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Contents

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REPORTS

EU

Report from the European Commission to the European Parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures

18 December 2020

COM(2020)813

Introduction

1. Tax fairness is a key element of the recently adopted *Commission Action Plan for a fair and simple taxation supporting the recovery strategy*.[1] Everyone is expected to pay their fair share of taxes. If taxes remain unpaid, tax authorities need to take recovery actions to collect the taxes. The competence of the tax authorities is however limited to their national territory. They cannot undertake recovery actions in other countries, although tax debtors may have moved to another country or may have assets in other countries. Therefore, the EU has adopted legislation which allows the EU Member States to provide mutual assistance to each other for the recovery of their taxes and for other EU claims defined in Article 2 of the Directive.

The following example illustrates the functioning of this recovery assistance: a person does not pay his tax debts in Member State A. He moves to Member State B but he also owns property in Member State C. In that case, the tax authorities of Member State A can ask the tax authorities of Member States B and C to help to recover the taxes due to Member State A.

In this way, mutual recovery assistance contributes to ensuring equity and non-discrimination in the field of taxation: it helps to ensure that everyone is paying their taxes and it helps to prevent tax fraud and budgetary losses for the Member States and for the EU.

2. This report presents the **follow-up to Commission Report COM(2017)778**[2] of 18 December 2017 to the European Parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU[3] of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. Article 27(3) of this Directive provides that the Commission shall report every 5 years to the European Parliament and the Council on the operation of the arrangements established by this Directive. The present report is the second report under this new Directive. It covers the period 2017-2019.

3. In line with the conclusions of the previous report, the following **actions have been determined**:

1) Improving the collection of statistical data on the use of tax recovery assistance, in view of a more detailed evaluation of the efficiency and effectiveness of mutual recovery assistance, taking account of the need to avoid or limit additional workload for the national tax authorities. Special attention should also be paid to the link between the workload of incoming requests for assistance and the administrative resources deployed in the requested Member State;

2) Examining problems at the level of individual Member States that hamper the smooth functioning of mutual recovery assistance, in view of recommendations or other actions to address these issues;

3) Examining needs and ways to improve the functioning of the recovery assistance system at EU level;

4) Developing the knowledge and awareness of the mutual recovery assistance legislation, both by national tax authorities and taxpayers;

5) Examining possibilities and ways to promote and facilitate recovery assistance with third countries, taking account of the EU's competence and priorities.

4. With regard to the first three action points, further analysis has been carried out by Fiscalis

[1] Action 14 of this Action plan, https://ec.europa.eu/taxation_customs/sites/taxation/files/2020_tax_package_tax_action_plan_en.pdf.

[2] Report from the Commission to the European Parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

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

Project Group 110, in which 13 Member States[4] participated. Input was also collected from the other Member States, in particular with regard to the problematic issues encountered at national level.

5. This report presents the follow-up actions and contains a number of recommendations for further improvements.

1. First action point: improving and automating the collection of statistical data

6. The **recovered amounts** reported by the applicant Member States and the requested Member States show some differences in the period 2017-2019.

Table 1: overview of recovered amounts (2017-2019):

	Recovered at the request of other Member States, before deduction of the own costs (reported by the requested Member States)	Recovered via requests to other Member States (reported by the applicant Member States)
	in €	*in €*
2017	103 536 690	159 544 517
2018	86 099 511	127 517 949
2019	93 304 732	106 391 930

The above data indicates that during the three-year period, between EUR 283 million and EUR 393 million were recovered.

The amounts in the left and right columns of the above table do not have to match exactly. The amounts in the left column refer to the amounts recovered before deduction of the costs incurred by the requested Member State (which would normally lead to a higher amount in the left column), and some debts may be paid directly to the applicant Member State (which leads to a higher amount in the right column). However, the discrepancies between the columns is significant, especially in 2017, although the differences between the reported amounts does decrease from year to year. Irrespective of this improvement, this raises questions about the accuracy of these statistics.

Discrepancies can also be found in the numbers of assistance requests reported by the Member States (see section 1.1. of the Commission staff working document accompanying this report for more information about the numbers of assistance requests).

7. The move to an **automated collection of statistical** data will help to **improve the reliability** of the statistical data reported by the Member States. It will also reduce the administrative burden for the Member Sates.

8. Moreover, an automated collection of statistics will enable the Member States to collect **more relevant information** about their actual performance in tax recovery assistance.

The Recovery Expert Group has already discussed the possibility for Member States to extend the collection of statistical data – in an automated way – to the following elements:

- the type of replies to requests for recovery, providing an indication of the usefulness of the request and its chances to obtain recovery;
- the number of situations where requests are revised by the applicant Member State, following corrections, disputes, (partial) payments, etc.;
- the timeliness of acknowledgments of the receipt of assistance requests and the timeliness of the first replies to assistance requests;
- the number of requests for recovery relating to VAT refunds to be made by the requested State (where the action requested from that State is limited to the seizure of the VAT refund amount concerned).

The Commission expects that this additional information will help to improve the evaluation of the work and better demonstrate the efforts made by the requested and applicant Member States.

9. The automated collection of the above statistical data requires some further IT-developments. These would normally be ready in 2021, so that the automated collection of these statistics could be fully applied by the Member States with regard to the requests and replies sent from 2022.

2. Second action point: Improving the legislation and practice at national level

10. There are different situations where the recovery and the execution of recovery assistance requests should be improved at national level:

[4] Member States represented in Fiscalis Project Group 110: Bulgaria, Germany, Estonia, Greece, Spain, Lithuania, Hungary, Austria, Poland, Romania, Slovenia, Slovakia, Finland.

1a) **Cases of no-reply**, showing a clear lack of cooperation. These include cases where the requested authorities do not acknowledge the receipt of the assistance request or where they do not provide further replies to the request.

These situations affect the mutual trust which is fundamental in tax recovery assistance.

1b) Other situations of lack of cooperation, due to **insufficient or unclear information and communication problems**. These include situations where the applicant authorities do not provide clear information about their request (e.g. insufficient or no justification for a request to recover an old claim; lack of explanation of the information on which the request is based, while that information would be useful for the execution of the request) or where the requested authorities do not provide clear information about the actions undertaken in the requested Member State and/or the problems that prevent or hinder the execution of the assistance request.

These situations affect the effectiveness and the efficiency of the tax recovery assistance. Unclear requests and replies cause an unnecessary additional administrative burden for the authorities concerned. The uncertainty also hinders the applicant Member State's decisions to take further actions (e.g. actions launching insolvency proceedings or actions to interrupt or suspend the period of limitation).

2a) **Incorrect implementation of the Recovery Directive**: situations where Directive 2010/24 is not correctly implemented in the legislation and/or administrative practice of the requested Member State or situations relating to a wrong interpretation of the Directive (see sections 2.2.1.-2.2.4. of the Commission staff working document accompanying this report).

These situations seriously hinder the proper functioning of the recovery assistance system. They create unnecessary confusion that sometimes leads to further misinterpretation and mutual misunderstandings.

2b) **Insufficient national legislation or practice**: situations where the legal framework or practice in the requested Member State is not fit to provide recovery assistance to other Member States (see section 2.2.5. of the Commission staff working document accompanying this report).

If the national legislation or practice are not sufficiently developed and adapted to the needs of international recovery assistance, the recovery assistance cannot work properly. Such situations may be directly or indirectly discriminative and have negative consequences for the tax collection and the functioning of the internal market.

11. In general, it can be concluded that Member States have to deploy sufficient human resources and IT-infrastructure to handle the incoming requests for recovery assistance, and that the national rules and administrative practice must be developed, in view of providing an active and effective recovery assistance.

12. The Commission intends to monitor closely the issues reported. All Member States concerned have been invited to comment and, where necessary, to present their follow-up actions. The evaluation of these issues by the Commission is ongoing, which may in some cases involve launching infringement procedures in situations of incorrect implementation of the Recovery Directive.

3. Third action point: improving the functioning of recovery assistance at EU level

13. The Commission report COM(2017)778 concluded that improving different legal and technical aspects of the functioning of the EU tax recovery assistance system may be considered (see section 4.3. of that report).

14. Some ideas to improve the EU framework were raised by Member States within the context of the evaluation that took place in 2017.[5] Fiscalis Project Group 110 has undertaken some further analysis of a number of suggestions to improve the efficiency of recovery assistance arrangements. The overview below presents the main elements.

15. A major concern relates to the **exchange of information**. This could be improved, *inter alia*, by:
- permitting more flexibility with regard to the use of the request form for exchange of information;
- extending the exchange of information without request and rapid access to information.

16. In the past, recovery assistance was only provided for taxes that existed in both Member States concerned. This **mirror approach** was abandoned in 2010, when Directive 2010/24 extended the scope to claims relating to "all taxes and duties of any kind". The mirror approach – requiring a similarity between the taxes of the applicant Member State and the requested Member State – was, however, maintained for the following elements:

[5] See Staff working document SWD(2017)461 of 18 December 2017 accompanying the Commission report COM(2017)778, No. 6.3.2.

- when executing a request for **recovery or precautionary measures**, the requested Member State must make use of its own powers and procedures applying to the same or, in the absence of the same, a similar tax or duty (with income taxes as a fall-back option) (Article 13(1) of Directive 2010/24);
- when sending requests for assistance, Member States have to take account of the requested Member States' internal division of competences for the recovery of the specific categories of taxes for which recovery assistance is requested. Therefore, a **system of 13 mailboxes** was set up, the use of which may be different from one Member State to another, depending on the Member States' internal division of competence for the specific categories of taxes;
- when **suspension, interruption or prolongation of periods of limitation** are applied, as Article 19(2) of Directive 2010/24 takes into account whether a corresponding effect is provided under the laws in both Member States.

17. **Simplification of the above rules should be considered**, at least on an optional basis. This would facilitate a possible (optional) extension of the scope to other public claims for which no recovery assistance framework exists at this moment. Several Member States have indeed repeatedly pleaded for a further extension of the scope of the recovery assistance to other public claims for which there is currently no other legal basis.

18. Attention should also be paid to the ways of dealing with the **digitalisation of transactions and assets**, which add to the existing recovery problems, such as:
- problems with regard to the seizure of e-bank accounts and crypto-currencies;
- difficulties to recover taxes due by taxable persons established in other countries than the countries where they are operating (in particular in case of e-commerce). In this respect, more attention should be paid to the recovery (assistance) aspects when new tax legislation is developed.

19. The Commission intends to have further discussions with the Member States in order to carry out an in-depth analysis of possibilities and needs to reinforce and facilitate the recovery assistance framework.

20. Any future developments should, nevertheless, take full account of the need to protect tax debtors' rights. The growing number of preliminary questions to the EU Court of Justice confirms that recovery assistance under Directive 2010/24 – just as recovery assistance under any other agreement – must respect tax debtors' rights, in particular their right of defence.

4. Fourth action point: Developing the knowledge and awareness of the mutual recovery assistance rules

21. One of the conclusions of the Commission evaluation report COM(2017)778 related to the need to develop the knowledge and awareness of the mutual recovery assistance legislation.[6] It appears that problems in mutual recovery assistance often result from a lack of understanding of the rules under Directive 2010/24. Furthermore, raising awareness is necessary not only at the level of national tax authorities but also at the level of the taxpayers.

22. At EU level, some **training events** have already been organised.[7] The Commission is planning to organise more regular and systematic training within the framework of the Fiscalis program, in order to contribute to a common understanding and awareness of the possibilities for recovery assistance within the EU.

These training activities also have to pay attention to the growing **impact of case law** developments in the field of tax recovery and recovery assistance

23. Furthermore, each Member State is expected to **share information about its national legislation and practice with other Member States**. This information is important for tax authorities of other Member States that wish to check the possibilities for recovery assistance in other countries. Some national information is already available on the common database CIRCABC. The Commission will set up a coordinated action, inviting the Member States to proceed with an update and extension of this national information.

24. Member States will also be invited to **raise the awareness of taxpayers** about the possibilities and consequences of cross-border tax recovery assistance.

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[6] Report from the Commission to the European Parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

[7] Fiscalis workshops on the use of the electronic forms for recovery under the central application (12-13 April 2018 and 19-20 April 2018) and a training workshop for Norwegian tax recovery authorities, following the adoption of the EU-Norway agreement on administrative cooperation and tax recovery assistance in the field of VAT (25-27 September 2018).

5. Fifth action point: Examining possibilities and ways to promote and facilitate recovery assistance with third countries

25. In 2018, the European Union signed its first **bilateral agreement** on administrative cooperation, combating tax fraud and recovery of claims in the field of VAT with a third country: the **Kingdom of Norway**.[8]

The EU-Norway Agreement allows Member States and Norway to use the e-forms also for recovery assistance with regard to other taxes than VAT.[9] Several Member States have expressed their interest in using this possibility. This would be useful, in view of the automated translation of the standard forms[10], which permit to inform the persons concerned in the official language of the requested State.[11] Norway indicated that the evaluation of the extended use of the e-forms will be done by the end of 2020.

26. In its conclusions of 5 December 2019[12], the Council of the European Union acknowledged that the EU–Norway Agreement was an important step in exchanging tax information with third countries. It stressed the importance of such cooperation between European Member States and third countries in the fight against tax fraud and invited the Commission to explore opportunities for **new agreements on mutual assistance arrangements in VAT and recovery with other third countries**.

Agreements on administrative cooperation with third countries, in particular to fight tax fraud related to e-commerce, are part of the initiatives outlined in the recently adopted Commission Action Plan for a fair and simple taxation supporting the recovery strategy.[13]

27. Provisions on recovery assistance, maintaining the possibility to use the current framework for on-going **recovery assistance with the United Kingdom**, were included in the withdrawal agreement.[14]

The Council of the European Union also authorised the European Commission to open negotiations for a new partnership with the United Kingdom.[15] The envisaged partnership covers, among other, administrative cooperation and mutual assistance in customs and value added tax (VAT) matters including for the exchange of information to fight customs and VAT fraud, and for mutual assistance for the recovery of claims related to taxes and duties, as mentioned in the negotiating directives[16].

28. Since 2019, **electronic recovery assistance request forms** (in the Java format[17]) are **available for use with third countries**. When these forms were initially developed, they were indeed designed in such a way that they can be used with other third countries.

A cooperation with third countries may also be envisaged for the revision of the current EU tax recovery assistance request forms.

29. Finally, the EU Recovery Expert Group has suggested to develop an **EU model Memorandum of Understanding** for bilateral agreements with third countries. Based on sharing best practices, this model could be used by Member States for organising their recovery assistance with third countries, in order to simplify the implementation of such agreements.

6. General conclusions and recommendations

30. The **automated collection of statistical data** will help to improve the accuracy of these statistics and to reduce the administrative burden for the Member States.

Member States are invited to effectively use the automated collection of statistical data and to include the additionally collected data in their annual reports to the Commission.

31. Although the recovered amounts are considerable, the problems reported show that there are concerns/doubts about the willingness or capacity of some Member States to provide recovery assistance. Member States have a legal obligation **to**

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8 OJ L 195/1 of 1 August 2018. This agreement entered into force on 1 September 2018.

9 Article 40(4) of the agreement.

10 Notably the uniform notification form and the uniform instrument permitting enforcement.

11 The obligation to inform the person concerned in a particular language was confirmed by the case law of the EU Court of Justice (case C-233/08, *Kyrian*, and case C-34/17, *Donnellan*).

12 Point 15 of the Council conclusions 14682/19 of 5 December 2019 on the report of the European Court of Auditors' Special Report No 12/2019 "*E-commerce: many of the challenges of collecting VAT and customs duties remain to be resolved*".

13 Action 14 of this Action plan, https://ec.europa.eu/taxation_customs/sites/taxation/files/2020_tax_package_tax_action_plan_en.pdf

14 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ C 384I , 12.11.2019, p. 1.

15 https://www.consilium.europa.eu/media/42737/st05870-en20.pdf

16 https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf

17 With regard to the central application e-forms (eFCA), it was noted that this would require an IT-connection and support provided by the Commission and entail a financial contribution from participating countries, requiring an international agreement (as is the case with Norway).

assist other Member States in the recovery of tax claims so adequate measures need to be taken at national level to fulfil this requirement.

32. An appropriate follow-up should be given to every assistance request and the processing time should be substantially shortened. Member States should devote **sufficient human resources, IT-infrastructure and IT-tools** to tax recovery assistance, so as to fulfil their assistance obligations and to handle the ever-increasing volume of assistance requests. **National rules and administrative practices need to be developed** in such a way that tax recovery authorities can provide such assistance.

Member States are invited to organise an internal control, in order to ensure that requests for assistance are effectively executed and that the requested authorities provide clear and timely information to the applicant authorities about the execution of assistance requests.

Tax authorities are invited to report situations of non-respect of the recovery assistance rules to the appropriate level within the Member States and Member States are invited to submit these problems (at an earlier stage) to other Member States and to the Commission, so that persisting problems in the relations with other Member States can be dealt with in a more pro-active and effective way.

33. The **EU tax recovery assistance framework faces several challenges**: the tools and instruments to request and grant recovery assistance must be adapted to the increasing need for recovery assistance, the new economic and technological developments and the legal developments, in particular with regard to the respect of tax debtors' rights.

34. The need to **increase the knowledge and awareness** of the EU tax recovery assistance framework is an important issue. Actions to increase this knowledge and awareness have been taken, but further action is needed.

35. Member States are invited to cooperate with the Commission to implement these actions, in a pro-active way and with a positive European spirit.

European Commission staff working document for the evaluation of the use of mutual tax recovery assistance on the basis of Directive 2010/24/EU by the EU Member States, accompanying the Report from the Commission to the European Parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures

18 December 2020,

SWD/2020/340

Background

Background

1. The Commission Report COM(2017)778 on tax recovery assistance presented the following conclusions:

- The EU legislation and framework for tax recovery assistance has facilitated tax recovery assistance between the EU Member States.
- In order to guarantee the efficiency and effectiveness of mutual recovery assistance, Member States should strengthen their internal tax recovery systems and deploy sufficient resources to deal with recovery assistance requests.

  In this regard, it should be examined if and how detailed and precise quantitative information can be collected about the administrative burden and costs and about the correspondence between the workload of incoming requests for assistance and the administrative resources deployed in the requested State.
- Improving different (legal and technical) aspects of the functioning of the system may still be considered with the Member States and other stakeholders, including taxpayers.
- More communication to explain and promote this legislation would contribute to increase tax compliance and respect of taxpayers' rights.
- Recovery of taxes is and remains difficult in case of organised tax fraud by natural or legal persons:
  - natural persons committing fraud or setting up fraudulent tax structures go missing and dislocate their assets;

- legal persons organise their insolvency and also move their assets.

- As a consequence of the international development of exchange of information, recovery assistance between the EU and third countries will become a more prominent issue.

2. The above report led to the adoption of the following action points:

1) Improving the collection of statistical data on the use of tax recovery assistance, in view of a more detailed evaluation of the efficiency and effectiveness of mutual recovery assistance, in order to avoid or limit additional workload for the national tax authorities;

2) Examining problems at the level of individual Member States that hamper the smooth functioning of mutual recovery assistance;

3) Examining needs and ways to improve the functioning of the recovery assistance system at EU level;

4) Developing the knowledge and awareness of the mutual recovery assistance legislation, both by national tax authorities and taxpayers;

5) Examining possibilities and ways to promote and facilitate recovery assistance with third countries, taking account of the EU's competence and priorities.

3. The follow-up on the above action points is described in the Commission report COM(2020) 813 to the European Parliament and the Council. This Commission staff working document, accompanying the Commission report to the European Parliament and the Council, presents a more detailed analysis of action points 1, 2 and 4.

1. First action point: improving the (automated) collection of statistical data

1.1. Increasing volume of the assistance requests

4. The yearly statistical data that each Member State has to report[1] relate to:

- the number of requests for information, notification, recovery or precautionary measures sent to each requested Member State and received from each applicant Member State over the year;

- the amount of the claims for which recovery assistance is requested and the amounts recovered.

5. The use of all traditional types of recovery assistance (requests for information, requests for notification, requests for precautionary and/or recovery measures) continued to increase in the period 2017-2019: [2]

Table 1: total numbers of requests received by all Member States in 2017-2019:

	Requests for information	Requests for notification	Requests for precautio-nary measures	Requests for recovery	TOTAL number of requests
2017	14 104	1 919	97	16 583	32 703
2018	17 054	1 945	94	19 326	38 419
2019	20 271	2 141	154	21 308	43 874

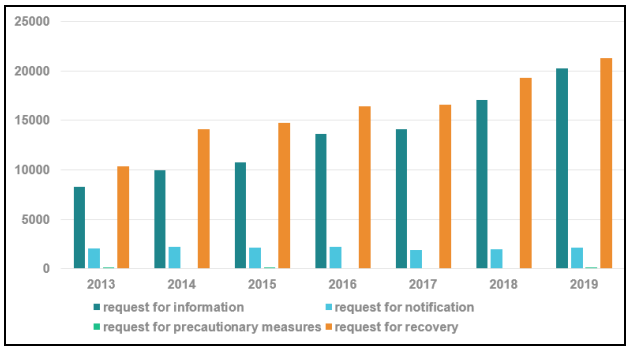
The above data indicates that during the three-year period, almost 115 000 requests were received. On average, the total number of requests grew 15 % every year.

6. If 2013 is taken as the baseline – 2013 being the first year when Directive 2010/24 was fully implemented in all Member States – then the increase is even more impressive, especially for the requests for information and the requests for recovery:

Table 2a: evolution of the total numbers of requests received by all Member States in 2017-2019, in % compared to 2013 (2013 = 100 %):

	Requests for information	Requests For notification	Requests for precautionary measures	Requests for recovery
2017	171 %	93 %	95 %	160 %
2018	207 %	94 %	92 %	186 %
2019	246 %	104 %	151 %	205 %

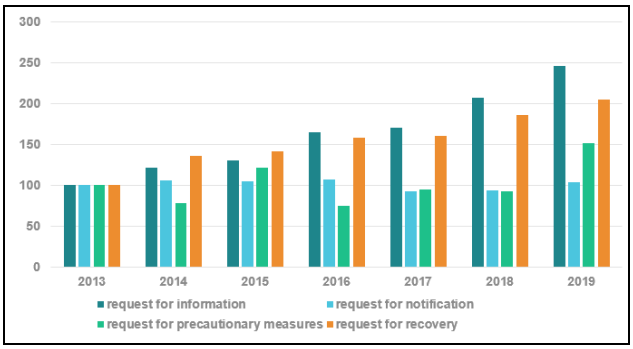
Table 2b: evolution of the total number of requests in the period 2013-2019:



[1] In accordance with Article 27(1) of Directive 2010/24.

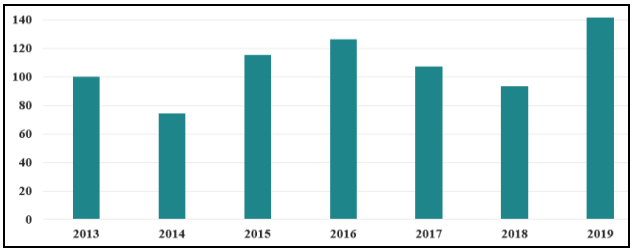
[2] Statistics about recovery assistance in previous years were presented in Commission report COM (2017)778 of 18 December 2017.

Table 2c: evolution of the total number of requests in the period 2013-2019 (in %, compared to 2013 = 100 %)[3]



7. The amounts for which recovery assistance was requested decreased in 2017 and 2018, but this was followed by a high increase in 2019:

Table 3: global evolution of the amounts for which recovery assistance was requested in the period 2013-2019 (in %, compared to 2013 = 100 %; based on the average of the sent and received requests):



8. The amounts recovered in 2017-2019 are anyhow considerably higher than the amounts recovered in previous years.

Table 4a: global evolution of the amounts recovered in the period 2013-2019 (based on the average of the amounts reported by the applicant and requested authorities)

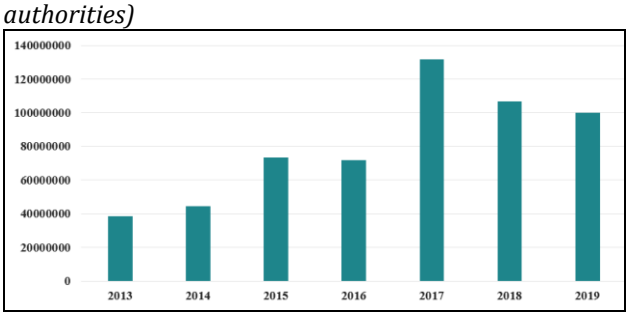
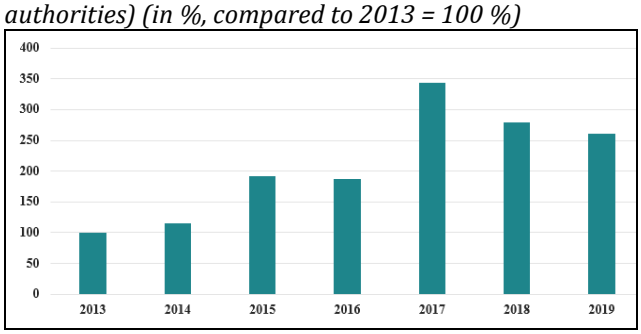


Table 4b: global evolution of the amounts recovered in the period 2013-2019 (based on the average of the amounts reported by the applicant and requested authorities) (in %, compared to 2013 = 100 %)



1.2. Move to an automated collection of statistical data

9. The transition to the central application for the electronic request forms (eFCA) will make it possible to automatically collect the statistical data that Member States have to report.

It is expected that the move to an automated collection of statistical data will not only reduce the administrative burden for the Member States but also help to improve the quality of these statistics. In the past, the correspondence between the statistics reported by applicant and requested Member States was not always guaranteed and the differences seemed to exceed the divergences that can be explained by other causes (e.g. differences in the number of requests that are caused by requests sent at the end of a calendar year and opened in the following year; differences in the amounts reported that are due to currency exchange or other bank costs).

In this regard, the collection of statistics on the use of recovery assistance between EU Member States and Norway in 2019 – on the basis of the EU-Norway agreement on administrative cooperation and recovery assistance in the field of VAT, concluded in 2018 – clearly illustrates the possible extent of differences in the statistics that are counted manually. Although the number of recovery assistance requests under this agreement in the first year of its use was still low, the statistics initially reported by the countries concerned showed considerable discrepancies. In 8 of the 16 reports on requests sent by Norway to EU Member States, the statistics initially reported by the Member States differed from the statistics reported by Norway; in 2 of the 7 reports on requests sent by EU Member States to Norway, the statistics initially reported by the Member States differed from the statistics reported by Norway.

[3] The year 2013 is taken as the baseline. This was the first year of full application of Directive 2010/24 in all Member States.

10. The automation process should also allow to avoid the late communication of statistics by some Member States.[4]

Table 5: Timing of the reporting of statistical data with regard to recovery assistance in the period 2017-2019:

Member State	2017	2018	2019
Belgium	30.03.2018	01.04.2019	30.03.2020
Bulgaria	13.03.2018	26.03.2019	19.03.2020
Czechia	05.03.2018	04.03.2019	26.02.2020
Denmark	23.03.2018	05.04.2019	31.03.2020
Germany	26.03.2018	20.03.2019	26.03.2020
Ireland	14.03.2018	12.04.2019	17.02.2020
Estonia	01.03.2018	27.05.2019	18.03.2020
Greece	30.03.2018	29.03.2019	06.05.2020
Spain	22.03.2018	28.03.2019	01.04.2020
France	13.04.2018	24.04.2019	26.05.2020
Croatia	19.03.2018	28.03.2019	18.03.2020
Italy	04.04.2018	27.03.2019	08.04.2020
Cyprus	30.03.2018	29.03.2019	31.03.2020
Latvia	29.03.2018	28.03.2019	01.04.2020
Lithuania	29.03.2018	26.03.2019	30.03.2020
Luxemburg	24.04.2018	02.05.2019	27.04.2020
Hungary	29.03.2018	26.03.2019	23.03.2020
Malta	14.03.2018	06.03.2019	30.03.2020
Netherlands	29.03.2018	30.06.2019	24.02.2020
Austria	13.03.2018	26.03.2019	18.03.2020
Poland	07.03.2018	12.02.2019	12.02.2020
Portugal	28.03.2018	28.03.2019	30.03.2020
Romania	30.03.2018	28.03.2019	01.04.2020
Slovenia	22.03.2018	01.04.2019	20.03.2020
Slovakia	12.04.2018	15.05.2019	11.03.2020
Finland	26.03.2018	09.04.2019	31.03.2020
Sweden	21.02.2018	26.03.2019	30.03.2020
United Kingdom	*09.03.2018*	*15.03.2019*	*17.04.2020*

11. Member States may also provide any other information that may be useful for evaluating the provision of mutual assistance under the Recovery Directive.[5] Almost all Member States (26 out of 27) provide statistics about the nature of the claims for which recovery assistance is requested. The development of the central application will also make it possible to automatically collect this information.

[4] The statistics must be communicated by 31 March of the following year (Art. 27(1) of Directive 2010/24).

[5] In accordance with Article 27(2) of Directive 2010/24.

1.3. Collection of more statistical data

12. In the past, Member States in the Recovery Expert Group already agreed to provide statistics on the use of exchange of information without prior request[6] and on the number of visits of tax recovery officials to other Member States.[7]

An automated collection of these statistics is not possible in the current system. In the Commission's view, there is no urgent need for automation here:

- at present, the possibilities for exchange of information without prior request – which Article 6 now limits to information about upcoming refunds of taxes or duties, other than VAT – are only used by a few Member States;
- the use of the possibilities for official visits to other Member States is very limited.[8]

2. Second action point: Improving the rules and practice at national level

13. Following the adoption of Commission report COM2017(778), all Member States have been invited to report about specific problems experienced in their relations with other Member States. The problems reported can be categorized as follows:

- situations of no-reply and other situations where the cooperation was considered problematic, due to insufficient or unclear information and communication problems (section 2.1.);
- incorrect implementation of Directive 2010/24 on tax recovery assistance and other situations where the national legislation or administrative practice are insufficient to provide effective recovery assistance (section 2.2.).

2.1. Cases of no-reply, unclear replies and late replies

2.1.1. General comments

14. Some requests for recovery assistance remained unanswered, despite several reminders. The

[6] Article 6 of Directive 2010/24.

[7] Article 7 of Directive 2010/24: presence in the offices where the administrative authorities of the requested Member State carry out their duties; presence during administrative enquiries carried out in the territory of the requested Member State; assistance to the competent officials of the requested Member State during court proceedings in that Member State.

[8] In the period 2012-2019, the possibilities of Art. 7 of Directive 2010/24 were only used two times.

information provided by the Member States shows that the situation is particularly worrying in two Member States, where a large number of requests remained unanswered in recent years. The situation also needs to be improved in two other Member States.

Member States also reported several cases where unclear replies were given and where it was experienced that the requested authorities did not provide (sufficient) clarification with regard to the follow-up given to requests for assistance.

15. Late replies were also reported as a problem, in particular with regard to requests for information. In principle, information should be transmitted "as and when it is obtained", "within a reasonable time" and "in any event, at the end of 6 months from the date of acknowledgement of receipt of the request".[9] The maximum time period of 6 months was copied from the former implementing legislation, starting with the implementing legislation adopted in 1977.[10] One could expect that requested authorities no longer need so much time – half a calendar year – to collect and transmit information, given the development of immediately accessible databases and modern communication means. As suggested by a Member State, an agreement to reduce this time period considerably[11] would give an important signal to all Member States that the assistance must be speeded up in order to improve the efficiency of the system.

16. In this regard, the suggestion to streamline the execution of assistance requests in the requested Member State (by the use of a single legal framework for the execution of requests, irrespective of the type of claims concerned) would facilitate the work of the requested authorities.

17. Good cooperation also requires a clear and precise communication from the applicant authorities. Their initial request should already provide all information that is useful for the requested authorities.

A striking example in this regard: a Member State complained that the requested authorities of another Member State replied to a recovery request, by asking for precise information about the notification of the claim(s) concerned, „while they never asked for that before". In view of the *Donnellan* judgement[12], it is rather surprising to see that the applicant authorities did not provide such information in their initial request for assistance.

18. Recommendations to applicant and requested Member States:

- Member States should apply a shorter period for the execution of requests for information.
- Member States should ensure and control that requests for assistance are effectively and timely executed.
- When requesting recovery assistance, the applicant Member State should provide the requested Member State with all information relevant to recovery that it possesses (in particular on the identification of the debtor). The applicant Member State should be accurate with respect to the information mentioned in the forms (e.g accurate date of notification of all the claims by the applicant Member State).
- When a request for recovery cannot be executed for reasons relating to the national law of the requested Member State, the requested authority should not reply with a general reference to its national law, but provide a clear and accurate explanation, possibly including the exact reference of the national provision(s) at stake.
- When informing about the execution of the request, the requested Member State should provide clear descriptions of the measures taken, of the current status of the case and of any problematic issues encountered. If it is difficult or impossible to execute a request for recovery or when the requested authority needs additional information, it should indicate this in a clear and precise way.
- Tax authorities request that the communication between Member States is done in English, unless another language is agreed by the Member States concerned.

2.1.2. Need to provide sufficient human resources

19. Given the continuous increase in the volume of assistance requests, it is important that Member States allocate sufficient human resources to deal with these requests. In its report of 2017, the Commission suggested to examine if and how detailed and precise quantitative information can be collected about the administrative burden and costs, and about the correspondence between the workload of incoming requests for assistance and the administrative resources deployed in the requested State.[13]

[9] Art. 8(1) and (2) of implementing Regulation 1189/2011.

[10] Article 6 of implementing Regulation 1179/2008 ; Article 6 of implementing Directive 2002/94 and Article 5 of implementing Directive 77/794.

[11] The Commission would suggest to reduce this time period to one month.

[12] EUCJ case C-34/17 Donnellan.

[13] Point 5.b. of the conclusions of Commission report COM(2017)778.

20. At its meeting on 26-27 February 2020, the Recovery Expert Group discussed a suggestion of Fiscalis Project Group 110 to collect statistics on the number of staff involved in tax recovery assistance at the level of the national Central Liaison Offices (CLOs) in each Member State, as data on the evolution of staff in relation to the evolution of requests, possibly also in comparison with other Member States' administrations, may help to evaluate staff needs. Two delegations were sceptical, arguing that such data had to be fed in manually and thus constituted a burden; that organisational structure varied; and that it could be difficult to quantify possible support from other departments.

21. Recommendation:

➢ Member States should allocate sufficient human resources for handling the ever increasing number of assistance requests. In this regard, sharing information about the number of people involved in tax recovery assistance at the level of the national CLOs may be useful for the assessment of the own staff needs.

2.1.3. Need to provide sufficient IT-resources

22. In 2019, a central platform for the electronic request forms was launched, together with a new release of these forms. This new platform – which also applies to other areas of administrative cooperation – has some important advantages, e.g. new versions of these forms no longer need to be deployed at national level in each Member State, and the central platform supports an automated collection of statistical data.
Following this change, several Member States reported problems about the slowness of the new application, in particular when the forms were used for multiple-claim requests. The analysis by the Commission services led to the conclusion that the behaviour reported was due to elements on the client side (browser used, network connection, workstation). At the Recovery Expert Group meeting on 26-27 February 2020, the Commission invited the Member States that reported persisting problems to provide all required information to the IT-helpdesk, in view of technical meetings with the relevant IT-staff in the administrations affected.

Following this meeting, no request was received by the Commission's IT-helpdesk, which seems to indicate a lack of communication between the authorities using the IT-infrastructure and the IT-offices in the Member States concerned.

On the one hand, Member States' tax authorities demand for advanced electronic forms (with an automated translation and a lot of "intelligent" functions built in); on the other hand several tax authorities are facing internal capacity limitations and restrictions with regard to browsers and workstations; operating systems, CPU, memory, etc.).

23. Recommendation:

➢ Member States should ensure that the IT-equipment at the disposal of the tax authorities dealing with recover requests is sufficient and appropriate, in order to avoid performance problems when using the electronic forms for tax recovery assistance.

2.2. Incorrect implementation of Directive 2010/24 and other insufficiencies of national rules and practice

24. Several Member States reported problems that raise questions about the correct implementation of the Directive on tax recovery assistance in the requested Member State.

Other issues reported relate to situations where the recovery legislation or practice in the requested Member State is not optimal or not fit to provide recovery assistance to other Member States. This prevents the requested authorities from treating a claim for which assistance is requested "as if it was a claim of the requested Member State" (as required by Article 13(1) of Directive 2010/24).

25. The Commission has asked the Member States concerned to clarify these situations, as it is not always clear whether the problematic replies were based on a misunderstanding of the EU rules in individual cases or whether they are symptomatic of fundamental and general problems of incorrect or insufficient implementation of the EU provisions.

26. This evaluation is ongoing. At this stage, the following categories of fundamentaal problems have been identified:

- access to (bank) information (section 2.2.1.);
- situations where the law or practice of the requested Member State does not permit the same treatment to claims for which recovery assistance is requested as for national claims (section 2.2.2.);
- incorrect implementation of Directive 2010/24 with regard to old claims (section 2.2.3.);
- incorrect implementation of Directive 2010/24 with regard to small claims (section 2.2.4.);
- other insufficiencies of the national recovery rules or practice (section 2.2.5.).

2.2.1. Access to (bank) information

27. At the request of the applicant authority, the requested authority has to provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims (Article 5(1) of Directive 2010/24). A requested authority is, however, not obliged to provide information which it would not be able to obtain for the purpose of recovering similar claims arising in the requested Member State (Art. 5(2)(a) of Directive 2010/24).

The implementation of this provision appears to be problematic in several Member States, as reported at the Fiscalis workshop in Vienna (FWS 130) in October 2019.

28. In two Member States, the recovery of tax claims is attributed to a separate Enforcement Authority, who has direct access to information about bank accounts or other assets. As the tax authorities of these Member States do not have this access to bank information without referring to their Enforcement Authority, they prefer to receive immediately a request for recovery instead of a request for information (unless the request for information only relates to the address of the person concerned).

In the view of the Commission, the approach adopted by these Member States is not in line with Article 5 of the Directive. Moreover, it is more burdensome for the applicant authorities to send a request for recovery than a request for information, as the form for a recovery request contains many more mandatory fields[14] to be filled out.

29. A similar problem was reported with regard to another Member State. At the Fiscalis workshop in Vienna (FWS 130) in September 2018, it was explained that the tax authorities of this Member State do not have access to bank accounts and cannot obtain any other asset information from third parties without a Court order, which can only be obtained when executing an actual request for recovery.

30. Problems concerning access to bank account information were also reported with regard to other Member States. It was reported that tax recovery authorities cannot have/request access to bank account information if they do not receive the exact bank account number or at least the name of the bank.

It was also observed that many requested authorities cannot provide information regarding the transfers that have been ordered from a bank account.

31. Several reports also mentioned cases relating to different Member States receiving requests for recovery, sent by other Member States on the basis of the bank account information that was previously exchanged under Directive 2011/16, and where the requested recovery authorities replied that they were unable to identify the person concerned or to retrieve the bank account concerned. This indicates that the recovery authorities in the Member States concerned do not have sufficient communication with other tax authorities.

32. The Commission concludes that all Member States should remove national obstacles to give full effect to Article 5 of Directive 2010/24, concerning the exchange of information relating to bank accounts.

The same should also be done with regard to the access to other information that may be relevant for tax recovery purposes.

33. Recommendations:

- When replying to an assistance request, the requested Member State should indicate why specific information is not available or why it cannot be provided. This would help the applicant Member State to adapt future requests for information to that particular requested Member State. At the same time, Member States should ensure that their recovery authorities have access to all information that may be relevant for recovery of tax claims of the other Member States.
- At the meeting of the Recovery Expert Group on 26-27 February 2020, it was agreed to set up a detailed overview of the standard information (databases, etc.) available to the tax authorities of each Member State and of the inquiries, checks and other actions usually carried out when a request for information is received. This would make clear from the start which information can be provided and could help to avoid repeated requests for information that is unavailable. All Member States are invited to provide a complete, clear and detailed report and to keep it updated.

2.2.2. National rules or practice not permitting the same treatment as for national claims

34. Some cases were reported about situations where the recovery rules or practice in the requested Member State was not optimal or not fit to provide

[14] The recovery request form also includes a large number of data fields for the uniform instrument permitting enforcement in the requested Member State.

recovery assistance to other Member States. Such situations affect the requested Member State's capacity to treat the claims of other Member States as if they were claims of the requested Member State, even though this "same treatment" is fundamental for the execution of the recovery requests.[15]

Examples:
- In a particular case, the authorities of a Member State replied that they could not execute a request for recovery, since the debtor did not dispose of a Personal Identification Number in that country.
- One requested authority replied in several cases that it was not possible to seize a bank account in that country if the person concerned was not resident in that country. In another case, the requested authority of the same country replied that it was highly unlikely that it would get a court judgment to seize a bank account for foreign tax claims.

35. The countries concerned have been requested to clarify these issues and, if needed, to change their national legislation or administrative practice. The further evaluation is ongoing.

2.2.3. Incorrect implementation of the Directive 2010/24 with regard to "old" claims

36. The Directive provides that "the requested authority shall not be obliged" to grant recovery assistance for older claims (as specified in Article 18(2) of Directive 2010/24). The purpose of this rule is to encourage and allow Member States to focus on more recent claims, which usually imply a better recovery chance.

37. Although the requested authority "shall not be obliged" to execute a request sent after the time period specified in Article 18(2) of the Directive, this provision does not prevent the requested authority from executing this request. There may indeed be good reasons for requesting – and granting – recovery assistance for older claims. It is for the requested authority to decide whether it accepts a request with regard to an old claim, having regard to the circumstances of a specific case, possibly taking account of particular evidence, reasons or expectations communicated by the applicant authority.

38. On this point, it appears that some Member States have incorrectly implemented this provision of the Directive.

In several Member States, the national law does not confer a discretionary power on their tax authorities to decide on their own whether they refuse requests for such old claims or whether they still grant assistance, possibly taking account of the special justification provided by the applicant authority when submitting its request for assistance after the normal time period.[16]

Any attempt by Member States to circumvent such incorrect national implementation of the Directive by granting recovery assistance on the basis of another legal instrument (a bilateral or multilateral agreement) would be conflicting with the priority of EU law and would be to the detriment of the legal protection offered to the debtor under EU law.[17] If the requested authority refused to handle a request for an older claim under the EU Directive, while accepting to handle a request with regard to the same claim submitted on the basis of another legal instrument, the requested authority would render ineffective the EU Directive and the legal protection surrounding this Directive (e.g. application of the EU Charter of Fundamental Rights; jurisdictional control by the EU Court of Justice). In this regard, it should be noted that the EU Court of Justice has explicitly stated that any legislative or administrative practice impairing the effectiveness of EU law is not acceptable.[18]

39. Member States are requested to correctly implement Article 18(2) of Directive 2010/24.

2.2.4. Incorrect implementation of the Directive 2010/24 with regard to small claims

40. Article 18(3) of Directive 2010/24 provides that: "A Member State shall not be obliged to grant assistance if the total amount of the claims covered by this Directive, for which assistance is requested, is less than EUR 1 500."

