provisions in question and of the aim they pursue, whilst account must be taken for that purpose of the principles and objectives of the field to which the measure at issue relates (judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraphs 23 and 26, and of 7 March 2017, *RPO*, C-390/15, EU:C:2017:174, paragraphs 41 and 42).

44 In the present case, as stated in paragraph 22 above, the national measure at issue in the main proceedings is intended to ensure the correct collection of VAT and prevent tax evasion by introducing a guarantee, to be borne by taxable persons who are under the obligation to register for the purposes of VAT and of which an executive officer or associate member was an executive officer or associate member of another legal person that has tax debts amounting, at the date of its dissolution, to at least EUR 1 000.

45 It is in order to attain those objectives that, according to the statutory rule at issue in the main proceedings, new taxable persons may be subject to an obligation to provide a guarantee because they present a risk of unpaid tax owing to their links with another legal person that itself has tax debts.

46 Consequently, it must be held that those taxable persons are in a different situation from taxable persons who have debts other than tax debts, or who have links with legal persons who have debts other than tax debts, with the result that they may be treated differently.

47 Having regard to all of the foregoing considerations, the answer to the questions referred is that:

– Article 273 of the VAT Directive and Article 16 of the Charter must be interpreted as not precluding, at the time of the registration for the purposes of VAT of a taxable person, of which the director was formerly the director or associate member of another legal person which had not complied with its tax obligations, the tax authority from requiring that taxable person to provide a guarantee, the amount of which could reach EUR 500 000, provided that the guarantee required from that taxable person does not go further than is necessary in order to attain the objectives of Article 273, which it is for the referring court to determine.

– The principle of equal treatment must be interpreted as not precluding the tax authority from requiring a new taxable person, at the time of his registration for the purposes of VAT, to provide, owing to his links with another legal person that has tax debts, such a guarantee.

(…)

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

Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 16 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding, at the time of the registration for the purposes of value added tax of a taxable person, of which the director was formerly the director or associate member of another legal person which had not complied with its tax obligations, the tax authority from requiring that taxable person to provide a guarantee, the amount of which could reach EUR 500 000, provided that the guarantee required from that taxable person does not go further than is necessary in order to attain the objectives of Article 273, which it is for the referring court to determine.

The principle of equal treatment must be interpreted as not precluding a tax authority from requiring a new taxable person, at the time of his registration for the purposes of value added tax, to provide, owing to his links with another legal person that has tax debts, such a guarantee.

EU Court of Justice

Aebtri

22 November 2017

Case number: C-224/16

Guarantees for tax collection – TIR Convention – Transport under cover of a TIR carnet – Liability of the guaranteeing association

Summary

Article 8(7) of the TIR convention provides that: "When payment of the sums mentioned in paragraphs 1 and 2 of this article becomes due, the competent authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the guaranteeing association."

The obligation laid down in Article 8(7) of the TIR Convention to require payment of the amounts at issue, first, from the person directly liable cannot be interpreted in such a way that the actual fulfilment of that obligation entails a risk of loss of the duties and taxes concerned. That obligation, furthermore, cannot lead to excessive procedural obligations on the part of the competent customs authority which fail to take any account of the guaranteeing association's own responsibilities in implementing the TIR procedure, and which are incompatible with the objective of facilitating the recovery of the customs debt.

In the light of the joint and several nature of the guaranteeing association's liability towards the customs authority, the requirement laid down in Article 8(7) of the TIR Convention to require payment of the amounts concerned from the person directly liable cannot be interpreted as leading to a situation in which the liability of the guaranteeing association becomes, in essence, entirely subsidiary to that of the person directly liable. That would be the case if that requirement had the consequence of obliging the competent customs authority to pursue recovery of the debt from the person directly liable as far as the enforcement stage.

To interpret Article 8(7) of the TIR Convention as having the effect of obliging the competent customs authority to exhaust all possibilities of recovery from the person or persons directly liable for the debt before being able to claim payment from the guaranteeing association, would undermine the very balance between, on the one hand, the facilities granted by Article 4 of the TIR Convention and, on the other, one of the essential conditions which must govern their implementation, namely that the guaranteeing association will incur specific liability.

In Case C-224/16,

Request for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), (…)

1 This request for a preliminary ruling concerns the interpretation of Article 267 TFEU, Articles 8 and 11 of the Customs Convention on the international transport of goods under cover of TIR carnets, signed in Geneva on 14 November 1975, and approved on behalf of the European Economic Community by Council Regulation (EEC) No 2112/78 of 25 July 1978 (OJ 1978 L 252, p. 1), in its amended and consolidated version published by Council Decision 2009/477/EC of 28 May 2009 (OJ 2009 L 165, p. 1) ('the TIR Convention' or 'the Convention'), the third indent of Article 203(3) and Article 213 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) ('the Customs Code'), and Article 457(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Community Customs Code (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 214/2007 of 28 February 2007 (OJ 2007 L 62, p. 6) ('the implementing regulation').

2 The request has been made in proceedings between the Asotsiatsia na balgarskite predpriyatia za mezhdunarodni prevozi i patishtata (Association of Bulgarian Enterprises for International Transport and Roads, 'Aebtri'), the guaranteeing association, and the Nachalnik na Mitnitsa Burgas (Director of the Burgas customs office, Bulgaria) concerning a decision for the enforced recovery of a debt relating to customs duties and value added tax (VAT), together with statutory interest, arising as a result of irregularities committed during an international carriage of goods operation carried out under cover of a TIR carnet.

Legal context

The TIR Convention

3 The Convention entered into force for the European Economic Community on 20 June 1983 (OJ 1983 L 31, p. 13). All of the Member States are also parties to that convention.

4 The preamble of the TIR Convention is worded as follows:

'THE CONTRACTING PARTIES,

DESIRING to facilitate the international carriage of goods by road vehicle,

CONSIDERING that the improvement of the conditions of transport constitutes one of the factors essential to the development of cooperation among them,

DECLARING themselves in favour of a simplification and a harmonisation of administrative formalities in the

field of international transport, in particular at frontiers,

HAVE AGREED as follows'.

5 Article 1 of the TIR Convention provides:

'For the purposes of this Convention:

(a) The term "TIR transport" shall mean the transport of goods from a Customs office of departure to a Customs office of destination under the procedure, called the TIR procedure, laid down in this Convention;

(b) the term "TIR operation" shall mean the part of a TIR transport that is carried out in a Contracting Party from a Customs office of departure or entry (en route) to a Customs office of destination or exit (en route);

...

(e) the term "discharge of a TIR operation" shall mean the recognition by Customs authorities that the TIR operation has been terminated correctly in a Contracting Party. This is established by the Customs authorities on the basis of a comparison of the data or information available at the Customs office of destination or exit (en route) and that available at the Customs office of departure or entry (en route);

(f) the term "import or export duties and taxes" shall mean customs duties and all other duties, taxes, fees and other charges which are collected on, or in connection with, the import or export of goods, but not including fees and charges limited in amount to the approximate cost of services rendered;

...

(o) the term "holder" of a TIR Carnet shall mean the person to whom a TIR Carnet has been issued in accordance with the relevant provisions of the Convention and on whose behalf a Customs declaration has been made in the form of a TIR Carnet indicating a wish to place goods under the TIR procedure at the Customs office of departure. He shall be responsible for presentation of the road vehicle, the combination of vehicles or the container together with the load and the TIR Carnet relating thereto at the Customs office of departure, the Customs office en route and the Customs office of destination and for due observance of the other relevant provisions of the Convention;

...

(q) the term "guaranteeing association" shall mean an association approved by the Customs authorities of a Contracting Party to act as surety for persons using the TIR procedure.'

6 Article 4 of the TIR Convention provides that goods carried under the TIR procedure are not to be subjected to the payment or deposit of import or export duties and taxes at customs offices *en route*.

7 For those facilities to be applied, the TIR Convention requires, as follows from Article 3(b) thereof, that the goods be accompanied throughout the transport operation by a standard document, the TIR carnet, which enables the regularity of the operation to be checked. It also requires that the transport operations be guaranteed by associations approved by the contracting parties, in accordance with the provisions of Article 6 of the convention.

8 The TIR carnet consists of a set of sheets each comprising vouchers No 1 and No 2, with the corresponding counterfoils, on which all the necessary information is set out, one pair of vouchers being used for each territory crossed. At the start of the transport operation, voucher No 1 is left with the customs office of departure. Discharge takes place once voucher No 2 has been returned from the customs office of exit in the same customs territory. This procedure is repeated for each territory crossed, each pair of vouchers in the carnet being used in turn.

9 Chapter II of the TIR Convention, entitled 'Issue of TIR Carnets Liability of guaranteeing associations', contains Articles 6 to 11 thereof.

10 Article 6(1) of that convention states:

'Each Contracting Party may authorise associations to issue TIR Carnets, either directly or through corresponding associations, and to act as guarantors, as long as the minimum conditions and requirements, as laid down in Annex 9, Part I, are complied with. The authorisation shall be revoked if the minimum conditions and requirements contained in Annex 9, Part I are no longer fulfilled.'

11 Article 8 of that convention stipulates:

'1. The guaranteeing association shall undertake to pay the import or export duties and taxes, together with any default interest, due under the customs laws and regulations of the country in which an irregularity has been noted in connection with a TIR operation. It shall be liable, jointly and severally with the persons from whom the sums mentioned above are due, for payment of such sums.

2. In cases where the laws and regulations of a Contracting Party do not provide for payment of import or export duties and taxes as provided for in paragraph 1 above, the guaranteeing association shall undertake to pay, under the same conditions, a sum equal to the amount of the import or export duties and taxes and any default interest.

...

7. When payment of the sums mentioned in paragraphs 1 and 2 of this article becomes due, the competent authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the guaranteeing association.'

12 Article 11 of the TIR Convention is worded as follows:

'1. Where a TIR operation has not been discharged, the competent authorities shall not have the right to

claim payment of the sums mentioned in Article 8, paragraphs 1 and 2, from the guaranteeing association unless, within a period of one year from the date of acceptance of the TIR Carnet by those authorities, they have notified the association in writing of the non-discharge. The same provision shall apply where the certificate of termination of the TIR operation was obtained in an improper or fraudulent manner, save that the period shall be two years.

2. The claim for payment of the sums referred to in Article 8, paragraphs 1 and 2 shall be made to the guaranteeing association at the earliest three months after the date on which the association was informed that the operation had not been discharged or that the certificate of termination of the TIR operation had been obtained in an improper or fraudulent manner and at the latest not more than two years after that date. However, in cases which, during the abovementioned period of two years, become the subject of legal proceedings, any claim for payment shall be made within one year of the date on which the decision of the court becomes enforceable.

3. The guaranteeing association shall have a period of three months, from the date when a claim for payment is made upon it, in which to pay the amounts claimed. The sums paid shall be reimbursed to the association if, within the two years following the date on which the claim for payment was made, it has been established to the satisfaction of the customs authorities that no irregularity was committed in connection with the transport operation in question.'

13 Article 43 of the TIR Convention states:

'The Explanatory Notes set out in Annex 6 and in Part III of Annex 7 interpret certain provisions of this Convention and its Annexes. They also describe certain recommended practices.'

14 Article 48 of that convention provides:

'Nothing in this Convention shall prevent Contracting Parties which form a customs or economic union from enacting special provisions in respect of transport operations commencing or terminating in, or passing through, their territories, provided that such provisions do not attenuate the facilities provided for by this Convention.'

15 Article 51 of the TIR Convention states:

'The Annexes to this Convention form an integral part of the Convention.'

16 Annex 6 to the TIR Convention includes, inter alia, the following explanations:

'Introduction to Explanatory Notes

...

(ii) The Explanatory Notes do not modify the provisions of this Convention or of its Annexes but merely make their contents, meaning and scope more precise,

...

0.8.7. Paragraph 7

Measures to be taken by the competent authorities in order to require payment from the person or persons directly liable shall include at least notification of the non-discharge of the TIR operation and/or transmission of the claim for payment to the TIR Carnet holder.

...'

17 Part I of Annex 9 to the TIR Convention contains the following passage:

'1. The minimum conditions and requirements to be complied with by associations in order to be authorised by Contracting Parties to issue TIR Carnets and act as guarantor in accordance with Article 6 of the Convention are:

...

(e) Establishment of a written agreement or any other legal instrument between the association and the competent authorities of the Contracting Party in which it is established. ...

(f) An undertaking in the written agreement or any other legal instrument under (e), that the association:

...

(iii) shall verify continuously and, in particular, before requesting authorisation for access of persons to the TIR procedure, the fulfilment of the minimum conditions and requirements by such persons as laid down in Part II of this Annex;

...

(v) shall cover its liabilities to the satisfaction of the competent authorities of the Contracting Parties in which it is established with an insurance company, pool of insurers or financial institution. ...

...'

18 Article 8(7) of the TIR Convention was repealed with effect from 13 September 2012 and replaced by a provision with almost identical content, contained, from that time, in Article 11(2) of the Convention (OJ 2012 L 244, p. 1).

19 The explanatory note to that new Article 11(2) is worded as follows:

'The efforts to be made by the competent authorities to require payment from the person or persons liable shall include, at least, the sending of the claim for payment to the TIR carnet holder, at his address indicated in the TIR carnet, or the person or persons liable, if different, established in accordance with national legislation. ...'

The Customs Code

20 Contained under point I, entitled 'General provisions', of point B, entitled 'External transit, of Section 3, entitled 'Suspensive arrangements and customs procedures with economic impact' of Chapter

2, entitled 'Customs procedures', of Title IV, entitled 'Customs-approved treatment or use', of the Customs Code, Article 91 thereof provides as follows:

'1. The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:

(a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures;

...

2. Movement as referred to in paragraph 1 shall take place:

(a) under the external Community transit procedure; or

(b) under cover of a TIR carnet (TIR Convention) provided that such movement:

(1) began or is to end outside the Community;

...'

21 Under the same point I, Article 92 of the Customs Code states as follows:

'1. The external transit procedure shall end and the obligations of the holder shall be met when the goods placed under the procedure and the required documents are produced at the customs office of destination in accordance with the provisions of the procedure in question.

2. The customs authorities shall discharge the procedure when they are in a position to establish, on the basis of a comparison of the data available to the office of departure and those available to the customs office of destination, that the procedure has ended correctly.'

22 Under point II, entitled 'Specific provisions relating to external Community transit', of point B of Section 3 of Chapter 2 of Title IV of the Customs Code, Article 96 thereof provides as follows:

'1. The principal shall be the [holder of the procedure] under the external Community transit procedure. He shall be responsible for:

(a) production of the goods intact at the customs office of destination by the prescribed time limit and with due observance of the measures adopted by the customs authorities to ensure identification;

(b) observance of the provisions relating to the Community transit procedure.

2. Notwithstanding the principal's obligations under paragraph 1, a carrier or recipient of goods who accepts goods knowing that they are moving under Community transit shall also be responsible for production of the goods intact at the customs office of destination by the prescribed time limit and with due observance of the measures adopted by the customs authorities to ensure identification.'

23 Articles 201 to 216 of the Customs Code form Chapter 2, entitled 'Incurrence of a customs debt', of Title VII, entitled 'Customs debt', of that code.

24 Article 203 of that code provides:

'1. A customs debt on importation shall be incurred through:

– the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

3. The debtors shall be:

– the person who removed the goods from customs supervision,

– any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

– any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and

and

– where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.'

25 Article 213 of the Customs Code provides:

'Where several persons are liable for payment of one customs debt, they shall be jointly and severally liable for such debt.'

The implementing regulation

26 Articles 454, 455, 455a and 457 of the implementing regulation are in Section 2, entitled 'The TIR procedure' of Chapter 9, entitled 'Transport under the TIR or ATA procedure', of Title II, entitled 'Customs status of goods and transit', of Part II, entitled 'Customs-approved treatment or use', of that regulation.

27 Article 454 of that regulation provides as follows:

'The provisions of this section apply to the transport of goods under cover of TIR carnets where import duties or other charges within the Community are involved.'

28 Article 455 of the implementing regulation is worded as follows:

'1. The customs authorities of the Member State of destination or exit shall return the appropriate part of Voucher No 2 of the TIR carnet to the customs authorities of the Member State of entry or departure without delay and at most within one month of the date when the TIR operation was terminated.

2. If the appropriate part of Voucher No 2 of the TIR carnet is not returned to the customs authorities of the Member State of entry or departure within two months of the date of acceptance of the TIR carnet, those authorities shall inform the guaranteeing association concerned, without prejudice to the notification to be made in accordance with Article 11(1) of the TIR Convention.

They shall also inform the holder of the TIR carnet, and shall invite both the latter and the guaranteeing association concerned to furnish proof that the TIR operation has been terminated.

3. The proof referred to in the second subparagraph of paragraph 2 may be furnished to the satisfaction of the customs authorities in the form of a document certified by the customs authorities of the Member State of destination or exit identifying the goods and establishing that they have been presented at the customs office of destination or exit.

...'

29 Article 455a of the implementing regulation provides:

'1. Where the customs authorities of the Member State of entry or departure have not received proof within four months of the date of the acceptance of the TIR carnet that the TIR operation has been terminated, they shall initiate the enquiry procedure immediately in order to obtain the information needed to discharge the TIR operation or, where this is not possible, to establish whether a customs debt has been incurred, identify the debtor and determine the customs authorities responsible for entry in the accounts.

If the customs authorities receive information earlier that the TIR operation has not been terminated, or suspect that to be the case, they shall initiate the enquiry procedure forthwith.

...

3. To initiate the enquiry procedure, the customs authorities of the Member State of entry or departure shall send the customs authorities of the Member State of destination or exit a request together with all the necessary information.

4. The customs authorities of the Member State of destination or exit shall respond without delay.

...'

30 Article 457 of the implementing regulation provides as follows:

'1. For the purposes of Article 8(4) of the TIR Convention, when a TIR operation is carried out on the customs territory of the Community, any guaranteeing association established in the Community may become liable for the payment of the secured amount of the customs debt relating to the goods concerned in the TIR operation up to a limit per TIR carnet of EUR 60 000 or the national currency equivalent thereof.

2. The guaranteeing association established in the Member State competent for recovery under Article 215 of the Code shall be liable for payment of the secured amount of the customs debt.

...'

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

31 On 11 November 2008, a transit operation was initiated under cover of a TIR carnet at the Kapitan Andreevo (Bulgaria) customs checkpoint by Sargut, a limited liability company established in Turkey, which was both the holder of that carnet and the carrier of the goods concerned. The declared transport destination was a customs checkpoint in Romania.

32 Having received no information concerning the completion of that TIR operation, on 29 April 2009, the Bulgarian customs authorities initiated, pursuant to Article 455a of the implementing regulation, an enquiry procedure concerning the discharge of that operation by contacting the Romanian customs authorities. In their reply, the Romanian customs authorities indicated that neither the goods nor the TIR carnet concerned had been presented to them and that it was impossible for them to obtain information in that regard.

33 On 8 July 2009, the Kapitan Andreevo customs checkpoint sent to the Romanian authorities, for verification purposes, a copy of voucher No 2 of the TIR carnet which Sargut had submitted to it in the intervening period. In their reply of 28 August 2009, the Romanian authorities stated that that voucher had not been presented to the customs office of destination and that the document produced appeared to be inauthentic or falsified.

34 On 10 September 2009, the director of the Kapitan Andreevo customs checkpoint issued a decision setting the amount of the debt payable by Sargut in respect of the unpaid customs duties and VAT, together with statutory interest on those sums. Both Sargut and Aebtri were notified of that decision.

35 After its administrative appeal against that decision was rejected by the director of the Mitnitsa Svilengrad (Svilengrad customs office, Bulgaria), Sargut brought an action, on 27 October 2009, before the Administrativen sad Haskovo (Haskovo Administrative Court, Bulgaria), which was upheld by judgment of 28 January 2010. By judgment of 2 November 2010, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) set aside that judgment and dismissed Sargut's action, having confirmed that the decision of 10 September 2009 was well founded.

36 By letter of 15 November 2010, Aebtri was invited to settle the debt, which it failed to do within the three-month period laid down in Article 11(3) of the TIR Convention.

37 On 7 June 2011, the director of the Svilengrad customs office requested the competent regional directorate of the Natsionalna agentsia za prihodite (National Revenue Agency, Bulgaria) to initiate proceedings against Sargut for the enforcement of the decision of 10 September 2009. Having been informed by that authority that no seizure had taken place and that no sum had been recovered for the discharge of the debt at issue in the main proceedings, on 5 September 2012, the director of the Svilengrad customs office issued a decision against Aebtri for the enforced recovery of the amounts concerned, a decision which was upheld, on appeal, by decision of the director of the Customs Agency.

38 Aebtri brought an action contesting that decision, claiming that Article 8(7) of the TIR Convention had been infringed, since the Bulgarian authorities had not first sought to recover the debt from the principal debtors.

39 That action was dismissed by judgment of the Administrativen sad Haskovo (Haskovo Administrative Court), which considered, first, that the customs authority had done everything possible to claim payment of the debt from Sargut and, secondly, that, since the transit operation had not been properly completed, it had not been proven that the goods reached the recipient or that that recipient had acknowledged receipt with respect to the customs office of destination.

40 Aebtri appealed on a point of law against that judgment before the Varhoven administrativen sad (Supreme Administrative Court) which states, first, that, although it is of the view that the Court has jurisdiction to interpret the relevant provisions of the TIR Convention, it nevertheless considers it necessary to confirm this by referring a question to the Court on that point.

41 The referring court points out, next, that the time limits laid down in Article 11(1) and (2) of the TIR Convention for the purposes of notifying the guaranteeing association of non-discharge and submitting a claim for payment were properly observed in the present case. It expresses doubts, however, as to whether the customs authorities fulfilled their obligation under Article 8(7) of that convention to require, so far as possible, payment of the sums in question from the holder of the TIR carnet as the person directly liable for payment of those sums before making a claim against the guaranteeing association.

42 That court states, in that regard, that, according to its own interpretation given on 25 March 2003 in plenary session, 'where the claims referred to in Article 8(1) and (2) of the [TIR] Convention have become payable, customs authorities may seek payment from the guaranteeing association, provided that all possible measures have been taken to recover the sums from the resident or foreign persons who are the primary debtors'.

43 However, it became apparent, after the delivery of that interpretative decision, that separate chambers of the Varhoven administrativen sad (Supreme Administrative Court), ruling at last instance, had given different answers to the question whether all such measures had been taken in a situation such as that in the main proceedings.

44 The referring court refers, finally, to the various items of evidence adduced during the procedure which led to the decision of 5 September 2012. It refers, inter alia, in that regard, to an international bill of lading concerning the carriage of the goods in question, which contains the TIR carnet number, the number of the vehicle concerned and a reference to Irem Corporation SRL Romania as recipient of the goods, the signature and stamp of the latter and a statement that the goods were received on of 13 November 2008. That court also refers to an 'international consignment note' for those goods with the stamp of the carrier, namely Sargut, Irem Corporation's signature and stamp affixed on the same date, as well as an acknowledgement of receipt of the goods bearing Irem Corporation's stamp and signature.

45 According to the referring court, those various documents permit the view that the goods in question in the main proceedings were received by Irem Corporation and that that company was aware, at the time of receipt, that those goods had been transported under cover of a TIR carnet. However, there is no proof that those goods were declared at the customs office of destination.

46 In those circumstances, the referring court considers that the Administrativen sad Haskovo (Haskovo Administrative Court) should have concluded that an obligation arose, on the part of the recipient of the goods, under Article 96(2) of the Customs Code, to present those goods itself at the customs office of destination. That customs office confirmed that neither the goods nor the TIR carnet were in fact presented to it.

47 To that extent, the question arises as to whether it must be concluded that that recipient was aware or should reasonably have been aware that those goods had been removed from customs supervision and that it was consequently primarily liable for the debt for the purpose of the third indent of Article 203(3) of the Customs Code, and whether or not the customs authority was, accordingly, also required to claim payment from that recipient before holding the guaranteeing association liable.

48 It is in those circumstances that the Varhoven administrativen sad (Supreme Administrative Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the Court of Justice have jurisdiction, with a view to forestalling divergent judgments, to interpret, in a manner binding on the courts of the Member States, [the TIR Convention], in so far as concerns the scope of Articles 8 and 11 of that convention, with regard to the assessment of liability of a guaranteeing association, also referred to in Article 457(2) of [the implementing regulation]?

(2) Does the interpretation of Article 457(2) of the [implementing regulation], in conjunction with Article 8(7) (now Article 11(2)) of [the TIR Convention] and the explanatory notes thereto, allow for a finding that, in a situation such as that in the present case, where the debts referred to in Article 8(1) and (2) [of the TIR Convention] become due, the customs authorities have required payment thereof so far as possible from the holder of the TIR carnet, who is directly liable for those sums, before bringing a claim against the guaranteeing association?

(3) Must the recipient, who acquired or held goods known to have been conveyed under cover of a TIR carnet, where it was not established that those goods were presented and declared before the customs office of destination, be considered to be, on account of those circumstances alone, a person who should have been aware that those goods had been removed from customs supervision, and be recognised as jointly and severally liable within the meaning of the third indent of Article 203(3), in conjunction with Article 213, of [the Customs Code]?

(4) If the answer to the third question is in the affirmative, does the customs administration's failure to require payment of the customs debt from the recipient preclude the liability under Article 457(2) of the [implementing regulation] of the guaranteeing association, pursuant to Article 1(q) of the TIR Convention?'

Consideration of the questions referred

The first question

49 By its first question, the referring court asks, in essence, whether the Court of Justice has jurisdiction to give a preliminary ruling on the interpretation of Articles 8 and 11 of the TIR Convention.

50 As is apparent from the Court's settled case-law, an international agreement concluded by the European Union constitutes an act of the institutions of the European Union within the meaning of point (b) of the first paragraph of Article 267 TFEU and the provisions of the agreement form an integral part of the legal order of the European Union, from the time it enters into force, with the result that the Court has jurisdiction to give a preliminary ruling on the interpretation of such an agreement (see, inter alia, judgment of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraphs 3 to 6, and of 4 May 2010, *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraph 60 and the case-law cited).

51 As observed in paragraphs 1 and 3 of the present judgment, the TIR Convention, to which all the Member States are also parties, was approved on behalf of the Community by Regulation No 2112/78 and entered into force for the Community on 20 June 1983.

52 As regards, more specifically, the provisions of Articles 8 and 11 of the TIR Convention, to which the referring court refers in its question, it must be noted that those provisions concern, in essence, the liability of guaranteeing associations in so far as concerns the payment of import duties and taxes in the event of irregularities relating to a TIR operation and the conditions under which such liability may be invoked by the competent customs authorities. Such provisions are accordingly intended, essentially, to safeguard the receipt of customs duties while facilitating customs operations for the external transit of goods.

53 In the light of the foregoing, the Court has jurisdiction to interpret Articles 8 and 11 of the TIR Convention, provisions concerning customs on whose scope it has, moreover, previously given a preliminary ruling (see, inter alia, judgments of 23 September 2003, *BGL*, C-78/01, EU:C:2003:490, paragraphs 47 and 70; of 5 October 2006, *Commission* v *Germany*, C-105/02, EU:C:2006:637, paragraphs 80 and 82; of 5 October 2006, *Commission* v *Belgium*, C-377/03, EU:C:2006:638, paragraphs 67 to 70, 86 and 88; and of 14 May 2009, *Internationaal Verhuis- en Transportbedrijf Jan de Lely*, C-161/08, EU:C:2009:308, paragraphs 34 to 36).

54 The answer to the first question is, therefore, that the Court has jurisdiction to give a preliminary ruling on the interpretation of Articles 8 and 11 of the TIR Convention.

The second question

55 By its second question, the referring court asks, in essence, whether Article 457(2) of the implementing regulation and read in conjunction with Article 8(7) of the TIR Convention, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, the customs authorities have fulfilled their obligation, as set out in the latter provision, to require payment of the import duties and taxes concerned, so far as possible, from the holder of the TIR carnet, as the person directly liable for those sums, before making a claim against the guaranteeing association.

56 It should be noted, first, that the rights and obligations of a guaranteeing association are governed by the TIR Convention, EU law, and the guarantee contract, subject to national law, which that association concluded with the Member State concerned (see, to that effect, judgment of 5 October 2006, *Commission* v *Belgium*, C-377/03, EU:C:2006:638, paragraph 84 and the case-law cited).

57 In the present case, the question referred seeks to determine the steps that the customs authorities are required to take in respect of the holder of a TIR carnet as the person directly liable for the duties and taxes payable as a result of an irregularity relating to a TIR operation, before being able to pursue recovery of those sums from a guaranteeing association.

58 The TIR Convention includes a provision specifically concerning this issue, which it is therefore appropriate to consider first. Article 8(7) of that convention provides that, before making a claim against the guaranteeing association, the competent authorities must so far as possible 'require payment [of the sums concerned] from the person or persons directly liable'.

59 As regards EU law, it must be observed that, although both the Customs Code and the implementing regulation contain provisions which have the effect of incorporating the procedure laid down by the TIR Convention in that law, and at the same time specify certain rules governing the application of procedure, those provisions contain no indication as to the specific measures to be taken by the competent authorities for the purposes of requiring payment of the sums in question from the person or persons directly liable for those sums, before being able to make a claim against the guaranteeing association.

60 While Article 457(2) of the implementing regulation, to which the referring court refers in its question, clearly reaffirms the principle that the guaranteeing association is liable for payment of the secured amount of the customs debt, that provision contains no indication of a procedural nature concerning the conditions under which a claim may be made against such an association.

61 In the light of the above, in the present case, it is necessary merely to examine the scope of Article 8(7) of the TIR Convention.

62 As regards the interpretation of that provision, it must be noted that, in accordance with the Court's settled case-law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which express to this effect general customary international law, state that a treaty is to be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (judgment of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 40 and the case-law cited).

63 In the present case, it should be noted at the outset that Annex 6 to the TIR Convention contains explanatory notes which, as stated in Article 43 of that convention, interpret certain provisions of the convention. Article 51 of the TIR Convention provides that the annexes thereto form an integral part of the convention. Finally, it follows from point (ii) of the introduction to the explanatory notes in Annex 6 to the convention that those notes do not modify the provisions of the convention but merely make its contents, meaning and scope more precise.

64 Moreover, in view of the period during which the events in the main proceedings took place, it is necessary to take into consideration the explanatory note to Article 8(7) of the TIR Convention, as reproduced in paragraph 16 above. By contrast, since it is inapplicable *ratione temporis*, the explanatory note to Article 11(2) of the convention, in the version in force since 13 September 2012, as reproduced in paragraph 19 above and to which the referring court refers in its question, cannot be taken into account for the purposes of the main proceedings.

65 As regards, first, the wording of Article 8(7) of the TIR Convention, which, it must be pointed out at the outset, was drafted in English, French and Russian, the three versions being authentic, under that provision provides that when the duties and taxes referred to in Article 8(1) and (2) of the convention become due, the competent authorities must so far as possible 'require payment' from the person or persons directly liable before making a 'claim' against the guaranteeing association.

66 It must be pointed out that the terms 'requérir le paiement' and 'require payment'used respectively in the French and English versions of Article 8(7) of the TIR Convention are neither clear nor unequivocal, in particular with regard to the nature of the specific acts that they may involve on the part of the competent authorities concerned.

67 For its part, the explanatory note to Article 8(7) of the TIR Convention specifically states that the measures to be taken by the competent authorities in order to require such payment must include 'at least notification of the non-discharge of the TIR operation and/or transmission of the claim for payment to the TIR Carnet holder'.

68 Although that explanatory note thus suggests, more clearly than the text of Article 8(7) of the TIR Convention itself, that it may, in some circumstances, suffice, for the purposes of requiring payment from the person directly liable for the debt, to have sent that person notification of the non-discharge and/or a claim, the question nonetheless remains, having regard to the use in that note of the expression 'at least', whether and, under what possible circumstances, compliance with the rule laid down in Article 8(7) could require the competent customs

authorities to go beyond the minimum requirements indicated in the explanatory note.

69 It follows from the foregoing that neither the text of Article 8(7) of the TIR Convention nor that of the explanatory note to that provision make it possible, as they stand, to determine what specific acts the customs authorities must carry out with regard to the person directly liable for the debt for the purposes of satisfying their obligation imposed on them by Article 8(7).

70 As regards, next, the context surrounding that provision, it is necessary, for the purposes of interpreting it, to examine it in the light of the general structure of the convention of which it forms part and of the totality of the provisions contained therein (see, to that effect, judgment of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraph 10).

71 In that regard, it should be recalled, in the first place, that Article 4 of the TIR Convention provides that goods carried under the TIR procedure established by that convention must not be subjected to the payment or deposit of import or export duties and taxes at customs offices *en route*.

72 As the Court has previously observed, for those facilities to be applied, the TIR Convention requires, inter alia, that transport operations be guaranteed by associations approved by the contracting parties, in accordance with the provisions of Article 6 of the convention (see, to that effect, judgment of 23 September 2003, *BGL*, C-78/01, EU:C:2003:490, paragraph 5).

73 It follows, moreover, from Article 6(1) of the TIR Convention that an association's authorisation to issue TIR carnets and the continuation of that authorisation are subject, inter alia, to the condition that the association must comply with the minimum conditions and requirements contained in Part 1 of Annex 9 to the convention. Those conditions and requirements include, as is clear from point 1(f)(iii) and (v) of Part I, an undertaking by that association, first, to verify continuously, and, in particular, before requesting authorisation for access of persons to the TIR procedure, the fulfilment of the minimum conditions and requirements by such persons as laid down in Part II of Annex 9 to the convention and, secondly, to cover its liabilities with an insurance company, pool of insurers or financial institution.

74 The guarantee required from the approved association thus seeks to ensure, and facilitate, the actual recovery, by the competent customs authorities, of unpaid duties and taxes, where the facilities referred to in paragraph 71 above have been improperly used, while at the same time making that association liable for the proper fulfilment of its obligations in the implementation of the TIR procedure.

75 It follows, inter alia, that the obligation laid down in Article 8(7) of the TIR Convention to require payment of the amounts at issue, first, from the person directly liable cannot be interpreted in such a way that the actual fulfilment of that obligation entails a risk of loss of the duties and taxes concerned. That obligation, furthermore, cannot lead to excessive procedural obligations on the part of the competent customs authority which fail to take any account of the guaranteeing association's own responsibilities in implementing the TIR procedure, and which are incompatible with the objective, referred to in the above paragraph, of facilitating the recovery of the customs debt.

76 To require the competent customs authority first to exhaust all possibilities of recovery at its disposal against the person or persons directly liable for the debt, which would require it, in some cases, to bring legal proceedings and to initiate enforcement procedures against such persons, who might be established in other Member States or, as in the case in the main proceedings, in a third country, would, first, in the light of the time limits likely to be imposed as a result of such steps, put that authority at risk of no longer being able to recover the amounts at issue for which the guaranteeing association is liable. It is also necessary to take into account, in that regard, in particular, the time limits within which the request for payment must be made to the guaranteeing association under Article 11(2) of the TIR Convention.

77 Secondly, the consequence of such a requirement would be to impose potentially extremely onerous procedures on customs authorities, which do not appear consistent either with the fact that if it were necessary to deposit duties and taxes, a requirement waived under Article 4 of the TIR Convention, there would in fact be no need for those authorities to have recourse to such procedures, or with the division of liabilities under that convention between customs authorities and guaranteeing associations.

78 Moreover, that requirement would also give rise to the appreciable risk that that authority might be required, in the event of the insolvency of the person directly liable for the debt, definitively to bear the costs associated with enforced recovery, which are potentially high.

79 In the second place, it follows from Article 8(1) of the TIR Convention that, under the guarantee contract, guaranteeing associations undertake to pay the customs duties due from the persons directly liable and are, in that regard, jointly and severally liable with those persons for the payment of such sums, even though, under Article 8(7) of that convention, the competent authorities must so far as possible, require payment from the person directly liable before making a claim against the guaranteeing association (see, to that effect, judgment of 5 October

2006, *Commission* v *Belgium*, C-377/03, EU:C:2006:638, paragraph 86).

80 As the Advocate General observes, in essence, in point 44 of his Opinion, the existence of such liability means that the guaranteeing association is itself a debtor, together with the persons directly liable, in respect of the sums in question. It follows, furthermore, from the very nature of joint and several liability that each debtor is liable for the full amount of the debt and the creditor is, in principle, free to claim payment of that debt from one or more of the debtors as he chooses (see, to that effect, judgment of 18 May 2017, *Latvijas dzelzceļš*, C-154/16, EU:C:2017:392, paragraph 85).

81 In the light of the joint and several nature of the guaranteeing association's liability towards the customs authority, the requirement laid down in Article 8(7) of the TIR Convention to require payment of the amounts concerned from the person directly liable cannot be interpreted as leading to a situation in which the liability of the guaranteeing association becomes, in essence, entirely subsidiary to that of the person directly liable. That would be the case if that requirement had the consequence of obliging the competent customs authority to pursue recovery of the debt from the person directly liable as far as the enforcement stage.

82 Finally, as regards the objectives of the TIR Convention, it follows from the preamble thereto that, in concluding that convention, the contracting parties intended 'to facilitate the international carriage of goods by road vehicle' while considering that 'the improvement of the conditions of transport constitutes one of the factors essential to the development of cooperation among them' and declaring 'themselves in favour of a simplification and a harmonisation of administrative formalities in the field of international transport, in particular at frontiers'.

83 The objective of the TIR system established by that convention, whose very title, indeed, highlights the fact that it is a customs convention is, inter alia, as noted in recital 2 of Decision 2009/477, to enable goods to be transported within an international transit regime with a minimum of interference by customs administrations *en route* and to provide, through its international guarantee chain, relatively simple access to the required guarantees.

84 To interpret Article 8(7) of the TIR Convention as having the effect of obliging the competent customs authority to exhaust all possibilities of recovery from the person or persons directly liable for the debt before being able to claim payment from the guaranteeing association, would undermine the very balance between, on the one hand, the facilities granted by Article 4 of the TIR Convention and, on the other, one of the essential conditions which must govern their implementation, namely that the guaranteeing association will incur specific liability.

85 As the Advocate General observed in point 48 of his Opinion, such an interpretation would put at risk the objective of facilitating the international carriage of goods by road vehicle pursued by the TIR Convention.

86 In the light of the above, Article 8(7) of the TIR Convention, read in conjunction with the explanatory note to that provision, must be interpreted as meaning that a customs authority fulfils its obligations to require payment from the person directly liable where it complies with the minimum requirements indicated in that explanatory note.

87 In the present case, it is common ground that, prior to the issue, on 5 September 2012, of a decision for the enforced recovery of the debts at issue in the main proceedings against Aebtri, the competent customs authorities notified the TIR carnet holder that the TIR operation had not been discharged and claimed payment of those debts from it, with the result that the minimum requirements indicated in the explanatory note to Article 8(7) of the TIR Convention were properly fulfilled, at least in so far as concerns that holder. Moreover, those authorities even went beyond those minimum requirements, since, after claiming payment from the guaranteeing association, they applied to the competent tax authorities for enforced recovery from that holder.

88 In those circumstances, the answer to the second question is that Article 8(7) of the TIR Convention must be interpreted as meaning that, in a situation such as that in the main proceedings, the customs authorities have fulfilled the obligation laid down in that provision to require payment of the import duties and taxes concerned, so far as possible, from the holder of the TIR carnet as the person directly liable for those sums, before bringing a claim against the guaranteeing association.

The third question

89 By its third question, the referring court asks whether the third indent of Article 203(3) and Article 213 of the Customs Code must be interpreted as meaning that the fact that a recipient acquired or held goods which he knew to have been conveyed under cover of a TIR carnet and the fact that it has not been established that the goods were presented and declared to the customs office of destination, are sufficient, in themselves, for it to be concluded that such a recipient was aware or should reasonably have been aware that those goods had been removed from customs supervision within the meaning of the first of those provisions and therefore he must be held jointly and severally liable for the customs debt pursuant to the second of those provisions.

90 As a preliminary point, it must be borne in mind that, under Article 1(o) of the TIR Convention, the TIR

carnet holder is responsible for presentation of the road vehicle, the combination of vehicles or the container together with the load and the TIR carnet relating thereto at the customs office of departure, the customs office *en route* and the customs office of destination.

91 That being so, the TIR Convention does not preclude a contracting party to it from providing, in its legislation, that persons other than the TIR carnet holder may also be directly liable for the import duties and taxes referred to in Article 8(1) of the convention. That provisions refers, in the plural form, to the 'persons from whom the sums mentioned above are due', with whom the guaranteeing association may be jointly and severally liable for payment, while Article 8(7) of that convention refers to payment of those sums by the 'person or persons directly liable' for such sums.

92 As regards EU law, it must be noted, in particular, that, under Article 203(1) of the Customs Code a customs debt on importation is incurred on the unlawful removal from customs supervision of goods liable to import duties (judgment of 20 January 2005, *Honeywell Aerospace*, C-300/03, EU:C:2005:43, paragraph 18 and the case-law cited).

93 As is apparent from the Court's case-law, the concept of 'unlawful removal from customs supervision', in that provision, must be understood as encompassing any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from monitoring them as provided for in Article 37(1) of the Customs Code (judgment of 20 January 2005, *Honeywell Aerospace*, C-300/03, EU:C:2005:43, paragraph 19 and the case-law cited).

94 Such is the case where, as in the main proceedings, the office of departure of the consignment concerned which has been cleared for the external transit procedure under a TIR carnet, has concluded that the consignment has not been presented at the office of destination and that the TIR procedure has not been discharged for the consignment in question (see, by analogy, judgment of 20 January 2005, *Honeywell Aerospace*, C-300/03, EU:C:2005:43, paragraph 20).

95 As regards the persons liable, it should be noted to begin with that the EU legislature intended, since the entry into force of the Customs Code, to lay down exhaustively the conditions for determining who are the debtors responsible for a customs debt (judgment of 17 November 2011, *Jestel*, C-454/10, EU:C:2011:752, paragraph 12 and the case-law cited).

96 In the event of a customs debt arising from the removal of goods from customs supervision, the persons who may be responsible for that customs debt are listed in Article 203(3) of the Customs Code, which identifies four categories of persons potentially liable for the duties.

97 Those categories include, as stated in the third indent of Article 203(3) of the Customs Code, any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision.

98 As is clear from paragraphs 44 and 45 of the present judgment, the referring court, which refers to certain documents the origin of which and the date on which they were produced are not specified, considers that it can only be inferred from those documents that, at the time of receipt of the goods at issue in the main proceedings, the recipient of those goods was aware or should have been aware that they had been transported under cover of a TIR carnet. According to that court, those documents cannot, by contrast, be used to establish that those goods were presented at the customs office of destination.

99 In that regard, it must be noted at the outset that, contrary to what is stated in the order for reference as the premiss of the reasoning which led the referring court to entertain doubts as to the scope of the third indent of Article 203(3) of the Customs Code, Article 96(2) of that code cannot be interpreted as meaning that a recipient of goods who knew, at the time of their receipt, that they had been carried under cover of a TIR carnet, but did not obtain a guarantee that they had been presented to the customs office of destination, is obliged, by virtue of that provision, to present those goods himself at that office.

100 Article 96(2) of the Customs Code is not applicable where goods are being carried under cover of a TIR carnet.

101 As is clear from Article 91(2)(a) and (b) of that code, the movement of goods under the external transit procedure may take place either 'under the external Community transit procedure' or 'under cover of a TIR carnet'.

102 Article 96 of that code constitutes, as is apparent from the wording of the title under which it appears, a specific provision relating to external Community transit.

103 It follows, first, that the recipient of goods transported under cover of a TIR carnet cannot be regarded as the person required to fulfil the obligations arising from the use of the customs procedure under which the goods have been placed, within the meaning of the fourth indent of Article 203(3) of the Customs Code.

104 Secondly, it follows that Article 96(2) of the Customs Code is irrelevant to the question whether, in a situation such as that in the main proceedings, the recipient of the goods may have the status of debtor in

respect of the customs debt pursuant to the third indent of Article 203(3) of the Customs Code.

105 As observed in paragraph 97 above, according to the wording of that provision, a person has that status if it has been established, first that the recipient of the goods actually acquired or held them and, secondly, that he was aware or should reasonably have been aware, at the time of acquiring or receiving the goods, that they had been removed from customs supervision. The third indent of Article 203(3) of the Customs Code covers any person who, although not responsible for the unlawful removal of the goods from customs supervision from which the customs debt arose, and not himself required to clear the goods through customs, has nevertheless been involved in the unlawful removal either before or after that removal as a result of having acquired or held the goods (see, by analogy, judgment of 25 January 2017, *Ultra-Brag*, C-679/15, EU:C:2017:40, paragraph 22).

106 The second of the conditions laid down in the third indent of Article 203(3) of the Customs Code specifically covers the situation in which, at the time when he acquired or received the goods at issue, the recipient was aware or should reasonably have been aware that those goods had not been presented to the customs office of destination and that, consequently, any customs duties and taxes due had not been paid. Accordingly, the status of 'debtor' for the purposes of the third indent of Article 203(3) of the Customs Code is subject to conditions based on subjective criteria, namely whether natural or legal persons participated knowingly in acquiring or holding goods removed from customs supervision (see, by analogy, judgment of 3 March 2005, *Papismedov and Others*, C-195/03, EU:C:2005:131, paragraph 40 and the case-law cited).

107 Since that condition concerns considerations of a factual nature, in the light of the division of powers between the Courts of the European Union and the national courts, it is for the national courts to determine whether that condition is satisfied in a specific case (see, by analogy, judgment of 17 November 2011, *Jestel*, C-454/10, EU:C:2011:752, paragraph 21 and the case-law cited).

108 In order to do so, those courts must, in essence, carry out an overall assessment of the circumstances of the case before them (see, by analogy, judgment of 17 November 2011, *Jestel*, C-454/10, EU:C:2011:752, paragraph 23), taking into account in particular all the information which was available to the recipient or of which he should have reasonably been aware, particularly because of his contractual obligations (see by analogy, judgment of 17 November 2011, *Jestel*, C-454/10, EU:C:2011:752, paragraph 25) and, where appropriate, the experience of that recipient, as an economic operator, in importing goods transported under cover of TIR carnets.

109 In the present case, the referring court's question relates specifically to whether the fact that a recipient acquired or held goods and was aware or should have been aware, in view of the documents received or signed by him on receipt of those goods, that they had been transported under cover of a TIR carnet, where it has not, moreover, been established that those goods were presented and declared to the customs office of destination, suffices, in itself, for it to be concluded that that recipient was aware or should reasonably have been aware that those goods had been removed from customs supervision, within the meaning of the third indent of Article 203(3) of the Customs Code.

110 To adopt such an interpretation of that provision would be tantamount to inferring, in essence, on the basis of some kind of irrebuttable presumption, from the fact that a recipient knows or should reasonably be aware that the goods which he received were transported under cover of a TIR carnet, that he was aware or should have been aware that those goods had not, assuming that to be the case, been presented to the customs office of destination.

111 Such an interpretation, which failed to take account of the subjective conditions laid down in the third indent of Article 203(3) of the Customs Code, is not consistent either with the intention of the EU legislature, referred to in paragraph 95 above, to lay down exhaustively the conditions for determining who are the debtors responsible for the customs debt, or with the very letter and purpose of that provision (see, by analogy, judgment of 23 September 2004, *Spedition Ulustrans*, C-414/02, EU:C:2004:551, paragraphs 39, 40 and 42).

112 In that context, it should be pointed out in particular that no provision of the TIR Convention or of EU law has the purpose or effect of placing a personal obligation on the recipients of goods transported under cover of a TIR carnet to ensure that the goods delivered to them were in fact presented to the customs office of destination.

113 In the light of the foregoing, the answer to the third question is that the third indent of Article 203(3) and Article 213 of the Customs Code must be interpreted as meaning that the fact that a recipient acquired or held goods which he knew to have been conveyed under cover of a TIR carnet and the fact that it has not been established that those goods were presented and declared to the customs office of destination, are not sufficient, in themselves, for it to be concluded that such a recipient was aware or should reasonably have been aware that the goods had been removed from customs supervision within the meaning of the first of those provisions and must therefore be held jointly and severally liable for the customs debt pursuant to the second of those provisions.

The fourth question

114 As is clear from its wording, the fourth question was raised by the referring court only in the event that

the Court answered the third question in the affirmative. In view of the negative answer to that question, there is no need to examine the fourth question.

(…)

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

1. The Court has jurisdiction to give preliminary rulings on the interpretation of Articles 8 and 11 of the Customs Convention on the international transport of goods under cover of TIR carnets, signed in Geneva on 14 November 1975, and approved on behalf of the European Economic Community by Council Regulation (EEC) No 2112/78 of 25 July 1978, in its amended and consolidated version published by Council Decision 2009/477/EC of 28 May 2009.

2. Article 8(7) of the Customs Convention on the international transport of goods under cover of TIR carnets, approved on behalf of the Community by Regulation No 2112/78, in its amended and consolidated version published by Decision 2009/477, must be interpreted as meaning that, in a situation such as that in the main proceedings, the customs authorities have fulfilled the obligation laid down in that provision to require payment of the import duties and taxes concerned, so far as possible, from the holder of the TIR carnet as the person directly liable for those sums, before bringing a claim against the guaranteeing association.

3. The third indent of Article 203(3) and Article 213 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, must be interpreted as meaning that the fact that a recipient acquired or held goods which he knew to have been conveyed under cover of a TIR carnet and the fact that it has not been established that those goods were presented and declared to the customs office of destination, are not sufficient, in themselves, for it to be concluded that such a recipient was aware or should reasonably have been aware that those goods had been removed from customs supervision within the meaning of the first of those provisions and must therefore be held jointly and severally liable for the customs debt pursuant to the second of those provisions.

EU

Court of Justice

Pula Parking

9 March 2017

Case number: C-551/15

Judicial cooperation in civil matters – Regulation 1215/2012 – Recovery of an unpaid public parking debt

Summary

Enforcement proceedings brought by a company owned by a local authority against a natural person domiciled in another Member State, for the purposes of recovering an unpaid debt for parking in a public car park, the operation of which has been delegated to that company by that authority, which are not in any way punitive but merely constitute consideration for a service provided, fall within the scope of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Request for a preliminary ruling under Article 267 TFEU from the Općinski sud u Puli-Pola (Municipal Court of Pula, Croatia) (…)

1 This request for a preliminary ruling concerns the interpretation of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

2 The request has been made in enforcement proceedings between Pula Parking d.o.o. and Mr Sven Klaus Tederahn, regarding an application for recovery of an unpaid public parking debt.

Legal context

EU law

3 The legal basis of Regulation No 1215/2012 is Article 67(4) and Article 81(2)(a)(c) and (e) TFEU.

4 Recitals 3, 4, 10, 26 and 34 of Regulation No 1215/2012 are worded as follows:

'(3) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters. …

(4) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.

…

(10) The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters …

…

(26) Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.

…

(34) Continuity between the Convention [of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 77.)], [Council] Regulation (EC) No 44/2001 [of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1)] and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of the Convention [of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters] and of the Regulations replacing it.'

5 Chapter I of Regulation No 1215/2012 is headed 'Scope and definitions'. It includes Article 1(1), which provides:

'This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).'

6 Article 2 of that regulation provides:

'For the purposes of this Regulation:

(a) "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ

of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

…'

7 Article 3 of that regulation is worded as follows:

'For the purposes of this Regulation, "court" includes the following authorities to the extent that they have jurisdiction in matters falling within the scope of this Regulation:

(a) in Hungary, in summary proceedings concerning orders to pay (fizetési meghagyásos eljárás), the notary (közjegyző);

(b) in Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the Enforcement Authority (Kronofogdemyndigheten).'

8 Article 66(1) and (2) of that regulation provides:

'1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.

2. Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.'

Croatian law

9 Article 31 of the Ovršni zakon (Law on Enforcement, Narodne novine, br. 112/12, 25/13 and 93/14) provides:

'(1) Under this law, an authentic document means an invoice … an extract from accounting records, a legalised private document or any document considered to be an official document under specific rules. The calculation of interest is also regarded as an invoice.

(2) An authentic document shall be enforceable if it includes reference to the identity of the creditor and of the debtor, as well as the subject matter, nature, scope and due date of the pecuniary obligation.

(3) In addition to the information referred to in paragraph 2 of this article, an invoice sent to a natural person who does not carry on a registered activity must inform the debtor that, in the event of non-performance of the pecuniary obligation that has fallen due, the creditor may apply for enforcement based on an authentic document.

…'

10 According to Article 278 of the Law on Enforcement, notaries decide on applications for enforcement that are based on authentic instruments.

11 In accordance with Article 279(1) and (3) of that law, so far as enforceable instruments are concerned, the notary with an office in the territorial area of the residence or registered office of the defendant in the enforcement proceedings is to have territorial jurisdiction. According to Article 38 of that law, that territorial jurisdiction is exclusive. An application for enforcement made before a notary who does not have territorial jurisdiction will be dismissed by the court.

12 Pursuant to Article 282(3) of that law, a notary before whom an admissible, well-founded opposition to a writ issued by that notary is raised in timely fashion is to transfer the file to the court with jurisdiction and the court must take a decision on the opposition in accordance with Articles 57 and 58 of that law.

13 Article 283(1) of that law provides that the notary is to append, at the applicant's request, the order for enforcement to an authenticated copy of the writ of execution that the notary has issued if, within eight days of expiry of the deadline for lodging an opposition, no opposition has been lodged.

14 According to Article 58(3) of the Law on Enforcement, the court to which the file of the writ that was the subject of opposition was transferred has jurisdiction to set aside that writ of execution in so far as that writ orders enforcement and to annul the measures taken, the procedure continuing according to the rules applicable to cases of opposition to an order to pay.