41. The implementing legislation of some Member States explicitly excludes recovery assistance for claims below this threshold. Some other Member States in practice refuse to provide assistance for such

[15] In accordance with Article 13(1) of Directive 2010/24.

[16] In accordance with the general principles of EU law, this provision of the Directive cannot be invoked by tax authorities against a national provision that would not be in line with the Directive. This means that if a Member State's law excludes assistance for requests submitted after the 5 year period, the tax authorities concerned cannot rely on the Directive to obtain/grant this assistance.

[17] Cf. Commission staff working document SWD(2017)461 of 18 December 2017 accompanying the Commission report COM(2017)778 on the use of the EU framework for tax recovery assistance, point 6.3.1.1.e.

[18] See e.g. EUCJ 19 June 1990, case C-213/89, *Factortame*, point 20; EUCJ 6 March 2018, case C-284/16, *Achmea*, points 58-59.

small claims under the Directive. As they have no such explicit refusal in their bilateral conventions, however, other Member States sometimes send two requests for recovery to these Member States – one based on the Directive and one based on a double tax treaty – for the same tax claim when the amount concerned is below EUR 1 500. This creates confusion and uncertainty about the validity of the request and the execution of that request.
It is not surprising that applicant Member States try to rely on the Directive, also for amounts below EUR 1 500: the use of the Directive *inter alia* enables them to make use of the standard request forms and the Uniform Instrument Permitting Enforcement in the requested Member State, with an automated translation. This is important in view of the language requirements imposed by the EU Court of Justice.[19]

The wording used in the Directive does not exclude that the requested Member State provides assistance for lower amounts, in particular in cases where there are no real recovery costs in the requested Member State (e.g. if a VAT (or another tax) refundable amount is in the hands of the requested tax authority), or in other justified situations (e.g. if a debtor deliberately paid his tax debts in another country, but deducting EUR 1 500 of the amount due).

Unfortunately, it appears that some Member States have implemented Article18(3) in a way that corresponds to the wording of the former implementing legislation of the Commission, i.e. refusing in an inflexible manner to grant assistance for claims below EUR 1 500. Such restrictive national implementation ignores the fact that the Directive intends to favour tax recovery assistance, in the same way as under the corresponding provision of the OECD Model treaty. If such Member States apply their double taxation treaties in such a way that they grant assistance for claims below EUR 1 500, despite the treaty provision stating that the requested State does not have to provide assistance if the administrative burden for that State would be disproportionate to the benefit of the other State, then it is unclear and unjustified that these countries systematically refuse to grant assistance under the Directive to other EU Member States for the same amounts. The Commission services would even expect the administrative burden for the requested Member State to be lesser if the EU framework is used, given the possibility to use the electronic communication framework and the specific e-forms and uniform instruments that reduce the translation problems.

Member States should not circumvent the Directive by agreeing and applying a different legal framework for executing requests for recovery or precautionary measures relating to such smaller amounts, which would not offer the legal protection granted to the tax debtor under the Directive.

42. The Member States concerned are requested to amend their national implementation of the Directive 2010/24. This will allow them to avoid the complications described above.

43. A good practice example: under the legislation of a Member State, it is possible to waive the 1 500 EUR threshold if assistance can be granted with only minor efforts by the requested authority (e.g. if the debtor is entitled to a VAT or other tax refund).

2.2.5. Other situations where the national legislation or practice is not fit to grant recovery assistance

44. The use of precautionary measures is important, in order to guarantee the recovery of contested tax claims. However, precautionary measures are not taken or cannot be taken in some Member States. The authorities of another Member State also declared that as a matter of practice, they do not take precautionary measures as part of the normal debt recovery process. This affects the capacity to provide useful assistance to other Member States.

Further, the exact purview of the precautionary measures is different from Member State to Member State. A general or theoretical possibility to take precautionary measures does not necessarily imply that useful assistance can be provided in a specific case.

Example: a Member State replied to a particular assistance request that there was no legal basis in its national law to freeze bank accounts during tax investigations.

The Commission intends to organise a debate with the Member States on minimum standards for precautionary measures in the Member States, taking account of both the need to step up the efforts in the fight against fraud and the obligation to respect the tax debtors' right of defence. This analysis will have to take account of the future decision of the EU Court of Justice in case C-420/19 (*Heavyinstall*).

45. Other specific rules in national law also hinder an effective and efficient tax recovery assistance.

Example: a Member State did not execute requests from other Member States to seize the amounts for which the debtor had requested a VAT refund, since the administrative costs – applied *ex officio* under the

[19] See EUCJ 14 January 2010, case C-233/08, *Kyrian*, and EUCJ 26 April 2018, case C-34/17, *Donnellan*.

national law of that requested Member State and thus not adapted to this particular situation where the amounts concerned could be seized very easily by the requested Member State – were so high that they would exceed the amounts seized.

Example: a Member State did not execute a request to recover claims from a third party having debts towards the tax debtor, because there was no legal basis in the requested Member State to recover the debt from third parties holding assets of the debtor or having debts towards the debtor.

46. The Member States are invited to check and improve their national recovery rules, in order to ensure that the national recovery provisions offer sufficient possibilities for the recovery of foreign tax claims or to guarantee their recovery, in order to give full effect to the recovery assistance under Directive 2010/24.

3. Fourth action point: Developing the knowledge and awareness of the mutual recovery assistance legislation

3.1. Training and guidance for national tax authorities in the field of recovery assistance

3.1.1. Training for tax recovery officials

47. Problems reported to Fiscalis Project Group 110 often result from non-respect or non-understanding of the common rules of Directive 2010/24. These issues confirm that tax officials dealing with mutual recovery assistance requests have a need for more guidance and training with regard to the EU rules and e-forms in this field.

48. Therefore, it is planned to organise periodical (e.g. yearly) training events for officials in the field of recovery assistance. These training events could be organised within the framework of the Fiscalis program. They would contribute to a common understanding and awareness of the possibilities for recovery assistance within the EU, and they could also pay attention to recent case law developments. They could also help to increase awareness of the existing tools and guidance (information on CIRCABC, EU and international tax collection newsletter, glossary of tax recovery terms, etc.). The possibility of developing e-learning courses will also be considered.

49. Explanatory notes on Directive 2010/24/EU have already been adopted by the Recovery Expert Group, but they provide clarification on some issues only. A more detailed commentary has been made available recently.

3.1.2. Specialised workshops / working groups

50. A recent increase of EU Court of Justice judgments and new cases relating to the interpretation of Directive 2010/24 can be observed:

Judgments			Date
C-361/02 and C-362/02	*Tsapalos and Diamantakis*	Claims which arose prior to the entry into force of the Directive	1.7.2004
C-233/08	*Kyrian*	Notification	14.1.2010
C-34/17	*Donnellan*	Notification – Competence of court in the requested State to check the validity of the notification by the applicant State	26.4.2018
C-695/17	*Metirato Oy*	Restitution of recovered claims to the insolvency estate	14.3.2019
C-19/19	*Pantochim*	Preferences	11.6.2020
Pending cases			
C-95/19	*Silcompa*	Competence of court in the requested State to determine where duties should be levied	adv. gen. 8.10.2020
C-420/19	*Heavyinstall*	Competence of the court in the requested State to review the need for precautionary measures	adv. gen. 17.9.2020

In view of these case law developments, there is a clear need for the technical experts to be informed and have an in-depth analysis of the judgments and possible consequences.

These discussions currently take place within the EU Tax Recovery Expert Group. A more detailed preparation in ad-hoc working groups of the Recovery Expert Group or in specialised workshops or working groups under the Fiscalis framework could speed up the discussions in that forum.

51. It is worth stressing that some of the abovementioned judgments (*Kyrian*, *Donnellan*) specifically address the fundamental rights of the tax payers/debtors. Nowadays, the protection of tax

payer/debtor rights is a major issue in the area of tax recovery and tax recovery assistance.

This development is also confirmed by the list of such cases currently pending at the EU Court of Justice and the European Court of Human Rights:

Pending cases at the EU Court of Justice		
C-788/19	*Commission v Spain*	Penalty payments in respect of the failure to fulfil the obligation to provide information in respect of overseas assets and rights (Fundamental freedoms under the TFEU and the EEA)
Pending cases at the European Court of Human Rights		
6215/18 (2018)	*Nagy v Hungary*	Attachment of goods relating to (statute-barred) tax debts of the previous owner (Art. 1 of Protocol 1)
38785/18 (2018)	*Radobuljac v Croatia*	Offsetting of a person's tax debt with his enforceable claim (Art. 1 of Protocol 1)
44521/11 (2019)	*Iletişim Hizmetleri Tic. Ve San. A. Ş. v Turkey*	Lack of interest on a reimbursed tax amount (Art. 1 of Protocol 1)

The analysis of these specific cases also requires the participation of technical experts, which can best be organised in ad-hoc working groups of the Recovery Expert Group or in specialised workshops or working groups under the Fiscalis framework.

3.1.3. National information on CIRCABC

52. Each Member State has the possibility to share information about its national legislation and practice by uploading it on the CIRCABC database. This information is important for tax authorities of other Member States that wish to check the possibilities for recovery assistance in other countries. Such information must be easily accessible, useful and up to date.

At present, these requirements are not always met. The information published is not always put in the right place, or not always clear and precise enough. Therefore, the Commission invites the Member States to check and update their national information on this platform. Coordination by the EU Recovery Expert Group should streamline this process, so as to promote an equal standard in order to increase the accessibility and relevance of that information.

The EU Recovery Expert Group should also examine how this national information can be further improved and/or extended,[20] and how this information can be further disseminated to all competent authorities in the Member States.

3.2. Raising general awareness about tax recovery assistance

53. In order to inform the public, the website of the European Commission provides some questions and answers (FAQ) with regard to the recovery of taxes in other Member States, explaining *inter alia* the use of the uniform instruments (uniform notification form and uniform instrument permitting enforcement in the requested Member State).[21]

54. The Commission will invite the Recovery Expert Group to reflect on possibilities to improve/extend the above information and to make such information available also at national level, for the benefit of citizens and companies.

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[20] In this regard, reference can be made to an example discussed at the meeting of the Recovery Expert Group in February 2020, where it was decided that Member States would provide a list of the standard information available to them (databases, etc.) and the inquiries, checks and other actions usually carried out when receiving a request for information from an applicant Member State.

[21] https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/tax-recovery/tax-recovery_en.

OPINIONS AND ARTICLES

The *Donnellan* judgment and the non-execution of a tax recovery assistance request for reasons of 'public policy': the exception confirms the rule

Luk Vandenberghe[1]

This overview describes the scope of the concept of "public policy" and its impact on tax recovery assistance between EU Member States. It contains an analysis of recent national case-law, following the Donnellan judgment (case C-34/17).

1. The application of Directive 2010/24 on mutual tax recovery assistance is based on the principle of mutual trust between the national authorities concerned.[2] This is confirmed, inter alia, in Article 14 (1) of the Directive: if the claim, the initial instrument, the uniform instrument or a notification is contested by an interested party, the action shall be brought before the competent bodies of the applicant Member State and not those of the requested Member State. Far from giving the bodies of the requested Member State the power to review the acts of the applicant Member State, Article 14(2) of Directive 2010/24 explicitly limits the power of review of those bodies to acts of the requested Member State.

Even though the acts taken by Member States pursuant to the system of mutual assistance established by Directive 2010/24 must be in accordance with the fundamental rights of the European Union, which include the right to an effective remedy enshrined in Article 47 of the Charter, it does not in any way follow that the acts of the applicant Member State must be capable of being challenged both before the courts of that Member State and before those of the requested Member State.

On the contrary, by relying, in particular, on the principle of mutual trust, that system of assistance is likely to increase legal certainty with regard to the determination of the Member State in which disputes are heard and thus prevent forum shopping.[3] It follows that an action brought by a debtor in the requested Member State seeking the rejection of a request for payment sent to him by the competent authority of that Member State in order to recover the claim established in the applicant Member State cannot, in principle, lead to an assessment in that requested State of the legality of the claim that originated in the applicant State.[4]

The division of jurisdiction in disputes relating to recovery, imposed by Article 14, between the competent bodies of the applicant Member State and the competent bodies of the requested Member State is logical. The assessment of the validity of a tax assessment is best entrusted to the court or other competent body of the Member State in which that tax claim originated, since it is familiar with the national law on the basis of which the claim is established. It is best placed to assess the potentially complex tax legislation and also the facts underlying the assessment.[5]

2. It is only exceptionally that the requested authority may decide not to grant recovery assistance to the applicant authority. In *Donnellan*, the Court of Justice ruled that enforcement of the request for recovery of the claim may be refused by the requested authority in particular if it appears that enforcement would be contrary to the public policy of the Member State of the requested authority.[6]

It is clear that the decision of the Court of Justice in *Donnellan* must be seen in the light of the particular circumstances of this case. The Greek authorities requested recovery assistance from the Irish authorities in respect of a customs debt in Greece. The Irish court, before which the recovery measures were challenged, found that the person concerned had not in fact been informed of the Greek claim in a manner which allowed him to challenge that claim in due time before the Greek courts. The Greek authorities had

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The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the European Union. Neither the European Union institutions and bodies nor any person acting on their behalf may be held responsible for the use which may be made of the information contained herein.

2 CJEU 26.04.2018, C-34/17 *Donnellan*, *EU & Int. tax Coll. News 2018-2*, 118, point 41.

3 CJEU 26.04.2018, C-34/17 *Donnellan*, *EU & Int. tax Coll. News 2018-2*, 118, points 43-45.

4 CJEU 26.04.2018, C-34/17 *Donnellan*, *EU & Int. tax Coll. News 2018-2*, 118, point 46. Cf. (Austria) Federal tax court (Bundesfinanzgericht) 06.04.2017, *EU & Int. tax Coll.News* 2017-2, p. 206; (Belgium) Court of Appeal of Ghent 13.11.2018, *EU & Int. tax Coll.News* 2019-2, p. 171.

5 CF. R. SEER, *Internationale WirtschaftsBriefe* 2017, p. 606.

6 CJEU 26.04.2018, C-34/17 *Donnellan*, *EU & Int. tax Coll. News 2018-2*, 118, point 47; cf. CJEU 14.01.2010, C-233/08, *Kyrian*, point 42.

indicated that the period for lodging an objection to the notice of assessment had already expired, since that period started to run from the moment when the claim was published in the Official Journal of the Greek Republic. It is perfectly correct that the Irish court held that such a form of notification could not be regarded as the starting point for the period for contesting, since the person concerned could not reasonably be expected to take notice of such publication.[7] In those circumstances, where the debtor could not exercise his fundamental right of defence, it was correctly held that the execution of the request for recovery assistance in Ireland was contrary to public policy. (It should be noted that the Irish court also found it problematic, from a public policy perspective, that the Greek customs claim – dating from 2009 - was based on facts in respect of which Mr *Donnellan* was found to be innocent, as he had been acquitted of the charge of smuggling goods by a decision of a Greek court of appeal in 2002).[8]

3. The judgment of the Munich Tax Court of 30 January 2020[9], reviewed below, concerns a very similar factual situation to that of the *Donnellan* judgment. A German couple owned a property in Spain from 1996 to 2006. When they sold it in 2006, the purchaser withheld a withholding tax on the purchase price and paid it to the Spanish authorities, indicating the German address of the couple (as non-residents).

The Spanish authorities then issued a notice of assessment in which the capital gain on that sale was taxed. The notice of assessment was sent to the address of the property in Spain, which had already been sold. Further attempts to notify this assessment and the subsequent fines and default interest at this address were also not successful. Ultimately, this led to a so-called public notification through publication in the Spanish Official Journal. The German debtors were not actually informed of that Spanish tax debt until they were asked for payment by the German authorities, following a request for recovery from the Spanish tax authorities.

The persons concerned challenged the amount concerned before a Spanish court. The latter dismissed their application on the ground that their application had been made after the expiry of the time-limit laid down by Spanish law. The court considered that, under Spanish law, the persons liable for payment could be deemed to receive notifications at the address of the immovable property giving rise to the tax. The court further considered that they could also have appointed a tax representative in Spain. According to the Spanish court, the Spanish tax authorities could not be required to determine the place of residence of the persons concerned with greater care.

The taxpayer's application to the German court against the execution of the request for assistance was successful. The Munich Tax Court found that it had in fact been impossible for the persons concerned to bring a challenge before the competent court in Spain in good time. Thus, their right of defence was infringed. Since the persons concerned were no longer able to assert their right of defence in Spain, the German court held that — in accordance with the *Donnellan* judgment — the recovery of the Spanish claim was contrary to public policy in Germany.

4. Both the *Donnellan* case and the case at the Munich Tax Court concerned persons who were no longer able to exercise their right of defence in the applicant Member State at the time of execution of the request for assistance in the requested Member State. In these exceptional circumstances, the courts accepted that public policy could be invoked in order to contest the execution of the request for assistance in the requested Member State.

That does not mean that the person liable can simply evade the obligation laid down in Article 14 of the Directive to challenge the validity of the tax claim in the applicant Member State by invoking the public policy exception in the requested State. As has already been pointed out in another commentary on *Donnellan*, the right of defence is not an unfettered prerogative and the taxpayer cannot oppose enforcement measures in the requested Member State by relying on his own negligence to challenge the claim in good time in the applicant Member State.[10] In this context, the similarities with EU law on the recognition and enforcement of judgments in civil and commercial matters were highlighted.

Article 45(1)(b) of the current Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters obliges the court of the Member State in which enforcement is sought to refuse or cancel the enforcement of a foreign judgment given in default of appearance if the defendant was not served with the document which instituted the proceedings or with an equivalent

[7] See L. VANDENBERGHE, Commentary on the EU tax recovery assistance directive, *EU & Int. tax Coll. News* 2020-2, point 09.04. Such a deemed notification, e.g. by publication in the official journal, may have a legal value – for instance for the interruption or prolongation of a period of limitation – but it does not imply that the person concerned was actually informed about the claim. On this point, the Court of Justice also emphasized the possibility for the applicant Member State to request notification assistance, in accordance with Art. 8 of Directive 2010/24 (see point 54 of the judgement).

[8] See points 36 and 20 of the CJEU judgement.

[9] (Germany) Munich Tax Court 30.01.2020, case 10 K 1105/17.

[10] See I. DE TROYER, The tax debtor's right of defence in case of cross-border collection of taxes, *EC Tax Review* 2019-1, p. 27 and 31, Nos 18-19 and 29.

document in sufficient time and in such a way as to enable him to arrange for his defence, 'unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

The approach adopted by the Court of Justice in *Donnellan,* which permits recourse to public policy in the requested Member State only in exceptional cases, as a derogation from the general obligation of trust in the competent authorities of the requesting Member State, is also in line with the case-law of that court on the recognition and enforcement of judgments in civil and commercial matters. The following considerations of the judgment in *Diageo Brands*, relating to the former Regulation 44/2001 in this field, may be noted in particular:[11]

> *40 It should be noted at the outset that the principle of mutual trust between the Member States, which is of fundamental importance in EU law, requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191 and the case-law cited). As is stated in recital 16 in the preamble to Regulation No 44/2001, the rules of recognition and enforcement laid down by that regulation are based, precisely, on mutual trust in the administration of justice in the European Union. Such trust requires, inter alia, that judicial decisions delivered in one Member State should be recognised automatically in another Member State (see judgment in flyLAL-Lithuanian Airlines, C-302/13, EU:C:2014:2319, paragraph 45).*
>
> *41 In that system, Article 34 of Regulation No 44/2001, which sets out the grounds on which the recognition of a judgment may be opposed, must be interpreted strictly, inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of that regulation. With regard, more specifically, to the public-policy clause in Article 34(1) of the regulation, it may be relied on only in exceptional cases (see judgment in Apostolides, C-420/07, EU:C:2009:271, paragraph 55 and the case-law cited).*
>
> *(…)*
>
> *63 In that respect, as was noted in paragraph 40 of this judgment, the rules on recognition and enforcement laid down by Regulation No 44/2001 are based on mutual trust in the administration of justice in the European Union. It is that trust which the Member States accord to one another's legal systems and judicial institutions which permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals (see paragraph 49 of this judgment).*
>
> *64 It follows that Regulation No 44/2001 must be interpreted as being based on the fundamental idea that individuals are required, in principle, to use all the legal remedies made available by the law of the Member State of origin. As the Advocate General has observed in point 64 of his Opinion,* ***save where specific circumstances make it too difficult or impossible to make use of the legal remedies in the Member State of origin, the individuals concerned must avail themselves of all the legal remedies available in that Member State with a view to preventing a breach of public policy before it occurs.*** *That rule is all the more justified where the alleged breach of public policy stems, as in the main proceedings, from an alleged infringement of EU law.*

Thus, where a person liable for payment opposes the execution of a request for recovery in the requested Member State, it is necessary to ascertain whether the person concerned was duly informed, in a manner and at a time which allowed him to become effectively acquainted with the claim and to challenge the claim in good time in the applicant Member State. If the person concerned had an effective opportunity to challenge the validity of the claim in the applicant Member State but failed to do so in good time, he cannot rely on a breach of his right of defence in order to challenge the execution of the request for assistance in the requested Member State.

5. The approach set out above was also followed in a judgment of the German Constitutional Court of 23 May 2019, which rejected a debtor's appeal against a decision of the Cologne Tax Court.[12] The person concerned had been active as managing director of a Greek company facing a VAT claim. The tax debt was challenged by the company but without success. The company was declared insolvent and the Greek tax authorities sent a request for assistance to the German authorities for recovery of the outstanding tax debt — approximately EUR 1 million in VAT and default interest — from that managing director, who then resided in Germany.

[11] CJEU, 16.07.2015, C-681/13, *Diageo Brands*.

[12] (Germany) Constitutional Court (Bundesverfassungsgericht) 23.05.2019, case 1 BvR 1724/18.

The Greek administration had not sent him a separate liability notice. It assumed that, as managing director, he had been informed of the tax claim imposed on his company. The person liable considered that it was contrary to German public policy that he had not received a separate liability notice concerning his joint liability for the VAT debt. Such an obligation is indeed provided for in German law. However, this argument was not followed by the Cologne Tax Court, which was followed by the Constitutional Court.

The Tax Court concluded, on the basis of the documents submitted, that the person concerned should be regarded as having been aware of the tax debt. The court found, *inter alia*, on the basis of the correspondence between the German tax authorities and the Greek tax authorities submitted by the person concerned, that the representative held jointly liable and the chairman of the board of directors of the company had lodged an objection in Greece. The Tax Court found that the person concerned had also had the opportunity to lodge an objection in good time, but failed to avail himself of this opportunity. The Tax Court concluded, therefore, that the person concerned had not in any way demonstrated that his fundamental rights had been infringed.

The German Constitutional Court ruled that there was no justification for annulling the decision of the lower court.

6. In the abovementioned judgments, it was considered that the execution of recovery assistance requests may be rejected or stopped in the requested State, on the basis of public policy reasons, if the person liable was no longer in a position to bring an action against the tax claim in question in good time. However, any doubt as to whether the person liable was actually informed of the tax debt for which recovery assistance is requested does not automatically have to lead to a definitive cessation of all (future) recovery measures. If it is not clear whether a notification previously made has actually reached the addressee, it is recommended that the person liable should still be given the opportunity to start contesting the claim before the competent bodies or courts of the applicant State within a reasonable time, even if the normal period for lodging an objection had already expired.[13] However, this only makes sense in those cases where the late knowledge of the person liable does not impair his ability to exercise his right of defence in a meaningful manner.

7. The case-law of the Court of Justice does not exclude the possibility that public policy may also be invoked as a ground for non-execution of a request for assistance in cases other than those in which the debt can no longer be challenged.[14]

Closely linked to the above situation is the case where a requested State is asked to provide recovery assistance in respect of a tax claim which can already be recovered under the law of the requesting State, even if it concerns a claim at a stage where, under the law of the requested State, recovery measures cannot yet be taken for the latter's own claims. Such recovery assistance is not provided for in the EU Directive, but is provided for in some bilateral treaties. It has already been held in legal literature that the person affected by such an arrangement could rely on its incompatibility with the public policy of the State in which enforcement is sought.[15]

8. In any event, any rejection of a request for assistance on grounds of public policy must always remain an exception. Not every possible derogation from the tax rules or principles of the requested Member State qualifies as a situation in which the recovery assistance request can be rejected.[16] Moreover, it is difficult for the courts of the requested Member State to assess the validity of a foreign taxation, in the absence of an understanding of the entire tax system on which that taxation is based. In the event of such a challenge on public policy grounds before a court in the requested Member State, that court must therefore be cautious in that regard. This can be illustrated by the following examples:

- Example: in Belgium, inheritance tax is in principle levied on possessions located both in Belgium and abroad. In a 2017 case, the Belgian Constitutional Court held that the rate of the inheritance tax at the time in one of the Belgian regions was fundamentally unlawful — because of the interference with the right to property — in so far

[13] In this respect, reference can be made to a parallel case-law of the Court of Justice on the right to deduct input VAT. Several judgments have ruled that a taxable person must still be able to exercise a right of deduction or refund of VAT, even after the expiry of the normal period for deduction or refund, if he was unable to exercise that right within that normal period (CJEU 12.04.2018, C-8/17, *Biosafe t. Flexipsio*; CJEU 12.07.2012, C-284/11, *EMS-Bulgaria Transport*; CJEU 21.03.2018, C-533/16, *Volkswagen*).

[14] The wording of Article 45(1)(a) of Regulation 1215/2012 of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters also confirms that there may be other reasons of public policy in the requested Member State, different from the impossibility to exercise the right of defence, explicitly mentioned in Article 45(1)(b) of the same Regulation.

[15] I. DE TROYER, Cross-border tax recovery assistance and the fundamental rights of the tax debtor, *European Taxation* 2020, p. 160.

[16] In this regard, it is irrelevant that, under the domestic law of a Member State, the entire tax legislation is regarded as a law of public policy (as decided, for example, by the Belgian Supreme Court (Court of Cassation); see, for example, its judgements of 03.03.2011, case F.08.0082.F; and 10.02.2012, case F.11.0048.F).

as it set the percentage of the inheritance tax for certain heirs at 80 %.[17] However, the rate and structure of an inheritance tax may also be affected by the taxability and rate structure of other taxes on income and capital levied in the same country. It would therefore be difficult for a Belgian court to simply transpose that Belgian case-law to a foreign inheritance tax debt in respect of which recovery assistance is requested from the Belgian tax authorities.

- Another example: if the applicant Member State requests recovery assistance in respect of a tax debt plus default interest, such default interest may have been calculated at a much higher rate in the applicant State than the rate applicable in the requested State. However, this does not mean that the public policy of the requested State would automatically preclude the recovery of that higher foreign default interest. On the one hand, the higher interest rate may be linked to a general economic and capital market difference between the countries concerned; moreover, the higher interest rate may also result from a more fundamental difference in the approach to the tax system in the applicant State, for example if in that country the sanctioning of tax offences is not done through separate fines but (also) through the charging of (higher) default interest. The latter was confirmed by the German Federal Tax Court in a judgment of 30 June 2020 concerning default interest charged in another EU Member State on a tax claim for which recovery assistance was requested from the German tax authorities. The person liable argued that the higher interest rate applied was contrary to public policy under German law. The Federal Tax Court however held, *inter alia*, that an interest clause cannot be taken into account in isolation, since it is linked to the other applicable provisions of the applicant Member State.[18]

9. The above case-law confirms the importance of respecting the rights of the tax debtor in the context of cross-border assistance for the recovery of taxes. That case-law confirms that this legal protection is effectively guaranteed within the framework of Directive 2010/24. On the one hand, it is stressed that the tax authorities must effectively inform the debtor, possibly by means of notification assistance from the requested Member State; on the other hand, it is also clear that the debtor has his own responsibility: a debtor who is duly informed but fails to exercise his rights of defence in the applicant Member State, in accordance with Article 14 of the Directive, cannot simply claim that recovery in the requested State adversely affects his fundamental rights.

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[17] (Belgium) Constitutional Court (Grondwettelijk Hof – Cour constitutionnelle) 22.06.2005, Case 107/2005.

[18] (Germany) Federal Tax Court (Bundesfinanzhof) 30.07.2020, VII B 73/20, point 88.

CASE LAW

Australia

Federal Court

27 November 2020

Deputy Commissioner of Taxation v Wang

Case number: [2020] FCA 1711

Precautionary measures – Application for freezing orders – Whether applicant has a good arguable case – Whether danger that a prospective judgement might not be satisfied – Balance of convenience

Summary

Where a freezing order is sought on the basis of a danger of the dissipation of assets, it is not necessary for the Court to be satisfied that the risk of dissipation is more probable than not. Nor is it necessary for the applicant to adduce evidence of an intention on the part of the respondent to dissipate assets.

The production of a notice of assessment gives rise to a present debt, not one that arises in future if payment is not made by the date specified in the notice.

It is not necessary for the Commissioner to show that the time for payment of the assessments has elapsed.

A freezing order should be made if there is a danger that a prospective judgment against the respondents will be wholly or partly unsatisfied because the assets of the respondents will be removed, disposed of or diminished in value.

File number: NSD 1250 of 2020

Judge: Abraham J

Dvision: General Division

Registry: New South Wales

(…)

1 The applicant, the Deputy Commissioner of Taxation (the Commissioner), has made an application on an ex parte basis pursuant to r 7.32 of the *Federal Court Rules 2011* (Cth) (Rules), for a freezing order against C. Wang (first respondent) and Z. (second respondent), who are husband and wife. On 23 November 2020, I made ex parte freezing orders against each respondent. These are my reasons for doing so.

2 The applicant relies on the affidavit of F.B., affirmed 20 November 2020, and the documents to that affidavit in exhibit FB-1, who is authorised to speak for and on behalf of the Commissioner.

3 In a nutshell, the applicant relied upon claims based upon a debt that arises as a result of an audit conducted and assessments made under the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth). Notices of Amended Assessments dated 20 November 2020 have been issued to the first respondent in respect to the income assessment years ended 30 June 2008 to 30 June 2019 and Notices of Shortfall Penalty dated 20 November 2020 for the same income years, with total outstanding tax liability being approximately $31,717,768.96. Notices of Amended Assessments and Notices of Shortfall Penalty dated 20 November 2020 for the same period have been issued to the second respondent with total outstanding tax liability being in the amount of $31,767,420.58.

4 The Court has power to make a freezing order: see generally s 23 *Federal Court of Australia Act 1976* (Cth), rr 7.31 – 7.38 of the Rules.

5 Relevantly, r 7.32 provides:

> (1) The Court may make an order (a **freezing order**), with or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.
>
> (2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

6 Rule 7.35, sets out the circumstances in which that power, which of its nature is discretionary, is enlivened. It is in the relevantly following terms:

> **7.35 Order against judgment debtor or prospective judgment debtor or third party**
>
> (1) This rule applies if:
>
> …
>
> (b) an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in:

(i) the Court; or
(ii) for a cause of action to which subrule (3) applies—another court.

…

(4) The Court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur:

(a) the judgment debtor, prospective judgment debtor or another person absconds;

(b) the assets of the judgment debtor, prospective judgment debtor or another person are:

(i) removed from Australia or from a place inside or outside Australia; or

(ii) disposed of, dealt with or diminished in value.

7 The applicant has the burden of satisfying the Court that he has a good arguable case, that this claim is justiciable in the Federal Court, and that there is a "danger" that the judgment which he seeks will be wholly or partly unsatisfied because of the removal of assets from Australia or from a place inside or outside Australia, or disposed of, dealt with, or diminished in value.

8 The principles relating to the making of a freezing order were recently summarised by Wigney J in *Basi v Namitha Nakul Pty Ltd* [2019] FCA 743 at [7] - [9]:

> The purpose of a freezing order is to prevent an abuse or a frustration of the Court's process by depriving an applicant of the fruits of any judgment obtained in the action: *Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612 at 625. It is "no light matter" to freeze a party's assets and there is, accordingly, a need for the Court to exercise caution: *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 324F. A freezing order is a "drastic remedy" which should not be lightly granted: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [51] citing *Frigo v Culhari* (unreported, NSW Court of Appeal 17 July 1998 at 10-11).
>
> An applicant has a good arguable case if they have "a reasonably arguable case on legal as well as factual matters": *Cardile* at [68]*; Insolvency Guardian Melbourne Pty Ltd v Carlei* (2016) 111 ACSR 236; [2016] FCA 72 at [18]. It has also been said that a "good arguable case" is one "which is more than barely capable of serious argument, and yet not necessarily one the judge considers would have better than a fifty per cent chance of success": *Curtis v NID Pty Ltd* [2010] FCA 1072 at [6] citing *Ninemia Maritime Corp v Trave Schiffahrtsgesselschaft mbH & Co KG (The Niedersachsen)* [1983] Com LR 234 at 235 (affirmed on appeal: [1983] 1 WLR 1412); *Deputy Commissioner of Taxation v Greenfield Electrical Services Pty Ltd* (2016) 103 ATR 327; [2016] FCA 653 at [7].
>
> Where a freezing order is sought on the basis of a danger of the dissipation of assets, it is not necessary for the Court to be satisfied that the risk of dissipation is more probable than not. Nor is it necessary for the applicant to adduce evidence of an intention on the part of the respondent to dissipate assets: *Deputy Commissioner of Taxation v Hua Wang Bank Berhad* (2010) 273 ALR 194; [2010] FCA 1014 at [8]-[10]; *Deputy Commissioner of Taxation v Chemical Trustee Ltd (No 4)* (2012) 90 ATR 711; [2012] FCA 1064 at [23]. The making of a freezing order involves a discretionary exercise of power. The Court retains a discretion to refuse relief even if the requirements in r 7.35 of the Rules are satisfied: *Patterson* at 321-322.

Good arguable case

9 The production of a notice of assessment is conclusive evidence that it was properly made and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* (Cth) on a review or appeal relating to the assessment, that the amounts and particulars contained within it are correct: *Taxation Administration Act 1953* (Cth) Sch 1, s 350-10(1), Item 2 and section 175 of the *Income Tax Assessment Act 1936* (Cth). The same applies to amended assessments. The production of a notice of assessment gives rise to a present debt, not one that arises in future if payment is not made by the date specified in the notice: *Commissioner of Taxation v Ornelas* [2016] FCA 457 at [7](b).

10 It is not necessary for the Commissioner to show that the time for payment of the assessments has elapsed: *Deputy Commissioner of Taxation (ACT) v Sharp* (1988) 91 FLR 70 at 74; and see: *Commissioner of Taxation v Growth Investment Fund SA* [2014] FCA 780 at [7]-[13].

11 In *Deputy Commissioner of Taxation v Hua Wang Bank Berhad* [2010] FCA 1014; (2010) 273 ALR 194 at [14]-[16] Kenny J observed:

> The Commissioner issued notices of assessment for unpaid income tax and notices of assessment for administrative penalties to each of the respondents on 12 August 2010. On the same day, the notices were sent by ordinary prepaid post to each of them,

> together with advice on the outcome of audits undertaken by the…ATO. Under s 255-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) ('TAA'), the Commissioner may sue in the Federal Court to recover any tax liability that is due and payable. Pursuant to s 204(1) of the *Income Tax Assessment Act 1936* (Cth) ('ITAA') (and subject to the issue of service discussed below) the income tax liabilities were due and payable at the time the Commissioner instituted this proceeding in this Court. The administrative penalties were due when assessed and notices of the assessment served, although not payable until 10 September 2010: see *Clyne v Deputy Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1 at 16-17; TAA, s 298-15 of Sch 1.
>
> Generally, a taxpayer cannot challenge the correctness of an assessment except under Part IVC of the TAA, that is, by making a taxation objection as prescribed and pursuing an appeals process under Pt IVC if the objection decision is unfavourable. In any proceeding other than a proceeding under Part IVC, the production of a notice of assessment, or a document under the hand of the Commissioner or a Deputy Commissioner purporting to be a copy of a notice of assessment, is conclusive evidence of the due making of the assessment and that the amount and all the particulars of the assessment are correct: s 177(1) of the ITAA and s 298-30(3) of Sch 1 to the TAA; also *FJ Bloeman Pty Ltd v Commissioner of Taxation* [1981] HCA 27; (1981) 147 CLR 360 at 376 and *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; (2008) 237 CLR 146 at 157 and 166-7. The Commissioner has produced documents under his hand purporting to be copies of the notices of assessment. Thus, in a recovery proceeding such as the proceedings on foot or contemplated here, the correctness of the assessments in question is not an issue the court can consider. Once an assessed liability is due and payable, the Commissioner may move for judgment in reliance on the conclusive evidence provision of s 177(1)…
>
> The result is that the Commissioner plainly satisfied the "good arguable case" requirement for obtaining a freezing order, although, in the case of the administrative penalties, the cause of action was prospective at the time the proceeding was instituted…

12 As the applicant submitted, those observations are apt in this case.

13 On the evidence presented, I was satisfied that the applicant had established a good arguable case within the meaning of r 7.35 in respect of each of the respondents.

Danger that prospective judgment will be unsatisfied

14 I was also satisfied, for the reasons given in the affidavit of Ms F.B., that there is a danger that a prospective judgment against the respondents will be wholly or partly unsatisfied because the assets of the respondents will be removed, disposed of or diminished in value.

15 As the applicant submitted, each of the respondents have both the "means and the motive" to dissipate the relevant assets: *Deputy Commissioner of Taxation v Chemical Trustee Ltd (No 4)* [2012] FCA 1064 (*DCT v Chemical Trustee (No 4)*) at [24]. The debt for each respondent is substantial. In *DCT v Chemical Trustee (No 4)* Perram J observed at [24]:

> In my opinion, in this case there is a danger of dissipation. My reasoning for this conclusion begins with the observation that the amount of tax (and penalties and interest) is very large.

16 The applicant submitted that it does not rely on evidence of an intention by the respondents to dissipate assets, but that such evidence was not necessary: *Deputy Commissioner of Taxation v Hua Wang Bank Berhad* (2010) 273 ALR 194; [2010] FCA 1014 at [10]; *DCT v Chemical Trustee Ltd (No 4)* at [23].

17 The circumstances in this case include, inter alia, that:

(1) the Commissioner's audit concluded that the respondents' true income is far in excess of the income reported by them, such that they have substantially underreported their income across a sustained period, namely 12 consecutive income years, and consistent with the position in this respect, the respondents may take steps to avoid the payment of tax. The evidence points towards false, misleading or otherwise incomplete provision of information in relation to tax affairs demonstrated by under-declarations of income, false declarations in relation to offshore assets and to direct or indirect interest in foreign controlled companies and, in the case of the first respondent, in his interactions with the ATO. I note in this respect that evidence of apparent dishonesty in relation to tax affairs over a substantial period is capable of supporting the inference that the relevant taxpayer is not the sort of person who would, unless restrained, preserve assets intact so that they might be available to a judgment creditor: *Deputy*

Commissioner of Taxation v Ghaly [2016] FCA 707 at [30];

(2) the respondents have the means to dissipate their assets. In respect to the second respondent, a significant component of her asset base is in the form of real properties in Australia. In those circumstances, the risk is that the second respondent may be able to borrow against those properties in a manner which would frustrate the Commissioner. The applicant pointed out that while real property assets are not themselves relatively liquid in nature, steps may be taken by way of encumbering those assets such that they would be readily dissipated. This risk is particularly so where the respondents have existing relationships with multiple banks and a proven ability to borrow against the assets they own;

(3) it is clear from the affidavit evidence that the respondents have significant financial connections outside of the jurisdiction, particularly in China, and that they have connections to entities and associated entities with commercial activities and access to bank accounts overseas. In this regard the applicant relied on evidence of the transfer of substantial funds from H.R. (of which the first respondent is sole director and shareholder) and C.H. (an offshore entity associated with the respondents) to Australian bank accounts of the respondents, and the transfer of funds offshore by the respondents through their related entities. I note also that each of the respondents are signatories or have authority to operate bank accounts held in the name of others.

(4) the first respondent has recently taken steps to dissipate assets he previously owned by transferring to the second respondent the interest in several residential properties in April 2020, and the interest in J.P. Ltd in January 2020, for no consideration. The applicant pointed out that a legal representative for the respondent indicated in early April to the Commissioner that there had been a recent separation between the respondents and there was to be a transfer of property as a result, however noting that the Commissioner has not found evidence of any Family Court proceedings in that respect.

18 After addressing the Court on matters in accordance with the applicant's duty of candour the applicant submitted that in the circumstances (including those referred to above) the orders should be made, with it being submitted that the documents before the Court speak to "two individuals with complex financial back stories that have amassed quite a significant amount of financial interest in the course of their adult lives and have connections to a raft of bank accounts and related entities".

19 On the evidence I am satisfied that the freezing orders should be made.

Balance of convenience

20 I was satisfied that the balance of convenience favours the making of the freezing orders sought. There is a real risk of dissipation in the absence of such an order. The form of the orders proposed by the applicant have a number of protections. The position of each of the respondents is protected by the Commissioner's undertaking as to damages: *Deputy Commissioner of Taxation v Ghaly* [2016] FCA 707 at [35]. The proposed freezing order is limited, in terms, by reference to the size of the relevant taxation-related liabilities. The orders do not prohibit the respondents' ability to meet their living expenses and reasonable legal expenses. The quantum of the taxation related liabilities is considerable, especially when measured against the known assets of each of the respondents: see *Deputy Commissioner of Taxation v Greenfield Electrical Services Pty Ltd* [2016] FCA 653 at [13].

Conclusion

21 Accordingly, I made the orders sought by the applicant.

Belgium

Supreme Court (Cassation)

28 January 2021

Z.T. and V.B. v. K.T. and S.T.

Case number:
ECLI:BE:CASS:2021:ARR.20210128.1F.6

Notification of tax claims – Right of defence – Time period for appeal running from a date on which the addressee cannot yet have knowledge of the decision that is notified to him

Summary

The right to access to a court is disproportionately restricted if the addressee's period for appeal is running from the date of delivery of the decision to the postal services, that is to say, from a time when the addressee cannot yet have knowledge of the content of the decision, without it being possible to determine with certainty when the document to be served was presented at the address of the addressee or when the person concerned has actually received it.

N° C.20.0007.F

(…)

The right to access to a court, guaranteed by Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights, does not prevent Member States from making the bringing of actions subject to conditions, provided that they serve a legitimate aim and that there is a reasonable proportion between the conditions imposed and the objective pursued. Those conditions may not have the consequence of substantially impairing the right to bring an action.

Under Article 40 (1) of the Judicial Code, to those who do not have a known domicile, residence or address for service in Belgium, a copy of the document is to be sent by the bailiff by registered post, to their domicile or residence abroad and, in addition, by air if the point of destination is not in a neighbouring State, without prejudice to other means of transmission agreed between Belgium and the country of their domicile or residence. Service shall be deemed to have been effected by delivery of the document to the postal service against the receipt of the consignment in the manner provided for in this Article.

Under Article 57 of that code, unless the law provides otherwise, the period for lodging an appeal starts to run from the date of service of the judgment on person or at home, or, as the case may be, from the handing over or deposit of the copy as referred to in Articles 38 and 40.

By having the addressee's period for appeal running from the date of delivery of the decision to the postal services, that is to say, from a time when the addressee cannot yet have knowledge of the content of the decision, without it being possible to determine with certainty when the document to be served was presented at the address of the addressee or when the person concerned has actually received it, those provisions disproportionately restrict the right of that addressee to bring such an action.

(…)

Note

1. This case related to a dispute between private parties, but the judgment may also be relevant for cross-border notification of documents by tax authorities.

2. The dispute concerned the admissibility of an appeal against a judgement of a Belgian court of first instance. The Court of Appeal declared the (late) appeal admissible, as the persons lodging the appeal claimed that the judgement under appeal was never brought to their attention by way of service and that service by post never reached them.

3. Before the Supreme Court (Cassation), the applicants claimed that the appeal should have been declared inadmissible on the ground that it was out of time. In their view, the Belgian law did not violate Art. 6 (1) of the European Convention on Human Rights. Their plea was based on the following arguments:

1) Article 6.1 of the European Convention on Human Rights provides that: " In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a

democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

That provision enshrines, inter alia, the right of everyone to have a court hearing any dispute or question relating to his civil rights and obligations.

This right is known in the case-law of the Court of Justice as the right of access to a court and implies in particular the right to receive proper notification of judicial decisions, in particular in cases where an appeal must be lodged within a certain period of time.

However, that right may be subject to limitations, in particular as regards the conditions for the admissibility of an action.

It is simply important that the restrictions applied do not restrict the access to the individual in such a way or to such an extent that the substance of the right is undermined and pursues a legitimate aim, while respecting a reasonable relationship of proportionality between the means employed and the aim pursued.

Furthermore, under Article 40 of the Judicial Code: ' Where the bailiff has no known domicile, residence or address for service in Belgium, a copy of the document shall be sent by the bailiff by registered post to the post office, at their domicile or at their place of residence abroad (...) Service shall be deemed to have been effected by delivery of the document to the post office against the receipt of the dispatch in the manner provided for in this Article'.

Article 55 of the Judicial Code provides: 'Where the law provides that, in respect of a party who has no domicile, residence or address for service in Belgium, the time limits laid down for him shall be increased, that increase shall be:

1° fifteen days, when the party resides in a neighbouring country or in the United Kingdom of Great Britain;

2° thirty days, when residing in another European country;

3° eighty days, when residing in another part of the world',

and Article 57 (2) of that Code states that: 'In respect of persons who do not have a domicile, residence or address for service in Belgium and who are not served in person, the time limit shall run from the date of delivery of a copy of the writ at post or from service by the Public Prosecutor's Office to the Public Prosecutor's Office. Delivery of a copy of the writ of summons to the Public Prosecutor may be made to a secretary or prosecutor's office'.

Finally, Article 860 of the Judicial Code provides that: 'Whatever the procedural requirement that has been omitted or improperly completed, no procedural act may be declared void, nor may any infringement of a time-limit prescribed by the law be penalised if the penalty is not formally imposed by law.
Failure to comply with the time-limits for exercising a remedy shall, however, result in that remedy's being time-barred.
Other time limits shall be laid down only if the law so provides.'

The period for bringing an appeal shall be extended in favour of the party unable to bring the appeal during all or part of the period, which shall be suspended for as long as force majeure persists and shall begin to run again when the period ceases to exist.

2) In the present case, having found that:

- *the contested judgment was served, at the applicants' request, on 28 February 2014 by the bailiff;*
- *the defendants were domiciled in ...;*
- *the bailiff states that he has sent to the address of each of the parties concerned two copies of his writ, each copy separately by registered post with acknowledgement of receipt, one by air and the other by ordinary means, via the post office ... in Brussels;*
- *the receipts submitted attest to the lodging of an international registered letter;*
- *the defendants claim that the contested judgment was never brought to their attention under the terms of service or, in other words, that service by post never reached them;*
- *the defendants raised an appeal against the judgment under appeal by application lodged at the Registry of the court of appeal in Brussels on 6 March 2015;*

the judgment under appeal decides that:

'the appeal is admissible' because 'the application of Article 57(2) of the Judicial Code, read in conjunction with Article 40 (1) of the European Convention on Human Rights [on the basis of Article 6.1 of the European Convention on Human Rights] must be disapplied in so far as it lays down the starting point of the period for lodging an appeal in respect of persons who have no domicile, residence or domicile in Belgium, and on whom service is given on the basis of a copy of the document confirming the delivery at the post office,

on the basis of the following reasons:

- *under those provisions, the legislature imposes a disproportionate restriction on the right of appeal of addressees domiciled or resident abroad by fixing the starting point of the period for appeal as the date of dispatch of the postal item containing the decision imposing a burden on them or adversely affecting their rights or interests;*
- *in such a legislative configuration, the time limit for bringing proceedings necessarily begins to run at a time when the addressees of the document are not aware of the content of the pleading or of the service of the judicial decision;*
- *however, that information is decisive and entails a specific and severe infringement of their rights, since (i) the time limit for bringing an appeal is time-barred (Article 860 (2) of the Judicial Code), without a possibility to have this time period extended, except in cases of force majeure, even if there is an agreement of the parties (Article 50 (1) of the Code) and (ii) that sanction is a matter of public policy; the court must of its own motion verify whether the action was brought within the time-limit and order the sanction*

of its own motion;

- *the violation of Article 6.1 of the European Convention on Human Rights is all the more blatant since the ECHR has generally decided that, as regards access to a civil court, it is important that the rules concerning, inter alia, the possibilities of legal remedies and time limits are laid down clearly, but that they should also be brought to the attention of individuals as explicitly as possible so that they can make use of them in accordance with the law.'*

However, Articles 40, 55, 57 and 860 of the Judicial Code strike a balance between the respective interests of the parties to the dispute, in the light of the general principle of the right to a fair trial, in particular in so far as it includes the right of access to a court.

On the one hand, the disputes brought before the civil court relate to particular interests. It is legitimate for the person in favour of whom a judgment is handed down to be able to assert those interests and to avail himself of the rights deriving therefrom, as determined by the courts. To that end, this person should be able to request the enforcement of that judgment on reasonable terms.

On the other hand, the rules thus laid down in Articles 40, 55, 57 and 860 of the Judicial Code for the purpose of determining the starting point of the period for bringing an action against the judgment are accompanied by an increase in the period of eighty days for bringing such an action (if the other party is residing outside Europe).

Moreover, a unsuccessful party whose period for bringing an appeal begins or expires without his knowledge, even though he cannot be held liable for any failure in the postal services, could, despite the expiry of the statutory time limits, obtain an extension of the period for bringing an appeal if he is able to prove the existence of force majeure.

There is therefore a reasonable relationship of proportionality between the means employed (i.e. the setting of a clear starting point for the time-limit for bringing an action) and the aim pursued.

Therefore, in so far as it forms part of a system which strives to balance the respective interests of the parties, the rule laid down in Article 57 of the Judicial Code is in no way contrary to the right of defendants to have access to a court within the meaning of Article 6.1 of the European Convention on Human Rights.

3) Consequently, the judgment under appeal, which disregards the application of Article 57 (2) of the Judicial Code, is not legally justified in the light of Article 6 (1) of the European Convention on Human Rights, the general principle of the right to a fair trial, in so far as it includes the right of access to a court, as well as Articles 40, 55, 57 (2) and 860 of the Judicial Code.

4. In its judgement, the Supreme Court rejected the above arguments.

European Court of Human Rights

12 January 2021

L.B. v. Hungary

Case number: 36345/16

Deterrent measures – Art. 8 ECHR – Respect for private life – Publication of a tax debtors' identifying data, including home address, on tax authority website for failing to fulfil his tax obligations – Justification

Summary

The fact that a national tax authority publishes someone's personal data, including his name and home address, on the list of tax defaulters on its website does not automatically lead to a serious intrusion into that person's personal sphere. In the circumstances of the present case, it does not appear that making his personal data public placed a substantially greater burden on his private life than was necessary to further the State's legitimate interest of protecting the tax system and third parties.

Given the specific context in which the information at issue was published, the fact that the publication was designed to secure the availability and accessibility of information in the public interest, and the limited effect of the publication on the applicant's daily life, the Court considers that the publication fell within the respondent State's margin of appreciation.

It follows that there has been no violation of Article 8 of the European Convention on Human Rights.

In the case of L.B. v. Hungary,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Yonko Grozev, *President,*
Iulia Antoanella Motoc,
Branko Lubarda,
Carlo Ranzoni,
Georges Ravarani,
Jolien Schukking,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 36345/16) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr L.B. ("the applicant"), on 7 June 2016;

the decision to give notice of the application to the Hungarian Government ("the Government");

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 1 September and 25 November 2020,

Delivers the following judgment, which was adopted on that last-mentioned date:

INTRODUCTION

1. The application, lodged under Articles 8 and 13 of the Convention, concerns the publication of the applicant's personal data on the website of the National Tax and Customs Authority for his failure to fulfil his tax obligations.

THE FACTS

2. The applicant was born in 1966 and lives in Budapest. The applicant was represented by Mr D. B. Kiss, a lawyer practising in Budapest.

3. The Government were represented by their Agent at the Ministry of Justice, Mr Z. Tallódi.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 27 January 2016 the National Tax and Customs Authority (hereinafter "the Tax Authority") published the applicant's personal data, including his name and home address, on the list of tax defaulters on its website. This measure was provided for by section 55(3) of Act no. XCII of 2003 on Tax Administration, which required the Tax Authority to publish a list of taxpayers (*nagy összegű adóhiánnyal rendelkező adózók közzétételi listája*) in respect of whom a final decision of the Tax Authority had assessed that they had tax arrears (*adóhiány*) in excess of 10 million Hungarian forints (HUF) for the previous quarter; the published information included their names, addresses, tax identification numbers and the amount of tax arrears.

6. On 16 February 2016 an online media outlet produced an interactive map called "the national map of tax defaulters". The applicant's home address, along with the addresses of other tax defaulters, was indicated with a red dot, and if a person clicked on the dot the applicant's personal information (name and

home address) appeared, thus the data was available to all readers.

7. Subsequently, the applicant appeared on a list of "major tax evaders" (who owed a large amount of tax, *nagy összegű adótartozással rendelkező adózók közzétételi listája*) that was also made available on the Tax Authority's website pursuant to section 55(5) of Act no. XCII of 2003 on Tax Administration, which provided for the publication of a list of persons who had owed a tax debt (*adótartozás*) to the Tax Authority exceeding HUF 10 million for a period longer than 180 days.

8. As indicated by the case-file material, the applicant's data is no longer available on the Tax Authority's website.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

9. Act no. XCII of 2003 on Tax Administration (hereinafter "the Tax Administration Act"), as in force at the material time, in so far as relevant, provided as follows:

Section 55

"...

(3) Within 30 days following the end of the quarter, the tax authority shall publish on its website, on the list of major tax defaulters (*nagy összegű adóhiánnyal rendelkező adózók közzétételi listája*), the names, places of residence, commercial premises, places of business and tax identification numbers of taxpayers in respect of whom a final decision has assessed that they have tax arrears (*adóhiány*) in excess of 10 million Hungarian forints – in the case of private individuals – or in excess of 100 million Hungarian forints – in the case of other taxpayers – for the previous quarter, along with the amount of tax arrears and the legal consequences of the taxpayer failing to fulfil his or her payment obligation prescribed in the respective final decision by the deadline also prescribed in that decision. For the purposes of this subsection, a decision of the tax authority may not be considered final if the time limit for judicial review has not yet expired, or if court proceedings initiated by the taxpayer for a review of the decision have not been concluded.

...

(5) Within thirty days following the end of the quarter, and on a quarterly basis, the tax authority shall publish on its website, on the list of major tax evaders (who owe a large amount of tax, *nagy összegű adótartozásssal rendelkező adózók közzétételi listája*), the names (corporate names), home addresses, registered offices, places of business and tax identification numbers of those taxpayers who have owed tax debts (*adótartozás*) to the tax authority exceeding 100 million Hungarian forints in total, minus any overpayment, or 10 million Hungarian forints in total in the case of private individuals, for a period longer than 180 consecutive days.

..."

10. The explanatory note to section 55(5) of the Tax Administration Act contained the following:

"With a view to strengthening the clarity and reliability of economic relations and encouraging law-abiding conduct by the taxpayer, for years the tax authority has followed the practice of publishing the data of tax defaulters who have fallen behind in paying a significant amount of tax which has been established in a final decision. Since significant debts may originate not only from tax arrears revealed during a tax inspection, and ... regular non-payment may constitute extremely important information about a taxpayer's solvency for contractual parties, the Act also makes it possible to publish the data of taxpayers who have owed a large debt for a long time."

11. Act CXII of 2011 on the right to informational self-determination and freedom of information (hereinafter "the Data Protection Act"), as in force at the material time, provided as follows:

5. Legal basis for data processing
Section 5

"(1) Personal data may be processed under the following circumstances:

(a) when the data subject has given his or her consent; or

(b) when processing is ordered in the public interest by an Act of Parliament or by a local authority as authorised by an Act of Parliament (hereinafter referred to as 'mandatory processing').

..."

13. Rights of data subjects
Section 14

"The data subject may request from the data controller:

(a) information on his personal data which are being processed;

(b) the rectification of his personal data; and

(c) with the exception of mandatory processing, the erasure or blocking of his personal data."

Section 17

"...

(2) Personal data shall be erased if:

(a) it is processed unlawfully;

(b) the data subject requests this in accordance with subsection (c) of section 14;

(c) it is incomplete or inaccurate and cannot be lawfully rectified, provided that erasure is not prohibited by a statutory provision of an Act;

(d) the processing no longer has any purpose, or the legal time-limit for storage has expired; or

(e) a court or the Data Protection Authority orders erasure.

..."

12. Decision no. 26/2004 (VII.7) AB of the Constitutional Court concerned the publication of a list of taxpayers who failed to comply with certain registration requirements. It contained the following relevant passages:

"As to section 55(4) of the Tax Administration Act [Act no. XCII of 2003], it can be established that in order to protect persons who duly pay their taxes, this provision obliges tax authorities to continuously publish the data of those who, through their unlawful conduct, might cause damage to others who enter into business relations with them.

Persons who carry out activities without the necessary registration, or sham companies, cannot issue bills, invoices or any other replacement invoice that another taxpayer could make use of. Thus, through [the] publication [of data], the tax authority contributes to isolating those who are engaged in such activities, and to whitening the economy.

The rule which obliges tax authorities to publish the available identifying data of those taxpayers who do not fulfil their obligations related to registration does not in itself infringe the right to protection of personal data (Article 59 § 1 of the Constitution). Section 2(5) of Act no. LXIII of 1992 on the Protection of Personal Data and the Public Accessibility of Data of Public Interest (hereinafter "the Data Protection Act") provides that data subject to disclosure in the public interest means any data, other than public-interest data, that by law are to be published or disclosed for the benefit of the general public. Pursuant to section 3(4) of the Data Protection Act, an Act of Parliament can order the publication of personal data in the public interest in relation to a certain type of data."

13. A circular of the National Authority for Data Protection and Freedom of Information of 21 February 2012 reads as follows:

"The public interest is best served if the names of local persons who owe tax are published in the manner which is common in the local area, for example on the noticeboard of the mayor's office. The personal data of local persons who owe tax should be removed from websites, since their online publication renders them accessible around the globe, which goes beyond the aim of the legislature.

The National Authority for Data Protection and Freedom of Information has been informed that public notaries in a number of local governments have published or intend to publish in the near future the names and addresses of local private individuals who have local or vehicle tax debts and the amount of unpaid tax which they owe, grouped according to the type of tax owed. Act no. XCII of 2003 on the Rules of Taxation provided a legal basis for local tax authorities to publish on the tenth day following the date when a debt was due the names and addresses of persons whose local or vehicle tax debts exceeded 100 million Hungarian forints and the amount of unpaid tax which they owed; [such information] was to be published in a manner which was common in the local area. The Rules of Taxation Act prescribes the precondition for publishing the data, and how [such data should be published].

According to the President of the National Authority for Data Protection and Freedom of Information, the publication of the data on the website of the local government is not in compliance with the legislative provisions. With any publication in relation to the activities of the local tax authority, it has to be borne in mind that tax income in the budget of the local government concerns the community of the local electorate, and publication – according to the aim of the legislature – should only take place in the manner which is common in the local area. Publication in a manner which is common in the local area means that it is the community of the local electorate that is being informed about the published data, for example via the noticeboard of the mayor's office. The purpose of the legislative amendment was to influence the life of the local community. [Publication via the] Internet is not publication in a manner which is common in the local area, since data published on the World Wide Web can be

accessed around the world. Such publication goes beyond what the legislature intended in respect of the local community.

The President of the National Authority for Data Protection and Freedom of Information calls on local tax authorities to remove the data of private individuals from their websites and refrain from such publications in the future. Moreover, it calls public notaries' attention to the plausible solution of providing private individuals with a grace period for the repayment of their tax debts, if need be by means of a tax rollover."

14. For the relevant international legal material, see the Court's judgment in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* ([GC], no. 931/13, §§ 55, 59-62, 67-68, and 73-74, 27 June 2017).

15. The relevant parts of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter "the Data Protection Convention"), which entered into force on 1 February 1998 in respect of Hungary and is currently being updated, read as follows:

Article 2 – Definitions

"For the purposes of this Convention:

'personal data' means any information relating to an identified or identifiable individual ('data subject');

..."

Article 5 – Quality of data

"Personal data undergoing automatic processing shall be:

a. obtained and processed fairly and lawfully;

b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

c. adequate, relevant and not excessive in relation to the purposes for which they are stored;

d. accurate and, where necessary, kept up to date;

e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored."

Article 9 – Exceptions and restrictions

"1. No exception to the provisions of Articles 5, 6 and 8 of this Convention shall be allowed except within the limits defined in this article.

2. Derogation from the provisions of Articles 5, 6 and 8 of this Convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:

a. protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences;

b. protecting the data subject or the rights and freedoms of others."

THE LAW

I. PRELIMINARY REMARKS

16. The Court notes at the outset that the case at issue does not concern the republication of the applicant's personal data by an online news outlet in the form of a "tax defaulters' map" (see paragraph 6 above), or the subsequent accessibility of the applicant's personal data through links in the list of results displayed by online search engines, but merely the publication of such data on the website of the Tax Authority. The Court acknowledges that it is primarily because of the subsequent republication of the tax defaulters' list and because of search engines that the information on the applicant could easily be found by Internet users. Nevertheless, the Tax Authority's actions and its responsibility as regards the initial publication of the information are essentially different from the dissemination of that information by online media outlets or search engines, and this latter aspect (the wider dissemination of that information) does not form part of the present case.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

17. The applicant complained that the publication of his personal data on the Tax Authority's website for his failure to comply with his tax obligations had infringed his right to private life as provided for in Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. *Applicability of Article 8*

18. Although this has not been disputed by the Government, the Court considers it necessary to address whether, in the circumstances of the present case, the right to privacy under Article 8 of the Convention is engaged in connection with the publication of the applicant's name, home address and tax identification number on the tax defaulters' list and the list of major tax evaders.

19. The Court firstly reiterates that in the particular context of data protection, it has on a number of occasions referred to the Data Protection Convention (see, for example, *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II). It must be held that within the meaning of Article 2 of the Data Protection Convention, an applicant's name, home address and tax identification number – as information relating to an identified or identifiable natural person – constitute "personal data" (see paragraph 15 above).

20. In determining whether the personal data published by the Tax Authority related to the applicant's enjoyment of his right to respect for private life, the Court will have due regard to the specific context (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 67, ECHR 2008).

21. The Court also reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition (ibid., § 66, and *Vukota-Bojić v. Switzerland*, no. 61838/10, § 52, 18 October 2016). It is well established in the Court's case-law that private life also includes activities of a professional or business nature (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B) or the right to live privately, away from unwanted attention (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 95, ECHR 2003 IX (extracts)). The concept can embrace multiple aspects of a person's identity, including a person's name. It also covers personal information which individuals can legitimately expect should not be published without their consent (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012).

22. It follows from well-established case-law that where there has been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private life considerations arise. The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article. Article 8 of the Convention thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged (see *SatakunnanMarkkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, §§ 136-37, 27 June 2017, with further references). As the Court held in that judgment, providing details of the taxable earned and unearned income of individuals, as well as their taxable net assets, clearly concerned their private life (ibid. § 138).

23. The Court notes that in the present case the Tax Authority published personal data in connection with the applicant's failure to contribute to public revenue, which could arguably be considered conduct that may be recorded or reported in a public manner (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 57, ECHR 2001-IX). Nonetheless, in the light of the consideration that such data provided information on the applicant's economic situation, and on the basis of the Court's case-law under Article 8, the Court considers that the data published by the Tax Authority related to the applicant's private life (see *Lundvall v. Sweden*, no. 10473/83, Commission decision of 1 December 1985, Decisions and Reports (DR) 45, p. 131). In this context, it is of no relevance whether the published data concerned unpaid tax on activities of a professional nature.

24. Furthermore, it has not been disputed that the measure involved the publication of the applicant's home address, which, in line with the Court's case-law, constitutes personal data and personal information entailing the protection of the right to private life (see *Alkaya v. Turkey*, no. 42811/06, § 30, 9 October 2012).

25. Having regard to the foregoing, the Court finds that Article 8 is applicable in the present case.

2. *The Government's objection regarding non-exhaustion of domestic remedies*

26. The Government argued that the applicant could have requested from the data controller the erasure of

his personal data under section 14(c) of the Data Protection Act (see paragraph 11 above). In their view, in the event of his request being refused, he could have challenged the decision of the data controller before the courts or before the Data Protection Authority. They concluded by stating that the applicant had failed to exhaust the domestic remedies available under domestic law.

27. The applicant submitted that the Government had failed to show that a request based on section 14(c) of the Data Protection Act would have been an effective remedy. He argued that the erasure of personal data on the basis of this provision could only be requested if processing had been unlawful, whereas in his case the publication of his personal data had been prescribed by the Tax Administration Act. Thus, the legal avenue suggested by the Government could not remedy his situation.

28. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus exempting States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic legislative system provides an effective remedy in respect of an alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available both in theory and practice at the relevant time, that is to say that the remedy was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Tiba v. Romania*, no. 36188/09, § 21, 13 December 2016, with further references).

29. Turning to the present case, the Court notes that section 17 of the Data Protection Act, as in force at the material time, provided for the erasure of personal data upon a data subject lodging a request under section 14(c) of the same Act. In terms of section 14(c), a request could be made in relation to data which were not subject to mandatory processing. Mandatory processing was defined in section 5(1)(b) as processing ordered in the public interest by an Act of Parliament or by a local authority exercising powers conferred upon it by an Act of Parliament (see paragraph 11 above).

30. Since the publication of the applicant's personal data was based on section 55(3) and (5) of the Tax Administration Act (see paragraph 9 above) and was thus mandatory, a request for erasure was not applicable in his situation. Under the Data Protection Act, there was no prospect of the applicant having his personal data deleted from the tax defaulters' list. The Court also notes that the Government have not supplied any comparable examples from domestic jurisprudence suggesting that a person in the applicant's situation would have had any prospect of success in challenging the publication of personal data under section 14(c) of the Data Protection Act. The Court therefore does not accept that it would have served any purpose for the applicant to lodge a request for the erasure of his personal data.

31. The Court therefore finds that the remedy relied on by the Government cannot be regarded as effective in the particular circumstances of the applicant's case. In conclusion, the Court dismisses the Government's objection as to the applicant's failure to exhaust domestic remedies.

32. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' observations

(a) The applicant

33. In the applicant's submission, the publication of his name on the tax defaulters' list could not be regarded as necessary in a democratic society.

34. The applicant submitted that the main reason behind the publication of his personal data on the tax defaulters' list had been public shaming, which could not be held to be a legitimate aim under Article 8 of the Convention. He made the point that listing tax defaulters in that way deprived them of their dignity. He did not dispute that the stated aim of the legislature had been to deter people from avoiding their tax liability, but he argued that the means chosen was clearly unfit for attaining that objective. Even though his data had become known to the public, it was unlikely that third parties could influence his compliance with the tax regime.

35. As regards the aim of protecting business partners, the applicant argued that failure to pay tax

did not necessarily correspond to unreliability in business. He thus contested the Government's argument that such a list was an appropriate method of informing business partners about his non-compliance with tax regulations.

36. Concerning the proportionality of the measure, the applicant submitted that even accepting that the interference with his right to privacy had served a legitimate aim, it had clearly been disproportionate. He invited the Court to have regard to the fact that his personal data had been published online, which had made the data at issue more accessible. Owing to the fact that the publication had appeared on the Tax Authority's website, his personal data had been made accessible around the world to third parties for whom such information had been completely irrelevant. He referred to the circular of the President of the National Authority for Data Protection and Freedom of Information (see paragraph 13 above) in arguing that the method chosen to publish tax defaulters' personal data should correspond to the group of people for whom such information was relevant.

37. Lastly, he argued that even if the information had subsequently been removed from the website of the Tax Authority, it had still been accessible to the public through the list of results displayed by online search engines.

(b) The Government

38. The Government submitted that the interference had been prescribed by law, namely section 55(3) and (5) of the Tax Administration Act.

39. They argued that the interference had pursued the legitimate aim of protecting the economic well-being of the country and the rights of others, that is, the interests of tax defaulters' business partners. They pointed out that the aim of the regulation was to secure the State funds necessary to carry out State tasks, and to enforce the principle of equal burden sharing. It also intended to inform actual and potential business partners about the liquidity of other economic actors. Therefore, it contributed to the proper functioning of the market economy.

40. The Government emphasised that the measure was proportionate to those stated objectives, since it only concerned taxpayers whose tax debts exceeded HUF 10 million (approximately 30,000 euros), and only if those tax debts had been established by a final decision. In addition, the personal data of the tax defaulters were immediately deleted once they had settled the debts which they owed to the revenue.

41. In the Government's opinion, the measure was also proportionate, since publishing information on tax defaulters on the Internet was the most appropriate means of achieving the objective pursued, particularly in relation to providing easily accessible information for potential business partners. As regards the applicant's argument that the online publication of the tax defaulters' list had led to the republication of his personal data by online media outlets and Internet search engines, the Government pointed out that the applicant could have asked those data processors to delete his personal data or remove the relevant links.

2. The Court's assessment

(a) Whether there was an interference

42. It is established case-law that the release or use by a public authority of information relating to a person's private life amounts to an interference with Article 8 § 1 of the Convention (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116, and *Rotaru v. Romania* [GC], no. 28341/95, § 46, ECHR 2000-V).

43. In the present case, because the information in question became available to third parties, the publication on the Tax Authority's website of data naming the applicant as a tax defaulter (see paragraph 5 above) and subsequently a major tax evader (see paragraph 7 above), and detailing the precise amount of his tax arrears and tax debts, his tax identification number and his home address, constituted an interference with his private life within the meaning of Article 8. In examining whether the interference was justified in the light of paragraph 2 of Article 8, the Court has to assess whether the authorities acted "in accordance with the law", pursuant to one or more legitimate aims, and whether the impugned measure was "necessary in a democratic society" (see *Šantare and Labazņikovs v. Latvia*, no. 34148/07, § 52, 31 March 2016).

(b) In accordance with the law

44. The applicant did not deny that the contested publication of information had had a legal basis in section 55(3) and (5) of the Tax Administration Act (see paragraph 11 above), and the Court sees no reason to call this into question.

(c) Legitimate aim

45. According to the Government, the aim underpinning the Hungarian legislative policy of making the taxation data of major tax defaulters available was the need to protect the economic well-being of the country and the rights of others (see paragraph 39 above). The applicant contested that argument, and was of the view that the aim of the legislation was public shaming (see paragraph 34 above).

46. The Court is ready to accept that the impugned measures aimed to improve discipline as regards tax payment, and thereby protect the economic well-being of the country. Furthermore, it is apparent from the explanatory note of the Tax Act that the aim of the disclosure provided for by section 55(5) is to protect the particular interests of third parties in relation to persons who owe tax (see paragraph 10 above) by providing them with an insight into those persons' financial situation. It is therefore legitimate for the State to invoke the need to protect the rights and freedoms of others within the meaning of the second paragraph of Article 8.

(d) Necessary in a democratic society

(i) General principles

47. An interference will be considered "necessary in a democratic society" for the achievement of a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see *S. and Marper*, cited above, § 101).

48. The Court's case-law indicates that in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation (see *A.-M.V. v. Finland*, no. 53251/13, § 82, 23 March 2017). The central question as regards such measures is not whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (see, *mutatis mutandis, Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 110, ECHR 2013 (extracts)). Other factors to be taken into account in assessing the compatibility of a legislative scheme involving the imposition of restrictive measures in the absence of an individualised assessment of an individual's conduct is the severity of the measure involved and whether the legislative scheme is sufficiently narrowly tailored to address the pressing social need it seeks to address in a proportionate manner (see *Polyakh and Others v. Ukraine*, nos. 58812/15 and 4 others, § 293, 17 October 2019, with further references). The application of the general measure to the facts of the case remains illustrative of its impact in practice, and is thus material to its proportionality (see, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 36, Series A no. 98).

49. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 179, 15 November 2016). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see, among other authorities, *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI, and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V). There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights (see *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011).

50. On the other hand, the Court also has regard to the essential role played by personal data protection in safeguarding the right to respect for private life as guaranteed by Article 8 (see *G.S.B. v. Switzerland*, no. 28601/11, § 90, 22 December 2015). The Court's case-law indicates that the protection afforded to personal data depends on a number of factors, including the nature of the relevant Convention right, its importance to the person in question, and the nature and purpose of the interference. According to the judgment in *S. and Marper* (cited above, § 102), the margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see *S.H. and Others*, cited above, § 94).

(ii) Application to the present case

51. In the present case, the Court must consider whether the State can be said to have struck a fair balance between the applicant's interest in protecting his right to privacy, and the interest of the community as a whole and third parties, as invoked by the Government.

52. In its assessment, the Court will have due regard to the specific context in which the information at issue was made public. The Court finds it important that the impugned measure was implemented in the framework of the State's general tax policy. It is relevant to note at this point the instrumental role of taxes in financing State apparatus, but also in implementing the economic and social policy of the State in a broader sense. The Court acknowledges the difficulties in establishing whether the publication of tax defaulters' data actually tackled tax evasion and revenue losses. The Government argued that it did (see paragraph 39 above), and the applicant disagreed (see paragraph 34 above). The Court does not find it unreasonable that the State considers it necessary to protect its general economic interest in collecting public revenue by means of public scrutiny aimed at deterring persons from defaulting on their tax obligations.

53. In addition to the economic interests of the country as a whole in a functioning tax system, the Government also referred to the protection of the economic interests of private individuals, that is, potential business partners (see paragraph 39 above). The Court sees no reason to call into question the idea that any person wishing to establish economic relations with others has a specific interest in obtaining information relating to another person's compliance with his or her tax obligations, and ultimately his or her suitability to do business with, particularly when tax avoidance persists for an extended period of time. Since access to such information also has an impact on fair trading and the functioning of the economy, the Court is ready to accept that the disclosure of the list of persons who owed a large amount of tax had an information value for the public on a matter of general interest. Such publication did not concern a purely private matter (see, *mutatis mutandis*, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 194, 8 November 2016) or an issue merely satisfying public curiosity (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 110, ECHR 2012).

54. Based on the above, and bearing in mind the margin of appreciation allowed to States as regards general measures of economic and social strategy, the Court finds that the legislature's choice to make public the identity of persons who fail to respect their tax obligations, in order to improve payment discipline and protect the business interests of third parties, and thereby contribute to the general economy, is not manifestly without reasonable foundation (see the case-law quoted in paragraph 49 above).

55. However, the applicant also took issue with the rationale underlying the legislative choices made as regards the scope of the personal data published and the manner of publication on the Internet. The question thus remains as to whether the impact of the publication in the present case outweighed the above-described justifications for the general measure. In this connection, the Court must have regard to the essential role played by personal data protection in safeguarding the right to respect for private life as guaranteed by Article 8 and the fundamental principles of data protection (see paragraphs 15 and 50 above).

56. The Court notes at the outset that the Tax Administration Act, which was the basis of the impugned measure, provided for the publication of the personal details of major tax defaulters and major tax evaders. Publication under section 55(3) and section 55(5) of the Tax Administration Act was only authorised in respect of those private individuals whose tax arrears and tax debts exceeded HUF 10 million, which, given the economic realities of contemporary Hungary, cannot be held to be an insignificant amount (see paragraph 9 above). Furthermore, the publication of the personal data of major tax evaders under section 55(5) of the Tax Administration Act was subject to the condition that the affected persons had failed to fulfil their tax obligations over an extended period of time, namely 180 days. The legislation thus drew a distinction between taxpayers, based on relevant criteria. The Court therefore accepts that the measure was circumscribed to address the risk of distortion of the tax system, and the legislature limited any negative effect of such publication to those whose conduct was the most detrimental to revenue (see the case-law quoted in paragraph 48 above).

57. The Court also observes that, as alleged by the Government (see paragraph 40 above) and not contested by the applicant, the personal data of a person who owed a large amount of tax were removed from the Tax Authority's website and the information in question was no longer made available to the general public once the person concerned had paid his or her due taxes. Consequently, the Court is satisfied that the identification of data subjects on the Tax Authority's website was possible for no longer than was necessary for the purposes of publication.

58. The Court notes that the disputed publication concerned the applicant's name, home address, tax identification number and the amount of unpaid tax which he owed. While these data cannot be considered intimate details linked to the applicant's identity, they still provided quite comprehensive information about him. Furthermore, despite the fact that the applicant's home address might have been publicly available in any event (for example, from telephone directories), his interest in the protection of his right to respect for his private life was still engaged by the disclosure of his home address along with the other information. Furthermore, it is important to emphasise at this point that the publication of personal data, including a home address, can have significant effects or even serious repercussions on a person's private life (see, *mutatis mutandis*, *Alkaya*, cited above, §§ 29 and 39).

59. In the circumstances of the present case, the Court accepts that the list of tax defaulters and tax evaders would have been pointless if it had not allowed for the identification of the taxpayers in question. While it is true that a name is one of the most common means of identifying someone, in the present context, it is clear that the communication of a taxpayer's first name and surname only would not have made it possible to distinguish him or her from other individuals. The publication of those personal data would not have been sufficient to fulfil the publication's purpose of facilitating public scrutiny of tax evasion. Moreover, a list restricted to taxpayers' names would have been likely to provide inaccurate information and entail ramifications for persons bearing the same name.

60. Therefore, the Court does not call into question the legislature's view that, in the circumstances, a combination of identifiers was necessary to ensure the accuracy and efficacy of the scheme. The legislature cannot be criticised for the fact that in order to provide accurate information on tax evaders, it chose a person's home address as additional identifying information. Besides, the applicant did not suggest, and the Court does not find, that the publication of any identifying data other than those at issue would have been manifestly less onerous, or would have constituted a less intrusive interference with his right to respect for his private life.

61. The Court further notes the applicant's argument that the information about him was published on the Internet and made available to an unnecessarily large audience, potentially worldwide (see paragraph 36 above).

62. It is important to emphasise at this point the Court's well-established case-law holding that the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see, *inter alia*, *Egill Einarsson v. Iceland*, no. 24703/15, § 46, 7 November 2017).

63. In the present case, it must be acknowledged that the publication of information concerning unpaid taxes subjects a taxpayer to public scrutiny, scrutiny which increases in proportion to the extent of the publicity. Uploading the applicant's personal data to the Tax Authority's website made those data accessible to anyone who connected to the Internet, including people in another country.

64. On the other hand, the Court finds force in the Government's argument that widespread public access to the data concerned was necessary for the efficacy of the scheme (see paragraph 41 above). While recognising the importance of the rights of a person who has been the subject of content available on the Internet, these rights must also be balanced against the public's right to be informed (see *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, § 104, 28 June 2018). In the present case, the purpose and the principal effect of publication were to inform the public, and the main reason for making such data available on the Internet was to make the information easily available and accessible to those concerned, irrespective of their place of residence.

65. The Court finds that the applicant's reliance in this regard on the circular issued by the National Authority for Data Protection and Freedom of Information (see paragraph 36 above) is to no avail. That document was issued in respect of persons who owned unpaid local tax to the local government, and was of relevance to only the local community (see paragraph 13 above). However, in the present case, the publication was intended to provide the general public with an insight into the state of tax defaulters' debt. It corresponded to everyone's interest in knowing who owed money to the central revenue and the whole community.

66. It is also clear that the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages (see *Savva Terentyev v. Russia*, no. 10692/09, § 79, 28 August 2018; contrast *Delfi AS v. Estonia* [GC], no. 64569/09, § 117, ECHR 2015).

67. In the present case, the fact alone that access to the list was not restricted did not necessarily mean that the list drew much public attention: amongst other things, an individual seeking the information had to take the initial step of going to the Tax Authority's website, proceeding to the tax defaulters' or tax evaders' list, and then looking up the desired information.

68. Furthermore, the Court has doubts as to whether the list of tax defaulters and tax evaders, appearing in Hungarian on the website of the Tax Authority, would have attracted public attention – worldwide – from persons other than those concerned. On the contrary, more than any other form of publication, publication by means of a portal designated for tax matters ensured that such information was distributed in a manner reasonably calculated to reach those with a particular interest in it, while avoiding disclosure to those who had no such interest.

69. The Court also finds it relevant that the Tax Authority's website did not provide the public with a means of shaming the applicant, for example, a way of posting comments underneath the lists in question.

70. Finally, the Court cannot but note that although the applicant referred to the general public-shaming effect of appearing on the list (see paragraph 34 above), his submissions contained no evidence or reference to personal circumstances indicating that the publication of his personal data on the tax defaulters' and tax evaders' list had led to any concrete repercussions on his private life. In the Court's view, in the circumstances of the present case, making the information in question public could not be considered a serious intrusion into the applicant's personal sphere. It does not appear that making his personal data public placed a substantially greater burden on his private life than was necessary to further the State's legitimate interest.

71. Given the specific context in which the information at issue was published, the fact that the publication was designed to secure the availability and accessibility of information in the public interest, and the limited effect of the publication on the applicant's daily life, the Court considers that the publication fell within the respondent State's margin of appreciation.

72. It follows that there has been no violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

73. The applicant alleged that no effective remedy was available in domestic law enabling him to assert before the domestic courts his complaint concerning the publication of his personal data. He relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

74. The Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 94, ECHR 2013 (extracts)).

75. In essence, the applicant's complaint related to provisions in the applicable legal regime providing for the publication of personal data, namely section 55(3) and (5) of the Tax Administration Act (see paragraph 9 above). It cannot be considered that Article 13 of the Convention required the provision of a remedy to challenge that regime.

76. Consequently, this complaint is manifestly ill-founded and as such must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning Article 8 of the Convention admissible, and the remainder of the application inadmissible;

2. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 12 January 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Ravarani and Schukking is annexed to this judgment.

JOINT DISSENTING OPINION OF
JUDGES RAVARANI AND SCHUKKING

With regret, we cannot agree with the majority's finding that there has been no violation of Article 8 of the Convention in the present case.

1. ***Points of agreement.*** We actually agree on many points with the majority. We agree that Article 8 is applicable to the publishing of the applicant's home address on the Government's website as it "constitutes personal data and personal information entailing the protection of the right to private life" (see paragraph 24 of the judgment). We also subscribe to the

statement that "because the information in question became available to third parties, the publication on the Tax Authority's website of data naming the applicant as a tax defaulter ... and subsequently a major tax evader ..., and detailing the precise amount of his tax arrears and tax debts, his tax identification number and his home address, constituted an interference with his private life within the meaning of Article 8" (see paragraph 43 of the judgment).

2. Whereas we have serious reservations as to the legitimacy of one of the aims of the publication, namely – under cover of protecting the well-being of the country and equal burden sharing, which are obviously legitimate purposes (see paragraphs 39 and 45 of the judgment) – to deter people from defaulting on their tax obligations by means of public scrutiny, which we consider to be a kind of modern pillory (see paragraph 52 *in fine* of the judgment), we do not challenge the legitimacy of the purpose of protecting the interests of third parties, more precisely potential business partners who may have a legitimate aim in being informed about the liquidity of potential business partners (see paragraphs 39 and 45-46 of the judgment).

3. Lastly, we do not dispute that when balancing the public and private interests at stake, the State could not be blamed for publicising to a certain extent, within its general tax policy, the identity of persons who failed to respect their tax obligations (see paragraph 54 of the judgment). Thus, we ultimately do not challenge the Hungarian State's choice to make public, for a certain period (until final payment of the tax debts and arrears), the identity of major tax defaulters (owing more than 10 million forints).

4. ***The point of disagreement.*** The only – but weighty – point where we disagree is on the scope of the personal data published and on the manner of publication. While we can go along with the publication of those tax defaulters' names, tax identification numbers and amount of unpaid taxes, we are unable to follow the majority in their approval of the publication, on the Government's website, of the home address of these persons. Our disagreement is thus twofold: we consider it unnecessary to have published the applicant's home address and, moreover and even more importantly, to have published it on the internet.

5. ***Publication of the applicant's home address.*** The majority agree that the publication of personal data, including a home address, "can have significant effects or even serious repercussions on a person's private life" (see paragraph 58 of the judgment). They accept, however, that such publication was the only means to distinguish him from other tax payers and to avoid providing inaccurate information and entailing ramifications for persons bearing the same name (see paragraph 59 of the judgment).

6. There we disagree. As to the – doubtful – deterrent effect, one should show some realism. Where people do not even know an individual, they will not "identify" him or her merely by the inclusion of their home address. However, if they are known – publicly or individually – the name in itself is sufficient to identify who is being dealt with. It is true that there are homonyms and perhaps more in one country than in another. But here too, the same reasoning as developed above applies: those who are really interested will easily find out who is actually being targeted.

7. As to the – admissible – purpose of allowing potential business partners to better assess the financial morality of future trading parties, the former, once informed of the latter's names, will have no difficulty in identifying them precisely, through further research or simply via the – published – tax identification number.

8. With regard to the last argument, drawn from the fact that home addresses are publicly available from, for example, telephone directories, this argument can easily be turned around: if they are so easily accessible, there is no need to publish them elsewhere.

9. In sum, the publication of his home address was in our view not needed to identify the applicant and thus to achieve the objective of the law. Its publication therefore does not sit well with the principle of "data minimisation".

10. ***Publication on the internet.*** What ultimately triggered our dissent was the fact that the personal data, especially the home address, were published on the internet. There is no need to paraphrase the immense multiplicative effect of any piece of information published on the internet, combined with search engines. The Court has emphasised in its case-law, as the majority themselves recognise (see paragraph 62 of the judgment), that the risk of harm posed by content and communications on the internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see, *inter alia*, *Egill Einarsson v. Iceland*, no. 24703/15, § 46, 7 November 2017).