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

15 Pula Parking, a company owned by the town of Pula (Croatia), carries out, pursuant to a decision of the mayor of that town, of 16 December 2009, as amended on 11 February 2015, the administration, supervision, maintenance and cleaning of the public parking spaces of that town, the collection of parking fees and other related tasks.

16 On 8 September 2010, Mr Tederahn, who is domiciled in Germany, parked his vehicle in a public parking space of the town of Pula. Pula Parking issued Mr Tederahn with a parking ticket.

17 As provided in the parking contract, which was entered into as a result of the issuing of that ticket, Mr Tederahn was required to pay that ticket within eight days of its date of issue, after which late payment interest accrued.

18 Since Mr Tederahn did not settle the sums due within the period prescribed, Pula Parking lodged, on 27 February 2015, with a notary whose office is in Pula, an application for enforcement on the basis of an 'authentic document' pursuant to Article 278 of the Law on Enforcement.

19 The 'authentic document' submitted by Pula Parking was a certified extract from its accounting records according to which, in view of the invoice of 8 September 2010, an amount of HRK 100 (Croatian

kunas) (approximately EUR 13) became due on 16 September 2010.

20 The notary issued a writ of execution on 25 March 2015, on the basis of that document.

21 Since Mr Tederahn lodged an opposition to that writ on 21 April 2015, the case was referred to the Općinski sud u Puli-Pola (Municipal Court of Pula, Croatia) pursuant to Article 282(3) of the Law on Enforcement.

22 In his opposition, Mr Tederahn put forward a plea alleging that the notary who issued the writ of execution of 25 March 2015 did not have substantive and territorial jurisdiction on the ground that that notary did not have jurisdiction to issue such a writ on the basis of an 'authentic document' from 2010, against a German national or a citizen of any other EU Member State.

23 In those circumstances, the Općinski sud u Puli-Pola (Municipal Court of Pula, Croatia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Taking into account the legal nature of the relationship between the parties to the proceedings, is Regulation No 1215/2012 applicable in the present case?

(2) Does Regulation No 1215/2012 relate also to the jurisdiction of notaries in the Republic of Croatia?'

Consideration of the questions referred

The temporal scope of Regulation No 1215/2012

24 Since Mr Tederahn has pleaded that Regulation No 1215/2012 is inapplicable *ratione temporis* because the contract relating to the use of the parking space was concluded before the Republic of Croatia acceded to the European Union, on 1 July 2013, it must be observed at the outset that the Act of Accession of a new Member State is based essentially on the general principle that the provisions of EU law apply *ab initio* and *in toto* to that State, derogations being allowed only in so far as they are expressly laid down by transitional provisions (judgment of 28 April 2009, *Apostolides*, C-420/07, EU:C:2009:271, paragraph 33).

25 As regards, specifically, Regulation No 1215/2012, it should be noted that, in accordance with Article 66(1), that regulation is to apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.

26 In this case, although the main proceedings relate to the recovery of an unpaid parking debt, payable under a contract entered into before the Republic of Croatia acceded to the European Union, the enforcement proceedings were brought on 27 February 2015, after Regulation No 1215/2012 entered into force and the dispute in the main proceedings was brought before the referring court, on 21 April 2015, so that an action such as that in the main proceedings falls within the temporal scope of that regulation.

27 As the Advocate General observed in point 33 of his Opinion, it is moreover common that the enforcement of due claims is subject to the procedural rules valid at the moment the action is initiated, not to the procedural rules in force when the original contract was concluded.

28 The finding in paragraph 26 of this judgment is also supported by the case-law of the Court of Justice under the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, whose continuity, as is apparent from recital 34 of Regulation No 1215/2012, should be ensured as regards the interpretation of Article 66(1) of that regulation, according to which the only necessary and sufficient condition for the scheme of that regulation to be applicable to litigation relating to legal relationships created before its entry into force is that the judicial proceedings should have been instituted subsequently to that date (see, to that effect, judgment of 13 November 1979, *Sanicentral*, 25/79, EU:C:1979:255, paragraph 6).

The first question

29 By its first question, the referring court asks, in essence, whether Article 1(1) of Regulation No 1215/2012 must be interpreted as meaning that enforcement proceedings brought by a local authority against a natural person domiciled in another Member State, for the purposes of recovering an unpaid debt for parking in a public car park, the operation of which has been delegated to that company by that authority, fall within the scope of that regulation.

30 Pula Parking, the Croatian and Swiss Governments and the European Commission agree, in essence, that the legal relationship in the main proceedings is of a civil nature, for the purposes of Article 1(1) of Regulation No 1215/2012.

31 As a preliminary point, in so far as Regulation No 1215/2012 has now replaced Regulation No 44/2001, it should be observed that the Court's interpretation of the provisions of the latter regulation also applies to Regulation No 1215/2012, whenever the provisions of the two instruments of EU law may be regarded as equivalent (judgment of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881, paragraph 26 and the case-law cited).

32 In that regard, as is apparent from Article 1(1) of Regulation No 1215/2012, which repeats the wording of Article 1(1) of Regulation No 44/2001, the scope of Regulation No 1215/2012 concerns 'civil and commercial matters'.

33 In accordance with the Court's settled case-law, in order to ensure, as far as possible, that the rights and obligations which derive from that regulation for

the Member States and the persons to whom it applies are equal and uniform, the concept of 'civil and commercial matters' should not be interpreted as a mere reference to the internal law of one or other of the States concerned. That concept must be regarded as an autonomous concept to be interpreted by reference, first, to the objectives and scheme of that regulation and, second, to the general principles which stem from the corpus of the national legal systems (see, to that effect, judgment of 22 October 2015, *Aannemingsbedrijf Aertssen and Aertssen Terrassements*, C-523/14, EU:C:2015:722, paragraph 29 and the case-law cited).

34 In order to determine whether a matter falls within the scope of Regulation No 1215/2012, it is necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action (see, to that effect, judgments of 11 April 2013, *Sapir and Others*, C-645/11, EU:C:2013:228, paragraph 34, and of 12 September 2013, *Sunico and Others*, C-49/12, EU:C:2013:545, paragraph 35).

35 In this case, as the Advocate General also observed in points 49 to 51 of his Opinion, the administration of public parking and the collection of parking fees constitute a task carried out in the local interest, effected by Pula Parking, an undertaking owned by the town of Pula. However, although the powers of Pula Parking have been entrusted to it by an act of public authority, neither the determination of the unpaid parking debt, of a contractual nature, nor the action for recovery of that debt, the purpose of which is to safeguard private interests and which is governed by general provisions of law applicable to relations between private individuals, appears to require the town of Pula or Pula Parking to exercise public authority powers.

36 In that regard, it appears from the documents before the Court — which it is, however, for the referring court to verify — that the parking debt claimed by Pula Parking is not coupled with any penalties that may be considered to result from a public authority act of Pula Parking and is not of a punitive nature but constitutes, therefore, mere consideration for a service provided.

37 Moreover, nor does it appear that, by issuing a parking ticket to the persons concerned, Pula Parking grants itself the power to issue an enforcement order, in derogation from the general rules of law, since after it has issued such a ticket, Pula Parking is merely able, in the same way as the issuer of an invoice, to rely on an authentic document capable of enabling it to initiate proceedings in accordance with the provisions of the Law on Enforcement (see, to that effect, judgment of 12 September 2013, *Sunico and Others*, C-49/12, EU:C:2013:545, paragraph 39).

38 It follows that the legal relationship between Pula Parking and Mr Tederahn must, in principle, be classified as a private law relationship and falls, therefore, within the concept of 'civil and commercial matters' for the purposes of Regulation No 1215/2012.

39 In the light of all the foregoing considerations, the answer to the first question is that Article 1(1) of Regulation No 1215/2012 must be interpreted as meaning that enforcement proceedings brought by a company owned by a local authority against a natural person domiciled in another Member State, for the purposes of recovering an unpaid debt for parking in a public car park the operation of which has been delegated to that company by that authority, which are not in any way punitive but merely constitute consideration for a service provided, fall within the scope of that regulation.

The second question

40 By its second question, the referring court asks, in essence, whether Regulation No 1215/2012 must be interpreted as meaning that, in Croatia, notaries, acting within the framework of the powers conferred on them by national law in enforcement proceedings based on an 'authentic document', fall within the concept of 'court' within the meaning of that regulation.

41 Pula Parking and the Croatian Government submit that, for the purposes of Regulation No 1215/2012, it is necessary to give the term 'court' a wide definition, covering not only courts, in the strict sense, which exercise judicial functions, but also notaries. The European Commission and the other interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union which have lodged submissions, with the exception of the Swiss Government which does not express a view on this matter, consider that, without prejudice to an amendment to that regulation, notaries in Croatia cannot be placed on the same footing as a court, for the purposes of that regulation, in respect of enforcement proceedings based on an 'authentic document'.

42 As is clear from the settled case-law of the Court, in the absence of reference to the law of the Member States, the provisions of Regulation No 1215/2012 must be interpreted autonomously, taking into account the overall scheme, the objectives and the origin of that instrument of EU law (see, to that effect, judgment of 7 July 2016, *Hőszig*, C-222/15, EU:C:2016:525, paragraph 29 and the case-law cited).

43 As regards the general scheme of Regulation No 1215/2012, it should be observed that, on several occasions, that regulation refers to the concepts of 'court', 'jurisdiction' or 'legal proceedings' without, however, defining them.

44 Thus, the title of Regulation No 1215/2012 refers to 'jurisdiction' and Article 66 thereof, which deals with the temporal application of that regulation,

specifies, in paragraph 1 of that article, that that regulation is to apply only to 'legal proceedings' instituted on or after 10 January 2015.

45 In its chapter I, entitled 'Scope and definitions', Article 1(1) of that regulation provides that that regulation is to apply in civil and commercial matters whatever the nature of the court or tribunal. Article 2 of that regulation defines the concept of 'judgment' as any judgment given by a court or tribunal of a Member State, whatever the judgment may be called.

46 Article 3 of that regulation states authorities which, to the extent that they have jurisdiction in matters falling within the scope of that regulation, are considered to be courts, namely, in Hungary, in summary proceedings concerning orders to pay, notaries and, in Sweden, in summary proceedings concerning those orders and assistance, the Enforcement Authorities. Since that article relates specifically to the authorities that it lists, notaries in Croatia do not fall within that article. It is, in that regard, not relevant that Regulation No 1215/2012 was adopted on 12 December 2012, before the Republic of Croatia acceded to the European Union, and that the technical adaptations to the EU *acquis* referred solely to the legal acts of the EU adopted and published in the *Official Journal of* the European Union before 1 July 2012.

47 Moreover, in its settled case-law concerning notaries' functions, the Court has consistently held that there are fundamental differences between judicial and notarial functions (see, to that effect, judgments of 24 May 2011, *Commission* v *Austria*, C-53/08, EU:C:2011:338, paragraph 103; of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 47, and of 1 February 2017, *Commission* v *Hungary*, C-392/15, EU:C:2017:73, paragraph 111).

48 It should also be noted that, unlike, for example, Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012 L 201, p. 107), whose Article 3(2) specifies that the term 'court', for the purposes of that regulation, encompasses not only the judicial authorities, but also any authority competent in that area which exercises judicial functions and which satisfies certain conditions listed in that provision, Regulation No 1215/2012 does not include any general provision having such an effect.

49 It is therefore necessary, as was observed in paragraph 42 of this judgment, to assess, in the context of this case, the concept of 'court' in the light of the objectives pursued by Regulation No 1215/2012, the interpretation of which is sought by the referring court.

50 In that regard, it should be recalled that, according to recital 4 of that regulation, it is essential to unify the rules of conflict of jurisdiction in civil and commercial matters, in order to ensure rapid and simple recognition and enforcement of judgments given in a Member State. As is noted in recital 26 of that regulation, that principle of mutual recognition is, above all, justified by mutual trust in the administration of justice in the Union.

51 According to the case-law of the Court of Justice, both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 78 and the case-law cited).

52 In the scheme of Regulation No 1215/2012, those principles result in the handling and enforcement of judicial decisions of the courts of a Member State as if they had been delivered in the Member State in which enforcement is sought.

53 Regulation No 1215/2012, the legal basis of which is Article 67(4) TFEU aimed at facilitating access to justice, in particular through the principle of mutual recognition of judicial decisions, thus seeks, in the field of cooperation in civil or commercial matters, to strengthen the simplified and efficient system for rules of conflict, recognition and enforcement of judicial decisions, a system established by the legal instruments of which that regulation forms a continuation, in order to facilitate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States (see, by analogy, in the field of cooperation in civil or commercial matters, the judgment of 1 June 2016, *Bob-Dogi*, C-241/15, EU:C:2016:385, paragraph 32).

54 Consequently, given the objectives pursued by Regulation No 1215/2012, the concept of 'court' for the purposes of that regulation must be interpreted as taking account of the need to enable the national courts of the Member States to identify judgments delivered by other Member States' courts and to proceed, with the expeditiousness required by that regulation, in enforcing those judgments. Compliance with the principle of mutual trust in the administration of justice in the Member States of the European Union which underlies that regulation requires, in particular, that judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*.

55 That conclusion is supported by the origin of Regulation No 1215/2012. In that regard, the proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(2010) 748 final), concerning the recast of Regulation No 44/2001, provided for the insertion, in Chapter I of Regulation No 1215/2012, entitled 'Scope and definitions', for a definition of the concept of 'court' in such a way as to include 'any authorities designated by a Member State as having jurisdiction in the matters falling within the scope of [the] Regulation'. However, the EU legislature did not follow that approach.

56 In this case, as the Croatian Government submitted at the hearing, in Croatia, notaries form part of the public notarial system, which is separate from the judicial system. Pursuant to the provisions of the Law on Enforcement, in Croatia, notaries have the power to give decisions by writ on applications for enforcement based on authentic documents. Once the writ has been served on the defendant, the latter may lodge an opposition. A notary before whom an admissible, well-founded opposition to a writ issued by that notary is raised in timely fashion is to transfer the file to the court with jurisdiction and the court must take a decision on the opposition.

57 It follows from those provisions that the writ of execution based on an 'authentic document', issued by the notary, is served on the debtor only after the writ has been adopted, without the application by which the matter is raised with the notary having been communicated to the debtor.

58 Although it is true that debtors have the opportunity to lodge oppositions against writs of execution issued by notaries and it appears that notaries exercise the responsibilities conferred on them in the context of enforcement proceedings based on an 'authentic document' subject to review by the courts, to which notaries must refer possible challenges, the fact remains that the examination, by notaries, in Croatia, of an application for a writ of execution on such a basis is not conducted on an *inter partes* basis.

59 In the light of all the foregoing considerations, the answer to the second question is that Regulation No 1215/2012 must be interpreted as meaning that, in Croatia, notaries, acting within the framework of the powers conferred on them by national law in enforcement proceedings based on an 'authentic document', do not fall within the concept of 'court' within the meaning of that regulation.

(…)

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

1. Article 1(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that enforcement proceedings brought by a company owned by a local authority against a natural person domiciled in another Member State, for the purposes of recovering an unpaid debt for parking in a public car park, the operation of which has been delegated to that company by that authority, which are not in any way punitive but merely constitute consideration for a service provided, fall within the scope of that regulation.

2. Regulation No 1215/2012 must be interpreted as meaning that, in Croatia, notaries, acting within the framework of the powers conferred on them by national law in enforcement proceedings based on an 'authentic document', do not fall within the concept of 'court' within the meaning of that regulation.

EU

Court of Justice

SCI Senior Home v Gemeinde Wedemark

26 October 2016

Case number: C-195/15

Insolvency proceedings – Regulation (EC) 1346/2000 – Notion of 'third parties' rights in rem' – Real property tax – National law providing for a security on the real property concerned

Summary

Under Art. 5(1) of Regulation (EC) 1346/2000, the opening of insolvency proceedings does not affect the rights 'in rem' of creditors or third parties in respect of assets belogning to a debtor which are situated within the territory of another Member State.

Under German law, the owner of real property must accept enforcement, on that property, of the instrument recovering a local tax on that real property. This constitutes a 'right in rem' for the purposes of Art. 5(1) of the above Regulation.

1 This request for a preliminary ruling concerns the interpretation of Article 5 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 SCI Senior Home, in administration, represented by Mr Pierre Mulhaupt acting as court appointed administrator, and Gemeinde Wedemark (Wedemark local authority, Germany) and Hannoversche Volksbank eG, concerning the compulsory sale of a property owned by Senior Home.

Legal context

EU law

3 Recitals 24 and 25 of Regulation No 1346/2000 state:

'(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.'

4 Article 4 of Regulation No 1346/2000, headed '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;

...

(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;

...'

5 Article 5 of Regulation No 1346/2000, entitled 'Third parties' rights *in rem*', provides:

'1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, 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.

2. The rights referred to in paragraph 1 shall, in particular, mean:

(a) 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;

(b) 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;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

…'

6 Under Article 39 of Regulation No 1346/2000, entitled 'Right to lodge claims':

'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.'

German law

7 Paragraph 12 of Grundsteuergesetz (Law on real property tax, 'GrStG'), entitled 'Security *in rem*' is worded as follows:

'The real property tax is a public charge on the taxable property.'

8 The first sentence of Paragraph 77(2) of the Abgabenordnung (Tax Code, 'AO') provides:

'The owner of real property shall accept enforcement against the property of a tax that is a public charge on real property.'

9 Paragraph 10(1) of Zwangsversteigerungs-gesetz (Law on compulsory sale by public auction) provides that:

'A right to satisfaction of the debt out of the proceeds of sale of the real property is granted according to the following order of priority:

…

3. claims to payment of public charges on the real property for amounts outstanding from the last four years; recurring payments, in particular real property tax, interest, supplements or payments on regularly recurring dates enjoy this right to a prior claim only in respect of current amounts and arrears from the last two years.

…'

The facts in the main proceedings and the question referred for a preliminary ruling

10 Senior Home, a real estate company under French law, is the owner of real property located in Wedemark (Germany). By decision of 6 May 2013, it was put into court-supervised administration by the tribunal de grande instance de Mulhouse (Regional Court, Mulhouse, France).

11 On 15 May 2013 the Wedemark local authority applied for the compulsory sale of that property by public auction in order to recover arrears of real property tax for the period from 1 October 2012 to 30 June 2013 in the sum of EUR 7 471.19, certifying that it was an enforceable tax debt.

12 By decision of 21 May 2013, the Amtsgericht Burgwedel (District Court, Burgwedel, Germany) ordered the compulsory sale of that property. The action brought against that decision by Senior Home was dismissed. After its appeal before the Landgericht Hannover (Regional Court, Hannover, Germany) was dismissed, Senior Home, represented by Mr Mulhaupt acting as court-appointed administrator, brought an action before the Bundesgerichtshof (Federal Court of Justice, Germany) for an order, first, that the decision of the Amtsgericht Burgwedel (District Court, Burgwedel, Germany) ordering the compulsory sale by auction of the property be set aside and, secondly, that the entry relating to that sale be removed from the land register.

13 The referring court states that, in accordance with Article 4 of Regulation No 1346/2000, the insolvency proceedings brought against Senior Home are governed by French law. Under French law, the opening of the court-supervised administration procedure essentially precludes the compulsory sale at issue in the main proceedings. On the other hand, under Article 5(1) of Regulation No 1346/2000, the opening of insolvency proceedings does not affect the rights *in rem* of creditors or third parties in respect of assets belonging to a debtor which are situated within the territory of another Member State.

14 The referring court observes that, under German law, debts due in respect of real property taxes are, in accordance with Paragraph 12 of the GrStG, public charges on real property which are rights *in rem*, and the owner of the encumbered real property must accept enforcement of the instrument recording those debts against that property, pursuant to the first sentence of Paragraph 77(2) of the AO. However, that court is unsure whether the issue of the existence or otherwise of a right *in rem*, for the purposes of applying Article 5(1) of that regulation, must be assessed in accordance with German law, or

whether, on the contrary, the notion of a 'right *in rem*' should be interpreted independently.

15 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does the term "right in rem" in Article 5(1) of Regulation No 1346/2000 include a national rule such as that contained in Paragraph 12 of the [GrStG] in conjunction with the first sentence of Paragraph 77(2) of the [AO], pursuant to which real property tax debts are by operation of law a public charge on real property, and the property owner must accept enforcement against the property in that respect?'

The question referred for a preliminary ruling

16 By its question, the referring court asks, in essence, whether Article 5 of Regulation No 1346/2000 must 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 is, by operation of law, to be subject to a public charge and that property owner must accept enforcement, against that property, of the instrument recording that tax debt, constitutes a 'right *in rem*' for the purposes of that article.

17 In that regard, it must be recalled, in the first place, that that regulation, as the Advocate General explained in points 21 to 23 of his Opinion, is based on a so-called 'attenuated universality' model, according to which, first, the law applicable to the main insolvency proceedings and its effects is that of the Member State within the territory of which those proceedings were opened, albeit that, secondly, that regulation lays down a number of exceptions to that rule. Article 5(1) of that regulation lays down one of those exceptions.

18 More specifically, as regards Article 5(1) of Regulation No 1346/2000, which stipulates that the opening of insolvency proceedings has no effect on the right *in rem* of a creditor or a third party over the debtor's assets which are located at the time the proceedings were opened in the territory of another Member State, it is clear from the case-law of the Court that the basis, validity and extent of such a right *in rem* must normally be determined according to the law of the place where the asset concerned is situated. As a consequence, Article 5(1) of that regulation, by derogating from the rule of the law of the Member State of the opening of the proceedings, allows the law of the Member State on whose territory the asset concerned is situated to be applied to the right *in rem* of a creditor or a third party in respect of certain assets belonging to the debtor (see, to that effect, judgments of 5 July 2012, *ERSTE Bank Hungary*, C-527/10, EU:C:2012:417, paragraphs 40 to 42, and of 16 April 2015, *Lutz*, C-557/13, EU:C:2015:227, paragraph 27).

19 Consequently, as regards the case in the main proceedings, the issue of the qualification of the right concerned as a right '*in rem*' for the purposes of applying Article 5(1) of that regulation is to be examined having regard to national law, in the present case German law.

20 In that respect, it is clear from the decision to refer that the charges at issue in the main proceedings are rights which may be enforced *in rem*, since the owner of the encumbered property must accept enforcement of the instrument recording that tax debt against that property. In any event, it is a matter for the referring court to find and assess the facts in the case before it and to interpret and apply national law (judgment of 8 June 2016, *Hünnebeck*, C-479/14, EU:C:2016:412, paragraph 36) in order to determine whether the real property tax debt at issue in the main proceedings may be regarded as a right *in rem* under German law.

21 In the second place, it must be pointed out that, whilst Article 5(2) and (3) of Regulation No 1346/2000 does not define the notion of a 'right *in rem*', it does, however, explain, through a number of examples of rights described in that regulation as '*in rem*', the scope and therefore the limits of the protection afforded by that provision to the privileges, guarantees or other rights under the national law of the Member States of the creditors of an insolvent debtor.

22 As the Advocate General stated, in essence, in points 43 and 44 of his Opinion, in order not to render ineffective the limitation on the scope of Article 5 of that regulation to rights '*in rem*', the Court considers that the rights regarded as '*in rem*' by the national legislation at issue must satisfy certain criteria in order to fall within that article.

23 In the present case, with regard to a right such as the one at issue in the main proceedings, it must be held that that right, without prejudice to the determination to be made by the referring court, satisfies the criteria listed in Article 5(2) of Regulation No 1346/2000, in that, first, it is a charge which directly and immediately encumbers taxed real property and, secondly, the owner of the real property must accept enforcement against that property, pursuant to the first sentence of Paragraph 77(2) of the AO. Furthermore, as the Advocate General stated in point 49 of his Opinion, during insolvency proceedings the tax authorities have the status of a preferential creditor on the basis of the charge over the property at issue in the main proceedings.

24 In the third place, that conclusion is not undermined by the fact, noted by the Commission in its observations, that Article 5 must be interpreted strictly, since it is an exception to the general rule laid down in Article 4 of that regulation, so that it covers only rights *in rem* granted in the context of commercial transactions.

25 Although in accordance with settled case-law a derogation must be interpreted strictly, it is nonetheless appropriate to ensure that the exception is not deprived of its effectiveness (see, to that effect, judgment of 13 December 2012, *BLV Wohn- und Gewerbebau*, C-395/11, EU:C:2012:799, paragraph 33 and the case-law cited).

26 Furthermore, neither the wording of the provisions of Regulation No 1346/2000 nor its objectives make it possible to interpret Article 5 of that regulation to the effect that it does not cover rights *in rem* granted outside the context of a commercial transaction.

27 As regards the wording of the provisions at issue, it must be pointed out that Article 5 contains nothing that could limit the scope of that article on the basis of the origin of the right *in rem* concerned or the nature, whether governed by public or private law, of the debt guaranteed by that right in rem.

28 As regards the objectives of that provision, it is clear from recital 24 of Regulation No 1346/2000 that the exceptions to the general rule for determining the applicable law, laid down in Article 4 of that regulation, seek to 'protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened', and, in that respect, the commercial nature of the rights or debts concerned are irrelevant.

29 In addition, it cannot be inferred from recital 25 of Regulation No 1346/2000, which states that there is a 'particular' need for a special reference diverging from the law of the opening State in the case of rights *in rem*, since these are of considerable importance for the granting of credit, that that exception covers only guarantees *in rem* in the context of commercial or credit contracts. On the contrary, it appears that a limitation on the scope of Article 5 of that regulation on the basis of the commercial origin of the right *in rem* concerned would be contrary to the objective, expressly stated in recital 24 of that regulation, of protecting legitimate expectations and the certainty of transactions.

30 In any event, the Court considers that an interpretation of Article 5 of Regulation No 1346/2000 to the effect that the exception which it makes provision for covers solely 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.

31 As the Advocate stated, in essence, in points 64 to 67 of his Opinion, Regulation No 1346/2000 is based on the principle of equal treatment of creditors and on the principle that its provisions must be applied irrespective of the nature — commercial or otherwise — of the debts guaranteed by the rights *in rem*. Thus, as regards the possibility for creditors to lodge claims in the insolvency proceedings in writing, Article 39 of that regulation excludes any discrimination by the tax authorities and the social security authorities of Member States, other than the State within the territory of which the proceedings were opened.

32 In those circumstances, the answer to the question referred is that Article 5 of Regulation No 1346/2000 must 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 is, by operation of law, to be subject to a public charge and that property owner must accept enforcement of the instrument recording that tax debt against that property, constitutes a 'right *in rem*' for the purposes of that article.

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

Article 5 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must 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 is, by operation of law, to be subject to a public charge and that property owner must accept enforcement of the decision recording that tax debt against that property, constitutes a 'right *in rem*' for the purposes of that article.

EU

Court of Justice

Degano Trasporti

7 April 2016

Case number: C-546/14

Insolvency proceedings- Procedure involving a partial discharge of VAT debts of the trader – Not contrary to the Member States' obligation to ensure collection of the VAT due on their territory.

Summary

The. EU VAT Directive does not preclude national legislation, under which an insolvent trader may apply to a court to open a procedure for an arrangement with creditors for the purpose of settling its debts by liquidating its assets, in which that trader offers only partial payment of a VAT debt and establishes by an independent expert's report that that debt would not be repaid more fully in the event of that trader's bankruptcy.

Request for a preliminary ruling under Article 267 TFEU from the Tribunale di Udine (District Court, Udine, Italy) (…)

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU and of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

2 The request has been made in the context of an application for an arrangement with creditors brought by Degano Trasporti Sas di Ferruccio Degano & C., in liquidation ('Degano Trasporti'), before the Tribunale di Udine (District Court, Udine, Italy).

Legal context

EU law

3 Pursuant to Article 2(1)(a), (c) and (d) of the VAT Directive, the supply of goods or services for consideration within the territory of a Member State by a taxable person acting as such and the importation of goods are subject to value added tax ('VAT').

4 Article 250(1) of the VAT Directive provides:

'Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.'

5 Under the first paragraph of Article 273 of the VAT Directive:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.'

Italian law

6 Royal Decree No 267 laying down provisions governing bankruptcy, arrangement with creditors, judicial administration and compulsory administrative liquidation (Regio Decreto n. 267, recante 'Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa') of 16 March 1942 (GURI No 81 of 6 April 1942), in the version applicable to the facts at issue in the main proceedings ('the Law on bankruptcy'), governs, in Article 160 et seq., the procedure for an arrangement with creditors.

7 By that procedure, which seeks to avoid a declaration of bankruptcy, a trader in critical difficulties or a state of insolvency proposes to its creditors to make its assets available in order to pay back in full the preferential creditors and partially pay back unsecured creditors. The arrangement may however provide for a partial repayment of certain categories of preferential creditors if an independent expert states that those creditors would not receive better treatment if the trader went bankrupt.

8 The procedure for the arrangement with creditors, in which the Public Prosecutor participates, starts with the trader's application before the competent court. That court rules, first of all, on the admissibility of the application, after having determined that the legal conditions for the arrangement are satisfied. Next, the creditors to whom the debtor does not offer full repayment are called upon to vote on the proposal, which must be approved by the creditors admitted to vote who represent the majority of the total amount of their claims. Finally, if that majority is reached, the court validates the arrangement after ruling on any opposition by dissenting creditors to the arrangement and determines again that the legal conditions are satisfied. The arrangement accordingly validated is binding on all the creditors.

9 Moreover, Article 182ter of the Law on bankruptcy, entitled 'Tax settlement', provides that, by the plan referred to in Article 160 of that law, the

debtor may propose the payment, partial and/or delayed, of taxes and ancillary claims of the tax authorities, as well as contributions and ancillary claims made by the compulsory social security institutions, as regards the part of the debt which is unsecured, even if they are not entered in the register, with the exception of taxes constituting the European Union's own resources. As regards, however, VAT and tax retained but unpaid, the proposal made by the debtor may solely provide for deferred payment.

The dispute in the main proceedings and the question referred

10 On 22 May 2014, Degano Transport applied to the referring court in order to be admitted to a procedure for an arrangement with creditors. Indicating that it was in financial crisis, it seeks to liquidate its assets in order to pay certain preferential creditors in full and to pay a percentage of its debts to unsecured creditors and some lower-ranking preferential creditors which, in its view, could not, in any event, recover the entirety of their claims if a bankruptcy procedure were initiated. Included in those latter claims is a VAT debt which Degano Trasporti proposes to pay in part, without linking that proposal to the conclusion of a tax settlement.

11 The referring court, having to rule on the admissibility of Degano Transporti's application, states, in particular, that Article 182ter of the Law on bankruptcy prohibits agreeing, in the context of a tax settlement, on partial payment of State claims to VAT, considered to be privileged claims of the 19th rank, and only allows for staggered payment of such claims.

12 It states that, according to the case-law of the Corte Suprema di Cassazione (Supreme Court of Cassation, Italy), that prohibition, although set out in Article 182ter of the Law on bankruptcy which governs tax settlements, applies in all cases and cannot be derogated from, even in the context of a proposal for an arrangement with creditors. That interpretation of national law is required, according to the Corte Suprema di Cassazione, in the light of EU law, in particular Article 4(3) TEU and the VAT Directive, as interpreted in the judgments in *Commission* v *Italy* (C-132/06, EU:C:2008:412), *Commission* v *Italy* (C-174/07, EU:C:2008:704) and *Belvedere Costruzioni* (C-500/10, EU:C:2012:186).

13 The referring court questions, however, whether the obligation on Member States to take all legislative and administrative measures appropriate for the full recovery of VAT, laid down by EU law, in fact prevents the use of collective proceedings other than bankruptcy, under which the insolvent trader liquidates all of its assets to satisfy its creditors and envisages settling its VAT debt in an amount which is no less than what that trader would pay in the event of bankruptcy.

14 In those circumstances, the Tribunale di Udine (District Court, Udine) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'On a proper construction, do the principles and rules contained in Article 4(3) TEU and the VAT Directive, as already interpreted in the judgments of the Court of Justice in Commission v Italy (C-132/06, EU:C:2008:412), Commission v Italy (C-174/07, EU:C:2008:704) and Belvedere Costruzioni (C-500/10, EU:C:2012:186), also preclude a national rule (and, therefore, in respect of the case in the main proceedings, an interpretation of Articles 162 and 182ter of the Law on bankruptcy) under which a proposal for an arrangement with creditors with the liquidation of the debtor's assets, which provides for only partial payment of the State's claim in respect of VAT, is permissible where there is no tax settlement and where, in respect of that claim, a larger payment in the event of bankruptcy is not foreseeable on the basis of an assessment by an independent expert and following the formal review of the court?'

The question referred for a preliminary ruling

15 As the referring court states that it is making the reference for a preliminary ruling at the stage of examining the admissibility of the application before it, whereas the strictly contentious stage of the arrangement procedure begins only after the approval of such an arrangement with creditors, when the minority creditors may raise an objection, it is necessary, first, to note that those elements do not preclude the Court's jurisdiction to hear the request for a preliminary ruling.

16 National courts may refer a question to the Court if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgments in *Grillo Star Fallimento*, C-443/09, EU:C:2012:213, paragraph 21, and *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 19) and the choice of the most appropriate time to refer a question for a preliminary ruling lies within their exclusive jurisdiction (see, to that effect, judgments in *X*, C-60/02, EU:C:2004:10, paragraph 28, and *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraph 45).

17 Accordingly, the Court has jurisdiction to hear the present request for a preliminary ruling, although it has been made by the referring court at the non-contentious stage of examining the admissibility of the application before it, which seeks to open a procedure for an arrangement with creditors, which, as is apparent from the national procedural rules set out in paragraph 8 of the present judgment, is intended, if it is admissible, to result in a judicial decision, adopted in the presence of the public prosecutor, after the court has ruled on any oppositions brought by the minority creditors.

18 By its question, the referring court asks, in essence, whether Article 4(3) TEU and Articles 2, 250(1) and 273 of the VAT Directive preclude national

legislation, such as that at issue in the main proceedings, interpreted as meaning that an insolvent trader may apply to a court to open a procedure for an arrangement with creditors for the purpose of settling its debts by liquidating its assets, in which that trader offers only partial payment of a VAT debt and establishes by an independent expert's report that that debt would not be repaid more fully in the event of that trader's bankruptcy.

19 In that regard, it should be borne in mind that it follows from Articles 2, 250(1) and 273 of the VAT Directive, and from Article 4(3) TEU that the Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory (judgments in *Commission* v *Italy*, C-132/06, EU:C:2008:412, paragraph 37; *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 20; *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 25; and *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 41).

20 Under the common system of VAT, the Member States are required to ensure compliance with the obligations to which taxable persons are subject, and they enjoy in that respect a certain latitude, inter alia, as to how they use the means at their disposal (judgments in *Commission* v *Italy*, C-132/06, EU:C:2008:412, paragraph 38, and *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 21).

21 That latitude is nevertheless limited by the obligation to ensure effective collection of the EU's own resources and not to create significant differences in the manner in which taxable persons are treated, either within a Member State or throughout the Member States. The VAT Directive must be interpreted in accordance with the principle of fiscal neutrality inherent in the common system of VAT, according to which economic operators carrying out the same transactions must not be treated differently in relation to the levying of VAT. Any action by the Member States concerning the collection of VAT must comply with that principle (see, to that effect, judgments in *Commission* v *Italy*, C-132/06, EU:C:2008:412, paragraph 39; *Commission* v *Germany*, C-539/09, EU:C:2011:733, paragraph 74; and *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 22).

22 The European Union's own resources include, in particular, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from the application of a uniform rate to the harmonised VAT basis of assessment determined according to European Union rules. There is thus a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 26 and the case-law cited).

23 In view of those factors, it is appropriate to examine whether the admission of a partial payment of a VAT claim by an insolvent trader, in the context of a procedure for an arrangement with creditors such as that laid down by the national legislation at issue in the main proceedings, is contrary to the obligation on Member States to ensure collection of all of the VAT due on their territory as well as the effective collection of the European Union's own resources.

24 In that regard, it should be noted that, as the Advocate General has stated in points 38 to 42 of her Opinion, the procedure for an arrangement with creditors, as described by the referring court and set out in paragraphs 6 to 8 of the present judgment, is subject to strict conditions of application which seek to provide guarantees as regards the recovery of privileged claims and therefore VAT claims.

25 Accordingly, first of all, the procedure for an arrangement with creditors entails that the insolvent trader liquidates the entirety of its assets to settle its debts. If those assets are insufficient to settle all of the debts, the partial payment of a privileged claim can be allowed only if an independent expert states that that claim would not be paid in a higher proportion in the event of the debtor being declared bankrupt. The procedure for an arrangement with creditors therefore appears to enable it to be established that, because of the trader's insolvency, the Member State concerned is unable to recover a higher proportion of its VAT claim.

26 Next, since the proposal for an arrangement with creditors is submitted to the vote of all creditors to whom the debtor does not propose full repayment of their claim and since it must be approved by the creditors entitled to vote who represent a majority of the total claims held by those creditors, the procedure for an arrangement with creditors gives the Member State concerned the opportunity to vote against a proposal for partial payment of a VAT claim if, inter alia, it disagrees with the independent expert's conclusions.

27 Finally, even if that proposal is adopted, notwithstanding that negative vote, since the arrangement with creditors has to be validated by the court hearing the case after it has ruled on any objections of creditors disagreeing with the proposal for the arrangement, the procedure for the arrangement with creditors allows the Member State concerned, by bringing an opposition, to again dispute an arrangement with creditors providing for a partial payment of a VAT claim and allows that court to carry out a review.

28 In the light of those circumstances, the admission of a partial payment of a VAT claim by an insolvent trader in the context of an arrangement with

creditors, which, unlike the measures at issue in the cases which gave rise to the judgments in *Commission* v *Italy* (C-132/06, EU:C:2008:412) and *Commission* v *Italy* (C-174/07, EU:C:2008:704) to which the referring court refers, does not constitute a general and indiscriminate waiver of collecting VAT, is not contrary to the obligation on Member States to ensure collection of all of the VAT due on their territory as well as the effective collection of the European Union's own resources.

29 Consequently, the answer to the question referred is that Article 4(3) TEU and Articles 2, 250(1) and 273 of the VAT Directive do not preclude national legislation, such as that at issue in the main proceedings, interpreted as meaning that an insolvent trader may apply to a court to open a procedure for an arrangement with creditors for the purpose of settling its debts by liquidating its assets, in which that trader offers only partial payment of a VAT debt and establishes by an independent expert's report that that debt would not be repaid more fully in the event of that trader's bankruptcy.

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

Article 4(3) TEU and Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax do not preclude national legislation, such as that at issue in the main proceedings, interpreted as meaning that an insolvent trader may apply to a court to open a procedure for an arrangement with creditors for the purpose of settling its debts by liquidating its assets, in which that trader offers only partial payment of a value added tax debt and establishes by an independent expert's report that that debt would not be repaid more fully in the event of that trader's bankruptcy.

EU

Court of Justice

Marci Identi

16 March 2017

Case number: C-493/15

Insolvency proceedings – Procedure discharging bankrupt persons from irrecoverable VAT debts – Not contrary to the Member States' obligation to ensure collection of the VAT due on their territory

Summary

Art. 4(3) TEU and the VAT Directive do not preclude VAT debts from being declared irrecoverable under national legislation, providing for a bankruptcy discharge procedure by means of which a court may, under certain conditions, declare irrecoverable the debts of a natural person which have not been settled by the close of the bankruptcy proceedings initiated against that person.

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU and Articles 2 and 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

2 The request has been made in proceedings between the Agenzia delle Entrate (the Revenue Authority; 'the tax authorities') and Mr Marco Identi concerning a tax assessment in relation to value added tax (VAT) and regional tax on productive activities for the tax year 2003.

Legal context

European Union law

3 Under Article 2 of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such and the importation of goods are to be subject to VAT.

4 Article 22 of the Sixth Directive provides:

'…

4. Every taxable person shall submit a return within an interval to be determined by each Member State …

…

5. Every taxable person shall pay the net amount of the [VAT] when submitting the return. The Member States may, however, fix a different date for the payment of the amount or may demand an interim payment.

…

8. … Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

…'

Italian law

5 The decreto legislativo n. 5 (Legislative Decree No. 5), of 9 January 2006 (Ordinary Supplement to the GURI No 13, of 16 January 2006) established the bankruptcy discharge procedure (*esdebitazione*), amending Articles 142 to 144 of the legge fallimentare (Law on insolvency and bankruptcy), approved by the regio decreto n. 267 (Royal Decree No 267), of 16 March 1942 (GURI No 81, of 6 April 1942), and amended by the decreto legislativo n. 169 (Legislative Decree No 169), of 12 September 2007 (GURI No 241, of 16 October 2007) ('the Law on insolvency and bankruptcy').

6 Under Article 142 of the Law on insolvency and bankruptcy, entitled 'Discharge from bankruptcy':

'A natural person who is bankrupt shall be granted the benefit of discharge from the remaining debts owed to creditors with a declared interest who have not been satisfied in the bankruptcy proceedings, provided that he:

(1) has cooperated with the authorities carrying out the procedure by providing all information and documentation necessary to clear the liabilities and by making every effort to ensure the effective conduct of the transactions;

(2) has not in any way delayed, or helped to delay, the conduct of the proceedings;

(3) has not infringed Article 48;

(4) has not benefited from any other discharge from bankruptcy in the ten years preceding the request;

(5) has not deducted assets or set out non-existent liabilities, caused or aggravated the imbalance, thereby making it seriously difficult to reconstruct the property and turnover, or committed credit fraud;

(6) has not been found guilty, by a final judgment, of fraudulent bankruptcy, or of offences against the national economy, industry and commerce, or of any other offence committed in connection with the pursuit of the undertaking's activity, save where he has been rehabilitated in respect of those offences. If criminal proceedings are ongoing in respect of one of those offences, the court shall stay the proceedings pending the outcome of those criminal proceedings.

Discharge from bankruptcy cannot be granted if the creditors with a declared interest in the bankruptcy proceedings have not been satisfied, at least in part.

The following are excluded from the discharge from bankruptcy:

(a) maintenance obligations and, in any event, obligations arising from relationships unconnected with the operations of the undertaking;

(b) debts relating to compensation for damage resulting from non-contractual liability, and criminal and administrative penalties of a pecuniary nature which are not ancillary to debts which have been extinguished.

Rights claimed by creditors vis-à-vis persons jointly liable, joint and several debtors and persons liable by way of recourse shall remain unaffected.'

7 Under Article 143 of the Law on insolvency and bankruptcy, entitled 'Bankruptcy discharge procedure':

'[T]he court shall, by a decree of bankruptcy closure or in response to a request by the debtor lodged within the following year, and having checked the conditions laid down in Article 142 and also taken account of the debtor's cooperative conduct, and heard the bankruptcy administrator and the creditors' committee, declare collective debts not settled in full to be irrecoverable in relation to a debtor who has already been declared bankrupt. ...

The debtor, creditors who have not been satisfied in full, the public prosecutor and any interested party may submit a complaint against the above order, pursuant to Article 26.'

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

8 By an order of 14 April 2008, the Tribunale di Mondovì (Mondovì District court, Italy) granted Mr Identi, general partner of the insolvent company PVA di Identi Marco e C. Sas (and himself bankrupt), discharge from bankruptcy. Subsequent to that order, the tax authorities issued a tax assessment to Mr Identi for VAT and the regional tax on productive activities in respect of the tax year 2003.

9 The tax authorities have sought, before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), to have set aside on a point of law the judgment of the Commissione tributaria regionale del Piemonte (Regional tax court, Piedmont, Italy), of 26 March 2012, which confirmed a decision at first instance finding that tax assessment to be unlawful and dismissed the appeal brought by the tax authorities against that decision.

10 The referring court states that the bankruptcy discharge procedure applicable to the debtor — a natural person who is a commercial trader who has been declared bankrupt — is intended to allow the person benefiting from it to 'make a fresh start' after being discharged from all his previous debts owed to creditors with a declared interest in the bankruptcy proceedings and which have not been settled at the close of those proceedings, so that the debtor concerned may become an active economic entity again without having to bear limitations on initiative or his potential to generate wealth as a result of the burden of past debts. The court dealing with insolvency and bankruptcy matters, sitting as a collegiate body, takes the decision to allow the debtor to benefit from that procedure after receiving the non-binding opinions of the bankruptcy administrator and the creditors' committee and checking, inter alia, whether the conditions laid down in Article 142, first paragraph, of the Law on insolvency and bankruptcy are met.

11 The referring court raises the issue of whether the bankruptcy discharge procedure complies with EU law. According to that court, the question arises as to whether, as in the case of the arrangement with creditors at issue in the case which gave rise to the judgment of 7 April 2016, *Degano Trasporti* (C-546/14, EU:C:2016:206), practical considerations established by a court, such as the bankruptcy or insolvency or a meritorious debtor or the possibility of collecting only part of the VAT claim, can justify the waiver, in full or in part, of that claim.

12 The referring court takes the view that by listing exhaustively in the third paragraph of Article 142 of the Law on insolvency and bankruptcy the debts from which the debtor may not be discharged, without referring to tax debts, the national legislature considered that a person eligible for the bankruptcy discharge procedure must be discharged also from tax debts. However, in the referring court's view it is also necessary to ascertain that the application of that procedure to VAT debts does not infringe EU law.

13 It adds that the issue is also raised of whether the national legislation concerned in the main proceedings is compatible with the EU rules on competition, since that legislation promotes the return to economic activity of persons benefiting from that procedure over other persons declared bankrupt who are ineligible *ex lege*.

14 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 4(3) TEU and Articles 2 and 22 of [the Sixth Directive] be interpreted as precluding the application, in relation to [VAT], of a provision of national law which provides for the extinguishment of debts arising from VAT in favour of taxable persons admitted to the bankruptcy discharge procedure governed by Articles 142 and 143 of [the Law on insolvency and bankruptcy]?'

Consideration of the question referred

15 By its question, the referring court asks, in essence whether EU law, in particular Article 4(3) TEU and Articles 2 and 22 of the Sixth Directive and the rules on State aid, must be interpreted to the effect that it precludes VAT debts from being declared irrecoverable under national legislation, such as that at issue in the main proceedings, providing for a bankruptcy discharge procedure by means of which a court may, under certain conditions, declare irrecoverable the debts of a natural person which have not been settled by the close of the bankruptcy proceedings initiated against that person.

16 It should be borne in mind that it follows from Articles 2 and 22 of the Sixth Directive, and from Article 4(3) TEU that the Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory (see, to that effect, judgment of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 19 and the case-law cited).

17 Under the common system of VAT, the Member States are required to ensure compliance with the obligations to which taxable persons are subject, and they enjoy in that respect a certain latitude, inter alia, as to how they use the means at their disposal (judgment of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 20 and the case-law cited).

18 That latitude is nevertheless limited by the obligation to ensure effective collection of the EU's own resources and not to create significant differences in the manner in which taxable persons are treated, either within a Member State or throughout the Member States. The VAT Directive must be interpreted in accordance with the principle of fiscal neutrality inherent in the common system of VAT, according to which economic operators carrying out the same transactions must not be treated differently in relation to the levying of VAT. Any action by the Member States concerning the collection of VAT must comply with that principle (judgment of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 21 and the case-law cited).

19 The European Union's own resources include, in particular, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from the application of a uniform rate to the harmonised VAT basis of assessment determined according to European Union rules. There is thus a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (judgment of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 22 and the case-law cited).

20 In view of those factors, it is appropriate to ascertain whether the possibility, under certain conditions, of declaring irrecoverable VAT debts under the bankruptcy discharge procedure at issue in the main proceedings is contrary to the obligation on Member States to ensure collection of all of the VAT due on their territory as well as the effective collection of the European Union's own resources. In order to do so, it is necessary to examine the conditions for the application of that procedure.

21 First of all, it is apparent that the bankruptcy discharge procedure, as described by the referring court and set out in paragraphs 5 to 7 above, is intended to allow a natural person who has been declared bankrupt to be discharged from debts which, at the end of the bankruptcy proceedings initiated against that person, have not been settled, so that he may resume a business activity. Whether it is applied concurrently to or subsequent to the bankruptcy proceedings, the bankruptcy discharge procedure thus presupposes that the debtor's property has been liquidated in full and the division of the assets resulting from that liquidation between the creditors has not enabled all the debts to be settled. Furthermore, discharge from bankruptcy is not granted, under the second paragraph of Article 142 of the Law on insolvency and bankruptcy, unless the creditors in the bankruptcy proceedings have been at least satisfied in part.

22 Secondly, the bankruptcy discharge procedure applies only to natural persons who meet certain conditions, set out in the first paragraph of Article 142 of the Law on insolvency and bankruptcy, which relate to the debtor's conduct prior to the initiation of the bankruptcy proceedings and in the course of those proceedings. It is apparent, inter alia, from those conditions that the debtor, on one hand, cannot have benefited already from such a procedure in the ten years preceding the request, cannot have been found guilty of fraudulent bankruptcy, an economic offence or an offence committed in connection with the pursuit of an undertaking's activity, or have deducted the assets of the undertaking, organised its insolvency or aggravated that insolvency by committing credit fraud and, on the other hand, must have been cooperative and acted with diligence during the bankruptcy proceedings. Those conditions seem to concern, essentially, the debtor's probity and good faith and thereby are such as to allow only debtors of good faith to benefit from the bankruptcy discharge procedure.

23 Lastly, as regards the conduct of the procedure, Article 143 of the Law on insolvency and bankruptcy provides, first, that the court deciding on the procedure must check that the conditions laid down in Article 142 of that law are met, second, that the bankruptcy administrator and the creditors' committee must be consulted and, third and lastly, that the creditors who have not been satisfied in full, the public prosecutor and any other interested party

may bring an action against the decision of that court declaring irrecoverable the debts which have not been settled in full in the bankruptcy proceedings. Thus, the bankruptcy discharge procedure involves an examination conducted on a case-by-case basis by a judicial body. It also permits the Member State concerned, holding a VAT claim, first, to issue an opinion at the request of the debtor seeking to benefit from that procedure, prior to the decision ruling on that request, and, secondly, to bring an action, as appropriate, against the decision declaring the VAT debts which have not been settled in full to be irrecoverable, leading to a second review by a court.

24 It is apparent from those considerations that, like the procedure for an arrangement with creditors examined in the judgment of 7 April 2016, *Degano Trasporti* (C-546/14, EU:C:2016:206, paragraph 28), the bankruptcy discharge procedure at issue in the main proceedings is subject to strict conditions for its application offering guarantees so far as concerns, inter alia, the recovery of VAT claims and that, having regard to those conditions, it does not constitute a general and indiscriminate waiver of collecting VAT and is not contrary to the obligation on Member States to ensure collection of all of the VAT due on their territory as well as the effective collection of the European Union's own resources (see judgment of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 28).

25 As regards the rules on State aid, it is settled case-law that classification of a national measure as 'State aid' requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited).

26 So far as concerns the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of 'State aid', within the meaning of Article 107(1) TFEU, it is clear from equally settled case-law of the Court that the assessment of that condition requires a determination whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited).

27 Further, it must be recalled that the fact that only taxpayers satisfying the conditions for the application of a measure can benefit from the measure cannot, in itself, make it into a selective measure (see, to that effect, judgments of 29 March 2012, *3M Italia*, C-417/10, EU:C:2012:184, paragraph 42, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 59).

28 In the present case, it is sufficient to note that, under the provisions of the Law on insolvency and bankruptcy governing the bankruptcy discharge procedure, the persons not granted the benefit of that procedure, either because they do not fall within the scope of the procedure or because the conditions laid down in Article 142 of that law are not fulfilled, are not in a comparable factual and legal situation to that of the persons granted the benefit of that procedure, having regard to the objective of those provisions, which is, as is apparent from paragraphs 10 and 12 and from paragraphs 21 and 22 above, to allow a natural person declared bankrupt, who has acted in good faith as a debtor, to resume a business activity discharged of the debts which, at the end of the bankruptcy proceedings initiated against that person have not been settled.

29 It follows, without there being any need to examine the other conditions mentioned in paragraph 25 above, that discharge from bankruptcy as provided for in the Law on insolvency and bankruptcy cannot be classified as State aid.

30 Having regard to all those considerations, the answer to the question referred is that EU law, in particular Article 4(3) TEU and Articles 2 and 22 of the Sixth Directive and the rules on State aid, must be interpreted to the effect that they do not preclude VAT debts from being declared irrecoverable under national legislation, such as that at issue in the main proceedings, providing for a bankruptcy discharge procedure by means of which a court may, under certain conditions, declare irrecoverable the debts of a natural person which have not been settled by the close of the bankruptcy proceedings initiated against that person.

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

EU law, in particular Article 4(3) TEU and Articles 2 and 22 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, and the rules on State aid, must be interpreted to the effect that it does not preclude value added tax debts from being declared irrecoverable under national legislation, such as that at issue in the main proceedings, providing for a bankruptcy discharge procedure by means of which a court may, under

certain conditions, declare irrecoverable the debts of a natural person which have not been settled by the close of the bankruptcy proceedings initiated against that person.

European Court of Human Rights Grand Chamber

A and B v. Norway

15 November 2016

Case numbers: 24130/11 and 29758/11

Penalties – Ne bis in idem – Dual criminal and administrative proceedings – Permitted if sufficiently connected in substance and in time

Summary

(point 131) Dual criminal and administrative proceedings are compatible with the "ne bis in idem" criterion in Art. 4 of Protocol No. 7, if they are sufficiently connected in substance and in time.

(point 132) Material factors for determining whether there is a sufficiently close connection in substance include:

- whether the different proceedings pursue complementary purposes and thus address, not only in abstracto but also in concreto, different aspects of the social misconduct involved;

- whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (idem);

- whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set;

- and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.