11. ***Publication of the personal data on the Government's website.*** First, the publication on the Government's website is in itself problematic. We are far from convinced that such publication was necessary in order to make the information easily available and accessible to those concerned, irrespective of their place of residence. What is particularly problematic is the reference to "those concerned" (see paragraph 64 of the judgment)

because the judgment does not specify who is really supposed to be interested in the information provided. If it is to ensure greater impact for the "shaming" effect, beyond the fact that this is a largely unavowable goal (paragraph 69 of the judgment discloses the majority's uneasiness with that concept), it does not even achieve this aim efficiently, because except for people who are known nationwide – and who are identifiable by their names alone – people's addresses are, in the specific circumstances of pointing at tax defaulters, only relevant in a restricted geographical area where people can and want to put a face to a certain name. If the aim is to provide nationwide or even worldwide coverage of the information to those who might be interested in carrying out business with them, the latter have at their disposal many other efficient means to identify those who are unworthy of trust and certainly, as stated before, identifying such individuals on the Government's website by their name and tax identification number would have sufficed to achieve such objective. Ultimately the majority themselves acknowledge "the difficulties in establishing whether the publication of tax defaulters' data actually tackled tax evasion and revenue losses" (see paragraph 52 of the judgment). So much for necessity.

12. ***Republication of the personal data by third parties.*** Secondly, it is in our view inaccurate to hold that the scope of the case excludes any potential republication of the applicant's personal data by third parties and that the responsibility of the tax authorities is limited to the initial publication (see paragraph 16 of the judgment). The truth is that it is perfectly foreseeable and even probable that such precious "gossip" will interest a certain public and will therefore find a publisher or disseminator who will ensure wide and popular coverage. In fact, this concern is far from a theoretical one, as less than a month after the appearance of the impugned information on the Governments website an online media outlet produced an interactive map called "the national map of tax defaulters", on which the applicant's home address, along with the addresses of other tax defaulters, was indicated with a red dot, and if a person clicked on the dot the applicant's personal information – name and home address – appeared (see paragraph 6 of the judgment). The Tax Authority certainly could and should have foreseen this excessive coverage and it bears the responsibility, not for the actual republishing of the data, but for having enabled or even fostered it. In this context, it is difficult to follow the majority's reasoning in asserting that "the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages" (see paragraph 66 of the judgment) and that it was doubtful, given the need to take the initial step to go on the Tax Authority's website, that the list drew much attention (see paragraph 67 of the judgment). This statement, as well as the assertion that there are doubts as to whether the list of tax evaders appearing on the Tax Authority's website would have attracted worldwide public attention from persons other than those concerned, is contradicted by the facts of the case and contradictory in itself: if, by nature, the information does not attract much attention, then its shaming effect – put forward by the Government and acknowledged by the majority – is not attained and in that case, it is all the less necessary to provide the "interested" public with the tax defaulters' home addresses.

13. It appears sanctimonious to state that the applicant had not demonstrated concrete repercussions on his private life. Such evidence is extremely difficult to adduce and it usually remains in the moral sphere, where the concrete impact of such a measure is simply impossible to measure objectively. This could have been dealt with easily via the amount of compensation awarded in respect of non-pecuniary damage; it would also have been possible to find a violation of Article 8 and to consider this finding sufficient in terms of compensation.

14. Furthermore, in the context of the republishing of the impugned personal data, the deletion of the data of the tax defaulters who had paid their outstanding tax debts from the Tax Authority's website (see paragraph 40 of the judgment) is, in our view, totally irrelevant. As a matter of fact, there is no "right to be forgotten" once one has been caught in the "web of the internet".

15. ***Potential serious consequences.*** Finally, publishing an individual's home address on the internet can trigger dramatic consequences. The case of *Alkaya v. Turkey* (no. 42811/06, 9 October 2012) is a very telling example. If the home addresses of defaulters who have not paid a substantial amount of taxes, approximatively 30,000 euros, are made public, one does not need an overactive imagination to suppose that those who appear on that list will be considered wealthy and will run an increased risk of being the victims of burglary.

16. ***Conclusion.*** To conclude, it is the lack of necessity in the means used to attain the partially doubtful purpose, and the very serious – and potentially dangerous – intrusion into the applicant's private life, that lead us to conclude that the domestic authorities, and ultimately the majority, conducted an unsatisfactory balancing exercise between the respective interests at stake. We have reached the conclusion that the proportionality assessment should have led to a finding of a violation of Article 8 of the Convention.

European Court of Human Rights

6 October 2020

Agapov v. Russia

Case number: 52464/15

► *1. Art. 6 § 2 European Convention Human Rights – Presumption of innocence – Non-payment of taxes by a company – Investigating office confirming that the managing director had evaded payment of the tax due by the company, but not instituting criminal proceedings because the criminal prosecution was time-barred – Civil proceedings against this person for the non-payment of the tax – Civil court holding that director liable for the company's debt – Civil court decision based on the investigator's finding that this person had evaded payment of the tax – Imputation of criminal guilt, inconsistent with the right to presumption of innocence.*

► *2. Art. 1 of the First Protocol – Peaceful enjoyment of possessions – Court concluding that the director was liable for the damage resulting from his company's failure to pay taxes, merely by referring to the investigator's finding, without examining any evidence or making independent findings of its own under civil law that this person was responsible for the non-payment of the company's tax debt – Court not referring to any laws allowing them to pierce the coporate veil – Arbitrary decision*

Summary

► *1. There is a violation of the right to be presumed innocent (Art. 6 § 2 of the European Convention of Human Rights) if a civil court holds the managing director of a company liable for the non-payment of the company's tax debt, stating that this director has committed illegal acts with a criminal intent to evade the payment of this tax debt, where that decision is only based on a finding of an investigator and if that person was never tried or convicted of that offence by a court competent to determine questions of guilt under criminal law.*

► *2. There is a violation of the requirement of lawfulness under Art. 1 of the first Protocol if the national court concludes that the managing director is liable for the damage resulting from his company's failure to pay taxes, merely be referring to the investigator's finding that he had evaded payment of taxes – although this investigation was not followed by criminal proceedings – without examining any evidence or making independent findings of its own under civil law that this person was responsible for the non-payment, and without referring to any laws that would have allowed that court to pierce the corporate veil.*

INTRODUCTION

77. The case concerns the applicant's complaints under Article 6 § 2 of the Convention (presumption of innocence) and Article 1 of Protocol No. 1 (the applicant's obligation to pay damages as a consequence of the failure to pay taxes by a legal entity of which he was the sole executive body).

THE FACTS

78. The applicant was born in 1967 and lives in Krasnodar. He was represented by Mr A. Zekoshev, a lawyer practising in Krasnodar.

(...)

79. The facts of the case, as submitted by the parties, may be summarised as follows.

I. Tax proceedings against the Limited Liability company

80. From 1 January 2011 the applicant was the managing director of Argo-RusCom Limited Liablity Company ("the LLC").

81. On an unspecified date in 2013, the inter-district tax inspectorate conducted an audit of the LLC. According to the audit report, in the years 2010 and 2011 the LLC had evaded payment of value-added tax (VAT) in breach of the Tax Code. In particular, the tax inspectorate established that the LLC had failed to submit in good time the documents justifying the application of zero rate VAT to its transactions. The LLC's allegations that the relevant documents had been stolen were dismissed as unsubstantiated. The inspectorate recalculated the taxes owed by the LLC and ordered that the latter pay the tax arrears, the interest on that amount and a penalty totalling 14,948,778.61 Russian roubles (RUB). The case was referred to the commercial courts for consideration. The commercial courts confirmed the lawfulness of the inspectorate's claims. The final decision on the matter was taken by the North Caucasus Circuit Commercial Court on 3 June 2015.

82. The LLC was unable to pay the amount indicated and on 3 December 2013 the Krasnodar Regional

Commercial Court declared the LLC insolvent and opened bankruptcy proceedings in respect of it.

83. On 2 June 2015 the Regional Commercial Court ordered the company's liquidation.

84. On 16 July 2015 the LLC was deregistered.

II. Criminal proceedings against the applicant

85. On an unspecified date the inter-district investigative committee opened an inquiry concerning the tax evasion allegedly committed by the applicant.

86. The investigator with the investigative committee studied the audit report prepared by the tax inspectorate and repeatedly questioned the applicant and the LLC's chief accountant.

87. On 2 June 2014 an investigator ruled that the audit report of the tax inspectorate confirmed that the applicant had evaded payment of VAT owed by the LLC. The investigator refused, however, to institute criminal proceedings, noting that the events in question had taken place more than two years before and that the criminal prosecution was time-barred. The applicant did not appeal.

III. Civil proceedings against the applicant

88. On 4 March 2015 the inter-district tax inspectorate brought a civil action against the applicant, seeking compensation for damage caused by the criminal offence of tax evasion committed by him in the amount of RUB 14,948,778.61. Relying on Ruling no. 64 of the Plenary of the Supreme Court of the Russian Federation on practice in the application of the law on tax crimes, the rules of criminal procedure and Article 199 of the Criminal Code of the Russian Federation, the inspectorate argued that the tax authorities had a right to recover damages caused by a criminal offence of evasion of taxes. They further referred to the general provisions of the Civil Code of the Russian Federation providing for a right to claim damages from a tortfeasor (Article 1064 of the Civil Code of the Russian Federation (the "CC") and an employer's vicarious liability in respect of the damage caused by its employee (Article 1068 of the CC). Lastly, they submitted that the damage incurred by the State had been caused by the applicant who had been the managing director of the LLC.

89. On 6 April 2015 the Leninskiy District Court of Krasnodar granted the claims in full. It relied on the audit report establishing that the LLC had evaded payment of taxes and on Ruling no. 64, noting as follows:

> "As the court has established and as is apparent from the material in the case file, from 1 January to 31 December 2011 [the applicant] was the managing director of the [LLC]. He had the right to sign financial documents and to submit tax declarations.
>
> The [LLC] failed to comply with its duty to pay value-added tax and tax on profits ...
>
> [The applicant], who was managing director of the LLC, committed illegal acts with a criminal intent to evade the payment of taxes and caused pecuniary damage to the budget of the Russian Federation, which fact was established by the decision on the refusal to open a criminal investigation of 2 June 2014.
>
> According to the said decision, the audit conducted [by the tax inspectorate] established that [the LLC] had failed to pay taxes in the amount of RUB 11,487,367 in respect of the first quarter of 2010 and the first and second quarters of 2011. These violations are documented in the [audit report] dated 13 May 2013.
>
> On 2 June 2014 the senior investigator [of the inter-district investigative department of the regional investigative committee] refused to institute a criminal investigation [on the charge of tax evasion] in respect of [the applicant] in view of [the fact that it was time-barred].
>
> The relevant decision came into force.
>
> The court cannot accept the [applicant's] argument that his guilt has not been proved given that the criminal proceedings in his case were discontinued on non-exonerating grounds."

90. On 9 June 2015 the Krasnodar Regional Court upheld the judgment of 6 April 2015 on appeal.

91. The applicant lodged a cassation appeal, alleging that the courts had erred in (1) application of substantive law and rules of civil procedure and (2) calculation of the damages. Relying on Article 6 § 2 of the Convention, the applicant argued that, in the absence of a conviction, the courts had wrongfully reasoned that he had committed a crime resulting in damage to the State.

92. On 30 July 2015 the Regional Court concluded that the lower courts had applied the laws correctly and rejected the applicant's cassation appeal.

93. Reiterating his earlier arguments, the applicant lodged another cassation appeal.

94. On 11 November 2015 the Supreme Court of the Russian Federation referred to the findings of the lower courts and rejected the cassation appeal lodged by the applicant.

95. According to the Government, the judgment of 6 April 2015 was enforced in part. The bailiff's service

recovered RUB 15,871.06 from the applicant. According to the applicant, as at 27 February 2019, RUB 51,571.45 had been recovered from him.

RELEVANT LEGAL FRAMEWORK

I. Presumption of innocence

96. The Constitution of the Russian Federation (Article 49) and the Russian Code of Criminal Procedure (Article 14 § 1) provide that everyone charged with a criminal offence is to be presumed innocent until proved guilty according to law and declared guilty by an effective court judgment.

II. Non-compliance with taxation laws

97. Under Article 122 of the Tax Code, non-payment or underpayment of taxes by a taxpayer gives rise to financial liability (penalty).

98. Article 199 of the Criminal Code provides for criminal liability in respect of tax evasion.

99. In Ruling no. 64 on practice in the application of the law on tax crimes (adopted on 28 December 2006, in force at the relevant time), the Plenary of the Supreme Court of the Russian Federation construed tax evasion (Article 199 of the Criminal Code) as a wilful (deliberate) act aimed at the non-payment of taxes resulting in the relevant taxes not being paid into the State budget (point 3). As regards the non-payment of taxes by a legal entity, its managing director, chief accountant or any other person responsible for tax reporting on behalf of the legal entity could be held criminally liable (point 7).

III. Inquiry preceding institution of criminal proceedings

100. It is incumbent on the investigator to conduct an inquiry if he or she receives information that a crime has been committed. In the course of the inquiry, the investigator may question the parties concerned, collect evidence, commission forensic expert assessments or audits, and so on. He or she is to advise the parties questioned as to their rights, including the right against self-incrimination and the right to legal assistance. The information obtained in the course of the inquiry may be admitted as evidence (Article 144 of the Code of Criminal Procedure).

IV. Civil liability as regards payment of damages

101. The Civil Code of the Russian Federation provides for an obligation of a tortfeasor to compensate for the damage caused to a person or property in full. The law may impose responsibility to compensate for the damage on a person other than a tortfeasor (Article 1064). The CC also establishes that the employer is vicariously liable for the damage caused by an employee (Article 1068).

V. Liability of limited liability companies (LLC)

102. Pursuant to the Federal Law on Limited Liability Companies (Article 3), the LLC is liable for its obligations. If, as a result of dishonest or unreasonable actions of a person who is competent to manage the LLC's activities, the LLC is declared bankrupt and its assets are insufficient to satisfy its obligations vis-à-vis its creditors, this person may be found subsidiarily liable for the LLC's obligations.

103. When interpreting the relevant provisions of the national legislation on the bankruptcy proceedings in respect of LLCs, the Supreme Court of the Russian Federation considered that, in order to find a person subsidiarily liable in respect of the LLC's obligations, it is incumbent to establish a cause and effect link between his or her actions and the LLC's activities resulting in the latter's bankruptcy (Overview of the judicial practice no. 2 (2016) adopted by the Presidium of the Supreme Court of the Russian Federation on 6 July 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

104. The applicant complained that, in the course of the civil proceedings, the national judicial authorities had pronounced him guilty in breach of Article 6 § 2 of the Convention, which reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Admissibility

105. The Court notes from the outset that it has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the

question of its jurisdiction at every stage of the proceedings (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III). Accordingly, even though the Government in their observations raised no plea of inadmissibility concerning lack of jurisdiction *ratione materiae*, the Court nevertheless has to examine, of its own motion, whether the applicant may claim that Article 6 § 2 of the Convention is applicable to the judicial proceedings in his case.

106. In this connection, the Court reiterates that, as expressly stated in the terms of that provision, Article 6 § 2 applies where a person is "charged with a criminal offence" within the autonomous Convention meaning (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 95, ECHR 2013). It further reiterates that there are two aspects of the protection afforded by Article 6 § 2 of the Convention. Firstly, Article 6 § 2 protects the right of any person to be "presumed innocent until proved guilty according to law". Regarded as a procedural safeguard in the context of the criminal trial itself, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuance decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public (see *Allen*, cited above, §§ 93-94, and *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 314-15, 28 June 2018, with further references).

107. In view of the above, the first question for the Court is whether the applicant was a person "charged with a criminal offence" within the autonomous meaning of Article 6 § 2 of the Convention. The Court answers this question in the affirmative. It accepts that the applicant's situation was "substantially affected" by the inquiry conducted by the investigative authorities into his alleged tax evasion, during which he was repeatedly questioned as a *de facto* suspect (see paragraph 86 above). The Court therefore considers that the applicant can be regarded as having been "charged with a criminal offence", within the autonomous Convention meaning, and can claim the protection of Article 6 of the Convention (compare *Aleksandr Zaichenko v. Russia*, no. 39660/02, §§ 41-43, 18 February 2010, and *Stirmanov v. Russia*, no. 31816/08, §§ 37-40, 29 January 2019).

108. As to the subsequent civil proceedings, the Court also accepts that there was a direct link between the concluded criminal proceedings and the civil proceedings for damages brought against the applicant by the tax authorities. The claims in question were based on the materials collected by the investigator in the course of the inquiry and were classified by the tax authorities as damage resulting from the criminal offence committed by the applicant (see paragraph 88 above).

109. Regard being had to the above, the Court considers that the complaint cannot therefore be rejected under Article 35 § 3 (a) of the Convention as incompatible *ratione materiae* with the provisions of the Convention. It notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible (see, by contrast, *Larrañaga Arando and Others v. Spain* (dec.), nos. 73911/16 and 3 others, 25 June 2019).

B. Merits

1. Submissions by the parties

110. The applicant argued that, in the civil proceedings, his right to be presumed innocent had been breached.

111. The Government discerned no violation of the applicant's right set out in Article 6 § 2 of the Convention. They pointed out that, although the criminal prosecution on the charge of tax evasion in the applicant's case had been time-barred, he had not been exonerated. The applicant had not challenged the relevant decision of the investigator, a fact which should be construed as an admission of guilt on his part. He could have opted for a criminal trial to obtain an acquittal. However, he had chosen not to do so.

2. The Court's assessment

(a) General principles

112. The general principles concerning observance of the presumption of innocence are well established in the Court's case-law and have been summarised as follows (see *Allen*, cited above):

> "119. ... [O]nce it has been established that there is a link between the two sets of proceedings, the Court must determine whether, in all the circumstances of the case, the presumption of innocence has been respected. It is

convenient, therefore, to begin by reviewing the Court's approach to its examination of the merits in previous comparable cases.

(a) The Court's approach in previous comparable cases

...

120. In cases involving civil compensation claims lodged by victims, regardless of whether the criminal proceedings ended in discontinuation or acquittal, the Court has emphasised that while exoneration from criminal liability ought to be respected in the civil compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. However, if the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention ... . This approach has also been followed in cases concerning civil claims lodged by acquitted applicants against insurers ... .

...

125. It emerges from the above examination of the Court's case-law under Article 6 § 2 that there is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings which follow the conclusion of criminal proceedings. As illustrated by the Court's existing case-law, much will depend on the nature and context of the proceedings in which the impugned decision was adopted.

126. In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 ... . Thus, in a case where the domestic court held that it was 'clearly probable' that the applicant had 'committed the offences ... with which he was charged', the Court found that it had overstepped the bounds of the civil forum and had thereby cast doubt on the correctness of the acquittal ... . Similarly, where the domestic court indicated that the criminal file contained enough evidence to establish that a criminal offence had been committed, the language used was found to have violated the presumption of innocence ... . In cases where the Court's judgment expressly referred to the failure to dispel the suspicion of criminal guilt, a violation of Article 6 § 2 was established ... . However, when regard is had to the nature and context of the particular proceedings, even the use of some unfortunate language may not be decisive ... . The Court's case-law provides some examples of instances where no violation of Article 6 § 2 has been found even though the language used by domestic authorities and courts was criticised ..."

(b) Whether the applicant's right to be presumed innocent was respected in the present case

113. Turning to the circumstances of the present case, the Court observes that on 2 June 2014 the investigator refused to institute criminal proceedings against the applicant on the charge of tax evasion as prosecution of the offence was time-barred. In other words, the applicant was never tried or convicted of that offence by a court competent to determine questions of guilt under criminal law.

114. The Court further observes that, in the subsequent civil proceedings, the national courts granted the claims lodged by the tax authorities to recover damages as a result of the LLC's failure to pay taxes. The courts found the applicant liable for the LLC's debt, stating that he had committed "illegal acts with a criminal intent to evade the payment of taxes". They considered that fact established by the investigator's finding that the applicant had evaded payment of VAT (see paragraph 88 above).

115. The question for the Court in the present case is whether the above wording used by the civil courts should be construed as imputing criminal liability to the applicant. The Court will look at the context of the proceedings as a whole and their special features in order to determine whether by using such a statement the civil courts breached Article 6 § 2 of the Convention (compare *Fleischner v. Germany*, no. 61985/12, § 65, 3 October 2019).

116. As regards the language used by domestic civil courts, the Court considers that it did constitute a statement about the applicant's criminal guilt. The judicial authorities did not limit their analysis to the establishment of facts. They claimed that the applicant had committed the illegal acts with a criminal intent: the domestic courts did not only determine the *actus reus*, which would have been permissible, under the circumstances, (see, for example, *Fleischner*, cited above, § 63). They went further and stated that the applicant's acts were made with the requisite *mens rea*.

117. Having examined the context of the proceedings, the Court discerns nothing in the materials submitted that would justify the impugned choice of words made by the domestic courts.

118. Firstly, the Court takes into account the fact that, when suing the applicant for damages, the tax authorities claimed that the damage had resulted from a criminal offence committed by him. The civil courts did not invite the plaintiff to recharacterise the claims. Nor did they do so of their own motion. The Court further notes that the civil courts based their decision to grant the claims against the applicant exclusively on the findings as to his criminal liability as set out in the investigator's decision of 2 June 2014. They did not evaluate any evidence or assess the facts or conclusions made by the investigator or the tax

inspectorate. Instead, they simply referred to a mere existence of the investigator's decision and the audit report confirming the LLC's obligations to pay taxes. They construed the absence of an acquittal in the applicant's criminal case as an automatic and sufficient ground to hold him liable for the damage resulting from the non-payment of taxes by the LLC.

119. Against such a background, the Court considers that the wording used by the civil courts was not merely unfortunate. It reflected those courts' unequivocal opinion that a criminal offence had been committed and that the applicant was guilty of that offence, even though he had never been convicted of that offence and had never had the opportunity to exercise his rights of defence in a criminal trial. In the Court's view, the civil courts' statement was inconsistent with the discontinuation of the criminal proceedings against the applicant and amounted to a pronouncement that the applicant had committed a criminal offence. Having examined the material before it, the Court finds no justification for such a statement imputing criminal liability to the applicant (compare *Farzaliyev v. Azerbaijan*, no. 29620/07, §§ 65-69, 28 May 2020, and, by contrast, *Fleischner*, cited above, §§ 61-69).

120. Regard being had to the above, the Court concludes that the applicant was treated in a manner inconsistent with his right to be presumed innocent and holds that there has been a violation of Article 6 § 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

121. The applicant complained that the domestic courts' decision to impose on him the duty to pay the tax arrears, penalty and a fine owed by the limited liability company of which he had been the managing director constituted an interference with his right to the peaceful enjoyment of his possessions, in contravention of Article 1 of Protocol No. 1, which reads as follows:

> "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."

A. Admissibility

122. The Government submitted that the obligation imposed on the applicant to pay damages had not amounted to an interference with his possessions. The money owed by the applicant had not constituted his possessions.

123. The applicant submitted that the duty to pay damages imposed on him had constituted an interference with his possessions.

124. The Court notes that the civil proceedings which lie at the core of the applicant's complaint concerned compensation for damage allegedly caused to the State budget by his actions. As a result, he was ordered to pay a certain amount in pecuniary damages. The Court considers that such an obligation imposed on the applicant constituted an interference with his property rights as guaranteed by Article 1 of Protocol No. 1 and dismisses the Government's argument to the contrary.

125. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

126. The applicant submitted that the interference with his possessions had failed to strike a fair balance between the general interest of the community and the protection of his rights.

127. The Government argued that, as the legal representative of the LLC, the applicant had failed to pay taxes on behalf of the LLC. The national tax and judicial authorities had established correctly that the applicant had been guilty of tax offences and that he had been liable for the damage caused by his actions.

2. The Court's assessment

(a) General principles

128. The Court's principles as regards the application of Article 1 of Protocol No. 1 have been summarised by the Grand Chamber in *G.I.E.M. S.R.L. and Others* (see *G.I.E.M. S.R.L. and Others*, cited above) as follows:

> "292. The Court reiterates that Article 1 of Protocol No. 1 above all requires that any interference by a public authority with the enjoyment of possessions be in accordance with the law: under the second sentence of the first paragraph of this Article, any deprivation of possessions must be 'subject to the conditions provided for by law'; the second paragraph entitles the

States to control the use of property by enforcing 'laws'. Moreover, the rule of law, which is one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III, and *Iatridis*, cited above, § 58)."

(b) Application to the present case

129. The Court will examine the situation complained of in the light of the general rule set forth in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (compare *Beyeler v. Italy* [GC], no. 33202/96, § 106, ECHR 2000-I).

130. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of one's possessions should be lawful and not arbitrary (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II). When speaking of "law", Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention, a concept which comprises statutory law as well as case-law. It refers to the quality of the law in question, requiring that it be accessible to the persons concerned, precise and foreseeable in its application (see *Carbonara and Ventura v. Italy*, no. 24638/94, § 64, ECHR 2000-VI).

131. It is in the first place for the national authorities to interpret and apply the domestic law. Nevertheless, the Court is required to establish whether the way in which the domestic law was interpreted and applied produced consequences that are consistent with the principles of the Convention (see, for example, *Mullai and Others v. Albania*, no. 9074/07, § 114, 23 March 2010).

132. In this connection, the Court reiterates that a procedural termination of the criminal proceedings, as occurred in the case under consideration, should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof (see the general principles cited in paragraph 112 above). In such circumstances the injured party should be able to submit a claim for compensation for damage under the general principles on the law of torts. Nor can the Court rule out the possibility that the piercing of the corporate veil may be an appropriate solution for defending the rights of a company's creditors, including the State (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 877, 25 July 2013).

133. Nevertheless, having examined the material submitted by the parties, the Court considers that, in the circumstances of the present case, for the reasons set out below, that the impugned decisions of the civil courts were devoid of any legal basis, contrary to the requirements of Article 1 of Protocol No. 1.

134. The Court notes at the outset that the tax authorities and subsequently the commercial courts established that the LLC had failed to comply with its tax obligations and, as a result, caused damage to the State budget (see paragraph 81 above). When the LLC was unable to fulfil its obligations and was subsequently declared insolvent (see paragraph 82 above), the tax authorities chose to bring the relevant claims against the applicant, alleging that the damage had resulted from a crime committed by him (see paragraph 88 above).

135. In this connection, the Court observes that, pursuant to Russian law, a person can be declared guilty only in an effective judgment delivered in the course of a procedure established by law (see paragraph 96 above). In the present case, no such judgment was delivered against the applicant. The investigator refused to institute criminal proceedings against him. Nevertheless, the national courts granted the tax authorities' claims and considered it sufficient to conclude that the applicant was liable for the damage resulting from the LLC's failure to pay taxes merely by referring to the investigator's finding that the applicant had evaded payment of VAT, without examining any evidence or making independent findings of their own under the applicable provisions of civil law that the applicant was in fact responsible for non-payment of taxes. Furthermore, none of the facts cited by the investigator in the relevant decision and relied upon by the civil courts was scrutinised or validated in any adversarial manner either in the criminal or civil proceedings.

136. Admittedly, the national courts took into consideration the fact that the applicant had been the managing director of the LLC which had failed to pay taxes. However, the national courts did not refer to any existing laws or judicial practice that would have allowed them to pierce the corporate veil and to hold the applicant responsible for the LLC's failure to pay taxes while the LLC was not yet deregistered (see, by contrast, *Lekić v. Slovenia* [GC], no. 36480/07, §§ 96-104, 11 December 2018, in which the Court analysed the quality of domestic laws underlying the piercing of the corporate veil in respect of the applicant).

137. Lastly, contrary to the Government's argument made in the context of Article 6 § 2 of the Convention (see paragraph 111 above), the Court finds it irrelevant that the applicant did not appeal against the investigator's decision of 2 June 2014 refusing to open a criminal investigation. There is no indication in the Government's submissions that domestic law allowed

such a failure to appeal to be construed as proof of guilt or a ground for civil liability.

138. Regard being had to the above, the Court considers that the order for the applicant to pay damages to the tax authorities was made in an arbitrary fashion and was therefore contrary to the requirement of lawfulness under Article 1 of Protocol No. 1.

The Court thus concludes that there has been a violation of that provision. This finding makes it unnecessary for the Court to establish whether or not a fair balance was struck.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

139. Article 41 of the Convention provides as follows:

> "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

140. The applicant claimed 51,571.45 Russian roubles (RUB) in respect of pecuniary damage corresponding to the amount recovered from him by the bailiff's service as repayment of the judgment debt. He also claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

141. The Government submitted that no award should be made to the applicant, discerning no interference with the applicant's possessions.

142. As regards the applicant's claims in respect of pecuniary damage, the Court reiterates that the priority under Article 41 of the Convention is *restitutio in integrum*, as the respondent State is expected to make all feasible reparation for the consequences of the violation in such a manner as to restore as far as possible the situation existing before the breach (see, among other authorities, *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85; *Tchitchinadze v. Georgia*, no. 18156/05, § 69, 27 May 2010; *Fener Rum Patrikliği (Ecumenical Patriarchy) v. Turkey* (just satisfaction), no. 14340/05, § 35, 15 June 2010; and *Stoycheva v. Bulgaria*, no. 43590/04, § 74, 19 July 2011). Consequently, having due regard to its findings in the instant case, the Court considers that the most appropriate form of redress would be the repayment of the amount recovered by the bailiff's service to the applicant. Thus, the applicant would be put as far as possible in a situation equivalent to the one in which he would have been had there not been a breach of Article 1 of Protocol No. 1. Accordingly, the Court decides to award the applicant 688 euros (EUR) in respect of the pecuniary damage corresponding to the amount recovered by the bailiff's service from him as repayment of the judgment debt. As for the remainder of the amount which the applicant has been ordered to pay, the Court notes that a finding of a violation of the Convention or its Protocols by the Court is a ground for reopening civil proceedings under Article 392 of the Code of Civil Procedure and for the review of domestic judgments in the light of the Convention principles established by the Court.

143. Furthermore, the Court has no doubt that the applicant suffered distress and frustration on account of the violation of his rights set out in Article 6 § 2 of the Convention and Article 1 of Protocol No. 1. Making its assessment on an equitable basis, the Court awards the applicant EUR 7,800 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

144. The applicant did not submit a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

145. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 2 of the Convention;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent

State at the rate applicable at the date of settlement:

(i) EUR 688 (six hundred and eighty-eight euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

EU

Court of Justice

11 June 2020

Pantochim

Case number: C-19/19

International recovery assistance – Status of the foreign claim – Concept of 'privilege' – Statutory set-off of that claim against a tax debt of the requested Member State

Summary

Article 6(2) of Directive 76/308/EEC and Article 6(2) of Directive 2008/55/EC must be interpreted as meaning that the claim of the applicant Member State is not to be treated as being a claim of the requested Member State and does not acquire the status of a claim of the requested Member State.

Article 10 of Directive 76/308 and Article 10 of Directive 2008/55 must be interpreted as meaning that:

- the term 'privilege' referred to in those provisions refers to any mechanism which results, in the event of concurrent claims, in the preferential payment of a claim;

- the option available to the requested Member State to set off claims in the event of concurrent claims constitutes a privilege, within the meaning of those provisions, where the use of that option has the effect of conferring on that Member State a preferential right or right of priority for the purposes of payment of its claims that is not available to the other creditors, which it is for the referring court to ascertain.

1 This request for a preliminary ruling concerns the interpretation of Article 6(2) and Article 10 of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73, p. 18), and of the second paragraph of Article 6 and Article 10 of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28).

2 The request has been made in proceedings between the Belgian State and Pantochim SA, in liquidation, concerning the set-off of a claim which the latter had against the Belgian State, against a debt which that company owed to the German State.

Legal context

European Union law

Directive 76/308

3 The first, second, third and eighth recitals of Directive 76/308 stated:

> *'Whereas it is not at present possible to enforce in one Member State a claim for recovery substantiated by a document drawn up by the authorities of another Member State;*
>
> *Whereas the fact that national provisions relating to recovery are applicable only within national territories is in itself an obstacle to the establishment and functioning of the common market; whereas this situation prevents Community rules from being fully and fairly applied, particularly in the area of the common agricultural policy, and facilitates fraudulent operations;*
>
> *Whereas it is therefore necessary to adopt common rules on mutual assistance for recovery;*
>
> *...*
>
> *Whereas when the requested authority is required to act on behalf of the applicant authority to recover a claim, it must be able, if the provisions in force in the Member State in which it is situated so permit and with the agreement of the applicant authority, to allow the debtor time to pay or authorise payment by instalment; whereas any interest charged on such payment facilities must also be remitted to the Member State in which the applicant authority is situated.'*

4 Under Article 1 of Directive 76/308, that directive laid down the rules to be incorporated into the laws, regulations and administrative provisions of the Member States to ensure the recovery in each Member State of the claims falling within the scope of that directive which arise in another Member State.

5 Article 6 of Directive 76/308 provided:

> *'1. At the request of the applicant authority, the requested authority shall, in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State in which the requested authority is situated, recover claims which are the subject of an instrument permitting their enforcement.*
>
> *2. For this purpose any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the*

requested authority is situated, except where Article 12 applies.'

6 Article 9 of that directive, as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17), provided:

'1. Claims shall be recovered in the currency of the Member State in which the requested authority is situated. The entire amount of the claim that is recovered by the requested authority shall be remitted by the requested authority to the applicant authority.

2. The requested authority may, where the laws, regulations or administrative provisions in force in the Member State in which it is situated so permit, and after consultations with the applicant authority, allow the debtor time to pay or authorise payment by instalment. Any interest charged by the requested authority in respect of such extra time to pay shall also be remitted to the Member State in which the applicant authority is situated.

…'

7 Under Article 10 of Directive 76/308:

'The claims to be recovered shall not be given preferential treatment in the Member State in which the requested authority is situated.'

8 Article 10 of Directive 76/308, as amended by Directive 2001/44, was worded as follows:

'Notwithstanding Article 6(2), the claims to be recovered shall not necessarily benefit from the privileges accorded to similar claims arising in the Member State in which the requested authority is situated.'

Directive 2008/55

9 Recitals 1 and 10 of Directive 2008/55 stated:

'(1) [Directive 76/308] has been substantially amended several times. In the interests of clarity and rationality the said Directive should be codified.

…

(10) When the requested authority is required to act on behalf of the applicant authority to recover a claim, it should be able, if the provisions in force in the Member State in which it is situated so permit and with the agreement of the applicant authority, to allow the debtor time to pay or authorise payment by instalment. Any interest charged on such payment facilities should also be remitted to the Member State in which the applicant authority is situated.'

10 According to Article 1 of Directive 2008/55, that directive laid down the rules to be incorporated into the laws, regulations and administrative provisions of the Member States to ensure the recovery in each Member State of the claims falling within the scope of that directive which arise in another Member State.

11 Article 6 of that directive provided:

'At the request of the applicant authority, the requested authority shall, in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State in which the requested authority is situated, recover claims which are the subject of an instrument permitting their enforcement.

For this purpose any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the requested authority is situated, except where Article 12 applies.'

12 Article 10 of that directive provided:

'Notwithstanding the second paragraph of Article 6, the claims to be recovered shall not necessarily benefit from the privileges accorded to similar claims arising in the Member State in which the requested authority is situated.'

Belgian law

13 Directive 76/308 was transposed into Belgian law by the loi du 20 juillet 1979 concernant l'assistance mutuelle en matière de recouvrement des créances relatives à certains cotisations, droits, taxes et autres mesures (Law of 20 July 1979 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures) (*Moniteur belge*, 30 August 1979, p. 9457).

14 Under Article 12 of that law, in the version applicable to the dispute in the main proceedings ('the Law of 20 July 1979'):

'The requested Belgian authority shall proceed with recoveries requested by the applicant foreign authority as if they were claims arising within the Kingdom [of Belgium].'

15 Article 15 of the Law of 20 July 1979 was worded as follows:

'The claims to be recovered shall not benefit from any privilege.'

16 Article 334 of the loi-programme du 27 décembre 2004 (Programme-Law of 27 December 2004) (*Moniteur belge*, 31 December 2004, p. 87006), in the version applicable until 7 January 2009, stated:

'Any sum to be repaid or paid to a debtor on the basis of legal provisions on income taxes, taxes treated as equivalent thereto, value added tax or

under the rules of civil law on the recovery of sums not due may be assigned without formalities by the competent official to the payment of withholding taxes, income taxes, taxes treated as equivalent thereto, value added tax, the principal amount, surcharges and increases, administrative or tax fines, interest and costs payable by that debtor, where the latter are not or are no longer contested.

The preceding paragraph shall continue to apply in the event of seizure, assignment, transfer or where there are concurrent claims or insolvency proceedings.'

17 Article 334 of the Programme-Law of 27 December 2004, as amended by Article 194 of the loi-programme du 22 décembre 2008 (Programme-Law of 22 December 2008) (*Moniteur belge*, 29 December 2008, p. 68649), applicable as from 8 January 2009, provided:

'Any sum to be repaid or paid to a person, either in the course of applying tax laws which fall within the competence of the Service public fédéral Finances [(Federal Public Service for Finance)] or for which the collection and recovery are ensured by that Federal public service or under the provisions of civil law relating to the recovery of sums not due, may be assigned without formalities and at the discretion of the competent official to the payment of sums owed by that person pursuant to the tax laws concerned or to the settlement of tax or non-tax claims the collection and recovery of which are ensured by the Federal Public Service for Finance by virtue of or under a legally binding provision. That assignment is limited to the uncontested amount of the debt in respect of that person.

The preceding paragraph shall continue to apply in the event of seizure, assignment, transfer or where there are concurrent claims or insolvency proceedings.'

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

18 Pantochim was put into liquidation by a judgment of 26 June 2001 of the tribunal de commerce de Charleroi (Charleroi Commercial Court, Belgium).

19 In the course of that liquidation, the Belgian State declared a preferential claim in respect of value added tax (VAT), which was paid in full by Pantochim, and a claim from the German State for EUR 634 257.50, comprising VAT and interest, which was admitted to the company's liabilities as an unsecured debt.

20 It is apparent from the order for reference that the German State's claim was the subject of a request for assistance for recovery by that Member State, and that neither the existence nor the lawfulness of that request was challenged.

21 For its part, Pantochim has a claim against the Belgian State as a result of the application of tax provisions, which the Belgian State intends to set off, on the basis of Article 334 of the Programme-Law of 27 December 2004, against the aforementioned claim of the German State.

22 Pantochim objected to that set-off and instituted proceedings in the tribunal de première instance du Hainaut, division de Mons (Court of First Instance, Hainaut, Mons Division, Belgium), which ruled that the Belgian State had no basis in law for such a set-off.

23 By a judgment of 27 June 2016, the Court of Appeal of Mons upheld that decision and ordered the Belgian State to pay the sum of EUR 502 991.47 plus interest to Pantochim.

24 The Belgian State brought an appeal against that judgment before the referring court, the Cour de cassation (Court of Cassation, Belgium).

25 In those circumstances the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the provision according to which the claim in respect of which a request for recovery has been made "shall be treated as a claim of the Member State in which the requested authority is situated", as provided for in [the second paragraph of] Article 6 of [Directive 2008/55], which replaces Article 6(2) of [Directive 76/308], be understood as meaning that the claim of the requesting State is to be treated as being a claim of the requested State, with the result that the claim of the requesting State acquires the status of a claim of the requested State?

(2) Must the term "privilege" referred to in Article 10 of [Directive 2008/55], and, before codification, in Article 10 of [Directive 76/308], be understood as the preferential right attached to the claim which confers on it a right of priority over other claims in the event of concurrent claims, or as any mechanism which results, in the event of concurrent claims, in the preferential payment of the claim?

Must the option available to the tax authority to carry out, under the conditions laid down by Article 334 of the Programme-Law of 27 December 2004, a set-off where there are concurrent claims be regarded as a privilege within the meaning of Article 10 of the abovementioned directives?'

Consideration of the questions referred

The first question

26 By its first question the referring court asks, in essence, whether Article 6(2) of Directive 76/308 and the second paragraph of Article 6 of Directive 2008/55 must be interpreted as meaning that the claim of the requesting Member State is to be treated as being a claim of the requested Member State and acquires the status of a claim of the requested Member State.

27 It must be noted at the outset that Directive 76/308 and Directive 2008/55, to which reference is made in the questions referred for a preliminary ruling, although now repealed, were in force at the time of the facts of the dispute in the main proceedings. As is apparent from the request for a preliminary ruling, the Belgian State set various tax claims which Pantochim was entitled to assert vis-à-vis the Belgian tax authority between 1 January 2005 and 20 April 2009 against settlement of the claim of the German State in respect of which the request for recovery at issue in the main proceedings had been made.

28 According to Article 6(2) of Directive 76/308 and the second paragraph of Article 6 of Directive 2008/55, which must, respectively, be read in conjunction with Article 6(1) of Directive 76/308 and the first paragraph of Article 6 of Directive 2008/55, where a request for recovery is made in respect of a claim, that claim is to be treated 'as' a claim of the requested Member State, and that Member State is required to recover the claim in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims of that Member State.

29 It thus follows from the actual wording of Article 6(2) of Directive 76/308 and the second paragraph of Article 6 of Directive 2008/55 that a claim in respect of which a request for recovery has been made does not acquire the status of a claim of the requested Member State but is to be 'treated as' a claim of that State solely for the purposes of its recovery by that State, the latter being thus required to make use of the powers and procedures provided for under the laws, regulations or administrative provisions applying to claims concerning identical or similar taxes or duties in its legal system (see, by analogy, judgment of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 48).

30 Consequently, although, under those provisions, the requested Member State is, for the purposes of recovery of a claim forming the subject matter of such a request, required to treat that request in the same way as its own claims (see, to that effect, judgment of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 43), that does not mean that the claim of the requesting Member State has been assigned to the requested Member State. As the Advocate General noted in point 35 of his Opinion, that claim remains, from a substantive perspective, a claim of the requesting Member State, distinct from those of the requested Member State.

31 This interpretation is also supported by the wording of Article 10 of Directive 76/308, as amended by Directive 2001/44, and that of Article 10 of Directive 2008/55, according to which the claims to be recovered are not necessarily to benefit from the privileges accorded to similar claims arising in the requested Member State.

32 It is also apparent from Article 9 of Directive 76/308, as amended by Directive 2001/44, and Article 9 of Directive 2008/55 that the claim of the requesting Member State, recovered by the requested Member State, does not acquire the status of a claim of the latter Member State since, under those provisions, the requested Member State is required to remit to the requesting Member State the entire amount of the claim that it has recovered as well as any interest payable if time to pay has been allowed.

33 Furthermore, it follows from the eighth recital of Directive 76/308 and recital 10 of Directive 2008/55 that it was the EU legislature's intention that the requested Member State should act to recover a claim 'on behalf' of the requesting Member State.

34 In view of the foregoing, the answer to the first question is that Article 6(2) of Directive 76/308 and the second paragraph of Article 6 of Directive 2008/55 must be interpreted as meaning that the claim of the requesting Member State is not to be treated as being a claim of the requested Member State and does not acquire the status of a claim of the requested Member State.

The second question

35 By its second question the referring court asks, in essence, whether Article 10 of Directive 76/308 and Article 10 of Directive 2008/55 must be interpreted as meaning that the term 'privilege' referred to in those provisions refers to a preferential right attached to a claim, conferring on it a right of priority over other claims in the event of concurrent claims, or to any mechanism which results, in the event of concurrent claims, in the preferential payment of that claim. The referring court also asks whether Article 10 of Directive 76/308 and Article 10 of Directive 2008/55 must be interpreted as meaning that the option available to the tax authority of a requested Member State to set off claims in the event of concurrent claims

constitutes a 'privilege' within the meaning of those provisions.

36 It must be noted that Directives 76/308 and 2008/55 do not define the term 'privilege' or make reference to the law of the Member States for that purpose.

37 According to the case-law of the Court, the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see, in particular, judgments of 13 October 2016, *Mikołajczyk*, C-294/15, EU:C:2016:772, paragraph 44, and of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869, paragraph 38).

38 As regards the objective of Directives 76/308 and 2008/55, it should be recalled that, in accordance with Article 1 of each directive, those directives establish general rules on mutual assistance to ensure the recovery in each Member State of the claims falling within the scope of those directives which arise in another Member State.

39 It follows from the first, second and third recitals of Directive 76/308 that the purpose of that directive is to eliminate obstacles to the establishment and functioning of the common market resulting from the territorial limitation of the scope of application of national provisions relating to recovery (judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 45).

40 That directive thus provides for measures of assistance in the form of the disclosure of information useful for the recovery, notification of instruments to the addressee and the recovery of claims which are the subject of an instrument permitting their enforcement (judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 46).

41 With regard to the context of the provisions concerned, it must be noted that Article 10 of that directive provides that the claims to be recovered are not to be given preferential treatment in the requested Member State. It thus establishes the rule that the privileges accorded to claims of the requested Member State are not to be accorded to claims in respect of which a request for recovery has been made.

42 The aforementioned Article 10 was amended by Directive 2001/44, and subsequently replaced by Article 10 of Directive 2008/55. Those directives introduced, by way of derogation from that rule, the possibility that the requested Member State could confer those privileges on the claims of the requesting Member State that are to be recovered.

43 Those provisions bear out the fact that even if, as has been noted in paragraphs 28 to 30 of the present judgment, those claims must, for the purposes of their recovery, be treated in the same way as the claims of the requested Member State, they are nevertheless distinct from the latter claims and do not, in principle, benefit from privileges in the requested Member State.

44 Having regard to the foregoing considerations, it is appropriate to adopt a broad understanding of the term 'privilege' as referred to in those provisions, encompassing all the mechanisms that enable the requested Member State to obtain preferential or priority payment of its claims in the event of concurrent claims, by way of derogation from the principle of equality of creditors.

45 As regards the set-off option at issue in the main proceedings, available to the Belgian tax authority in respect of its own tax claims, it is not possible to determine from the information provided by the referring court whether recourse to that option would enable that authority to obtain preferential or priority payment of its claims in the event of concurrent claims, or whether it is an ordinary set-off mechanism.

46 Should that option constitute an ordinary set-off mechanism intended to simplify the recovery procedure without conferring on the Belgian State a preferential right or a right of priority for the purposes of payment of its claims or any privilege derogating from the principle of equality of creditors, it would have to be regarded as falling within the scope of Article 6 of Directive 76/308 and Article 6 of Directive 2008/55, and therefore the Belgian State should also use it to recover another Member State's claims in respect of which a request for recovery has been made, pursuant to those directives.

47 Conversely, should the use of the set-off option at issue in the main proceedings have the effect of conferring on the Belgian State such a preferential right or right of priority not available to the other creditors, that option would constitute, in derogation of the principle of equality of creditors in the event of concurrent claims, a 'privilege' within the meaning of Article 10 of Directive 76/308 and Article 10 of Directive 2008/55.

48 In that situation, the Belgian State would not be able to use that option for the purpose of recovering the claims of another Member State in respect of which a request for recovery had been made, pursuant to those directives, since it is apparent from the order for reference that, in accordance with Article 15 of the Law of 20 July 1979, the claims to be recovered are not to benefit from any privilege.

49 In all events, it is important to emphasise that the requested Member State may use a set-off option such as that at issue in the main proceedings only for the benefit of the requesting Member State.

50 In those circumstances, the answer to the second question is:

– Article 10 of Directive 76/308 and Article 10 of Directive 2008/55 must be interpreted as meaning that the term 'privilege' referred to in those provisions refers to any mechanism which results, in the event of concurrent claims, in the preferential payment of a claim.

– Article 10 of Directive 76/308 and Article 10 of Directive 2008/55 must be interpreted as meaning that the option available to the requested Member State to set off claims in the event of concurrent claims constitutes a privilege, within the meaning of those provisions, where the use of that option has the effect of conferring on that Member State a preferential right or right of priority for the purposes of payment of its claims that is not available to the other creditors, which it is for the referring court to ascertain.

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

1. Article 6(2) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, and the second paragraph of Article 6 of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures must be interpreted as meaning that the claim of the requesting Member State is not to be treated as being a claim of the requested Member State and does not acquire the status of a claim of the requested Member State.

2. Article 10 of Directive 76/308 and Article 10 of Directive 2008/55 must be interpreted as meaning that:

– the term 'privilege' referred to in those provisions refers to any mechanism which results, in the event of concurrent claims, in the preferential payment of a claim;

– the option available to the requested Member State to set off claims in the event of concurrent claims constitutes a privilege, within the meaning of those provisions, where the use of that option has the effect of conferring on that Member State a preferential right or right of priority for the purposes of payment of its claims that is not available to the other creditors, which it is for the referring court to ascertain.

Belgium

Supreme Court (Cassation)

14 January 2021

Pantochim

Case number:
ECLI:BE:CASS:2021:ARR.20210114.1F.17

International recovery assistance – Status of the foreign claim – Concept of 'privilege' – Statutory set-off of that claim against a tax debt of the requested Member State

Summary

The Belgian law implementing the EU Directive on tax recovery assistance provides that the foreign claims to be recovered in Belgium do not enjoy any privilege.

The tax claim of the applicant Member State, for which recovery assistance is requested from the Belgian tax authorities, cannot be offset against a debt which the Belgian State has towards the debtor of that foreign claim.

N° F.17.0025. F

Belgian State, represented by the Minister for Finance,

appellant in cassation,

against

Pantochim, a company in liquidation,

I. Procedure before the Court

The appeal on a point of law is directed against the judgment of the Court of Appeal of Mons of 27 June 2016.

By its judgment of 20 December 2018, the Court referred to the Court of Justice of the European Union for a preliminary ruling questions, which are answered by judgment No 19/19 of 11 June 2020 of that court.

II. Ground of appeal

The applicant puts forward a plea which is reproduced in the abovementioned judgment of 20 December 2018.

III. Decision of the Court

(...)

1. Under Article 1289 of the old Civil Code, where two persons have debts to each other, set-off is effected between them which extinguishes both debts.

Article 334 of the Programme Law of 27 December 2004, before its amendment by Article 194 of the Programme Law of 22 December 2008, provides that:

> *'Any sum to be repaid or paid to a debtor on the basis of legal provisions on income taxes, taxes treated as equivalent thereto, value added tax or under the rules of civil law on the recovery of sums not due may be assigned without formalities by the competent official to the payment of withholding taxes, income taxes, taxes treated as equivalent thereto, value added tax, the principal amount, surcharges and increases, administrative or tax fines, interest and costs payable by that debtor, where the latter are not or are no longer contested.*
>
> *The preceding paragraph shall continue to apply in the event of seizure, assignment, transfer or where there are concurrent claims or insolvency proceedings.'*

In the version applicable after its amendment by Article 194 of the Programme Law of 22 December 2008 and before its amendment by the Law of 25 December 2016, Article 334 provides that:

> *'Any sum to be repaid or paid to a person, either in the course of applying tax laws which fall within the competence of the Federal Public Service for Finance or for which the collection and recovery are ensured by that Federal public service or under the provisions of civil law relating to the recovery of sums not due, may be assigned without formalities and at the discretion of the competent official to the payment of sums owed by that person pursuant to the tax laws concerned or to the settlement of tax or non-tax claims the collection and recovery of which are ensured by the Federal Public Service for Finance by virtue of or under a legally binding provision. That assignment is limited to the uncontested amount of the debt in respect of that person.*
>
> *The preceding paragraph shall continue to apply in the event of seizure, assignment, transfer or where there are concurrent claims or insolvency proceedings.'*

It follows that, apart from the derogations provided for, the compensation provided for in Article 334, in the versions applicable, remains subject to the conditions of ordinary set-off.

2. In accordance with Article 6(1) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties and other measures, coordinated by Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, the requested authority shall, in accordance with the legal provisions applicable for the recovery of similar claims arising in the Member State in which it is situated, recover claims which are the subject of an instrument which is the subject of an instrument permitting its enforcement. In accordance with Article 6(2), for this purpose any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the requested authority is situated.

Under Article 9 of those directives, the requested authority is to transfer to the applicant authority the full amount of the claim which it has recovered.

Article 10 of the same Directives provides that, notwithstanding Article 6(2), claims to be recovered do not necessarily enjoy the privileges of similar claims arising in the Member State in which the requested authority is situated and, in its version prior to its amendment by Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/608/EEC, provided that claims to be recovered shall not enjoy any privilege in the Member State in which the requested authority is situated.

Under Article 12 of the Law of 20 July 1979 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, applicable to the dispute, the Belgian authority is to recover claims for which recovery is requested by the applicant foreign authority as if they were claims arising in Belgium and, under Article 15 of that law, the claims to be recovered do not enjoy any privilege.

In its abovementioned judgment No C-19/19 of 11 June 2020, the Court of Justice of the European Union held that "a claim which is the subject of a request for recovery does not acquire the status of a claim of the requested Member State, but is "treated as" a claim of that State for the sole purpose of its recovery, the latter thereby having to implement the powers and procedures defined by the laws, regulations or administrative provisions applicable to the claims relating to the same or similar duties, taxes or charges in its territory; and that this claim remains a claim of the applicant Member State, distinct from the claims of the requested Member State, and that the requested Member State has to transfer the recovered amount to the applicant Member State, and that the intention of the Union legislature was that the requested Member State acts on behalf of the applicant Member State. It also stated that 'In all events, (…) the requested Member State may use a set-off option such as that at issue in the main proceedings only for the benefit of the applicant Member State'.

It follows that, where the Belgian State is requested to recover a claim by another Member State, that claim is not treated as a claim of the Belgian State and the proceeds of its recovery must be remitted to that foreign authority.

The claim of the applicant Member State, which does not fall within the scope of the derogations provided for in Article 334, cannot therefore be offset against a debt which the Belgian State has towards the debtor of that claim.

(…)

On those grounds,

The Court,

Dismisses the appeal

EU

Court of Justice

20 January 2021

Heavyinstall

Case number: C-420/19

International recovery assistance – Request for precautionary measures - Judicial decision of the applicant Member State for the purpose of implementing precautionary measures – Jurisdiction of the court of the requested Member State to assess and reassess the justification of those measures – Principles of mutual trust and of mutual recognition

Summary

The Finnish tax authorities sent a request for precautionary measures to the Estonian tax authorities. A Finnish court's seizure decision – confirming that precautionary measures were justified – was attached to that request.

Article 16 of Directive 2010/24 must be interpreted as meaning that the courts of the requested Member State, ruling on a request for precautionary measures, are bound by the assessment of the factual and legal compliance with the conditions laid down for the application of those measures made by the authorities of the applicant Member State, in particular where that assessment is contained in the document referred to in the second subparagraph of Article 16(1) of that directive, attached to that request.

1 This request for a preliminary ruling concerns the interpretation of Article 16 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1).

2 The request has been made in proceedings between the Maksu- ja Tolliamet (Tax and Customs Authority, Estonia; 'the MTA') and Heavyinstall OÜ regarding the adoption, in Estonia, of precautionary measures requested by the Finnish tax authority against that company.

Legal context

European Union law

3 Recitals 1, 4 and 6 of Directive 2010/24 state:

'(1) Mutual assistance between the Member States for the recovery of each others' claims and those of the Union with respect to certain taxes and other measures contributes to the proper functioning of the internal market. It ensures fiscal neutrality and has allowed Member States to remove discriminatory protective measures in cross-border transactions designed to prevent fraud and budgetary losses.

...

(4) To better safeguard the financial interests of the Member States and the neutrality of the internal market, it is necessary to extend the scope of mutual assistance for recovery to claims relating to taxes and duties not yet covered by mutual assistance for recovery, whilst in order to cope with the increase in assistance requests and to deliver better results, it is necessary to make assistance more efficient and effective and to facilitate it in practice. ...

...

(6) This Directive should not affect the Member States' competence to determine the recovery measures available under their internal legislation. However, it is necessary to ensure that neither disparities between national laws nor lack of coordination between competent authorities jeopardise the seamless operation of the mutual assistance system provided for in this Directive.'

4 Article 14(1) and (2) of that directive provides:

'1. Disputes concerning the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State and disputes concerning the validity of a notification made by a competent authority of the applicant Member State fall within the competence of the competent bodies of the applicant Member State. If, in the course of the recovery procedure, the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State is contested by an interested party, the requested authority shall inform that party that such an action must be brought by the latter before the competent body of the applicant Member State in accordance with the laws in force there.

2. Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by a competent authority of the requested Member State shall be brought before the competent body of that Member State in accordance with its laws and regulations.'

5 According to Article 16 of that directive:

'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.

The document drawn up for permitting precautionary measures in the applicant Member State and relating to the claim for which mutual assistance is requested, if any, shall be attached to the request for precautionary measures in the requested Member State. This document shall not be subject to any act of recognition, supplementing or replacement in the requested Member State.

2. The request for precautionary measures may be accompanied by other documents relating to the claim, issued in the applicant Member State.'

6 Article 17 of the same directive provides:

'In order to give effect to Article 16, Articles 10(2), 13(1) and (2), 14, and 15 shall apply mutatis mutandis.'

7 Article 18 of Directive 2010/24 provides:

'1. The requested authority shall not be obliged to grant the assistance provided for in Articles 10 to 16 if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the requested Member State, in so far as the laws, regulations and administrative practices in force in that Member State allow such exception for national claims.

2. 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 Article 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.

However, in cases where the claim or the initial instrument permitting enforcement in the applicant Member State is contested, the 5-year period shall be deemed to begin from the moment when it is established in the applicant Member State that the claim or the instrument permitting enforcement may no longer be contested.

Moreover, in cases where a postponement of the payment or instalment plan is granted by the competent authorities of the applicant Member State, the 5-year period shall be deemed to begin from the moment when the entire payment period has come to its end.

However, in those cases the requested authority shall not be obliged to grant the assistance in respect of claims which are more than 10 years old, dating from the due date of the claim in the applicant Member State.

3. A Member State shall not be obliged to grant assistance if the total amount of the claims covered by this Directive, for which assistance is requested, is less than EUR 1 500.

4. The requested authority shall inform the applicant authority of the grounds for refusing a request for assistance.'

8 Commission Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Directive 2010/24/EU (OJ 2011 L 302, p. 16), as amended by Commission Implementing Regulation (EU) No 2017/1966 of 27 October 2017 (OJ 2017 L 279, p. 38) ('Regulation No 1189/2011'), lays down, as is apparent from Article 1 thereof, detailed rules for the application, inter alia, of Article 16(1) of Directive 2010/24.

9 Under Article 15 of Regulation No 1189/2011:

'1. Requests for recovery or for precautionary measures shall include a declaration that the conditions laid down in Directive 2010/24/EU for initiating the mutual assistance procedure have been fulfilled.

2. In case of a request for precautionary measures, this declaration may be supplemented by a declaration specifying the reasons and circumstances of the request, established in accordance with the model set out in Annex III.'

10 In accordance with points 2.2 and 2.3 of the model set out in Annex III to Regulation 1189/2011, the request for precautionary measures may be accompanied either by an administrative decision permitting precautionary measures or by a judicial confirmation that precautionary measures are justified.

Estonian law

11 Article 130(1) of the Maksukorralduse seadus (Law on the organisation of taxes; 'the MKS') sets out the measures that may be taken by the tax authority in order to enforce recovery of debts, where the debtor fails to fulfil his pecuniary obligation within the period prescribed by that law.

12 Paragraph 136^1 of the MKS, entitled 'Precautionary measures before establishment of monetary claim or liability', provides:

'(1) If, upon inspection of the correct payment of taxes, there is reason to suspect that, following the establishment of the monetary claim or liability arising from tax legislation, the enforceability thereof may prove to be much more difficult or impossible due to the

conduct of the taxable person, the head of the tax authority or an officer authorised thereby may ask the Administrative Court to grant approval for an enforcement measure provided for in Paragraph 130(1) of the present law.'

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

13 On 8 February 2018, the Keski-Pohjanmaan käräjäoikeus (District Court, Keski-Pohjanmaa, Finland) adopted an interim decision relating to the seizure of certain assets belonging to Heavyinstall, in order to secure a tax claim of an anticipated amount of EUR 320 022 held by the Finnish tax authority on that company ('the Finnish court's seizure decision').

14 According to that decision, there was a risk that Heavyinstall would conceal, destroy or dispose of its assets or act in a manner liable to frustrate the recovery of the Finnish tax authority's claim. In addition, Heavyinstall's partner had knowingly misled that authority since 2010, in order to relieve that company of its tax obligations in Finland.

15 On 13 March 2018, the Finnish tax authority sent the MTA, on the basis of Article 16 of Directive 2010/24, a request for assistance concerning precautionary measures to be taken against Heavyinstall ('the request for assistance'). It is apparent from the information available to the Court that the Finnish court's seizure decision was attached to that request.

16 In order to comply with the request for assistance, the MTA made a request, on 29 March 2018, before the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia), with a view to seizure of Heavyinstall's vehicles, namely two trailers with a value of EUR 7 500 and a HGV with a value of EUR 9 500, as well as attachment of that company's bank accounts in all the Estonian credit institutions in the amount of EUR 297 304 ('the request for precautionary measures').

17 By an order of 3 April 2018, the Tallinna Halduskohus (Administrative Court, Tallinn) rejected the request for precautionary measures, on the ground that no proof had been provided that the condition set in Paragraph 136[1] of the MKS had been fulfilled. In accordance with that provision, the application of precautionary measures requires there to be reason to suspect that, following the establishment of the claim, the enforceability of the claim may prove to be much more difficult or impossible due to the conduct of the taxable person.

18 The MTA brought an appeal against that order before the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia), which dismissed that appeal by an order of 8 May 2018.

19 According to that court, it is apparent from Article 16 of Directive 2010/24 that the requested Member State is entitled to assess whether the request for precautionary measures is well founded and proportionate in the light of its own legislation, and to verify whether the adoption of such measures is in conformity with that legislation and with its administrative practices.

20 The Tallinna Ringkonnakohus (Court of Appeal, Tallinn) examined, on the basis of that premiss, whether the conditions of application of Paragraph 136[1] of the MKS were fulfilled and concluded, as the court of first instance had done, that that was not the case. Moreover, according to the Tallinna Ringkonnakohus (Court of Appeal, Tallinn), the application of the precautionary measures the implementation of which is requested against Heavyinstall is disproportionate.

21 In addition, the MTA was informed by the Finnish tax authority that, by a decision of 21 June 2020, the Keski-Pohjanmaan käräjäoikeus (District Court, Keski-Pohjanmaa) had upheld the Finnish court's seizure decision.

22 The MTA brought an appeal before the referring court, the Riigikohus (Supreme Court, Estonia), by which it has requested that court to set aside the order of 8 May 2018 of the Tallinna Ringkonnakohus (Court of Appeal, Tallinn) and to grant its request for implementation of precautionary measures against Heavyinstall.

23 According to the referring court, it is necessary, in the case in the main proceedings, to determine whether the Estonian courts, when ruling on the request for precautionary measures, may themselves assess the evidence adduced and decide, at their own discretion, whether the conditions of application of those measures are fulfilled, or whether, on the contrary, those courts must base their decision on the assessment made in the Finnish court's seizure decision.

24 The Riigikohus (Supreme Court) favours the interpretation of Article 16 of Directive 2010/24 advocated by the courts of first instance and of appeal according to which, in essence, the Finnish court's seizure decision is merely one of the items of evidence that must be examined in the assessment of the conditions set in Paragraph 136[1] of the MKS. However, the referring court also notes that the principles of cooperation, mutual trust and effectiveness of EU law might suggest accepting the interpretation of Article 16 of Directive 2010/24 favoured by the MTA in the main proceedings.

25 It is in those circumstances that the Riigikohus (Supreme Court) decided to stay the proceedings and

to refer the following question to the Court for a preliminary ruling:

'Is Article 16 of [Directive 2010/24] to be interpreted as meaning that the court of the Member State which has received the request for precautionary measures, when ruling on that request on the basis of national law (which is possible for the requested court under the first sentence of Article 16), is bound to the view taken by the court of the state of establishment of the applicant in relation to the necessity and possibility of the precautionary measure when a document containing that view has been submitted to the court (last sentence of [the second subparagraph of] Article 16[(1)], according to which this document shall not be subject to any recognition, supplementing or replacement in the requested Member State)?'

Consideration of the question referred

26 By its question, the referring court asks, in essence, whether Article 16 of Directive 2010/24 must be interpreted as meaning that the courts of the requested Member State, ruling on a request for precautionary measures, are bound by the assessment of the factual and legal compliance with the conditions laid down for the application of those measures made by the authorities of the applicant Member State, where that assessment is contained in the document provided for in the second subparagraph of Article 16(1) of that directive, attached to that request, or, on the contrary, whether they may carry out their own assessment, having regard to their national law.

27 In that regard, it should be recalled that, according to the Court's settled case-law, for the purposes of interpreting a provision of EU law, it is necessary to consider not only its wording, but also its context and the objectives of the rules of which it is part (judgment of 11 June 2020, *ratiopharm*, C-786/18, EU:C:2020:459, paragraph 28).

28 As regards the literal interpretation of Article 16 of Directive 2010/24, first, it is apparent from the wording of the first subparagraph of paragraph 1 of that article that the requested authority is to take precautionary measures, in particular, if 'allowed by its national law and in accordance with its administrative practices' and if 'precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant Member State'.

29 Thus, that wording merely mentions the need for those precautionary measures, on the one hand, to be authorised in the requested Member State and, on the other, to be possible in the applicant Member State, without providing further details as to the extent of the powers of the courts of the requested Member State as regards the assessment of the conditions of application of those precautionary measures.

30 Secondly, it should be noted that, according to the wording of the second subparagraph of Article 16(1) of Directive 2010/24, where a document drawn up for permitting precautionary measures in the applicant Member State is attached to the request for assistance, 'this document shall not be subject to any act of recognition, supplementing or replacement in the requested Member State'.

31 Thus, as the Advocate General observed in point 36 of his Opinion, the analysis contained in that accompanying document, which generally covers the existence of the conditions laid down for precautionary measures in the light of the national law of the applicant Member State, must not and may not be supplemented or replaced in the requested Member State, which is consistent with an interpretation according to which that analysis is binding on the courts of the requested Member State.

32 As regards the interpretation of Article 16 of Directive 2010/24 in the light of its context, it should be noted, in the first place, that, under Article 17 of that directive, Article 14 thereof is to apply, *mutatis mutandis*, in order to give effect to that Article 16.

33 Article 14 of Directive 2010/24 provides for a division of powers between the courts of the applicant Member State and the requested Member State to hear disputes concerning, on one hand, the claim, the initial instrument permitting enforcement in the applicant Member State, the uniform instrument permitting enforcement in the requested Member State or disputes concerning the validity of a notification given by a competent authority of the applicant Member State and, on the other hand, the enforcement measures taken in the requested Member State or the validity of the notification given by a competent authority of the latter. That division of powers results from the fact that the claim and the instrument permitting enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, whilst, for enforcement measures in the Member State in which the requested authority is situated, the latter applies according to its national law (see, to that effect, judgment of 14 March 2019, *Metirato*, C-695/17, EU:C:2019:209, paragraphs 33 and 34).

34 Thus, pursuant to Article 14(1) of Directive 2010/24, any dispute of the claim and of the initial instrument permitting enforcement in the applicant Member State must be brought before the competent bodies of that Member State and not before those of the requested Member State, whose power of review is expressly limited by Article 14(2) of that directive to acts of the requested Member State (see, to that effect,

judgment of 14 March 2019, *Metirato*, C-695/17, EU:C:2019:209, paragraph 35 and the case-law cited).

35 The transposition of that case-law, concerning Article 14 of that directive, to disputes relating to precautionary measures, referred to in Article 16 of that directive, is likewise consistent with an interpretation according to which the courts of the requested Member State cannot assess those measures in the light of the substantive conditions laid down by their national law for the adoption of such measures, since those precautionary measures have been established on the basis of the legal rules in force in the applicant Member State.

36 Consequently, as the Advocate General observed in point 45 of his Opinion, a concurrent analysis of the provision laid down by Article 16 of Directive 2010/24 indicates that the courts in the requested Member State are competent to rule on whether the procedure for application of precautionary measures complies with the legal provisions and administrative practices of that State, but not on whether the substantive conditions exist for application of those measures.

37 In the second place, it should be recalled that Article 18 of Directive 2010/24 lists specific cases in which the requested Member State may refuse to grant the mutual assistance provided for in that directive. In accordance with the Court's settled case-law, those cases, as exceptions to the principle of mutual trust, must be interpreted strictly (see, by analogy, judgment of 14 November 2013, *Baláž*, C-60/12, EU:C:2013:733, paragraph 29).

38 Similarly, the Court has accepted that the requested authority may, exceptionally, decide not to grant its assistance to the applicant authority if it is shown that such enforcement is liable to be contrary to the public policy of the Member State of the requested authority (see, to that effect, judgment of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 47).

39 It is thus apparent from the analysis of the context of Article 16 of Directive 2010/24 that it is only in specific and defined cases, based on a derogation expressly provided for by that directive or on the case-law of the Court, that the courts of the requested Member State may refuse to grant assistance for the adoption of precautionary measures.

40 So far as concerns the teleological interpretation of Directive 2010/24, it should be borne in mind that that directive, while falling within the area of the internal market and not that of the area of freedom, security and justice, is based on the principle of mutual trust. The implementation of the system of mutual assistance established by Directive 2010/24 depends on the existence of such trust between the national authorities concerned (see, to that effect, judgment of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 41).

41 In that regard, it should also be recalled that both the principle of mutual trust between the Member States and the principle of mutual recognition, which is based on the first of those principles, are of fundamental importance in EU law, given that they allow an area without internal borders to be created and maintained (see, to that effect, judgment of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 40).

42 Moreover, first, it is apparent from recital 4 of Directive 2010/24 that, in order to cope with the increase in assistance requests and to deliver better results, it is necessary to make assistance more efficient and effective and to facilitate it in practice.

43 Secondly, in accordance with recital 6 of that directive, it is necessary to ensure that neither disparities between national laws nor lack of coordination between competent authorities jeopardise the seamless operation of the mutual assistance system provided for in the directive.

44 An interpretation of Article 16 of Directive 2010/24 that would allow the courts of the requested Member State to carry out a fresh examination of the conditions of application of precautionary measures, in the light of their national law, however, in particular where the assessment of those conditions is contained in the document provided for in the second subparagraph of Article 16(1) of that directive, would be contrary to the principle of mutual trust – on which that directive is based – and to the requirements relating to the seamless operation and the effectiveness of the system of mutual assistance established by that directive.

45 Furthermore, as the Advocate General observed in point 55 of his Opinion, that fresh examination would also be contrary to both the specific requirements for expeditious treatment characterising the procedure for application of precautionary measures and the need to avoid contradictory assessments in that assistance procedure by judicial bodies in the two Member States involved with regard to the same factual circumstances.

46 It follows, therefore, from a literal interpretation of Article 16 of Directive 2010/24 as well as from the context of that provision and from the objectives pursued by that directive that the courts of the requested Member State are, in principle, bound by the assessment made by the authorities of the applicant Member State of compliance with the

conditions of application of precautionary measures, in particular where that assessment is contained in the document provided for in the second subparagraph of Article 16(1) of Directive 2010/24, attached to the request for assistance.

47 In the case at hand, it is appropriate to note that the Finnish court's seizure decision may be regarded as the document referred to in the second subparagraph of Article 16(1) of Directive 2010/24. Indeed, as is apparent from point 2.3 of Annex III to Regulation No 1189/2011, which contains a model declaration specifying the reasons and circumstances of a request for precautionary measures, such a request, based on Article 16 of Directive 2010/24, may result from a judicial decision confirming that the precautionary measures are justified. The model also provides that that judicial decision is to be attached to that declaration.

48 It is therefore on the basis of the analysis set out in that document and not on the basis of their own assessment of the facts at issue and of the conditions of application, within the meaning of Paragraph 136[1] of the MKS, of the precautionary measures, that the Estonian courts must rule on the request for assistance before them.

49 In the light of all the foregoing considerations, the answer to the question referred is that Article 16 of Directive 2010/24 must be interpreted as meaning that the courts of the requested Member State, ruling on a request for precautionary measures, are bound by the assessment of the factual and legal compliance with the conditions laid down for the application of those measures made by the authorities of the applicant Member State, in particular where that assessment is contained in the document referred to in the second subparagraph of Article 16(1) of that directive, attached to that request.

(…)

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

Article 16 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures must be interpreted as meaning that the courts of the requested Member State, ruling on a request for precautionary measures, are bound by the assessment of the factual and legal compliance with the conditions laid down for the application of those measures made by the authorities of the applicant Member State, in particular where that assessment is contained in the document referred to in the second subparagraph of Article 16(1) of that directive, attached to that request.

EU

Court of Justice

24 February 2021

Silcompa

Case number: C-95/19

International recovery assistance – Directive 76/308 – Excise duty payable in two Member States for the same transactions – Review carried out by the courts of the Member State in which the requested authority is situated – Refusal to provide assistance – Conditions

Summary

Article 12(3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery, read in conjunction with Article 20 of Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products must be interpreted as meaning that, in the context of an action disputing enforcement measures taken in the requested Member State, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by another Member State in respect of goods which irregularly departed from a suspension arrangement, where that request is based on the facts relating to the same export transactions which are already subject to excise duty recovery in the requested Member State.

1 This request for a preliminary ruling concerns the interpretation of Article 12(3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18), as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17) ('Directive 76/308'), in conjunction with Article 20 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124) ('Directive 92/12').

2 The request has been made in proceedings between the Agenzia delle Dogane (Customs Agency, Italy) ('the Agency') and Silcompa SpA, a company established in Italy which produces ethyl alcohol, concerning two payment notices adopted in respect of the recovery of excise duties, on the basis of a request for assistance submitted to the Agency by the Greek customs authority pursuant to Article 6(1) of Directive 76/308/EEC, relating to the sales of ethyl alcohol made by Silcompa to Greece between 1995 and 1996 under duty suspension arrangements.

Legal context

EU law

Directive 76/308

3 According to the seventh recital, Directive 76/308 aims, inter alia, to give a limitative definition of the particular circumstances in which the requested authority may refuse requests for assistance drawn up by the applicant authority.

4 According to the tenth recital of that directive, where, during the recovery procedure in the Member State in which the requested authority is situated, the claim or the instrument authorising its enforcement issued in the Member State in which the applicant authority is situated is contested, the person concerned must bring the action contesting the claim before the competent body of the latter Member State, and the requested authority must suspend any enforcement proceedings which it has begun until a decision is taken by the aforementioned body.

5 That directive is applicable, pursuant to Article 2(f) thereof, to all claims relating to excise duties on, inter alia, alcohol and alcoholic beverages.

6 Article 6 of that directive provides:

'1. At the request of the applicant authority, the requested authority shall, in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State in which the requested authority is situated, recover claims which are the subject of an instrument permitting their enforcement.

2. For this purpose any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the requested authority is situated, except where Article 12 applies.'

7 Article 7(1) and (2) of Directive 76/308 provides:

'1. The request for recovery of a claim which the applicant authority addresses to the requested authority must be accompanied by an official or certified copy of the instrument permitting its enforcement, issued in the Member State in which the applicant authority is situated and, if appropriate, by

the original or a certified copy of other documents necessary for recovery.

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, except in cases where the second subparagraph of Article 12(2) is applied;

(b) it has, in the Member State in which it is situated, applied appropriate recovery procedures available to it on the basis of the instrument referred to in paragraph 1, and the measures taken will not result in the payment in full of the claim.'

8 Article 8 of that directive is worded as follows:

'1. The instrument permitting enforcement of the claim shall be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated.

2. Notwithstanding the first paragraph, the instrument permitting enforcement of the claim may, where appropriate and in accordance with the provisions in force in the Member State in which the requested authority is situated, be accepted as, recognised as, supplemented with, or replaced by an instrument authorising enforcement in the territory of that Member State.

Within three months of the date of receipt of the request for recovery, Member States shall endeavour to complete such acceptance, recognition, supplementing or replacement, except in cases where the third subparagraph is applied. They may not be refused if the instrument permitting enforcement is properly drawn up. The requested authority shall inform the applicant authority of the grounds for exceeding the period of three months.

If any of these formalities should give rise to contestation in connection with the claim and/or the instrument permitting enforcement issued by the applicant authority, Article 12 shall apply.'

9 Article 12(1) to (3) of the directive provides:

'1. If, in the course of the recovery procedure, the claim and/or the instrument permitting its enforcement issued in the Member State in which the applicant authority is situated are contested by an interested party, the action shall be brought by the latter before the competent body of the Member State in which the applicant authority is situated, in accordance with the laws in force there. This action must be notified by the applicant authority to the requested authority. The party concerned may also notify the requested authority of the action.

2. As soon as the requested authority has received the notification referred to in paragraph 1 either from the applicant authority or from the interested party, it shall suspend the enforcement procedure pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the second subparagraph. Should the requested authority deem it necessary, and without prejudice to Article 13, that authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the Member State in which it is situated allow such action for similar claims.

Notwithstanding the first subparagraph of paragraph 2, the applicant authority may in accordance with the law, regulations and administrative practices in force in the Member State in which it is situated, request the requested authority to recover a contested claim, in so far as the relevant laws, regulations and administrative practices in force in the Member State in which the requested authority is situated allow such action. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for the reimbursement of any sums recovered, together with any compensation due, in accordance with the laws in force in the Member State in which the requested authority is situated.

3. Where it is the enforcement measures taken in the Member State in which the requested authority is situated that are being contested the action shall be brought before the competent body of that Member State in accordance with its laws and regulations.'

Directive 92/12

10 The fourth recital of Directive 92/12 states that, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties should be identical in all the Member States.

11 In accordance with Article 3(1) thereof, that directive is applicable on EU level inter alia to alcohol and alcoholic beverages.

12 Article 4 of that directive provides:

'For the purpose of this Directive, the following definitions shall apply:

(a) authorised warehousekeeper: a natural or legal person authorised by the competent authorities of a Member State to produce, process, hold, receive and dispatch products subject to excise duty in the course of his business, excise duty being suspended under tax-warehousing arrangement;

(b) tax warehouse: a place where goods subject to excise duty are produced, processed, held, received or dispatched under duty-suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the

competent authorities of the Member State where the tax warehouse is located;

(c) suspension arrangement: a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended;

…'

13 Article 5(1) of that directive provides:

'The products referred to in Article 3(1) shall be subject to excise duty at the time of their production within the territory of the [Union] as defined in Article 2 or of their importation into that territory.'

14 Pursuant to Article 6(1) and (2) of Directive 92/12:

'1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14(3).

Release for consumption of products subject to excise duty shall mean:

(a) any departure, including irregular departure, from a suspension arrangement;

(b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;

(c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. …'

15 The first subparagraph of Article 15(1) of Directive 92/12 provides that, in principle, *'the movement of products subject to excise duty under suspension arrangements shall take place between tax warehouses*'.

16 Under Article 15(3) and (4) of that directive:

'3. The risks inherent in … movement [within the European Union] shall be covered by the guarantee provided by the authorised warehousekeeper of dispatch, as provided for in Article 13, or, if need be, by a guarantee jointly and severally binding on both the consignor and the transporter. …

4. Without prejudice to the provision of Article 20, the liability of the authorised warehousekeeper of dispatch and, if the case arises, that of the transporter may only be discharged by proof that the consignee has taken delivery of the products, in particular by the accompanying document referred to in Article 18 under the conditions laid down in Article 19.'

17 According to Article 18(1) of that directive:

'… all products subject to excise duty moving under duty-suspension arrangements between Member States, including those moving by sea or air directly from one [EU] port or airport to another, shall be accompanied by a document drawn up by the consignor. This document may be either an administrative document or a commercial document. …'

18 The first and third subparagraphs of Article 19(1) of Directive 92/12 provide:

'The tax authorities of the Member States shall be informed by traders of deliveries dispatched or received by means of the document or a reference to the document specified in Article 18. This document shall be drawn up in quadruplicate:

- *one copy to be kept by the consignor,*
- *one copy for the consignee,*
- *one copy to be returned to the consignor for discharge,*
- *one copy for the competent authorities of the Member State of destination.*

…

The Member States of destination may stipulate that the copy to be returned to the consignor for discharge should be certified or endorsed by its national authorities. …'

19 Article 19(2) and (3) of that directive is worded as follows:

'2. When products subject to excise duty move under the duty-suspension arrangements to an authorised warehousekeeper or to a registered or non-registered trader, a copy of the accompanying administrative document or a copy of the commercial document, duly annotated, shall be returned by the consignee to the consignor for discharge, at the latest within 15 days following the month of receipt by the consignee.

…

3. The duty-suspension arrangements as defined in Article 4(c) shall be discharged by the placing of the products subject to excise duty under one of the arrangements referred to in Article 5(2) and subject to the conditions referred to therein, after the consignor has received the copy to be returned of the accompanying administrative document or a copy of the commercial document, duly annotated, in which it must be noted that the products have been placed under such an arrangement.'

20 Article 20 of that directive states:

'1. Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3), without prejudice to the bringing of criminal proceedings.

Where the excise duty is collected in a Member State other than that of departure, the Member State collecting the duty shall inform the competent authorities of the country of departure.

2. When, in the course of movement, an offence or irregularity has been detected without it being possible to determine where it was committed, it shall be deemed to have been committed in the Member State where it was detected.

3. Without prejudice to the provision of Article 6(2), when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence [or] irregularity was committed, that offence or irregularity shall be deemed to have been committed in the Member State of departure, which shall collect the excise duties at the rate in force on the date when the products were dispatched unless within a period of four months from the date of dispatch of the products evidence is produced to the satisfaction of the competent authorities of the correctness of the transaction or of the place where the offence or irregularity was actually committed. Member States shall take the necessary measures to deal with any offence or irregularity and to impose effective penalties.

4. If, before the expiry of a period of three years from the date on which the accompanying document was drawn up, the Member State where the offence or irregularity was actually committed is ascertained, that Member States shall collect the excise duty at the rate in force on the date when the goods were dispatched. In this case, as soon as evidence of collection has been provided, the excise duty originally levied shall be refunded.'

Italian law

21 Mutual assistance for the recovery of excise duties is governed in Italian law, inter alia, by decreto legislativo n. 69 – Attuazione della direttiva 2001/44/CE relativa all'assistenza reciproca in materia di recupero di crediti connessi al sistema di finanziamento del FEOGA, nonché ai prelievi agricoli, ai dazi doganali, all'IVA ed a talune accise (Legislative Decree No 69 on the implementation of Directive 2001/44/EC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the EAGGF, and of agricultural levies and customs duties, and in respect of VAT and certain excise duties) of 9 April 2003 (Ordinary Supplement to GURI No 87 of 14 April 2003) ('Legislative Decree No 69/2003').

22 Article 5 of Legislative Decree No 69/2003, headed 'Assistance for recovery of claims', provides:

'1. At the request of the applicant authority, the Ministero dell'economia e delle finanze [(Ministry of Economy and Finance, Italy)] shall, on the basis of the instruments permitting enforcement which it has received, take steps to recover claims as referred to in Article 1 arising in the Member State in which the applicant authority is situated, in accordance with current legislation governing the recovery of similar claims arising within the national territory. The instruments permitting enforcement, which shall have direct and immediate effect, shall be included in the lists referred to in decreto del Presidente della Repubblica [n. 602 – Disposizioni sulla riscossione delle imposte sul reddito (Presidential Decree No 602 on rules on the collection of income tax) of 29 September 1973 (Ordinary Supplement to GURI No 268 of 16 October 1976)].

2. The applicant authority may make a request for recovery only if:

(a) the claim and/or the instrument permitting its enforcement are not contested in the Member State in which the applicant authority is situated, unless an intention has been clearly expressed to proceed in any event with the recovery of the claim in the event that it is contested;

(b) it has initiated the recovery procedure in the Member State in which it is situated and the measures taken will not result in the payment of the claim in full.

…'

23 Article 6 of that legislative decree, headed 'Action contesting a claim', provides:

'1. A person who wishes to contest a claim or an instrument permitting its enforcement issued in the Member State in which the applicant authority is situated shall apply to the competent authority in that State, in accordance with the current law of that State. In such a case, the Ministry of Economy and Finance, upon receiving notification of the contested claim from the applicant authority or from the person concerned, shall, unless the applicant authority requests otherwise, suspend the enforcement procedure until the competent authority has given its decision. In the event that the procedure for the recovery of the contested claim is nevertheless proceeded with following the request of the applicant authority, and the outcome of the dispute is favourable to the debtor, the applicant authority shall be liable for the reimbursement of any sums recovered,

together with any other sums due, in accordance with Italian law. If a court rules on the dispute in favour of the applicant authority and permits the recovery of the claim in the same State, the enforcement procedure shall recommence on the basis of that court's decision.

2. A person who wishes to contest measures in the enforcement procedure shall apply to the competent authority, in accordance with national law.

3. The Member State in which the applicant authority is situated shall remain liable to the Member State in which the requested authority is situated for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument issued by the applicant authority are concerned.'

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

24 Between 1995 and 1996 Silcompa sold ethyl alcohol to Greece under duty suspension arrangements.

25 In January 2000, following a check carried out by the Ufficio Tecnico di Finanza di Reggio Emilia (Technical Finance Office, Reggio Emilia, Italy) in the context of the administrative cooperation procedure provided for in Article 19 of Directive 92/12, it was established that the accompanying administrative documents ('the AADs') relating to the consignments of alcohol dispatched by Silcompa had never been received by the Greek customs authority in order for the official documents to be drawn up and that the stamps of the Corinthian customs office (Greece) on the AADs, found at Silcompa's premises, were false. As a result, the Agency issued three payment notices for the recovery of the unpaid excise duties, for a total amount of EUR 6 296 495.47.

26 Silcompa brought an action against those payment notices before the Tribunale di Bologna (District Court, Bologna, Italy), whose decision in favour of Silcompa was appealed against by the Agency before the Corte d'Appello di Bologna (Court of Appeal, Bologna, Italy). According to the referring court, at the date of the request for a preliminary ruling, the proceedings relating to that action were still ongoing.

27 In addition, after the Greek customs authorities sent a request for information to Silcompa in April 2001 in order to obtain clarification on the transactions regarding the consignments of alcohol in question, and after Silcompa replied to that request, those authorities informed the Agency, in February 2004, that the deliveries of the products sent by Silcompa to a Greek company should be considered irregular.