(point 133) In this regard, it is also instructive to have regard to the manner of application of Article 6 of the Convention in the type of case that is now under consideration. The extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings is an important factor. Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law. The additional factor that those proceedings do not carry any significant degree of stigma renders it less likely that the combination of proceedings will entail a disproportionate burden on the accused person. Conversely, the fact that the administrative proceedings have stigmatising features largely resembling those of ordinary criminal proceedings enhances the risk that the social purposes pursued in sanctioning the conduct in different proceedings will be duplicated (bis) rather than complementing one another.

(point 134) Where the connection in substance is sufficiently strong, the requirement of a connection in time nonetheless remains and must be satisfied. This does not mean, however, that the two sets of proceedings have to be conducted simultaneously from beginning to end. It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice.

The connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time, even where the relevant national system provides for an "integrated" scheme separating administrative and criminal components. The weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings.

There was no violation of this principle in the case of A and B v. Norway, where the total length of the proceedings against the two applicants amounted to approximately five years and the criminal proceedings continued for less than two years after the tax decisions had acquired legal force, and where the integration between the two proceedings was evident through the fact that the indictments against the applicants were issued before the tax authorities' decisions to amend their tax assessments were taken and the District Court convicted them only months after those tax decisions.

The European Court of Human Rights, sitting as a Grand Chamber
(...)
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 24130/11 and 29758/11) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 28 March 2011 and 26 April 2011 respectively, by two Norwegian nationals, Mr A and Mr B ("the

applicants"). The President of the Grand Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

(…)

4. The applicants alleged, in particular, that, in breach of Article 4 of Protocol No. 7 to the Convention, they had been both prosecuted and punished twice in respect of the same tax offence.

(…)

8. The applicants and the Government each filed observations on the admissibility and merits of the applications.

9. In addition third-party comments were received from the Governments of Bulgaria, the Czech Republic, Greece, France, the Republic of Moldova and Switzerland, which had been granted leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The first applicant, Mr A, was born in 1960 and lives in Norway. The second applicant, Mr B, was born in 1965 and lives in Florida, United States of America.

12. The applicants and Mr E.K. owned a Gibraltar-registered company Estora Investment Ltd. ("Estora"). Mr T.F. and Mr G.A. owned the Samoa/Luxembourg-registered company Strategic Investment AS ("Strategic"). In June 2001 Estora acquired 24% of the shares in Wnet AS. Strategic acquired 46% of the shares in Wnet AS. In August 2001 all the shares in Wnet AS were sold to Software Innovation AS, at a substantially higher price. The first applicant's share of the sale price was 3,259,341 Norwegian *kroner* (NOK) (approximately 360,000 euros (EUR)). He transferred this amount to the Gibraltar-registered company Banista Holding Ltd., in which he was the sole shareholder. The second applicant's share of the sale price was NOK 4,651,881 (approximately EUR 500,000). He transferred this amount to Fardan Investment Ltd., in which he was the sole shareholder.

Mr E.K., Mr G.A. and Mr T.F. made gains on similar transactions, while Mr B.L., Mr K.B. and Mr G.N. were involved in other undeclared taxable transactions with Software Innovation AS.

The revenue from these transactions, amounting to approximately NOK 114.5 million (approximately EUR 12.6 million), was not declared to the Norwegian tax authorities, resulting in unpaid taxes totalling some NOK 32.5 million (approximately EUR 3.6 million).

13. In 2005 the tax authorities started a tax audit on Software Innovation AS and looked into the owners behind Wnet AS. On 25 October 2007 they filed a criminal complaint against T.F. with *Økokrim* (the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) with regard to matters that later led to the indictment of the first applicant, along with the other persons mentioned above and the second applicant, for aggravated tax fraud.

The persons referred to in paragraph 12 above were subsequently prosecuted, convicted and sentenced to terms of imprisonment for tax fraud in criminal proceedings. It may also be noted that:

- the prison term to which Mr E.K. was sentenced at first instance was upheld at second instance, even though the second-instance court found it somewhat mild; in the meantime he had had a 30% tax penalty imposed on him;
- the length of Mr B.L.'s term of imprisonment was fixed in the light of his having previously had a 30% tax penalty imposed on him;
- Mr G.A. was neither sentenced to a fine nor had a tax penalty imposed on him;
- Mr T.F. was in addition sentenced to a fine corresponding to the level of a 30% tax penalty;
- Mr K.B. and Mr G.N. were each sentenced to a fine in accordance with the approach set out in the Supreme Court's ruling in *Rt*. 2011 p. 1509, with reference to *Rt*. 2005 p. 129, summarised at paragraph 50 below.

A summary of the particular circumstances pertaining to the first and second applicants is given below.

A. The first applicant

14. The first applicant was interviewed first as a witness on 6 December 2007; on 14 December 2007 he was arrested and gave evidence as a person charged ("*siktet*"). He admitted the factual circumstances but did not accept criminal liability. He was released after four days.

15. On 14 October 2008 the first applicant was indicted for violations of sections 12-1(1)(a), cf. 12-2, of the Tax Assessment Act 1980 (*ligningsloven*) (see paragraph 43 below for the text of these provisions).

16. On 24 November 2008 the Tax Administration (*skattekontoret*) amended his tax assessment for the years 2002 to 2007, after issuing a warning to that effect on 26 August 2008, with reference *inter alia* to the tax audit, to the criminal investigation, to the evidence given by him, as mentioned in paragraph 13 above, and to documents seized by *Økokrim* in the investigation. For the year 2002 the amendment was made on the ground that the first applicant had omitted to declare a general income of NOK 3,259,341 (approximately EUR 360,000), having instead declared a loss of NOK 65,655. Moreover, with reference to sections 10-2(1) and 10-4(1) of the Tax Assessment Act (see paragraph 42 below for the text of these provisions), the Tax Administration ordered him to pay a tax penalty of 30%, to be calculated on

the basis of the tax that he owed in respect of the undeclared amount. The decision had regard *inter alia* to evidence given by the first and second applicants during their interviews in the criminal investigation. The first applicant did not lodge an appeal against that decision and paid the outstanding tax due, with the penalty, before the expiry of the three-week time-limit for lodging an appeal.

17. On 2 March 2009 the Follo District Court (*tingrett*) convicted the first applicant on charges of aggravated tax fraud and sentenced him to one year's imprisonment on account of his having failed to declare, in his tax return for 2002, the sum of NOK 3,259,341 in earnings obtained abroad. In determining the sentence the District Court had regard to the fact that the first applicant had already been significantly sanctioned by the imposition of the tax penalty.

18. The first applicant appealed, complaining that, in breach of Article 4 of Protocol No. 7 to the European Convention on Human Rights, he had been both prosecuted and punished twice: in respect of the same offence under section 12-1 he had been charged and indicted by the public prosecutor, had then had a tax penalty imposed on him by the tax authorities, which he had paid, and had thereafter been convicted and sentenced.

19. In a judgment of 12 April 2010 the Borgarting High Court (*lagmannsrett*) unanimously rejected his appeal; similar reasoning was subsequently given by the Supreme Court (*Høyesterett*) in a judgment of 27 September 2010 (summarised below).

20. In its judgment of 27 September 2010 the Supreme Court first considered whether the two sets of proceedings in question had concerned the same factual circumstances (*samme forhold*). In this connection it noted the developments in the Convention case-law expounded in the Grand Chamber judgment of *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, §§ 52, 53, 80-82, 84, ECHR 2009) and the attempt in that judgment to harmonise through the following conclusion:

> *"... Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same. ... The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and [are] inextricably linked together in time and space ..."*.

21. In the present instance, the Supreme Court observed, there was no doubt that the factual circumstances underlying the decision to impose tax penalties and the criminal prosecution had sufficient common features to meet these criteria. In both instances, the factual basis was the omission to declare income on the tax return. The requirement that the proceedings relate to the same matter had accordingly been met.

22. The Supreme Court next examined whether both sets of proceedings concerned an "offence" within the meaning of Article 4 of Protocol No. 7. In this regard the Supreme Court reiterated its ruling as reported in *Norsk Retstidende* ("*Rt.*") 2002 p. 509 (see paragraph 45 below) that tax penalties at the ordinary level (30%) were consistent with the notion of "criminal charge" in Article 6 § 1. That earlier assessment had relied on the three so-called "*Engel* criteria" (the legal classification of the offence under national law; the nature of the offence; and the degree of severity of the penalty that the person concerned risked incurring) as spelled out in the Court's judgment in *Engel and Others v. the Netherlands* (8 June 1976, § 82, Series A no. 22). Of importance for the Supreme Court's assessment was the general preventive purpose of the tax penalty and the fact that, because 30% was a high rate, considerable sums could be involved. The Supreme Court further had regard to its judgment as reported in *Rt*. 2004 p. 645, where it had held in the light of the Strasbourg case-law (to the effect that the notion of "penalty" should not have different meanings under different provisions of the Convention) that a 30% tax penalty was also a criminal matter for the purposes of Article 4 of Protocol No. 7 – a stance adopted without further discussion in *Rt*. 2006 p. 1409.

23. The Supreme Court also noted that both the Directorate of Taxation (*Skattedirektoratet*) and the Director of Public Prosecutions (*Riksadvokaten*) were of the view that it was unlikely that a tax penalty at the ordinary level would not be deemed criminal punishment for the purposes of Article 4 of Protocol No. 7.

24. The Supreme Court further had regard to the Court's more recent case-law (*Mjelde v. Norway* (dec.), no. 11143/04, 1 February 2007; *Storbråten v. Norway* (dec.), no. 12277/04, 1 February 2007; *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007, with references to *Malige v. France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII; and *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-XIII) to the effect that a wider range of criteria than merely the *Engel* criteria applied to the assessment under Article 4 of Protocol No. 7. It found confirmation in *Sergey Zolotukhin* (cited above, §§ 52-57) – later followed in *Ruotsalainen v. Finland* (no. 13079/03, §§ 41-47, 16 June 2009) – that the three *Engel* criteria for establishing the existence of a "criminal charge" for the purposes of Article 6 applied equally to the notion of criminal punishment in Article 4 of Protocol No. 7.

25. Against this background, the Supreme Court found no ground on which to depart from its above-mentioned rulings of 2004 and 2006, holding that tax penalties at the ordinary level were to be regarded as "criminal punishment" (*straff*) for the purposes of Article 4 of Protocol No. 7.

26. It went on to observe that a condition for protection under the above-mentioned provision was that the decision which barred further prosecution –

in this case the decision of 24 November 2008 to impose ordinary tax penalties – had to be final. That decision had not been appealed against to the highest administrative body within the three-week time-limit, which had expired on 15 December 2008, and was in this sense final. If, on the other hand, the expiry of the six-month time-limit for lodging a judicial appeal under section 11-1(4) of the Tax Assessment Act were to be material, the decision had not yet become final when the District Court delivered its judgment of 2 March 2009.

27. The words "finally acquitted or convicted" in Article 4 of Protocol No. 7 had been formulated with a view to situations where the barring decision was a judgment in a criminal case. The Court had established that a decision was final when it was *res judicata*, when no further ordinary remedies were available. In this regard, the time when a decision became *res judicata* according to the rules of national law would be decisive. Neither the wording of the provision, nor its drafting history, nor the case-law provided any guidance for situations where the barring decision was an administrative one. It was pointed out that, in *Rt*. 2002 p. 557, the Supreme Court had expressed an authoritative view to the effect that a tax assessment decision, including a decision on tax penalties, ought to be regarded as final when the taxpayer was precluded from challenging it (p. 570), without specifying, however, whether it was the time-limit for an administrative appeal, or rather for a judicial appeal, which was decisive. In the present case, the Supreme Court observed that the best solution would be to consider that the three-week time-limit for an administrative appeal was decisive in relation to Article 4 of Protocol No. 7. Otherwise, there would be clarity only after six months in cases where the taxpayer did not institute proceedings before the courts and, where he or she did so, only after a legally enforceable judgment – a period that would vary and could be lengthy. The decision of 24 November 2008 was therefore to be considered as final for the purposes of Article 4 of Protocol No. 7.

28. The Supreme Court noted that the first applicant had been charged on 14 December 2007 and that the warning about the amendment of his tax assessment had been sent on 26 August 2008. Thereafter the case concerning the tax penalties and the criminal case had been conducted in parallel until they had been decided respectively by a decision of 24 November 2008 and a judgment of 2 March 2009. A central question in this case was whether there had been successive prosecutions, which would be contrary to Article 4 of Protocol No. 7, or parallel treatment, which was permissible to some extent. In this connection the Supreme Court had regard to two inadmissibility decisions, *R.T. v. Switzerland* (dec.), no. 31982/96, 30 May 2000; and *Nilsson v. Sweden*, cited above, in particular the following passage from the latter:

"However, the Court is unable to agree with the applicant that the decision to withdraw his driving licence amounted to new criminal proceedings being brought against him. While the different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, in substance and in time, to consider the withdrawal to be part of the sanctions under Swedish law for the offences of aggravated drunken driving and unlawful driving (see R.T. v. Switzerland, cited above, and, mutatis mutandis, Phillips v. the United Kingdom, no. 41087/98, § 34, ECHR 2001-VII). In other words, the withdrawal did not imply that the applicant was 'tried or punished again ... for an offence for which he had already been finally ... convicted', in breach of Article 4 § 1 of Protocol No. 7."

29. In the present case, the Supreme Court held that there could be no doubt that there was a sufficient connection in substance and time. The two cases had their basis in the same factual circumstances – the lack of information on the tax return which had led to a deficient tax assessment. The criminal proceedings and the administrative proceedings had been conducted in parallel. After the first applicant had been charged on 14 December 2007, a warning had followed on 26 August 2008 about an amendment to his tax assessment, then an indictment on 14 October 2008, the tax authorities' decision of 24 November 2008 to amend the assessment, and the District Court's judgment of 2 March 2009. To a great extent the administrative-law and criminal-law processing had been interconnected.

30. The purpose behind Article 4 of Protocol No. 7, to provide protection against the burden of being subjected to a new procedure, had applied to a lesser degree here, in as much as the first applicant had had no legitimate expectation of being subjected to only one procedure. In such a situation the interest in ensuring effective prosecution was preponderant.

B. The second applicant

31. Following the tax audit in 2005 referred to in paragraph 13 above, during the autumn of 2007 the tax authorities reported to *Økokrim* that the second applicant had failed to declare on his tax return for the tax year 2002 income of NOK 4,561,881 (approximately EUR 500,000) earned from his sale of certain shares.

32. On 16 October 2008 the Tax Administration put the second applicant on notice that it was considering amending his tax assessment and imposing a tax penalty, referring *inter alia* to the tax audit, the criminal investigation and the evidence given by him, mentioned in paragraph 13 above, and to documents seized by *Økokrim* in the investigation. On 5 December 2008 the Tax Administration amended his tax assessment to the effect that he owed NOK 1,302,526 (approximately EUR 143,400) in tax in respect of the

undeclared income. In addition, with reference to sections 10-2(1) and 10-4(1) of the Tax Assessment Act, it decided to impose a tax penalty of 30%. The decision had regard *inter alia* to evidence given by the first and second applicants during interviews in the criminal investigation. The second applicant paid the tax due, with the penalty, and did not appeal against the decision, which became final on 26 December 2008.

33. In the meantime, on 11 November 2008 the public prosecutor indicted the second applicant for a violation of section 12-1(1)(a), cf. section 12-2, of the Tax Assessment Act on the ground that for the tax year(s) 2001 and/or 2002 he had omitted to declare income of NOK 4,651,881 on his tax return, which represented a tax liability of NOK 1,302,526. The public prosecutor requested the Oslo City Court (*tingrett*) to pass a summary judgment based on his confession (*tilståelsesdom*). In addition, Mr E.K., Mr B.L. and Mr G.A. pleaded guilty and consented to summary trials on a guilty plea.

34. On 10 February 2009 the second applicant (unlike E.K., B.L. and G.A.) withdrew his confession, as a result of which the public prosecutor issued a revised indictment on 29 May 2009, including the same charges.

35. On 30 September 2009 the City Court, after holding an adversarial hearing, convicted the second applicant on the charges of aggravated tax fraud and sentenced him to one year's imprisonment, account being taken of the fact that he had already had a tax penalty imposed on him.

36. The second applicant appealed against the City Court procedure to the Borgarting High Court, arguing in particular that by reason of the prohibition against double jeopardy in Article 4 of Protocol No. 7, the fact that he had had a tax penalty imposed on him constituted a bar against criminal conviction. Thus he requested that the City Court's judgment be quashed (*opphevet*) and that the prosecution case be dismissed (*avvist*) from the courts.

37. In a judgment of 8 July 2010 the High Court rejected the second applicant's appeal, relying essentially on its reasoning in the case of the first applicant, which was similar to that of the Supreme Court summarised above (see paragraphs 20 to 30 above). Thus, the High Court found that the tax authorities' decision of 5 December 2008 ordering him to pay a tax penalty of 30% did constitute a criminal punishment (*straff*); that the decision had become "final" upon the expiry of the time-limit for lodging an appeal on 26 December 2008; and that the decision on the tax penalty and the subsequent criminal conviction concerned the same matter.

38. Moreover, as in the case of the first applicant, the High Court considered that parallel proceedings – both administrative and criminal – were to some extent permissible under Article 4 of Protocol No. 7, provided that the second proceedings had commenced before the first had become final. Where that minimum requirement had been fulfilled, an assessment had to be made of the state of progress of the second set and, not least, as to whether there was a sufficient connection in substance and in time between the first and second decisions.

39. As to the concrete assessment of the second applicant's case, the High Court observed that the criminal proceedings and the tax proceedings had in fact been conducted in parallel since as far back as the tax authorities' complaint to the police in the autumn of 2007 and until the decision to impose the tax penalty had been taken in December 2008. This state of affairs was similar to the case of the first applicant. The second applicant had been indicted and the case referred to the City Court with a request for a summary judgment on the basis of his confession on 11 November 2008, before the decision on the tax penalty. The criminal proceedings had thus reached a relatively advanced stage by the time the decision to impose the tax penalty had been taken. The *nine*-month period – from when the tax authorities' decision of 5 December 2008 had become final until the second applicant's conviction of 30 September 2009 by the City Court – had been somewhat longer than the *two-and-a-half*-month period in the case of the first applicant. However, this could be explained by the fact that the second applicant had withdrawn his confession in February 2009, with the consequence that he had had to be indicted anew on 29 May 2009 and an ordinary trial hearing had had to be scheduled. Against this background, the High Court (like the City Court) concluded that there was undoubtedly a sufficient connection in substance and time between the decision on the tax penalties and the subsequent criminal conviction.

40. On 29 October 2010 the Appeals Leave Committee of the Supreme Court refused the second applicant leave to appeal, finding that such leave was warranted neither by the general importance of the case nor by any other reason.

II. RELEVANT DOMESTIC LAW AND PRACTICE

41. By virtue of section 10-2(1) of chapter 10 on Tax Penalties ("*Tilleggsskatt*") of the Tax Assessment Act 1980, taxpayers who have provided the tax authorities with inaccurate or incomplete information which has led to or could have led to a deficiency in their tax assessment may be liable to pay a tax penalty. Under the terms of section 10-4(1), tax penalties will in general be assessed at the level of 30% of the amount of tax which has been or could have been evaded.

42. At the time of the applicants' offences, sections 10-2, 10-3 and 10-4 of the Act provided as follows:

Section 10-2 (Tax penalties)

"1. If the tax authorities find that the taxpayer has given the tax authorities incorrect or incomplete

information in a tax return, income statement, appeal or other written or oral statement, which has or could have resulted in a deficiency in the assessment of tax, a tax penalty shall be imposed on the taxpayer as a percentage of the tax that has or could have been evaded.

Social security contributions are also regarded as tax in this connection.

2. If a taxpayer has failed to submit a tax return or income statement as required, the tax penalty shall be calculated based on the tax that is determined in the assessment.

3. A wealth or income supplement that provides grounds for the imposition of a tax penalty is regarded as representing the upper part of the taxpayer's wealth or income. If the taxpayer is to pay a tax penalty based on different rates for the same year, the tax on the basis of which the tax penalty is to be calculated will be distributed proportionately based on the amount of the wealth or income to which the various rates are to apply. 4. The same obligation that applies to the taxpayer pursuant to this section also applies to his or her estate or heirs.

5. Before a tax penalty is assessed, the taxpayer shall be notified and given an appropriate deadline within which to express his or her opinion.

6. Tax penalties may be assessed within the deadlines provided for in section 9-6. They may be assessed at the same time as the assessment of the tax on the basis of which they are to be calculated or in a subsequent special assessment."

Section 10-3 (Exemption from tax penalties)

"Tax penalties shall not be imposed:

(a) as a result of obvious calculation or clerical errors in the taxpayer's statements, or

(b) where the taxpayer's offence must be regarded as excusable owing to illness, old age, inexperience or other cause for which he or she cannot be blamed, or

(c) where the tax penalty is less than NOK 400 in total."

Section 10-4 (Tax penalty rates)

"1. Tax penalties shall in general be assessed at 30 per cent. If an act as mentioned in section 10-2(1) has been committed wilfully or with gross negligence, a tax penalty of up to a maximum of 60 per cent may be assessed. The rate shall be 15 per cent where the incorrect or incomplete information applies to items that are declared without solicitation by an employer or other party pursuant to Chapter 6, or applies to circumstances that are easy to verify by means of information otherwise available to the tax authorities.

2. Tax penalties shall be assessed at half the rates that are specified in subsection 1, first and third sentences, where there are circumstances as mentioned in section 10-3 (b), but these circumstances do not dictate that the tax penalty must be eliminated completely.

3. Tax penalties may be calculated at a lower rate than that specified in subsection 2 or omitted where the taxpayer, or the estate or heirs thereof, voluntarily correct or supplement the information previously provided, so that the correct tax can be calculated. This does not apply if the correction may be regarded as having been brought about by control measures that have been or will be implemented or by information that the tax authorities have obtained or could have obtained from other parties."

43. Chapter 12 on Punishment ("*Straff*") includes the following provisions of relevance to the present case:

Section 12-1 (Tax fraud)

"1. A person shall be punished for tax fraud if he or she, with intent or as a result of gross negligence,

(a) provides the tax authorities with incorrect or incomplete information when he or she is aware or ought to be aware that this could lead to advantages pertaining to taxes or charges, ..."

Section 12-2 (Aggravated tax fraud)

"1. Aggravated tax fraud shall be punished by a fine or up to six years' imprisonment. Aiding and abetting shall be punished likewise.

2. In deciding whether tax fraud is aggravated, particular emphasis shall be placed on whether the act may lead to the evasion of a very significant amount in tax or charges, if the act is carried out in a manner which makes its discovery particularly difficult, if the act has been carried out by abuse of position or a relationship of trust or if there has been aiding and abetting in connection with the performance of professional duties.

3. In application of the criteria stated in subsection 2, several offences may be considered in conjunction.

4. The present section shall also be applicable in the event of ignorance about the factors that render the act aggravated where such ignorance is seriously negligent."

44. According to the Supreme Court's case-law, the imposition of a tax penalty of 60% is to be viewed as a "criminal charge" within the meaning of Article 6 of the Convention (*Rt*. 2000 p. 996). Where criminal charges have been brought thereafter on account of the same conduct, the trial court ought to dismiss the charges; otherwise there would be a breach of Article 4 of Protocol No. 7 (two plenary judgments of 3 May 2002 reported in *Rt.* 2002 p. 557 and *Rt.* 2002 p. 497).

45. The Supreme Court also ruled that liability for a 30% tax penalty constituted a "criminal charge" for the purposes of Article 6 of the Convention (third judgment of 3 May 2002, *Rt*. 2002 p. 509). In subsequent judgments reported in *Rt*. 2004 p. 645 and

Rt. 2006 p. 1409, it held that a 30% tax penalty was also a criminal matter for the purposes of Article 4 of Protocol No. 7.

46. It should also be pointed out that, with respect to the nature of ordinary penalties of 30% the Supreme Court referred to the drafting history (*Ot.prp.nr 29 (1978-1979*), pp. 44-45). It found that the Ministry attached significant weight to considerations of general prevention. A strong prospect of a sanction in the form of a tax penalty was viewed as more important than having fewer and stricter (criminal) sanctions. The tax penalty was first and foremost to be a reaction to a taxpayer's having provided incorrect or incomplete returns or information to the tax authorities, and to the considerable work and costs incurred by the community in carrying out checks and investigations. It was considered that those costs should to a certain extent be borne by those who had provided the incorrect or incomplete information (*Rt.* 2002 p. 509, at p. 520). The purposes of the rules on ordinary tax penalties were first and foremost characterised by the need to enhance the effectiveness of the taxpayer's duty to provide information and considerations of general prevention (*Rt*. 2006 p. 1409). The taxpayer had an extensive duty to provide such information and material as was relevant for the tax assessment. This duty was fundamental to the entire national tax system and was underpinned by a system of audits and effective sanctions in the event of a violation. Tax assessment was a mass operation involving millions of citizens. The purpose of tax penalties was to secure the foundations of the national tax system. It was accepted that a properly functioning taxation system was a precondition for a functioning State and thus a functioning society (*Rt.* 2002 p. 509, at p. 525).

47. In a plenary judgment of 14 September 2006, following the Court's inadmissibility decision of 14 September 2004 in the case of *Rosenquist v. Sweden* ((dec.), no. 60619/00, 14 September 2004), the Supreme Court held that the imposition of a tax penalty of 30% and criminal proceedings for tax fraud did not concern the same offence within the meaning of Article 4 of Protocol No, 7 (*Rt*. 2006 p. 1409). In its judgment (of September 2010) in the first applicant's case, the Supreme Court reversed this case-law and found that the administrative proceedings and the criminal proceedings concerned the same offence for the purpose of Article 4 of Protocol No. 7 (see paragraph 20 above).

48. In the meantime, following the Court's judgment of 10 February 2009 in *Sergey Zolotukhin v. Russia* (cited above) the Director of Public Prosecutions (*Riksadvokaten*) issued on 3 April 2009 Guidelines (RA-2009-187) with immediate effect. According to these guidelines, the Supreme Court's judgment of 2006 could no longer be followed. The guidelines stated *inter alia* as follows:

"4. The same offence – the notion of 'sameness'

It has traditionally been assumed that the notion of idem in Article 4 of Protocol No. 7 comprised two elements, one concerning the factual circumstances and another relating to the law. According to this interpretation, the second set of proceedings (in practice, the criminal case) would only concern the same offence as the previous set (in practice, the tax penalty) if both cases concerned the same facts – 'the same conduct' – and if the content of the relevant provisions was mainly identical (contained the 'same essential elements').

In its plenary decision in Rt-2006-1409, the Supreme Court found – with particular reference to the European Court's inadmissibility decision of 14 September 2004 in Rosenquist v. Sweden (dec.) no. 60619/00 – that a decision to impose ordinary tax penalties did not preclude subsequent criminal proceedings, since the two proceedings concerned different offences within the meaning of Article 4 of Protocol No. 7. The majority (14 justices) found that the provision regarding ordinary tax penalties in section 10-2 of the Tax Assessment Act, cf. Section 10-4(1) first sentence, did not contain the same essential elements as the penal provision in section 12-1 of the Tax Assessment Act. In the view of the Supreme Court, the decisive difference lay in the fact that, while the penal provision could only be applied in cases involving intent or gross negligence, ordinary tax penalties were imposed on a more or less objective basis. Reference was also made to the difference in purpose between these sanctions.

In the Grand Chamber judgment in Zolotukhin, the Court carried out an extensive review of the principle of the notion of 'idem' in Article 4 of the Protocol, which led to the Court deviating from the previously prevailing interpretation. Following Zolotukhin, it is clear that the assessment of whether both proceedings concern the same offence must take place on the basis of the act alone (see in particular paragraphs 82 and 84 of the judgment). The two sets of proceedings will concern the same offence if they both apply to 'identical facts or facts which are substantially the same' (paragraph 82). The assessment should therefore 'focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space ...' (paragraph 84).

In the opinion of the Director General of Public Prosecutions, the Supreme Court's view in Rt-2006-1409, which was primarily based on differences in the criterion of guilt, cannot be upheld following the European Court's judgment in Zolotukhin. As long as the imposition of tax penalties and the subsequent criminal case are based on the same act or omission, as will normally be the case, it must be assumed that, pursuant to Article 4 of Protocol No. 7, the imposition of ordinary tax penalties will also preclude subsequent

criminal proceedings. Following discussions with the Norwegian Directorate of Taxes, the Director General of Public Prosecutions understands that the Directorate shares this opinion.

The new notion of 'idem' in Article 4 of the Protocol will undoubtedly give rise to new questions about how great the differences in factual circumstances must be before sameness is deemed non-existent. However, these questions must be resolved in practice as the cases arise. It should be noted that the discussion in the Zolotukhin judgment indicates that the Court is less inclined to consider a sequence of events as one entity than is Norwegian domestic law in connection with the assessment of whether a continued offence exists.

5. New procedure

As is known, the previous Guidelines (see in particular section 3 of the Director General of Public Prosecutions' letter of 26 March 2007 (RA-2007-120) to the regional offices of the public prosecutors and the chiefs of police) were based on the fact that, for ordinary tax penalties, it was possible to apply the two-track system set out in the Tax Assessment Act. Following the change in the European Court's case-law, it is necessary to apply a 'one-track' system also as regards ordinary tax penalties.

As described above, the Director General of Public Prosecutions and the Norwegian Directorate of Taxes find that it is not justifiable to base a new procedure on the assumption that the courts will no longer find that imposition of ordinary tax penalties constitutes a criminal sanction within the meaning of the Convention. The issue is presumably arguable, but there is too much uncertainty; also bearing in mind the relatively large number of cases involved.

Even if the Court's case law has not changed as regards parallel proceedings, we hold – as previously – that in the event of mass action – which is what we would be facing – it will be too complicated to base a procedure on parallel proceedings, i.e. on the administrative track and in the courts. Another matter is that in individual cases, where circumstances permit, agreements can be entered into with a view to parallel proceedings.

Following discussions, the Director General of Public Prosecutions and the Norwegian Directorate of Taxes agree on the following procedure: ..."

49. The Guidelines went on to set out the modalities of the "new procedures".

(a) As to new cases, namely those in which a decision had not yet been taken by the tax authority, the latter was to consider, on an independent basis, whether the punishable act was so serious as to warrant being reported to the police. If it decided to report the case, no tax penalty was to be imposed. Where a tax penalty was to be imposed, the case was not to be reported to the police.

As regards cases that had been reported to the police, it was pointed out that the imposition of a fine (through a criminal-law penalty notice or judgment) precluded a subsequent decision to impose a tax penalty. If the prosecuting authority found no basis for prosecution, the case was to be referred back to the tax authority for continued consideration and the person concerned was to be informed accordingly.

In cases where the tax authority had imposed an ordinary tax penalty and had also filed a report with the police, but where a decision to prosecute had yet to be made ("pending reports"), the proceedings ought to be dropped.

(b) Cases where criminal-law penalty notices had been issued but had not been accepted and where the tax authority had imposed tax penalties prior to reporting the case to the police, ought to be withdrawn and dropped. Penalty notices that had been accepted ought to be cancelled by the higher prosecuting authority. On the other hand, with reference to the power of discretion under Article 392(1) of the Code of Criminal Procedure recognised by the plenary Supreme Court in its judgment in Rt-2003-359, it was not necessary to cancel penalty notices accepted before 10 February 2009, the date of delivery of the *Zolotukhin* judgment.

(c) As regards cases brought to trial in the first-instance courts – on the basis of an indictment, a non-accepted penalty notice or a request for a judgment rendered on a guilty plea in summary proceedings – the prosecuting authority was to withdraw the case and drop the charges if the trial hearing had not yet taken place or, if it had, enter a claim for the case to be dismissed. Convictions that were not final and enforceable should be appealed against by the prosecution in favour of the convicted person and regardless of the outcome at first instance the prosecutor ought to enter a claim for annulment of the first-instance judgment and dismissal of the case by the courts.

(d) There was no question of reopening cases where a judgment had become final and enforceable prior to the date of delivery of the *Zolotukhin* judgment, i.e., before 10 February 2009. As for such decisions taken after this date, reopening could be envisaged in exceptional cases, but the person concerned should be informed that the prosecuting authority would not seek a reopening of its own motion.

50. With respect to the imposition of several criminal sanctions for the same conduct, Article 29 of the 2005 Penal Code (*Straffeloven*) provides that the resultant aggregate sanction must have a reasonable relationship to the offence committed. This provision is a clear expression of the general principle of proportionality that also applied in the Norwegian law on criminal sentencing under the former 1902 Penal Code. In the Supreme Court judgment *Rt.* 2009 p. 14, which concerned criminal proceedings for tax fraud, it

was held to follow from the principles of the 1902 Penal Code that regard should be had to the fact that a defendant had already had imposed on him a sanction – an administrative tax penalty – on account of his tax fraud; with the consequence that he should not be treated more severely than if the criminal offence of tax fraud had been adjudicated on together with the conduct sanctioned in the administrative proceedings. In *Rt*. 2011 p. 1509, the Supreme Court confirmed an earlier ruling in *Rt.* 2005 p. 129 that the principle (stated in *Rt.* 2004 p. 645) whereby an amount corresponding to the usual 30% administrative tax penalty could be incorporated into the fine, could not extend to criminal tax fraud cases where imprisonment as well as a fine was to be imposed. It also confirmed, as held in its 2005 ruling, that, in instances where an administrative tax penalty could no longer be imposed, the criminal fine ought to be more severe.

III. CASE OF *HANS ÅKEBERG FRANSSON* (C-617/10) BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

51. In his opinion delivered on 12 June 2012 in the above case before the Court of Justice of the European Union, the Advocate General Cruz Villalón stated as follows:

"2. Analysis of the second, third and fourth questions

70. The questions referred by the Haparanda tingsrätt [District Court] are particularly complex and are just as difficult as the issue which I dealt with above. On the one hand, the imposition of both administrative and criminal penalties in respect of the same offence is a widespread practice in the Member States, especially in fields such as taxation, environmental policies and public safety. However, the way in which penalties are accumulated varies enormously between legal systems and displays special features which are specific to each Member State. In most cases, those special features are adopted with the aim of moderating the effects of the imposition of two punishments by the public authorities. On the other hand, as we shall see below, the European Court of Human Rights recently gave a ruling on this subject and confirmed that such practices, contrary to how things might initially appear, infringe the fundamental right of ne bis in idem laid down in Article 4 of Protocol No 7 to the ECHR. However, the fact is that not all the Member States have ratified that provision, while others have adopted reservations or interpretative declarations in relation to it. The effect of that situation is that the requirement to interpret the Charter in the light of the ECHR and the case-law of the European Court of Human Rights (Article 52(3) of the Charter) becomes, so to speak, asymmetrical, leading to significant problems when it is applied to this case.

a) Article 4 of Protocol No 7 to the ECHR and the relevant case-law of the European Court of Human Rights

i) Signature and ratification of Article 4 of Protocol No 7 to the ECHR

71. The ne bis in idem principle was not an explicit part of the ECHR at the outset. It is common knowledge that the principle was incorporated into the ECHR by means of Protocol No 7, which was opened for signature on 22 November 1984 and entered into force on 1 November 1988. Among other rights, Article 4 contains the guarantee of the ne bis in idem principle, with the aim, according to the explanations on the protocol drawn up by the Council of Europe, of giving expression to the principle pursuant to which no one may be tried in criminal proceedings for an offence in respect of which he has already been finally convicted or acquitted.

72. Unlike the other rights laid down in the ECHR, the right in Article 4 of Protocol No 7 to the ECHR has not been unanimously accepted by the States signatories to the convention, including a number of Member States of the European Union. As at the date of delivery of this Opinion, Protocol No 7 has still not been ratified by Germany, Belgium, the Netherlands and the United Kingdom. Among the Member States which have ratified the protocol, France lodged a reservation to Article 4, restricting its application solely to criminal offences. ... In addition, at the time of signature, Germany, Austria, Italy and Portugal lodged a number of declarations leading to the same situation: restriction of the scope of Article 4 of Protocol No 7 so that the protection under that provision applies only to double punishment in respect of criminal offences, within the meaning laid down in national law. ...

73. The foregoing demonstrates clearly and expressively the considerable lack of agreement between the Member States of the European Union regarding the problems resulting from the imposition of both administrative and criminal penalties in respect of the same offence. The problematic nature of the situation is reinforced in the light of the negotiations on the future accession of the European Union to the ECHR, in which the Member States and the Union have decided to exclude, for the time being, the protocols to the ECHR, including Protocol No 7. ...

74. That lack of agreement can be traced back to the importance of measures imposing administrative penalties in a large number of Member States, in addition to the special significance also afforded to criminal prosecution and penalties in those Member States. On the one hand, States do not wish to abandon the characteristic effectiveness of administrative penalties, particularly in sectors where the public authorities seek to ensure rigorous compliance with the law, such as fiscal law or public safety law. On the other hand, the exceptional nature

of criminal prosecution and the guarantees which protect the accused during proceedings incline States to retain an element of decision-making power as regards actions which warrant a criminal penalty. That twofold interest in maintaining a dual – administrative and criminal – power to punish explains why, at the moment, a significant number of Member States refuse, by one means or another, to be bound by the case-law of the European Court of Human Rights, which, as I shall now go on to examine, has developed in a direction which practically excludes that duality."

52. On 26 February 2013, the Court of Justice of the European Union (Grand Chamber) held, *inter alia*, as follows:

"Consideration of the questions referred

Questions 2, 3 and 4

32. By these questions, to which it is appropriate to give a joint reply, the Haparanda tingsrätt asks the Court, in essence, whether the ne bis in idem principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

33. Application of the ne bis in idem principle laid down in Article 50 of the Charter to a prosecution for tax evasion such as that which is the subject of the main proceedings presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature.

34. In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties (see, to this effect, Case 68/88 Commission v Greece [1989] ECR 2965, paragraph 24; Case C-213/99 de Andrade [2000] ECR I-11083, paragraph 19; and Case C-91/02 Hannl-Hofstetter [2003] ECR I-12077, paragraph 17). These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

35. Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 Bonda [2012] ECR, paragraph 37).

36. It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (see, to this effect, inter alia Commission v. Greece, paragraph 24; Case C-326/88 Hansen [1990] ECR I-2911, paragraph 17; Case C-167/01 Inspire Art [2003] ECR I-10155, paragraph 62; Case C-230/01 Penycoed [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others [2005] ECR I-3565 paragraph 65).

37. It follows from the foregoing considerations that the answer to the second, third and fourth questions is that the ne bis in idem principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine."

THE LAW

ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

53. The applicants submitted that, in breach of Article 4 of Protocol No. 7, they had been both prosecuted and punished twice in respect of the same offence under section 12-1 of chapter 12 of the Tax Assessment Act, in that they had been charged and indicted by the public prosecutor, had then had tax penalties imposed on them by the tax authorities, which they had paid, and had thereafter been convicted and sentenced by the criminal courts. Article 4 of Protocol No. 7 reads:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

54. The Government contested that argument.

A. Admissibility

55. In the Court's view the applications raise complex issues of fact and Convention law, such that they cannot be rejected on the ground of being manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Neither are they inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The applicants

56. The applicants argued that, in breach of Article 4 of Protocol No. 7, they had been subjected to double jeopardy on account of the same matter, namely an offence under section 12-1(1) of the Tax Assessment Act, having been first accused and indicted by the prosecution services and having had tax penalties imposed on them by the tax authorities, which they had both accepted and paid, before being criminally convicted. Referring to the chronology of the proceedings complained of, the first applicant added that he had been prosecuted twice over a long period, which had exposed him to an unreasonably heavy burden, both physically and psychologically, leading to a heart attack and hospitalisation.

(a) Whether the first proceedings were criminal in nature

57. Agreeing with the Supreme Court's analysis on the basis of the *Engel* criteria and other relevant national case-law concerning tax penalties at the ordinary 30% level, the applicants found it obvious that the tax penalty proceedings, not only the tax fraud proceedings, were of a "criminal" nature and that both sets of proceedings were to be regarded as "criminal" for the purpose of Article 4 of Protocol No. 7.

(b) Whether the offences were the same (*idem*)

58. The applicants further shared the view expressed by the Supreme Court that there was no doubt that the factual circumstances underlying the decision to impose tax penalties and the criminal prosecution had sufficient common features to be regarded as the same offence. In both instances, the factual basis was the omission to declare income on the tax return.

(c) Whether and when a final decision had been taken in the tax proceedings

59. In the applicants' submission, the tax authorities' decision to impose the tax penalties had become final with the force of *res judicata* on 15 December 2008 in the case of the first applicant and on 26 December 2008 in the case of the second applicant, that is, before the District Court had convicted them in respect of the same conduct, on 2 March 2009 in the case of the first applicant and on 30 September 2009 in the case of the second applicant. No matter whether these sanctions were to be regarded as so-called parallel proceedings, the tax penalty decisions against the applicants had become final and had gained legal force before the applicants were convicted for exactly the same conduct by the Follo District Court and the Oslo City Court, respectively. Subjecting them to criminal punishment accordingly violated the *ne bis in idem* principle enshrined in Article 4 of Protocol No. 7.

(d) Whether there was duplication of proceedings (*bis*)

60. The applicants argued that they had been victims of duplication of proceedings such as was proscribed by Article 4 of Protocol No. 7. Since the administrative proceedings relating to the tax penalties had indeed been of a criminal nature, the prosecution authorities were obliged under Article 4 of the Protocol to discontinue the criminal proceedings as soon as the outcome of the administrative set had become final. However, they had failed to do so.

61. In the applicants' submission, whilst parallel proceedings were permissible under Norwegian law, the domestic authorities' use of this avenue had made it possible for them to coordinate their procedures and circumvent the prohibition in Article 4 of Protocol No. 7 and thus make the protection of that provision illusory. In the case of the first applicant, in particular, the use of the parallel proceedings model seemed to have been coordinated as a joint venture organised by prosecutors in cooperation with the tax authorities.

62. In the present case the prosecutors had simply waited until the tax authorities had decided to impose tax penalties before referring the related case for trial. Criminal and administrative proceedings had thus been coordinated, with the aim of trapping the applicants by means of two different sets of criminal provisions so as to impose on them additional tax and tax penalties and have them convicted for the same conduct, in other words double jeopardy. From the point of view of legal security, the possibility of conducting parallel proceedings was problematic. The strong underlying aim of this provision of the Protocol in protecting individuals against being forced to bear an excessive burden suggested that the possibilities for the authorities to pursue parallel proceedings ought to be limited.

63. From a due-process prospective, this option of concerted efforts between the administrative and prosecution authorities to prepare the conduct of parallel proceedings was contrary to the prohibition against double jeopardy in Article 4 of Protocol No. 7 and the Court's recent case-law as well as some national case-law. Consequently, this option allowing for parallel proceedings arranged between different authorities in the present case was questionable and failed to take due account of the strain on the applicants and the main interest behind Article 4 of Protocol No. 7.

64. During their "nightmare" experience in this case, so the applicants claimed, they had experienced great relief when the first applicant was called by the tax officer who stated that he could now "breathe a sigh of

relief" because of new written guidelines from the Director of Public Prosecutions, dated 3 April 2009, which banned double prosecution and double jeopardy, as in his case. With reference to *Zolotukhin,* these guidelines provided, *inter alia*, that at an appellate hearing, whether the lower court had decided on conviction or acquittal, the prosecutor should request that the judgment be set aside and the case be dismissed. By virtue of these new guidelines from the Director of Public Prosecutions and the fact that a tax penalty was classified as punishment, and because the decision on the tax penalty had become final and *res judicata* for the applicants, they reasonably expected that the penal proceedings against them would be discontinued on account of the prohibition against double jeopardy in Article 4 of Protocol No. 7. Besides, pursuant to the same new guidelines, other defendants who had been charged with the same offences in the same case-complex had not had tax penalties imposed on them, because they had already been convicted and sentenced to imprisonment for violation of section 12-2 of the Tax Assessment Act. The applicants, however, unlike the other defendants in the same case-complex, had been convicted and sentenced to imprisonment despite having had additional tax and a tax penalty imposed on them in respect of the same conduct. The Government's argument that an important consideration was the need to ensure equality of treatment with other persons involved in the same tax fraud was thus unconvincing.

65. According to the applicants, they had been psychologically affected even more when, notwithstanding the above guidelines, the prosecutors continued the matter by invoking legal parallel proceedings and denied the applicants' request that their conviction by the District Courts be expunged and the criminal case against them be dismissed by the courts. In this connection the first applicant produced various medical certificates, including from a clinic for heart surgery.

2. The Government

(a) Whether the first proceedings were criminal in nature

66. The Government invited the Grand Chamber to confirm the approach taken in a series of cases predating the *Zolotukhin* judgment, namely that a wider range of factors than the *Engel* criteria (formulated with reference to Article 6) were relevant for the assessment of whether a sanction was "criminal" for the purposes of Article 4 of Protocol No. 7. They contended that regard ought to be had to such factors as the legal classification of the offence under national law; the nature of the offence; the national legal characterisation of the sanction; its purpose, nature and degree of severity; whether the sanction was imposed following conviction for a criminal offence; and the procedures involved in the adoption and implementation of the sanction (they referred to *Malige v. France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII; *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-XIII; *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007; *Storbråten v. Norway* (dec.), no. 12277/04, 1 February 2007; and *Mjelde v. Norway* (dec.), 11143/04, 1 February 2007).

67. The Government maintained, *inter alia*, that the different wording and object of the provisions clearly suggested that the notion of "criminal proceedings" under Article 4 of Protocol No. 7 was narrower than the use of "criminal" under Article 6. It transpired from the Explanatory Report in respect of Protocol No. 7 that the wording of Article 4 had been intended for criminal proceedings *stricto sensu*. In paragraph 28 of that report it was stated that it did not seem necessary to qualify the term offence as "criminal," since the provision "already contain[ed] the terms 'in criminal proceedings' and 'penal procedure' which render[ed] unnecessary any further specification in the text of the article itself". In paragraph 32 it was stressed that Article 4 of Protocol No. 7 did not prohibit proceedings "of a different character (for example, disciplinary action in the case of an official)". Moreover, Article 6 and Article 4 of Protocol No. 7 safeguarded different, and at times opposite, aims. Article 6 was aimed at promoting procedural safeguards in criminal proceedings.

68. The Government also pointed to a number of further differences in regard to the manner in which the two provisions had been interpreted and applied in the Court's case-law, including the absolute character of Article 4 of Protocol No. 7 (non-derogable under Article 15) as opposed to the differentiated approach which the Court applied under Article 6. They referred to *Jussila v. Finland* ([GC], no. 73053/01, § 43, ECHR 2006-XIV), where the Grand Chamber had stated that there were "clearly 'criminal charges' of differing weight" and that "[t]ax surcharges differ[ed] from the hard core of criminal law" such that "the criminal-head guarantees w[ould] not necessarily apply with their full stringency".

69. Relying on the wider range of criteria, the Government invited the Court to hold that ordinary tax penalties were not "criminal" under Article 4 of Protocol No. 7.

70. However, were the Grand Chamber to follow the other approach, based solely on the *Engel* criteria, and to find that the decision on ordinary tax penalties was "criminal" within the autonomous meaning of Article 4 of Protocol No. 7, they argued as follows.

(b) Whether the offences were the same (*idem*)

71. Agreeing with the reasoning and conclusions of the Supreme Court in the case of the first applicant (see paragraphs 20 to 30 above), which the High Court followed in that of the second applicant (see paragraph 37 above), the Government accepted that the factual circumstances pertaining to the tax

penalties and to the tax fraud cases involved the same defendants and were inextricably linked together in time and space.

(c) Whether a final decision had been taken in the tax proceedings

72. The Supreme Court had concluded, out of consideration for effective protection and clear guidelines, that the tax assessment decision became final upon expiry of the three-week time-limit for lodging an administrative appeal (15 and 26 December 2008 for the first and second applicants respectively), even though the six-month time-limit for instituting judicial proceedings pursuant to the Tax Assessment Act, section 11-1(4), had not yet expired. While this was hardly a decisive point in the applicants' cases (the time-limit for legal proceedings also expired before the ongoing criminal proceedings came to an end – on 24 May and 5 June 2009 for the first and second applicants respectively), the Government nonetheless queried whether Article 4 of Protocol No. 7 required an interpretation in this stricter sense. It seemed well supported by the Court's case-law that "[d]ecisions against which an ordinary appeal [lay] [were] excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal ha[d] not expired" (they referred to *Zolotukhin*, cited above, § 108). Ordinary remedies through legal proceedings were still available to the applicants for a period of six months from the date of the decision.

(d) Whether there was duplication of proceedings (*bis*)

73. On the other hand, the Government, still relying on the Supreme Court's analysis, stressed that Article 4 of Protocol No. 7 under certain circumstances allowed for so-called "parallel proceedings". The wording of this provision clearly indicated that it prohibited the repetition of proceedings after the decision in the first proceedings had acquired legal force ("tried or punished again ... for which he has already been finally acquitted or convicted"). The Explanatory Report in respect of Protocol No. 7 confirmed that the *ne bis in idem* rule was to be construed relatively narrowly. This was reflected in *Zolotukhin* (cited above, § 83), where the Grand Chamber had refined the scope of the provision, limiting it to the following situation:

> *''The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of res judicata.''*

74. This implied *a contrario* that parallel proceedings – different sanctions imposed by two different authorities in different proceedings closely connected in substance and in time – fell outside the scope of the provision. Such parallel proceedings would not constitute the commencement of a new prosecution where a prior acquittal or conviction had already acquired the force of *res judicata*. *R.T. v. Switzerland* and *Nilsson v. Sweden* (both cited above) clarified the circumstances in which proceedings might be considered parallel and hence permissible under Article 4 of Protocol No. 7.

75. Nonetheless, on the Government's analysis, the *Zolotukhin* approach had been departed from in a number of more recent judgments, notably in four judgments against Finland delivered on 20 May 2014 (they referred in particular to *Nykänen v. Finland*, no. 11828/11, § 48 and *Glantz v. Finland*, no. 37394/11, § 57), in which paragraph 83 of *Zolotukhin* had merely been taken as a point of departure, with the statement that Article 4 of Protocol No. 7 "clearly prohibits consecutive proceedings if the first set of proceedings has already become final at the moment when the second set of proceedings is initiated (see for example *Sergey Zolotukhin v. Russia* [GC], cited above)".

76. In the Government's view, this expansive interpretation of Article 4 of Protocol No. 7 in *Nykänen* (amongst others), which seemed incompatible with *Zolotukhin*, appeared to presuppose that Article 4 of Protocol No. 7 called for the discontinuance of criminal proceedings when concurrent administrative proceedings became final, or *vice versa*. It had been based on one admissibility decision (*Zigarella v. Italy* (dec.), no. 48154/99, ECHR 2002-IX (extracts)) and two Chamber judgments (*Tomasovic v. Croatia*, no. 53785/09, 18 October 2011, and *Muslija v. Bosnia and Herzegovina*, no. 32042/11, 14 January 2014). However, neither of these cases provided a sound basis for such a departure.

The first case, *Zigarella*, had concerned subsequent, not parallel, proceedings, contrary to what the Chamber had assumed. The subsequent criminal proceedings, brought without the authorities' knowledge of an existing finalised set of (also criminal) proceedings, had been discontinued when the judge learned of the final acquittal in the first case. In this situation the Court had merely applied the negative material effect of *ne bis in idem* as a *res judicata* rule in relation to two succeeding sets of ordinary criminal proceedings in respect of the same offence.

The two other cases, *Tomasovic* and *Muslija*, had concerned proceedings for offences under "hard-core" criminal law, respectively possession of hard drugs and domestic violence (they referred to *Jussila*, cited above, §43). The cases clearly involved two sets of criminal proceedings concerning one act. Both the first and the second set had been initiated on the basis of the same police report. These situations would at face value not occur under Norwegian criminal law and bore at any rate little resemblance to the well-established and traditional systems of administrative and criminal proceedings relating to tax penalties and tax fraud at stake here.

77. Requiring the discontinuance of another pending parallel set of proceedings from the date on which other proceedings on the same matter had given rise

to a final decision amounted to a *de facto lis pendens* procedural hindrance, as there was little sense in initiating parallel proceedings if one set had to be discontinued just because the other set had become final before it.

78. In the Government's submission, against this backdrop of renewed inconsistency in the case-law under Article 4 of Protocol No. 7, it was of particular importance for the Grand Chamber to reassert its approach in *Zolotukhin*, affirming the provision as a *res judicata* rule, and to reject the differing approach in *Nykänen*.

79. The Government failed to see the policy considerations behind *Nykänen*. The underlying idea behind the *ne bis in idem* rule was to be protected against the burden of being exposed to repeated proceedings (they referred to *Zolotukhin*, cited above, §107). An individual should have the certainty that when an acquittal or conviction had acquired the force of *res judicata*, he or she would henceforth be shielded from the institution of new proceedings for the same act. This consideration did not apply in a situation where an individual was subjected to foreseeable criminal and administrative proceedings in parallel, as prescribed by law, and certainly not where the first sanction (tax penalties) was, in a foreseeable manner, taken into account in the decision on the second sanction (imprisonment).

80. It was further difficult to reconcile the view that, while pending, parallel proceedings were clearly unproblematic under the Protocol, with the view that, as soon as one set had reached a final conclusion, the other set would constitute a violation, regardless of whether the more lenient administrative proceedings or the more severe criminal proceedings had been concluded first and regardless of whether the latter had commenced first or last.

81. *Nykänen* also ran counter to the fundamental principles of foreseeability and equal treatment. In the event that the criminal proceedings acquired the force of *res judicata* before the administrative proceedings, one individual could end up serving time in prison, while another individual, for the same offence, would simply have to pay a moderate administrative penalty. The question of which proceedings terminated first depended on how the taxation authorities, police, prosecuting authorities or courts progressed, and whether the taxpayer availed himself or herself of an administrative complaint and/or legal proceedings. *Nykänen* would thus oblige States to treat persons in equal situations unequally according to mere coincidences. As acknowledged in *Nykänen*, "it might sometimes be coincidental which of the parallel proceedings first becomes final, thereby possibly creating a concern about unequal treatment".