28 Thus, on 27 March 2004, the Ufficio delle Dogane di Reggio Emilia (Customs Office, Reggio Emilia, Italy) issued adjustment notice No 6/2004, which covered the Italian tax claims on which the payment notices issued in January 2000 were based, referred to in paragraph 25 above, and the additional tax adjustment of EUR 473 410.66, payable following the communication from the Greek administration in February 2004. Silcompa challenged adjustment notice No 6/2004 before the Commissione tributaria provinciale di Reggio Emilia (Provincial Tax Commission, Reggio Emilia, Italy). That procedure led to the conclusion, in September 2017, of a settlement agreement between the Agency and Silcompa, under which Silcompa was to pay a total amount of EUR 1 554 181.23 in respect of the debt claimed by the Italian authorities.

29 In addition, in January 2005, in relation to the same export transactions within the European Union, the Athens customs office (Greece) issued two 'excise duty payment notices', submitting that the unlawful release for consumption on Greek territory of ethyl alcohol shipped by Silcompa to 'letterbox' companies had been established. According to the statements of the parties to the main proceedings, the Athens customs office acted on the basis of the criminal investigations that had resulted in a judgment at first instance which confirmed that Silcompa's goods had reached Greek operators and been fraudulently released for consumption.

30 On 31 January 2005, the Greek tax authorities made a request for assistance to the Agency, pursuant to Article 6(1) of Directive 76/308, as amended by Directive 76/308, for the recovery of claims relating to the excise duties in question.

31 On 13 September 2005, the Agency, as the competent requested authority, notified Silcompa, pursuant to Article 5 of Legislative Decree No 69/2003, of two amicable payment notices for the sums of EUR 10 280 291.66 (notice RP 05/14) and EUR 64 218.25 (notice RP 05/12), which form the subject matter of the dispute in the main proceedings.

32 The action brought by Silcompa against those payment notices was dismissed as inadmissible at first instance by the Commissione tributaria provinciale di Roma (Provincial Tax Court, Rome, Italy), before being upheld by the Commissione tributaria regionale del Lazio (Regional Tax Court, Lazio, Italy), hearing the appeal brought by Silcompa, in which it claimed that the Greek authorities had failed to serve the necessary 'preliminary documents' and had failed to state sufficient reasons for those payment notices, in so far as they did not refer to the procedures which had been initiated, in parallel, in Italy concerning recovery of

excise duties in respect of the same export transactions.

33 The Agency consequently brought an appeal on a point of law before the Corte suprema di cassazione (Supreme Court of Cassation, Italy).

34 The referring court questions, in particular, whether, in an action concerning the enforcement procedure initiated in the context of mutual assistance for the recovery of claims relating to excise duties, there is a 'possible duplication of the tax claim' in so far as requests based on the same events giving rise to liability for excise duty were brought at the same time in both the Member State in which the applicant authority is situated and the Member State in which the requested authority is situated.

35 While conceding that, under Article 12 of Directive 76/308, where the dispute concerns enforcement measures in the Member State in which the requested authority is situated, the action is to be brought before the competent body of that Member State, whereas, where the dispute concerns the claim or the instrument permitting its enforcement the action is to be brought before the competent body of the Member State in which the applicant authority is situated, the referring court notes that, in accordance with Article 20(4) of Directive 92/12, the duties originally collected in a Member State are to be refunded if the Member State in which the offence or irregularity was actually committed is ascertained. Nevertheless, under that provision, the Member State in which the offence or irregularity was actually committed must be ascertained before the expiry of a period of three years from the date on which the AAD was drawn up, a time limit which, in the present case, expired long ago.

36 In that regard, the referring court wonders, in particular, whether, in the context of the recovery procedure provided for in Article 12(3) of Directive 76/308, which seeks to implement a request for assistance made on the basis of Article 6(1), the conditions referred to in Article 20 of Directive 92/12, such as the place where the offence or irregularity was actually committed, should also be examined, at least in the particular circumstances of the case in the main proceedings. In fact, according to the referring court, the matter to be examined does not seem to relate to the claim or foreign instrument, as provided for in Article 12(1) of Directive 76/308, but relates to the lawful basis of the request for assistance and, as a result, of all the measures enforcing that claim.

37 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 12(3) of [Directive 76/308], read in conjunction with Article 20 of [Directive 92/12], to be interpreted as meaning that, in proceedings brought against enforcement measures for the collection of excise duty, the court may examine (and if so within what limits) the question of the place (of actual release for consumption) where the irregularity or offence was actually committed where, as in the present case, the same claim, based on the same export transactions, is made, independently, against the taxable person by both the [applicant authority] and the [requested authority] and, in the requested State, proceedings are pending, contemporaneously, both in respect of the national claim and the action for the collection of duties for the other State, and would the court's finding in that regard invalidate the request for assistance and consequently all the enforcement measures?'

The procedure before the Court

38 On 22 October 2019, the Court sent a request for information to the referring court concerning the factual and legal framework of the dispute in the main proceedings.

39 On 31 December 2019, the referring court replied to that request for information.

40 The hearing, which had been scheduled for 26 March 2020 was, on account of the health crisis and the uncertainties it led to regarding when the Court might be able to resume its judicial activities under normal conditions, cancelled and the questions which had been asked for an oral response were converted into questions for a written response. The Italian, Spanish and Swedish Governments and the European Commission responded to the questions within the period prescribed by the Court.

The question referred for a preliminary ruling

41 By its question, the referring court asks, in essence, whether Article 12(3) of Directive 76/308, read in conjunction with Article 20 of Directive 92/12, must be interpreted as meaning that, in the context of an action disputing enforcement measures taken in the Member State where the requested authority is situated, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of another Member State, as regards goods which irregularly departed from a suspension arrangement, for the purposes of Article 6(1) of Directive 92/12, based on the same export transactions which are already the subject of excise duty recovery in the Member State in which the requested authority is situated.

42 In the present case, on the basis of the irregularities which occurred during the same series

of export transactions under excise duty suspension arrangements dating from 1995 and 1996, the authorities of the two Member States, namely the Italian Republic and the Hellenic Republic, consider themselves to have the right, under Article 20 of Directive 92/12, to claim the excise duties on those transactions.

43 In that context, it should be noted, as a preliminary point, that Directive 76/308 was repealed and codified by Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28), which was in turn repealed and replaced by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1). Moreover, Directive 92/12 was repealed and replaced by Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12). However, in view of the date of the facts of the main proceedings, this reference for a preliminary ruling will be examined by reference to the provisions of Directives 76/308 and 92/12.

44 As regards, in the first place, Directive 92/12, that directive seeks to establish a certain number of rules regarding the holding, movement and monitoring of products subject to excise duty, such as alcohol and alcoholic beverages, within the meaning of Article 3(1) of that directive, in order, as is apparent inter alia from the fourth recital thereof, to ensure that the chargeability of excise duty is identical in all the Member States. That harmonisation makes it possible, in principle, to avoid double taxation in relations between Member States (see, to that effect, judgment of 5 March 2015, *Prankl*, C-175/14, EU:C:2015:142, paragraph 20 and the case-law cited).

45 In that regard, Article 20 of Directive 92/12 seeks, inter alia, to establish the Member State which has the exclusive right to collect excise duties on the products concerned where, in the course of a movement, an offence or infringement has been committed (see, to that effect, judgments of 12 December 2002, *Cipriani*, C-395/00, EU:C:2002:751, paragraph 46, and of 13 December 2007, *BATIG*, C-374/06, EU:C:2007:788, paragraph 44).

46 Products subject to excise duty become taxable for the purposes of Directive 92/12, in accordance with Article 5(1) thereof, upon their being produced within the territory of the European Union or imported into that territory (judgment of 5 April 2001, *Van de Water*, C-325/99, EU:C:2001:201, paragraph 29).

47 By contrast, pursuant to Article 6(1) of Directive 92/12, excise duty becomes chargeable, inter alia, at the time of release for consumption of products subject to excise duty. Under point (a) of the first subparagraph of Article 6(1) of that directive, that concept also covers any departure, including irregular departure, from a suspension arrangement, defined in Article 4(c) of that directive (see, to that effect, judgments of 5 April 2001, *Van de Water*, C-325/99, EU:C:2001:201, paragraphs 30, 31, 34 to 36; of 12 December 2002, *Cipriani*, C-395/00, EU:C:2002:751, paragraphs 42 and 43; and of 13 December 2007, *BATIG*, C-374/06, EU:C:2007:788, paragraph 29).

48 In accordance with Article 4(c) of Directive 92/12, the suspension arrangement is the tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended.

49 It is a feature of that arrangement that the excise duty on the products covered by it is not yet payable, despite the fact that the chargeable event for taxation purposes has already taken place. Consequently, as regards the products subject to excise duty, that arrangement postpones the chargeability of excise duty until one of the conditions of chargeability, such as the one described in paragraph 47 above, is met (see, by analogy, judgment of 28 January 2016, *BP Europa*, C-64/15, EU:C:2016:62, paragraph 22 and the case-law cited).

50 Pursuant to Article 15(1) of Directive 92/12, the movement of products subject to excise duty under suspension arrangements is to take place, in principle, between tax warehouses, defined in Article 4(b) of that directive, and to be operated by authorised warehousekeepers, within the meaning of Article 4(2) thereof.

51 Under Article 15(4) of that directive, without prejudice to Article 20 thereof, the liability of the authorised warehousekeeper of dispatch may only be discharged by proof that the consignee has taken delivery of the products, in particular by the accompanying document referred to in Article 18 of the same directive under the conditions laid down in Article 19 thereof.

52 Thus, the EU legislature gave a central role to the authorised warehousekeeper in the context of the procedure for movement of products subject to excise duty and placed under a suspension arrangement, which results in liability for all the risks inherent in that movement. That warehousekeeper is, consequently, designated as liable for the payment of excise duties in cases where an offence or an irregularity involving the chargeability of such duties has been committed in the course of the movement of

those products. That liability is, moreover, objective and based not on the proven or presumed fault of the warehousekeeper, but on his participation in an economic activity (see, to that effect, judgment of 2 June 2016, *Kapnoviomichania Karelia*, C-81/15, EU:C:2016:398, paragraphs 31 and 32).

53 In the event that an irregularity or offence has been committed in the course of movement involving the chargeability of excise duty, Article 20(1) of Directive 92/12, in principle, confers on the Member State in which the offence or irregularity was committed the right to collect the excise duties.

54 However, if it is not possible to determine where the offence or irregularity was committed, Article 20(2) and (3) provides for presumptions as regards determining that place, to the effect that it is to be deemed to be the Member State where the offence or infraction was detected or, when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence of irregularity was committed, it is to be deemed to be the 'Member State of departure'.

55 Moreover, as the Commission noted and the Advocate General stated in point 54 of his Opinion, Article 20(4) of Directive 92/12 provides for a 'corrective' mechanism that allows the Member State in which the offence or irregularity was actually committed to be determined before the expiry of a period of three years from the date on which the AAD was drawn up, in accordance with Article 18(1) and Article 19(1) of that directive. In that case, as soon as evidence of collection has been provided, the excise duty originally levied on the basis of Article 20(2) and (3) of that directive is to be refunded.

56 Accordingly, the corrective mechanism provided for in Article 20(4) of Directive 92/12 does not concern the situation in which there is a conflict of competency between a Member State where the offence or irregularity was committed in the course of a movement of products subject to excise duty involving the chargeability of excise duty, on the one hand, and a Member State where, subsequently, release for consumption of those products took place, on the other, but rather, as the Advocate General noted, in essence, in point 63 of his Opinion, it concerns the situation in which it is clear that the place where the offence or irregularity was actually committed is a different Member State from that which was originally determined.

57 In the present case, as is apparent from the order for reference, in January 2000 the Italian customs authority detected the failure to discharge the suspension arrangement, within the meaning of Article 19(3) of Directive 92/12, inasmuch as the AADs which Silcompa had received in respect of the deliveries of the products sent were irregular, since the stamps of the Corinthian customs office (Greece) affixed to those AADs were false.

58 However, the order for reference does not state whether, for the purpose of recovering the excise duty, those customs authorities were in fact able to establish that the irregularity consisting in the affixing of false Greek customs stamps had been committed in Italy, in order to rely on Article 20(1) of Directive 92/12, or whether they had to apply one of the presumptions provided for in Article 20(2) and (3) of that directive.

59 Moreover, as the Advocate General noted in point 62 of his Opinion, the Court has no specific information on which to assess whether the offence or irregularity was committed in a Member State other than Italy. The unlawful marketing on Greek territory of ethyl alcohol shipped by Silcompa must indeed be regarded as an offence or irregularity in respect of the products in question, but it could also be considered to be only a consequence of the offence or irregularity previously committed in Italy, which is a matter for the referring court to determine.

60 In relation to such a determination, there are two possibilities.

61 The first possibility is that there were several offences or irregularities.

62 In such a case, in a situation where several offences or infractions were consecutively committed in several Member States, two or more Member States consider that they have the right, under Directive 92/12, to collect the excise duty arising from an offence or irregularity that was committed in their respective territories.

63 Nevertheless, the Court has ruled that it cannot reasonably be claimed that the EU legislature intended to favour the prevention of abuse and evasion by generally allowing, in cases where products subject to excise duty are unlawfully transported, all the transit Member States to levy excise duty (see, to that effect, judgment of 5 March 2015, *Prankl*, C-175/14, EU:C:2015:142, paragraph 27).

64 Equally, in a situation involving an irregular departure from the suspension arrangement, which occurred in one Member State, leading, in accordance with Article 6(1)(a) of Directive 92/12, to a release for consumption of products subject to excise duty, and, subsequently, an actual release for consumption in another Member State, it cannot be accepted that the latter may also collect excise duties in so far as regards the same export transactions.

65 As the Advocate General stated in point 56 of his Opinion, in accordance with the general scheme of

Directive 92/12, release for consumption of products subject to excise duty may happen only once. It follows that, while, in practice, a number of successive offences or irregularities may take place in different Member States in the course of the movement of a single product subject to excise duties, only the first of those offences or irregularities, namely the one that had the consequence of making the products in the course of movement leave the excise duties suspension arrangement, must be taken into account for the purposes of applying Article 20 of Directive 92/12, since such an offence or such an irregularity had the effect of releasing the products for consumption within the meaning of Article 6 thereof.

66 The second possibility is that the authorities of one Member State relied on one of the presumptions of Article 20(2) and (3) of Directive 92/12 and the authorities of another Member State ascertain that the offence or irregularity was actually committed in their Member State. In such a situation, the authorities of those Member States are to apply the corrective mechanism set out in Article 20(4) of that directive, in compliance with the conditions set out in that respect, within three years from the date on which the AAD was drawn up in accordance with Article 18(1) and Article 19(1) of that directive.

67 Once that period of three years has passed, no Member State other than the Member State which relied on one of the presumptions provided for in Article 20(2) and (3) of Directive 92/12 may successfully claim the right provided for under Article 20(4) thereof.

68 In the second place, as regards Directive 76/308, it must be borne in mind, first, that that directive establishes common rules on mutual assistance in order to ensure the recovery of claims relating to certain levies, duties and taxes (see, to that effect, judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 44 and the case-law cited).

69 Under Article 2(f) thereof, that directive is applicable to excise duties, inter alia, on alcohol and alcoholic beverages.

70 Moreover, as regards the rules on mutual assistance for the recovery of claims relating, inter alia, to excise duty, it should be borne in mind that Article 12(1) and (3) of Directive 76/308 provides for a division of powers, between the bodies of the Member State where the applicant authority is situated and the bodies of the Member State where the requested authority is situated, to hear disputes relating to the claim, the instrument permitting its enforcement or the enforcement measures themselves, respectively (see, to that effect, judgment of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 37).

71 That division of powers results from the fact that the claim and the instrument permitting enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, whilst, for enforcement measures in the Member State in which the requested authority is situated, the latter applies, pursuant to Articles 5 and 6 of Directive 76/308, the provisions which its national law lays down for corresponding measures, that authority being the best placed to assess the legality of the measure in the light of its national law (judgment of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 40).

72 That is why, in accordance with Article 8(1) of Directive 76/308, the instrument permitting enforcement is to be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated (see, to that effect, judgment of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 36).

73 That division of powers is also an expression of the principle of mutual trust between the national authorities concerned (see, by analogy, as regards Directive 2010/24, judgment of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraphs 40 to 46).

74 It follows that, as the Advocate General stated in points 76 and 77 of his Opinion, the authorities of the requested Member State cannot call into question the assessment of the requesting Member State as regards the place where the irregularity or offence was committed, since such an assessment forms part of the very subject of the claim in respect of which recovery is sought by the requesting Member State and thus comes within its jurisdiction alone.

75 However, it should be noted, first, that Directive 76/308 and the case-law relating to it does not relate to a situation such as that at issue in the main proceedings in which two competing claims are made based, in essence, on the same export transactions – one established by a body of the Member State in which the requested authority is situated and the other established by a body of the Member State in which the requesting authority is situated and which benefits from national treatment in the first Member State. The rules on division of power in such a situation are provided for in Directive 92/12.

76 Second, it must be noted that the Court has held 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 State and, where appropriate, to refuse to grant assistance in whole or in part or to

make it subject to fulfilling certain conditions (see, to that effect, judgments of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 42, and of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 47).

77 On account of the national treatment to be given, under Articles 6 and 8 of Directive 76/308, to the claim in respect of which a request for recovery has been made and to the instrument permitting enforcement of that claim, it is hard to imagine that such an instrument would be enforced in the Member State in which the requested authority is situated if that enforcement were liable to be contrary to the public policy of that State (see, to that effect, judgments of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 43, and of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 48).

78 Equally, despite that national treatment, it is hard to imagine that the instrument permitting enforcement of the claim would be enforced in the Member State in which the requested authority is situated if that enforcement were liable to lead to a situation in which the excise duties on essentially the same transactions regarding the same products are levied twice, in infringement of Directive 92/12.

79 In order to prevent such a situation arising, it is necessary to allow the competent authority of that Member State to refuse to enforce that instrument.

80 To take a contrary approach would be tantamount to allowing, in the same national system, two final decisions to tax the same products subject to excise duty – one based on the irregular departure of those products from the suspension arrangement and the other based on their subsequent release for consumption – to coexist.

81 Since it is clear from the order for reference that the proceedings based on the irregular departure from the suspension arrangement and the procedure concerning the request for assistance are still pending, the referring court should, in principle, initially stay the proceedings regarding the request for assistance until a decision is taken in the proceedings regarding the irregular departure from the suspension arrangement and, subsequently, it is only if there is, in the requested Member State, a definitive judicial decision to tax the same products subject to excise duty as those referred to in the enforcement instrument of the requesting Member State, that that court may refuse to grant assistance.

82 That interpretation cannot be called into question by the fact that, in paragraph 55 of the judgment of 13 December 2007, *BATIG* (C-374/06, EU:C:2007:788), the Court held that, although Directive 92/12 seeks to harmonise the procedures for collecting excise duty by pursuing a double objective of effectively levying excise duties in a single Member State, which is the Member State in which the products are released for consumption, it must be noted that the Community legislature has not established prevention of double taxation as an absolute principle.

83 Such considerations are part of the specific factual context of the case giving rise to that judgment, which concerned the situation of an unlawful departure from the suspension arrangement on account of the theft of the products to which tax markings had already been affixed in the 'Member State of departure', tax markings having, as is apparent from paragraph 32 of that judgment, an intrinsic value which distinguishes them from straightforward documents representing the payment of a sum of money to the tax authorities in the Member State in which those markings were issued (see, to that effect, judgment of 5 March 2015, *Prankl*, C-175/14, EU:C:2015:142, paragraphs 28 and 29).

84 In the light of the foregoing considerations, the answer to the question referred is that Article 12(3) of Directive 76/308, read in conjunction with Article 20 of Directive 92/12, must be interpreted as meaning that, in the context of an action disputing enforcement measures taken in the Member State in which the requested authority is situated, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of another Member State in respect of goods which irregularly departed from a suspension arrangement, for the purposes of Article 6(1) of Directive 92/12, where that request is based on the facts relating to the same export transactions which are already subject to excise duty recovery in the Member State in which the requested authority is situated.

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

Article 12(3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, as amended by Council Directive 2001/44/EC of 15 June 2001, read in conjunction with Article 20 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December must be interpreted as meaning that, in the context of an action disputing enforcement measures taken in the Member State in which the requested authority is situated, the competent

body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of another Member State in respect of goods which irregularly departed from a suspension arrangement, for the purposes of Article 6(1) of Directive 92/12, where that request is based on the facts relating to the same export transactions which are already subject to excise duty recovery in the Member State in which the requested authority is situated.

Note:

This judgement related to the application of the earlier EU Tax Recovery Assistance Directive (Directive 76/308/EEC). It may be noted that the current Directive 2010/24/EU contains a specific provision concerning situations of double taxation, namely Article 14 (4), fourth subparagraph.

Germany

Federal Tax Court

(Bundesfinanzhof)

30 July 2020

Case number: VII B 73/20
ECLI: DE: BFH: 2020: BA.300720. VIIB73.20.0

► *1. International recovery assistance – Directive 2010/24/EU – Refusal on grounds of public policy of the requested State –*
► *1.1. Mere assertion by the debtor that he did not receive the applicant State's decision - Not justifying the assumption of an infringement of that public policy*
► *1.2. Higher interest rate applied by the applicant State – Not necessarily unacceptable under the public policy of the requested State – Interest rule not to be considered in isolation*
► *1.3. No interim relief in the applicant State – not necessarily unacceptable under the public policy of the requested State*
► *2. International recovery assistance – Directive 2010/24/EU – Division of powers – Suspension or revocation of enforcement with effects equivalent to remission – Competence of the applicant authority*
► *3. National recovery – Suspension of recovery measures to mitigate the consequences of the COVID-19 pandemic – not necessary to apply this to enforcement measures taken prior to the publication of the special measures*

Summary

► *1. The principle of mutual trust between the Member States requires each Member State to assume — except in exceptional circumstances — that all the other Member States respect EU law and, in particular, the fundamental rights recognised therein. The obligation of the requested authority to provide assistance is however not unlimited. Mutual assistance will not be provided if enforcement would be contrary to the public policy of the requested State.*

► *1. 1. The mere assertion by the tax debtor that he had not received a decision in respect of (part of) the claims does not justify the assumption that there has been an infringement of public policy and, consequently, does not justify the suspension or revocation of the attachment and recovery orders at issue.*

► *1.2. The fact that the applicant State has allegedly applied an annual interest rate of 7 % to its interest claims, is not necessarily contrary to the public policy of Germany. On the contrary, it would be necessary for the enforcement of such a claim to be in an unacceptable contrast with the legal order of the requested State, which is not apparent. Nor can an interest rule be considered in isolation; it must be seen in the overall context with the other relevant provisions of the Member State.*

► *1.3. The fact that no interim relief is generally granted in the applicant EU Member State has not been established by the applicant or established by the Tax Court. The applicant has also failed to demonstrate what intolerable contrast with the German legal order would result from this.*

► *2. If a suspension or revocation of enforcement measures, with effects equivalent to a remission were conceivable, this would have to be properly decided by the applicant authority and not by an authority that is requested to provide mutual recovery assistance.*

► *3. Suspension of enforcement measures on the basis of an administrative notice adopted in view of mitigating the consequences of the COVID-19 pandemic does not necessarily apply to enforcement measures taken prior to the publication of the special COVID-19 measures.*

(…)

II.

1. The tax office's appeal against the decision of the tax court (19.05.2020-4 V 540/20) is well founded and the applicant's appeal must be rejected.

2. The appeals are admissible. (…)

3. The tax office's complaint is well founded. The Tax Court wrongly suspended the attachment and recovery orders at issue in part from enforcement and, wrongly, partially cancelled the enforcement. On the basis of the summary examination carried out in the present urgent procedure on the basis of the documents available, there is no doubt that the attachment and recovery orders are lawful. Enforcement also does not lead to undue hardship for the applicant which is not required by overriding public interests (§ 69 (3) point 1(2) in conjunction with point 2(2) Tax Court Code).

4. a) The Tax Court correctly assumed that the applicant's application for suspension or annulment of the contested attachment and recovery orders without a security being lodged is admissible until the decision on the appeal proceedings has become final.

5. aa) Preservation (§ 309 Tax Code) and confiscation orders (§ 314 Tax Code) are administrative acts the execution of which can be

suspended by the court in the main proceedings in accordance with § 69 (3) point 1 in conjunction with § 69 (2) points 2 to 6 of the Tax Court Code if the Tax Office has refused the suspension or revocation of enforcement of the attachment and confiscation orders (§ 69 (4) point 1 Tax Court Code) or if the enforcement is imminent (§ 69 (4) point 2 No 2 Tax Court Code). Under § 69 (3) point 3 of the Tax Court Code, the court may also order the annulment of enforcement in whole or in part, including against security, if the administrative act has already been implemented at the time of the decision. The application for suspension or revocation of enforcement may be made before the action is brought (§ 69 (3) point 2 Tax Court Code).

6. bb) Accordingly, the application is admissible in the present case and the requirements of § 69 (3) points 1 and 3 of the Tax Court Code are met. The request for suspension or revocation of the enforcement was rejected by the Tax Office. Enforcement was imminent or was already ongoing at the time of the Tax Court's decision. The application for suspension or revocation of the enforcement was validly lodged before the action was brought. As this was lodged within the prescribed period, the attachment and recovery orders are still contested administrative acts within the meaning of § 69 (3) point 1 (2) in conjunction with point 2 (2) of the Tax Code.

7. b) However, the request is unfounded. The Tax Court wrongly granted partial suspension or revocation of the enforcement.

8. aa) In the present case, there are no serious doubts as to the legality of the attachment and recovery orders at issue.

9. The request for suspension or revocation of the enforcement does not demonstrate that the reasons for illegality and ineffectiveness prevail (see, inter alia, Supreme Tax Court Decision of 25.11.2005 — V B 75/05, BFHE 212, 176, BStBl II 2006, 484, with further references). However, serious doubts arise only if, when examining the factual and legal situation, it is apparent from the evidence presented and the undisputed facts that, for serious reasons, there is uncertainty in the assessment of questions of law or ambiguity in the assessment of questions of fact and, if these questions are finally clarified, the administrative act could prove to be unlawful (Federal Tax Court decision of 31.01.2002 — V B 108/01, BFHE 198, 208, BStBl II 2004, 622, with further references).

10. These conditions are not met in the present case.

11. (1) Under the EU Recovery Act, mutual assistance in the field of recovery in respect of claims relating to taxes (within the meaning of § 3 (1) Tax Code) and duties, including claims arising from liability notices and ancillary tax benefits (within the meaning of § 3 (4) Tax Code), such as surcharges for late payment (cf. Senate judgment of 21.07.2009-VII R 52/08, BFHE 226, 102, BStBl II 2010, 51, under II.4.a), is granted for claims above the threshold of 1.500 € (§ 14 (1) EU Recovery Act, Article 18 (3) EU Directive) that are not too old (§ 14 (2) EU Recovery Act, Art. 18(2) EU Directive).

12. Those general conditions were satisfied in the present case. The EU Member State requested the recovery of a tax comparable to corporation tax and the interest and arrears related thereto. The minimum amount is exceeded. The claims were not more than five years old or ten years old.

13. (2) The Tax Ofice had the territorial competence to issue the attachment and recovery orders pursuant to § 4 (1) point 1 (1) (a) EU Tax Recovery Act and under § 4 (1) point 2 EU Tax Recovery Act in conjunction with § 25 (1) Tax Code, since enforcement on the basis of the request for recovery in respect of a taxable person without a registered office in Germany, and relating to assets held in various banks, in principle fell within the competence of several offices and the case was first referred to the Tax Office by the liaison office at the Federal Central Office. There was no priority other jurisdiction under § § 19 et seq. of the Tax Code. § 20 (3) of the Tax Code concerns the taxation procedure and not the enforcement procedure.

14. The Federal Central Office had to make a selection in order to prevent the uncoordinated enforcement by several tax authorities from a uniform enforcement order; contrary to the unsubstantiated assertions made by the applicant, it also made a choice, since it entrusted the tax authorities of Hessen and, ultimately, the Tax Office with the enforcement task. This was not arbitrary, since, according to the findings of the Tax Court of Frankfurt am Main, any action for recovery against Z-Bank would have been under the general jurisdiction (§ 17 of the ZPO), and since the Federal Central Office knew, or at least had reasons to consider that an international company such as the applicant had an account with that bank. The fact that it subsequently became apparent that the secured claim concerned the credit balance of a branch, that the Z-Bank had an 'attachment department' in D-Stadt, to which the attachment and recovery orders were addressed, or that it was ultimately the most likely to be recovered from another bank, does not alter the competence of the Tax Office under § 25 (1) of the Tax Code, since jurisdiction must be established before the administrative act was adopted.

15. Moreover, in the case at issue, § 127 of the Tax Code is also applicable, according to which the annulment of an administrative act which is not null and void under § 125 of the Tax Code cannot be claimed solely on the ground that it was adopted in breach of provisions on territorial jurisdiction if no other decision on the substance could have been taken. Pursuant to § 9 (1) point 1 EU Tax Recovery Act, recovery on the basis of the EU Recovery Act is not at the discretion of the requested authority, but it must be carried out at the request of the applicant authority if the conditions are met (cf. judgment of the Hamburg Tax Court of 04.02.2010 -3 V 254/09, EFG 2010, 848 on the predecessor provision). Given the applicant's financial situation, which, according to the applicant, was already over-indebted as at 31.12.2019, it was objectively unable to avoid enforcement by means of payment or security; nor does it claim this. With regard to the amount of the claims to be recovered and in the absence of any other assets on the part of the applicant, the Tax Office also did not have any discretion. It had to issue an attachment order and a recovery order to all banks keeping accounts in Germany.

16. (3) The applicant's allegation that the attachment and recovery orders are too vague and contradictory is incorrect. The same applies to the objection that the Tax Office indicated the Land of Hessen as the enforcement creditor and infringed the principle that the addressees of the attachment and recovery orders must be aware of the rights in question in order to be able to decide on payments and/or appeals (see, for example, Senate judgment of 18.07.2000 — VII R 101/98, BFHE 192, 232, BStBl II 2001, 5).

17. The attachment and recovery orders, like any administrative act, must be interpreted in accordance with the objective horizon of the recipient. The addressees were several large German banks, which have their own enforcement departments, and the applicant — a major shipping company operating worldwide — which, according to its own indication, is indirectly owned by a German partnership. If such an undertaking receives a seizure of around EUR 6 million, the objective horizon of a relevant legal practitioner is decisive, since such an undertaking will (objectively) deal with the matter. In the case of the dispute, therefore, the objective horizon of the recipient is, in the case of all the parties involved, that of an addressee experienced in business and legal transactions.

18. Against this background, the indication in the orders that the applicant owed the Land Hessen EUR 5.925.648,30, together with the attached statement of arrears, was clear. (…). The attached statement of arrears showed that the claims to be recovered were those of the EU Member State and that the Land Hessen or the Tax Office acted on the basis of the request for recovery from that State. This is not unclear or self-contradictory.

19. (…)

20. The fact that the arrears notices sent to the applicant and the banks also contained a clerical error in the date (04.02 instead of 05.02.2020) is also irrelevant. The Tax Court correctly assumed that the reference to an attachment and confiscation order of 04.02.2020 in the arrears notices attached to the attachment and recovery orders of 05.02.2020 was clearly a mere clerical error or another obvious mistake within the meaning of § 129 point 1 Tax Code that can be corrected at any time. The attachment and recovery orders were therefore not unclear or contradictory.

21. What matters is that, according to the file, the documents were sent together and related to claims amounting to EUR 5.925.648,30.

22. (…)

23. (4) The applicant's unsubstantiated assertion that the formal conditions laid down in § 9 (1) points 1 and 3 EU Tax Recovery Act, § 10 (3) EU Tax Recovery Act and Article 12 (1) of the EU Recovery Directive were not met, because there was no title in the EU Member State within the meaning of § 9 (1) point 1 EU Tax Recovery Act for the amount or no uniform instrument permitting enforcement under § 10 (3) EU Recovery Act or Article 12 (1) of the EU Recovery Directive, does not convince this Court that there are reasons to doubt the validity of the attachment and recovery orders.

Since the uniform instrument permitting enforcement is generated by the requested authority from the data contained in the electronic form 'Request for recovery or precautionary measures' (see also Senate judgment of 11.12.2012 — VII R 70/11, BFHE 239, 501, BStBl II 2013, 475, paragraphs 10, 19 et seq.), it necessarily goes with the request for recovery. Pursuant to § 9 (1) point 3 EU Tax Recovery Act, the uniform instrument permitting enforcement attached to the request is considered to be an enforceable administrative act, so the requested authority does not have to check whether it corresponds to the decision in the applicant Member State. On the contrary, the principle of mutual trust between the Member States requires each Member State to assume — except in exceptional circumstances — that all the other Member States respect EU law and, in particular, the fundamental rights recognised therein. This trust will only be shaken if sufficient evidence of a breach of minimum fundamental rights standards is provided (cf. decision of the Federal Constitutional Court — BVerfG of 23.05.2019-1 BvR 1724/18, Wertpapier-

Mitteilungen/Zeitschrift für Wirtschafts- und Bankrecht — WM-2019, 1179, with further references; Judgment of the Court of Justice in Donnellan, EU: C: 2018: 282, OJ 2018 C 211, 5, with further references). The burden of proof for foreign cases lies with the parties (§ 76 (1) point 4 Tax Court Code in conjunction with § 90 (2) point 1 Tax Code; see also the judgment of the Senate in BFHE 239, 501, BStBl II 2013, 475, paragraph 26).

24. The outprint provided by the applicant of a decision of the competent authority of the applicant EU Member State dated 26.04.2019, according to which the applicant already owed approximately EUR 4,8 million plus interest, i.e. approximately EUR 5,3 million together, relating to the first main claim at the time, is not such as to give rise to such doubts in relation to the recovery request of 09.01.2020, which concerns three principal claims plus interest and penalties for late payment. There is no reason to believe that the applicant Member State may have attempted, by means of a request for recovery, to recover more tax than had been established, as the applicant claims. Moreover, the account balances covered by the attachment and recovery orders at issue fall far short of the amount of approximately EUR 5,3 million, which, according to the applicant, was also established in connection with the first main claim.

25. (5) The applicant cannot demand that the attachment and recovery orders at issue be set aside on the ground that, in the case at issue — contrary to the Ministry of Finance's fact sheet in BStBl I 2014, 188, No 4.2.4.--, no demand for payment was issued before they were issued, even if, in its judgment in BFHE 226, 102, BStBl II 2010, 51 on earlier law, the Senate Chamber ruled that such a leaflet had external effect.

26. In the case at issue, the Senate Chamber may leave open the question whether it maintains this opinion, since, under § 127 of the Tax Code, annulment of an administrative act which is not null and void under § 125 of the Tax Code cannot be claimed solely on the ground that it was adopted in breach of the rules governing the procedure. As stated above, recovery in the present case was not at the discretion of the Tax Office.

27. (6) Enforcement on the basis of a request for recovery is possible even if the administrative act to be enforced is contested (§ 10 (1) EU Tax Recovery Act, Article 11 (1) and Article 14 (4) EU Tax Recovery Directive).

28. (7) There are no serious doubts as to the legality of the attachment and recovery orders at issue in so far as the applicant EU Member State initially failed to comply with the obligation to state reasons laid down in § 13 (3) point 2 EU Tax Recovery Act.

29. According to the summary examination required in the present case, there is much to suggest that the requirement to state reasons is primarily intended to make the applicant Member State aware that the enforcement of contested claims entails a risk of liability or compensation (§ 13 (3) point 3 EU Tax Recovery Act) and should therefore be brought only for good reasons. Objections to errors made by the applicant Member State — in particular concerning the tax assessment and the request for recovery pursuant to § 13 (1) and (2) EU Tax Recovery Act (Article 14 (1) and (2) EU Tax Recovery Directive) — must in principle only be raised against the applicant State (in this case the EU Member State).

30. In the present case, however, it is ultimately not necessary to determine whether the requirement to state reasons is protective of third parties. Any failure by the applicant authority to comply with the obligation to state reasons may, in any event, be remedied, in accordance with the legal logic of § 126 (1) point 2 and (2) of the Tax Code, until the court adjudicating on the facts in the financial proceedings has closed a case. In the event of a dispute, the applicant EU Member State therefore has the opportunity to re-examine its previous letters (in particular the letter of 13.02.2020) before a decision is taken on the substance of the case, in order to determine whether they contain sufficient reasons and, if necessary, to rectify or supplement them.

31. (8) Furthermore, no serious doubts as to the legality of the attachment and recovery orders at issue follow from the fact that the Tax Office did not apply the Ministry of Finance's notice in BStBl I 2020, 262 (by analogy).[1] According to the case-law of the Federal

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[1] Point I.16 of the judgment mentions that the applicant raised the following argument: "As a result of the coronavirus pandemic, it (the applicant) currently has significant revenue losses, particularly in the charter business. In its favour, at least in application of the notice of the Ministry of Finance (in BStBl I 2020, 262) in conjunction with § 14 (1) of the EU Tax Recovery Act (the national law implementing the EU tax recovery assistance Directive), no enforcement measures should be taken; funds which had already been recovered should be reimbursed to it. Also in the applicant EU Member State, all tax recovery proceedings have been automatically suspended as from the entry into force of a law mitigating the consequences of the COVID-19 pandemic in April 2020. The tax authority in that country wrongly rejected the applicant's request to withdraw the request for recovery on the ground that the law applied only to enforcement measures on national territory. However, since the refusal of the tax authorities of the EU Member State appears arbitrary, the continuation of the request for recovery and the continuation of enforcement by the tax office would be unfair."

Tax Court, the interpretation of an administrative provision is not determined by the way in which the tax courts understand the administrative instruction, but how the administration has understood and sought to understand it. The tax courts may therefore not interpret administrative instructions themselves in accordance with the general methods of interpretation, but only check whether the authority's interpretation is possible (Federal Tax Court judgment of 26.09.2019 — V R 36/17, BFH/NV 2020, 86, paragraph 13).

32. Where a rule, an administrative provision replacing a standard or an order does not specify the date from which the rules are to apply, and where such a date cannot be determined by interpretation, the rules shall normally enter into force upon their publication. The Ministry of Finance's notice in BStBl I 2020, 262 does not specify any specific date from which the rules should apply. However, point 3 (2) of the notice shows or confirms that the relevant date from which the administration intends to exercise restraint in enforcement matters is the publication of the notice (in electronic form) on 19.03.2020. The term 'waiver' within the meaning of point 3 (1) of this notice also indicates that it applies to measures which have not yet been implemented (see also the decision of the Hessen Tax Court of 08.06.2020-12 V 643/20, EFG 2020, 1056, paragraph 25). In any event, it cannot be inferred from that notice that enforcement measures taken before the publication of that notice must be annulled or reversed. That finding is based on the fact that the administrative instruction entered into force on the date of its publication. If that conclusion could only be determined by interpretation, the Senate Chamber considers that such an understanding of the Ministry of Finance's notice is at least possible.

33. Consequently, even nationals in a comparable situation could not obtain a suspension or revocation of the attachment and recovery orders on the basis of that notice. The failure to apply this notice does not therefore constitute an infringement of the free movement of capital under Article 63 et seq. TFEU (which, as the Tax Office has overlooked, must also be observed in favour of persons established in third countries).

34. The assumption by the tax authority that the Ministry of Finance's notice in BStBl I 2020, 262 concerns only enforcement measures taken after its publication on 19.03.2020 does not lead to an infringement of Article 3 (1) of the Constitution, since Article 3 of the Consitution permits cut-off dates provided that they do not lead to arbitrary results. Where an advantage is introduced, it is not normally necessary to include situations which have already occurred in the advantage.

35. However, this does not mean that persons against whom enforcement is sought are deprived of legal protection in such cases. Rather, the general rules apply in this respect, in particular § 258 of the Tax Code. If the administration does not apply the rule in point 3 of the Ministry of Finance's notice in BStBl I 2020, 262, the applicant is only required to explain more clearly why the continuation of the enforcement measure is unfair because of the coronavirus pandemic or for other reasons or why interim relief should be granted. This distribution of the burden of proof is justified because, in cases where enforcement measures were taken before 19.03.2020, the coronavirus pandemic and the measures taken to contain it can hardly cause the non-payment of tax debts prior to enforcement (despite the reminder).

36. There is no reason to treat debtors who, before and completely independently of the coronavirus pandemic and the restrictions imposed by the State, did not settle their tax debts — against whom enforcement measures were thus necessary — better than those who had fulfilled their payment obligations (possibly only after a bank loan had been taken out) by applying in their favour the rule set out in point 3 of the Ministry of Finance's notice in BStBl I 2020, 262 in general to enforcement measures taken before 19.03.2020.

This would be contrary to the principle of equal taxation derived from Article 3 of the Constitution. The tax authorities are not only entitled but obliged to determine the tax claims arising from the fulfilment of a tax situation (§ 38 of the Tax Code) and to collect the tax. There is no free waiver of tax claims at the discretion of the tax authorities. Even by means of administrative decisions, the tax authorities may not allow exemptions from the taxation prescribed by law, as the waiver of the tax interference also requires a legal basis. If this is missing, the tax authorities cannot waive the assessment and collection of tax claims arising in accordance with § 38 of the Tax Code (Federal Tax Court Decision of 28.11.2016 — GrS 1/15, BFHE 255, 482, BStBl II 2017, 393).

37. Even if one were to take a different view on the validity of the Ministry of Finance's notice (cf. decision of the Düsseldorf Tax Court of 29.05.2020-9 V 754/20 AE (KV), WM 2020, 1365, paragraph 34; (...)), the applicant's application for suspension or revocation of the attachment and recovery orders could be rejected (regardless of where the applicant is established). According to that notice, recovery 'shall' be waived only, that is to say, in special cases, enforcement may be carried out. This may be the case, in particular, if the proposed suspension or revocation of the attachment and recovery orders would not lead to a mere deferral of payment and could contribute to avoiding avoidable insolvency, but would only result

in other creditors or the shareholders of the tax debtor who had already been over-indebted or insolvent before the 'coronavirus outbreak' being favoured to the detriment of the (foreign) tax authorities. This is also not in line with the intention of the Federal Ministry of Finance's notice in BStBl I 2020, 262 and the case-law on § 258 of the Tax Code. (…)

38. According to its own submissions, the applicant was already over-indebted on 31.12.2019, that is to say before the outbreak of the coronavirus pandemic, and has since experienced additional and massive revenue losses and, according to the applicant's own statements, is seeking to cover maritime mortgage loans with the lending banks and other claims. The applicant has not provided any information on how to settle the claims of the applicant Member State after 31.12.2020 or how it intends to overcome its insolvency. Against this background, there is no reason to believe that the case in question concerns a mere deferral of payment or the prevention of avoidable insolvency. Granting a suspension or revocation of the attachment and recovery orders in accordance with the application would only favour individual creditors or the shareholders and would lead to a final non-recovery of the tax claim — in this case that of the applicant State – and thus ultimately to a remission of a tax debt (§ 227 Tax Code). Such a decision would also be contrary to the division of powers in the area of mutual recovery assistance. If — for whatever reason — a suspension or revocation with effects equivalent to a remission were conceivable, this would have to be properly decided by the applicant authority and not by an authority that is requested to provide mutual recovery assistance.