82. The need for efficiency in the handling of cases would often militate in favour of parallel proceedings. On the one hand, it ought to be noted that, owing to their specialised knowledge and capacity, administrative authorities would frequently be able to impose an administrative sanction more swiftly than would the prosecution and courts within the framework of criminal proceedings. Owing to their role of large-scale administration, the administrative authorities would moreover be better placed to ensure that same offences be treated equally. Crime prevention, on the other hand, demanded that the State should not be precluded from prosecuting and punishing crimes within traditional, formal penal procedures where the administrative and criminal proceedings disclosed offences of greater severity and complexity than those which may have led to the administrative process and sanctioning in the first place. According to the Government, the applicants' cases were illustrative examples of such situations.

83. The Government noted that several European States maintained a dual system of sanctions in areas such as tax law and public safety (they referred to the reasons given in the opinion of 12 June 2012 of the Advocate General before the Court of Justice of the European Union in the *Fransson* case, quoted at paragraph 51 above).

84. In Norway, the issue of continued parallel proceedings was not restricted to taxation. If Article 4 of Protocol No. 7 were to be interpreted so as to prohibit the finalisation of ongoing parallel proceedings from the moment either administrative or criminal proceedings were concluded by a final decision, it would entail far-reaching, adverse and unforeseeable effects in a number of administrative-law areas. This called for a cautious approach. Similar questions would arise in a number of European States with well-established parallel administrative and criminal systems in fundamental areas of law, including taxation.

85. The considerations underlying Article 4 of Protocol No. 7 applied to a lesser degree where the proceedings in question were parallel and simultaneous. A defendant who was well aware that he or she was subjected by different authorities to two different sets of proceedings closely connected in substance and in time, would be less inclined to expect that the first sanction imposed would be final and exclusive with regard to the other. Finally, the rationale of the *ne bis in idem* principle applied to a lesser degree to sanctions falling outside the "hard core" of criminal law, such as tax penalties (they referred to the reasoning in *Jussila*, cited above, § 43, with regard to Article 6, which was transposable to Article 4 of Protocol No. 7).

86. As regards the specific circumstances, the Government fully endorsed the reasoning of the Supreme Court in the case of the first applicant (see paragraph 29 above) and that of the High Court in the case of the second applicant (see paragraph 39 above) that there was a sufficiently close connection in substance and time. Neither of the applicants could

have legitimately expected to be subjected only to the administrative proceedings and sanction. In order to avoid an outcome that would run counter to the fundamental requirement of equal treatment, so the Government explained, the applicants had, "on an equal footing with" E.K. and B.L. who were defendants in the same case-complex (see paragraphs 12-13 above), each been sentenced to imprisonment in criminal proceedings after having had a 30% administrative tax surcharge imposed.

3. Third-party interveners

87. The third-party interventions were primarily centred on two points; firstly the interpretation of the adjective "criminal" in Article 4 of Protocol No. 7 and the relationship between this provision and both Article 6 (criminal head) and Article 7 of the Convention; and secondly the extent to which parallel proceedings were permissible under the Protocol (dealt with under sub-headings (a) and (b) below).

(a) Whether the first set of proceedings concerned a "criminal" matter

88. The Governments of the Czech Republic and France joined the respondent Government in observing that the *Zolotukhin* judgment did not explicitly abandon the broader range of criteria for the determination of the character of the proceedings to be assessed under Article 4 of Protocol No. 7 and that the Court had itself considered, *inter alia*, proceedings on tax penalties to fall outside the hard core of criminal law and thus applied less stringent guarantees under Article 6 (they referred to *Jussila*, cited above, § 43 *in fine*). The Czech Government invited the Court to clarify primarily whether and, if so, under what conditions, that is in which types of cases, the broader criteria ought to be applied.

89. The Bulgarian Government, referring to the wording of the provision and its purpose, maintained that only traditional criminal offences fell within the ambit of Article 4 of Protocol No. 7. Whilst extending the scope of Article 6 was paramount for the protection of the right to a fair trial, the purpose of the provision in the Protocol was different. Referring to the ruling of the Supreme Court of the United States of America in *Green v. United States*, 355 US 194 (1957), they stressed that the double-jeopardy clause protected an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offence. The underlying idea was that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty. A second vitally important interest was to preserve the finality of judgments.

90. The French Government made extensive submissions (paragraphs 10 to 26 of their observations) on the interpretation of Articles 6 and 7 of the Convention and of Article 4 of Protocol No. 7. Referring to *Perinçek v. Switzerland* ([GC], no. 27510/08, §146, 15 October 2015), they argued that the terms used in Article 4 of Protocol No. 7, which differed from those in Article 6 § 1 of the Convention, must result in the adoption of narrower criteria serving the principle of *ne bis in idem* protected by Article 4 of Protocol No. 7. Article 7 of the Convention referred to the notions of conviction ("held guilty" in English; "*condamné*" in French), "criminal offence" ("*infraction*" in French) and "penalty" ("*peine*" in French), which were also to be found in Article 4 of Protocol No. 7. Furthermore, the protection afforded by Article 7 of the Convention, like that afforded by Article 4 of Protocol No. 7, concerned essential components of criminal procedure, understood in a strict sense. This was borne out by the fact that no derogation from the obligations concerned was allowed under Article 15, whereas that Article did provide for derogation from Article 6.

91. It followed that, for reasons of consistency, the Court should, in applying Article 4 of Protocol No. 7, rely only on the criteria it had formulated in the framework of Article 7 of the Convention, while clarifying them in order to assign to the words "in criminal proceedings", as used in Article 4, the strict meaning that was called for. In seeking to determine whether a measure fell within the scope of the latter, the Court ought to consider: the legal classification of the offence in domestic law; the purpose and nature of the measure concerned; whether the measure was imposed following conviction for a criminal offence; the severity of the penalty, it being understood that this was not a decisive element; and the procedures associated with the adoption of the measure (and in particular whether the measure was adopted by a body which could be characterised as a court and which adjudicated on the elements of an offence regarded as criminal within the meaning of Article 6 of the Convention). The last of these criteria was of paramount importance having regard to the actual wording and purpose of Article 4 of Protocol No. 7.

92. In the light of these criteria, one could not regard as falling within the scope of Article 4 of Protocol No. 7 tax penalties which were not classified as criminal in domestic law, which were administrative in nature and intended only as a sanction for a taxpayer's failure to comply with fiscal obligations, which were not imposed following conviction for a criminal offence and which were not imposed by a judicial body.

93. The Swiss Government submitted that the only exception allowed – under Article 4 § 2 of Protocol No. 7 – was the reopening of the case "in accordance with the law and penal procedure of the State concerned". At the time of adoption of the Protocol in 1984, other exceptions, such as those subsequently allowed by the

relevant case-law, were not provided for – and did not require such provision in view of the inherently criminal focus of the protection concerned. The narrow conception underlying the guarantee was tellingly confirmed at Article 4 § 3, which ruled out any derogation under Article 15 of the Convention in respect of the protection provided by Article 4 § 1. The *ne bis in idem* guarantee was thus placed on an equal footing with the right to life (Article 2; Article 3, Protocol No. 6; Article 2, Protocol No. 13), the prohibition of torture (Article 3), the prohibition of slavery (Article 4) and the principle of no punishment without law (Article 7). These elements militated in favour of a restrictive interpretation of the protection. The case for such an approach would be still more persuasive if the Grand Chamber were to maintain the practice that any "criminal charge" in the autonomous sense of Article 6 § 1 was likewise such as to attract the application of Article 4 of Protocol No. 7 (see paragraph 100 below).

(b) Duplication of proceedings (*bis*)

94. The Bulgarian Government found no reason to depart from the approach in *R.T. v. Switzerland* and *Nilsson v. Sweden* (both cited above) in the context of road traffic offences and in important areas relating to the functioning of the State such as taxation. Parallel tax proceedings ending in tax penalties and criminal proceedings for investigating tax fraud were closely related in substance and in time. Also, the Court had recognised that the Contracting States enjoyed a wide margin of appreciation when framing and implementing policies in the area of taxation and that the Court would respect the legislature's assessment of such matters unless it was devoid of any reasonable foundation. A system allowing for parallel proceedings in taxation matters seemed to fall within the State's margin of appreciation and did not appear *per se* to run counter to any of the principles protected in the Convention, including the guarantee against double jeopardy.

95. The Czech Government advanced four arguments for preserving the existence of dual systems of sanctioning: (1) each type of sanction pursued different goals; (2) whilst criminal proceedings *stricto sensu* had to comply with stringent fair trial guarantees, the fulfilment of which was often time-consuming, administrative sanctions needed to comply with demands of speediness, effectiveness and sustainability of the tax system and State budget; (3) the strict application of the *ne bis in idem* principle to parallel tax and criminal proceedings might defeat the handling of large-scale organised crime if the first decision, usually an administrative one, were to impede a criminal investigation leading to the revelation of networks of organised fraud, money laundering, embezzlement and other serious crime; (4) the sequence of the authorities deciding in a particular case. Finally, the Czech Government drew attention to cases of several concurrent administrative proceedings.

96. The French Government were of the view that the reasoning adopted in *R.T. v. Switzerland* and *Nilsson v. Sweden* might be transposed to the field of taxation having regard to the aims pursued by the States in that field, the aims of criminal proceedings and those pursued by the imposition of tax penalties being different (i) and where there was a sufficient connection between the fiscal and the criminal proceedings (ii):

(i) Criminal prosecution for tax evasion must constitute an appropriate and consistent response to reprehensible conduct. Its primary purpose was to punish the most serious forms of misconduct. In its decision in *Rosenquist v. Sweden* ((dec.), no. 60619/00, 14 September 2004), the Court had observed that the purpose of prosecuting the criminal offence of tax evasion differed from that of the imposition of a fiscal penalty, the latter seeking to secure the foundations of the national tax system.

Criminal proceedings for tax evasion also served an exemplary function, especially where new types of fraud came to light, with a view to dissuading potential tax evaders from going down that particular road. Not to bring the most serious cases of tax evasion to trial where a tax penalty had already been imposed would be to deprive the State of the exemplary force of, and publicity provided by, criminal convictions in such cases.

In the event that a judicial investigation in a matter of tax evasion was set in motion prior to an audit by the tax authority, an obligation to discontinue the second action once the outcome of the first had become final would encourage the taxpayer to let the criminal proceedings reach a swift conclusion, without denying the charge, in such a way that those proceedings would be terminated in advance of the tax audit and the administrative sanctions, which generally represented much larger sums, would thus be avoided.

In such a situation, a taxpayer under investigation would be in a position to opt for whichever procedure offered the most favourable outcome; this would most certainly detract from the dissuasive force of action by the State to punish the most reprehensible conduct in this area. It would be paradoxical indeed for taxpayers who had committed the most serious forms of tax fraud and who were prosecuted for such offence, to receive less severe penalties.

In conclusion, complementary criminal and administrative action was essential in dealing with the most serious tax fraud cases and it would be artificial to consider that, simply because two sets of proceedings and two authorities came into play, the two forms of sanction did not form a coherent whole in response to this type of offence. The two types of proceedings were in reality closely connected and it ought therefore be possible for them both to be pursued.

(ii) In the cases against Finland of 20 May 2014, the main criterion identified by the Court for refusing to allow a second set of proceedings was the total independence of the fiscal procedure on the one hand and the criminal proceedings on the other. However, the fiscal and criminal proceedings ought to be regarded as connected in substance and in time where there was an exchange of information between the two authorities and where the two sets of proceedings were conducted simultaneously. The facts of the case would demonstrate the complementary nature of the proceedings.

By way of illustration, the Government provided a detailed survey of the manner in which, under the French system, criminal and fiscal proceedings were interwoven, how they overlapped in law and in practice, and were conducted simultaneously. The principle of proportionality implied that the overall amount of any penalties imposed should not exceed the highest amount that could be imposed in respect of either of the types of penalty.

In determining whether criminal and fiscal proceedings might be regarded as sufficiently closely connected in time, account ought to be taken only of the phase of assessment by the tax authority and that of the judicial investigation. These two phases ought to proceed simultaneously or be separated by only a very short time interval. It did not, on the other hand, appear relevant, in assessing the closeness of the connection in time between the two sets of proceedings, to consider the duration of the judicial proceedings before the courts called upon to deliver judgment in the criminal case and rule on the validity of the tax penalties. It ought to be borne in mind that the response time of the various courts depended on external factors, sometimes attributable to the taxpayer concerned. He or she might choose to deliberately prolong the proceedings in one of the courts by introducing large numbers of requests, or by submitting numerous written documents which would then call for an exchange of arguments, or again by lodging appeals.

The States should be afforded a margin of appreciation in defining appropriate penalties for types of conduct which might give rise to distinct forms of harm. While providing for a single response, the State should be able to assign to a number of – judicial and administrative – authorities the task of furnishing an appropriate response.

97. The Greek Government maintained that the existence of separate and consecutive proceedings, in the course of which the same or different measures of a criminal nature were imposed on an applicant, was the decisive and crucial factor for the notion of "repetition" ("*bis*"). The *ne bis in idem* principle was not breached in the event that different measures of a "criminal" nature, though distinct from one another, were imposed by different authorities, criminal and administrative respectively, which considered all the sanctions in their entirety when meting out the punishment (they referred to *R.T. v. Switzerland*, cited above).

98. On the other hand, the Greek Government pointed to *Kapetanios and Others v. Greece* (nos. 3453/12, 42941/12 and 9028/13, §72, 30 April 2015), in which the Court had held that the *ne bis in idem* principle would in principle not be violated where both sanctions, namely the deprivation of liberty and a pecuniary penalty, were imposed in the context of a single judicial procedure. Regardless of this example, it was apparent that the Court attached great importance to the fact that the imposition of criminal and administrative penalties had been the subject of an overall judicial assessment.

99. Nonetheless, they did not disagree with the view held by the Norwegian Supreme Court in the present case that parallel proceedings were at least to some extent permissible under Article 4 of Protocol No. 7. This was strongly supported by the CJEU judgment in the *Fransson* case (they referred to § 34 of the judgment, quoted at paragraph 52 above).

The CJEU had specified that it was for the referring court to determine, in the light of the set criteria, whether the combining of tax penalties and criminal penalties that was provided for by national law should be examined in relation to national standards, namely as being analogous to those applicable to infringements of national law of a similar nature and importance, where the choice of penalties remained within the discretion of the member State; thus it was for the national courts to determine whether the combination of penalties was contrary to those standards, as long as the remaining penalties were effective, proportionate and dissuasive (they referred to § 37 of the judgment, quoted at paragraph 52 above).

The aforementioned ruling of the CJEU appeared relevant to the present case. More specifically, within the framework of such interpretation, it could be inferred *mutatis mutandis* that the national judges had indeed duly ruled, at their sole discretion, as found by the CJEU, that the combination of the sanctions at issue, imposed through so-called "parallel proceedings" upon close interaction between two distinct authorities, had not been in breach of the national standards, despite the fact that national judges had essentially assessed the tax sanctions as being of a "criminal nature". In view of the arguments in paragraph 97 above, it could reasonably be concluded that parallel proceedings, imposing different sanctions through different authorities, clearly distinct in law, were not prohibited by Article 4 of Protocol No. 7 whenever such proceedings satisfied the test of being closely connected in substance and in time. This test answered the critical question whether there had been repetition.

100. The Swiss Government, relying on *Zolotukhin* (cited above, § 83), maintained that the guarantee set forth in Article 4 of Protocol No. 7 became relevant on the institution of a new prosecution, where a prior acquittal or conviction had already acquired the force of *res judicata*. A situation in which criminal proceedings had not been completed at the point in time at which an administrative procedure was initiated was not therefore, in itself, problematic with regard to the *ne bis in idem* principle (they referred, *mutatis mutandis*, to *Kapetanios and Others*, cited above, § 72). It followed that parallel procedures were permissible under Article 4 of Protocol No. 7. The present case afforded the Grand Chamber an opportunity to reaffirm this line of authority.

The justification for a dual system resided primarily in the nature of, and distinct aims pursued by, administrative law (preventive and educative) on the one hand, and criminal law (retributive), on the other.

Whilst the notion of a "criminal charge" in Article 6 had, in the light of the *Engel* criteria, been extended beyond the traditional categories of criminal law *(malum in se*) to cover other areas (*malum quia prohibitum*), there were criminal charges of differing weight. In the case, for example, of tax penalties – which fell outside the hard core of criminal law – the guarantees under the criminal head of Article 6 of the Convention ought not necessarily to apply with their full stringency (they referred to *Jussila*, cited above, § 43). This ought to be taken into account when determining the scope of application of Article 4 of Protocol No. 7.

The foreseeability of the cumulative imposition of administrative and criminal sanctions was another element to be considered in the assessment of the dual system (they referred to *Maszni v. Romania*, no. 59892/00, 21 September 2006, § 68).

In the Swiss Government's view, *Zolotukhin* should not be interpreted or developed in such a way as to embrace the full range of systems providing for both administrative and criminal sanctions for criminal offences, without regard for the fact that different authorities, possessing different competences and pursuing separate aims, might be called upon to deliver decisions on the same set of facts. At all events, this conclusion was persuasive in instances where there was a sufficiently close connection in substance and in time between the criminal proceedings on the one hand and the administrative procedure on the other, as required by the Court (they referred to the following cases where the Court had been satisfied that this condition had been fulfilled: *Boman v. Finland*, no. 41604/11, § 41, 17 February 2015, with reference to *R.T. v. Switzerland* and *Nilsson v. Sweden*, both cited above, and also *Maszni*, cited above). The Swiss Government invited the Grand Chamber to take the opportunity afforded by the present case to reaffirm this approach, which was not prohibited *per se* in its case-law as it stood.

4. The Court's assessment

101. The Court will first review its existing case-law relevant for the interpretation and application of the *ne bis in idem* rule laid down in Article 4 of Protocol No. 7 (sub-titles "(a)" to "(c)" below). In the light of that review, it will seek to draw such conclusions, derive such principles and add such clarifications as are necessary for considering the present case (sub-title "(d)" below). Finally, it will apply the *ne bis in idem* rule, as so interpreted by it, to the facts complained of by the applicants (sub-title "(e)" below).

(a) General issues of interpretation

102. It is to be noted that in the pleadings of the parties and the third-party interveners there was hardly any disagreement regarding the most significant contribution of the Grand Chamber judgment in *Zolotukhin* (cited above), which was to clarify the criteria relating to the assessment of whether the offence for which an applicant had been tried or punished in the second set of proceedings was the same (*idem*) as that for which a decision had been rendered in the first set (see §§ 70 to 84 of the judgment). Nor was there any substantial disagreement regarding the criteria laid down in that judgment for determining when a "final" decision had been taken.

103. In contrast, differing views were expressed as to the method to be used for determining whether the proceedings relating to the imposition of tax penalties were "criminal" for the purposes of Article 4 of Protocol No. 7 – this being an issue capable of having implications for the applicability of this provision's prohibition of double jeopardy.

104. In addition, there were conflicting approaches (notably between the applicants, on the one hand, and the respondent Government and the intervening Governments, on the other) as regards duplication of proceedings, in particular the extent to which parallel or dual proceedings ought to be permissible under Article 4 of Protocol No. 7.

(b) Relevant criteria for determining whether the first set of proceedings was "criminal": Different approaches in the case-law

105. In *Zolotukhin* (cited above), in order to determine whether the proceedings in question could be regarded as "criminal" in the context of Article 4 of Protocol No. 7, the Court applied the three *Engel* criteria previously developed for the purposes of Article 6 of the Convention: (1) "the legal classification of the offence under national law", (2) "the very nature of the offence" and (3) the degree of severity of the penalty that the person concerned risks incurring – the second and third criteria being alternative, not necessarily cumulative, whilst a cumulative approach was not excluded. The *Zolotukhin* judgment did not, as it could have done, mirror the line of reasoning

followed in a string of previous cases (see, for example, *Storbråten*, cited above), involving a non-exhaustive ("such as") and wider range of factors, with no indication of their weight or whether they were alternative or cumulative. The Governments of France and Norway are now inviting the Court to use the opportunity of the present judgment to affirm that it is the latter, broader test which should apply (see paragraphs 66-68 and 90-91).

106. A number of arguments going in the direction of such an interpretive approach do exist, in particular that Article 4 of Protocol No. 7 was apparently intended by its drafters for criminal proceedings in the strict sense and that – unlike Article 6, but like Article 7 – it is a non-derogable right under Article 15. Whilst Article 6 is limited to embodying fair-hearing guarantees for criminal proceedings, the prohibition of double jeopardy in Article 4 of Protocol No. 7 has certain implications – potentially wide ones – for the manner of applying domestic law on criminal and administrative penalties across a vast range of activities. The latter Article involves a more detailed assessment of the substantive criminal law, in that there is a need to establish whether the respective offences concerned the same conduct (*idem*). These differences, the lack of consensus among the domestic systems of the Contracting States and the variable willingness of States to be bound by the Protocol and the wide margin of appreciation to be enjoyed by the States in deciding on their penal systems and policies generally (see *Nykänen*, cited above, § 48; and, *mutatis mutandis*, *Achour v. France* [GC], no. 67335/01, § 44, ECHR 2006-IV) are well capable of justifying a broader range of applicability criteria, in particular with a stronger national-law component, as used for Article 7 and previously used (*before Zolotukhin*), for Article 4 of Protocol No. 7, and hence a narrower scope of application, than is the case under Article 6.

107. However, whilst it is true, as has been pointed out, that the *Zolotukhin* judgment was not explicit on the matter, the Court must be taken to have made a deliberate choice in that judgment to opt for the *Engel* criteria as the model test for determining whether the proceedings concerned were "criminal" for the purposes of Article 4 of Protocol No. 7. It does not seem justified for the Court to depart from that analysis in the present case, as there are indeed weighty considerations that militate in favour of such a choice. The *ne bis in idem* principle is mainly concerned with due process, which is the object of Article 6, and is less concerned with the substance of the criminal law than Article 7. The Court finds it more appropriate, for the consistency of interpretation of the Convention taken as a whole, for the applicability of the principle to be governed by the same, more precise criteria as in *Engel*. That said, as already acknowledged above, once the *ne bis in idem* principle has been found to be applicable, there is an evident need for a calibrated approach in regard to the manner in which the principle is applied to proceedings combining administrative and criminal penalties.

(c) Convention case-law on dual proceedings

(i) What the* Zolotukhin *judgment added

108. *Zolotukhin* concerned two sets of proceedings, both relating to disorderly conduct *vis-à-vis* a public official and in which the outcome of the administrative proceedings had become final even before the criminal proceedings were instituted (see *Zolotukhin*, cited above, §§ 18-20 and 109). The most significant contribution of the *Zolotukhin* judgment was the holding that the determination as to whether the offences in question were the same (*idem*) was to depend on a facts-based assessment (ibid., § 84), rather than, for example, on the formal assessment consisting of comparing the "essential elements" of the offences. The prohibition concerns prosecution or trial for a second "offence" in so far as the latter arises from identical facts or facts which are substantially the same (ibid., § 82).

109. Furthermore, when recalling that the aim of Article 4 of Protocol No. 7 was to prohibit the repetition of criminal proceedings that had been concluded by a "final" decision ("*res judicata*"), the *Zolotukhin* judgment specified that decisions against which an ordinary appeal lay were excluded from the scope of the guarantee in Protocol No. 7 as long as the time-limit for lodging such an appeal had not expired.

110. The Court also strongly affirmed that Article 4 of Protocol No. 7 was not confined to the right not to be punished twice but that it extended to the right not to be prosecuted or tried twice. Were this not the case, it would not have been necessary to use the word "tried" as well as the word "punished" since this would be mere duplication. The Court thus reiterated that Article 4 of Protocol No. 7 applied even where the individual had merely been prosecuted in proceedings that had not resulted in a conviction. Article 4 of Protocol No. 7 contained three distinct guarantees and provided that, for the same offence, no one should be (i) liable to be tried, (ii) tried, or (iii) punished (ibid., § 110).

111. It should be noted, however, that the *Zolotukhin* judgment offered little guidance for situations where the proceedings have not in reality been duplicated but have rather been combined in an integrated manner so as to form a coherent whole.

***(ii) The case-law on dual proceedings before and after* Zolotukhin**

112. After the *Zolotukhin* judgment, as had been the position previously, the imposition by different authorities of different sanctions concerning the same conduct was accepted by the Court as being to some extent permissible under Article 4 of Protocol No. 7, notwithstanding the existence of a final decision. This conclusion can be understood as having been based on the premise that the combination of sanctions in those

cases ought to be considered as a whole, making it artificial to view the matter as one of duplication of proceedings leading the applicant to being "tried or punished again .... for an offence for which he has already been finally ... convicted" in breach of Article 4 of Protocol No. 7. The issue has arisen in four types of situations.

113. At the origin of this interpretative analysis of Article 4, is a *first* category of cases, going back to *R.T. v. Switzerland*, cited above. *R.T.* concerned an applicant whose driving licence had been withdrawn (for four months) in May 1993 by the Road Traffic Office on account of drunken driving. This measure was eventually confirmed by judgments of the Administrative Appeals Commission and the Federal Court (December 1995). In the meantime, in June 1993 the Gossau District Office had imposed a penal order on the applicant which sentenced him to a suspended term of imprisonment and a fine of 1,100 Swiss francs (CHF). This penal order was not appealed against and acquired legal force.

The Court found that the Swiss authorities had merely been determining the three different, cumulable sanctions envisaged by law for such an offence, namely a prison sentence, a fine and the withdrawal of the driving licence. These sanctions had been issued at the same time by two different authorities, namely by a criminal and by an administrative authority. It could not, therefore, be said that criminal proceedings were being repeated contrary to Article 4 of Protocol No. 7 within the meaning of the Court's case-law.

Similarly, while *Nilsson v. Sweden*, cited above, also concerned criminal punishment (50 hours' community service) and withdrawal of a driving licence (for 18 months) on the ground of a road-traffic offence, the complaint was disposed of on more elaborate reasoning, introducing for the first time the test of "*a sufficiently close connection ..., in substance and in time*".

The Court found that the licence withdrawal had been a direct and foreseeable consequence of the applicant's earlier conviction for the same offences of aggravated drunken driving and unlawful driving and that the withdrawal on the ground of a criminal conviction constituted a "criminal" matter for the purposes of Article 4 of Protocol No. 7. Furthermore, the severity of the measure – suspension of the applicant's driving licence for 18 months – was in itself so significant, regardless of the context of his previous criminal conviction, that it could ordinarily be viewed as a criminal sanction. While the different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, in substance and in time, to consider the withdrawal to be part of the sanctions under Swedish law for the offences of aggravated drunken driving and unlawful driving. The licence withdrawal did not imply that the applicant had been "tried or punished again ... for an offence for which he had already been finally ... convicted", in breach of Article 4 § 1 of Protocol No. 7.

Likewise, in *Boman*, cited above, the Court was satisfied that a sufficient substantive and temporal connection existed between, on the one hand, the criminal proceedings in which the applicant had been convicted and sentenced (to 75 day-fines, amounting to EUR 450) and banned from driving (for 4 months and 3 weeks) and, on the other, the subsequent administrative proceedings, leading to the prolongation of the driving ban (for 1 month).

114. In a *second* series of cases, the Court reaffirmed that parallel proceedings were not excluded in relation to the imposition of tax penalties in administrative proceedings and prosecution, conviction and sentencing for tax fraud in criminal proceedings, but concluded that the test of "*a sufficiently close connection ..., in substance and in time*" had not been satisfied in the particular circumstances under consideration. These cases concerned Finland (notably *Glantz*, cited above, § 57 and *Nykänen*, cited above, § 47) and Sweden (*Lucky Dev v. Sweden*, no. 7356/10, § 58, 27 November 2014). In *Nykänen*, which set out the approach followed in the other cases against Finland and Sweden, the Court found on the facts that, under the Finnish system, the criminal and the administrative sanctions had been imposed by different authorities without the proceedings being in any way connected: both sets of proceedings followed their own separate course and became final independently of each other. Moreover, neither of the sanctions had been taken into consideration by the other court or authority in determining the severity of the sanction, nor was there any other interaction between the relevant authorities. More importantly, under the Finnish system the tax penalties had been imposed following an examination of an applicant's conduct and his or her liability under the relevant tax legislation, which was independent from the assessments made in the criminal proceedings. In conclusion, the Court held that there had been a violation of Article 4 of Protocol No. 7 to the Convention since the applicant had been convicted twice for the same matter in two separate sets of proceedings.

Identical (or almost identical) reasoning and conclusions may be found in respect of similar facts in *Rinas v. Finland*, no. 17039/13, 27 January 2015, and *Österlund v. Finland*, no. 53197/13, 10 February 2015.

It is to be noted that, while in some of these judgments (*Nykänen*, *Glantz*, *Lucky Dev*, *Rinas*, *Österlund*) the two sets of proceedings were largely contemporaneous, the temporal connection on its own was evidently deemed insufficient to exclude the application of the *ne bis in idem* prohibition. It would not seem unreasonable to deduce from these judgments in cases against Finland and Sweden that, given that the two sets of proceedings were largely contemporaneous, in the particular circumstances it was the lack of a

substantive connection that gave rise to the violation of Article 4 of Protocol No. 7.

115. In a *third* strand of case-law, where proceedings had been conducted in parallel for a certain period of time, the Court found a violation but without referring to the *Nilsson* test of "*a sufficiently close connection ... in substance and in time*".

In *Tomasović* (cited above, §§ 5-10 and 30-32), the applicant had been prosecuted and convicted twice for the same offence of possession of drugs, first as a "minor offence" (held to be "criminal" according to the second and third *Engel* criteria (ibid. §§ 22-25)) and then as a "criminal offence". As the second set of proceedings had not been discontinued on the conclusion of the first, the Court found it evident that there had been duplication of criminal proceedings in breach of Article 4 of Protocol No. 7 (see, similarly, *Muslija*, cited above, §§ 28-32 and 37, in relation to the infliction of grievous bodily harm).

Similarly, in *Grande Stevens and Others v. Italy* (nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014), the Court found that there had been dual proceedings in respect of the same fraudulent conduct – namely market manipulation through the dissemination of false information: one set of administrative proceedings (from 9 February 2007 to 23 June 2009), which were considered "criminal" according to the *Engel* criteria, were conducted before the National Companies and Stock Exchange Commission (*Commissione Nazionale per le Societa e la Borsa* – "CONSOB"), followed by appeals to the Court of Appeal and the Court of Cassation and culminating in the imposition of a fine of EUR 3,000,000 (plus a business ban); the other set being criminal proceedings (from 7 November 2008 to 28 February 2013 and beyond, still pending at the time of judgment) conducted before the District Court, the Court of Cassation and the Court of Appeal. Its finding that the new set of proceedings concerned a second "offence" originating in identical acts to those which had been the subject-matter of the first, and final, conviction was sufficient for the Court to conclude that there had been a breach of Article 4 of Protocol No. 7.

116. *Fourthly*, a further and distinct illustration of a lack of substantive connection without specific reference to the above-mentioned *Nilsson* test is provided by *Kapetanios and Others* (cited above), which was confirmed by *Sismanidis and Sitaridis v. Greece*, nos. 66602/09 and 71879/12, 9 June 2016. In these cases the applicants had in the first place been acquitted of customs offences in criminal proceedings. Subsequently, notwithstanding their acquittals, the administrative courts imposed on the applicants heavy administrative fines on account of the self-same conduct. Being satisfied that the latter proceedings were "criminal" for the purposes of the prohibition in Article 4 of Protocol No. 7, the Court concluded that there had been a violation of this provision (*ibid,* respectively, § 73 and 47).

(d) Conclusions and inferences to be drawn from the existing case-law

117. Whilst a particular duty of care to protect the specific interests of the individual sought to be safeguarded by Article 4 of Protocol No. 7 is incumbent on the Contracting States, there is also, as already indicated in paragraphs 106 above, a need to leave the national authorities a choice as to the means used to that end. It should not be overlooked in this context that the right not to be tried or punished twice was not included in the Convention adopted in 1950 but was added in a seventh protocol (adopted in 1984), which entered into force in 1988, almost 40 years later. Four States (Germany, the Netherlands, Turkey and the United Kingdom) have not ratified the Protocol; and one of these (Germany) plus four States which did ratify (Austria, France, Italy and Portugal) have expressed reservations or interpretative declarations to the effect that "criminal" ought to be applied to these States in the way it was understood under their respective national laws. (It should be noted that the reservations made by Austria and Italy have been held to be invalid as they failed to provide a brief statement of the law concerned, as required by Article 57 § 2 of the Convention (see respectively *Gradinger v. Austria*, 23 October 1995, § 51, Series A no. 328-C; and *Grande Stevens*, cited above, §§ 204-211), unlike the reservation made by France (see *Göktan v. France,* no. 33402/96, § 51, ECHR 2002-V).

118. The Court has further taken note of the observation made by the Advocate General before the Court of Justice of the European Union in the *Fransson* case (see paragraph 51 above), namely that the imposition of penalties under both administrative law and criminal law in respect of the same offence is a widespread practice in the EU Member States, especially in fields such as taxation, environmental policies and public safety. The Advocate General also pointed out that the way in which penalties were accumulated varied enormously between legal systems and displayed special features which were specific to each member State; in most cases those special features were adopted with the aim of moderating the effects of the imposition of two punishments by the public authorities.

119. Moreover, no less than six Contracting Parties to Protocol No. 7 have intervened in the present proceedings, mostly expressing views and concerns on questions of interpretation that are largely common to those stated by the respondent Government.

120. Against this backdrop, the preliminary point to be made is that, as recognised in the Court's well-established case-law, it is in the first place for the Contracting States to choose how to organise their legal system, including their criminal-justice procedures (see, for instance, *Taxquet v. Belgium* [GC], no. 926/05, § 83, ECHR 2010). The Convention does not, for example, prohibit the separation of the sentencing process in a given case into different stages

or parts, such that different penalties may be imposed, successively or in parallel, for an offence that is to be characterised as "criminal" within the autonomous meaning of that notion under the Convention (see, for instance, *Phillips v. the United Kingdom*, no. 41087/98, § 34, ECHR 2001-VII, concerning Article 6 complaints in regard to confiscation proceedings brought against an individual in respect of proceeds from drugs offences after conviction and sentence of the individual for these offences).

121. In the view of the Court, States should be able legitimately to choose complementary legal responses to socially offensive conduct (such as non-compliance with road-traffic regulations or non-payment/evasion of taxes) through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned.

122. In cases raising an issue under Article 4 of Protocol No. 7, it is the task of the Court to determine whether the specific national measure complained of entails, in substance or in effect, double jeopardy to the detriment of the individual or whether, in contrast, it is the product of an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice.

123. It cannot be the effect of Article 4 of Protocol No. 7 that the Contracting States are prohibited from organising their legal systems so as to provide for the imposition of a standard administrative penalty on wrongfully unpaid tax (albeit a penalty qualifying as "criminal" for the purposes of the Convention's fair-trial guarantees) also in those more serious cases where it may be appropriate to prosecute the offender for an additional element present in the non-payment, such as fraudulent conduct, which is not addressed in the "administrative" tax-recovery procedure. The object of Article 4 of Protocol No. 7 is to prevent the injustice of a person's being prosecuted or punished twice for the same criminalised conduct. It does not, however, outlaw legal systems which take an "integrated" approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes.

124. The Court is of the view that the above-mentioned case-law on parallel or dual proceedings, originating with the *R.T. v. Switzerland* and *Nilsson v. Sweden* cases and continuing with *Nykänen* and a string of further cases, provides useful guidance for situating the fair balance to be struck between duly safeguarding the interests of the individual protected by the *ne bis in idem* principle, on the one hand, and accommodating the particular interest of the community in being able to take a calibrated regulatory approach in the area concerned, on the other. At the same time, before proceeding to further elaborate the relevant criteria for the striking of the requisite balance, the Court deems it desirable to clarify the conclusions to be drawn from the existing case-law.

125. In the first place, what emerges from the application of the "sufficiently close connection ... in substance and in time" test in recent cases against Finland and Sweden is that this test will not be satisfied if one or other of the two elements – substantive or temporal – is lacking (see paragraph 114 above).

126. Second, in some cases the Court has first undertaken an examination whether and, if so, when there was a "final" decision in one set of proceedings (potentially barring the continuation of the other set), before going on to apply the "sufficiently close connection" test and to reach a negative finding on the question of "*bis*" – that is, a finding of the absence of "*bis*" (see *Boman*, cited above, §§ 36-38). In the Court's opinion, however, the issue as to whether a decision is "final" or not is devoid of relevance when there is no real duplication of proceedings but rather a combination of proceedings considered to constitute an integrated whole.

127. Third, the foregoing observation should also have implications for the concern expressed by some of the Governments taking part in the present proceedings, namely that it should not be a requirement that connected proceedings become "final" at the same time. If that were to be so, it would enable the interested person to exploit the *ne bis in idem* principle as a tool for manipulation and impunity. On this point, the conclusion in paragraph 51 of *Nykänen* (quoted above) and in a number of judgments thereafter that "both sets of proceedings follow their own separate course and become final independently from each other" is to be treated as a finding of fact: in the Finnish system under consideration there was not a sufficient connection in substance between the administrative proceedings and the criminal proceedings, although they were conducted more or less contemporaneously. *Nykänen* is an illustration of the "sufficient connection in substance and in time" test going one way on the facts.

128. Fourth, for similar reasons to those stated above, the order in which the proceedings are conducted cannot be decisive of whether dual or multiple processing is permissible under Article 4 of Protocol No. 7 (compare and contrast, *R.T. v. Switzerland* – in which the revocation of a licence was effected before the criminal proceedings, and *Nilsson v. Sweden* – where the revocation took place subsequently).

129. Lastly, it is apparent from some of the cases cited above (see *Zolothukin, Tomasović,* and *Muslija* – described at paragraphs 108 and 115 above) that, in as much as they concerned the duplication of proceedings which had been pursued without the

purposes and means employed being complementary (see paragraph 130 below), the Court was not minded to examine them as involving parallel or dual proceedings capable of being compatible with the *ne bis in idem* principle, as in *R.T. v. Switzerland*, *Nilsson* and *Boman* (see paragraph 113 above).

130. On the basis of the foregoing review of the Court's case-law, it is evident that, in relation to matters subject to repression under both criminal and administrative law, the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence can be addressed within the framework of a single process. Nonetheless, as explained above (see notably paragraphs 111 and 117-120), Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. In particular, for the Court to be satisfied that there is no duplication of trial or punishment (*bis*) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time". In other words, it must be shown that they have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.

131. As regards the conditions to be satisfied in order for dual criminal and administrative proceedings to be regarded as sufficiently connected in substance and in time and thus compatible with the *bis* criterion in Article 4 of Protocol No. 7, the relevant considerations deriving from the Court's case-law, as discussed above, may be summarised as follows.

132. Material factors for determining whether there is a sufficiently close connection in substance include:

- whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;

- whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*);

- whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set;

- and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.

133. In this regard, it is also instructive to have regard to the manner of application of Article 6 of the Convention in the type of case that is now under consideration (see *Jussila*, cited above, §43):

> *"[I]t is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly 'criminal charges' of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a 'criminal charge' by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties ..., prison disciplinary proceedings ..., customs law ..., competition law ..., and penalties imposed by a court with jurisdiction in financial matters .... Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency ...".*

The above reasoning reflects considerations of relevance when deciding whether Article 4 of Protocol No. 7 has been complied with in cases concerning dual administrative and criminal proceedings. Moreover, as the Court has held on many occasions, the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Klass and Others v. Germany*, 6 September 1978, § 68, Series A no. 28; also *Maaouia v. France* [GC], no. 39652/98, § 36, ECHR 2000-X; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X).

The extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings is an important factor. Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law" (in the language of *Jussila* cited above). The additional factor that those proceedings do not carry any significant degree of stigma renders it less likely that the combination of proceedings will entail a disproportionate burden on the accused person. Conversely, the fact that the administrative proceedings have stigmatising features largely resembling those of ordinary criminal proceedings enhances the risk that the social purposes

pursued in sanctioning the conduct in different proceedings will be duplicated (*bis*) rather than complementing one another. The outcome of the cases mentioned in paragraph 129 above may be seen as illustrations of such a risk materialising.

134. Moreover, as already intimated above, where the connection in *substance* is sufficiently strong, the requirement of a connection *in time* nonetheless remains and must be satisfied. This does not mean, however, that the two sets of proceedings have to be conducted simultaneously from beginning to end. It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice. However, as indicated above, the connection in time must always be present. Thus, the connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time (see, as an example of such shortcoming, *Kapetanios and Others*, cited above, § 67), even where the relevant national system provides for an "integrated" scheme separating administrative and criminal components. The weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings.

(e) Whether Article 4 of Protocol No. 7 was complied with in the present case

(i) The first applicant

135. In the case of the first applicant, the Tax Administration had, on 24 November 2008, imposed a 30% tax penalty on him, under sections 10-2(1) and 10-4(1) of the Tax Assessment Act, on the ground that he had omitted to declare in his tax return for 2002 the sum of NOK 3,259,342 in earnings obtained abroad (see paragraph 16 above). Since he did not appeal against that decision it became final at the earliest on the expiry of the three-week time-limit for lodging an appeal (see paragraph 143 below). He was also subjected to criminal proceedings in connection with the same omission in his 2002 tax declaration: on 14 October 2008 he was indicted and on 2 March 2009 the District Court convicted him of aggravated tax fraud and sentenced him to one year's imprisonment for having violated section 12-1(1)(a), cf. section 12-2, of the Tax Assessment Act on account of the above-mentioned failure to declare (see paragraphs 15 and 17 above). The High Court rejected his appeal (see paragraph 19 above), as did the Supreme Court on 27 November 2010 (see paragraphs 20 to 30 above).

(α) Whether the imposition of tax penalties was criminal in nature

136. In line with its conclusion at paragraph 107 above, the Court will examine whether the proceedings relating to the imposition of the 30% tax penalty could be considered "criminal" for the purposes of Article 4 of Protocol No. 7, on the basis of the *Engel* criteria.

137. In this regard, the Court notes that the Supreme Court has been attentive to the progressive developments of the Convention law in this domain and has endeavoured to integrate the Court's case-law developments into its own rulings on national tax legislation (see paragraphs 44-47 above). Thus, in 2002 the Supreme Court for the first time declared that liability for a 30% tax penalty constituted a "criminal charge" in the sense of Article 6 of the Convention. The Supreme Court also held, contrary to previous rulings, that a 60% tax penalty was a criminal matter for the purposes of Article 4 of Protocol No. 7 and in 2004 and 2006 it went on to hold that the same applied to the 30% tax penalty.

138. In comparable cases concerning Sweden (involving tax penalties at rates of 40% and 20%), the Court has held that the proceedings in question were "criminal", not only for the purposes of Article 6 of the Convention (see *Janosevic v. Sweden*, no. 34619/97, §§ 68-71, ECHR 2002-VII; and *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, §§ 79-82, 23 July 2002), but also for the purposes of Article 4 of Protocol No. 7 (see *Manasson v. Sweden* (dec.), no. 41265/98, 8 April 2003; *Rosenquist*, cited above; *Synnelius and Edsbergs Taxi AB v. Sweden* (dec.), no. 44298/02, 17 June 2008; *Carlberg v. Sweden* (dec.), no. 9631/04, 27 January 2009; and *Lucky Dev*, cited above, §§ 6 and 51).

139. Against this background, the Court sees no cause for calling into question the finding made by the Supreme Court (see paragraphs 22-25 above) to the effect that the proceedings in which the ordinary tax penalty – at the level of 30% – was imposed on the first applicant concerned a "criminal" matter within the autonomous meaning of Article 4 of Protocol No. 7.

(β) Whether the criminal offences for which the first applicant was prosecuted were the same as those for which the tax penalties were imposed on him (*idem*)

140. As stated above (at paragraph 128), the protection of the *ne bis in idem* principle is not dependent on the order in which the respective proceedings are conducted; it is the relationship between the two offences which is material (see *Franz Fischer v. Austria*, no. 37950/97, § 29, 29 May 2001; and also *Storbråten*; *Mjelde*; *Haarvig*; *Ruotsalainen*; and *Kapetanios and Others*, all cited above).

141. Applying the harmonised approach in *Zolotukhin* (cited above, §§ 82-84) to the facts of the present case, the Supreme Court found that the factual circumstances that constituted the basis for the tax penalty and the criminal conviction – in that both concerned the omission to provide certain information about income on the tax return – were sufficiently similar as to meet the above-mentioned requirement (see paragraph 21 above). This point is

not disputed between the parties and, despite the additional factual element of fraud present in the criminal offence, the Court sees no reason to consider finding otherwise.

(γ) Whether there was a final decision

142. As to the issue of whether in the proceedings concerning the tax penalty there had been a "final" decision that could potentially bar criminal proceedings (see *Zolotukhin*, cited above, §§ 107-108), the Court refers to its analysis above. Being satisfied, on the assessment carried out below, that there was a sufficient connection in substance and in time between the tax proceedings and the criminal proceedings for them to be regarded as forming an integrated legal response to the first applicant's conduct, the Court does not find it necessary to go further into the issue of the finality of the tax proceedings considered separately. In its view, the circumstance that the first set became "final" before the second does not affect the assessment given below of the relationship between them (see paragraph 126 above).

143. Thus, the Court sees no need to express any view with regard to the Supreme Court's examination of the question whether the first decision of 24 November 2008 became final after the expiry of the three week time-limit for lodging an administrative appeal or after that of the six month time-limit for lodging a judicial appeal (see paragraph 27 above).

(δ) Whether there was duplication of proceedings (*bis*)

144. The competent national authorities found that the first applicant's reprehensible conduct called for two responses, an administrative penalty under chapter 10 on Tax Penalties of the Tax Assessment Act and a criminal one under chapter 12 on Punishment of the same Act (see paragraphs 15, 16 and 41-43 above), each pursuing different purposes. As the Supreme Court explained in its judgments of May 2002 (see paragraph 46 above), the administrative penalty of a tax surcharge served as a general deterrent, as a reaction to a taxpayer's having provided, perhaps innocently, incorrect or incomplete returns or information, and to compensate for the considerable work and costs incurred by the tax authorities on behalf of the community in carrying out checks and audits in order to identify such defective declarations; it was concerned that those costs should to a certain extent be borne by those who had provided incomplete or incorrect information. Tax assessment was a mass operation involving millions of citizens. For the Supreme Court, the purpose of ordinary tax penalties was first and foremost to enhance the effectiveness of the taxpayer's duty to provide complete and correct information and to secure the foundations of the national tax system, a precondition for a functioning State and thus a functioning society. Criminal conviction under chapter 12, on the other hand, so the Supreme Court stated, served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud.

145. Thus, following a tax audit carried out in 2005, the tax authorities filed a criminal complaint against the first applicant along with others in the autumn of 2007 (see paragraph 13 above). In December 2007 he was interviewed as an accused and was held in custody for four days (see paragraph 14 above). With reference, *inter alia*, to the criminal investigation, in August 2008 the tax authorities warned him that they would amend his tax assessment, including in respect of the year 2002, on the ground that he had omitted to declare NOK 3,259,341. That warning was issued against the background of the tax audit conducted by the tax authorities at Software Innovation AS, the ensuing criminal investigation and the evidence given by him in those proceedings (see paragraph 16 above). In October 2008 the *Økokrim* indicted the applicant in respect of the tax offences. On 24 November 2008 the tax authorities amended his tax assessment and ordered him to pay the tax penalty at issue. The decision had regard, *inter alia*, to evidence given by the first and second applicants during interviews in the criminal investigation. A little more than two months later, on 2 March 2009, the District Court convicted him of tax fraud in relation to his failure to declare the said amount on his tax return for 2002. The Court regards it as particularly important that, in sentencing him to one year's imprisonment, the District Court, in accordance with general principles of national law on criminal sentencing (see paragraph 50 above), had regard to the fact that the first applicant had already been significantly sanctioned by the imposition of the tax penalty (see paragraph 17 above; compare and contrast *Kapetanios and Others*, cited above, § 66, where the administrative courts imposing administrative fines failed to take into account the applicants' acquittal in previous criminal proceedings relating to the same conduct; and also *Nykänen*, cited above, where there was found to be no sufficient connection in substance between the two sets of proceedings).

146. In these circumstances, as a first conclusion, the Court has no cause to call into doubt either the reasons why the Norwegian legislature opted to regulate the socially undesirable conduct of non-payment of taxes in an integrated dual (administrative/criminal) process or the reasons why the competent Norwegian authorities chose, in the first applicant's case, to deal separately with the more serious and socially reprehensible aspect of fraud in a criminal procedure rather than in the ordinary administrative procedure.

Secondly, the conduct of dual proceedings, with the possibility of different cumulated penalties, was foreseeable for the applicant who must have known from the outset that criminal prosecution as well as

the imposition of tax penalties was possible, or even likely, on the facts of the case (see paragraphs 13 and 16 above).

Thirdly, it seems clear that, as held by the Supreme Court, the criminal proceedings and the administrative proceedings were conducted in parallel and were interconnected (see paragraph 29 above). The establishment of facts made in one set was used in the other set and, as regards the proportionality of the overall punishment inflicted, the sentence imposed in the criminal trial had regard to the tax penalty (see paragraph 17 above).

147. On the facts before it, the Court finds no indication that the first applicant suffered any disproportionate prejudice or injustice as a result of the impugned integrated legal response to his failure to declare income and pay taxes. Consequently, having regard to the considerations set out above (in particular as summarised in paragraphs 132-134), the Court is satisfied that, whilst different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, to consider them as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information about certain income on a tax return, with the resulting deficiency in the tax assessment (see paragraph 21 above).

(ii) The second applicant

148. In the case of the second applicant, the High Court, relying on the same approach as that followed by the Supreme Court in the first applicant's case, found, firstly, that the tax authorities' decision of 5 December 2008 ordering him to pay a tax penalty of 30% did amount to the imposition of a "criminal" punishment within the meaning of Article 4 of Protocol No. 7; secondly, that the decision had become "final" upon the expiry of the time-limit for lodging an appeal on 26 December 2008; and, thirdly, that the decision on the tax penalty and the subsequent criminal conviction concerned the same matter (see paragraph 37 above). The Court, as in the case of the first applicant, sees no reason to arrive at a different conclusion on the first and the third matter, nor any need to pronounce a view on the second.

149. As to the further question whether there was a duplication of proceedings (*bis*) that was incompatible with the Protocol, the Court notes that the competent authorities, as for the first applicant (see paragraph 144 above), judged that dual proceedings were warranted in the second applicant's case.

150. As to the details of the relevant proceedings, following their tax audit in 2005 the tax authorities filed a criminal complaint with *Økokrim* in the autumn of 2007 also against the second applicant (as they had done against the first applicant and others) in relation to his failure to declare NOK 4,561,881 (approximately EUR 500,000) in income for the tax year 2002 (see paragraph 31 above). With reference in particular to the tax audit, the criminal evidence given by him in the relevant criminal investigation and documents seized by *Økokrim* in the investigation on 16 October 2008, the Tax Administration warned him that it was considering amending his tax assessment on the ground that he had omitted to declare the said income and imposing a tax penalty (see paragraph 32 above). On 11 November 2008 the public prosecutor indicted the applicant on a charge of tax fraud in relation to his failure to declare the aforementioned amount, which represented a tax liability of NOK 1,302,526, and requested the City Court to pass a summary judgment based on the second applicant's confession (see paragraph 33 above). The criminal proceedings had reached a relatively advanced stage by 5 December 2008 when the Tax Administration amended his tax assessment to the effect that he owed the latter amount in tax and ordered him to pay the tax penalty in question (see paragraph 32 above).

Thus, as can be seen from the foregoing, since as far back as the tax authorities' complaint to the police in the autumn of 2007 and until the decision to impose the tax penalty was taken on 5 December 2008, the criminal proceedings and the tax proceedings had been conducted in parallel and were interconnected. This state of affairs was similar to that which obtained in the first applicant's case.

151. It is true, as noted by the High Court on appeal, that the nine-month period – from when the tax authorities' decision of 5 December 2008 had become final until the second applicant's conviction of 30 September 2009 by the City Court – had been somewhat longer than the two-and-a-half-month period in the case of the first applicant. However, as also explained by the High Court (see paragraph 39 above), this was due to the fact that the second applicant had withdrawn his confession in February 2009, with the consequence that he had had to be indicted anew on 29 May 2009 and an ordinary adversarial trial hearing had had to be scheduled (see paragraphs 34 and 35 above). This circumstance, resulting from a change of stance by the second applicant, cannot of itself suffice to disconnect in time the tax proceedings and the criminal proceedings. In particular, the additional lapse of time before the criminal trial hearing cannot be considered disproportionate or unreasonable, having regard to its cause. And what remains significant is the fact that, as for the first applicant, the tax penalty was indeed taken into account by the City Court in fixing the sentence in the criminal proceedings (see paragraph 35 above).

152. Therefore, also in the second applicant's case, the Court has no cause to call into doubt the reasons why the Norwegian authorities opted to deal with his reprehensible conduct in an integrated dual (administrative/criminal) process. The possibility of different cumulated penalties must have been

foreseeable in the circumstances (see paragraphs 13 and 32 above). The criminal proceedings and the administrative proceedings were conducted largely in parallel and were interconnected (see paragraph 39 above). Again the establishment of facts made in one set was relied on in the other set and, as regards the proportionality of the overall punishment, regard was had to the administrative penalty in meting out the criminal sentence (see paragraphs 33 and 35 above).

153. On the facts before the Court, there is no indication that the second applicant suffered any disproportionate prejudice or injustice as a result of the impugned integrated legal treatment of his failure to declare income and pay taxes. Having regard to the considerations set out above (in particular as summarised in paragraphs 132-134), the Court thus considers that there was a sufficiently close connection, both in substance and in time, between the decision on the tax penalties and the subsequent criminal conviction for them to be regarded as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information on a tax return leading to a deficient tax assessment.

(iii) Overall conclusion

154. Against this background, it cannot be said that either of the applicants was "tried or punished again ... for an offence for which he had already been finally ... convicted" in breach of Article 4 of Protocol No. 7. The Court accordingly finds no violation of this provision in the present case in respect of either of the two applicants.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the applications admissible;

2. *Holds*, by sixteen votes to one, that there has been no violation of Article 4 of Protocol No. 7 to the Convention in respect of either of the applicants.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 November 2016.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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I – Introduction

1. I do not subscribe to either the reasoning or the conclusions of the majority in the present case. Although the present case specifically pertains to the combination of penalties imposed in tax proceedings and in parallel criminal proceedings, the Grand Chamber of the European Court of Human Rights ("the Court") has deliberately extended the scope of the case to the more general legal problem of "dual criminal and administrative proceedings"[85]. The obvious purpose of the Grand Chamber is to establish a principle of European human rights law that is applicable to all cases involving a combination of administrative and criminal proceedings. The problem is that the Grand Chamber's reasoning cuts some corners. The imprecise description of the conditions required for the combination of administrative and criminal penalties and the perfunctory application of these conditions to the Norwegian legal framework and practice leave a lingering impression of lightness of reasoning.

2. In the first part of my opinion, I deal with the forgotten foundations of the *ne bis in idem* principle, namely its historical roots as an individual guarantee and its gradual recognition as a principle of customary international law. Afterwards, I present the contemporary challenges to this principle in the field of administrative offences and especially of tax offences and the Court's hesitant response to them. In the second part of the opinion, I assess the *pro persona* legacy of *Sergey Zolotukhin*[86] and compare the majority's *pro auctoritate* stance in the present case with the recent solutions adopted by the Court and by the Court of Justice of the European Union in the field of tax offences[87], stock-exchange offences[88] and customs offences[89]. Finally, I demonstrate the shortcomings of the majority's solution in the present case on the basis of an in-depth discussion of the aims and the elements of the criminal and administrative offences at stake, the different evidentiary rules applicable in Norwegian administrative and criminal proceedings and the specific features of the alleged offsetting mechanism provided by domestic substantive law and case-law. In the light of the foregoing, I conclude that there has been a violation of Article 4 of Protocol No. 7.

First Part

II - Foundations of *ne bis in idem*

A. Brief historical note

a. Roman times

3. The maxim *ne bis in idem* was respected during the Roman Republic and the Principate, although some exceptions were mentioned of new proceedings for the same crime against defendants who had already been acquitted[90]. Initially, during the period of the *legis actiones*, the maxim meant that *bis de eadem res ne sic actio*, that is, the launching of a certain action had the consequence of extinguishing the respective right, which hindered the launching of new *actiones*, even when no decision on the merits had been delivered. To limit the impact of this maxim, the *exceptio rei judicatae* was introduced, which was dependent on a previous decision on the merits. The *exceptio* hindered *bis in eadem*, regardless of the fact that the previous judgment had been upon an acquittal or a conviction. In both cases, the *autoritas rerum judicatarum* consisted in the extinguishing effect of the criminal action. The scope of the maxim was limited by the object of the previous criminal action: *tantum consumptum, quantum judicatum, tantum judicatum, quantum litigatum*. The *eadem quaestio* was defined by the same fact, *idem factum*[91].

4. In Justinian law, the presumption of the truthfulness of the court's decision became the new rationale of the maxim. Ulpiano was the first to formulate the maxim *res iudicata pro veritate accipitur* (D. 50, 17, 207). Together with the emergence of the inquisitorial process and of syllogistic legal reasoning, the rationale of the imperial codification – the court's authority and the infallibility of the court's findings – impacted negatively on the individual dimension of the maxim. In the logic of the new inquisitorial process, the once exceptional cases of reopening of criminal proceedings for the same facts in Roman law became mere examples of the maxim *absolutio pro nunc, rebus sic stantibus*, which in fact acknowledged the transitory nature of the criminal judgment in the pursuit of truthfulness. For example, in France, according to the *plus amplement informé* rule, in the absence of positive evidence of the defendant's innocence, the acquittal had a transitory nature, which could be reversed at any moment by new

[85] See the crucial paragraph 132 of the judgment.
[86] *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 82 and 84, ECHR 2009.
[87] *Hans Åkeberg Fransson* (C-617/10, judgment of the Grand Chamber of the Court of Justice of the European Union, 26 February 2013, and *Lucky Dev v. Sweden*, no. 7356/10, § 58, 27 November 2014.
[88] *Grande Stevens and Others v. Italy*, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014.
[89] *Kapetanios and Others v. Greece*, nos. 3453/12, 42941/12 and 9028/13, § 72, 30 April 2015, and *Sismanidis and Sitaridis v. Greece*, nos. 66602/09 and 71879/12, 9 June 2016.
[90] For the historical debate see Laurens, *De l'autorité de la chose jugée considerée comme mode d'extinction de l'action publique*, Paris, 1885; Mommsen, *Römisches Strafrecht*, Aalen, 1899; Arturo Rocco, *Trattato della Cosa Giudicata come Causa di Estinzione dell'Azione Penale*, Roma, 1900; Danan, *La régle* non bis in idem *en droit pénal français*, Rennes, 1971; Spinellis, *Die materielle Rechtskraft des Strafurteils*, Munich, 1962; Mansdörfer, *Das Prinzip des ne bis in idem im europäischen Strafrecht*, Berlin, 2004; and Lelieur-Fischer, *La règle ne bis in idem, Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive, Etude à la lumière des droits français, allemand et européen*, Paris, 2005.
[91] See Laurens, cited above, p. 50-51; Arturo Rocco, cited above, p. 76; and Mommsen, cited above, p. 450.

incriminatory evidence. The same occurred in Italy, where the defendant was acquitted from the observation of the court (*At in casu quo reus absoluendus est ab observatione iudici*), with the caveat "while things stand as they are" (*stantibus rebus prout stant*), the proceedings being reopened whenever new evidence appeared (*supervenient nova indicia*).

b. The Enlightenment

5. The Enlightenment brought a revival of the individual dimension of *ne bis in eadem*, which was incorporated into Article 8 of Chapter V of Title II of the 1791 French Constitution ("*tout homme acquité par un jury legal ne peut plus être repris ni accusé à raison du même fait*") and Articles 246 and 360 of the 1808 *Code d'Instruction Criminelle*. The practical consequence of these provisions was the abolition of the infamous *plus amplement informé* rule. On the other side of the Atlantic Ocean, in that same year of 1791, the Fifth Amendment to the United States Constitution introduced a prohibition of double jeopardy in criminal procedure ("*nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*"), which encompasses the prohibition of subsequent prosecution after acquittal, subsequent prosecution after conviction and multiple punishments for the same offence[92]. The Amendment was designed as much to prevent the offender from being punished twice as from being tried twice for the same offence. When the conviction has been set aside for an error, the punishment already exacted for the offence must be fully "credited" in imposing sentence upon a new conviction for the same offence[93].

B. A principle of customary international law

a. The universal consolidation of the principle

6. As the established and virtually universal practice of States shows, it is a principle of customary international law that the State's claim to prosecute, adjudicate and punish a criminal act is exhausted (*Strafklageverbrauch*) once the accused person has been acquitted or has been found guilty of the imputed offence by a final decision taken in criminal proceedings (the exhaustion-of-procedure principle or *Erledigungsprinzip*)[94]. This principle is independent of any condition regarding sentencing or enforcement of the sentence. Where this principle does not apply, as in the case of the prohibition of double punishment, without barring a second prosecution and trial, any previous penalty must be taken into account when imposing a subsequent punishment for the same fact (the accounting principle or *Anrechnungprinzip*).

7. The exhaustion-of-procedure principle (*Erledigungsprinzip*) is affirmed by Article 14 § 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR – "tried or punished")[95], Article 8 § 4 of the 1969 American Convention on Human Rights ("new trial"), Article 75 § 4 (h) of the 1977 Additional Protocol I to the 1949 Geneva Conventions ("prosecuted or punished"), Article 10 § 1 of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia ("tried")[96], Article 9 § 1 of the 1994 Statute of the International Criminal Tribunal for Rwanda ("tried")[97], Article 20 § 2 of the 1998 Statute of the International Criminal Court ("convicted or acquitted"), Article 9 § 1 of the 2002 Statute of the Special Court for Sierra Leone ("tried")[98] and Article 19 § 1 of the 2004 Arab Charter on Human Rights ("tried"). Article 86 of the 1949 Third Geneva Convention ("punished") and Article 117 § 3 of the 1949 Fourth Geneva Convention ("punished") do not go that far, since they only prohibit a new punishment, but make no reference to the accounting principle.

b. The European consolidation of the principle

8. Within the Council of Europe, the principle of *ne bis in idem* initially came into play as a mandatory or optional bar to cooperation in criminal matters between States. Examples of this limited approach are Article 9 of the 1957 European Convention on Extradition[99], Article 9 of the 1962 European Convention on the Punishment of Road Traffic Offences[100], Article 2 of the 1975 Additional Protocol to the European Convention on Extradition[101], Article 8 of the 1983 Convention on the Transfer of Sentenced Persons[102], Article 2 § 4 of the 1995 Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[103] and Article 28 § 1 (f) of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[104].

[92] *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).
[93] Ibid., 718.
[94] See, for the constitutional practice, Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" (1993), 3 *Duke Journal of Comparative & International Law* 247.
[95] See Human Rights Committee General Comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, §§ 54-57.
[96] "But in considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."
[97] "But in considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."
[98] "But in considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."
[99] ETS no. 24.
[100] ETS no. 52.
[101] ETS no. 86.
[102] ETS no. 112.
[103] ETS no. 156.
[104] CETS no. 198.

9. More recently, the exhaustion-of-procedure principle (*Erledigungsprinzip*) was affirmed by Article 53 of the 1970 European Convention on the International Validity of Criminal Judgments ("neither be prosecuted nor sentenced nor subjected to enforcement of a sanction")[105], Article 35 of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters ("neither be prosecuted nor sentenced nor subjected to enforcement of a sanction")[106] and Article 17 of the 1985 European Convention on Offences relating to Cultural Property ("neither be prosecuted nor sentenced nor subjected to enforcement of a sanction")[107]. In these cases, when *ne bis in idem* does not apply, the accounting principle must be safeguarded as a last-resort guarantee. Article 25 of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings provides solely for the accounting principle[108].

10. The Council of Europe Parliamentary Assembly Recommendation 791 (1976) on the protection of human rights in Europe urged the Committee of Ministers to "endeavour to insert as many as possible of the substantive provisions of the Covenant [on Civil and Political Rights] in the Convention". Article 4 of Protocol No. 7[109] was thus approved in 1984 under the direct influence of Article 17 § 7 of the ICCPR. The major novelty was the non-derogable nature of the European principle.

11. Within the European Union, the exhaustion-of-procedure principle (*Erledigungsprinzip*) was affirmed by Article 1 of the 1987 Convention between the Member States of the European Communities on Double Jeopardy ("not be prosecuted")[110], Article 54 of the 1990 Convention implementing the Schengen Agreement (CISA – "not be prosecuted")[111], Article 7 of the 1995 Convention on the protection of the European Communities' financial interests ("not be prosecuted")[112], Article 10 of the 1997 Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the Member States of the European Union ("not be prosecuted")[113], Article 2 § 1 of the European Central Bank Regulation no. 2157/1999 on the powers of the European Central Bank to impose sanctions ("No more than one infringement procedure shall be initiated"), Article 50 of the 2000 Charter of Fundamental Rights of the European Union ("the Charter" – "tried or punished") and the 2003 Initiative of the Hellenic Republic with a view to adopting the Council Framework Decision concerning the application of the "*ne bis in idem*" principle ("cannot be prosecuted for the same acts")[114].

12. The Charter radically changed the legal obligations of those member States of the European Union to which it is applicable. Since the right not to be tried or punished twice in criminal proceedings for the same offence is set out in Article 54 of the CISA and in Article 50 of the Charter, Article 54 must be interpreted in the light of Article 50[115]. In the light of Article 52 § 3 of the Charter, when implementing Charter rights and freedoms which correspond to rights and freedoms guaranteed by the European Convention on Human Rights ("the Convention") and the Protocols thereto, member States of the European Union are bound by the meaning and scope of those rights and freedoms laid down by the Convention and Protocols, as interpreted by the Court[116], even when they have not ratified these Protocols.

This is also the case for Article 50 of the Charter and consequently Article 54 of the CISA, which evidently must be interpreted and applied in the light of the Court's case-law on Article 4 of Protocol No. 7, even in the case of those European Union member States which have not ratified this Protocol.

13. Furthermore, *ne bis in idem* was inserted as a bar to cooperation in criminal matters between States in various instruments, such as Article 3 § 2 of the 2002 Framework Decision on the European Arrest Warrant[117], Article 7 § 1 (c) of the 2003 Framework Decision on the execution in the European Union of orders freezing property or evidence[118], Article 8 § 2 (b) of the 2006 Framework Decision on the

[105] ETS no. 70. When this principle is not applied, Article 54 provides for the accounting principle for prison sentences.
[106] ETS no. 73. When this principle does not apply, Article 36 provides for the accounting principle for prison sentences.
[107] ETS no. 119. When this principle is not applied, Article 18 provides for the accounting principle for prison sentences.
[108] CETS no. 197.
[109] ETS no. 117. The Protocol entered into force on 1 November 1988.
[110] Article 3 provides for the accounting principle for prison sentences as well as penalties not involving deprivation of liberty.
[111] Where this principle does not apply, Article 56 provides for the accounting principle for prison sentences as well as penalties not involving deprivation of liberty. Articles 54 to 57 of the Convention implementing the Schengen Agreement were taken from the Convention between the Member States of the European Communities on Double Jeopardy. The Treaty of Amsterdam incorporated *ne bis in idem* in the third pillar. From that moment on, the principle became an objective of the common space of freedom, security and justice. See also the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (2001/C 12/02) and the Commission Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM(2005) 696 final.
[112] Council Act of 26 July 1995.
[113] Council Act of 26 May 1997. Article 10 provides for the accounting principle for prison sentences as well as penalties not involving deprivation of liberty.
[114] Article 3 has rules on *lis pendens*. Article 5 provides for the accounting principle, including for any penalties other than deprivation of freedom which have been imposed and penalties imposed in the framework of administrative procedures.
[115] See paragraph 35 of the judgment of 5 June 2014 in *M* (C-398/12).
[116] See Note from the Praesidium of the Convention: explanations on the Charter of Fundamental Rights of the European Union (Brussels, 11 October 2000): "The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Communities."
[117] Council Framework Decision 2002/584/JHA of 13 June 2002.
[118] Council Framework Decision 2003/577/JHA of 22 July 2003.

application of the principle of mutual recognition to confiscation orders[119], Article 11 § 1 (c) of the 2008 Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions[120], Article 13 § 1 (a) of the 2008 Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[121], Article 15 § 1 (c) of the 2009 Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention[122], and Article 1 § 2 (a) of the 2009 Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings[123].

Finally, Article 6 of Regulation no. 2988/95 on the protection of the European Communities' financial interests sets out the principle *le pénal tient l'administratif*, coupled with the accounting principle.

14. In the judicial arena, the Court of Justice of the European Union held, in *Walt Wilhelm and others v. Bundeskartellamt*, that concurrent sanctions could be imposed in two parallel sets of proceedings pursuing different ends. In competition law, the possibility that one set of facts could be submitted to two parallel procedures, one at Community level and the other at national level, followed from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels. If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice would demand that any previous punitive decision must be taken into account in determining any sanction which is to be imposed[124].

Later on, the Court of Justice further developed its case-law within the ambit of the third pillar on *bis* (*Gözütok and Brügge*,[125] *Miraglia*[126], *Van Straaten*[127], *Turanský*[128], *M.*[129], *Kussowski*[130]), on "*idem*" (*Van Esbroeck*[131], *Van Straaten*[132], *Gasparini*[133], *Kretzinger*[134], *Kraaijenbrink*[135] and *Gasparini*[136]) and on the enforcement clause (*Klaus Bourquain*[137], *Kretzinger*[138] *and Spasic*[139]).

In the tax law domain, the landmark judgment was *Hans Åkeberg Fransson*, which reached the following conclusion: "It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person."[140] By refusing the Advocate General's proposal based on the accounting principle[141], the Luxembourg Court decided, in a remarkable move towards convergence with the Strasbourg Court, that a combination of tax penalties with a criminal nature according to the *Engel* criteria and criminal penalties would constitute an infringement of Article 50 of the Charter[142].

15. In sum, the copious occurrence of the *ne bis in idem* principle in both international and domestic law and case-law testifies to the recognition of a principle of customary international law[143]. The exhaustion-of-procedure principle (*Erledigungsprinzip*) is largely predominant in international law, both at the universal and the European levels, but the accounting principle also finds some recognition, in a narrower form within the Council of Europe (deduction of prison sentences) and a broader form within the European Union (deduction of prison sentences and taking into account of sanctions not entailing deprivation of liberty).

119 Council Framework Decision 2006/783/JHA of 6 October 2006.
120 Council Framework Decision 2008/947/JHA of 27 November 2008.
121 Council Framework Decision 2008/978/JHA of 18 December 2008.
122 Council Framework Decision 2009/829/JHA of 23 October 2009.
123 Council Framework Decision 2009/948/JHA of 30 November 2009.
124 Case 14/68, 13 February 1969, § 11.
125 Case C-187/01 and Case C-385/01, 11 February 2003.
126 Case C-469/03, 10 March 2005.
127 Case C-150/05, 28 September 2006.
128 Case C-491/07, 22 December 2008.
129 Case C-398/12, 5 June 2014.
130 Case C-486/14, 29 June 2016.
131 Case C-436/04, 9 March 2006.
132 Cited above.
133 Case C-467/04, 28 September 2006.
134 Case C-288/05, 18 July 2007.
135 Case C-367/05, 18 July 2007.
136 Cited above.
137 Case C-297/07, 11 December 2008.
138 Case C-288/05, 18 July 2007.
139 Case C-129/14 PPU, 27 May 2014.
140 *Hans Åkeberg Fransson*, cited above, §§ 34 and 37.
141 In paragraphs 86 and 87 of his opinion, the Advocate General pleaded for a "partially autonomous interpretation" of Article 50 of the Charter, arguing that there was a constitutional tradition common to the member States and at variance with the then prevailing interpretation by the Strasbourg Court of Article 4 of Protocol No. 7 which "clashes with the widespread existence and established nature in the Member States of systems in which both an administrative and a criminal penalty may be imposed in respect of the same offence."
142 This is exactly the reading of the *Fransson* judgment by the Court in *Grande Stevens and Others*, cited above, § 229; *Kapetanios and Others*, cited above, § 73; and *Sismanidis and Sitaridis*, cited above, § 73.
143 See, among many sources of *opinio iuris* in this regard, the conclusions of the International Association of Penal Law (IAPL) at the Fourteenth International Congress of Penal Law in October 1989 ("If an act meets the definition both of a criminal offence and of an administrative penal infraction, the offender should not be punished twice; at a minimum, full credit should be given, in sentencing on a subsequent conviction, for any sanction already imposed in relation to the same act") and the Seventeenth International Congress of Penal Law in September 2004 ("At any rate, double prosecutions and sanctions of a criminal nature have to be avoided"); Principle 9 of the Princeton Principles on Universal Jurisdiction, 2001; and Anke Biehler et al. (eds.), Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union, 2003.

III - Contemporary challenges to *ne bis in idem*

A. Administrative offences and criminal policy *à deux vitesses*

a. The policy trend towards decriminalisation

16. Decriminalisation has been a most welcome trend of criminal law in Europe since the 1960s[144]. Administrative offences are a rational deflative instrument of criminal policy. This trend is frequently characterised by the transfer of criminal offences with a lesser degree of social offensiveness, such as road traffic offences, to the field of administrative law, where the substantive and procedural guarantees are not on a par with those of classic criminal law and criminal procedure. Administrative offences are frequently couched in broad and open-ended terms and administrative fines (*Geldbusse*) are the preferred form of punishment. Imprisonment is not an alternative (*Ersatzfreiheitsstrafe*) to a fine as is the case in criminal law, and no coercive imprisonment (*Erzwingungshaft*) can be ordered unless the person concerned has failed to pay the sum due without having established his or her inability to pay. Administrative penalties are not entered in the national criminal record but solely, in certain circumstances, on administrative registers for specific sectors, such as the register of road traffic offences. Normally, administrative offences are processed by means of a simplified procedure of prosecution and punishment conducted before administrative authorities, save in the event of a subsequent appeal to a court. In many cases, the prosecution of administrative offences falls within the discretionary power of the competent administrative authorities. General laws on criminal procedure are in principle applicable only by analogy. Shorter limitation periods apply to administrative offences than to criminal offences.

17. The blurring of the dividing line between criminal law and administrative law has its own risks. Forms of conduct with a high degree of social offensiveness have also become the subject of administrative law, especially when they involve mass processing of data, such as tax law, or highly qualified expertise, such as competition law[145] and securities and stock-exchange law[146].

b. *Öztürk* and the "criminalisation" of petty offences

18. It has been the long-standing case-law of the Court that administrative offences also come under its scrutiny, as far as Article 6 guarantees are concerned. On the basis of the *Engel* criteria[147], the Court has time and again reaffirmed that conduct punishable by administrative penalties must benefit from the procedural guarantees of Article 6 regardless of the personal or collective nature of the legal interests protected by the norm that has been breached[148], the relative lack of seriousness of the penalty[149] and the fact that the penalty is hardly likely to harm the reputation of the offender[150]. Otherwise such deprivation of procedural guarantees would contradict the purpose of Article 6[151].

19. In *Öztürk*[152] the Court used three crucial arguments to swim against the tide of decriminalisation and support the position that the administrative offence at stake, a road traffic offence, was "criminal" for the purposes of Article 6: the ordinary meaning of the terms, the punishability of the offending conduct by criminal law in the "vast majority of the Contracting States" and the general scope of the norm that was breached – a provision of the Road Traffic Act[153]. On closer inspection, none of these arguments is convincing. It is hard to establish the dividing line between administrative and criminal offences on the basis of the "ordinary meaning of terms", whatever this may mean for the Court. Furthermore, while it is true that a European consensus is certainly a decisive criterion for the criminalisation of conduct with a high degree of social offensiveness, it is hard to understand why the Court should argue, on the basis of a European consensus, against the decriminalisation of petty offences, a trend which reflects a concern to benefit not only the individual, who would no longer be answerable in criminal terms for his or her conduct and could even avoid court proceedings, but also to ensure the effective functioning of the courts, which would henceforth be relieved in principle of the task of dealing with the great majority of such offences. Above all, the Court errs in equating criminal offences with norms of general personal scope. Quite surprisingly, it seems to ignore the long-standing European tradition of criminal offences with a limited personal scope, namely norms applicable to certain

144 IAPL, Fourteenth International Congress, cited above: "The decriminalization of transgressions is in accord with the principle of subsidiarity of penal law and is thus welcomed."
145 See *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.
146 See *Grande Stevens and Others*, cited above.
147 See *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.
148 See *Öztürk v. Germany*, 21 February 1984, § 53, Series A no. 73: "It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic."
149 Ibid., § 54. "The relative lack of seriousness of the penalty at stake … cannot divest an offence of its inherently criminal character." See also *Lutz v. Germany*, 25 August 1987, § 55, Series A no. 123, and *Jussila v. Finland* [GC], no. 73053/01, § 31, ECHR 2006-XIII.
150 See *Öztürk*, cited above, § 53: "The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6. There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness."
151 Ibid.: "it would be contrary to the object and purpose of Article 6, which guarantees to 'everyone charged with a criminal offence' the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article a whole category of offences merely on the ground of regarding them as petty."
152 Ibid.
153 Ibid.

categories of citizens distinguishable by personal or professional features (*Sonderdelikte* or *Pflichtendelikte*)[154]. Therefore, criminal offences and norms of limited personal scope of applicability are not mutually exclusive.

20. While decriminalisation is not unproblematic in terms of the guarantees in Articles 6 and 7 of the Convention and Article 4 of Protocol No. 7 when it relates to petty administrative penalties that punish conduct with a lesser degree of social offensiveness[155], it undoubtedly raises a serious issue under those Articles when it deals with conduct with a higher degree of social offensiveness that has been downgraded to the sphere of administrative law, for policy purposes. This is all the more so when administrative offences, including those committed negligently, are punishable by astronomical, sometimes even unlimited, financial penalties, fines or surcharges, frequently coupled with the suspension, restriction or even withdrawal of certain rights, such professional rights. Special leniency regimes are available for whistleblowers and others who collaborate with the judicial authorities. Some administrative offences even carry a more severe penalty in the event of recidivism. In addition, administrative proceedings may include such intrusive investigatory measures as interception of communications and house searches, which may restrict the suspect's privacy just as in the most serious criminal proceedings.

21. In fact, this *droit pénal à deux vitesses* hides a net-widening repressive policy, which aims to punish more expediently and more severely, with lesser substantive and procedural safeguards. In this new Leviathan-like context, administrative-law offences are nothing but pure mislabelling of a hard-core punitive strategy and administrative law becomes a shortcut to circumvent the ordinary guarantees of criminal law and criminal procedure[156].

22. The Convention is not indifferent to this criminal policy. On the contrary, it does not leave human rights issues of this magnitude to each State's discretion. No margin of appreciation is accorded to States by Article 7 of the Convention and Article 4 of Protocol No. 7, which are non-derogable provisions. The definition of the confines of criminal law and the application of the principles of legality and *ne bis in idem* are not dependent on the particularities of each domestic legal system. On the contrary, they are subject to strict European supervision performed by the Court, as will be shown below.

B. Tax penalties as a criminal policy instrument

a. The criminal nature of tax penalties

23. Like the wording of Articles 6 and 7 of the Convention, the notion of "criminal proceedings" in the text of Article 4 of Protocol No. 7 must be interpreted in an autonomous way. Furthermore, as a matter of principle, the Convention and its Protocols must be read as a whole[157]. Hence, Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 of the Convention respectively[158]. Furthermore, the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the *ne bis in idem* principle under Article 4 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention. Precisely in order to avoid this discretion, there may be cases where neither a final acquittal[159] nor a final conviction[160] is capable of triggering the *ne bis in idem* effect.

24. In the present case, the first set of proceedings concerned the imposition of tax penalties. The Court has taken a clear stand on the criminal nature of tax penalties, in the context of Article 6 of the Convention. In *Bendenoun*[161], which concerned the imposition of tax penalties for tax evasion, the Court did not refer expressly to the *Engel* criteria and listed four aspects as being relevant to the applicability of Article 6 in that case: that the law setting out the penalties covered all citizens in their capacity as taxpayers; that the surcharge in question was not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending; that it was imposed under a general rule whose purpose was both deterrent and punitive; and that the surcharge was substantial. The Court considered, however, that Contracting States must be free to empower tax authorities to impose sanctions such as tax surcharges

[154] On this type of criminal offences, see Roxin, *Täterschaft und Tatherrschaft*, Berlin, 9 edition, 2015, and Langer, *Das Sonderverbrechen*, Berlin, 1972. Scholarly literature distinguishes between "true special offences" (*echte Sonderdelikte*), which can only be committed by a person with a certain status or in a certain situation, and "false special offences" (*unechte Sonderdelikte*), which can be committed by any person but carry an aggravated penalty if committed by a person with a certain status or in a certain situation. The Court made no mention of this distinction in *Öztürk*.

[155] For the Court, it is clear that decriminalisation is linked to minor offences which have no social stigma (see *Lutz*, cited above, § 57).

[156] I have already criticised this trend in my opinions appended to *A. Menarini Diagnostics S.R.L.*, cited above, and *Grande Stevens and Others*, cited above.

[157] See, among many other authorities, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 178, ECHR 2012, and *Ferrazzini v. Italy* [GC], no. 44759/98, § 29, ECHR 2001-VII.

[158] See *Nykänen v. Finland*, no. 11828/11, § 38, 20 May 2014; *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007; *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-XIII; *Rosenquist v. Sweden* (dec.), no. 60619/00, 14 September 2004; *Manasson v. Sweden* (dec.), no. 41265/98, 8 April 2003; *Göktan v. France*, no. 33402/96, § 48, ECHR 2002-V; and *Malige v. France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII.

[159] See *Marguš v. Croatia* [GC], no. 4455/10, § 139, ECHR 2014.

[160] See *Kurdov and Ivanov v. Bulgaria*, no. 16137/04, § 44, 31 May 2011.

[161] *Bendenoun v. France*, 24 February 1994, Series A no. 284.

even if they involved large amounts. Such a system was not incompatible with Article 6 § 1 so long as the taxpayer could bring any such decision affecting him or her before a judicial body with full jurisdiction, including the power to quash in all respects, on questions of fact and law, the decision challenged[162].

25. In *Janosevic*[163] and *Västberga Taxi Aktiebolag and Vulic*[164], the Court made no reference to *Bendenoun* or the particular approach pursued in that case, but proceeded squarely on the basis of the *Engel* criteria[165]. After confirming that the administrative proceedings had determined a "criminal charge" against the applicant, the Court found that the judicial proceedings in the cases before it had been conducted by courts that afforded the safeguards required by Article 6 § 1, since the administrative courts had jurisdiction to examine all aspects of the matters before them. Their examination was not restricted to points of law but could also extend to factual issues, including the assessment of evidence. If they disagreed with the findings of the tax authority, they had the power to quash the decisions appealed against. The Court added that the starting-point for the tax authorities and courts must be that inaccuracies found in a tax assessment were due to an inexcusable act attributable to the taxpayer and that it was not manifestly unreasonable to impose a tax surcharge as a penalty for that act. The tax authorities and courts had to consider whether there were grounds for remission even if the taxpayer had not made any claim to that effect. However, as the duty to consider whether there were grounds for remission only arose in so far as the facts of the case warranted it, the burden of proving that there was a reason to remit a surcharge was, in effect, on the taxpayer. The Court concluded that a tax system operating with such a presumption, which it was up to the taxpayer to rebut, was compatible with Article 6 § 2 of the Convention.

b. *Jussila* and the dividing line between *malum in se* and *malum quia prohibitum*

26. In *Jussila*[166] the Court confirmed the approach taken in *Janosevic* and emphasised that "[n]o established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6."[167] Moreover, in a clear signal of its intention not to deprive taxpayers of their fundamental safeguards in dealings with the State, the Court added that "[w]hile there is no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention."[168] In so doing, the Court "to a certain extent"[169] abandoned the rationale of *Ferrazzini*[170], since it admitted that matters of pure tax assessment did not fall outside the Convention's material scope. *Ratione materiae*, issues relating to tax penalties may involve the Court in an evaluation of the States' sovereign power of tax assessment. The neutralisation of the public power prerogative in *Jussila* led the Court to an apparent reframing of the specificity of tax obligations in the context of European human rights law.

27. Even where the tax surcharges were not classified in national law as criminal, that fact alone was not decisive for the Court. The fact that tax surcharges were imposed by legal provisions applicable to taxpayers generally, with a deterrent purpose, was considered far more relevant. As a matter of principle, tax surcharges were not intended solely as pecuniary compensation for certain damage caused to the State, but as a form of punishment of offenders and a means of deterring recidivism and potential new offenders. In the eyes of the Court, tax surcharges were thus imposed by a rule, the purpose of which was simultaneously deterrent and punitive, even where a 10% tax surcharge had been imposed, with an overall maximum possible surcharge of 20%[171]. For the Court, the punitive nature of tax surcharges trumped the *de minimis* consideration of *Bendenoun*. Consequently, proceedings involving tax surcharges were also found to be "criminal proceedings" for the purpose of Article 6 of the Convention.

28. Had the Court stopped here, *Jussila* would have been a simple extension of *Öztürk* to the field of tax penalties. But the Court did not stop here. It went on to note that it was "self-evident that there are criminal cases which do not carry any significant degree of stigma". Consequently, in the Court's judgment, the criminal-head guarantees did not necessarily apply with their full stringency to criminal charges with no

[162] Ibid., § 46.
[163] *Janosevic v. Sweden*, no. 34619/97, ECHR 2002-VII.
[164] *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002.
[165] The Court emphasised the wrong argument: "The resultant tax surcharges were imposed in accordance with tax legislation … directed towards all persons liable to pay tax in Sweden and not towards a given group with a special status" (see *Janosevic*, cited above, § 68; *Västberga Taxi Aktiebolag and Vulic*, cited above, § 79; and again, for example, in *S.C. IMH Suceava S.R.L. v. Romania*, no. 24935/04, § 51, 29 October 2013).
[166] *Jussila*, cited above, § 41.
[167] Ibid., § 35.
[168] Ibid., § 36.
[169] Ibid., § 45.
[170] See *Ferrazzini*, cited above, § 29. In fact, the Court has assessed the compatibility of tax policy measures with Article 1 of Protocol No. 1 on several occasions (among the most significant, *NKM v. Hungary*, no. 66529/11, 14 May 2013; *Koufaki and ADEDY v. Greece* (dec.), no. 57665/12 and 57657/12, 7 May 2013; *Da Conceição Mateus v. Portugal* (dec.), nos. 62235/12 and 57725/12, 8 October 2013; and *Da Silva Carvalho Rico v. Portugal* (dec.), no. 13341/14, 1 September 2014).
[171] See *Jussila*, cited above, § 38.

significant degree of stigma.[172] By applying Article 6 in a differentiated manner depending on the nature of the issue and the degree of stigma that certain criminal charges carried, the Court distinguished between disposable and non-disposable Convention procedural guarantees, the right of the defendant to a public hearing being one of the former guarantees. In so far as they did not carry any significant degree of stigma, administrative offences could differ from the hard core of criminal law, and therefore the criminal-head guarantees of Article 6 might not apply fully to them. A second-class type of criminal offence, benefiting from only some of the Article 6 guarantees, came into existence in *Jussila*.

29. Unfortunately, the Court has not made any effort, either in *Jussila* or subsequently, to develop a coherent approach to the *magna quaestio* of the dividing line between "hard-core criminal law" and the rest of criminal law, which echoes the outdated distinction between the *mala in se* and the *mala prohibita*. Besides being too simplistic, the Grand Chamber's distinction seems rather artificial. In *Jussila*, as in a few other cases, the social stigma criterion resembles a merely rhetorical argument that the Court does not really use to solve cases[173]. In fact, the Court decided the *Jussila* case very pragmatically, on the basis of the fact that the applicant was given ample opportunity to put forward his case in writing and to comment on the submissions of the tax authorities.

30. The lack of conceptual clarity on the definition of "hard-core criminal law" under Article 6 is further aggravated by the fact that the application of the *Engel* criterion is normally more a matter of degree, depending on the weight of the applied and applicable penalties, than a matter of the nature of the charges levelled against the defendant. The Court more often than not prefers to solve the question of the applicability of the *Engel* criteria by resorting to a purely quantitative evaluation, rather than a qualitative one, of the offences at issue. When it embarks on a substantive analysis of the nature of the offence, it frequently uses the erroneous *Öztürk* argument of the limited personal scope of the norm[174].

31. In sum, the *Öztürk* policy choice to "criminalise" petty administrative offences for the purposes of Article 6 was fundamentally reviewed in *Jussila*. The apparent extension of this policy choice to tax penalties was diluted in the end by the efficiency-oriented, pragmatic stance of the Court, which labelled these petty offences as, although "criminal", not "hard core criminal", and therefore undeserving of the full protection of the criminal limb of Article 6. The interests of efficient mass tax collection speak louder than any other.

32. Be that as it may, the message of the Court in *Jussila* is valid for Norway as well. The tax penalties imposed in the present case were criminal in nature and the respective tax proceedings were criminal for the purposes of Article 4 of Protocol No. 7. The Norwegian tax penalties of 30%, with an overall possible maximum of 60% for wilful or grossly negligent offences, are well above the *Jussila* standard.

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[172] Ibid., § 43; see also *Grande Stevens and Others*, cited above, § 120; *Kammerer v. Austria*, no. 32435/06, § 26, 12 May 2010; and *Flisar v. Slovenia*, no. 3127/09, § 36, 29 September 2011. The conclusion in *Jussila* that a public hearing was not needed to deal with administrative offences was extended to other procedural issues covered by Article 6, such as, in the *Kammerer* and *Flisar* cases, the presence of the accused at a hearing.

[173] In fact, the application of the criterion of social stigma in the Court's case-law has been very limited. It is true that the Court has repeatedly noted the special social stigma implied by the offence of torture (see, among many other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25; *Aksoy v. Turkey*, 18 December 1996, § 64, *Reports* 1996-VI; *Aydın v. Turkey*, 25 September 1997, §§ 83-84 and 86, *Reports* 1997-VI; *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V; *Dikme v. Turkey*, no. 20869/92, §§ 94-96, ECHR 2000-VIII; and *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 116, ECHR 2004-IV). But other than these cases the use of the criterion is scarce. Sometimes the Court refers to the social stigma carried by a conviction as a factor for considering the need for the defendant to take part in the proceedings in person (in a murder case, see *Chopenko v. Ukraine*, no. 17735/06, § 64, 15 January 2015; in a corruption case, see *Suuripää v. Finland*, no. 43151/02, § 45, 12 January 2010), or for determining that the applicant's situation must already have been substantially affected by the measures taken by the police in the preliminary proceedings (in a case of sexual abuse of a minor, see *Subinski v. Eslovenia*, no. 19611/04, § 68, 18 January 2007). The *Suuripää* finding was extended to the case of a tax administrative offence in *Pákozdi v. Hungary* (no. 51269/07, § 39, 25 November 2014). In other instances, the Court has stated that criminal offences punishable by imprisonment carried a significant degree of stigma, when the convicted person had been sentenced to a seven-year term (*Popa and Tanasescu v. Romania*, no. 19946/04, § 46, 10 April 2012), a four-year term (*Sándor Lajos Kiss v. Hungary*, no. 26958/05, § 24, 29 September 2009), or a suspended prison term (*Goldmann and Szénászky v. Hungary*, no. 17604/05, § 20, 30 November 2010), or even only a fine (*Taláber v. Hungary*, no. 37376/05, § 27, 29 September 2009). On other occasions, the Court has simply affirmed that certain legal interests, such as the observance of rules on fire safety, consumer protection or town-planning construction policy, do not fall into the criminal law field, without mentioning the lack of social stigma (see *Kurdov and Ivanov*, cited above, § 43; *S.C. IMH Suceava S.R.L.*, cited above, § 51; and *Inocêncio v. Portugal* (dec.), no 43862/98, ECHR 2001-I). In *Segame SA v. France* (no. 4837/06, § 59, 7 June 2012) the Court found that supplementary taxes on works of art and related penalties "differ from the hard core of criminal law for the purposes of the Convention". In *Grande Stevens and Others* (cited above, § 122) the Court noted that, quite apart from their financial severity, the penalties which some of the applicants were liable to incur carried a "significant degree of stigma", and were likely to adversely affect the professional honour and reputation of the persons concerned. Hence, the substantive criterion of social stigma is sometimes connected to the penalties applicable to the offence, whilst in cases of murder, torture, corruption or sexual abuse of minor it is linked to the very nature of the conduct. Finally, the Court has also rejected the tautological, organic criterion, according to which offences dealt with by administrative courts or "minor offence" courts are administrative and therefore their classification as "criminal" is precluded (see *Tomasović v. Croatia*, no. 53785/09, § 22, 18 October 2011).

[174] The application of this criterion has produced unfortunate decisions, such as the one delivered in *Inocêncio* (cited above), which considered the administrative offences (*contraordenações*) at stake to be non-criminal, although the Portuguese *contraordenações* were structured exactly like the German *Ordnungswidrigkeiten* that had been treated as "criminal" in *Öztürk* (compare the German 1968 Law on Administrative Offences, *Gesetz über Ordnungswidrigkeiten*, and the Portuguese 1982 Law on Administrative Offences, *Regime Geral das Contraordenações*).

This is also the position of the majority of the Grand Chamber in the present case, since they confirm, contrary to the assertion of the Government[175], that there is not a narrower notion of "criminal" under Article 4 of Protocol No. 7. Hence, the majority reject the approach taken in *Storbråten*[176], *Mjelde*[177] and *Haarvig*[178], where the Court accepted a wider range of criteria than the *Engel* criteria for the purposes of establishing the existence of criminal proceedings under Article 4 of Protocol No. 7.

Second Part

IV - The *pro persona* legacy of *Sergey Zolotukhin*

A. The combination of administrative and criminal penalties

a. The *idem factum* in administrative and criminal proceedings

33. Article 4 of Protocol No. 7 prohibits anyone from being prosecuted or tried for an offence for which he or she has already been finally acquitted or convicted. An approach emphasising the legal characterisation of the offence (*idem crimen*) would be too restrictive. If the Court limited itself to finding that a person had been prosecuted for offences with a different legal classification, it would risk undermining the guarantee enshrined in Article 4 of Protocol No. 7, for two reasons. First, the same fact may be characterised as a criminal offence in different States, but the constituent elements of the offence may differ significantly. Second, different States may characterise the same fact as a criminal offence or an administrative (that is, non-criminal) offence[179].

34. Accordingly, Article 4 of Protocol No. 7 has to be understood as prohibiting the fresh prosecution or trial of an offence in so far as it arose from identical facts or facts which were substantially the same (*idem factum*)[180]. It is therefore important, in the Court's eyes, to focus on those facts which constituted a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings[181]. This means that the scope of the prohibition encompasses the prosecution of new offences which are in a relationship of apparent concurrence (*concours apparent*, *concorso apparente*, *Gesetzeskonkurrenz*) or true concurrence (*concours idéal de crimes*, *concorso ideale di reati, Idealkonkurrenz*)[182] with the offence or offences already tried. The same prohibition is valid for a combination of offences (*concours réel de crimes*, *concorso materiale di reati, Realkonkurrenz*) when they are connected by temporal and spatial unity. This also means that the *ne bis in idem* effect of a judgment concerning a continuous offence precludes a fresh trial on charges relating to any new individual act forming part of the succession of criminal acts[183].

35. To sum up, *Sergey Zolotukhin* affirms the *ne bis in idem* principle as an individual right in European human rights law, with the same scope as the standard exhaustion-of-procedure principle (*Erledigungsprinzip*)[184]. This guarantee extends to the right not to be prosecuted or tried twice[185]. The European meaning of the principle goes far beyond the maxim of *res judicata pro veritate habetur*, which is aimed fundamentally at protecting the final, authoritative, public statement on the *crimen*, and therefore at ensuring legal certainty and avoiding contradictory judgments. In addition to this, the European understanding of the *ne bis in idem* principle seeks to protect the person suspected of the alleged offence from double jeopardy where a prior acquittal or conviction has already acquired the force of *res judicata*[186].

Nevertheless, the Court required in *Sergey Zolotukhin* that a comparison be made between the decision by which the first "penal procedure" was concluded and the list of charges levelled against the applicant in the new proceedings. Since the facts in the two sets of proceedings differed in only one element, namely the threat of violence, which had not been mentioned in the first set of proceedings, the Court found that the criminal charge under Article 213 § 2 (b) of the Criminal Code encompassed the elements of the offence under Article 158 of the Code of

[175] See paragraphs 66 and 67 of the judgment.
[176] *Storbråten v. Norway* (dec.), no. 12277/04, 11 February 2007.
[177] *Mjelde v. Norway* (dec.), no. 11143/04, 11 February 2007.
[178] *Haarvig*, cited above.
[179] For example, Article 4 of Protocol No. 7 has been extended to administrative penalties, such as tax penalties of 40% and 80% of the amounts due (see *Ponsetti and Chesnel v. France* (dec.), no. 36855/97 and 41731/98, ECHR 1999-VI), administrative penalties complementary to criminal penalties (see *Maszni v. Romania*, no. 59892/00, 21 September 2006) and civil penalties (see *Storbråten*, cited above).
[180] The Cout has defined *idem factum* as "the same conduct by the same persons at the same date" (see *Maresti v. Croatia*, no 55759/07, § 63, 25 June 2009, and *Muslija v. Bosnia and Herzegovina*, no 32042/11, § 34, 14 January 2014). The Luxembourg jurisprudence has adopted a similar position for the purposes of Article 54 of the CISA (see *Van Esbroeck,* cited above, §§ 27, 32 and 36; *Kretzinger*, cited above, §§ 33 and 34; *Van Straaten*, cited above, §§ 41, 47 and 48; and *Kraaijenbrink*, cited above, § 30).
[181] See *Sergey Zolotukhin*, cited above, §§ 82 and 84. This is not the place to analyse the artificial character of the *summa divisio* between the *idem factum* and the *idem legem*. *Idem factum* is to a certain extent conditioned by an *a priori* understanding of the relevant facts in the light of criminal law. This is especially true in the case of continuous offences.
[182] See *Oliveira v. Switzerland*, n°25711/94, 30 July 1998, *Reports* 1998-V.
[183] See my separate opinion in *Rohlena v. the Czech Republic* [GC], no. 59552/08, ECHR 2015, § 9.
[184] Literally referring to the individual nature of the right: see *Sergey Zolotukhin*, cited above, § 81.
[185] Ibid., § 110, and for a previous example, see *Franz Fischer v. Austria*, no. 37950/97, § 29, 29 May 2001.
[186] As has been shown above, this is the underlying ideology of the Seventh Amendment to the United States Constitution and of Article 8 of Chapter V of Title II of the 1791 French Constitution, which shows that *Sergey Zolotukhin* is in line with the historical, *pro persona* understanding of this principle in modern times.

Administrative Offences in their entirety and that, conversely, the offence of "minor disorderly acts" did not contain any elements not contained in the offence of "disorderly acts" and "concerned essentially the same offence".[187]

36. In view of the above, I share the view of the majority of the Grand Chamber in the present case that the criminal offences for which the applicants were prosecuted, convicted and sentenced were based on the same set of facts for which the tax penalties were imposed on them.

b. The final decision in the administrative proceedings

37. The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of proceedings which have been concluded by a "final" decision. According to the Explanatory Report on Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a decision is final "if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them"[188]. In *Sergey Zolotukhin*, the Court reiterated that decisions against which an ordinary appeal lay were excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal had not expired. On the other hand, extraordinary remedies such as a request for reopening of the proceedings or an application for extension of an expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion.

38. Unlike the majority of the Grand Chamber, I cannot follow the Supreme Court's and the applicants' position as regards the argument that the tax penalty decisions became final on 15 December 2008 for Mr A and on 26 December 2008 for Mr B, that is, before they were convicted for the same conduct by the District Court, even though the six-month time-limit for instituting judicial proceedings pursuant to section 11-1(4) of chapter 11 of the Tax Assessment Act had not yet expired. Since the applicants still had the right of access to a full judicial review, I fail to see how the administrative decisions on tax penalties can be regarded as "irrevocable"[189]. This conclusion is even more forceful bearing in mind that, since the administrative bodies in question are neither independent nor tribunals at all, the right of access to a judicial procedure is necessary in order for the administrative penalties to comply with Article 6 § 1 in the Convention[190].

39. The exact date when the administrative decisions became final is evidently not an anodyne fact. A legal scenario in which the administrative decision to impose tax penalties becomes final first may be different from one in which the criminal conviction for tax fraud becomes final first. Although the Court has stated that "the question whether or not the *non bis in idem* principle is violated concerns the relationship between the two offences at issue and can, therefore, not depend on the order in which the respective proceedings are conducted"[191], the legal impact of a final criminal conviction on administrative proceedings may differ quite significantly from the legal impact of a final administrative decision on criminal proceedings. The majority shut their eyes to this *distinguo*, without assessing the different legal consequences in Norwegian law of each of these legal scenarios. They simply assume that the administrative and criminal proceedings formed part of an "integrated approach response"[192], concluding that it was not necessary to decide the issue of the finality of the administrative proceedings. I will demonstrate next the negative effects of this position.

B. Parallel administrative and criminal proceedings (*bis*)

a. The sufficient connection in time

40. Although the Court did not address the scenario of parallel proceedings *ex professo* in *Sergey Zolotukhin*[193], it did brush off the erroneous, supplementary condition which *Zigarella* had added to *bis*: in the absence of any damage proved by the applicant, only new proceedings brought in the knowledge that the defendant has already been tried in the previous proceedings would violate *ne bis in idem*[194].

[187] See *Sergey Zolotukhin*, cited above, §§ 97 and 121. This might be unintentional, but the fact is that in some other cases the Court does compare the "essential elements" of the alleged offences for the purposes of establishing *idem* (see, for some post-*Zolotukhin* examples, *Muslija*, cited above, § 34; *Asadbeyli and Others v. Azerbaijan*, nos. 3653/05, 14729/05, 20908/05, 26242/05, 36083/05 and 16519/06, § 157, 11 December 2012; and *Ruotsalainen v. Finland*, no 13079/03, § 56, 16 June 2009).

[188] *Sergey Zolotukhin*, cited above, §§ 107 and 108.

[189] This was also the point made by the Government (see paragraph 72 of the judgment).

[190] See *Västberga Taxi Aktiebolag and Vulic*, cited above, § 93.

[191] See *Franz Fischer*, cited above, § 29.

[192] See paragraph 141 of the judgment.

[193] *Sergey Zolotukhin* deals with two consecutive sets of proceedings: the administrative proceedings were terminated on 4 January 2002 and the criminal proceedings started on 23 January 2002 and were concluded on 15 April 2003.

[194] See *Zigarella v. Italy* (dec.), no. 48154/99, ECHR 2002-IX (extracts), and *Falkner v. Austria* (dec.), no. 6072/02, 30 September 2004. In paragraph 36 of the *Sergey Zolotukhin* Chamber judgment the same position is taken, but paragraph 115 of the Grand Chamber judgment refrains from repeating the same sentence. The Grand Chamber only admits that it may regard the applicant as having lost his or her status of "victim" in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *ne bis in idem* principle and offer appropriate redress by way, for instance, of terminating or annulling the second set of proceedings and erasing its effects. Hence, the Court does not refer to the voluntary opening of a second set of proceedings as a condition for finding a violation of *ne bis in idem* and only requires that an explicit acknowledgment of the violation should occur at

41. Literally, there is nothing in the wording of Article 4 of Protocol No. 7 to suggest that a distinction should be made between parallel and consecutive proceedings, between the continuation of a pending, parallel prosecution and the launching of a new prosecution. Strictly speaking, the provision does not preclude several parallel sets of proceedings from being conducted before a final decision has been given in one of them. In such a situation it cannot be said that the individual has been prosecuted several times "for an offence for which he has already been finally acquitted or convicted"[195]. In a situation involving two parallel sets of proceedings, the Convention requires the second set of proceedings to be discontinued as soon as the first set of proceedings has become final[196]. When no such discontinuation occurs, the Court finds a violation[197].

42. However, in a number of cases the Court has set a different standard for certain parallel administrative and criminal proceedings. In *Nilsson*, the Court held for the first time that "while the different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, in substance and in time, to consider the withdrawal to be part of the sanctions under Swedish law for the offences of aggravated drunken driving and unlawful driving"[198]. It is not clear what the Court means by the "sufficient connection in time" requirement, since it is not explicit whether the Court is referring to the period of time between the decision which became final first (the applicant's conviction of 24 June 1999 by the Mora District Court) and the decision which became final last (the Supreme Administrative Court's decision of 18 December 2000 dismissing the applicant's appeal), or between the first administrative decision (the notification of 5 May 1999 by the County Administrative Board) and the first criminal court decision (the conviction of 24 June 1999 by the Mora District Court), or between the first criminal court decision (the conviction of 24 June 1999 by the Mora District Court) and the first administrative decision on the withdrawal of the driving licence (the decision of the County Administrative Board of 5 August 1999). In fact, there was a very short overlap between the administrative proceedings, which started on 5 May 1999 and ended on 18 December 2000, and the criminal proceedings, which ended on 24 June 1999.

In *Boman*[199] the Court also found that there was such a time connection, since the police's decision of 28 May 2010 to impose the second driving ban was directly based on the applicant's final conviction by the District Court for traffic offences, delivered on 22 April 2010, and thus did not contain a separate examination of the offence or conduct at issue by the police. The sufficient connection in time was linked to the lack of an autonomous assessment of evidence, as if the two went hand in hand.

43. Contrastingly, in *Glantz*[200], *Nykänen*[201], *Lucky Dev*[202], *Rinas*[203] and *Österlund*[204] the Court took into consideration the dates when the administrative and criminal decisions had become final. In all of those cases, the Court found a violation. In *Glantz*[205] the administrative proceedings were initiated on 18 December 2006 and became final on 11 January 2010, whereas the criminal proceedings were initiated on 15 December 2008. The two sets of proceedings were thus pending concurrently until 11 January 2010, when the first set became final. As the criminal proceedings were not discontinued after the first set of proceedings became final but were continued until a final decision on 18 May 2011, the Court found that the applicant had been convicted twice for the same matter in two sets of proceedings which had become final on 11 January 2010 and 18 May 2011 respectively[206].

In *Rinas*[207] the Court noted that when the criminal proceedings had become final on 31 May 2012, the applicant's appeal against the tax surcharge decisions had still been pending before the Supreme Administrative Court. As the administrative proceedings before the Supreme Administrative Court were not discontinued after the criminal proceedings became final but were continued until a final decision on 13 September 2012, the applicant had been convicted twice for the same matter concerning the tax years 2002 to 2004 in two sets of proceedings which became final on 31 May 2012 and on 13 September 2012 respectively[208].

domestic level as a condition for the complaint's inadmissibility. Later on, the Court unfortunately returned to the *Zigarella* formulation in *Maresti* (cited above, § 66) and *Tomasović* (cited above, § 29), but see the important separate opinion of Judge Sicilianos in the latter case.