39. In conclusion, it must be assumed that, in circumstances which are otherwise similar, this suspension or revocation of the attachment and recovery orders would not have to be granted to a resident on the basis of the Ministry of Finance's notice in BStBl I 2020, 262. The fact that the Tax Office did not apply the abovementioned notice to the applicant (albeit for other reasons) does not therefore amount to discrimination contrary to Article 63 TFEU (see, in this regard, the legal logic of § 126 (4) Tax Court Code). It is therefore unnecessary to comment on the applicant's further submissions on Article 63 et seq. TFEU, in particular on questions of de facto suspension of accounts and on Article 65 (1) (a) TFEU.

40. (9) In the case at issue, enforcement is neither unfair within the meaning of § 14 (1) EU Tax Recovery Act nor disturbs German public policy. It does not infringe public policy within the meaning of Article 6 of the Civil Code and is not liable to cause significant economic or social difficulties in Germany within the meaning of Article 18 of the EU Recovery Directive.

41. (a) The obligation of the requested authority to provide assistance is not unlimited. Pursuant to § 14 (1) point 1 EU Tax Recovery Act, mutual assistance will not be provided if enforcement would be unfair. That is in any event the case where it would be contrary to public policy (Article 6 of the Civil Code), disturb the public policy of the requested Member State or cause serious economic or social difficulties in Germany. Under Article 6 (1) of the Civil Code, a rule of law of another State is not to be applied if its application leads to a result which is manifestly incompatible with fundamental principles of German law. In particular, it does not apply if its application is incompatible with fundamental rights (Article 6 (2) Civil Code). The Court of Justice (see the judgment of the Court of Justice in Kyrian of 14.01.2010 — C-233/08, EU: C: 2010: 11, [2010] ECR I-177) and, in accordance with that judgment, the Senate Chamber (judgment of 03.11.2010 — VII R 21/10, BFHE 231, 500, BStBl II 2011, 401), therefore held, with regard to the previous legal basis, that an exception to the principle that the validity and enforceability of the claim to be recovered should not be examined by the requested authority can be admitted if the enforcement of the requested claim (…) would be contrary to the public policy (…). This case-law has not become obsolete as a result of the entry into force of the EU Recovery Act (Constitutional Court Decision in WM 2019, 1179, with further references; Senate judgment of 28.11.2017 — VII R 30/15, BFH/NV 2018, 405, paragraph 16; (…)).

42. The decision of the Federal Court of Justice of 24.04.2014 — VII ZB 28/13 (BGHZ 201, 22, Neue Juristische Wochenschrift 2014, 2363), according to which a public policy review does not take place in the executing State if a European Enforcement Order is certified in a Member State of the European Union, does not concern the EU Recovery Act, but the enforcement of civil claims. Tax claims and other 'acta jure imperii' are expressly excluded from the relevant legislation (Article 2 (1) of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21.04.2004 creating a European Enforcement Order for uncontested claims), so no further examination of the case-law of the Federal Court of Justice is necessary in this respect.

43. A ground for refusal under § 14 (1) EU Tax Recovery Act may exist, for example, if the enforcement order originates from proceedings which depart from the principles of German procedural law to such an extent that it cannot be regarded as having been issued in an orderly procedure governed by the rule of law (Federal Tax Court judgment in BFHE 231, 500, BStBl II 2011, 401; Federal Court of Justice Decision of 26.08.2009 — XII ZB 169/07, BGHZ 182, 188, with further references). Moreover, as already

stated, the principle of mutual trust between the Member States requires each Member State to assume — except in exceptional circumstances — that all the other Member States respect EU law and, in particular, the fundamental rights recognised therein. If no manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as fundamental in that legal order is established, the requested authority shall not examine the substance of the claim and the enforceability of the instrument permitting enforcement. Errors must then be invoked solely in the applicant State (§ 13 (1) and (2) point 1 EU Tax Recovery Act; Article 14 (1) and (2) of the EU Recovery Directive; see Senate judgments of 24.02.2015 — VII R 1/14, BFH/NV 2015, 801; in BFHE 239, 501, BStBl II 2013, 475; Judgment of the Court of Justice in Kyrian, EU: C: 2010: 11, [2010] ECR I-177).

44. (b) According to these principles, the Tax Office was not prevented from complying with the recovery request in the case at issue. This is because enforcement on the basis of this request is not manifestly incompatible with fundamental principles of German law, nor is it unfair for other reasons within the meaning of Section 14 (1) of the EU Tax Recovery Act.

45. (aa) It is not contrary to public policy (Article 6 of the Civil Code) for the competent authority of the EU Member State requesting recovery not to refer retroactively to suspension arrangements that may have been adopted in that Member State, similar to the Ministry of Finance's notice in BStBl I, 2020, 262 – which was only issued in April 2020 – for the handling of the recovery request of 09.01.2020, which the Tax Office had already complied with by means of attachment and recovery orders of 05.02.2020 before the coronavirus pandemic could have an economic impact. In Germany too, it is not necessary to apply the Ministry of Finance's notice in BStBl I 2020, 262 to enforcement measures taken prior to its publication.

46. (bb) The applicant, who is required to present and prove the situation in the other country, has not explained in detail why the tax claim referred to in the first principal claim is based on an unconstitutional law, as it argues. It should at least have set out the overall context of the scheme and the actual impact on its taxation over the tax periods. In any event, different views on the interpretation of the relevant provisions, any errors of law or (economic) errors made by the applicant in the choice of tonnage taxation in the EU Member State do not preclude enforcement. In the case of tonnage tax, the shipowner normally pays a tax directly on the tonnage operated, irrespective of actual income, profits or losses. If the choice turns out to be unfavourable afterwards, there is no obvious reason to believe that the enforcement of a subsequent tax claim by the EU Member State would be unfair, especially since, according to the Community guidelines on State aid to maritime transport (BStBl I 2000, 1049, 1053), it can be assumed that replacing corporate tax with a tonnage tax constitutes State aid and generally favours those who opt for tonnage taxation.

47. (cc) In the present case, the mere assertion by the applicant that it had not received a decision in respect of part of the claims (the second principal claim) does not justify the assumption that there has been an infringement of public policy and, consequently, does not justify the suspension or revocation of the attachment and recovery orders at issue.

48. It is true that the Court of Justice has ruled that the requested authority may refuse to recover a claim if the decision on which the claim is based has not been properly served (judgment of the Court of Justice in Donnellan, EU: C: 2018: 282, OJ 2018, C 211, 5). The Senate Chamber also considered an infringement of public policy to be possible in the case of a request for enforcement in a foreign language — which had been received — on the basis of the lack of information on legal remedies, the short time limit for bringing an action and the impossibility of obtaining *restitutio in integrum* in the event of failure to comply with the time limit (Senate judgment in BFHE 231, 500, BStBl II 2011, 401).

49. In the case at issue, however, the applicant merely asserted the lack of access in an unsubstantiated manner and did not make any efforts to establish credibility. That would have been necessary since, in accordance with the principle of mutual trust between the Member States, the applicant Member State must be regarded as having followed due process and respected EU law and, in particular, the fundamental rights recognised therein. Mere denial of access does not preclude recovery on the basis of a request for recovery (see Constitutional Court Decision in WM 2019, 1179, paragraph 33).

50. (dd) An infringement of public policy (Article 6 of the Civil Code) also does not consist of the fact that the EU Member State requesting recovery has allegedly applied an annual interest rate of 7 % to its interest claims. On the contrary, it would be necessary for the enforcement of such a claim to be in an unacceptable contrast with the legal order of the State in which enforcement is sought, which is not apparent.

51. The applicant has not explained in detail and the Tax Court has not established that the claims to be recovered include interest claims calculated at an interest rate of 7 %.

52. It is entirely unclear whether the claim relates to interest that should be comparable to that of one half

per month in Germany (§ 238 (1) point 1 of the Tax Code) or interest comparable to default interest, which in Germany amounts to 1 % per month (§ 240 (1) point of the Tax Code), that is to say, 12 % per year. In any event, the enforcement of an interest claim calculated at an interest rate of 7 per cent would not be in an unacceptable contrast to the legal order of Germany, irrespective of any constitutional objections to the level of interest. Nor can a (interest) rule be considered in isolation, but it must be seen in the overall context with the other relevant provisions of the Member State. Nor does the applicant comment on that point. Moreover, even under German law, enforcement is not to be waived until the Constitutional Court has found the provision to be unconstitutional (see § 79 (2) point 2 of the Act on the Federal Constitutional Court); doubts as to constitutionality are not sufficient. They do not therefore justify the assumption that the enforcement of such a claim would be in an unacceptable contrast to the legal order of Germany.

53. (ee) The fact that no interim relief is generally granted in the applicant EU Member State has not been established by the applicant or established by the Tax Court. The applicant has also failed to demonstrate what intolerable contrast with the German legal order would result from this, assuming that there is no possibility of granting interim relief in the EU Member State.

54. (10) In the case at issue, there are therefore no serious doubts as to the legality of the attachment and recovery orders at issue within the meaning of § 69 (3) point 1 (1) in conjunction with point 2 (2) of the Tax Court Code.

55. bb) The enforcement of the attachment and recovery orders at issue does not lead to undue hardship for the applicant which is not required by overriding public interests (§ 69 (3) point 1 (2) in conjunction with point 2 (2) of the Tax Court Code).

56. According to the case-law of the Federal Tax Court, enforcement is unfair if it or individual enforcement measures cause an unreasonable disadvantage to the party against whom enforcement is sought, which can be avoided by short-term delays or other enforcement measures. The hardship attached to any enforcement is not meant.

57. In the case at issue, enforcement is not unfair, as it is not apparent that possible alternative enforcement measures are possible; according to the applicant's own statements, the applicant is also not in a position to provide a security. If done without a security, the suspension or revocation requested by the applicant would lead to an isolated advantage for other creditors or shareholders and would probably result in a final loss of the claim of the applicant State. In such a case, the public interest in recovery prevails.

58. cc) Since no suspension or revocation of the attachment and recovery orders is to be granted, the Senate Chamber is not required to rule on a security. In the event of a change in circumstances, in particular where the applicant can raise the funds necessary to provide a security or demonstrate equivalent enforcement measures which are less onerous for it, it remains free to submit a new application for interim relief and to argue that, in the changed circumstances, the enforcement of the attachment and recovery orders at issue would result in undue hardship not required by overriding public interests. However, in so far as it continues to seek remission in substance, it would have to address that concern to the applicant State.

59. 3. It follows from the foregoing that the applicant's complaint is unfounded. This is because, in the context of the summary examination required in the present urgent procedure on the basis of the documents available, there is no doubt that the attachment and recovery orders at issue are lawful. Enforcement also does not lead to undue hardship for the applicant which is not required by overriding public interests (§ 69 (3) point 1 (2) in conjunction with point 2 (2) of the Tax Court Code). A suspension and revocation of the attachment and recovery orders at issue is therefore not possible.

Germany

Constitutional Court

(Bundesverfassungsgericht)

23 May 2019

Case number: 1 BvR 1724/18

International recovery assistance – Directive 2010/24/EU – Trust between EU Member States – Refusal to grant assistance on grounds of public policy of the requested State – Joint liability of a company director – Requirement of a separate assessment notice – No element of public policy.

Summary

A special trust should in principle be given to the applicant Member State of the European Union, concerning the compliance with the principles of the rule of law and the protection of human rights. This trust will only be shaken if sufficient evidence is provided of an infringement of minimum standards of fundamental rights. The complainant has not provided any such evidence. The tax court considered that he was aware of the tax debt of the company and of his joint liability, and it was concluded that he could have challenged this claim in the applicant State in a timely manner.

The mere fact that, under the law of the applicant State, the claim for joint liability of the company director does not require a separate assessment of the liability by means of a special notice of liability, such as that provided for in the law of the requested State, does not constitute an argument of public policy that should lead to a refusal by the requested State to provide recovery assistance.

(…).

The 3th Chamber of the First Senate of the Federal Constitutional Court decided unanimously on 23 May 2019:

The constitutional complaint is not admitted for consideration.

Reasons:

1. The constitutional complaint is directed against the refusal to grant interim legal protection in a tax court case concerning mutual assistance granted by the Tax Office in the recovery of a debt claimed against the complainant in Greece.

I.

2 1. The complainant was the managing director of company (…) from 1997 to 30 June 2001 in Greece. The Greek tax authorities carried out an audit of the company in the following years, leading to additional tax claims of approximately EUR 35 million. The company went into insolvency.

3 2. On 28 January 2013, the complainant received a demand for payment via the Cologne South Tax Office, according to which he had to pay approximately EUR 1 million of VAT to a tax office in Athens, together with interest, for the period from 1 January 2000 to 31 December 2000. Reference was made to the EU Recovery assistance Directive as a legal basis. A uniform instrument permitting enforcement dated 25 January 2013 was attached to the letter. According to the uniform instrument permitting enforcement, the date of establishment of the claim was 14 May 2008; the date of possible commencement of enforcement was 1 July 2008; the date on which the original enforcement order was served was 16 May 2008. It was also stated that the complainant, as managing director of company (…), was held liable as a 'co-debtor'.

4 The complainant asked the Tax Office to suspend the recovery measures and to refuse administrative assistance pursuant to § 14 (2) of the EU Tax recovery Act on the ground that the enforcement was time-barred or because of unfairness under § 14 (1) of the EU Tax Recovery Act, or, in the alternative, to suspend the enforcement under § 258 of the Tax Code. He argued that he first became aware of his alleged liability by means of the uniform instrument permitting enforcement. The Cologne South Tax Office asked the Greek authorities for information in response to the submissions made by the complainant. In January 2017, the Tax Office informed the complainant that it had received the reply that he was jointly and severally liable under Greek law for the VAT debt of the company (…), for the period from 1 January 2000 to 31 December 2000 and that the VAT notice of 23 April 2003 of the company (…) was served via employee K. The company should have informed the complainant. In addition, according to the tax authorities' notes, Mr K. had been appointed as the company's tax representative since 8 April 2002. The notification of the impending criminal prosecution was sent to the complainant by the competent tax office in Athens on 27 October 2003, to the address 'M. 21 — C.', the last address declared by the complainant to the tax authorities. The complainant did not lodge an appeal with the Greek authorities.

5 On 5 April 2018, the tax office of Euskirchen, where the appellant had in the meantime moved, issued an attachment and recovery order concerning his accounts, depots and lockers in a bank.

6 3. The appellant then applied to the Tax Court for interim measures under § 114 of the Tax Court Code. He argued that that the Greek request for recovery was contrary to § 14 (2) of the EU Tax Recovery Act , since it related to claims which at that time were already over five years old. The claims were now more than ten years old. In addition, the request for recovery was unfair within the meaning of § 14 (1) of the EU Tax Recovery Act or it was contrary to public policy (ordre public). The Greek authorities did not issue to him, the complainant, a liability notice as required under German law. He first became aware of his personal liability by letter of 28 January 2013 from the Tax Office Cologne South. Nor was he informed of the VAT assessment against the company (…). Mr K. and Mr F., who subsequently acted as representatives for the company (…), merely informed him in 2003 that there was a VAT assessment against the company (…). He never knew that he was personally liable for the VAT debts of the company (…). He therefore had no opportunity to appeal against the VAT assessment in respect of the company (…).

7 He also argued that the claim to be enforced exceeded his assets. In the event of recovery of the entire claim, he would be at risk of personal insolvency. His assets were his entire pension scheme. In the event of the unlawfulness of the enforcement order, it was not guaranteed that the funds paid to the Greek authorities would be reimbursed to him. (…)

8 The Tax Office contended that the application for interim measures should be dismissed. It submitted, inter alia, correspondence with the Greek authorities, in which these Greek authorities had stated, inter alia, that, under Greek law, in addition to the company responsible for paying taxes, its managing director was also jointly liable. The enforcement proceedings against the managing director could be initiated against him without any further tax assessment notice. In addition, the authorities stated that the company (…) had initially appealed against this tax assessment, but that appeal had been rejected. Even after the initiation of the mutual assistance procedure in Germany, the complainant did not take any legal action to challenge the instrument permitting enforcement in Greece.

9 4. By the order of 24 May 2018, the Tax Court dismissed the appellant's application for interim measures as unfounded. (…). This decision is challenged by the constitutional complaint.

10 The claims to be enforced are not time-barred. The uniform instrument permitting enforcement mentions that the claim was due by 1 July 2008. Thus, the request for recovery assistance of 25 January 2013 respected the relative limitation period of five years. The information obtained from the Greek authorities by the Tax Office Cologne South showed that there were no objections to the notification of the VAT assessment by the company (…) and to the liability of the complainant as former director. On the basis of a summary examination, the opinion of the Greek authorities appears to be consistent and not self-contradictory. The argument of the complainant that the due date in 2008 could affect another managing director appears to be untrue, if not totally impossible. On the contrary, in view of the fact that the audit resulted in an additional tax claim of approximately EUR 35 million, there is much to suggest that the company (…) initially lodged an appeal against the relevant decisions and that the claim became final only after the appeal proceedings had been closed in 2008. In those circumstances, the ten-year limitation period was also observed when the attachment and recovery order was issued. In that regard, the relevant date is the due date in accordance with § 14 (2) point 2 (2) of the EU Tax Recovery Act.

11 A breach of public policy is not apparent in a summary examination, since the claim against the complainant is based on lawul liability proceedings. The mere fact that, under Greek law, the claim for liability does not require a separate assessment of the liability by means of a special notice of liability, such as that provided for in § 191 of the Tax Code, does not render the liability claim absolute. As under German law, a claim for liability under Greek law presupposes the assessment of the tax liability against the principal debtor; it is also clear that the other conditions for a liability claim are laid down in detail by law. It is also apparent from the observations of the Greek authorities that, prior to execution, the Greek Tax Office had made a 'notification of impending criminal proceedings' and that, therefore, the execution would not affect the applicant unprepared. As a rule, the managing director is prepared to such a liability claim and he may bring appropriate legal remedies against it.

12 The complainant did not put forward the grounds for the order in a conclusive manner. On the basis of a summary examination, there are doubts as to the completeness and accuracy of his assets declaration. Moreover, the fact that the debts to the Greek tax authorities are higher than the complainant's existing assets cannot lead to a complete waiver of enforcement. The civil procedure provisions provide sufficient protection.

(…)

14 6. By his constitutional complaint, the

complainant alleges infringement of Articles 19 (4) and 103 (1) of the Constitution.

15 a) In his view, in the order refusing to grant an interim order, the Tax Court failed to comply with its inspection obligations and the scope of the examination guaranteed by Article 19 (4) of the Constituttion. The Tax Court assumed that the complainant had been informed of the enforcement by means of a 'notification of the threat of criminal prosecution'. However, in the proceedings he had produced a sworn statement that, before the request for recovery was made in 2013, he had not been notified of the VAT notice against the company (…) or of any separate liability notice, of any other notification of liability or of a request for payment by the Greek authorities.

16 He also argued that the examination of the ground for exclusion under § 14 (2) of the EU Tax Recovery Act did not satisfy the requirements of effective legal protection. The Tax Court assumed that the company (…) lodged an appeal against the VAT assessment and that the claims became definitively due after the closure of the appeal proceedings in 2008.

17 b) He found that his right to be heard under Article 103 (1) of the Constitution was infringed because the Tax Court did not give him an opportunity to comment on the reply of the Tax Office before adjudicating on his application for interim measures. In doing so, the Court de facto also refused his right of access to the file.

(…)

II.

19 The constitutional complaint is not admitted for consideration. The conditions laid down in § 93a (2) of the Act on the Constitutional Court are not fulfilled. The constitutional complaint has no fundamental constitutional significance. Nor is it appropriate to accept them in order to enforce the complainant's rights under § 90 (1) of this Act. The constitutional complaint has no prospect of success.

20 1. The constitutional complaint against the decision of the Tax Court of 24 May 2018 is unfounded in so far as the complainant alleges a violation of his fundamental right under Article 19 (4) (1) of the Constitution.

21 (a) Article 19 (4) of the Constitution guarantees effective and as complete judicial protection as possible against acts of the public authority. Legal protection is effective only if it is applied within a reasonable time. The specialised courts are therefore required to grant interim relief if applicants otherwise risk a significant breach of their rights, which can no longer be remedied by the decision on the substance of the case, unless, exceptionally, there are opposing and overriding reasons of particular importance. Ensuring effective legal protection requires an interpretation and application of the provisions governing the lodging of legal remedies which do not make it unreasonable and unjustifiable for objective reasons to take action on the basis of legal remedies. The specialised courts must not unduly shorten the right to judicial enforcement of substantive law by excessively strict application of procedural rules.

22 In principle, a summary assessment of the decision to grant interim relief is not problematic under the Constitution; however, the necessary intensity of checks increases with the risk of infringement of the law. It may be so far-reaching that, in special circumstances the courts may be obliged to examine the factual and legal situation not only summarily but finally. Where, in the event of a refusal to grant an interim remedy, an applicant is threatened with a serious breach of his fundamental rights beyond marginal areas, which can no longer be remedied by a judgment upholding the substance of the case, interim relief must be granted — if necessary with a detailed examination of the facts and law of the claim put forward in the main proceedings — unless, exceptionally, there are overriding reasons that are particularly serious.

23 (b) The decision of the Tax Court of 24 May 2018 still meets those requirements. The Tax Court examined briefly and rejected both the existence of a right to an order and a ground for issuing an order.

24 (aa) In so far as the Tax Court took the view that the appellant had not established the right to an order, it did not fail to have regard to the requirements of Article 19 (4) of the Constitution on the protection of urgent rights. In particular, it examined sufficiently the factual and legal situation with regard to the recovery assistance requested by the Greek authorities, also taking into account the potential disadvantages for the complainant.

25 (1) The Tax Court has respected its duty to carry out an investigation under the law on the implementation of mutual assistance for the recovery of claims relating to taxes, duties and other measures agreed between the Member States of the European Union (EU Recovery Act), by which Council Directive 2010/24/EU of 16 March 2010 (EU Recovery Directive) has been transposed into national law.

26 (a) According to the division of powers between the Member States involved in the context of an international request for recovery, the claim to be recovered, the original foreign instrument permitting enforcement and the uniform instrument permitting

enforcement in Germany as the requested Member State are not, in principle, subject to a review of their legality. Under Article 14 (1) of the EU Recovery Directive, disputes relating to the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State and disputes concerning the validity of a notification by a competent authority of the applicant Member State are within the competence of the relevant bodies of that Member State. Such disputes shall be brought before the competent body of the applicant Member State in accordance with the law of that Member State. The underlying reason for this is that the courts of the requested Member State should in principle not be asked to investigate the facts or to deal with the possibly complex foreign tax legislation as regards the technical conditions for taxation in the applicant Member State.

27 In the case of disputes which relate to the recovery measures taken by the requested Member State or to the validity of a notification by a competent authority of the requested Member State, the dispute under Article 14 (2) of the EU Recovery Directive must be lodged with the competent body of the requested Member State in accordance with the law of that Member State. In principle, this division of powers does not enable the Tax Office, as the requested body, and subsequently the Tax Court to ascertain the accuracy of the claim to be recovered and the enforceability of the instrument permitting enforcement.

28 However, there is an exception to this principle if the claim to be recovered is fundamentally incompatible with the German legal order (so-called ordre public reservation). There is a breach of public policy if the instrument permitting enforcement is unacceptably contrary to fundamental principles of the German legal order, so that the result of the application of foreign law appears unacceptable under German rules of justice. In this respect, the German authorities and courts must investigate the issues of a person affected by the enforcement measures.

29 (b) The tax court has exercised this review in the context of the summary examination in the urgent procedure.

30 (aa) In so far as the Tax Court has rejected the argument that the public policy has not been respected because the appellant has not been issued with a separate liability notice in respect of the VAT liabilities of company (…), as provided for under German law in § 191 of the Tax Code, this cannot be criticised for constitutional reasons. In that regard, the Tax Court was entitled, in particular, to take account of the applicant's existing legal remedies against his liability in Greece.

31 Nor does an infringement of Article 19 (4) of the Constitution arise in this context from a failure on the part of the Tax Court to examine the Greek legislation and the means of redress available there against the complainant's liability. (…)

32 Accordingly, the Tax Court was entitled to rely on the documents in the file and the extensive correspondence between the Tax Office of Cologne-South and the Greek authorities, in which they explained in detail the legal situation in Greece. Similarly, the Tax Court was entitled, on the basis of a summary examination, to take the view that the complainant had sufficient legal protection against his liability in Greece. In addition, it was clear from the correspondence between the Tax Office of Cologne-South and the Greek tax authorities, which the complainant himself submitted, that the representative and chairman of the administrative board of the company (…), who was also held liable, had appealed against his liability claim. The Tax Court was entitled to infer from this information that this would also have been possible for the complainant.

33 In this respect, there was also no reason to consider the Greek legal situation in view of the fundamental requirements of the Constitution. (…) A special trust should in principle be given to a Member State of the European Union, concerning the compliance with the principles of the rule of law and the protection of human rights. This trust will only be shaken if sufficient evidence is provided of an infringement of minimum standards of fundamental rights. The complainant has not provided any such evidence.

34 (bb) Further, the Tax Court did not misjudge that the authority requested to recover a claim may be required to refuse mutual assistance if the person concerned has not become aware of the debt to be recovered, since knowledge of it is a necessary precondition for action to be taken against it (see judgment of the Court of Justice of 26 April 2018 in Case C-34/17).

35 Indeed, the Tax Court did not assume that the complainant was unaware of the debt to be recovered. In that regard, it was not required to give unqualified faith in the information provided by the complainant, but had to decide, in accordance with § 96 (1) point 1 in conjunction with § 113 (1) of the Tax Court Code, on the basis of its free conviction based on the overall outcome of the proceedings. The information provided by the complainant with regard to the appointment of Mr K. as a representative was contradicted by the information provided by the Greek authorities. In that regard, the Tax Court expressly stated that, according to the information provided by the Greek authorities, the VAT notice was issued against the company (…) on

23 April 2003, and served on employee K., who was also appointed by the complainant as his tax representative. The complainant's submission that Mr K. and Mr F. had told him that there was such a VAT assessment against the company (…) is also reproduced. If, against that background, the Tax Court relies on the file and correspondence between the Cologne South Tax Office and the Greek authorities and also takes into account the fact that, prior to enforcement, there was still an 'announcement of the impending prosecution' by the Greek tax office, and it also refers to the fact that it is normal to assume that a director of a Greek company is preparing to react to his liability, this is not, in any event, open to criticism in the light of the mere summary examination of constitutionality required in urgent proceedings. In so far as the complainant considers that the Tax Court should have reached a different conclusion, this, as a matter of interpretation and application of simple law and the assessment of the facts, is not subject to review by the Federal Constitutional Court.

(…)

Germany

Tax Court Munich

30 January 2020

Case number: 10 K 1105/17

International recovery assistance – Directive 2008/55/EC – Claim not properly notified – Refusal to provide assistance – Justified for reasons of public policy of the requested State.

Summary

The applicant State proceeded with a public service of the decisions relating to the tax claim – through a publication in the official journal – although the tax authority concerned was aware that the debtors were private individuals with a residence in another Member State, and the tax authority concerned knew the address of these tax debtors.

As the addressees did not actually receive the decisions, they had not been placed in a position to assert their rights effectively in the applicant State. Under these conditions, recovery assistance should be refused for reasons of public policy of the requested State.

Decision

The enforcement of the Spanish tax authorities' claims referred to in the requests for recovery with reference number... and with reference number... relating to a total amount of ... is unlawful.

(…)

Reasons

I.

The parties are in dispute over the validity of two requests for recovery made by the Spanish authorities on 5 April 2011.

The applicants were in the period ... 1996 to ... May 2006 owner of a property in Y, in the street X. The notarial contracts for the purchase and sale of the property, to which reference is made for further details, mention the applicants' German address.

In connection with the sale of the property, a withholding tax of 5 % of the purchase price was withheld by the purchasers and paid to the Spanish tax authorities by means of the tax return Form 211 of ..., indicating the applicants' German address (as 'non-residents').

The German federal central tax office forwarded the two Spanish recovery assistance requests, relating to the two applicants and mentioning their German address, to the defendant tax office (via the Bavarian State tax office).

In the requests for recovery, the date of 17 June 2010 is mentioned as the date of the tax assessment and 29 November 2010 is mentioned as the date of service for the principal claim, for an amount of ... EUR, for "income tax (non-residents) 2006". The date of 28 October 2010 is mentioned as the date of assessment and 3 March 2011 is mentioned as the date of service for a claim of ... EUR, relating to "income tax (non-residents. Expansion) 2006". The total amount of the claims is ... EUR.

On 27 May 2011, the tax office sent a notice of enforcement for ... EUR to one applicant and a notice of enforcement for … EUR to the other applicant.

The applicants objected to the enforcement by letter of 1 June 2011 (received on 6 June 2011). The tax office subsequently suspended recovery and informed the Spanish authorities via the federal central tax office that the claims had been contested.

The Spanish authorities then sent the documents on which the recovery request was based. These documents indicated that, as a result of the sale, the applicants owed taxes and penalties for failure to pay these taxes. All the documents refer to Street X. in Y. as the applicants' address. The taxable income of the applicants was mentioned, specifying the price of the sale and the deduction of their purchase price. The penalty for the non-payment of the tax was mentioned.

By report of 29 August 2011 – in Spanish – sent to the federal central tax office, the applicant authority commented on the applicants' objections and rejected them. According to the translated version, made by the federal central tax office, which summarises the content of that Spanish opinion, the Spanish tax authority initiated an investigation procedure on 11 June 2009, in relation to the 2006 income tax in respect of the sale of the property in street X. in Y. on ... May 2006. It was not possible to notify the assessment and the taxation of the capital gains at the applicants' place of residence for tax purposes in Spain, which had been kept at the address of Street X. in Y. since the acquisition of the property, with the result that notification by public notice took place on 26 May 2009. On 30 June 2009, penalties had been applied, for an amount of ... EUR. According to the Spanish authorities, the failure to comply with the

obligation to notify the tax residence and the change of residence could not be invoked as a defence.

The original opinion of the Spanish authorities and the summary translation were sent to the applicants on 14 November 2011, and it was recommended to them to raise their objections to the assessment of the tax in Spain.

By letter of 16 November 2011, the applicants requested that recovery be suspended on the basis of Paragraph 258 of the Tax Code (Abgabenordnung). They claimed that they had never worked in Spain. They were not allocated a tax number. There was no reason for them to deregister or to undertake any similar action towards the Spanish tax authorities. They first became aware of the assessment of the Spanish claims by the letter of the German tax office of 14 November 2011.

On 23 November 2011, the applicants lodged an objection to the rejection of their request for suspension of the recovery. The tax office thereupon suspended enforcement on production of a bank guarantee covering the amounts to be recovered (bank guarantees issued by…).

The proceedings brought by the applicants in Spain in May 2012 against the amounts to be recovered were unsuccessful. By order of 30 January 2013, the Regional Economic Administrative Court of ... held that their contestation was out of time because the Spanish tax claim had been notified lawfully and the one-month period for lodging an objection had expired. According to that court, it was apparent from the (Spanish) administrative file that the authorities' claim related to the income earned by the applicants on ... May 2006 from the transfer of the single-family house in street X. in Y. Attempts to serve documents in street X. in Y. were recorded on 10 March 2010 with the result 'unknown'. In addition, enforcement orders resulting from the assessment of the income tax and attempts to serve documents dated 1 and 2 July 2010 (income tax) and 12 and 15 November 2010 (administrative penalty proceedings) were also recorded at the above address with the result 'unknown'. As a consequence, the documents were notified by the publication of a notice in the Spanish Official Journal, with an invitation to appear at the place indicated within 15 days for delivery of the pending notifications. The applicants' complaint was declared inadmissible on the ground that it was submitted after the non-renewable period of one month, as required by Article 235.1 of the General Tax Law 58/2003, which, in that case, started on the day following the notification of the contested administrative acts. Under Article 112 of the General Tax Law, an attempt to serve is sufficient where an addressee or his representative is not found at the place of residence for tax purposes. In that case, the taxable person or his representative is summoned for service by publication of notices published in the Spanish Official Journal once for each interested party. Under Article 11 of the new version of the Law on income tax due by non-resident taxpayers, if they receive income from immovable property, these taxpayers are considered to have their tax residence, for the fulfilment of their tax obligations in Spain, at the tax residence of their representative and, if there is no representative, in the place where the property is located. Under that provision, the location of the property constitutes the applicants' domicile for tax purposes and, in view of the result 'unknown' of the attempts to serve them, publication of the notice for service by appearance within a maximum period of 15 calendar days from the date of publication is permissible, with the result that that period had expired without the applicants having appeared, so that service was deemed to have taken place from the day following the date of expiry of the period prescribed for such appearance. Thus, the applicants' complaints of 28 September 2012 were lodged well after the non-renewable period of one month.

By judgment of 10 February 2015 of the Supreme Court (Administrative Chamber), the action brought against the abovementioned decision was dismissed. In essence, that court took the view that "*taxpayers not established on Spanish territory are resident for tax purposes in Spain in order to fulfil their tax obligations in Spain, where they are resident for tax purposes in the place where their representative is resident for tax purposes and, if they do not have a representative, at the location of the property concerned, if they receive income from that property. The purpose of the investigation is therefore whether, following attempts to serve documents, the tax authority could lawfully use the public notice at the taxpayer's last known place of residence and tax domicile, in accordance with the aforementioned legal rule, or, as the applicant claims, to another place of residence not indicated by the appellants themselves. In the light of those findings, it should be noted that Article 43.3 of General Law No 58/03 states that taxpayers must notify their place of residence for tax purposes and any changes thereto, in the form and within the time limits laid down by law. It should be added that the proceedings initiated ex officio after the notification of such a change may continue to be conducted by the relevant authority at the original place of residence if service is effected in the context of those proceedings in accordance with the provisions of Article 110 of that legal text. Consequently, the Chamber must share the defendant's view that the assertion of the existence of a different place of residence in Germany, which the interested parties did not communicate to the administrative authority, does not make it possible to invalidate service orders which,*

according to the data available to the tax authority, were correct at the time when they were made. The applicants must therefore bear the consequences of the failure to comply with the obligation referred to in Article 48.3 of the General Tax Law. On the other hand, there can be no question of a lack of legal protection, since they could have appointed a representative in Spain, even if they were not required to do so, or, at the very least, they could have indicated a place of residence for service in connection with the transfer effected. However, they decided not to do so. Under these circumstances, a greater care could not be required from the tax authority in determining the place of residence." With regard to the further details of the decisions, reference is made to them (in German translation).

By letter of 16 March 2015, the applicants requested the suspension of all recovery measures and the provision of bank guarantees on the ground that the recovery of the Spanish tax notices was contrary to public policy. In particular, it is contrary to public policy for taxpayers not to have the possibility of having foreign tax assessments reviewed for their legality. There were no attempts to serve in Germany, although the German address was mentioned in the notarial contract for the sale of the Spanish plot of land.

After consulting the Bavarian State Ministry of Finance, Regional Development and Home Affairs, according to which public service was lawful under Spanish law, the German tax office informed the applicants, by letter of 19 October 2016, that the recovery procedure would continue. (...) In that regard, the tax office took the view that, according to two court decisions, service in Spain was lawful because the applicants had failed to comply with Spanish reporting obligations and that recovery in Germany was therefore not contrary to 'ordre public'.

In support of the action brought against that decision, the applicants submit, in essence, as follows: the formal conditions for enforcement of the Spanish notices were not met. The enforcement orders were not presented in German. In its judgment of 14 January 2010, C-233/08, the European Court of Justice (ECJ) ruled that an instrument permitting enforcement must be served on the addressee in an official language of the Member State in which the requested authority is situated in order to enable him to assert his rights. § 4 (1) sentence 1 No 1 of the Act implementing the EC Recovery Directive (version of 13 December 2007, hereinafter referred to as the 'EC Recovery Act'), which transposes Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (codified version), OJ L 150 of 10.06.2008 (hereinafter 'the EC Recovery Directive'), which is the basis for this Act, and Articles 7 and 17 of the EC Recovery Directive provide for the production of the enforcement order and a translation. In the meantime, Paragraph 10 (3) of the EU Recovery Act and Article 12 (1) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ L 84/1, EU-Recovery Directive) require the production of a uniform instrument permitting enforcement with the information laid down therein. Under Article 20 of the EU Recovery Act (Article 22 (1) of the EU Recovery Directive), the uniform instrument permitting enforcement must be sent in the official language of the requested Member State or accompanied by a translation into that official language. The applicants were not notified within the meaning of Paragraph 254 (1) of the Tax Code (cf. Düsseldorf Tax Court order of 23 June 2000 18 V 524/00 A (AO), DStRE 2000, 1103, Tax Court Hamburg judgment of 4 February 2010 3 V 254/09, EFG 2010, 848). Whether a requirement for service within the meaning of Paragraph 254 of the Tax Code is connected with the Spanish decisions (cf. Federal Tax Court - BFH - Order of 30 August 2010 VII B 48/10, BFH/NV 2010, 2235) cannot be examined because they are not submitted in German. In any event, the notices were not served in Germany. Enforcement announcements of 27 May 2011, 2 December 2016 and 8 February 2017 cannot be taken into account, since no reference is made to the decisions to be enforced.

Some of the claims are time-barred. This is the case for the claims that were announced for the first time on 2 December 2016. This is relied on by the applicants in Spain. For these claims, the recovery procedure should be suspended.

Enforcement of the Spanish notices in Germany is contrary to public policy (ordre public). The taxable persons against whom the foreign tax notices are to be enforced did not have the opportunity to have the foreign tax notices reviewed as to their legality. A breach of public policy is to be assumed if the enforcement order is in an unacceptable contradiction with fundamental principles of the German legal order, with the result that the result of the application of foreign law appears unsustainable under German law (Federal Tax Court judgment of 3 November 2010 VII R 21/10, IStR 2011, 194). It is for national law to decide whether the issue of the enforcement order differs from the national legal order and national legal concepts to such an extent that compliance with the request for assistance appears unsustainable.

The Spanish tax authorities are aware of the applicants' non-residence in Spain and of their German address, as this results from the notarial deed of ... May 2006 on the sale of the property and the tax

return form 211 of ... July 2006. The tax assessments and penalties decisions also state that the applicants are resident in Germany in the Z-street in A. In addition, the decisions to be enforced impose a tax based on the fact that the taxable person is not established in Spain. It is clear to the Spanish tax authorities that it was not possible to serve the notices on the applicants at the address of the property sold by the applicants. The applicants could not have become aware of the subsequent publication of the notices.

The actions brought in Spain and the action also did not enable the applicants to obtain a review of the assessments made by the Spanish tax authorities with regard to the determination of profits and the amount. In particular, it is clear that, in determining the capital gain, the significant repair costs were not taken into account; only the initial purchase price of the property in need of refurbishment was taken into account. The appeals and the action were dismissed solely on the ground of an alleged limitation period. Following the legal proceedings in Spain, further appeals were no longer possible. *Restitutio in integrum* is not possible in Spain because of involuntary failure to comply with a time limit. The lack of an opportunity to have the decisions of the Spanish tax authorities reviewed for their legality is blatantly contrary to German principles of law and to the principles of justice underlying the German State governed by the rule of law.

If account was taken of the additional investments made, for an maount of ... EUR, the respective taxable amount would not exceed ... Thus, at a rate of 15 %, the income tax liability would have been fully covered by the advance payment of ... EUR. Against that background, the penalties imposed for failure to pay the tax debt incorrectly determined were also excessive and disproportionate. In addition, the penalty was imposed for failure to pay income tax, of which the applicants were unaware.

Before the translations were sent to the applicants in the course of the action, only documents in Spanish had been submitted to the applicants by the tax office.These were presumably requests for payment, assessment of income tax and assessment of penalties. No evidence of the public notices was provided either. Documents relating to the amounts to be recovered have now now been submitted to the applicants for the first time in a German translation; they were not served on them in Germany.

The applicants claim that the Tribunal should declare that the enforcement of the Spanish tax authorities' claims referred to in the requests for recovery with reference number ... and ..., relating to a total of ..., is unlawful (…)

The defendant (the tax office) claims that the Court should dismiss the action.

The defendant refers, in essence, to the following: On 14 November 2011, the tax office had already sent the Spanish notices, together with a cover letter, to the tax representative of the applicants at the time. As a result of the judicial proceedings conducted by the applicants in Spain through two instances, they were also sufficiently aware of the factual and legal situation. It does not follow from the judgment of the Court of Justice of 14 January 2010 in Case C-233/08 that an enforcement order in another Member State must always be served in the official language of that Member State, nor would it be contrary to public policy. On the contrary, the Court of Justice held in the proceedings that, in principle, the courts of the Member State in which the requested authority is situated do not have jurisdiction to examine the enforceability of the instrument permitting enforcement. It is true that the Court of Justice has also held that, in the context of the mutual assistance provided for by Directive 76/308, the addressee of an instrument permitting enforcement must be notified of that instrument in an official language of the Member State in which the requested authority is situated in order to enable him to assert his rights. However, since, in the present case, the applicants challenged the enforcement orders in Spain and were unsuccessful before the Spanish tax courts as to the validity of public service, the question whether service must be effected in any event in the language of the requested Member State is no longer relevant to the decision. The drafting of the enforcement order in German would not have given the applicants a more favourable legal position in the light of the effective notification in Spain.

Nor is there an infringement of public policy, since, according to the Spanish judicial decisions in question, the applicants have failed to comply with legal obligations in force in Spain.

Under Spanish tax law, in the case of sales of immovable property by 'non-residents', 5 % of the certified purchase price had initially to be withheld and paid to the Spanish tax office as a withholding tax. Reference was made to this in the sale agreement. It is therefore not unlikely that the notary would have drawn the applicants' attention to the related further tax obligations. The applicants should therefore have expected the Spanish tax authorities to intervene and should have taken appropriate precautions.

For further details, reference is made to the documents in the file and to the pleadings lodged by the parties. Reference is made to the minutes of the hearing on 30 January 2020.

II.

The action is admissible and well founded.

1. (…)

2. The action for a declaratory judgment seeking a declaration that enforcement of the Spanish recovery request at issue is inadmissible is well founded.

(a) The general conditions for enforcement have been met.

On the basis of the request for recovery, the Tax Office is formally entitled to carry out the requested measure, § 250 Tax Code.

The EC Tax Recovery Act applies to the enforcement of pecuniary claims arising in other Member States of the European Community. The intended enforcement concerns taxes on income and capital (§ 1 (7) of the EC Tax Recovery Act), but also fines imposed by administrative authorities in connection with the abovementioned claims, with the exception of penalties of a criminal nature (§ 1 (9) of the EC Tax Recovery Act). The intended enforcement is based on an instrument permitting enforcement from the Spanish tax authorities, and the request for recovery complies with the requirements of § 4 (1) point 1 (1) of the EC Tax Recovery Act if — as in the present case — the applicant authority sends to the German tax authorities by e-mail a file which, in PDF format, reproduces the enforcement order of the applicant authority. The Spanish authority has confirmed that the claims are not contested in its State (§ 4 (1) (2) (a) of the EC Tax Recovery Act) and that enforcement proceedings have already been carried out in Spain on the basis of the instrument and the measures have not led to, and are not likely to result in, the full payment of the claim (§ 4 (1) (2) (b) of the EC Tax Recovery Act). (…)

(b) recovery of the claims referred to in the recovery request is however contrary to public policy.

aa) Under Article 6 (1) of the EC Recovery Directive, at the request of the applicant authority, the requested authority has to recover claims covered by an instrument permitting enforcement in accordance with the laws, regulations and administrative provisions applicable to the recovery of such claims arising in the Member State in which it is situated.