[195] See *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts).

[196] See *Zigarella*, cited above. There might be an issue with the Convention when two or more criminal proceedings run in parallel against the same defendant for the same facts, even before a final decision is delivered in one of them. The situation of *lis pendens*, forcing the defendant to present several defence strategies at the same time before different authorities, raises an issue of unfairness.

[197] See *Tomasović*, cited above, §§ 30 and 32; *Muslija*, cited above, § 37; and *Milenković v. Serbia*, no. 50124/13, § 46, 1 March 2016.

[198] See *Nilsson*, cited above.

[199] *Boman v. Finland*, no. 41604/11, 17 February 2015.

[200] *Glantz v. Finland*, no. 37394/11, 20 May 2014.

[201] *Nykänen*, cited above.

[202] *Lucky Dev*, cited above.

[203] *Rinas v. Finland*, no. 17039/13, 27 January 2015.

[204] *Österlund v. Finland*, no. 53197/13, 10 February 2015.

[205] See *Glantz*, cited above, § 62.

[206] The same reasoning was applied in *Nykänen* (cited above, § 52 – the tax proceedings commenced on 28 November 2005 and were finalised on 1 April 2009, whereas the criminal proceedings were initiated on 19 August 2008 and became final on 1 September 2010), and *Lucky Dev* (cited above, § 63 – the tax proceedings commenced on 1 June 2004 and were finalised on 20 October 2009 and the criminal proceedings were initiated on 5 August 2005 and became final on 8 January 2009).

[207] *Rinas*, cited above, § 56.

[208] A similar situation happened in *Österlund* (cited above, § 51).

44. The Court came to a different finding in *Häkkä*[209]. The administrative proceedings started in 2007, when the tax surcharges were imposed on the applicant. He apparently never sought rectification or appealed and therefore those proceedings became final on 31 December 2010 and 31 December 2011 respectively, when the time-limits for rectification and appeal ran out. The criminal proceedings were initiated on 3 April 2008 and concluded on 29 June 2010, when the Supreme Court rendered its final judgment. The two sets of proceedings were thus pending concurrently until 29 June 2010, when the second set became final. The Court did not find a violation, because "the applicant had a real possibility to prevent double jeopardy by first seeking rectification and then appealing within the time-limit which was still open to him"[210]. Hence, according to the Court in *Häkkä*, if the defendant does not make use of administrative appeals, *ne bis in idem* does not operate, even if he or she has already been convicted with final effect in the criminal proceedings.

45. Finally, in *Kiiveri*[211] the Court found that the applicant could no longer claim to be a victim of double jeopardy in relation to the tax year 2002, precisely because the Supreme Court had found that this issue had already been finally decided in the taxation administrative proceedings and had dismissed the criminal charge of aggravated tax fraud "without examining the merits"[212] in so far as the charge concerned the tax year 2002, on the basis of the principle of *ne bis in idem*.

46. The above suffices to show that the "sufficient connection in time" criterion is arbitrary. This is precisely why the Court dispensed with it in the Italian and Greek cases[213].

Contrary to the position of the French Government, who identified the assessment by the tax authority and the judicial investigation as the two phases which ought to proceed simultaneously or to be separated by only a very short interval[214], the majority in the present case chose to attach relevance to the nine-month period from when the tax authorities' decision of 5 December 2008 had become final until the second applicant's conviction of 30 September 2009. Although this period was "somewhat longer"[215] than the two-and-a-half-month period in the case of the first applicant, that additional delay is attributed by the majority to the second applicant's withdrawal of his confession. According to this reasoning, the *ne bis in idem* guarantee becomes flexible, having a narrower scope when the defendant exercises her or his own procedural rights and a wider scope when he or she does not. The punitive mindset of the majority could not be more eloquently shown.

b. The sufficient connection in substance

47. The majority explicitly follow the line of reasoning set out in *R.T v. Switzerland*[216] and in *Nilsson v. Sweden*[217] concerning dual administrative and criminal proceedings, where the decisions on withdrawal of a driving licence were directly based on an expected or final conviction for a traffic offence and thus did not contain a separate examination of the offence or conduct at issue[218]. This case-law was further developed in *Lucky Dev, Nykänen* and *Häkkä*[219], where the Court found that there was no close connection, in substance and in time, between the criminal and the taxation proceedings. In the three above-mentioned cases, the tax proceedings and the criminal proceedings were parallel and concerned the same period of time and essentially the same amount of evaded taxes. In all of them, the Court noted that the offences had been examined by different authorities and courts without the proceedings being connected, both sets of proceedings having followed their own separate course and become final at different times. Finally, in all of them, the applicants' criminal responsibility and liability to pay tax penalties under the relevant tax legislation were determined in proceedings that were wholly independent of each other. In *Lucky Dev*, the Supreme Administrative Court did not take into account the fact that the applicant had been acquitted of the tax offence when it refused leave to appeal and thereby made the imposition of tax surcharges final[220]. In *Nykänen* and *Häkkä*, neither of the administrative and criminal penalties was taken into consideration by the other court or authority in determining the severity of the sanction, nor was there any other interaction between the relevant authorities[221].

48. Before discussing in detail this line of reasoning, two fallacious arguments must be discarded right from the outset. One says that if Article 4 of Protocol

[209] *Häkkä v. Finland*, no. 758/11, §§ 50-52, 20 May 2014.
[210] Ibid., § 52.
[211] *Kiiveri v. Finland*, no. 53753/12, 10 February 2015.
[212] Ibid., § 36.
[213] I am referring to *Grande Stevens and Others* (cited above), *Kapetanios and Others*,(cited above), and *Sismanidis and Sitaridis* (cited above), in all of which the Court was unanimous.
[214] See paragraph 96 of the judgment.
[215] See paragraph 150 of the judgment.
[216] *R.T. v. Switzerland* (dec.), no. 31982/96, 30 May 2000.
[217] *Nilsson*, cited above.
[218] In *R.T. v. Switzerland* the administrative proceedings started on 11 May 1993 and were concluded with the Federal Court's decision on 5 December 1995, whereas the criminal proceedings were concluded with the imposition of the penal order on 9 June 1993, which was not appealed against. In *Nilsson*, the criminal proceedings were concluded on 24 June 1999, because the Mora District Court judgment was not appealed against, whereas the administrative proceedings started on 5 May 1999 and ended on 11 November 1999. In the latter case, the administrative penalty was imposed after the criminal penalty became final. In the former case, the administrative penalty was imposed before the imposition of the criminal penalty. The cases are not similar. Yet the majority treat them as if they were.
[219] *Lucky Dev*, cited above, § 54; *Nykänen*, cited above, § 43; and *Häkkä*, cited above, §§ 50-52.
[220] See *Lucky Dev*, cited above, § 62; *Österlund*, cited above, § 50 and 51; and *Rinas*, cited above, §§ 55 and 56.
[221] See *Nykänen*, cited above, §§ 51 and 52, and *Häkkä*, cited above, §§ 50 and 52.

No. 7 were to be interpreted as prohibiting the finalisation of ongoing parallel proceedings from the moment either administrative or

criminal proceedings were concluded by a final decision, this would entail "far-reaching, adverse and unforeseeable effects in a number of administrative-law areas"[222]. Such an *argumentum ad terrorem*, which plays the fear-appeal card, is not a legal argument and therefore should be given no credit whatsoever in a court of law. The other example of an inadmissible fallacy is the argument that several European States which have a dual system of sanctions have pleaded for its maintenance before the Court, expressing views and concerns similar to those of the respondent Government[223]. This is called an *argumentum ad nauseam*, playing on the repetition of the argument by several interested stakeholders, and not on its merits. It should *qua tale* have no place in a court's decision.

49. Two erroneous general assumptions must also be denounced. It is erroneous to argue, in an Article 4 of Protocol No. 7 context, that States should enjoy a wide margin of appreciation in this matter as long as the dual sanctions scheme appears to pursue a legitimate aim and does not entail an excessive or disproportionate burden for the defendant. *Ne bis in idem* is a non-derogable right and therefore States enjoy no margin of appreciation[224].

It is also impermissible to argue that it might be coincidental which of the parallel proceedings becomes final first and that if the authorities were to be compelled to discontinue one set of proceedings once the other set became final, this could lead to an arbitrary outcome of the combined proceedings. This line of argument simply begs the question, since it presupposes that there must be more than one set of proceedings for the same facts. Furthermore, it implies that the defendant could use the *ne bis in idem* principle as a tool for "manipulation and impunity"[225], as if the defendant were always in a position to control the pace of the proceedings. Such a vision of the balance of powers in administrative proceedings is disconnected from reality[226]. Ultimately, the underlying assumption of the majority's reasoning is that *ne bis in idem* is not the expression of a subjective right of the defendant, but a mere rule to guarantee the authority of the *chose jugée*, with the sole purpose of ensuring the punitive interest of the State and the impugnability of State adjudicatory decisions. The following reflections will evidence this *pro autorictate* stance of the majority in greater detail.

V - The review of *Sergey Zolotukhin*

A. Restriction of *idem factum* by the *bis* criteria

a. Pursuance of different aims addressing different aspects of the social misconduct

50. According to the majority, four substantive conditions must be fulfilled for cumulative administrative and criminal penalties to be acceptable: proceedings pursuing complementary aims and addressing different aspects of the social misconduct at issue; foreseeability of the combination of penalties; no duplication of the collection and assessment of evidence; and an offsetting mechanism between the administrative and criminal penalties.

51. The majority's first condition refers to different proceedings pursuing complementary aims and addressing different aspects of the social misconduct involved. The majority identify in paragraph 144 the different aims pursued by tax penalties under section 10 of chapter 10 (general deterrence and compensation for the work and costs incurred by tax authorities in order to identify defective declarations) and by a criminal conviction under section 12 of chapter 12 of the Tax Assessment Act 1980 (punitive purpose). The majority also point out in paragraph 123 the "additional element" of the criminal offence (fraudulent conduct), which according to them is not addressed by the administrative tax offence. In other words, the majority side with the Government, who contend that ordinary tax surcharges are "imposed objectively without regard to guilt, with a remedial purpose to compensate the State for costs incurred" in the checking process[227].

52. This contention does not stand, for two principled legal reasons. First, there is no provision or other binding instrument in domestic law requiring proportionality between the tax penalties and the costs incurred by the tax administration in order to detect, investigate, prosecute and make good the specific tax offence imputed to the offender. Such a requirement would in any event be simply unfeasible, since it could only be based on a virtual, rough estimation of the costs *per capita* incurred by the tax authorities with the entire machinery of checks and audits carried out in order to identify defective declarations. Hence, if tax penalties pursued a compensatory aim, this would imply an impermissible element of collective guilt, imposing on some taxpayers the costs of the entire system for checking tax declarations.

53. Second, the majority's position neglects the fact that the tax penalty at issue cannot in any possible way be considered merely compensatory. Tax

[222] See the Government's argument in paragraph 84 of the judgment.
[223] See this argument in paragraph 119 of the judgment.
[224] See, in a similar vein, the Explanatory Memorandum on the Parliamentary Assembly of the Council of Europe Opinion on Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Doc. 13154, 28 March 2013, § 8.
[225] See paragraph 127 of the judgment.
[226] For a good example of the imbalance of power between the administrative authorities and the defendant in administrative proceedings, see my opinion appended to *Grande Stevens and Others*, cited above.
[227] See the Government's observations of 11 November 2015, page 29.

penalties of up to 30% or even 60% are so severe that they undoubtedly include an element of punishment. In *Janosevic*, surcharges normally fixed at 20% or 40% of the tax avoided, without an upper limit and not convertible into a prison sentence in the event of non-payment, were held to fall under the criminal limb of Article 6[228]. Ultimately, the majority are unaware of the inherent punitive purpose of any tax penalty, regardless of its amount, as the *Jussila* precedent established long ago in the case of a 10% tax surcharge that was imposed, with an overall maximum possible surcharge of 20%[229]. It is hard to understand why the Court should suddenly depart from these well-established standards in the present case without any explanation.

In sum, in the Norwegian legal framework, administrative tax proceedings are aimed at deterring potential fraudsters and reoffending. General prevention is the admitted purpose of the tax penalties in question[230]. Pursuing general prevention "necessarily" has side-effects of punishment and special prevention regarding the convicted offender and these side-effects are obviously intended by the State policy[231]. The Supreme Court has made a laudable effort to limit these exemplary, punitive effects by the principle of proportionality[232]. But the Court should not engage in playing with semantics. Instead it should assess in a down-to-earth, realistic fashion tax penalties and their impact on the lives of taxpayers. In this light, general prevention through proportionate punishment is nothing but a "disguised retributive theory" (*verkappte Vergeltungstheorie*)[233].

54. The Government's line of argument can also not be accepted with regard to the "additional element" of the criminal offence, the alleged element of fraudulent intent. Acceptance of the Government's argument would run counter to *Ruotsalainen*[234]. In that case, the respondent Government argued that tax fraud included the element of "wilfulness", whereas the administrative offence was possible on solely objective grounds. The Court's reply was eloquent: the facts in the two sets of proceedings hardly differed, although there was the requirement of intent in the criminal proceedings, but this was not relevant for the purposes of Article 4 of Protocol No. 7. The elements of the two offences therefore had to be regarded as substantially the same for these purposes. The same should apply in the present case.

55. Furthermore, the majority do not compare the subjective elements of the administrative tax offences that are punishable by tax penalties and the criminal tax offences that are punishable by imprisonment or a fine. Consequently, they omit to take into account the ethical reproach inherent in the letter and spirit of the relevant provision of the 1980 Tax Assessment Act (section 10-2 to 4 of Chapter 10). Section 10-3 refers to "excusable" and "cause for which he cannot be blamed" as causes for tax remission. Inexcusability and blameworthiness are intrinsically ethical concepts of the administrative offences which characterise the *mens rea* of the offender. They are to be found in criminal offences as well. The 2010 amendment to this provision deleted the reference to both concepts of inexcusability and blameworthiness, but added the notion of "obviously inadvertent error", which obviously includes an element of ethical reproach for "non-inadvertent" or intentional errors.

Moreover, tax penalties of up to a maximum of 60% may be imposed when acts are committed wilfully or with gross negligence. Hence, they require the establishment of *mens rea* and guilt, as in criminal cases. The subjective element of fraud of the criminal provision of section 12-1 of Chapter 12 – "when he or she is aware or ought to be aware that this could lead to advantages pertaining to taxes or charges" – overlaps with the subjective element of the aggravated tax penalty of up to 60% (intent or gross negligence – section 10-4 of Chapter 10). To put it differently, the subjective elements of the administrative and the criminal offences coincide. There are no different aspects of the social misconduct targeted in the administrative and criminal proceedings at stake.

56. One final note: the majority's first condition pertains ultimately to the determination of *idem*. The establishment of the "different aims" pursued by administrative and criminal offences and of the "different aspects of the social misconduct" targeted by each one of these offences is intrinsically a substantive issue that has to do with the definition of *idem*. These questions must be considered to relate more to the concept of *idem* than to that of *bis*, contrary to the conceptual approach of the majority. In spite of this conceptual confusion, the majority's purpose is very clear: to limit the scope of *idem factum*. By so doing, they inflict a major blow to *Sergey Zolotukhin*.

[228] See *Janosevic*, cited above, § 69.
[229] See *Jussila*, cited above, § 38.
[230] See paragraph 47 of the judgment.
[231] As the Court itself clearly acknowledged in *Kurdov and Ivanov* (cited above, § 40), referring to the necessarily punitive aim of administrative penalties of a pecuniary nature.
[232] See paragraph 50 of the judgment.
[233] It is impossible within the limits of this opinion to enter into the immense scholarly discussion on the purposes of administrative offences, and particularly their "disguised" purposes. As an introduction to this discussion, see James Goldschmidt, *Das Verwaltungsstrafrecht. Eine Untersuchung der Grenzgebiete zwischen Strafrecht und Verwaltungsrecht auf rechtsgeschichtlicher und rechtsvergleichender Grundlage*, Berlin, 1902; Erik Wolf, "Die Stellung der Verwaktungsdelikte im Strafrechtssystem", in *Beiträge zur Strafrechtswissenschaft. Festgabe für Reinhard von Frank*, II, Tübingen, 1930; Schmidt, "Straftaten und Ordnungswidrigkeiten", in *Juristen Zeitung*, 1951; Mattes, *Untersuchungen zur Lehre von der Ordnungswidrigkeiten*, Berlin, 1972; Paliero, *Minima non curat praetor, Ipertrofia del diritto penale e decriminalizzazione dei reatti bagatellari*, Padua, 1985; and Delmas-Marty et al., *Punir sans juger? De la répression administrative au droit administratif pénal*, Paris, 1992.
[234] See *Ruotsalainen*, cited above, § 56.

b. Foreseeability of the combination of penalties

57. The majority's second condition deals with the foreseeability of the duality of administrative and criminal proceedings as a consequence, both in law and practice, of the same social misconduct. Such foreseeability is affirmed *ab initio* in paragraphs 146 and 152 of the judgment, without the slightest effort to delve into the very delicate issue of the required degree of knowledge for administrative liability. A legal issue that has absorbed the attention of the academic community for decades has simply been disregarded[235]. The majority simply assume that citizens in general, and taxpayers specifically, know or should know the entire administrative legal framework, including penalties, and therefore may be made responsible for any faults and defective conduct in the light of this legal framework.

58. The majority do not spend a single line of their reasoning responding to the applicants' argument that the penalties imposed on them were discriminatory, discretionary and therefore not foreseeable because four other defendants (G.A., T.F., K.B. and G.N.) involved in the same set of events did not have tax penalties imposed on them, while the applicants had to endure prison terms and tax penalties[236]. This argument goes to the heart of the majority's second condition.

The facts of the present case show that the 3 April 2009 Guidelines of the Director of Public Prosecutions were not applied to the applicants, either to A, whose conviction in the criminal proceedings dates from 2 March 2009, or even to B, whose conviction dates from 30 November 2009. The Supreme Court noted this fact, but disregarded it with the justification that "the public prosecuting authority reserved the right to institute proceedings in criminal cases based on individual assessment if parallel proceedings were in progress that were not in contravention of [Article 4 of Protocol No. 7]. It has been stated that the case against [A] was continued because a correct sanction was desirable in relation to other cases in the same related set of cases. ... Hence, the basis for the decision was the principle of equal treatment in related cases." The applicants rejected that argument, pointing out that on the basis of the 2009 Guidelines, tax penalties had not been imposed on four other defendants involved in the same set of events. The Government did not specifically dispute this claim. The majority have nothing to say on this major argument submitted by the applicants.

59. In any event, the discretion left by the Guidelines is impermissible in the light of *Camilleri*[237]. This discretion raises an issue of legal uncertainty. The Guidelines created an expectation that the State no longer considered the Norwegian two-track system for the punishment of tax fraud lawful or in compliance with the Convention, and therefore the public prosecuting authorities had a legal obligation to appeal against convictions and, prior to their delivery, to drop the charges[238]. The decision of the public prosecuting authorities to proceed differently in the applicants' cases was not foreseeable. The preferential treatment given to four other defendants involved in the same set of events, who were exempted from any tax penalties (G.A., T.F., K.B. and G.N.), only serves as evidence of the discretionary and therefore unforeseeable choice by the domestic authorities.

B. The majority's *pro auctoritate* concept of *ne bis in idem*

a. No duplication of collection and assessment of evidence

60. The majority's third condition consists of a soft prohibition ("as far as possible") of the duplication of the collection and assessment of evidence, with the benefit of an example ("notably"): the interaction between different authorities, administrative and judicial, to ensure that the establishment of facts in one set of proceedings is also used in the other set[239]. To me, this condition is very problematic.

61. As a matter of principle, conditions pertaining to the protection of a non-derogable individual right such as *ne bis in idem* must not be left to the discretion of States. Since the majority's third condition is a mere *de iure condendo* recommendation, it is not a Convention requirement. It has the same effect as the equally *de iure condendo* statement that "the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure"[240]. Both are non-binding *dicta*, which add nothing to the binding case-law of the Court.

62. Additionally, this recommendation merely scratches the surface of a very serious problem. The existence of different pronouncements by the administrative and the judicial authorities on the same facts, based on a different assessment of the same evidence, calls into question the authority of the State. Worse still, a different assessment of the evidence in administrative and criminal proceedings allows for the insidious manipulation of the administrative proceedings for the purposes of the criminal

[235] See, as an introduction to this legal issue, the annotations to paragraphs 10 and 11 in Rebman et al., *Gesetz über Ordnungswidrigkeiten, Kommentar*, third edition, Stuttgart, 2016, and *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten*, fourth edition, Munich, 2014.

[236] See paragraph 64 of the judgment.

[237] *Camilleri v. Malta*, no. 42931/10, 22 January 2013.

[238] The position of the Norwegian Director of Public Prosecutions after *Sergey Zolotukhin* could not be clearer: "Following the change in the European Court's case-law, it is necessary to apply a 'one-track' system also as regards ordinary tax penalties." See paragraphs 48 and 64 of the judgment.

[239] See paragraph 132 of the judgment. The majority do not say a word about the solution, existing in some countries, of cooperation between the administrative and prosecuting authorities in order to determine the appropriate avenue.

[240] See paragraph 130 of the judgment.

proceedings. This manipulation is even more worrying than the danger to the State's authority, because it puts the defendant in a defenceless position. That is to say, the criminal conviction is almost a foregone conclusion when the taxpayer's administrative offence has already been established on the basis of a lower burden of proof. The taxpayer's duty to cooperate with the tax authorities in administrative proceedings aggravates this conclusion even further.

63. The majority do not compare the evidentiary rules of administrative and criminal procedure in Norway, in order to ascertain whether there is a danger of duplication in the collection and assessment of evidence in both proceedings. Moreover, they do not analyse the legal framework regulating the interaction between the different administrative and judicial authorities, to check if the establishment of facts in the administrative proceedings impacts on the criminal proceedings and vice versa. In paragraphs 145 and 150 of the judgment the majority simply refer to some instances of *ad hoc* exchange of information between the administrative and judicial authorities, and nothing more.

64. Yet the parties discussed the question thoroughly. The Government acknowledged that the standard of the burden of evidence was different in tax proceedings, to which the "qualified probable cause" standard applied, and criminal proceedings, to which the "strict standard of proof" applied. In fact, this is one of the "major advantages" that administrative proceedings offer, in the Government's opinion[241]. If this is the case, then the majority's third condition is not fulfilled in Norwegian law, for the simple reason that, since different standards of the burden of evidence apply, the evidence must be assessed differently in administrative and criminal proceedings, with the obvious risk of different pronouncements on the same facts.

Between the Charybdis of the risk of contradictory findings in administrative and criminal proceedings owing to different evidentiary standards (*deux poids, deux mesures*) and the Scylla of the manipulation of the administrative evidence for criminal purposes, the defendant is in any event placed in an unfair position in the Norwegian double-track system.

b. Offsetting mechanism between administrative and criminal penalties

65. The majority's fourth condition is the existence of "an offsetting mechanism designed to ensure that the amount of any penalties imposed is proportionate"[242]. Without any previous explanation of why this option has been chosen, the majority do not consider other well-known procedural solutions, such as the suspension of one set of proceedings while another concurring set of proceedings is pending[243], or other substantive solutions, such as the principle of specialty or the setting of limits for punishment for a combination of criminal and administrative offences, such as a requirement that the overall amount of the penalties imposed should not exceed the highest amount that could be imposed in respect of either of the types of penalty, or that the maximum level of the tax penalty should be set at the minimum level for the criminal offence. The scope and features of the proposed offsetting mechanism proposed are, to say the least, very problematic.

66. The majority's line of reasoning conflicts head-on with the Court's recent position in *Grande Stevens and Others*, which concerns parallel administrative and criminal proceedings. The Italian Government argued without success in that case that, in order to ensure the proportionality of the penalty to the accusations, the Italian criminal courts were able to take into account the prior imposition of an administrative penalty and to reduce the criminal penalty. In particular, the amount of the administrative fine was deducted from the criminal financial penalty (Article 187 *terdecies* of Legislative Decree no. 58 of 1998) and assets already seized in the context of the administrative proceedings could not be confiscated[244]. That argument, which was given no credit by the Court in *Grande Stevens and Others*, is now put at centre stage in the Norwegian context, without any justification by the majority for this sudden change of heart. The majority seem to have forgotten that in *Grande Stevens* the Court decided that the respondent State had to ensure that the new set of criminal proceedings brought against the applicants in violation of *ne bis in idem* were closed as rapidly as possible and without adverse consequences for the applicants[245].

67. The Italian Government also argued that the double-track system was required by Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation, in order to fight market manipulation and abuses more efficiently, invoking the Advocate General's opinion in *Hans Åkerberg Fransson*[246]. The Court easily dismissed that argument as invalid[247]. In this context, it is quite puzzling that the Court now cites the opinion of the Advocate General in *Fransson* as supportive of its views[248].

[241] See the Government's observations of 11 November 2015, page 8. The Government also argue that administrative proceedings have the advantage of a faster investigation and adjudication procedure.
[242] See paragraph 132 of the judgment.
[243] This was a proposal made in *Kapetanios and Others* (cited above, § 72) and *Sismanidis and Sitaridis* (cited above, § 72).
[244] See *Grande Stevens and Others*, cited above, § 218.
[245] Ibid., § 237. It is useful to bear in mind the IAPL 2004 conclusions, cited above: "The '*bis*', in terms of double jeopardy to be prevented, shall not refer to only a new sanction; it should already bar a new prosecution".
[246] See *Grande Stevens and Others*, cited above, § 216.
[247] Ibid., § 229.
[248] See paragraph 118 of the present judgment. The European Parliament and Council Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse, which accepts the dual system (recital 23), has to be read in conjunction with the European Parliament and Council Regulation (EU) 596/2014 of 16 April 2014

In spite of the fact that the Luxembourg Court disapproved of the Advocate General's perspective and reached a decision in line with the Strasbourg Court's case-law, and in spite of the fact that in *Grande Stevens* the Court rejected that same perspective of the Advocate General, the majority in the present case support his position. The Strasbourg Court willingly distances itself from the Luxembourg Court, which had made an effort to align the positions of both courts in *Fransson.* The judges of the Court prefer to side with the sole voice of the Advocate General, who was vehemently critical of the Court's case-law for being contradictory with European constitutional tradition. The unexplained change of heart in Strasbourg represents a serious setback for the relationship between the two European courts.

68. Furthermore, the majority's offsetting mechanism only applies to the deduction of penalties imposed in the proceedings which become final first. It does not apply in the event of a different outcome in the proceedings which become final first, namely if the court delivers an acquittal or decides to discontinue the case. The reason is obvious. In these cases, there is literally nothing to offset – that is, to compensate for or to deduct – in the subsequent or parallel administrative proceedings.

69. This question is obviously crucial in the light of the recent Greek cases where the administrative courts imposing administrative fines failed to take into account the applicants' acquittal in parallel (applications nos. 3453/12 and 42941/12) and subsequent (application no. 9028/13) criminal proceedings relating to the same conduct[249]. Following the rationale of *Kapetanios and Others*, any acquittal or discontinuance of the criminal case would have a *Sperrwirkung* on other parallel or subsequent administrative proceedings, as the Court also concludes in *Sismanidis and Sitaridis*, which also concerns two cases (applications no. 66604/09 and 71879/12) of parallel administrative and criminal proceedings[250]. The acquitted defendant has the right not to be disturbed again for the same facts, which includes the risk of a new prosecution, regardless of the different nature of the (judicial and administrative) bodies involved[251]. In other words, there is an absolute prohibition on pronouncing again on the same facts. Furthermore, the taking into account of the *res judicata* force of the acquittal is an *ex officio* obligation of the courts and administrative authorities in view of the absolute and non-derogable nature of the defendant's right[252].

70. The Greek case-law is also in line with the clear statement of principle made in paragraph 60 of *Lucky Dev*, emphasising that Article 4 of Protocol No. 7 would be violated if one set of proceedings continued after the date on which the other set of proceedings was concluded with a final decision. In *Lucky Dev*, tax surcharges were applied after a final acquittal in the parallel criminal proceedings, and the Court's principled statement is crystal clear: "That final decision would require that the other set of proceedings be discontinued."[253]

71. To sum up, the present judgment contradicts the core of the *Kapetanios and Others*, *Sismanidis and Sitaridis* and *Lucky Dev* jurisprudence. For the majority, the acquittal of the defendant, be it because the acts do not constitute a criminal offence, the defendant did not commit them or it is not proven that the defendant committed them, does not have to be taken into account in subsequent or parallel administrative proceedings. This evidently also raises an issue with regard to Article 6 § 2 of the Convention. Any new pronouncement on the merits would call into question the presumption of innocence resulting from the acquittal[254].

72. The majority's offsetting mechanism is also not applicable in a scenario where the proceedings which become final first are the administrative proceedings and no tax penalties are imposed because the respective administrative liability has not been proven. In the majority's view, the taxpayer can still be convicted for the same facts and sentenced in criminal proceedings in this scenario.

on market abuse (recital 72). The European legislation did not solve the issue of *ne bis in idem*, preferring to pass the hot potato to the States. Nevertheless, the imposition of criminal sanctions on the basis of the mandatory offences set out in the new Directive and of administrative sanctions in accordance with the optional offences provided for by the new Regulation (Article 30 § 1: "may decide not") should not lead to a breach of *ne bis in idem*.

[249] In *Kapetanios and Others* (cited above); see application no. 3453/12, on administrative proceedings pending from November 1989 to June 2011 and criminal proceedings pending from 1986 to November 1992; application no. 42941/12, on administrative proceedings pending from September 1996 to November 2011 and criminal proceedings pending from 1988 to June 2000; and finally application no. 9028/13, on administrative proceedings pending from 2011 to February 2012 and criminal proceedings terminated in May 1998.

[250] *Sismanidis and Sitaridis* (cited above): see application no. 66602/09, on administrative proceedings pending between September 1996 and May 2009 and criminal proceedings pending between December 1994 and April 1997; and application no. 71879/12, on administrative proceedings pending from November 1996 to February 2012 and criminal proceedings pending from 1998 to February 1999.

[251] *Kapetanios and Others*, cited above, §§ 71 and 72. The French version of *Sergey Zolotukhin* is more expressive since it includes in paragraph 83 the risk of new prosecutions (*risque de nouvelles poursuites*) in addition to new trials. See also paragraph 59 of the *Van Straaten* judgment of the Court of Justice of the European Union, cited above: "in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations."

[252] See *Kapetanios and Others*, cited above, § 66. That is precisely the conclusion reached in *Melo Tadeu v. Portugal* (no. 27785/10, § 64, 23 October 2014): "*La Cour estime qu'un acquittement au pénal doit être pris en compte dans toute procédure ultérieure, pénale ou non pénale.*"

[253] See *Lucky Dev*, cited above, § 60.

[254] See *Kapetanios and Others*, cited above, § 88, and *Sismanidis and Sitaridis*, cited above, § 58.

73. By now, it is plain to see that the fourth condition is a *chèque en blanc* for States to do as they please. But worse still is the fact that the majority do not explain how the offsetting mechanism works in Norwegian law. Paragraph 50 of the judgment alone provides a summary of the case-law, which leaves the reader with the impression that discretion reigns in the way criminal courts sometimes decide to take into account previous administrative penalties and sometimes decide not to. That impression is borne out in the case at hand, as demonstrated below. Furthermore, there is no indication whatsoever in the judgment that a similar offsetting mechanism exists in tax proceedings, whereby previous criminal penalties would have to be taken into account in the determination of tax penalties.

74. The Government stated that "[i]mposed tax surcharges will be taken into account when the courts assess what is a fair and adequate sanction for a company, see Section 28 *litra* g of the 2005 Penal Code. When a natural person is sentenced, courts will take into account any tax surcharges that have been imposed, pursuant to Section 27 of the 1902 Penal Code, transposed in Section 53 of the 2005 Penal Code."[255] Section 27 provided: "When a fine is imposed, due consideration should be given not only to the nature of the offence but also especially to the financial position of the convicted person and to what he can presumably afford to pay in his circumstances." No mention is made of penalties in parallel or previous proceedings relating to the same facts, let alone to tax penalties. No mention is made either of the limits of the combination of penalties, such as, for instance, a requirement that the overall amount of the penalties imposed should not exceed the highest amount that could be imposed in respect of either of the types of penalty. In fact, the taking into consideration of previous penalties is not even mentioned in the event that a sentence of imprisonment has been imposed.

To put it simply, there is no offsetting mechanism in Norwegian law, but a general, undifferentiated indication given by the legislature to the judge that the financial situation of the convicted person should be taken into account when sentencing him or her to a fine. No more, no less.

75. The Supreme Court's case-law based on the above mentioned Penal Code provisions, in so far as it has been made available to the judges of the Grand Chamber, may be creative, but it is certainly not foreseeable. It is so broadly couched that even the most experienced lawyer cannot anticipate whether and how tax penalties will be taken into consideration in the imposition of criminal pecuniary penalties. Furthermore, its impact is very limited in practical terms. Since it does not allow for any offsetting in imprisonment cases, the Supreme Court's case-law limits the alleged impact of the compensatory effect to cases of lesser gravity, but denies it in the most serious cases.

Mindful of the weaknesses of the domestic legal framework, a laudable effort has been made by Norwegian judges to fill the legal black hole and put some proportionality into an arbitrary, excessive and unfair system: arbitrary in the choice of single- or double-track punishment, excessive in the penalties applied and procedurally unfair in the way it treats defendants. But *ne bis in idem* "is not a procedural rule which operates as a palliative for proportionality when an individual is tried and punished twice for the same conduct, but a fundamental guarantee for citizens"[256].

76. Like the Government, the majority are seduced by an "efficiency interests"-driven approach[257], according to which the rationale of the *ne bis in idem* principle applies to a "lesser degree to sanctions falling outside the hard core of criminal law, such as tax penalties"[258]. They overlook the fact that the content of a non-derogable Convention right, such as *ne bis in idem*, must not be substantially different depending on which area of law is concerned. There is no leeway for such an approach in Article 4 § 3 of Protocol No. 7.

77. Finally, and most importantly, in the case at hand the tax penalties were taken into account by the domestic court in the following way as regards the first applicant: "A noticeable sanction has already been imposed on the defendant with the decision on tax surcharge. Most of the tax has already been paid." The consideration given to the tax penalty in the case of the second applicant is even more succinct: "Account must be taken of the fact that a tax surcharge of 30% has been imposed on the defendant"[259]. In neither of the cases did the domestic courts care to explain the impact of the previous tax penalties on the criminal penalties. The cosmetic reference to previously imposed tax penalties may appease some less demanding consciences, but it is certainly not a predictable and verifiable legal exercise. In this context, the conditions, degree and limits of the tax penalties' impact on criminal sanctions can only be the object of pure speculation, remaining in the realm of

[255] See the Government's observations of 11 November 2015, page 8.

[256] Case C-213/00 P, *Italcementi SpA v. Commission of the European Communities*, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003, § 96, and Case C-150/05, cited above, Opinion of the same Advocate General delivered on 8 June 2006, § 58. Therefore, the view expressed in paragraph 107 of the present judgment that *ne bis in idem* concerns mainly a procedural issue ("is mainly concerned with due process"), rather than a substantive issue ("is less concerned with the substance of the criminal law than Article 7"), is essentially wrong.

[257] The "interests of efficiency" are stressed by the majority themselves (see paragraph 134 of the judgment).

[258] See paragraph 85 of the judgment, where reference is made to the Government's explicit argument that the *Jussila* qualifying reasoning regarding Article 6 was transposable to Article 4 of Protocol No. 7. This argument patently overlooks the absolute and non-derogable nature of this latter Article.

[259] See judgments of the Follo District Court of 2 March 2009 and the Oslo City Court of 30 September 2009.

the unknown, inner belief of the trial judges, inaccessible to the defendants.

VI – Conclusion

78. In spite of its human rights-oriented rationale, *Öztürk* did not provide a clear conceptual framework for the definition of the dividing line between administrative and criminal offences. In the midst of some uncertainty in the Court's case-law, *Jussila* offered a restrictive solution which sought to distinguish hard-core criminal cases which carry a significant degree of stigma and those which do not, limiting the applicability of the criminal-head guarantees in the case of the latter group. Subsequent case-law clarified neither the substantive criterion of significant degree of stigma nor the distinction between the disposable and non-disposable procedural guarantees.

79. Just as *Jussila* qualified and limited the impact of *Öztürk*, so too does *A and B v. Norway* qualify and limit the impact of *Sergey Zolotukhin*. The past, generous stance on *idem factum* is significantly curtailed by the new proposed *bis* straitjacket. Mistrustful of defendants, the majority decide to abandon the fundamental principle in European legal culture that the same person may not be prosecuted more than once for the same facts (principle of unity of repressive action or *Einmaligkeit der Strafverfolgung*). *Ne bis in idem* loses its *pro persona* character, subverted by the Court's strict *pro auctoritate* stance. It is no longer an individual guarantee, but a tool to avoid the defendants' "manipulation and impunity"[260]. After turning the rationale of the *ne bis in idem* principle upside down, the present judgment opens the door to an unprecedented, Leviathan-like punitive policy based on multiple State-pursued proceedings, strategically connected and put in place in order to achieve the maximum possible repressive effect. This policy may turn into a never-ending, vindictive story of two or more sets of proceedings progressively or successively conducted against the same defendant for the same facts, with the prospect of the defendant even being castigated, in a retaliatory fashion, for exercising his or her legitimate procedural rights, and especially his or her appeal rights.

80. The sole true condition of the majority's "efficiency interests"-oriented approach[261] is a simulacrum of proportionality, limited to a vague indication to take into consideration the previous administrative penalties in the imposition of fines in the criminal proceedings, an approach which is very distant from the known historical roots of *ne bis in idem* and its consolidation as a principle of customary international law. The combination of criminal penalties and administrative penalties with a criminal nature was specifically rejected by the Court in *Grande Stevens and Others*, as well as by the Luxembourg Court in *Hans Åkeberg Fransson*. After the delivery of its death certificate in that Italian case, such an approach is now being resuscitated as a "calibrated regulatory approach"[262]. The progressive and mutual collaboration between the two European courts will evidently once again be deeply disturbed, Strasbourg going the wrong way and Luxembourg going the right way. The Grand Chamber examining the *Sergey Zolotukhin* case would not have agreed to downgrade the inalienable individual right to *ne bis in idem* to such a fluid, narrowly construed, in one word illusory, right. Me neither.

[260] See paragraph 127 of the judgment.
[261] See paragraph 134 of the judgment.
[262] See paragraph 124 of the judgment.

European Court of Human Rights
First Section

Jóhannesson and Others v. Iceland

18 May 2017

Case number: 22007/11

Penalties – Ne bis in idem – Violation – Dual criminal and administrative proceedings not sufficiently connected in substance and in time

Summary

Having regard to the following circumstances, in particular the limited overlap in time and the largely independent collection and assessment of evidence, the Court cannot find that there was a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings in the case for them to be compatible with the bis criterion in Article 4 of Protocol No. 7.

The applicants' conduct and their liability under the different provisions of tax and criminal law were thus examined by different authorities and courts in proceedings that were largely independent of each other.

Turning to the connection in time between the two proceedings, the Court reiterates that the overall length was about nine years and three months. The proceedings were conducted in parallel for just a little more than a year. Moreover, the applicants were indicted 15 and 16 months after the mentioned tax decision had been taken and nine and ten months after they had acquired legal force. The criminal proceedings then continued on their own for several years. Furthermore, the Government have failed to explain and justify the delay which occurred in the domestic proceedings and which had not been the applicants' fault.

The European Court of Human Rights (First Section), sitting as a Chamber
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 22007/11) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Icelandic nationals, Mr Jón Ásgeir Jóhannesson and Mr Tryggvi Jónsson and by Fjárfestingafélagið Gaumur, a private limited liability company which is domiciled in Iceland ("the applicants"), on 21 March 2011.

2. The applicants were represented by Mr Gestur Jónsson, Mr Jakob R. Möller and Ms Kristín Edwald, lawyers practising in Reykjavik. The Icelandic Government ("the Government") were represented by their Agent, Ms Ragnhildur Hjaltadóttir, Permanent Secretary of the Ministry of the Interior.

3. The applicants alleged that they had been tried twice for the same offence through the imposition of tax surcharges and a subsequent criminal trial for aggravated tax offences, in violation of Article 4 of Protocol No. 7 to the Convention, as the two sets of proceedings had been based on identical facts.

4. On 3 June 2013 the application was communicated to the Government. The Government and the first and the second applicants (jointly), submitted written observations on the admissibility and merits of the case. The third applicant did not submit written observations.

5. Mr Robert Spano, the judge elected in respect of Iceland, withdrew from the case (Rule 28 of the Rules of Court). Accordingly, Ms Oddný Mjöll Arnardóttir was appointed to sit as an ad hoc judge (Article 26 § 4 of the Convention and Rule 29 § 1).

6. By letter of 8 September 2015, sent by registered post, the third applicant was requested to inform the Court, before 22 September 2015, whether it wished to pursue its application before the Court. The applicant's attention was drawn to Article 37 § 1 (a) of the Convention, which provides that the Court may decide to strike an application out of its list of cases where the circumstances lead to the conclusion that the applicant does not intend to pursue the application. The applicant received this letter on 16 September 2015. However, no response has been received.

7. On 6 January 2017 the first and second applicants submitted additional information to the Court. The Court decided pursuant to Rule 38 § 1 of the Rules of Court to include the information in the case file for the considerations of the Court. A copy was forwarded to the Government, who was requested to submit comments. On 1 March 2017 the Government submitted its comments.

8. Furthermore, on 6 January 2017 the applicants requested an oral hearing in the case. The Court decided not to hold a hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant, Mr Jón Ásgeir Jóhannesson, was born in 1968 and lives in London. The second applicant, Mr Tryggvi Jónsson, was born in 1955 and lives in Reykjavík. At the time of lodging its

application, the third applicant, Fjárfestingafélagið Gaumur, was a private limited liability company registered in Iceland.

A. Tax proceedings

10. On 17 November 2003 the Directorate of Tax Investigations (*Skattrannsóknarstjóri ríkisins)* initiated an audit of the applicants' tax returns and bookkeeping. The investigation concerning the first applicant was concluded with a report issued on 27 October 2004. On the basis of the report the Directorate of Internal Revenue (*Ríkisskattstjóri)*, ruling on 30 December 2004, found that the first applicant had failed to declare a significant payment that he had received in August 1998. Therefore, it revised upwards the amount declared as capital income in his tax return for 1999 and, consequently, re-assessed his taxes and imposed a 25% tax surcharge. Ruling on 30 December 2005, it also found, among other things, that he had failed to declare significant payments received from 1999 to 2002, car allowances for the years 2000 to 2002, further allowances (payment of life insurance) and profits from the sale of shares in the Baugur Group company. It re-assessed his taxes for the years 1999 to 2002 and imposed a 25% surcharge.

11. The investigation concerning the second applicant was concluded with a report of 24 November 2005. On the basis of that report the Directorate of Internal Revenue, ruling on 29 December 2005, found, in particular, that he had failed to declare significant payments received from 1999 to 2002. It also found that the Baugur Group company had paid his life insurance in the years 1999 to 2002 and that he had failed to declare these amounts as taxable allowances. It re-assessed his taxes for the mentioned years and imposed a 25% surcharge.

12. The investigation concerning the third applicant was concluded with a report of 29 July 2004. On the basis of that report the Directorate of Internal Revenue, ruling on 30 December 2004, re-assessed the third applicant's taxes for the years 1998 to 2002. In particular, it found that the third applicant had failed to account for and declare allowances (such as cars and housing) enjoyed by the first applicant and other employees, and failed to withhold public levies on these allowances and pay them to the state treasury. It further considered that profits and losses from the sale of shares in the Baugur Group company had not been declared correctly and that expenditure from 2000 to 2002 had been overdeclared. Consequently, it re-assessed the third applicant's taxes for the years 1998 to 2002, imposing a 25% surcharge and a further 10% surcharge because of its failure to withhold levies at source and pay them to the state treasury.

13. Following the applicants' appeal, the Internal Revenue Board (*Yfirskattanefnd*), in its decisions of 29 August 2007 (in respect of the second applicant) and 26 September 2007 (in respect of the first and third applicants), upheld the imposition of tax surcharges for the most part.

14. The applicants did not seek judicial review of these decisions, which thus acquired legal force six months later, in February and March 2008, respectively, when the time-limit for appeals had expired.

B. Criminal proceedings

15. On 12 November 2004 the Director of Tax Investigations reported the matter to the National Police Commissioner (*Ríkislögreglustjóri*) and its unit for investigation and prosecution of economic and environmental crimes, and forwarded its reports concerning the applicants and the documents collected during the investigation were forwarded to the police. In August 2006 the applicants and other witnesses were interviewed by the police for the first time. According to the respondent Government, the applicants were, at the same time, informed of their status as suspects in the criminal investigation. On 18 December 2008 the National Police Commissioner indicted the applicants for aggravated tax offences. The first applicant was indicted, among other things, for having underdeclared his income in his tax returns in 1999 to 2003. This included the failure to declare significant payments received in 1998 to 2002, car allowances for the years 2000 to 2002, further allowances (life insurance payments) and profits from the sale of shares in the Baugur Group company. The second applicant was indicted for having underdeclared his income in his tax returns in 1999 to 2003 by failing to declare significant payments he had received from 1998 to 2002 and the Baugur Group's payment of his life insurance. The third applicant and its representative, KJ, were indicted for having failed, from 1999 to 2002, to declare salaries and car allowances enjoyed by the first applicant and other employees, for not having withheld public levies on these allowances and pay them to the state treasury, for having neglected to declare correctly the profits and losses from the sale of shares in Baugur Group and for having overdeclared expenditure and losses.

16. In a ruling of 1 June 2010 the Reykjavik District Court (*Héraðsdómur Reykjavíkur*) found that the offences for which the applicants were personally indicted were based on the same facts as the above-mentioned decisions of the tax authorities. It further found that the proceedings concerning the tax surcharges had involved a determination of a "criminal charge" within the meaning of Article 4 of Protocol No. 7 to the Convention. Relying mainly on that provision and the Court's judgment in *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, ECHR 2009), the District Court therefore dismissed those parts of the indictment on the ground that they referred to offences for which the applicants had already been tried and punished by the decisions of the Directorate of Internal Revenue of 30 December 2004 and 29

December 2005, as upheld by the Internal Revenue Board in its decisions of 29 August and 26 September 2007.

17. The Acting National Commissioner of Police lodged an appeal with the Supreme Court (*Hæstiréttur Íslands*) which, by a judgment of 22 September 2010, overturned the District Court's ruling and ordered it to examine the merits of the case. It referred to section 2 of the Act on the European Convention on Human Rights (*Lög um mannréttindasáttmála Evrópu*, no. 62/1994), in which the legislature had reiterated the validity of the principle of dualism of national law and international law in respect of the decisions of the institutions established under the Convention. It stated that the courts should look to the judgments of the European Court when interpreting the Convention, but that the principle of dualism required that the necessary amendments to national law to honour the State's obligations under the Convention would have to be made by the legislature. Domestic law provided for the current system where tax offences could be dealt with in two separate sets of proceedings, one deciding on surcharges and the other on criminal punishment, even in circumstances where the proceedings were based on the same or substantially the same facts. According to the Supreme Court, the case-law of the European Court had not been clear on this issue and, consequently, there was uncertainty as to the scope and content of Article 4 of Protocol No. 7. In the light of this, the Supreme Court found that the domestic courts could not decide that the current system of tax surcharges and subsequent criminal proceedings was in violation of the Convention.

18. By a judgment of 9 December 2011 the District Court found that the first and second applicants had acted with gross negligence, which was sufficient for criminal liability under the relevant provisions of the tax law, and all three applicants were convicted in respect of some of the charges against them. However, the District Court, referring to the excessive length of the proceedings and to the fact that the tax authorities had imposed a 25% tax surcharge on the applicants, decided to suspend the determination of penalty for one year.

19. The first and second applicants, as well as KJ and the public prosecutor, lodged an appeal against the District Court's judgment. No appeal was lodged on behalf of the third applicant.

20. On 7 February 2013 the Supreme Court upheld the first and second applicants' convictions for the most part. Moreover, the Supreme Court convicted the first applicant on two further charges for which he had been acquitted by the District Court. It revoked earlier suspended sentences (three months' imprisonment in respect of the first applicant and twelve months' imprisonment in respect of the second applicant, both suspended for two years by a Supreme Court judgment of 5 June 2008) and included them in their sentencing in the present case. The first applicant was sentenced to twelve months' imprisonment, suspended for two years, and the payment of a fine of 62,000,000 Icelandic krónur (ISK; corresponding to approximately 360,000 euros (EUR) at the exchange rate applicable in February 2013). The second applicant was sentenced to eighteen months' imprisonment, suspended for two years, and the payment of a fine of ISK 32,000,000 (approximately EUR 186,000). In determining the applicants' prison sentences, the Supreme Court took into consideration the excessive length of the proceedings, noting that the delay had not been the applicants' fault, and therefore decided that the sentences should be suspended. In fixing the fine that the applicants were ordered to pay, the court had regard to the tax surcharges imposed, without describing any calculation made in this respect, and the excessive length of the proceedings.

II. RELEVANT DOMESTIC LAW

21. Section 108 of the Income Tax Act (*Lög um tekjuskatt***,** no. 90/2003) reads as follows:

"If an entity that is obliged to submit a tax return does not do so within the given deadline, the Director of Internal Revenue is permitted to add up to a 15% charge to his tax base estimate. The Director of Internal Revenue is nonetheless required to take into account the extent to which taxation has taken place through withheld taxes. The Director of Internal Revenue sets further rules on that point. If a tax on which the levying of taxes will be based is submitted after the filing deadline, but before a Local Tax Commissioner completes tax assessment, only a 0.5% charge may be added to the tax base for each day that the filing of a tax return has been delayed after the given deadline, although the total must be no more than 10%.

If a tax return is flawed, as noted in Article 96, or specific items declared wrongly, the Director of Internal Revenue can add a 25% charge to estimated or wrongly-declared tax bases. If a tax entity corrects the errors or adjusts specific items in the tax return before taxes are assessed, the charge made by the Director of Internal Revenue may not be higher than 15%.

Additional charges, in accordance with this Article, are to be cancelled if a tax entity can prove that it is not to blame for limitations in the tax return, or the failure to file, that force majeure made it impossible to file the tax return in the given time, if it rectifies errors in the tax return or corrects specific items therein.

Complaints to the Directorate of Internal Revenue and the Internal Revenue Board are subject to the provisions of Article 99 of the Act and the provisions of Act No. 30/1992 on the Internal Revenue Board."

22. Section 109 of the Income Tax Act reads:

"If a taxable person, intentionally or out of gross negligence, makes false or misleading statements

about something that matters in relation to its income tax, such person shall pay a fine of up to ten times the tax amount from the tax base that was concealed and never a lower fine than double the tax amount. Tax from a charge in accordance with Article 108 is deducted from the fine. Paragraph 1 of Article 262 of the Penal Code applies to major offences against this provision.

If a taxable person, intentionally or out of gross negligence, neglects to file a tax return the violation calls for a fine that is never to be lower than double the tax amount from the tax base that was lacking, if the tax evaluation proved to be too low when taxes were re-assessed in accordance with paragraph 2 of Article 96 of this Act, in which case the tax on the added charge shall be deducted from the amount of the fine in accordance with Article 108. Paragraph 1 of Article 262 of the Penal Code applies to major offences against this provision.

If a taxable person gives false or misleading information on any aspects regarding his tax return, then that person can be made to pay a fine, even if the information cannot affect his tax liability or tax payments.

If violations of paragraph 1 or paragraph 2 of the provision are discovered when the estate of a deceased person is wound up, then the estate shall pay a fine of up to four times the tax amount from the tax base that was evaded and never less than one and a half times the tax amount. Tax from a charge in accordance with Article 108 is deducted from the fine. Under circumstances stated in Paragraph 3, the estate may be fined.

Any person who wilfully or by gross negligence provides tax authorities with wrongful or misleading information or documentation regarding the tax returns of other parties, or assists a wrongful or misleading tax return to tax authorities, shall be subject to punishment as stated in Paragraph 1 of this Article.

If a person, intentionally or out of gross negligence, has neglected his duties according to the provisions of Articles 90, 92 or 94 he shall pay a fine or be sentenced to imprisonment for up to 2 years.

An attempted violation and accessory to a violation of this Act is punishable according to the provisions of Chapter III of the Penal Code and is subject to a fine up to the maximum stated in other provisions of this Article.

A legal entity may be fined for a violation of this Act, irrespective of whether the violation may be attributable to a criminal act of an officer or employee of the legal entity. If its officer or employee has been guilty of violating this Act, the legal entity may be subject to a fine and withdrawal of its operating licence in addition to a punishment inflicted on it, provided the violation is committed for the benefit of the legal entity and it has profited from the violation."

23. Section 110 of the Income Act reads as follows:

"The State Internal Revenue Board rules on fines in accordance with Article 109 unless a case is referred to investigation and judicial treatment in accordance with paragraph 4. Act 30/1992 on the State Internal Revenue Board, applies to the Board's handling of cases.

The Directorate of Tax Investigations in Iceland appears before the Board on behalf of the state when it rules on fines. The rulings of the Board are final.

Despite the provision of paragraph 1 the Directorate of Tax Investigations or its representative learned in law is permitted to offer a party the option to end the penal proceedings of a case by paying a fine to the Treasury, provided that an offence is considered proven beyond doubt, and then the case is neither to be sent to be investigated by the police nor to fine proceedings with the State Internal Revenue Board. When deciding the amount of a fine notice is to be taken of the nature and scale of the offence. Fines can amount from 100 thousand krónur to 6 million krónur. The entity in the case is to be informed of the proposed amount of a fine before it agrees to end a case in such a manner. A decision on the amount of a fine according to this provision is to have been made within six months form the end of the investigation of the Directorate of Tax Investigations.

An alternative penalty is not included in the decision of the Directorate of Tax Investigations. On the collection of a fine imposed by the Directorate of Tax Investigations the same rules apply as to taxes according to this Act, the right to carry out distraint included. The State Prosecutor is to be sent a record over all cases that have been closed, according to this provision. If the State Prosecutor believes that an innocent person has been made to suffer a fine in accordance with paragraph 2 or that the closure of the case has been improbable in other ways he can refer the case to a judge in order to overthrow the decision of the Directorate of Tax Investigations.

The Directorate of Tax Investigations can of its own accord refer a case to be investigated by the police as well as on the request of the accused, if he is opposed to the case being dealt with by the State Internal Revenue Board in accordance with paragraph 1.

Tax claims can be upheld and judged in criminal proceedings because of offences against the Act.

Fines for offences against this Act go to the Treasury.

An alternative penalty does not accompany the State Internal Revenue Board's rulings of a fine. On the collection of a fine issued by the State Internal Revenue Board the same rules apply as do to taxes according to this Act, the right to carry out distraint included.

Charges in accordance with Article 109 have a six year limitation period from the time an investigation by the Directorate of Tax Investigations commences, given that there are no unnecessary delays in the investigation of a case or the issue of punishment."

24. Section 28 of the Act on Withholding Public Levies at Source (*Lög um staðgreiðslu opinberra gjalda*, no. 45/1987) provides the following:

"If payments by a wage payer in accordance with Article 20 are not remitted at the prescribed time, a surcharge shall be levied in addition to the amount of the funds remitted or in addition to the funds which it should have remitted The same shall apply if a remittance form has not been submitted or if it has been inadequate and the amount of levies due has been estimated as referred to in Article 21, unless the wage payer has paid, by the final date for payment, an amount equivalent to the estimate.

The surcharge on unremitted funds as referred to in the first paragraph shall be as follows:

1. one percent (1%) of the amount of funds unremitted for each day past the final due date for payment, up to a maximum of ten percent (10%);

2. an additional surcharge on the amount of funds unremitted, calculated from the due date, if payment has not been made on the first day of the month following the final date for payment. This surcharge shall be equivalent to penalty interest as determined by the Central Bank of Iceland and published as provided for in Act No. 38/2001 on interest and price indexation.

For calculating the surcharge on the estimated amount of levies, the final date for payment shall be deemed to be the final date for payment of the month for which the estimate was made. The same shall apply concerning the surcharge on all unpaid payments due from earlier periods.

If the wage payer sends a satisfactory remittance form within 15 days of the date of a notification from a regional tax director as referred to in Article 21, it shall pay the amount of remittance funds according to the remittance form plus a surcharge as provided for in the second paragraph. The director of internal revenue may alter the previous estimate after this time-limit has elapsed if special circumstances so warrant.

In the eventuality that no estimate was made for a wage payer, who was to pay remittance funds, or that the estimate was lower than the remittance funds it should have paid, the wage payer shall pay the remittance funds due, plus a surcharge as provided for in the second paragraph.

A surcharge as referred to in the second paragraph may be cancelled if a wage payer can provide valid reasons to excuse him/herself; the regional tax director shall decide in each individual case what should be considered as valid reasons in this connection.

The amount of remittance due from a wage payer may be estimated if it turns out that its remittance form is not supported by the prescribed accounts pursuant to Act No. 51/1968 [now Act No. 145/1994] or provisions of the rules on special payroll accounting set by the Minister of Finance based on an authorisation in Article 27. Furthermore, the amount of remittance due from a wage payer may be estimated if it turns out that entries in its payroll, or other factors upon which the remittance form is to be based, are not supported by the data which provisions of the rules adopted as referred to in Article 27 provide for, or if the accounts and the data available on the amount of remittance due according to the remittance form cannot be considered sufficiently reliable. Furthermore, the amount of remittance due from a wage payer may be estimated if it fails to submit accounts or any documentation which the taxation authorities may request to verify remittance forms, cf. Article 25. The provisions of the second paragraph shall also apply to estimates in accordance with this paragraph.

If remittance funds have been undercalculated or wages not reported, a wage payer may be obliged to pay any unremitted funds for the previous six years, calculated from the beginning of the year when reassessment takes place. If an investigation is made by the Director of Internal Revenue or the police of a wage payer's remittance, the authorisation to reassess funds shall extend to the previous six years, calculated from the beginning of the year when the investigation began."

25. Section 30 of the Act on Withholding of Public Levies at Source reads as follows:

"If a person obliged to pay levies, intentionally or through gross negligence provides incorrect or misleading information on anything of significance for remittance of his/her withholding, the person shall pay a fine of up to ten times the amount of the levy for which payment was not made and never less than the equivalent of double that amount. Paragraph 1 of Article 262 of the Penal Code applies to major offences against this provision.

Any wage payer which, intentionally or through gross negligence, provides incorrect or misleading information on anything of significance for remittance of its withholding, has failed to retain funds as obliged to do from wage payments, has not submitted remittance forms at the time prescribed by law or has failed to remit payments of wage earners which it has retained or should have retained, shall pay a fine of up to ten times the amount of the levy which it failed to retain or to remit and never less than the equivalent of double the amount of tax, unless the violation is liable to more severe punishment pursuant to Article 247 of the General Penal Code. The minimum fine

provided for in this paragraph shall not apply if a violation is limited to failing to submit properly reported withholding on the withholding remittance form, provided a substantial portion of the withholding amount has been remitted or there are significant extenuating circumstances. The surcharge as provided for in Point 1 of the second paragraph of Article 28 shall be deducted from the amount of the fine. Paragraph 1 of Article 262 of the Penal Code applies to major offences against this provision.

If a wage payer deliberately or through gross negligence has failed to keep prescribed payroll accounts, this violation is liable to penalties under the Act on Accounting, or to the second paragraph of Article 262 of the General Penal Code if the violation is major.

If a person deliberately or through gross negligence fails to fulfil obligations to give notification as referred to in Article 19, fails to fulfil disclosure obligations as referred to in Article 25, misuses an income tax card, or fails to provide information or assistance, remittance forms, reports or documentation, as prescribed in this Act, he/she shall be liable to fines or imprisonment of up to 2 years.

If a person obliged to remit levies deliberately or through gross negligence provides incorrect or misleading information on anything of significance for his/her withholding, the person may be liable to a fine even if the information cannot affect his/her levies or payment of them. The same penalty shall apply to a wage earner who accepts wages paid to him/her, knowing that the wage payer has not deducted from the wages the amount of public levies prescribed by this Act, or who provides incorrect or misleading information on anything concerning the levies or their payment, even if the information cannot affect this remittance.

If a violation of the first or second paragraph is discovered when an estate is probated, the estate shall pay a fine of up to four times the amount of the levy for which payment was not made and never less than the equivalent of one and a half times that amount. The surcharge provided for in Point 1 of the second paragraph of Article 28 shall be deducted from the amount of the fine. If a situation as described in the fifth paragraph exists, a fine may be levied against the estate.

Any person who wilfully or by gross negligence provides tax authorities with wrongful or misleading information or documentation regarding amounts due by another person or assists a wrongful or misleading tax return to tax authorities shall be subject to punishment as stated in the first or second paragraph of this Article.

An attempt to commit, or complicity in, a violation of this Act is punishable as provided for in Chapter III of the General Penal Code and is liable to fines with a maximum as determined in other provisions of this Article.

A legal entity may be fined for a violation of this Act, irrespective of whether the violation may be attributable to a criminal act of an officer or employee of the legal entity. If its officer or employee has been guilty of violating this Act, the legal entity may be subject to a fine and withdrawal of its operating licence in addition to a punishment inflicted on it, provided the violation is committed for the benefit of the legal entity and it has profited from the violation."

26. Article 262 of the Penal Code (*Almenn hegningarlög*, no. 19/1940) stipulates:

"Any person who intentionally or through gross negligence is guilty of a major violation of the first, second or fifth paragraphs of Article 109 of Act No. 90/2003 on income tax, cf. also Article 22 of the act on municipal tax revenues, the first, second or seventh paragraphs of Article 30 of the Act on the withholding of public levies at source, cf. also Article 11 of the Act on payroll taxes, and of the first or sixth paragraphs of Article 40 of the Act on value added tax, shall be subject to a maximum imprisonment of 6 years. An additional fine may be imposed by virtue of the provisions of the tax laws cited above.

The same punishment may be imposed on a person who intentionally or through gross negligence is guilty of a major violation of the third paragraph of Article 30 of the Act on the withholding of public levies at source, the second paragraph of Article 40 of the Act on value added tax, Articles 37 and 28, cf. Article 36, of the Act on accounting or Articles 83-85, cf. Article 82, of the Act on annual accounts, including any intent to conceal an acquisitive offence committed by oneself or others.

An action constitutes a major violation pursuant to the first and second paragraphs of this Act if the violation involves significant amounts, if the action is committed in a particularly flagrant manner or under circumstances which greatly exacerbate the culpability of the violation, and also if a person to be sentenced to punishment for any of the violations referred to in the first or second paragraph has previously been convicted for a similar violation or any other violation covered by the provisions."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

27. The applicants complained that, through the imposition of tax surcharges and the subsequent criminal trial and conviction for aggravated tax offences, they had been tried and punished twice for the same offence. They argued that the two sets of proceedings had been based on identical facts. They relied on Article 4 of Protocol No. 7 to the Convention, the relevant parts of which read as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

...."

28. The Government contested that argument.

A. Admissibility

29. Under the terms of Article 37 § 1 (a) of the Convention, the Court may decide, at any time during the proceedings, to strike a case out of its list where the circumstances lead to the conclusion that the applicant does not intend to pursue his application. The third applicant has failed to show that it wished to pursue its application, within the meaning of Article 37 § 1 (a) of the Convention. In accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the third applicant's complaints. Therefore, in so far as the third applicant's complaints are concerned, the Court strikes the application out of its list.

30. The Court notes that the remainder of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. Thus, in so far as it concerns the first and second applicants, it must be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

31. Firstly, the applicants submitted that, according to the case-law of the Court, the imposition of tax surcharges constituted sanctions which were criminal by nature and fell within the scope of Articles 6 and 7, and thus also Article 4 of Protocol No. 7 (referring, among other authorities, to *Ponsetti and Chesnel v. France* (dec.), nos. 36855/97 and 41731/98, ECHR 1999-VI; *Janosevic v. Sweden*, no. 34619/97, ECHR 2002-VII; *Rosenquist v. Sweden* (dec.), no. 60619/00, 24 September 2004; and *Carlberg v. Sweden* (dec.), no. 9631/04, 27 January 2009). The Swedish decisions referred to were particularly relevant to the present application as the systems of tax surcharges in Sweden and Iceland were comparable in respect of the penal nature of the surcharges. Furthermore, the applicants referred to *Sergey Zolotukhin v. Russia* (cited above, § 52) in which the Court had confirmed that the notion of "criminal procedure" in Article 4 of Protocol No. 7 should be interpreted in the light of the general principles concerning the concepts of "criminal charge" and "penalty" in Articles 6 and 7 of the Convention, namely the so-called "*Engel* criteria" (that is, the legal classification under domestic law, the nature of the offence and the degree of severity of the penalty – see *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22).

32. Applying these criteria to the facts of the present case, the applicants submitted that the surcharges imposed on them had by their nature served a penal purpose of deterring taxpayers from violating statutory obligations to report taxable income and other relevant information to the authorities in a correct manner. In that context, they also referred to the fact that, according to domestic law, these surcharges were to be deducted from subsequent criminal sanctions. The applicants emphasised that such a system did not provide protection against being tried or being liable to be tried in new proceedings following a final decision.

33. As to the degree of severity of the measure, the applicants submitted that the 25% surcharge imposed on the applicants was the maximum potential penalty provided for by the relevant domestic law. This had amounted to ISK 45,558,248 (approximately EUR 530,000 at the exchange rate applicable in August/September 2007) for the first applicant and ISK 1,314,781 (approximately EUR 15,000) for the second applicant.

34. Moreover, the applicants submitted that the offences for which they had been prosecuted were the same as those that had formed the basis for the imposition of the tax surcharges (the "*idem*" element of the principle of *ne bis in idem*). Referring again to the case of *Sergey Zolotukhin* (cited above), the applicant submitted that Article 4 of Protocol No. 7 prohibited trial for a second offence "in so far as it arises from identical facts or facts which are substantially the same" (§ 82). In the present case, neither the domestic courts nor the prosecution authorities had disputed the applicants' submission that the indictment in the criminal proceedings had been based on the same facts as the tax surcharges.

35. Finally, the applicant pointed out that the police investigation had started on 16 August 2006. They claimed that when looking at the facts of the present case it was clear that the two sets of proceedings – administrative and criminal – had neither been conducted in parallel nor had they been interconnected, contrasting the case of A and B v. Norway ([GC], nos. 24130/11 and 29758/11, ECHR 2016).

(b) The Government

36. The Government did not dispute that the imposition of a 25% tax surcharge pursuant to Section

108 of the Act on Income Tax constituted a penalty within the meaning of Article 4 of Protocol No. 7 and that therefore the proceedings before the tax authorities had been criminal in nature.

37. As to whether the applicants had been tried or punished twice for the same offence, the Government acknowledged that the tax proceedings, on the one hand, and the criminal proceedings, on the other, had been rooted in the same events. However, they argued that the Court's interpretation in the case of *Sergey Zolotukhin* (cited above, § 82) – that the *"idem"* element of Article 4 of Protocol No. 7 prohibits the trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same – could not be applied in the present case in light of the special nature of tax cases, as it would lead to an extremely unreasonable conclusion. The circumstances and particulars in the present case were of a very different nature than in *Sergey Zolotukhin* and were therefore not comparable.

38. The Government submitted that tax surcharges were imposed on an objective basis and that the conditions for their imposition were fulfilled if a tax return was not submitted at the required time or if there were flaws or misstatements in the return, irrespective of any culpability of the taxpayer. The primary purpose of the surcharges was therefore to ensure that the tax authorities were provided with adequate, correct and timely information to enable them to regulate in a practical and efficient manner the levy of taxes. There needed to be an effective and immediately applicable sanction to ensure this. Criminal proceedings could take a long time and it would reduce the deterrent effects against violations of the tax law if sanctions could only be applied after the conclusion of criminal proceedings. Moreover, the tax authorities did not take any stand on the criminal character of the actions of taxpayers; there were other provisions in the Income Tax Act and other acts relevant to taxation which were more akin to criminal sanctions and which involved a requirement of intent or gross neglect. Furthermore, the surcharges imposed on the applicants had been deducted from the fines determined by the Supreme Court in the criminal proceedings.

39. Iceland's legal provisions regarding unpaid tax and tax surcharges, on the one hand, and criminal liability, on the other, were fundamentally different. The Government referred to the cases of *Ponsetti and Chesnel* and *Rosenquist* (both cited above) and argued that the provisions relevant to the present case differed in their purpose and did not include the same fundamental elements. The two offences were therefore not the same within the meaning of Article 4 of Protocol No. 7.

40. Moreover, the Icelandic system was fully transparent and ensured harmonised enforcement and efficiency. The applicants could therefore not have had any legitimate expectation that they would not be indicted for criminal conduct after having been subjected to the tax surcharges. The situation in the present case was therefore distinguishable from the situation in *Sergey Zolotukhin* and the Court's interpretation in the latter case could not apply to the present case. In that context, the Government also referred to the principle of subsidiarity which entailed that the domestic authorities were better placed than international courts in certain tasks which, in the Government's view, would indeed apply to measures adopted by States to create efficient tax systems.

41. In any event, the Government asserted that the applicants had not been subjected to new or repeated proceedings within the meaning of Article 4 of Protocol No. 7. Referring to *R.T. v Switzerland* ((dec.), no. 31982/96, 30 May 2000) and *Nilsson v. Sweden* ((dec.), no. 73661/01, ECHR 2005-XIII), they argued that the provision did not prohibit parallel proceedings. In the present case, the tax proceedings and the criminal proceedings had begun at virtually the same time, since the investigation of the Director of Tax Investigations had been finalised on 27 October 2004 and he had reported the matter to the Economic Crimes Unit of the National Commissioner of the Icelandic Police on 12 November 2004. The criminal proceedings had begun on the latter date and the criminal investigation had been ongoing for the entire period during which the tax proceedings had taken place. In August 2006 the applicants had been informed that they had the status of suspects in the criminal investigation and they had been indicted on 18 December 2008. The Government submitted that it was of no relevance that the indictment had been issued after the decisions of the tax authorities relating to the tax surcharges had become final, as the investigation had begun many years earlier. When, as in the present case, the criminal proceedings had begun long before the final decision by the tax authorities had been issued, the applicants could have had no legitimate expectation that the criminal proceedings would be discontinued. Moreover, the two sets of proceedings had been closely connected in substance as they had been rooted in the same events. Thus, they had been a part of an integrated dual process.

42. Additionally, the Government maintained that the facts of the present case were similar to the case of A and B v. Norway (cited above). The administrative and criminal investigations had been interconnected because they had both been based on the facts in the respective final reports of the tax investigation.

2. The Court's assessment

(a) Whether the imposition of tax surcharges was criminal in nature

43. In comparable cases involving the imposition of tax surcharges, the Court has held, on the basis of the Engel criteria, that the proceedings in question were "criminal" in nature, not only for the purposes of

Article 6 of the Convention but also for the purposes of Article 4 of Protocol No. 7 (see A and B v. Norway, cited above, §§ 107, 136 and 138, with further references).

44. Noting that the parties did not dispute this, the Court concludes that both sets of proceedings in the present case concerned a "criminal" matter within the autonomous meaning of Article 4 of Protocol No. 7

(b) Whether the criminal offences for which the applicants were prosecuted and convicted were the same as those for which the tax surcharges were imposed (idem)

45. The notion of the "same offence" – the *idem* element of the *ne bis in idem* principle in Article 4 of Protocol No. 7 – is to be understood as prohibiting the prosecution or conviction of a second "offence" in so far as it arises from identical facts or facts which are substantially the same (see *Sergey Zolutukhin*, cited above, §§ 78-84)

46. In the criminal proceedings in the present case, the applicants were indicted and convicted for aggravated tax offences. Both parties submitted, and the domestic courts found, that the facts underlying the indictment and conviction were the same or substantially the same as those leading to the imposition of tax surcharges.

47. The Court agrees with the parties. The applicants' conviction and the imposition of tax surcharges were based on the same failure to declare income. Moreover, the tax proceedings and the criminal proceedings concerned the same period of time and essentially the same amount of evaded taxes. Consequently, the *idem* element of the *ne bis in idem* principle is present.

(c) Whether there was a final decision

48. Before determining whether there was a duplication of proceedings (*bis*), in some cases the Court has first undertaken an examination whether and, if so, when there was a "final" decision in one set of proceedings (potentially barring the continuation of the other set). However, the issue as to whether a decision is "final" or not is devoid of relevance if there is no real duplication of proceedings but rather a combination of proceedings considered to constitute an integrated whole. In the present case, the Court does not find it necessary to determine whether and when the first set of proceedings – the tax proceedings – became "final" as this circumstance does not affect the assessment given below of the relationship between them (see *A and B v. Norway*, cited above, §§ 126 and 142).

(d) Whether there was a duplication of proceedings (bis)

49. In the recent Grand Chamber judgment in the case of *A and B v. Norway* (cited above), the Court stated (§ 130):

"On the basis of the foregoing review of the Court's case-law, it is evident that, in relation to matters subject to repression under both criminal and administrative law, the surest manner of ensuring compliance with Article 4 of Protocol No. 7 is the provision, at some appropriate stage, of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence can be addressed within the framework of a single process. Nonetheless, as explained above (see notably paragraphs 111 and 117-120), Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. In particular, for the Court to be satisfied that there is no duplication of trial or punishment (bis) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time". In other words, it must be shown that they have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected."

The Court exemplified what should be taken into account when evaluating the connection in substance and in time between dual criminal and administrative proceedings. In regard to the substance connection, the Court stated (§§ 132-133):

"Material factors for determining whether there is a sufficiently close connection in substance include:

– whether the different proceedings pursue complementary purposes and thus address, not only in abstracto but also in concreto, different aspects of the social misconduct involved;

– whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (idem);

– whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set;

– and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the

overall amount of any penalties imposed is proportionate.

In this regard, it is also instructive to have regard to the manner of application of Article 6 of the Convention in the type of case that is now under consideration (see Jussila v. Finland [GC], no. 73053/01, § 43, ECHR 2006-XIV):

"[I]t is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly 'criminal charges' of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a 'criminal charge' by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties ..., prison disciplinary proceedings ..., customs law ..., competition law ..., and penalties imposed by a court with jurisdiction in financial matters .... Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency ...".

The above reasoning reflects considerations of relevance when deciding whether Article 4 of Protocol No. 7 has been complied with in cases concerning dual administrative and criminal proceedings. Moreover, as the Court has held on many occasions, the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions. ...

The extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings is an important factor. Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law" (in the language of Jussila cited above). The additional factor that those proceedings do not carry any significant degree of stigma renders it less likely that the combination of proceedings will entail a disproportionate burden on the accused person. Conversely, the fact that the administrative proceedings have stigmatising features largely resembling those of ordinary criminal proceedings enhances the risk that the social purposes pursued in sanctioning the conduct in different proceedings will be duplicated (bis) rather than complementing one another. The outcome of the cases mentioned in paragraph 129 above may be seen as illustrations of such a risk materialising."

With respect to the time connection between the two proceedings, the Court noted (§ 134):

"... [W]here the connection in substance is sufficiently strong, the requirement of a connection in time nonetheless remains and must be satisfied. This does not mean, however, that the two sets of proceedings have to be conducted simultaneously from beginning to end. It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice. However, ... the connection in time must always be present. Thus, the connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time ..., even where the relevant national system provides for an "integrated" scheme separating administrative and criminal components. The weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings."

50. In the present case, the Directorate of Tax Investigations initiated a tax audit on the applicants on 17 November 2003. It was finalised with the issuing of reports on 27 October 2004 (as regards the first applicant) and 24 November 2005 (as regards the second applicant) (see paragraphs 9-10 above). On 12 November 2004 the Directorate reported the matter to the police for criminal investigation. The Directorate forwarded to the police its reports and the documents collected during the tax audit. In August 2006 the police questioned the applicants and other witnesses for the first time and, apparently, informed the applicant about their status as suspects in the criminal investigation (see paragraph 14 above). The State Internal Revenue Board's decisions in the tax proceedings were issued on 29 August 2007 (in respect of the second applicant) and 26 September 2007 (in respect of the first applicant) and became final six months thereafter (see paragraph 13 above). On 18 December 2008, about two years and four months after the applicants had been informed about the criminal investigation and their status as suspects and approximately nine months after the decisions in the tax proceedings had become final, the indictments in the criminal case were issued. By a judgment of 9 December 2011 the District Court convicted the applicants for aggravated tax offences. On 7 February 2013, the Supreme Court upheld the applicants´ convictions for the most part, and convicted the first applicant on two further charges for which he had been acquitted by the District Court. Thus, the overall length of the two proceedings, from the start of the Directorate's investigation until the Supreme Court gave its final ruling, was almost nine years and three months which, as noted by the Supreme Court, was not the applicants' fault.

51. Assessing the connection in substance between the tax and criminal proceedings in the present case – as well as the different sanctions imposed on the applicants – at the outset the Court accepts that they pursued complementary purposes in addressing the issue of taxpayers' failure to comply with the legal

requirements relating to the filing of tax returns. Furthermore, the consequences of the applicants' conduct were foreseeable: both the imposition of tax surcharges and the indictment and conviction for tax offences form part of the actions taken and sanctions levied under Icelandic law for failure to provide accurate information in a tax return.

52. The Supreme Court sentenced the applicants to a suspended sentence of respectively 12 and 18 months, which included earlier suspended sentences for different offences (see paragraph 19 above) and ordered them to pay fines. In fixing the fines, the court had regard to the excessive length of proceedings and tax surcharges that had already been imposed on the applicants, albeit without providing any details on the calculation in this respect. However, in determining the prison sentence the court only considered the excessive length of the proceedings. Nevertheless, the Court concludes that, given that the tax surcharges were offset against the fines, the sanctions already imposed in the tax proceedings were sufficiently taken into account in the sentencing in the criminal proceedings.

53. As has been noted above (paragraph 14), the police in charge of the criminal investigation had access to the reports issued by the Directorate of Tax Investigations and the documents collected during the tax audit. Nevertheless, the police proceeded by conducting their own independent investigation, which resulted in the applicants' conviction by the Supreme Court more than eight years after the Directorate had reported the matter to the police. The applicants' conduct and their liability under the different provisions of tax and criminal law were thus examined by different authorities and courts in proceedings that were largely independent of each other.

54. Turning to the connection in time between the two proceedings, the Court reiterates that the overall length was about nine years and three months. During that period, the proceedings were in effect progressing concurrently between August 2006, when the first interviews were held by the police, and 29 August 2007 **(**in the second applicant´s case) or 26 September 2007 (in the first applicant´s case), when the Internal Revenue Board issued its decisions upon the applicants' tax appeals, confirming their obligation to pay tax surcharges. The proceedings were thus conducted in parallel for just a little more than a year. Moreover, the applicants were indicted on 18 December 2008, 15 and 16 months after the mentioned tax decision had been taken and nine and ten months after they had acquired legal force. The criminal proceedings then continued on their own for several years: the District Court convicted the applicants on 9 November 2011, more than four years after the decisions of the State Internal Revenue Board, and the Supreme Court´s judgment was not pronounced until more than a year later, on 7 February 2013. This, again, stands in contrast to the case of *A and B v. Norway* (cited above), where the total length of the proceedings against the two applicants amounted to approximately five years and the criminal proceedings continued for less than two years after the tax decisions had acquired legal force, and where the integration between the two proceedings was evident through the fact that the indictments against the applicants were issued before the tax authorities' decisions to amend their tax assessments were taken and the District Court convicted them only months after those tax decisions. Furthermore, in the present case the Government have failed to explain and justify the delay which occurred in the domestic proceedings and which, as the Supreme Court held, had not been the applicants' fault (see *A. and B*., cited above, § 134).

55. Having regard to the above circumstances, in particular the limited overlap in time and the largely independent collection and assessment of evidence, the Court cannot find that there was a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings in the case for them to be compatible with the *bis* criterion in Article 4 of Protocol No. 7.

56. Consequently, the applicants suffered disproportionate prejudice as a result of having been tried and punished for the same or substantially the same conduct by different authorities in two different proceedings which lacked the required connection.

For these reasons, there has been a violation of Article 4 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

58. The first applicant claimed ISK 62,000,000 (corresponding to approximately EUR 520,000 at today's exchange rate) in respect of pecuniary damage or the cancellation of the whole debt (ISK 62,000,000) resulting from the Supreme Court judgment of 7 February 2013. The second applicant requested that the whole debt (ISK 32,000,000, corresponding to approximately EUR 269,000) resulting from that judgment be cancelled. Both applicants confirmed, however, that they had not yet paid the fines imposed by the Supreme Court. Each applicant claimed EUR 50,000 in respect of non-pecuniary damage.

59. The Government argued that, as the applicants had not paid the fines, no pecuniary damage had been

sustained. Furthermore, if a violation of Article 4 of Protocol No. 7 to the Convention were to be found, such a finding by the Court would in itself constitute just satisfaction for any non-pecuniary damage claimed.

60. The Court notes that it is common ground that the fines imposed by the Supreme Court's judgment of 7 February 2013 have not been paid. Agreeing with the Government, the Court considers that, due to the non-payment of the fines, it cannot be said that the applicants have suffered any pecuniary damage. In these circumstances, the finding of a violation of the applicants' rights under Article 4 of Protocol No. 7 should be regarded as sufficient just satisfaction in this respect.

61. However, this finding cannot be said to compensate the applicants for the sense of injustice and frustration that they must have felt. Making its assessment on an equitable basis, the Court therefore awards each applicant EUR 5,000 in respect of non-pecuniary damage."

B. Costs and expenses

62. The first applicant claimed ISK 5,647,500 (corresponding to approximately EUR 47,000 at today's exchange rate) for the costs and expenses incurred in the domestic proceedings and ISK 4,232,283 (EUR 35,000) for those incurred before the Court. The second applicant requested ISK 3,906,638 (EUR 33,000) for the costs and expenses incurred in the domestic proceedings and ISK 1,310,220 (EUR 11,000) for those incurred before the Court.

63. The Government noted that the applicants had not reimbursed to the state treasury the fee paid by the state to the applicants' legal representatives for their work in the domestic proceedings. Furthermore, the Government asserted that the costs claimed before the Court were excessively high, having regard to the scope of the case and the work undertaken by the applicants' representatives.

64. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court notes that the applicants have not paid the costs and expenses incurred in the domestic proceedings and therefore rejects this claim. The Court furthermore finds that the applicants' claims concerning their costs and expenses before the Court are excessive. However, making an overall assessment, the Court considers it reasonable to award the first applicant EUR 10,000 and the second applicant EUR 5,000 for costs and expenses incurred in the proceedings before the Court.

C. Default interest

65. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to strike the application out of its list in so far as the complaints of the third applicant, Fjárfestingafélagið Gaumur, are concerned;

2. *Declares* the remainder of the application admissible;

3. *Holds* that there has been a violation of Article 4 of Protocol 7 to the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts plus any tax that may be chargeable to the applicants, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) the first applicant (Mr Jón Ásgeir Jóhannesson):

– EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

– EUR 10,000 (ten thousand euros) in respect of costs and expenses;

(ii) the second applicant (Mr Tryggvi Jónsson):

– EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

– EUR 5,000 (five thousand euros) in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 May 2017,.

EU

Court of Justice

Orsi and Baldetti

5 April 2017

Case numbers: C-217/15 and C-350/15

Penalties – Ne bis in idem - Administrative penalty and criminal penalty for non-payment of VAT – Imposed respectively on a company and on a natural person – No violation

Summary

Art. 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation which permits criminal proceedings to be brought for non-payment of VAT, after the imposition of a definitive tax penalty with respect to the same act or omission, where that penalty was imposed on a company with legal personality, while those criminal proceedings were brought against a natural person.

Two requests for a preliminary ruling under Article 267 TFEU from the Tribunale di Santa Maria Capua Vetere (District Court, Santa Maria Capua Vetere, Italy) (…)

1 These requests for preliminary rulings concern the interpretation of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

2 The requests have been made in the context of two criminal proceedings brought, respectively, against Mr Massimo Orsi and Mr Luciano Baldetti, as a result of offences committed by them relating to value added tax (VAT).

Legal context

The ECHR

3 Article 4 of Protocol 7 to the ECHR, entitled 'Right not to be tried or punished twice', provides:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.'

European Union law

4 Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) determines the transactions subject to VAT.

5 Under Article 273 of that directive:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

…'

Italian law

6 Article 13(1) of the decreto legislativo n. 471, Riforma delle sanzioni tributarie non penali in materia di imposte dirette, di imposta sul valore aggiunto e di riscossione dei tributi, a norma dell'articolo 3, comma 133, lettera q), della legge 23 dicembre 1996, n. 662 (Legislative Decree No 471 on the reform of non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, in accordance with Article 3(133q) of Law No 662 of 23 December 1996) of 18 December 1997 (Ordinary Supplement to GURI No 5 of 8 January 1998) is worded as follows:

'Any person who fails to pay, in whole or in part, within the prescribed periods, instalments, periodic payments, the equalisation payment or the balance of tax due on the tax return, after deduction in those cases of the amount of the periodic payments and instalments, even if they have not been paid, shall be liable to an administrative penalty amounting to 30% of each outstanding amount, even where, after the correction of clerical or calculation errors noted during the inspection of the annual tax return, it transpires that the tax is greater or that the deductible surplus is less.

…'

7 Article 10a of the decreto legislativo n. 74, Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto, a norma dell'articolo 9 della legge 25 giugno 1999, n. 205 (Legislative Decree No 74 adopting new rules on offences relating to direct taxes

and value added tax, pursuant to Article 9 of Law No 205 of 25 June 1999) of 10 March 2000 (GURI No 76 of 31 March 2000, p. 4) ('Legislative Decree No 74/2000') provides:

'Any person who fails to pay, by the deadline fixed for the filing of the withholding agent's annual tax return, the withholding tax resulting from the certification issued to the taxpayers in respect of whom tax is withheld shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 50 000 for each tax period.'

8 Article 10b of that decree, entitled 'Failure to pay VAT', states:

'Article 10a shall also apply, within the limits there determined, to any person who fails to pay the value added tax owed on the basis of the annual return by the deadline for the payment on account relating to the subsequent tax period.'

The main proceedings and the question referred for a preliminary ruling

9 During the tax periods at issue in the main proceedings, Mr Orsi was the legal representative of S.A. COM Servizi Ambiente e Commercio Srl and Mr Baldetti that of Evoluzione Maglia Srl.

10 Proceedings have been brought against Mr Orsi and Mr Baldetti before the Tribunale di Santa Maria Capua Vetere (District Court, Santa Maria Capua Vetere, Italy) with respect to the offence provided for in and punishable under Article 10b of Legislative Decree No 74/2000, read in conjunction with Article 10a thereof, on the ground that they failed, in their capacity as legal representatives of those companies, to pay within the time limit stipulated by law, VAT due on the basis of the annual return in respect of the tax periods at issue in the main proceedings. The amount of unpaid VAT, in each case, is more than EUR 1 million.

11 Those criminal proceedings were brought after the Agenzia delle Entrate (tax authorities) reported those offences to the Procura della Repubblica (public prosecutor). During those criminal proceedings, a precautionary seizure was carried out of the assets of both Mr Orsi and Mr Baldetti. Both Mr Orsi and Mr Baldetti submitted an application for review of that seizure.

12 Before those criminal proceedings were initiated, the amounts of VAT at issue in the main proceedings were subject to an assessment by the tax authorities, which not only calculated that tax liability, but also imposed a tax penalty on S.A. COM Servizi Ambiente e Commercio and on Evoluzione Maglia, equivalent to 30% of the amount of VAT owed. Following a transaction relating to those assessment measures, they became definitive, without being contested.

13 In those circumstances, the Tribunale di Santa Maria Capua Vetere (District Court, Santa Maria Capua Vetere) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'On a proper construction of Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter, is the provision made under Article 10b of Legislative Decree No 74/2000 consistent with EU law, in so far as it permits the criminal liability of a person to whom a final assessment by the tax authorities of the State has already been issued imposing an administrative penalty … to be assessed in respect of the same act or omission (non-payment of VAT)?'

Consideration of the question referred

14 By its question, the referring court asks, in essence, whether Article 50 of the Charter and Article 4 of Protocol No 7 to the ECHR must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows criminal proceedings to be brought for non-payment of VAT, after the imposition of a definitive tax penalty with respect to the same act or omission.

15 Since the referring court refers not only to Article 50 of the Charter, but also to Article 4 of Protocol No 7 to the ECHR, it should be noted that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that convention, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44, and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 45 and the case-law cited). Therefore, the examination of the question referred must be undertaken solely in the light of the fundamental rights guaranteed by the Charter (see, to that effect, judgments of 28 July 2016, *Conseil des ministres*, C-543/14, EU:C:2016:605, paragraph 23 and the case-law cited, and of 6 October 2016, *Paoletti and Others*, C-218/15, EU:C:2016:748, paragraph 22).

16 As regards Article 50 of the Charter, it should be noted that tax penalties and criminal proceedings, such as those at issue in the main proceedings, which concern offences relating to VAT and seek to ensure the correct collection of that tax and to avoid fraud, constitute implementation of Articles 2 and 273 of Directive 2006/112 and of Article 325 TFEU and, therefore, of European Union law for the purposes of Article 51(1) of the Charter (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 24 to 27, and of

8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraphs 49, 52 and 53). Therefore, since provisions of national law dealing with criminal proceedings concern offences relating to VAT, such as those at issue in the main proceedings, they come within the scope of application of Article 50 of the Charter.

17 The application of the *ne bis in idem* principle guaranteed in Article 50 of the Charter presupposes in the first place, as the Advocate General stated in point 32 of his Opinion, that it is the same person who is the subject of the penalties or criminal proceedings at issue.

18 It follows from the wording itself of that article, according to which '[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law', that it prohibits prosecuting or imposing criminal sanctions on the same person more than once for the same offence.

19 That interpretation of Article 50 of the Charter is supported by the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), which must be taken into account with a view to its interpretation (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20). Concerning that article, those explanations refer to the Court's case-law relating to the *ne bis in idem* principle, as recognised as a general principle of European Union law prior to the entry into force of the Charter. According to that case-law, that principle cannot, in any event, be infringed if it is not the same person who was sanctioned more than once for the same unlawful act (see, to that effect, inter alia, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 338, and of 18 December 2008, *Coop de France bétail et viande and Others* v *Commission*, C-101/07 P and C-110/07 P, EU:C:2008:741, paragraph 127).

20 The Court confirmed that case-law after the entry into force of the Charter (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 34).

21 In this case, it follows from the information contained in the orders for reference, confirmed both by certain information contained in the documents available to the Court and by the Italian Government during the hearing before the Court, that the tax penalties at issue in the main proceedings were imposed on two companies with legal personality, namely S.A. COM Servizi Ambiente e Commercio and Evoluzione Maglia, whereas the criminal proceedings at issue in the main proceedings relate to Mr Orsi and Mr Baldetti, who are natural persons.

22 It therefore appears, as the Advocate General noted in point 36 of his Opinion, that, in the two criminal proceedings at issue in the main proceedings, the tax penalty and the criminal charges concern distinct persons, namely, in Case C-217/15, S.A. COM Servizi Ambiente e Commercio, which was subject to a tax penalty, and Mr Orsi, against whom criminal proceedings have been brought, and, in Case C-350/15, Evoluzione Maglia, which was subject to a tax penalty, and Mr Baldetti, against whom criminal proceedings have been initiated, so that the condition for the application of the *ne bis in idem* principle, according to which the same person must be subject to the penalties and criminal proceedings at issue appears not to be satisfied, which is however to be determined by the referring court.

23 In that regard, the fact that criminal proceedings have been brought against Mr Orsi and Mr Baldetti in respect of acts or omissions committed in their capacity as legal representatives of companies which were subject to tax penalties is not capable of calling into question the conclusion reached in the previous paragraph.

24 Finally, in accordance with Article 52(3) of the Charter, in so far as Article 50 thereof contains a right corresponding to that provided for in Article 4 of Protocol No 7 to the ECHR, it is necessary to ensure that the above interpretation of Article 50 thereof does not disregard the level of protection guaranteed by the ECHR (see, by analogy, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 77).

25 According to the case-law of the European Court of Human Rights, the imposition of penalties, whether tax or criminal, does not constitute an infringement of Article 4 of Protocol No 7 to the ECHR where the penalties at issue concern natural or legal persons who are legally distinct (ECtHR, 20 May 2014, *Pirttimäki v. Finland*, CE:ECHR:2014:0520JUD00353211, § 51).

26 Since the condition that the same person must be subject to the penalties and proceedings at issue is not satisfied in the context of the main proceedings, it is not necessary to examine the other conditions for the application of Article 50 of the Charter.

27 Therefore, the answer to the question referred is that Article 50 of the Charter must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which permits criminal proceedings to be brought for non-payment of VAT, after the imposition of a definitive tax penalty with respect to the same act or omission, where that penalty was imposed on a company with legal personality, while those criminal proceedings were brought against a natural person.

(…)

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

Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which permits criminal proceedings to be brought for non-payment of value added tax, after the imposition of a definitive tax penalty with respect to the same act or omission, where that penalty was imposed on a company with legal personality, while those criminal proceedings were brought against a natural person.

Belgium

Court of First Instance of Brussels

29 November 2016

Case numbers: 13/14976/A and 13/15453/A

International recovery assistance – EU – Directive 2010/24 – Authority that should deal with the execution of the assistance request

Summary

The execution of a request for recovery assistance under Directive 2010/24 should not necessarily be done by the central liaison office (CLO) itself. This CLO is only a point of contact for the communication between the Member States concerned.

(…)

10. By stating that only the Belgian Central Liaison Office was vested with the power to execute the French request for assistance and to proceed with the recovery of taxes and the adoption of precautionary measures, Mr and Mrs X invoke an argument based on a literal reading of the Directive 2010/24 and the Belgian Law of 9 January 2012 transposing that Directive.

However, their argument has to be rejected since it ignores the true purpose of the Directive and the Belgian law referred to above.

11. The wording and the spirit of that Directive and of the Belgian law implementing the Directive do not permit the conclusion that the request for recovery assistance, sent by other States, should be executed by the Central Liaison Office itself.

The objective of the Council of the European Union has clearly been to oblige the Member States to establish a simple cooperation structure to serve as an interface between the tax administrations of the Member States in order to ensure the processing of requests for assistance, which must in principle be transmitted by electronic means using standard forms. This was considered to guarantee efficiency, and the requested State has a wide discretion in the execution of requests for assistance.

This follows from the following provisions and recitals of the Directive:

— recital 20 of the Directive states that the objective pursued is the provision of a uniform system of recovery assistance within the internal market.

— Article 3 of the Directive defines the following key terms:

"For the purposes of this Directive:

(a) 'applicant authority' means a central liaison office, a liaison office or a liaison department of a Member State which makes a request for assistance concerning a claim referred to in Article 2;

(b) 'requested authority' means a central liaison office, a liaison office or a liaison department of a Member State to which a request for assistance is made."

— Article 4 on the organisation is worded in the following terms:

"1. Each Member State shall inform the Commission by 20 May 2010 of its competent authority or authorities (hereinafter respectively referred to as the 'competent authority') for the purpose of this Directive and shall inform the Commission without delay of any changes thereof.

The Commission shall make the information received available to the other Member States and publish a list of the competent authorities of the Member States in the Official Journal of the European Union.

2. The competent authority shall designate a central liaison office which shall have principal responsibility for contacts with other Member States in the field of mutual assistance covered by this Directive.

The central liaison office may also be designated as responsible for contacts with the Commission.

3. The competent authority of each Member State may designate liaison offices which shall be responsible for contacts with other Member States concerning mutual assistance with regard to one or more specific types or categories of taxes and duties referred to in Article 2.

4. The competent authority of each Member State may designate offices, other than the central liaison office or liaison offices, as liaison departments. Liaison departments shall request or grant mutual assistance under this Directive in relation to their specific territorial or operational competences.

5. Where a liaison office or a liaison department receives a request for mutual assistance requiring action outside the competence assigned to it, it shall forward the request without delay to the competent office or department, if known, or to the central liaison office, and inform the applicant authority thereof.

6. The competent authority of each Member State shall inform the Commission of its central liaison office and any liaison offices or liaison departments which it has designated. The Commission shall make the information received available to the Member States.

7. Every communication shall be sent by or on behalf or, on a case by case basis, with the agreement of the central liaison office, which shall ensure effectiveness of communication."

— Article 13 "Execution of the request for recovery" provides that:

"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. (…)".

— Article 16 "Request for precautionary measures" explains the following with regard to precautionary measures in the requested Member State:

"1. 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. (…)".

12. It was never the intention of the Council of the European Union to compel Member States to duplicate their national tax administration within their Central Liaison Office, as confirmed also by the Law of 9 January 2012 transposing the Directive and by the preparatory documents.

— The Minister of Finance informed the House of Representatives that *'the European Commission has requested all Member States to establish a Central Liaison Office which shall have principal responsibility for contacts with other Member States and with the European Commission'*. The willingness to implement a simple structure is also clear from the number of electronic messaging services defined with the European Commission, which is limited to 13 for all federal tax services.

— It appears from the Opinion of the Council of State that *'taking into account the respective competences of the Federal State, the Communities and the Regions on taxes and other levies, the Central Liaison Office should be a body common to those authorities'*, which implicitly confirms that the Central Liaison Office is only an interface and not the body responsible for the execution of the assistance.

— The Act of 9 January 2012 defines the *'Belgian authority'* as *'the central liaison office, a liaison office or a liaison department authorised by the competent Belgian authority to submit a request for assistance concerning a claim referred to in Article 3 to a foreign authority or to receive and deal with such a request from a foreign authority'*.

— The legislator has not stipulated that the 'Central Liaison Office' shall execute, by itself, the request for assistance addressed to it by the foreign authority. Moreover, Article 20, first paragraph of the Act provides that *"for the purpose of the recovery in Belgium, any claim in respect of which a request for recovery has been made shall be treated as a Belgian claim, unless otherwise provided for in this Act"*, and that *"the **Belgian administration** applies the powers and procedures defined by the laws, regulations or administrative provisions applicable to Belgian claims concerning the same or, at the very least, to a similar tax or duty"*.

— With regard to the autonomy of the tax administration, Article 21 of the Law states that:

"At the diligence of a foreign authority, the Belgian authority shall take precautionary measures, if allowed under Belgian 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, if these precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant Member State".

13. Therefore, the assistance requested by the French State should not necessarily be provided by the Central Liaison Office, which is only a point of contact, but by the tax administration.

Since Article 20 of the transposition law provides that any claim in respect of which a request for recovery has been made shall be treated as a Belgian claim (above, point 12), the collection of State funds may only be done by an authorised accountant (Article 35 of the Law of 22 May 2003 organising the budget and the accounts of the Federal State).

With regard to French taxes payable by French nationals who are not established in Belgium, the Belgian legislation does not provide explicitly for the department responsible for recovery of that tax. It does not therefore appear abnormal that the Belgian State refers to its administrative practice to entrust that task to the Adviser Recovery — Tax Collector of the Special Recovery Team Office in Brussels.

14. The aforementioned Directive does not expressly deal with the nature of the precautionary measures or the measures that should be taken in order to ensure the recovery of the tax claim of the applicant State.

It was explained that Belgium, as a requested State, has the obligation, under the Directive and its transposing legislation, to treat the French claim as its own claims and to use its own administrative practice. In other words, the requested State has a broad discretion in the choice of the means to take in order to address the French request for assistance. Therefore, the Belgian State cannot be criticised for having adopted the contested precautionary measures.

On those grounds,

The judge of seizures decides that the Belgian State has correctly implemented Directive 2010/24/EU, executing the French request for assistance.

FR

Court of Appeal of Metz

N.B. vs Directorate-General for Public Finances

7 February 2017

Case number: J.E.X. 15/01586

International recovery assistance – EU – Directive 2010/24 – French company with an activity in Germany – Insolvency proceedings of this company completed – German tax authorities holding the director personally liable for the German tax due by the company – Tax recovery assistance possible – Argument that the tax liability is violating Regulation 1346/2000 – No possibility to raise this argument before the French court

Summary

A dispute about the liability for a tax debt can only be brought before the competent bodies of the Member State requesting recovery assistance on the basis of Directive 2010/24.

By writ of 26 March 2014, notified to Mr B on 27 March 2014, the Directorate-General for Public Finances, acting on the basis of uniform instruments permitting the recovery of claims which come within the scope of the Council Directive (2010/24/EU), on the request for recovery assistance sent by the German tax authorities in respect of income tax for the years 1999 to 2003, issued a preventive attachment in the hands of Bank C to the account opened in the name of Mr B, up to the principal sum of EUR 422 817,98, plus interest and costs.

By act of 25 April 2014, Mr B brought proceedings against the Directorate-General for Public Finances in order to stop the enforcement measures.

By judgment of 30 April 2015, the enforcement judge at the Court of First Instance of Metz dismissed the claims made by Mr B, said that the decision is enforceable (in accordance with Article R. 121-21 of the Code of Civil Enforcement Procedures), ordered Mr B to pay to the French Directorate-General for the Public Finances the sum of EUR 500,00 pursuant to Article 700 of the Code of Civil Procedure and to pay the costs.

The appeal of Mr B was handed over at the Registry of the Court on 18 May 2015.

In his most recent written observations, notified on 14 August 2015, Mr B asks the Court:

primarily,

— to order the release of the attachment carried out on 26 March 2014 by the bailiff, at the request of the Directorate-General for Public Finances against him with the Bank C,

in the alternative,

— to order the release of EUR 722,92 and,

in any event, to order the French State — Directorate-General for Public Finances, to pay him the sum of EUR 2 000,00 pursuant to Article 700 of the Code of Civil Procedure and to pay the costs.

In his most recent written observations, served on 23 September 2015, the Accounting Officer of the Directorate-General for Public Finances asks to dismiss Mr B's requests, to confirm the referred judgment, to order Mr B to pay him the sum of EUR 1 200,00 under Article 700 of the Code of Civil Procedure and to pay the costs.

THE COURT,

Given that Mr B states that he was the manager of the company M, created in 1999, a company incorporated under French law with an activity relating to electrical installations located in the border area, which was carrying out work in Germany; on 12 April 2005, the company was placed under judicial supervision with a continuation plan and then in judicial liquidation on 5 September 2006; this liquidation has been closed for lack of assets by a judgment of 2 February 2013; the German tax authorities (Finanzamt Offenburg) claimed payment of the charges due in respect of work performed in Germany; the company M challenged those claims; subsequently the German tax authorities asked Mr B to pay the taxes due by his company; the German tax authorities issued a request for recovery assistance to the French authorities for an initial claim of EUR 280,473, which rose to EUR 422,817 in 2007;

Mr B submits that the recovery measures carried out against him were contrary to the French rules of public policy, under which the personal responsibility of the director for the social debts of the company is governed by special conditions which are not met in this case; that the court of first instance wrongly rejected his application for release of the attachment, as the title issued against him on a claim arising from the liquidation of the company M was contrary to the French law;

He claims that it is impossible to enforce the claim in the light of applicable law resulting from Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings in force in France and Germany; in accordance with Articles 3, 4 and 16 of this Regulation, the insolvency proceedings with regard to company M

are governed by French law only and they can be opposed to the German tax authorities; he claims that the German tax authorities first claimed company M to pay the tax, and that he was only requested to pay following the judicial liquidation of the debtor company, as the German tax authorities considered that he had committed a fault in the management of the enterprise, in the absence of a declaration of income subject to tax in Germany (according to a letter of 18 April 2007); he relies on the French Commercial Code which constitutes the only applicable law and which determines the conditions under which the liability of the legal representative of a legal person may be at stake, due to the insufficiency of assets of a company in the context of collective proceedings, and which excludes the application of the provisions of German law; he submits that the German tax authorities had to apply provisions of French law under Articles L.651-1 to L.651-3 and L.652-1 to L.652-4 of the Commercial Code in the version then applicable if they considered that he had committed an error in the management of his company; the German tax authorities did not declare the claim in the insolvency proceedings against company M and failed to invoke his liability in accordance with applicable law; that following the completion of the insolvency proceedings for reason of insufficient assets, no prosecution is possible against him in respect of unpaid liabilities of the insolvency proceedings;

Mr B submits that he is entitled to contest the enforcement of the title pursuant to Article R.283C of the Tax Procedures Code; no measures of execution may be carried out against him under the mandatory rules of the European Regulation and of the French Commercial Code; that the German tax authorities sought to circumvent the prohibition by French law to pursue, in a personal capacity, the leader for the company's debts, by referring to the German law; that Article L.643-11 of the Commercial Code precludes the right of pursuit of Article L.111-2 of the Code of Civil Enforcement Procedures; he considers that there is no justification to apply a reasoning by analogy to Article L.267 of the Code of Tax Procedures to admit that the provisions of German tax law, under which the German tax authorities are acting against him, are independent of the provisions of the Commercial Code and that the autonomy of the French tax law is transposable to the German law; that the EU Regulation 1346/2000 has the priority and requires the application of French law so that the German law may not derogate from them; the German tax authorities did not apply the procedure of Article L.267 of the Code of Tax Procedures and cannot apply their national legislation to request him to pay any tax due by the company M;

In the alternative, he submits that the seizure was made on unemployment benefits paid by the social authorities to his wife, and that the seizure of these unemployment benefits is contrary to Article 1414 of the Civil Code; so that a release is required for an amount of EUR 722,92;

Whereas the French Directorate-General for Public Finance replies that it pursues the recovery of charges mentioned in the EU Directive (2010/24/EU) of the Council of 16 March 2010 on behalf of the tax authorities of the Member States of the European Union; that this Directive was complemented by Implementing Regulation 1189/2011 of 18 November 2011 (…), transposed in Articles L.283 A et seq. of the Code of Tax Procedures; that under Article L.283.C paragraph VI of the Tax Procedures Code, the request for recovery assistance is accompanied by a uniform instrument drawn up by the applicant State, directly recognised as an enforcement order on the territory of the requested State; the German authorities made a request for recovery assistance to pay income tax in respect of the years 1999 to 2003 after a payment request had been been sent to Mr B by registered letter with acknowledgement of receipt on 3 October 2012, together with the enforcement order; whereas, by letter of 16 October 2012, the debtor contested the tax claim and his appeal was rejected by letter of 7 May 2013, complemented by an e-mail of 6 June 2013; that the formal notice to Mr B to pay the sum due was not successful and that the French tax authorities thereupon authorised a bailiff to seize the debtor's accounts opened in France;

The French Directorate-General submits that the tax claim at stake results from a notice on third party liability, notified to Mr B on 18 April 2007 and issued by the Finance Office of Offenburg (Germany) in accordance with Article 191 in conjunction with Articles 34 and 69 of the German Tax Code against Mr B for the payment of the tax debts of the company M; and that this notification by the German Finance Office was done to Mr B in French; that the instrument permits the recovery of the debt on the national territory of the requested State; that in accordance with Articles 12 and 14 of the Directive, acts carried out in Germany by the German tax authorities fall exclusively within the jurisdiction of the courts of that Member State, in accordance with the principle of sovereignty of states; that Mr B had already objected to an initial demand for recovery assistance in 2007, which had suspended the proceedings, and that his contestation was then rejected by the competent authority without there being an appeal so that the refusal decision was final; that the principle of administrative recovery assistance means that once a uniform recovery instrument is received, recovery is effected in the requested Member State as if it were a tax claim of that State; the conditions for issuing the original title, its notification by the applicant Member State and the conditions for its conversion into a uniform instrument permitting recovery on French territory fall within the jurisdiction of the courts of the requesting State; the courts of the requested Member State have no legitimacy and power to call into

question the legality of an administrative act established in the requesting State and the procedures followed; that the dispute before the French courts cannot concern the conditions for establishment of the claim and its validity in the requesting State;

The French Directorate-General adds that it is not contested that the insolvency proceedings of the company M, a company incorporated under French law, fall within the scope of Regulation 1346/2000 of 29 May 2000, which entered into force on 31 May 2002, and that it is the law of the State in which the insolvency proceedings are opened which applies, but that all arguments of Mr B based on Articles L.651-1 to L.651-3 and L.652-1, L.652-3, L.652-4 and L.643-11 of the Commercial Code are not relevant, taking into account the application of Article 191 in conjunction with Articles 34 and 69 of the German Tax Code, which establish the German tax rules with regard to the liability of a manager and which are independent of the implementation of sanctions against the manager under the French law on insolvency proceedings in the same way as the procedure provided for in Article L.267 of the Code of Tax Procedures; as it concerns a specific liability action of the Public Treasury for the recovery of its debts to its own benefit which is distinct from the liability provisions or any other sanction of the Commercial Code which may be initiated only by the bodies of such proceedings in the collective interest of the creditors; that Mr B is seeking to call into question the validity of the German claim which does not fall within the jurisdiction of the French courts;

The French Directorate-General argues that the provision of Article R.283-C of the Tax Procedures Code only relates to the contestation of the enforcement measures and does not permit to contest the validity of the claim recognised by an enforceable title;

In relation to the request for release of the amount of EUR 722,92, the French Directorate-General submits that the sum claimed in respect of unemployment benefit of Ms B was credited on 3 April 2014 whereas the attachment was effected on 26 March 2014, therefore, this unemployment benefit is not included in the amount seized; so that this request is unfounded.

Whereas pursuant to Article L.283 of the Code of Tax of Procedures, the competent administration has to comply with the request for recovery assistance where the claim was the subject of an enforceable title and the request is accompanied by a uniform instrument established by the requesting Member State, which constitutes the sole basis for the recovery and which is directly recognised as an enforcement order;

Whereas Article R.283 C-3 of the Tax Procedures Code provides that:

1. — The dispute relating to the validity of the notification by the applicant Member State, the enforcement order or the uniform instrument permitting enforcement in the requested Member State shall be brought by the addressee before the competent body of the applicant Member State.

   Any dispute concerning the claim, the instrument permitting enforcement issued by the applicant Member State or the uniform instrument permitting enforcement in the requested Member State shall be brought before the competent body of the applicant Member State.

   Where the dispute concerning the claim, the instrument permitting enforcement, or the uniform instrument permitting enforcement in the requested Member State is made during the recovery procedure in the requested Member State, the latter shall inform the person liable that he must bring such arguments before the competent body of the applicant Member State.

2. — Any contestation relating to the enforcement measures taken by the requested Member State or the validity of the notification, by this Member State, of the claim, the instrument permitting enforcement or the uniform instrument permitting enforcement in the requested Member State shall be brought by the addressee before the competent body of the requested Member State.

It is established and not contested that, by writ of 26 March 2014, the French Directorate-General for the Public Finances, acting on the basis of a uniform instrument permitting the recovery of claims falling within the scope of Council Directive 2010/24/EU has carried out a preventive attachment in the hands of Bank C on the account opened in the name of Mr B for a maximum amount of EUR 422 817,98 in principal plus interests and costs; it has acted at the request of Germany, a Member State of the European Union, which has added a valid uniform instrument permitting recovery to its request for recovery; the title for the enforcement is constituted by a notice to a third party – held jointly liable – drawn up by the Offenburg Tax Office on 18 April 2007, in accordance with Article 191 in conjunction with Articles 34 and 69 of the German Tax Code, against Mr B for the payment of the tax debts of the company M in respect of taxes on wages and solidarity contributions for the years 1999 to 2003;

Given that Mr B does not dispute the formal validity of the acts or their notification nor that of the recovery assistance request sent by the German tax authorities to the French Directorate-General for the Public Finances under the EU Directive (2010/24/EU of the Council of 16 March 2010) nor the procedure launched by the French tax authorities in accordance with the uniform instrument permitting recovery of the claim, but the claim of the German State and the subsequent enforcement order issued by the German

tax authorities which he considers contrary to the French insolvency law provisions applying to sanctions against the managing director of a company that is wound up;

Whereas the disputed liability was established in Germany by a German tax authority on the basis of German tax law, in view of the recovery of a claim of the German State against Mr B; any dispute on the validity of that claim and the German instrument permitting enforcement has to be brought before the courts of the applicant Member State;

Following a first request for administrative assistance in tax matters of 6 September 2007, in accordance with the Franco-German Convention of 21 July 1959, Mr B contested the amount claimed by the Tax Office Offenburg in respect of taxes on wages and solidarity contributions due for the years 1999 to 2003 by the company M, for which he received a third party liability notice, in accordance with the provisions of Article 191 in conjunction with Articles 34 and 60 of the German Tax Code, on 18 April 2007; this is still the title of the applicant Member State and the objection of Mr B was rejected by a final decision on 28 November 2011, which was not further disputed by him;

Whereas, in response to the second request for assistance of the German tax authorities of 24 September 2012, the French Directorate-General for the Public Finances informed Mr B and he has again contested the payment of the tax in the requested State. The requested State informed the German authorities about this contestation and the German authorities have replied, by email of 16 October 2012, that the tax assessment could not be challenged anymore, since a final decision had been delivered on 28 November 2011 on the appeal lodged by the tax debtor and that decision was final; the tax authorities have informed Mr B by email of 6 June 2013 and issued a formal notice to pay on 20 November 2013. This was followed by the contested attachment of 26 March 2014;

Mr B contested the payment of the tax debt without success and has not brought any action before the German courts, which have an exclusive jurisdiction;

Moreover, given that Mr B is wrong to rely on Regulation 1346/2000 on insolvency proceedings and on the French Commercial Code's provisions relating to sanctions against the directors of a company in liquidation and the impact of the closure of the judicial liquidation of the company M on the grounds of insufficiency of its assets, as he has not asked the German court – which has exclusive jurisdiction - to apply them, that the penalties under Articles L 651.-1 to L 651-3, L 652-1, L 652-3 and L 652-4 of the Commercial Code can only be applied by the bodies responsible for guaranteeing the collective interests of the creditors in the insolvency proceedings and that they appear to be distinct from and independent of the tax liability used by the tax office of Offenburg in its sole interest under German tax law and that there is no conflict with Article L.643-11 of the above Code since the French Directorate-General for the Public Finances, acting on the basis of a uniform instrument permitting enforcement at the request of the German tax authorities, pursues the recovery of the claim against Mr B, who is a separate person from the company M which is the only one protected against individual proceedings of creditors, and he has not been the subject of any judicial liquidation;

Given that the request for partial release of EUR 722,92 is not substantiated by the documents produced; that it is clear from the statement produced by the appellant that the preventive attachment has blocked the debtor's account opened in the books of the Bank C on the day of the attachment on 26 March 2014 for an amount of EUR 1 093,41 and that the sum of EUR 722,92 was paid by the employment authorities to Ms B on 3 March 2014, after the attachment, and is not blocked;

Whereas Mr B does not validly contest the attachment by the French Directorate-General for the Public Finances, on the basis of a uniform instrument, in the framework of the tax recovery assistance between the EU Member States;

ON THOSE GROUNDS

The Court, (…) confirms the judgment of the court of first instance.

Spain

Central Economic-Administrative Court
Madrid

27 October 2016

Case number: 2803/16

International recovery assistance – EU – Directive 76/308 – 1. Notification in the language of the requested Member State, accompanied by documents in the language of the applicant Member State – No nullity for lack of translation - 2. Alleged irregularities in the determination of (the amount of) the tax debt – To be discussed before the applicant Member State

Summary

1. The fact that a Spanish notification act is accompanied by Swedish documents does not affect the validity of the notification made by the Spanish authorities at the request of another Member State, in accordance with Directive 76/308.

2. A dispute about the amount of the tax debt has to be brought before the authorities of the applicant State.

FACTS

1.- The recovery office of the Delegation of the State Tax Authority of Barcelona sent the complainant a "Notification of an enforcement order, for mutual assistance within the EU" and a "document" (mod. 010) requiring the payment of EUR 135.582,51, which apparently was a personal income tax debt incurred by the person concerned in Sweden in 2001 - 2005. Notification took place on 9 November 2009.

Challenging the demand for payment, the applicant launched an internal appeal. He alleged that his right of defence was not respected, due to the absence of translation, the lack of motivation, the fact that the instrument was in a language other than Spanish and the lack of recognition of the original instrument. This appeal was rejected by a decision notified on 12 February 2010.

2.- The complainant did not accept the above decision and lodged an appeal before the regional Economic-Administrative Court of Cataluña on 11 March 2010. In his claim, he repeated his earlier arguments.

On 27 June 2013, the regional Economic-Administrative Court of Cataluña declared that it did not have the competence to deal with this matter, and referred the case to the Central Economic-Administrative Court.

(...)

LEGAL ASSESSMENT

1. (...)

2. It must be recalled, first of all, that the present case deals with tax collection by cooperation through mutual assistance between States. The Royal Decree 704/2002 of 19 July transposes the amendments of certain Community directives on mutual assistance for recovery and establishes the mutual assistance for recovery, which started in the framework of Community traditional resources, with Council Directive 76/308/EEC of 15 March 1976 which provided for recovery assistance for certain claims, Directive 77/794/EEC on practical arrangements for implementing this assistance, subsequently amended by Directive 86/489/EEC and by Directive 79/1071/EEC which extended the scope of this collaboration.

This Royal Decree contains the procedure that has to be launched when circumstances make it necessary to put in place the mechanisms of mutual assistance between States. (...) The authority of the requested State considers the request for assistance and all the documentation submitted, and executes the request for assistance if it finds that the request fulfils all the formal requirements of Royal Decree 704/2002.

A dispute can only relate to the procedure laid down in the above Royal Decree governing mutual assistance; any other issue outside the fulfilment of this collaboration procedure had to be rejected from the outset.

3. In respect of the Central Economic-Administrative Court's competence to hear the present complaint, it should be noted that, in accordance with Articles 4, 7 and 9 of Royal Decree 704/2002 and 9 of Order 2324/2003, of 31 July 2003, the Department for Collection, as requested authority, checks whether the request for recovery meets all the requirements and if so, forwards the file to the relevant Recovery Department (depending on the debtor's residence), which is obliged to notify the enforcement order and to carry out the necessary actions to recover the claim. A central body of the State Agency of the Tax Administration is responsible for authorising the collection activities to be carried out by the Recovery Department concerned. Hence seizures and subsequent recovery acts carried out by the Recovery Departments will be challengeable before the respective Regional Courts, to the extent that they do not respect the Spanish State legislation (General Tax Law and Tax Collection Regulation, essentially) but the review of all questions concerning the

requirements which must be met by the request for recovery, the effects of any contestation of the claim before the applicant State, and ultimately the acceptance of a request for assistance of a Member State falls within the competence of the Central Economic-Administrative Court which, in accordance with Art. 229.1 of the General Tax Law 58/2003, has jurisdiction on acts issued by the central bodies of the State Agency for Tax Administration.

4. The person concerned raises essentially two grounds for opposition: nullity of the enforceable title for lack of translation and invalidity of the mutual assistance procedure.

As to the former, Article 8 of the Royal Decree lays down the language of the case and states that: *"Requests for assistance, the instrument permitting the enforcement and other attachments will be accompanied by a translation into the official language of the requested State."* The language to be used is Spanish and not French.

Article 523 of the Law on Civil Procedure states that: *"1. The execution of judgments and other foreign enforceable titles in Spain wil be arranged by the provisions of international treaties and the laws on international legal cooperation. 2. In any event, the enforcement of foreign enforceable instruments in Spain shall be done in accordance with the provisions of this Act, unless provided otherwise in international treaties in force in Spain"*.

The language of the procedure is Spanish; when examining the file it is verified that the documentation of the Swedish Ministry of Finance joins or is attached to the documentation in Spanish.

The request made by the State of Sweden to the Spanish State consists in expressly communicating to the debtor the debt contained in the accompanying documents. In the event of a request for recovery, it is possible to carry out the recovery assistance requested by the Ministry of Finance of Sweden, which implies the notification of the debt and the granting of the deadlines to proceed with the payment of this; and which may be followed by the attachment of assets of the debtor in order to enforce the claim.

The alleged nullity for lack of translation of that documentation, which only needs to be notified, can not entail such a serious consequence as the one put forward by the appellant, who asks to declare it invalid, given that the Swedish documentation is the one that is integrated or notified to the appellant; this documentation is authentic and it does not cause any damage to the debtor that the request is not written in the language of the requesting country but in Spanish; to the extent that the document was issued for the notification of the act of execution issued by the Swedish administration and being executed against a person registered and domiciled in Spain, it is perfectly valid and effective that the act of notification is made in Spanish, accompanied by the documentation in Swedish.

The last question is about the annulment of the mutual assistance procedure. The appellant states that the request for recovery issued by the Swedish State does not meet the requirements of the Royal Decree 704/2002.

Art. 21 of the Royal Decree provides that the Department for Collection, as requested authority, shall verify that the request for recovery meets all the requirements. The instrument permitting enforcement of the claim shall be directly recognised and automatically treated as an instrument permitting enforcement issued by the competent authority. And paragraph 2 of this provision adds that: *"Notwithstanding the provisions of the previous paragraph, the instrument permitting enforcement of the claim may, where appropriate, be accepted, recognised, supplemented, or replaced by an instrument authorising enforcement in accordance with the General Regulation on recovery".*

First and foremost there is the principle of mutual confidence in the administration of Member States, which justifies that the administrative body in one Member State considers that all the conditions for certification as an executive order are met, permitting enforcement in the requested State, and the bodies of the State where the claim is to be enforced must review if the request complies with the rules contained in agreements on mutual assistance or cooperation between the States concerned.

In this case there is an enforcement order permitting the request for recovery, enabling the authorities to seize the goods if the appellant has failed to pay within the time-limits.

The procedure used and governed by the Royal Decree did not affect any of the rights of the Appellant against the recovery sought, since the Spanish State in examining the request for mutual assistance could refuse that request for recovery if the conditions required were not fulfilled (which, as stated above, was verified by the administrative authority) and if there had been an irregularity in the amount of the debt, this could be invoked before the authorities of the requesting State; the present case before us is a mere procedure of mutual assistance for recovery and only permits to examine whether the request for recovery complies with the aforementioned Royal Decree; it does not permit to examine whether there are irregularities in the determination of the tax debt or the amount thereof, which are fundamental issues that must be discussed before the creditor State and not before the requested State, which only provides help for the recovery of the tax claim.

For these reasons,

The Court rejects the appeal and upholds the contested decision.

Spain

Central Economic-Administrative Court
Madrid

23 February 2017

Case number: 4647/2015

International recovery assistance – EU – Directive 2010/24 – Age of the claim – Mentioning in the uniform instrument permitting enforcement – Contestation to be brought before the courts of the applicant Member State

Summary

Arguments relating to the age of the claim – implying that no recovery assistance has to be granted – have to be brought before the competent bodies in the applicant Member State.

In the city of Madrid, at the date referred to above, and in the economic-administrative claim at first and last instance pending resolution before the Central Economic-Administrative Court, Chamber, brought by (...) against the tax collection authority for Extremadura in the case concerning an order for payment in the framework of mutual assistance for recovery provided to the State of Portugal, with regard to an amount of EUR 402 750,96.

FACTS

FIRST: On 24/02/2015, the Spanish tax authorities' regional collection office for Extremadura issued a payment order to Ms J., the appellant, with regard to "income and wealth taxes 2008", amounting to EUR 402 750, under the applicable legislation on mutual assistance, and upon Portugal's request for mutual recovery assistance.

Following the notification of this payment order on 26/02/2015, she lodged an administrative appeal, which was dismissed by a decision of the Head of the Recovery Department, notified on 06/03/2015.

SECOND: on 30/03/2015, the appellant brought an action before the Central Economic-Administrative Court claiming, in essence, that the granting of mutual recovery assistance was not in accordance with Article 18 of Council Directive 2010/24/EU, since the claim that was the subject of the request for recovery was older than 5 years.

LEGAL ASSESSMENT

FIRST: the action is admissible.

SECOND: It should be recalled, first of all, that the present case relates to the field of mutual assistance in recovery between Member States of the European Union.

For those purposes, Articles 177a et seq. of Law 58/2003 of 17 December have transposed into national law the EU Directive on mutual assistance between the Member States of the European Union, Council Directive 2010/24/EU of 16/03/2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures.

(...)

THIRD: referring to Article 18 of Directive 2010/24/EU, the appellant argues that mutual recovery assistance should not be granted, since the claim that is the subject of the request for recovery is older than 5 years.

On this point, Article 177a (4) of the General Tax Law provides that:

"The assistance that the tax authorities provide to other countries or international or supranational entities under rules governing mutual assistance shall be subject to the limitations laid down in these rules".

This provision seeks to draw attention to the existence of different limits or conditions set out in the rules governing the provision of mutual assistance between Member States, to be taken into account in determining whether or not the tax authorities should provide the assistance that has been requested.

Thus, in the field of mutual recovery assistance, the requested authority must assess the request for recovery and all the documentation submitted (basically, the uniform instrument permitting enforcement in the requested Member State). If the request fulfils all the formal requirements imposed by the legislation referred to above, the authorities of the requested Member State shall proceed with the recovery.

In this regard, Article 18 of Directive 2010/24/EU, in its paragraph 2, provides that:

"The requested authority shall not be obliged to grant the assistance provided for in Articles 5 and 7 to 16, if the initial request for assistance pursuant to Articles 5, 7, 8, 10 or 16 is made in respect of claims which are more than 5 years old, dating from the due date of the claim in the applicant Member State to the date of the initial request for assistance."

Paragraph 4 of the same Article provides that:

"The requested authority shall inform the applicant authority of the grounds for refusing a request for assistance."

First, it is necessary to analyse whether – as the appellant argues – the claim that is the subject of the request for recovery is older than 5 years from the due date of the claim in the applicant Member State (30 April 2009) to the date of the initial request for assistance (19 February 2015).

However, the appellant states that the due date of the claim in Portugal was the 30/04/2009, without having submitted any procedural evidence attesting to this fact. The uniform instrument permitting enforcement in Spain, with date of issue 19/02/2015 – which is included in the file – does not contain any reference to that date, but states that the claim relates to personal income tax for the period 2008, and indicates that the due date was on 12/10/2011, and the "date from which enforcement is possible" on 12/11/2011.

Therefore, the discrepancies invoked by the appellant mainly concern the claim and the alleged inaccuracy of the enforcement instrument underlying the recovery request received from the Portuguese State. The uniform instrument permitting enforcement in Spain does not permit to conclude that the claim which is the subject of the request for recovery is over the age of 5 years.

In short, I do not accept the above arguments in Spain, since these arguments have to be brought directly before the Portuguese tax authorities. In this regard, attention must be drawn to Article 177k of the General Tax Law, concerning 'Jurisdiction to review', which in its first paragraph reads as follows:

"The review of the instrument permitting enforcement referred to in Article 177h of this Act shall be performed by the State or international or supranational institution requesting mutual assistance unless the rules of this Act provide otherwise. (...)".

Consequently,

The Economic-Administrative Court decides to reject the complaint and to uphold the contested decision.

Note

Article 18 of Directive 2010/24 provides that the requested Member State "shall not be obliged" to grant recovery assistance for old claims. It is not contrary to this Directive to grant such assistance for older claims.

United Kingdom

Bankruptcy High Court

Revenue and Customs Commissioners v Smart

23 June 2016

International recovery assistance – EU – Directive 2010/24 – Enforcement proceedings may include a bankruptcy petition – Court in requested State not competent to deal with disputes as to the liability on the foreign tax claim

Summary

A UK citizen was held liable for his company's tax debt in Germany. Following a dispute in Germany, the amount was finally assessed by a German tax court. This amount remained unpaid and the German tax authorities requested the UK authorities to provide recovery assistance. The UK authorities requested a UK court to make a bankruptcy order.

The enforcement proceedings which might be brought in respect of a foreign tax claim include a bankruptcy petition.

The UK Bankruptcy Court also decided that it was not able to consider questions as to the debtor's liability on the foreign claim.

1. On 9 June 2016 I made a bankruptcy order against the respondent on a petition of HM Revenue & Customs based on a debt due under an unsatisfied judgment of the County Court at Taunton dated 21 October 2014. That judgment was given by way of enforcement in this country of a German tax debt under a European Union mutual assistance regime. At the invitation of counsel for the petitioners I said that I would give full written reasons for making the bankruptcy order.

Background

2. The respondent is a semi-retired builder. He was previously, together with his wife, a director of a company called Trancourt Limited which traded in Germany between September 1994 and December 2002 but was dissolved on 2 November 2004. Following an investigation into the affairs of that company by the relevant German tax authority the respondent was made personally liable for its tax debts, and a notice of liability was issued on 12 April 2005. The respondent appealed against the notice to the Hanover North Tax Office but the appeal was rejected on 28 October 2008.

3. The respondent appealed that decision to the Lower Saxony Tax Court. The appeal was settled at a hearing on 19 March 2010 attended by the respondent together with a friend and/or business associate, Angelika Hörmann, on terms recorded by the court that the liability under the notice of 12 April 2005 stand in a reduced amount. The reduced debt remained unsatisfied.

4. On 14 February 2011, the German tax authority made a request to the petitioners for assistance with the collection of their claim, as a result of which the petitioners brought proceedings in the County Court. Those proceedings were suspended while the respondent's solicitors investigated the possibility of a further appeal in the German courts against the order of 19 March 2010. After concluding, however, that such an appeal would be out of time, the respondent's solicitors instead made an application to the European Court of Human Rights. That application was declared inadmissible on 7 January 2013. The petitioners reactivated their proceedings and obtained the judgment to which I have referred and which the respondent's solicitors did not resist.

5. Following service of a statutory demand on 13 December 2014 the petition was presented on 3 February 2015.

The issues

6. The respondent filed and served a notice of opposition as a result of which directions were given. I do not, I think, need to deal with what is set out in the notice, since it does not really put forward grounds of opposition so much as grounds for adjourning the petition. It is now water under the bridge. Rather, the grounds on which the petition was opposed are to be found in the evidence and other documents. Mr Fell summarises them in paragraph 3 of his skeleton argument as follows:

"The Respondent appears, so far as the Commissioners can discern, to resist the petition on two main substantive grounds: see the Respondent's solicitor's letter of 19 January 2016. First, he asserts that the Court should decline to make a bankruptcy order on the basis that the hearing in the Lower Saxony Tax Court on 19 March 2010 was unfair and/or that HMRC did not conduct itself properly in the County Court proceedings. [I shall call this "the fairness issue".] Second, he asserts that the petition should be dismissed on the basis that he has made an offer which he asserts the Commissioners have unreasonably refused ["The offer to secure or compound".]"

I asked the respondent whether that paragraph properly set out his position and he confirmed that it did.

The mutual assistance regime

7. Before I deal with the issues I should set out how the mutual assistance regime works because it creates an exception to the well established principle that the courts of one country will not enforce the revenue laws of another country (see *Government of India v Taylor* [1955] AC 491 and, more recently, *Ben Nevis v HMRC* [2013] EWCA Civ 578 at [6]). The so called "revenue rule" enunciated in the authorities may, however, be modified or superseded by treaty.

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 (generally referred to as "MARD") is grounded in the Treaty on the Functioning of the European Union as the opening recital makes clear. Mr Fell summarises the way in which it operates in his skeleton argument at paragraph 6 as follows:

"6.1 At the request of an applicant authority in one member state, the requested authority in another member state is to recover the claim in question: art. 10(1).

6.2 For the purposes of recovery in the requested member state, the claim is treated as if it were a claim of the requested member state: art. 13(1).

6.3 Disputes concerning claims fall within the competence of the applicant member state, rather than the requested member state: art. 14(1).

6.4 Disputes concerning the enforcement measures taken in the requested member state are to be brought before the competent body of that member state (rather than the applicant member state): art. 14(2)".

9. MARD was implemented in the United Kingdom by Schedule 25 Finance Act 2011. I should set out the provisions contained in Schedule 25 relevant for present purposes:

"1 In this Schedule "MARD" means Council Directive 2010/24/EU.

2(1) The Commissioners are a competent authority in the United Kingdom for the purposes of all matters under MARD.

(2) HMRC is designated as the central liaison office in the United Kingdom for the purposes of all matters under MARD.

6(1) This paragraph applies if an applicant authority of another member State makes a request in accordance with MARD for the recovery in the United Kingdom of a claim.

(2) The claim in relation to which such a request is made is referred to as "the foreign claim".

(3) Such steps may be taken by or on behalf of the relevant UK authority to enforce the foreign claim as might be taken (whether or not by the relevant UK authority) to enforce a corresponding UK claim.

(4) "Steps" includes any legal or administrative steps, whether by way of legal proceedings, distress, diligence or otherwise.

(5) See paragraphs 7 and 8 for the meaning of "the relevant UK authority" and "corresponding UK claim".

[…]

11(1) The taking or continuation of steps against a person under paragraph 6(3) must be suspended if the person shows that relevant proceedings are pending, or about to be instituted, before a court, tribunal or other competent body in the member State in question.

(2) "Relevant proceedings" are proceedings relevant to the person's liability on the foreign claim.

(3) Relevant proceedings are "pending" so long as an appeal may be brought against any decision in the proceedings.

(4) Sub-paragraph (1) does not apply to steps that may be taken or continued against the person by the application (by virtue of paragraphs 6(7) and 9) of an enactment or rule of law that permits such steps to be taken or continued in similar circumstances in the case of a corresponding UK claim.

(5) Sub-paragraph (1) ceases to apply if the relevant proceedings are not prosecuted or instituted with reasonable speed.

12(1) Steps under paragraph 6(3) must not be taken or continued against a person if a final decision on the foreign claim has been given in the person's favour by a court, tribunal or other competent body in the member State in question.

(2) For this purpose, a final decision is one against which no appeal lies or against which an appeal lies within a period that has expired without an appeal having been brought.

(3) If the person shows that such a decision has been given in respect of part of the foreign claim, steps under paragraph 6(3) must not be taken or continued in relation to that part.

13 In relation to any steps against a person under paragraph 6(3), no question may be raised as to the person's liability on the foreign claim except as mentioned in paragraph 12."

10. Mr Fell summarises the position thus:

"7.1 Such steps may be taken by the UK authority, in this case the Commissioners, to enforce the foreign claim as might be taken to enforce a corresponding UK claim, including by way of legal proceedings, distress, due diligence or otherwise: para. 6(3) and (4). The predecessor to FA 2011, Sch. 39 to the Finance Act 2002, was considered by the High Court in HMRC v Morris *[2007] EWHC 3345 (Ch). The court held at [32] that the enforcement proceedings which might be brought in respect of a foreign claim include a bankruptcy petition.*

7.2 Enforcement steps of the Commissioners must be suspended if it is shown that proceedings relevant to their liability on the foreign claim are pending in the other member state: para. 11(1).

7.3 No enforcement steps may be taken if a final decision has been given in the person's favour by a competent body in the requesting member state: para. 12(1).

7.4 In relation to any enforcement steps taken by the Commissioners, 'no question may be raised as to the person's liability on the foreign claim'*, except as mentioned in para.12: para. 13"*.

11. The last provision is important. Its effect is that the courts of the EU member state in which the tax authority with the substantive tax claim to be enforced under MARD have exclusive jurisdiction to determine any disputes about the validity of the claim. This is clear from the judgment of the European Court of Justice in *Milan Kyrian v Celní úřad Tábor* (C-233/08) in which the court said (paragraph 42):

"Although it thus falls, in principle, within the exclusive jurisdiction of the bodies of the Member State in which the applicant authority is situated to hear any disputes concerning the validity of the claim or the instrument permitting enforcement, it cannot be ruled out that, exceptionally, the bodies of the Member State in which the requested authority is situated will be authorised to review whether the enforcement of the instrument is liable, in particular, to be contrary to the public policy of that last mentioned State and, where appropriate, to refuse to grant assistance in whole or in part or to make it subject to fulfilling certain conditions".

12. That case concerned Directive 76/308/EEC, a predecessor of MARD, but I accept Mr Fell's submission that the principle stands as far as this case is concerned. I also agree with his submission that any possible public policy consideration which the court said could not be ruled out does not fall to be considered in this case. Mr Fell compares the stance this country's legislature has taken on MARD with Council Regulation (EC) No 44/2001 on jurisdiction and the enforcement of judgments in civil and commercial matters for the reciprocal enforcement of non-tax judgments. This provides at art. 34(1) for an exception to enforcement where it would be contrary to public policy (see *Dicey, Morris and Collins on The Conflict of Laws* (fifteenth edition) at 14-225), which might be argued to include a case in which the judgment was obtained in circumstances which breached principles of natural justice; so the decision in *Kyrian* may, Mr Fell accepts, open up the possibility of a member state authorising its courts to review whether the enforcement of a foreign claim under MARD is contrary to the public policy of that member state. However, Parliament chose not to authorise the UK courts to conduct any such review under MARD. As Mr Fell points out in his skeleton argument:

"17.1 FA 2011 Sch.25 para.13 provides in clear and unambiguous terms that 'no question may be raised as to the person's liability on the foreign claim'*. Sch. 25 does not provide for any separate jurisdiction to review whether enforcement of a foreign claim is contrary to the public policy of the UK. [Had Parliament wished to confer a jurisdiction on the courts to review a foreign claim for non-compliance with public policy and decline to enforce on that basis, it would have done so in express terms, as it has in other statutes permitting the enforcement of foreign judgments: see Administration of Justice Act 1920 s. 9(1) and 9(2)(e), and the Foreign Judgments (Reciprocal Enforcement) Act 1933 s. 4(1)(a)(v).]*

17.2 Sch. 25 is unambiguous in this regard, and leaves no scope for any alternative reading. In any event, there is no basis in human rights law for even attempting to construe it differently, as it is well established that art. 6 of the European Convention of Human Rights does not extend to the determination of liability for tax in non-criminal proceedings: see Ferrazzini v Italy *[2002] 34 EHRR 45, recently applied by the Court of Appeal in* R (APVCO 19 Ltd) v Revenue & Customs *[2015] EWCA Civ 648.*

17.3 The inability of the County Court or Bankruptcy Court to consider questions as to a debtor's liability on a foreign claim was confirmed by the High Court in Morris*, in which it was held at [12] that the phrase* 'no question may be raised as to the person's liability on the foreign claim' *in a predecessor of FA 2011 entailed that* 'it is not open to an individual to challenge liability in any enforcement proceedings commenced by the requested authority, which is a matter exclusively for the courts or other relevant institutions of the country where liability arose'*. This conclusion is summarised in a bankruptcy context in* Muir Hunter on Personal Insolvency *at 3-301 as being that* 'where…HMRC presents a petition based on tax due to another member of the EU, the bankruptcy court will not adjudicate on the validity of the debt, this being a matter solely for the courts or authorities of the requesting member'*.*

To those general propositions I would add that no public policy point has been raised by the respondent in this case, even at stages at which he has had the benefit of legal advice, and that nothing on the facts seems to me to be of such a nature that it could in any event render the underlying debt unenforceable on some public policy ground, even if this court were authorised to consider such a point.

13. I return then to the two issues.

The fairness issue

14. The starting point is that the petitioners have a judgment. That is a powerful starting point. It is only in exceptional circumstances that the court sitting in bankruptcy will go behind a judgment. Etherton J, as he then was, set out the circumstances in which an investigation could be conducted into a judgment debt

in *Dawodu v American Express Bank* [2001] BPIR 983 (at 990):

"[T]he cases establish that what is required before the court is prepared to investigate a judgment debt, in the absence of an outstanding appeal or an application to set it aside, is some fraud, collusion, or miscarriage of justice. The latter phrase is of course capable of wide application according to the particular circumstances of the case. What in my judgment is required is that the court be shown something from which it can conclude that had there been a properly conducted judicial process it would have been found, or very likely would have been found, that nothing was in fact due to the claimant. It is clear that in those circumstances the court can enquire into the judgment and the judgment debt".

In this case there is no outstanding appeal, and there is no allegation of collusion or fraud, as the respondent accepted. That leaves miscarriage of justice.

15. The first miscarriage of justice on which the respondent relies arises as a result of something he says he was told at one of the hearings by a representative of the petitioners. There is some argument about when exactly it was said and if anything of the kind alleged was said at all, but I do not think anything hangs on that. What the respondent says is that at one of the hearings in the County Court on 8 March 2012 or in April 2012 he was told that the petitioners would only be seeking a charge on his interest in his property which would not be enforced until he and his wife had died (see the respondent's witness statement of 6 May 2016). That is contested, but I cannot resolve what may or may not have been said. I can, however, note that the judgment itself records the court's having read a letter from the respondent's solicitors simply indicating that they were instructed not to defend the proceedings. No mention is made of any qualification, which is significant: if the respondent was in fact relying on a matter of importance, a representation, it is odd that his solicitors would not have asked for it to have been recorded in some way in the order giving judgment. Even odder is the fact that no application was later made to vary the order, much less to set it aside. That makes me sceptical about the respondent's claim as to what was said. But even if it were true it seems to me that it takes the respondent nowhere. I say that because there is in my view no prospect of the judgment being set aside, whatever anyone representing the petitioners may have said. I say that for two reasons. First there is the provision in the Finance Act 2011 to which I have already referred which prevents questions being raised here as to liability on the foreign claim. The second is that, even if this court could do what that Act precludes it from doing, there is still the underlying agreed claim in the German court to which the judgment in the County Court simply gives effect.

16. It follows that there was no miscarriage of justice in the County Court proceedings on which the respondent can rely.

17. The second miscarriage of justice relied on takes the form two complaints about the conduct of the German proceedings. The respondent says that he was "refused a translator and legal representative" and that the judge, in essence, bullied him into agreeing to pay the lower sum he agreed to pay by threatening him with judgment for the higher sum if he did not.

18. I am unimpressed by the first point. The respondent was a party to German proceedings before a German court. He puts forward no explanation as to why he did not make arrangements to have an interpreter with him if he did not speak German or his German was not good enough to cope with the proceedings. Furthermore, the record of the proceedings notes that he was accompanied by Angelika Hörmann, who seems likely to have been a German speaker. The second point also seems to me to be a bad one. If the German judge misconducted himself, as the respondent alleges, the remedy was to appeal. The respondent says that he was misled about his right to do so. I do not know, but it seems to me that it was for him to take advice and take whatever steps were open to him and to do so promptly. Again, then, I do not see that anything in the German proceedings can be said to have amounted to a miscarriage of justice.

19. There is no prospect of the respondent establishing that no debt was due.

20. For those reasons it seems to me that the first ground of opposition fails.

The offer to secure or compound

21. The second ground is that the petitioners have unreasonably refused an offer to secure or compound for the petition debt.

22. The starting point is section 271(3) Insolvency Act 1986 which provides:

"The court may dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied—

(a) that the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented,

(b) that the acceptance of that offer would have required the dismissal of the petition, and

(c) that the offer has been unreasonably refused […]"

23. The principles applicable to the section have been examined in a number of authorities but were listed (Mr Fell thinks correctly) in the decision of this court in *Her Majesty's Revenue and Customs v Garwood* [2012] BPIR 575 and are summarised by Mr Fell in his skeleton argument as the following:

(1) the starting point is to ask whether a reasonable hypothetical creditor in the position of the petitioning creditor would accept or refuse the offer, bearing in mind, however, that there could be a range of reasonable positions which such a creditor could adopt;

(2) the test is objective;

(3) it is necessary to consider the extent to which the reasonably hypothetical creditor may be taken to have the characteristics of the petitioning creditor;

(4) the court must look at the position at the date of the hearing;

(5) the court is not limited to considering the matters taken into account by the petitioning creditor when the offer of security was refused; it must look at all the relevant factors and their impact on the reasonable hypothetical creditor;

(6) that includes the history;

(7) the debtor must be full, frank and open in providing the necessary information to enable the creditor to make an informed decision;

(8) a rigid institutional policy of rejecting offers to secure could be a relevant consideration, since the reasonable hypothetical creditor was obliged to consider an offer on its merits; "coherent in-house policies", however, are not necessarily wrong;

(9) a creditor is entitled to have regard to his own interests and is not obliged to "take a chance" or to show patience or generosity;

(10) the cost and resources implications for the creditor are a "highly material consideration".

24. The offer on which the respondent relied at the date of the hearing was:

(a) he will grant the petitioners a charge over his interest in his matrimonial home which is not to be redeemed until both he and his wife have died;

(b) he will make a one off payment of £4,500 followed by monthly payments of £100 towards the judgment debt;

(c) he will release a claim he says he has to a refund due from the petitioners in the sum of £20,000.

The petitioners have rejected that offer on instructions from the German tax authority.

25. The objection to the offer is obvious. Accepting it would entail an unreasonable and open ended delay in realising what is said to be the respondent's principal asset. Mr Smart is 66. It is not known how old his wife is, although the petitioners understand that she is a pensioner. Furthermore, the petitioners complain that the respondent has provided little information about his financial affairs.

26. I put to the respondent that if someone who owed him, as a builder, money made an offer that left open the date on which the debt would be paid he probably would not think it reasonable, and he accepted that; and that seems to me to be exactly the point. I have no difficulty in finding that for the reasons advanced on behalf of the petitioners the respondent's offer falls well outside the scope of any that it would be unreasonable for a hypothetical creditor in the position of the petitioners to refuse.

27. Accordingly the second ground of opposition fails.

28. In those circumstances I conclude that the petitioners were entitled to the order sought.

Italy

Court of Cassation

R.A.X.

17 March 2017

Case number: 6925 (Civil)

International recovery assistance – EU – Directive 76/308 – Obligation for the applicant Member State to apply recovery measures in its own territory before requesting recovery assistance – Condition to be verified by the courts of the applicant Member State

Summary

The Italian customs authorities requested the German authorities to provide recovery assistance. Before requesting this assistance, the Italian authorities did not initiate recovery procedures in Italy on the assets owned in Italy by the tax debtor, as they foresaw that the value of these assets would be insufficient.

However, Directive 76/308 does not provide for this option not to apply its own recovery procedures before requesting recovery assistance.

It is for the courts of the applicant Member State to verify whether the applicant Member State initiated recovery proceedings on the assets in the applicant State before recovery assistance was requested.

Facts of the case

1. Following a fraudulent import of live bovine animals with false invoices in 1991, the Aosta customs office issued against R. A. X. orders Nos 1015 and 1016 of 1997 for payment of the evaded VAT and default interest. Subsequently, the customs authorities sent a recovery assistance request to the competent German customs authorities, in accordance with Directive 76/308. R.'s late objections against the injunctions led to a suspension of the execution of the assistance request in Germany. The appeal against the order No 1015 (Cass. No 22152 of 2006) was finally rejected. With regard to order No 1016, the decision was favourable to the taxpayer (Cass. No 7276 of 2007).

On 11 September 2007, the Customs Office of Aosta requested the competent German authorities to resume the recovery procedure for the claim referred to in order No. 1015.

(…)

2. (…) The tax debtor argues that there has been an infringement of the provisions governing international tax recovery assistance.

His appeal was dismissed by the regional tax court of Aosta (…).

3. The taxpayer appealed to the Supreme Court (Corte di Cassazione) (…).

Reasons for the decision

(…)

10.8. As to the second aspect, the tax debtor challenges the regularity of the Italian request for assistance for the recovery of the claim based on the enforceable title issued in Italy.

In particular, the debtor argues that no enforcement measures were taken on the property that he owned in Italy, and that this omission renders unlawful the request for assistance addressed to the authorities of another Member State.

10.9. That objection does not relate to the enforcement measures in the requested Member State, but to an act preparatory to the assistance procedure itself, which, indeed, is the condition for the requested State to become active in the recovery of the claim.

(…)

10.10. In this regard, reference can be made to earlier decisions of the Joined Chambers, although in relation to the opposite situation where, pursuant to article 346a of the Customs Law, Italy was the requested State and Germany the applicant State. In this context it was clarified that for tax claims from other Member States of the European Community, the fulfilment of the conditions — in the specific case — of article 346a, second subparagraph (b), is not verified by the Italian authorities before proceeding with the enforcement; it is sufficient if these conditions are certified in the mutual assistance request sent by the tax authorities of the State which has issued the enforceable title, so that, "where the request contains the due date of the claim, the statement that the claim is uncontested and enforceable in the applicant Member State, as well as the statement that the claim could not be fully recovered in that State despite the enforcement action undertaken there, the Italian authorities may start their recovery actions, taking into account that any disputes over the fulfilment of these conditions shall be addressed to the competent body of the applicant State, since they concern the enforcement order abroad and not the procedure to recover the claim in Italy" (see the following decisions: Joined Chambers No 760, 2006, Rv. 585787-01, (…); Joined Chambers No 21669, 2006, Rv. 594652-01; Joined Chambers No 13357, 2008, Rv. 603548-01; Joined Chambers No 18189, 2008, Rv. 603935-01).

Reference should also be made to the precedent set by the decision of the Joined Chambers No 9671, 2009, Rv. 607448-01, which, in interpreting Article 346a, fourth and fifth subparagraph, has stated that "with regard to relations between the German and Italian jurisdiction in tax matters, if the German authorities confirm that the definitive nature of the enforceable title is 'uncontested' and request the Italian authorities to recover the taxes, the Italian tax debtor invoking the invalidity of the Italian payment order because of the lack of notification of the German title, although formally contesting a measure such as the Italian payment order (…) in fact contests the German statement and, with it, the enforceability of the German title, thereby raising a question which is explicitly attributed by law to the authorities of the applicant State" (see also subsequently, even more in a more precise way, Cass. sect. 3, No. 19283 of 2014, Rv. 632996-01).

The same reasoning applies here – with regard to a situation which is substantially similar but reverse – in accordance with article 346b, so that it can be said that in relation to intra-Community mutual assistance for the recovery of a VAT claim, where the dispute relates to the conditions — including the use or at least the consideration of internal enforcement actions in the applicant State — underlying the request for mutual assistance made by the Italian tax authorities to the competent authority of the foreign state (in this case, the German customs authority), the body competent to hear the case is the Italian tax court, because the dispute concerns the enforceability of an instrument which is the basis for recovery actions abroad and not (yet) the recovery actions nor the execution of the request".

(…)

11.2. As regards the second plea, the following should be noted.

Art. 7(2) of Directive 76/308/EEC states that:

"2. The applicant authority may not make a request for recovery unless:

(a) the claim and/or the instrument permitting its enforcement are not contested in the Member State in which it is situated;

(b) it has, in the Member State in which it is situated, applied the recovery procedure available to it on the basis of the instrument referred to in paragraph 1, and the measures taken have not resulted in the payment in full of the claim".

Paragraph 346b of the Italian Customs Law – in terms even more incisive – provides that the application must contain *"an indication of the date from which enforcement is possible according to the national provisions in force as well as the declaration that the claim and the instrument permitting its enforcement are not contested in the territory of the Italian Republic and that the recovery measures were taken but did not result in payment in full of the claim."*

(…).

Art. 14 of Directive 76/308/EEC adds that:

"The requested authority shall not be obliged:

[...]

(b) to undertake recovery of a claim if the applicant authority has not exhausted the means on the territory of the Member State in which it is situated. The requested authority shall inform the applicant authority of the grounds for refusing a request for assistance. Such reasoned refusal shall also be communicated to the Commission".

It follows from this legislation that:

a) enforcement actions in the applicant State (in so far as possible, given the existence of debtor's assets within the national territory) are a necessary condition for the existence of an obligation of the other State to grant assistance;

b) if one of the conditions for a request for assistance is not fulfilled, there is no obligation for the requested State;

c) where the internal enforcement action has been taken but is not yet exhausted, the request for assistance is possible but the requested State may, according to its assessment, decide whether it will grant assistance or not; in this case the refusal shall be reasoned in relation to the concrete circumstances of that refusal and communicated to the Commission.

It follows that there is no need to refer this matter to the Court of Justice, given the 'acte claire' nature of the legislation.

11.3. This regulatory framework thus provides for procedural rules regarding the admissibility of the request for recovery assistance. Contrary to what is argued by the authorities, this does not mean that the position of the taxpayer is indifferent to the non-compliance with these admissibility rules.

Active international cooperation indeed leads to a complex phenomenon characterised by a multiplicity of acts in individual jurisdictions of different States in view, in tax matters, of a common intention to have a correct assessment and collection of taxes.

The applicant State has to ensure the fulfilment of the conditions relating to the right to request and the obligation to provide assistance, especially when an activity – as the tax collection – affects the rights of the tax debtor.

In this case the legal basis for the cooperation should necessarily be assessed, taking into account the internal rules governing the execution of the required administrative actions, so that all the activities carried out by the cooperating State are necessarily influenced

by the regularity of the actions carried out by the applicant State.

In other words, the tax debtor's interests may be harmed not only by the irregularities of the recovery procedure, i.e. by the execution phase in the strict sense, but also by the irregularities that can be found in actions taken by the applicant State, because their regularity constitutes a validity requirement.

11.4. Therefore, the following principle should be applied: "In intra-Community mutual assistance for the recovery of VAT claims based on an enforceable title issued in Italy, the prior initiation of the enforcement action on the debtor's assets existing on the national territory, pursuant to article 346b of the Italian Customs Law and of article 7(2) of Directive 76/308/EEC, is a necessary condition for the validity of the request for assistance. This cannot be substituted by a prognostic assessment by the applicant tax authorities on the inappropriateness of their internal recovery procedure, taking account of the low value of the assets, and the absence of prior enforcement action in the applicant State can be challenged before the courts in that State, as it affects the validity of enforcement measures in the requested State".

11.5. Turning to the concrete case, it is clear that no procedure has been initiated on the assets owned by the tax debtor in the national territory, which was justified by the Customs Agency on the basis of a forecast on the inappropriateness of the enforcement procedure in Italy because of the poor value of the assets there.

This option is however not provided for in Community legislation, nor can be referred to the possibility, offered by Art. 73 of Presidential Decree No 43 of 1988 to the operator, to obtain that the enforcement procedure is not applied if it can be assumed that the proceeds of the sale will be fully offset by the costs of these proceedings. There is no trace of such an authorisation here. Moreover, this provision could not be applied, as it is incompatible with the Community legislation in the field of harmonised taxes.

12. The main appeal must therefore be upheld (…).

For these reasons

The Court accepts the debtor's action; declares inadmissible the counterclaim brought by the Ministry of Finance; dismisses the counterclaim brought by the Customs Agency; annuls the judgment under appeal.

Note

Art. 11(2) of Directive 2010/24/EU provides that:

"Before the applicant authority makes a request for recovery, appropriate recovery procedures available in the applicant Member State shall be applied, except in the following situations:

(a) where it is obvious that there are no assets for recovery in the applicant Member State or that such procedures will not result in the payment in full of the claim, and the applicant authority has specific information indicating that the person concerned has assets in the requested Member State;

(b) where recourse to such procedures in the applicant Member State would give rise to disproportionate difficulty."

The EU Recovery Expert Group adopted the following explanatory note with regard to the above provision (see *EU & Int. Tax Coll. News* 2017, p. 18):

'The term "disproportionate difficulty" in Art. 11(2)(b) is identical to the wording used in Art. 21(2)(g) of the Joint Council of Europe – OECD Convention on mutual administrative assistance in tax matters (as replaced by Article V of the Protocol of 27 May 2010). Hence, it can be understood in the same way. In this regard, reference is made to Explanatory report to the Joint Council of Europe – OECD Convention, point 231: "For instance, in the case of assistance in recovery, some assets might only be seized through lengthy proceedings in the applicant State, while there are other assets in the requested State that can be seized more easily."'

Austria

Federal Tax Court (Bundesfinanzgericht)

6 April 2017

Case number: ECLI:AT:BFG:2017:RV.3100218.2017

International recovery assistance – EU – Directive 2010/24 – Contestation of the validity of the claim – Exclusive competence of the courts in the applicant Member State

Summary

Disputes about the lawfulness of a tax claim relate to the existence of the tax claim and can only be brought before the competent authorities of the Member State requesting recovery assistance for that claim.

The Bundesfinanzgericht (Federal Tax Court)

on the complaint of 3 January 2017 against the decision of the Tax Office Kufstein Schwaz (Austria) of 16 December 2016, concerning the attachment of monetary claims,

has decided as follows:

1. The complaint is dismissed as unfounded.

(…)

Grounds for the decision

On 8 December 2016, the competent authority of Germany sent a request for recovery of the complainant's VAT debt established by the Tax Office of Moers (Germany), for a total amount of EUR 35.034,60. This request was sent with a standard request form, in accordance with Art. 21 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 (Recovery Directive), accompanied by a uniform instrument permitting recovery in the requested Member State.

Subsequently, by decision of 16 December 2016 pursuant to Section 65 of the Tax Enforcement Regulation (Abgabenexekutionsordnung), the Tax Office of Kufstein Schwaz has ordered the attachment and transfer of a monetary claim (credit on bank account X), in view of the recovery of the tax debt. The attachment decision was simultaneously transmitted to the complainant, informing him that he was not allowed to dispose of the attached amounts.

In a letter dated 3 January 2017, the complainant contested the attachment decision. (…) He argued that the claim of the Tax Office of Moers (in Germany) was unconstitutional.

On 23 January 2017, the Austrian tax authorities rejected the complaint as unfounded. Questions about the existence of the tax debt underlying the request for recovery assistance do not fall within the competence of the authorities of the requested State. On this point, the requested State's authorities are bound by the applicant authority's declaration confirming the unchallengeable and enforceable character of its claim.

By letter of 18 February 2017, the complainant submitted his dispute to the Federal Tax Court (Bundesfinanzgericht).

On 31 March 2017 the German Federal Central Tax Office has informed the Austrian authorities that the Tax Court of Düsseldorf (Germany), by order of 9 March 2017, had rejected the request to suspend enforcement of the claim, and that enforcement measures could be resumed.

The Federal Tax Court (Bundesfinanzgericht) considers that:

§ 1 of the Federal Act transposing Directive 2010/24/EU on mutual assistance for the recovery of claims relating to taxes, duties and other measures states:

'§ 1. (1) This Federal Act governs the implementation of administrative assistance between Austria and the other Member States of the European Union (Member States), for the recovery of claims of other Member States, in accordance with Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ L 84 of 31.03.2010 p. 1 (hereafter: the Recovery Directive).

(…).'

§ 10 of the Federal Act transposing Directive 2010/24/EU states:

'§ 10 (1) At the request of another Member State, the tax recovery authorities proceed with the recovery of claims for which there is an enforceable title in the other Member State. The foreign claim is treated as a domestic claim. The uniform instrument permitting enforcement, accompanying the request, is considered as the enforceable title, in accordance with Art. 12(1) of the Recovery Directive. This instrument shall not be subject to any act of recognition, supplementing or replacement in Austria. The request for recovery may be accompanied by other documents relating to the claim issued in the applicant Member State.

(2) The recovery shall be governed by the rules applying to the same or, in the absence of the same, a similar tax or duty. The assessment of comparability is the responsibility of the central liaison office. Where this central liaison office finds that the same or similar taxes

or duties are not levied in Austria, it shall transmit the request to the competent authority, indicating that it must be carried out in accordance with the rules governing the enforcement of personal income tax. (…).

(3) The central liaison office shall notify the other Member State of the measures which the executing authority has taken on the request for recovery.

(4) (...)'.

§ 14 of the Federal Act transposing Directive 2010/24/EU states:

'§ 14. (1) Disputes concerning the claim, the initial instrument permitting enforcement in the applicant 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 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 or the uniform instrument permitting enforcement 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 fall within the competence of the authorities or competent bodies of this Member State.

(3) Where an action referred to in § 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 § 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 § 10 (6) or § 11 (2).

(5) (...)'

§ 65 of the Tax Enforcement Regulation reads as follows:

'§ 65. (1) Enforcement on the debtor's monetary claims shall be effected by attachment of these claims. The order of attachment shall specify the amount of the tax debt and the fees and reimbursemens (§ 26). If the provision of paragraph 67 is not applied, the attachment implies that the tax office prohibits the third-party debtor from paying his debt to the tax debtor. At the same time, the taxpayer himself must be prohibited from disposing of his claim and of any pledge which may have been demanded for that claim, and in particular from recovering his claim. With regard to monetary claims that can only be partially attached, the tax debtor must be ordered to report immediately any maintenance obligations of the third-party debtor and the income of dependants who are entitled to this maintenance.'

On the basis of the request for recovery of the Federal Republic of Germany, the tax office has carried out the enforcement in accordance with the applicable provisions by seizing a credit on the bank account of the tax debtor, pursuant to § 65 of the Tax Enforcement Regulation.

The debtor's argument, that the tax claims of the tax authorities of Moers were unconstitutional, relates to the existence of the tax claims referred to in the uniform instrument permitting enforcement. However, according to Art. 14 (1) of the Federal Act transposing Art. 14(1) of Directive 2010/24/EU, such objections must be brought before the competent authorities in Germany. (…)

Objections relating to the enforcement measures were not raised. The enforcement measures can be resumed, in accordance with the decision of the Tax Court of Düsseldorf on 9 March 2017 (as notified by the German Federal Central Tax Office).