Under Article 12 (3) of the EC Recovery Directive, an appeal against recovery measures taken in the requested Member State is to be brought before the competent body of that Member State in accordance with its laws and regulations.

(1) This division of powers under Article 12 (3) of the EC Recovery Directive is the logical consequence of the fact that the claim and the instrument permitting enforcement have been established or issued on the basis of the law of the applicant Member State, whereas, for enforcement measures taken in the requested Member State, the requested authority applies, in accordance with Article 6 of the EC Recovery Directive, the rules laid down by its national law, since that authority is best placed to assess the legality of an action in the requested Member State (see judgement of the Court of Justice of 14 January 2010 in Kyrian, case C-233/08).

This division of powers does not, in principle, allow the requested authority to question the validity and enforceability of the act or decision the recovery of which is requested by the applicant authority (see judgment of the Court of Justice of 14 January 2010 in Kyrian, C-233/08).

(2) Although, in principle, the decision on the merits of disputes concerning the claim or the instrument permitting enforcement falls within the exclusive competence of the bodies of the Member State in which the applicant authority is situated, it cannot be ruled out that, exceptionally, the bodies of the Member State in which the requested authority is situated may have the power to examine whether the enforcement of that instrument would, in particular, affect the public policy of that Member State and, where appropriate, to refuse to grant assistance in whole or in part or to make it subject to compliance with certain conditions (see Judgment of the Court of Justice of 14 January 2010,C-233/08).

There is therefore an exception to the principle that the requested authority (and, subsequently, the tax court) is not, in principle, required to verify the accuracy of the claim to be recovered and the enforceability of the instrument permitting enforcement, if the claim to be recovered is generally incompatible with German legal concepts (so-called 'public policy' reservation). There is a breach of public policy if the enforcement order is so contrary to fundamental principles of the German legal order, that the result of the application of foreign law appears unacceptable according to German rules of justice. In this respect, the German authorities and courts must investigate indications from an individual affected by the enforcement measures (Federal Constitutional Court decision of 23 May 2019 1 BvR 1724/18, IStR 2019, 666 with further references). In particular, a declaration of enforceability cannot be refused on the sole ground that the foreign judgment was given in proceedings which depart from mandatory provisions of German procedural law. Rather, there is a ground for refusal only if the foreign court's judgment was delivered on the basis of proceedings which depart from the principles of German procedural law to the extent that it cannot be regarded as having been given in an orderly procedure governed by the rule of law

(Federal Tax Court judgment of 3 November 2010 VII R 21/10, BStBl II 2011, 401, Federal Court judgment of 26 August 2009 XII ZB 169/07, BGHZ 182, 188).

(3) Moreover, the principle of mutual trust between the Member States, which is of fundamental importance in EU law, requires each Member State to assume, save in exceptional circumstances, that all the other Member States respect EU law and, in particular, the fundamental rights recognised therein. Further, according to settled case-law, restrictions on the principle of mutual trust must be interpreted strictly (see judgment of the Court of Justice of 26 April 2018, Donnellan C-34/17, with further references).

bb) In this case, the enforcement of the claims of the applicant Member State is contrary to the public policy of the requested Member State.

In this case, the service effected under Spanish law is contrary to the public policy of the requested Member State. In particular, it derogates from the principles of German procedural law (with regard to the guarantee of effective legal protection under Article 19 (4) of the Constitution and the granting of the right to be heard under Article 103 (1) of the Constitution) to such an extent that it cannot be regarded as having been given in an orderly procedure governed by the rule of law.

(1) Article 19 (4) of the Constitution guarantees effective and as complete judicial protection as possible against acts of public authority. The guarantee of effective legal protection requires an interpretation and application of the rules governing the lodging of legal remedies which do not make it unreasonably difficult, in a way that cannot be justified on objective grounds, to pursue the available legal remedy. The specialised courts may not unacceptably limit the right to judicial enforcement of substantive law by applying procedural rules in an excessively strict manner (Constitutional Court decision of 23 May 2019 1 BvR 1724/18, IStR 2019, 666 with further references).

Article 19 (4) of the Constitution prohibits the exclusion of legal remedies. It is true that restrictions on access may legitimately be laid down in so far as they are not unreasonable and no longer justified on objective grounds. However, de facto difficulties in obtaining access are also significant (Schmidt-Aßmann in Maunz-Dürig, Grundgesetz, July 2014, Article 19 (4), paragraph 233).

Time limits for bringing actions and applications serve, on the one hand, legal certainty, but are also necessary for reasons of administrative efficiency (Schmidt-Aßmann in Maunz-Dürig, Grundgesetz, July 2014, Article 19 (4), paragraph 235). Failure to comply with the time limit must be prevented by the possibility of restitution in the previous condition. As a general rule, it will be appropriate to link this restitution to situations where the failure to comply with the deadline is not due to fault (Schmidt-Aßmann in Maunz-Dürig, Grundgesetz, July 2014, Article 19 (4), paragraph 235).

Closely linked to this is the issue of the definitive nature of administrative acts. The binding nature of a non-void administrative act which has not been challenged within a certain period by those entitled to challenge is one of the most important institutions of general administrative law. (...)

The announcement of State acts which regulate external relations is an essential requirement of the rule of law. The principle is that rules must be notified by publication in an official publication and that individual obligations must be notified by individual publication. In particular, the time limit for bringing an action for annulment is functionally related to the individual notification (Schmidt-Aßmann in Maunz-Dürig, Grundgesetz, July 2014, Article 19 (4), paragraph 250). However, there are mixed forms under the publication types. For example, administrative acts are subject to public publication (only) in accordance with specific legislation (Schmidt-Aßmann in Maunz-Dürig, Grundgesetz, as at July 2014, Article 19 (4), paragraph 251).

In so far as the public notice is nevertheless used, its effects which have the effect of curtailing legal protection must be offset by the grant of a right to reopen the proceedings under facilitated conditions (Schmidt-Aßmann in Maunz-Dürig, Grundgesetz, July 2014, Article 19 (4) (251)).

Proper compliance with the rules on service of documents serves to ensure the right to a fair hearing. At the same time, it can be left open whether any failure to serve documents results in a failure to achieve this constitutionally required purpose: in any event, Article 103 (1) of the Constitution is infringed where public service is effected without its conditions having been met and even though another form of service would have been readily possible (Constitutional Court decision of 26 October 1987, 1 BvR 198/87). The purpose of service on the addressee is to ensure that he is able to acquaint himself with the document concerned and to arrange for his legal defence (cf. Federal Constitutional Court decision of 15 October 2009 1 BvR 2333/09, NJW-RR 2010, 421 with further references).

(2)The simple statutory rules on public disclosure under German tax law and the relevant case-law illustrate these constitutional considerations.

(a) Under Paragraph 122 (3) (1) of the Tax Code, an administrative act may be made public if authorised by law.

Under Paragraph 9 (1) of the Law on administrative service, service is to be effected abroad

- by registered letter with acknowledgement of receipt, in so far as service of documents by post is permitted under international law,
- at the request of the authority, by the authorities of the foreign State or by the competent diplomatic or consular representation of the Federal Republic of Germany,
- at the request of the authority, by the Foreign Office, to a person enjoying the right of immunity and belonging to a representative of the Federal Republic of Germany abroad, and to members of the family of such a person who enjoy the right of immunity, or
- by transmission of electronic documents to the extent permitted under international law.

Under Paragraph 10 of the Law on administrative service, service may be effected by public notice if:

- the addressee's whereabouts are unknown and service on a representative or authorised representative is not possible,
- in the case of legal persons required to register a domestic business address in the Commercial Register, service is not possible either at the registered address or at an address entered in the commercial register of a person authorised to receive service or with another domestic address known without investigation, or
- service in the case referred to in Paragraph 9, it is not possible or does not promise to succeed.

(b) Public service is only acceptable as a 'last resort' and, on the basis of the fundamental right to be heard (Article 103 (1) of the Constitution), only justified if another method of service would be impossible or difficult to implement for objective reasons (Federal constitutional Court Decision of 26 October 1987 1 BvR 198/87, NJW 1988, 2361; Federal Tax Court Decision of 9 August 2007 V B 149/06, BFH/NV 2007, 2310; Federal Tax Court Decision of 13 January 2005 V R 44/03, BFH/NV 2005, 998). The tax authority generally fulfils the obligation to investigate by consulting the population registration office, the police or, where appropriate, an authorised representative (Federal Tax Court judgments of 15 January 1991 VII R86/89, BFH/NV 1992, 81; of 13 January 2005 V R 44/03, BFH/NV 2005, 998). In the case of a concealment of the place of residence by a recipient of service, it seems unfair and unjustified to require the authority to investigate the address in a particularly detailed manner. In this case, it is for the addressee either to inform the service provider of his whereabouts or to designate a person authorised to receive the document to be served (Federal Tax Court judgment of 13 January 2005, V R 44/03, BFH/NV 2005, 998 with further references).

(c) On the basis of these rules, under German law, there should not have been a public service for the applicants, as private individuals, because their residence was not unknown. On the contrary, in Germany, the possibilities of service under the EC Recovery Directive at a known address located in another EU Member State should have been used.

It is true that the applicants did not inform the Spanish tax authorities of the residence for tax purposes in Spain after the transfer of the property in accordance with the provisions of Spanish law (see the judgment of the Supreme Court of 10 February 2015 pursuant to Article 43.3 of the General Tax Law 58/03: 'their tax domicile and any changes thereto, in the form and within the time limits laid down by law.'), which, under Spanish law, justified public service following an attempt to serve in the place where the property was previously held. However, the applicants have not attempted — as required by German case-law — to evade taxation by concealing their place of residence. On the contrary, their German address was known to the Spanish authorities throughout the tax procedure (as indicated in the sales contract of ... May 2006 and by mentioning in the declaration 'Income tax of non-residents Model 211', with the result that the Spanish authorities were able to indicate the German address of the applicants in the tax assessment and penalty assessment decisions and also in the enforcement requests).

(3) The Chamber also considers this derogation of Spanish law from German law to be so serious that it cannot be regarded as having been given in an orderly procedure governed by the rule of law.

This is because, by the public service, in another country, of assessments of income tax and penalties, the applicants were in fact unable to bring an appeal against the decisions in good time. The applicants were not given a *de facto* right to be heard. Therefore, their fundamental rights under Articles 19 (4) and 103 (1) of the Constitution have not been respected.

(a) The Chamber considers that it is unreasonable under German law to make legal recourse to the Spanish authorities and courts so difficult, and not justified on substantive grounds, so that the right to effective legal protection and the right to be heard have been infringed.

Although the Chamber does not consider it unreasonable to expect purchasers of real estate in another EU Member State to find out about the tax provisions relating to property ownership or its termination, or seek expert representation. According to the contract of sale of ... in May 2006, the parties

were even informed by the notary of the 'legal provisions, including those of a fiscal nature' (page 7 of the deed). In addition, the use of the words 'advance payment of tax' in the contract of sale of ... 1996 and of ... in May 2006, indicated to the applicants that a tax liability – which was not yet fully fulfilled – may exist. In addition, it seems plausible to the present Chamber that, for reasons of fact of easier service of notices to foreign property sellers who do not formally state their place of residence at the time of the sale, the Spanish tax authorities consider service by public notice as sufficient, rather than notification under the EC Recovery Directive.

However, the Chamber does not consider tax breaches of obligations prior to the adoption of administrative tax decisions to be sufficient justification for limiting the applicants' fundamental rights to be heard and effective judicial protection after the adoption of these administrative tax decisions.

The Chamber takes into account the principle of good faith and, in particular, the idea of forfeiture in support of that assessment.

Admittedly, it may constitute an unlawful exercise of the right if the addressee of service, who deliberately and specifically caused an error as to his actual centre of interests, relies on the incorrect nature of a substitute service at that apparent place of residence (Federal Court of Justice, judgment of 14 May 2019 X ZR94/18, MDR 2019, 1275). However, in the case at issue, there is no error on the part of the Spanish authorities as to the actual centre of interests of the applicants. Moreover, if there were such an error on the part of the Spanish authorities, it would not be caused by the applicants, acting deliberately and in a targeted manner; they did not even keep their German address secret.

Moreover, forfeiture cannot be applied to the fundamental right laid down in Article 19 (4) of the Constitution. Forfeiture follows from the idea of good faith and is therefore part of the rule of law. However, the mere passage of a longer period is not sufficient in this regard. In addition, the beneficiary must remain inactive in circumstances in which he could reasonably have been expected to pursue his rights. This can only be said to be the case if the person entitled to bring the action was made aware of the harmful act of the State or could otherwise reasonably have been aware of it (Schmidt-Aßmann in Maunz-Dürig, Grundgesetz, July 2014, Article 19 (4), paragraph 233; See also Federal Constitutional Court Decision of 16 June 2015 2 BvR 2718/10, 2 BvR 1849/11, 2 BvR 2808/11, BVerfGE 139, 245).

(b) The above considerations are supplemented by the fact that Spanish law does not provide for *restitutio in integrum*. In the view of the Chamber, this too is contrary to public policy.

If the time limit for lodging an objection is not met, the enforcement of the right under Article 103 (1) of the Constitution depends on the grant of *restitutio in integrum* to the accused person; In these cases of 'first access' to the court, this legal concept thus serves directly and to a greater extent than otherwise the establishment of guarantees of legal protection guaranteed by the Constitution (Federal Constitutional Court Decision of 10 June 1975, 2 BvR1018/74, BVerfGE 40, 91, with reference to BVerfGE 38, 38; also BVerfGE 37, 96; 37, 101 et seq.; 41, 23 et seq.).

Accordingly, under German law, under the conditions laid down in Paragraph 56 (1) and (2) of the Tax Court Act, a person who was prevented from complying with a time limit without fault must be granted *restitutio in integrum*. Spanish law, on the contrary, does not provide for the possibility of *restitutio* (and, accordingly, this aspect has not been examined in the Spanish judgments).

The Chamber does not take into account the specific case in which the applicants even under German law could no longer obtain *restitutio in integrum* with the proceedings brought in Spain from May and September 2012 against the Spanish decisions, because of failure to comply with the one-year period laid down in Paragraph 56 (3) of the Tax Court Act (public announcement of the income tax and penalty notices on 10 March 2010 or the offers for payment/enforcement decisions most recently in February 2011).

(c) This interpretation of the law of the Chamber is consistent with the case-law of the Court of Justice of the European Union. The facts giving rise to the dispute are comparable, as regards the possibility of actual knowledge of the judgments to be enforced, to the facts underlying the judgment of the Court of Justice of 26 April 2018 (Donnellan C-34/17, OJ 2018, No C 211, 5). The court also considers — on the legal grounds formulated by the Court of Justice — that recovery by the requested Member State must be refused on the ground that the decisions imposing the taxes and fines were not properly notified to the persons concerned before the request for recovery was made to the Central Liaison Office and the tax office.

(aa) In the case giving rise to the judgment of the Court of Justice, a Greek customs office issued a decision in April 2009 imposing an administrative penalty for cigarette smuggling. In June 2009, the Greek Embassy in Ireland sent a registered letter to Mr Donnellan at an Irish address requesting

immediate contact with the Greek authorities in order to be able to receive relevant documents. In July 2009, following the April decision, the Greek customs office imposed the same fine; the same day, that fine was published in the Official Journal of the Hellenic Republic. In November 2009, the Greek authorities sent a request for recovery of the fine to the Irish Commissioners. By letter from the Commissioners of November 2012, Mr Donnellan was also asked to pay a total amount of EUR 1.507.971,88. The enforcement order contained the number of Mr Donnellan's passport, stating that the address was known. Following unsuccessful efforts by Mr Donnellan in November 2012 to obtain further information on the decision of the Greek customs office, Mr Donnellan brought proceedings before the High Court in Ireland against recovery in June 2014. In that regard, Mr Donnellan produced, inter alia, a report drawn up by an expert in Greek law, according to which Mr Donnellan could have challenged the customs office's decision only until 90 days after the date of publication of the sentence in the Official Journal of the Hellenic Republic (judgment of the Court of Justice of 26 April 2018, Donnellan C-34/17, OJ EU 2018, No C 211,5).

(bb) In that regard, the Court of Justice has held that, in those circumstances, as established by the referring court in the main proceedings, the person concerned is subject to the procedure for the enforcement of the request for recovery under Directive 2010/24, notwithstanding the fact that the decision on the fine in question was not served on him. The person concerned is therefore in a situation in which the requested authority requires him to pay the fine, together with interest, costs and default interest, even though he could not challenge the decision imposing the fine on him in the absence of sufficient knowledge of its content and reasons in the Member State of the applicant authority. A situation in which the applicant authority requests recovery of a claim based on a decision which has not been notified to the person concerned does not satisfy the requirement for a request for recovery referred to in Article 11 (1) of Directive 2010/24. Since, under that provision, no request for recovery within the meaning of the Directive can be made as long as the claim and/or the instrument permitting its enforcement in the applicant Member State are contested, such a request cannot be made even if the person concerned has no knowledge of the claim, since knowledge of it is a necessary precondition for action to be taken against it (judgment of the Court of Justice of 26 April 2018, Donnellan C-34/17, OJ EU 2018, No C 211,5).

(cc) In the present case too, the applicants, as addressees of the contested decisions, did not actually receive them and had not been placed in a position to assert their rights effectively in the applicant Member State.

The Chamber has no doubt that the applicants also became aware of the claims established in June and October 2010 only on the day when the notice of enforcement was sent to them by the tax office by letter of 27 May 2011. Accordingly, by letter of 1 June 2011, they objected. As in the case of Donnellan, the notices were also served in the case at issue by publication in the official journal of the requesting Member State and the time limit for bringing an appeal expired by the expiry of a specified period after publication. However, in the case of Donnellan, a letter was even sent to his home address, prior to that publication, asking him to contact the Greek authorities; in the present case, failure to contact the tax debtor at the address of the (sold) property situated in Spain was sufficient to induce publication. In the present case too, the German address of the applicants was known to the authorities of the applicant State.

The fact that, under Spanish law, service of the contested notices was in conformity with the law did not — as necessary — lead to the possibility of actual knowledge of the decisions concerned. The ECJ also considered that the decision on the fine had not been notified to the Irish applicant, despite public notice in Greece and letters previously sent in Ireland requesting immediate contact with the Greek authorities in order to receive relevant documents (judgment of the Court of Justice of 26 April 2018 Donnellan C-34/17, OJ EU 2018, No C 211,5, paragraph 57).

d) In the light of the above, there is no need to examine whether the failure to produce the enforcement orders in German results in an infringement of public policy.

In any event, as the period for bringing an action in Spain had already expired under Spanish law, the applicants would no longer have been able to safeguard their rights by means of a title submitted in German after the expiry of the time-limit for bringing an appeal. Consequently, in any event, the fact that no action had been lodged in good time in Spain was not due to the lack of a German translation.

(…).

UK

High Court of Justice - Commercial Court

27 April 2021

Skatteforvaltningen (Danish customs and tax administration) v. S. LLP

Case number: [2021] EWHC 974 (Comm)

1. Civil proceedings – International enforcement of a civil law claim to obtain the return of withholding tax refunds – Exception of public policy - No jurisdiction to entertain actions for the enforcement, either directly or indirectly, of a revenue law of another State.
2. International recovery assistance – Directive 2010/24/EU – Scope – Erroneously paid refunds of withholding tax

Summary

1. The Danish tax authorities in error approved and paid lots of withholding tax refund claims that were not valid claims. They therefore sought the return of these amounts and started civil litigation proceedings in the UK, asserting only private law causes of action.

The UK court however decided that these claims were not admissible before this court, as English courts have no jurisdiction to entertain actions for the enforcement, either directly or indirectly, of a revenue law of another State. This overriding principle of the 'Dicey Rule 3' is by nature an English law public policy rule. It implies that claims are not admissible that in substance (whatever the form) seek to enforce extra-territorially a foreign revenue law or other exercise of sovereign authority. In this case, the Danish claims, although in form not asserting tax law causes of action, in substance sought to enforce Denmark's sovereign right to tax dividends.

2. The recovery of a withholding tax refund falls within the scope of Article 2(1)(a) of Directive 2010/24/EU.

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Mr Justice Andrew Baker :

Introduction

1. The claimant is the Danish national tax authority, which (without deciding the point) I understand to mean it is not a separate legal person from the Kingdom of Denmark. I refer to the claimant as 'SKAT' without by doing so deciding any question of its true legal nature or identity going beyond what I have just said.

2. SKAT claims to have been induced by misrepresentations, over a three-year period from August 2012 to July 2015, to pay out as tax refunds it was not liable to pay, over DKK12.5 billion (c.£1.5 billion), 90% or more of which in the second half of that period, from March 2014. Five separate Claims have been consolidated into one action: CL-2018-000297 (70 defendants); CL-2018-000404 (25 defendants); CL2018-000590 (8 defendants); CL-2019-000487 (9 defendants); and CL-2020-000369 (7 defendants). Allowing for overlap (some defendants are party to more than one Claim), in total 114 defendants were named. Taking account of common legal representation where that exists, at the time of this first preliminary issue trial, there were 21 separate legal teams from 18 firms of solicitors responding to SKAT's various claims, representing between them 74 of the defendants.

3. The remaining 40 defendants, at the time of this trial hearing, were:

(i) 14 individuals litigating in person;

(ii) 12 corporate defendants litigating without representation (one of which, Acupay System LLC, acting by its general counsel, who is a qualified solicitor, instructed leading counsel for this preliminary issue argument though in general it does not presently have external legal representation);

(iii) 7 corporate defendants against whom judgment in default had been entered;

(iv) 3 corporate defendants that no longer exist (2 dissolved, 1 liquidated);

(v) 1 corporate defendant which had not yet acknowledged service;

(vi) 2 defendants (1 individual and 1 corporation) with whom SKAT had settled; and

(vii) 1 individual defendant against whom SKAT had discontinued.

4. I was appointed as designated judge for the litigation, pursuant to section D4 of the Commercial Court Guide, in good time before the first main CMC in January 2020, at and after which I have sought actively to manage the case, with Bryan J initially, Foxton J more recently, as alternate. I described the structure of SKAT's claims and what they would involve in a ruling at the second main CMC in July 2020, [2020] EWHC 2022 (Comm). The main case management decision taken then, for the reasons given in that judgment, was that there should be three trial hearings:

(i) Firstly, the trial of a preliminary issue whether SKAT's claims offend against 'Dicey Rule 3', which states that:

"English courts have no jurisdiction to entertain an action:

(1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or

(2) founded upon an act of state"

(Dicey, Morris & Collins on the Conflict of Laws, 15th Ed., R5-019)".

This is the judgment on that first trial, the 'Revenue Rule Trial', for which the issue ordered to be tried is in these terms:

"Are any of SKAT's claims, as alleged, inadmissible in this court under the rule of law stated, e.g., as Dicey Rule 3 (Dicey, Morris & Collins on the Conflict of Laws, 15th Ed., para 5R-019)? If so, which claims are inadmissible and why?"

(ii) Secondly, the 'Validity Trial', a trial of preliminary issues defined to determine foundational aspects of SKAT's allegations that the tax refund claims it says it should not have paid were not valid claims under Danish tax law. The Validity Trial has been fixed for 4-6 weeks in Michaelmas Term 2021.

(iii) Thirdly, the 'Main Trial', a massive final trial that, subject to further orders hereafter splitting it up or managing how and when different parts of the case will be considered at trial, would be designed to determine all remaining issues across all the claims SKAT has made. The Main Trial has been fixed to commence at the start of Hilary Term 2023 and to occupy the whole of 2023 plus Hilary Term 2024.

5. SKAT submitted that the Revenue Rule Trial had to proceed, or ought to proceed, on the basis that it will prove the essential facts of its case at trial, in particular because of the way the issue for trial was defined (see paragraph 4(i) above). That submission generated rather more heat than light, including at a pre-trial review hearing. The real issue was whether it would be fair to seek to resolve a disputed point of fact, if it would be necessary to do so in order to judge whether Dicey Rule 3 applied so as to defeat some or all of SKAT's claims, on the basis of the factual material put before the court on this trial, in the light of its case management history. In the event, I have not found it necessary to resolve contentious matters of fact to reach a final decision concerning Dicey Rule 3.

Background

6. The case concerns Danish withholding tax ('WHT') deducted at source by Danish companies because under Danish tax law they had to pay SKAT 27% of dividends they declared, paying out for shareholders, net of that deduction, only 73% of the declared dividend. SKAT maintains a system for processing and paying claims for WHT refunds to which foreign (non-Danish) resident parties may be entitled under Danish tax legislation giving effect to Denmark's obligations under double taxation agreements ('DTAs') concluded by it, including DTAs particularly relevant to this litigation with the USA and Malaysia. For instance, a tax-exempt US pension plan with shares in (say) Carlsberg A/S such that it received 73% of a declared dividend on that investment would be entitled to claim a full refund of the 27% WHT paid by Carlsberg to SKAT in respect of those shares.

7. The WHT refund system as operated by SKAT included more than one scheme. This case concerns the 'Forms Scheme', which operated by reference to a standard paper form produced by SKAT, Form No. 06.003, which had to be completed and submitted by post with supporting documents, for approval or rejection by SKAT's 'Accounting 2' department, managed at the material time by Mr Sven Nielsen. An example of a Form 06.003 was exhibited to my judgment on a summary judgment application brought by Goal Taxback Ltd ('Goal'), one of the defendants accused only of negligence, [2020] EWHC 1624 (Comm), [2020] 4 WLR 98.

8. SKAT says it received under the Forms Scheme, and in error approved and paid, thousands of WHT refund claims that were not valid claims, in that the transactions (or purported transactions) relating to shares in Danish companies that underlay the claims did not give the applicants the WHT refund entitlement they claimed, at all (in most cases), or in

the amount claimed (in some cases). By its claims, SKAT therefore seeks the return of amounts it says it was wrongly induced to pay out as tax refunds.

9. As I have just done, I shall refer variously, in discussing SKAT's claims, to the 'return' of a tax refund wrongly paid, or to SKAT seeking to 'claw back' or 'recoup' such a refund. I think that a natural use of language, but to be clear (and of course) I do not mean the return to SKAT in specie of anything it transferred, or the delivery to SKAT of anything that was ever its property in Denmark. The case concerns payments by bank transfer made by SKAT by way of tax refund (as it thought). Such payments do not involve a transfer of ownership of any kind in any property owned by the payor. They involve the discharge of a debt owed to the payor by its bank and the creation of a debt owed to the payee by its bank, via intermediate 'transfers' in the inter-bank payment system.

10. The principal focus of the main fraud allegation is the activity of Mr Sanjay Shah through his business, Solo Capital Partners LLP ('Solo'), together with other entities associated or said to be associated with Solo, at the time an apparently reputable financial services operation authorised and regulated by the FSA, later the FCA. There are further significant fraud allegations relating to the activities of individuals initially employed within Solo who, it is said by SKAT, came to use the same or similar, and allegedly fraudulent, methods of procuring SKAT to make payments using the Forms Scheme. I shall refer compendiously to the WHT applications alleged by SKAT to have been fraudulent as the 'Solo etc Applications'.

11. The fraud allegation, and associated allegations of conspiracy, says at its core that the WHT refund claims in which defendants who are said to have been dishonest had an involvement were bad claims, and that those defendants must have realised that at the time. The primary focus, of all the causes of action said by SKAT to arise, is the information said by SKAT to be conveyed to it by a completed WHT refund claim form and the documents sent with it, and what SKAT's Accounting 2 department did with that information. It is said that misrepresentations were made thereby to SKAT that induced the approval and payment of claims, in particular because of a strong culture in Denmark of presuming the taxpayer's honesty in its dealings with SKAT.

12. There are also claims by SKAT against various parties (e.g. Goal, as mentioned in paragraph 7 above) alleging only a liability in negligence. They include claims against parties, such as Goal, that played a part in the submission to SKAT of Solo etc Applications involving WHT refund claims now alleged to have been dishonest, and also claims relating to WHT refund claims organised by ED&F Man Capital Markets Ltd in which no allegation of dishonesty is made against anyone ('ED&F Man Applications'). Finally, for the purposes of this introduction, there are claims by SKAT against various parties alleged to have received proceeds of or derived from SKAT's mistaken payment (as it alleges) of WHT refund claims, founded upon allegations of 'knowing receipt' or unjust enrichment. Those claims include 'proprietary claims', in which SKAT claims that assets belonging to defendants that are traceably the proceeds of fraud against it are held on trust for SKAT.

13. As well as being different in not being said to have involved dishonesty by anyone, the ED&F Man Applications differ from the Solo etc Applications in that SKAT advances a case, it may be strictly in the alternative, that is different to its case in respect of the Solo etc Applications. For most of the ED&F Man Applications (336 of 400) SKAT advances a case that if (which SKAT does not admit) the WHT refund applicant in question obtained Danish dividends, then they (the applicant) were the party with a tax liability in respect of which WHT at 27% was deducted at source, but ED&F Man and not the applicant was the beneficial owner of dividends, and for that reason the applicant was not entitled to the WHT refund paid (or any refund). In most of those cases (320 of 336), ED&F Man does not admit that any refund was paid that was not due. In the other 16 cases, ED&F Man admits that the full refund claimed and paid was not due, but says these were excessive refund claims only, where applicants with valid claims for lesser refunds sought and were paid by SKAT a full refund and therefore received more than they were due. (In the remaining 64 instances (of 400), ED&F Man admits that the applicant did not receive the dividend referred to in the refund claim and so had no valid refund claim at all.)

Dicey Rule 3

14. The basis for Dicey Rule 3 has been a subject for debate. The editors of Dicey submit that the reason foreign revenue claims are not entertained is that the assertion of such claims is an extension of a sovereign power of taxation and, *per* Lord Keith of Avonholm in *Government of India v Taylor* [1955] A.C. 491, 511: *"an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties"*. I respectfully agree that that is a sound basis, and the true basis, for the rule, at all events so far as it could apply in this case.

15. A *dictum* of Learned Hand J in *Moore v Mitchell* (1929) 30 F. (2d) 600, at 604 is also often cited,

including by Lord Keith, *ibid*, which has two facets: first, and akin to Lord Keith's own formulation, that *"to pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities"*; second, that to 'pass upon' such provisions *"may commit the domestic State [i.e. through its courts] to a position which would seriously embarrass its neighbour. ... No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws [i.e. for the public order of another State] are consonant with its own notions of what is proper"*.

16. Contrary to certain of the submissions by the defendants, the second facet of Learned Hand J's rationale does not arise here. It does *not* mean that SKAT's claims stand to be dismissed because (if this be the case) the court, in order to determine them, might have to consider whether SKAT's WHT refund application system was incompetently designed or administered, or whether Mr Nielsen did an incompetent job, or perhaps even was dishonest. There is no question here of sitting in judgment over the propriety, assessed by some standard set by this court, of the Danish tax legislation that falls to be considered, or the DTAs concluded by the Kingdom of Denmark with various counterparties. The question is whether SKAT's claims seek, directly or indirectly, to enforce that tax legislation or in some other way the exercise of Danish sovereign authority.

17. The following high level statements of principle were agreed:

(i) Dicey Rule 3 is not a rule of jurisdiction, despite the language in which it is articulated in *Dicey*. It is a substantive rule of English law leading to the dismissal of claims falling within it, on the ground that the court will not entertain them because they involve an attempt to have the court enforce extraterritorially the exercise of sovereign authority.

(ii) The rule demands an analysis of the substance of the claim rather than the form: the court must look past the cause(s) of action pleaded, or even (though not relevant here) the identity of the claimant, to the substance of the right sought to be vindicated, or the nature of the acts or actions upon which the claim is founded.

(iii) Dicey Rule 3 is a rule of English law applicable whether or not English law will govern the merits more generally by reference to English law conflict of laws rules; and it is for the court to decide for itself whether, given its substance, a claim falls within Dicey Rule 3. That is not a question for Danish law, for example, even if in this case Danish law is the governing law of a particular claim.

(iv) Whether Dicey Rule 3 applies in this case involves a question of characterisation, for any given claim, whether it is a claim to enforce, directly or indirectly, Danish revenue law, so as to fall within (as it has often been called) the rule in *Government of India* (after *Government of India v Taylor*, *supra*) and/or whether in some other way it amounts in substance to an attempt to exercise sovereign power extra-territorially.

(v) There is a distinction to be drawn between *"an exercise of sovereign power and an action brought by a sovereign state which might equally be brought by an individual to recover losses for damage to property"* (*Mbasogo v Logo* [2006] EWCA Civ 1370, [2007] QB 846 at [67]). The latter of these has been referred to, after *inter alia* Lord Keith in *Government of India*, as a 'patrimonial' claim; *"when a state owns property in the same way as a private citizen there is no impediment to recovery"* (*Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374, [2009] QB 22 at [136]).

(vi) There is a distinction between mere recognition of foreign penal, revenue or other public laws, or sovereign acts, including recognising the effects or consequences of the past exercise of sovereign power in the sovereign territory, for example the vesting of title to property by an act of expropriation completed in the territory of the expropriating sovereign, on the one hand, and enforcement, on the other hand. Dicey Rule 3 is not designed to preclude or prohibit the former.

18. It follows that Dicey Rule 3 is not avoided because SKAT's claims are for damages, personal restitutionary remedies, or proprietary remedies in respect of traceable proceeds, and the defendants are not the WHT refund applicants themselves. Dicey Rule 3 would apply to a damages claim against a party involved in the submission by a taxpayer of erroneous tax returns or in a tax evasion scheme for that taxpayer, even if the defendant's conduct involved all the ingredients of a private law cause of action, such as a damages claim for a tort, because in substance the claim would seek to enforce the underlying right to tax the miscreant taxpayer. Likewise if Dicey Rule 3 would apply, in a case of tax refunds wrongly claimed, to the foreign sovereign's claim against the refund applicant erroneously paid, then a claim by the foreign sovereign against those culpably involved in the

making of the claim is equally inadmissible in this court. This was also common ground.

19. I have included as an Appendix a fuller summary of the arguments set out by the parties in their written submissions and developed in oral argument in relation to Dicey Rule 3. The significance of this preliminary issue to the case and the resources devoted to it notwithstanding, the point raised on Dicey Rule 3 is ultimately a narrow one, and the arguments on both sides became a touch repetitive or tangential. I have not lengthened this judgment, therefore, by dealing *seriatim* with every individual argument advanced; but in preparing it, I carefully re-read and considered all of them.

Brussels-Lugano

20. By the 'Brussels-Lugano regime', I refer to the system for the allocation of jurisdiction over defendants and the mutual recognition and enforcement of judgments in 'civil and commercial matters', under the Brussels Regulation (recast), Regulation (EU) 1215/2012, and the Lugano Convention. Many of the defendants were domiciled in Brussels-Lugano member states when these proceedings were served on them ('Brussels-Lugano defendants').

21. Article 1(1) of the Brussels Regulation (recast) provides that it applies *"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)"*; Article 1(1) of the Lugano Convention, to similar effect so far as material, provides that the Convention applies *"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."*

22. SKAT argued that: (i) this is a 'civil and commercial matter', not a 'revenue, customs or administrative matter', under Article 1(1); and (ii) it is therefore not possible to invoke Dicey Rule 3 to dismiss its claims against Brussels-Lugano defendants, because to do so would be to decline to exercise a jurisdiction conferred by the Brussels-Lugano regime otherwise than in accordance with its rules. If that were correct, then any claims falling within Dicey Rule 3 would proceed against Brussels-Lugano defendants while being dismissed against other defendants.

23. That response to reliance by Brussels-Lugano defendants on Dicey Rule 3 has the capacity to arise because:

(i) it is *acte clair* under the Brussels-Lugano regime that its concept of 'civil and commercial matters' – and therefore its companion concept of a 'revenue, customs or administrative matter' – is an autonomous concept that cannot differ from member state to member state,

whereas

(ii) albeit a substantial element of its *raison d'etre* is an understanding that the inadmissibility of, e.g., tax claims, in the courts of a state other than the state claiming tax, is part of an accepted international order, Dicey Rule 3 is a rule of English law and its scope need not match precisely that of a 'revenue, customs or administrative matter' within Article 1(1) of the Brussels-Lugano regime, especially since there is a focus in the ECJ/CJEU jurisprudence on Article 1(1) upon matters that Dicey Rule 3 would treat as matters of form rather than substance.

Dicey Rule 3

Authorities

24. A very early dictum often cited, expressing the rule that the court will not give effect to a suit to recover foreign tax, is that of Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341, at 343: *"There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For no country ever takes notice of the revenue laws of another."* To similar effect, per Abbott CJ in James v Catherwood (1823) 3 Dow & Ry KB 190 at 191: *"... in a British court we cannot take notice of the revenue laws of a foreign State."*

25. The language of never 'taking notice' of foreign revenue laws should not be taken too far. English law sets its face against actions that, in substance, have the effect, directly or indirectly, of *enforcing* here, extra-territorially, a foreign revenue law, for the benefit of the foreign sovereign authority (see, e.g., *re Visser*, *Queen of Holland v Drukker* [1928] Ch 877, *per* Tomlin J at 883-884).

26. In 1950, the authorities as they then stood led Kingsmill Moore J to conclude as follows in *Buchanan v McVey* [1955] AC 516 (approved by the House of Lords in, and reported as a note to, *Government of India*), namely that:

> *"[The cases on penal laws] would seem to establish that it is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced; and*

that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand." (ibid, at 527)

27. The suit in *Buchanan v McVey* was not brought by the Revenue, but by Mr McVey's former company, asset-stripped by him so as to frustrate the Revenue, and its liquidator. The cause of action pleaded was not for payment of taxes, or even for a liability of Mr McVey's to the Revenue in respect of the non-payment by the company of taxes. It was for an account of moneys due to the company from Mr McVey on account of his breaches of duty as director, trustee and agent. But the rule of law recognised and applied in the case, and endorsed by the House of Lords in *Government of India*, required the court to look past those matters – they were matters of form, not substance – to see that though *"... it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the courts of this country [i.e. claims for unpaid taxes], relief cannot be given*." (*ibid*)

28. *Government of India* itself was less indirect – the substance was closer to the surface – in that the foreign sovereign power pursuing its right to tax was the plaintiff, and the foundation of the claim was expressly its unpaid tax demand. The defendant was not the taxpayer company, but its liquidator in a voluntary liquidation, and the proceedings, under rule 108 of the Companies (Winding-up) Rules 1949, sought to reverse his refusal to admit the plaintiff's proof of debt in the liquidation. The decision was that the plaintiff's claim for the debt in question could not be enforced in the English courts, and the refusal of the proof of debt was therefore sound upon a proper construction of s.302 of the Companies Act 1948 concerning matters for which a liquidator had to make provision in a liquidation. As Viscount Simonds put it at [1955] AC 508, "*the company ... could not on the day before its resolution to wind up became effective have been sued by the Indian Government for the recovery of tax in the courts of this country. But it is said that from the moment that the company went into liquidation the situation changed, the old rule of law was abrogated, and our courts became the means of collecting the taxes of a foreign power*"; the decision was that s.302 of the 1948 Act brought about no such change.

29. The case actually decided in *Buchanan v McVey*, i.e. that of an asset-stripped company or its liquidator suing the company's former owner for breaches of the latter's duties to the company, in substance to secure the recovery by a foreign sovereign tax authority of taxes due from and unpaid by the company, came before the English courts in *QRS 1 ApS et al v Frandsen* [1999] 1 WLR 2169. The Court of Appeal confirmed that Dicey Rule 3 applies to such a case (though it seems from the judgment of Simon Brown LJ at 2173F-G that the contrary was not seriously argued).

30. SKAT reminds the court often that it claims to be the victim of fraud, not only of negligent or unblameworthy conduct. Not so, as regards the ED&F Man Applications, where fraud or dishonesty is not alleged at all. But in any event, in my view, the fact that in some of its causes of action against some of the defendants SKAT alleges fraud or dishonesty by those defendants, or by others in circumstances that are said to result in a liability on the part of those defendants, does not assist SKAT on the characterisation issue raised by Dicey Rule 3.

31. Thus, for example, the issue of characterisation when comparing this case to *Government of India* itself, was encapsulated in a submission by SKAT that a claim to recover money incorrectly paid out by a tax authority, ostensibly by way of tax refund, on the faith of misrepresentations, is not properly to be characterised as the imposition of a tax or a claim otherwise arising under a foreign revenue law, alternatively is not properly so characterised if the payee of the ostensible refund had not originally paid the tax ostensibly refunded. The defendants contend to the contrary. The point now is that the formulation of the rival contentions, and thus the question of characterisation, has no reference to the nature or degree of any fault required for liability upon any given cause of action relied on by SKAT under the system of law that in general governs it.

32. A plea to the character of the wrongful act, by reference to the nature or degree of fault involved in it, or to any consequent lack of sympathy the court might be invited to have for the defendant pursued abroad by the sovereign claimant, or sympathy for the claimant, has never been admitted as relevant. Thus, in *Buchanan v McVey*, considered above, Mr McVey engaged in a dishonest (at 522, "*highly fraudulent*") scheme to enable his company to evade tax; in *Mbasogo v Logo*, *supra*, considered in more detail below, the allegation was of a conspiracy to overthrow the lawful sovereign and government of Equatorial Guinea by a private armed coup.

33. The rule of law as a consequence of Dicey Rule 3, and of the essence of the public policy that rule reflects, is that *so far as concerns ordinary private law causes of action as a possible means of redress*, parties amenable to the jurisdiction of this court may engage in dishonest conduct whereby to defraud a foreign sovereign tax authority in respect of its tax-collecting activities and, as Kingsmill Moore J put it in *Buchanan*, at 517, "*snap [their] fingers in the face of a disgruntled [foreign] Revenue*." That was said as part of the judge's description of the intent behind Mr McVey's exercise in corporate asset-stripping and personal relocation to Ireland, the imposition on his companies by the Finance Act 1943 of an element of retroactive taxation having, as the judge put it, *ibid*, "*called forth the resources of his ingenuity*".

34. The decision in the case, endorsed and relied on by the House of Lords in establishing the rule in *Government of India*, was that in an Irish court, Mr McVey could indeed snap his fingers at the Scottish Revenue exactly as he had planned; and if that be thought unacceptable to the foreign sovereign (in that case, the British Crown), the remedy was to seek a solution in the public international law arena by Treaty, Convention or other inter-state cooperation or mutual assistance, if any be available (for example, in modern times, by EU legislative instruments such as the Mutual Assistance Recovery Directive (Tax etc.), Directive 2010/24/EU ('MARD')). That is the way to ensure – which, again, is at the heart of the public policy given effect by Dicey Rule 3 – that if (for example) English companies are to be pursued here by tax demands from SKAT, then in a reciprocal and equivalent way Danish companies may be pursued there by tax demands from HMRC (or, if not so, only because an asymmetrical supranational arrangement has been concluded, in which case the asymmetry would be a matter of sovereign choice on the part of the Crown, acting by HMG). In short, there is no cause of action under English law, which in this respect overrides ordinary choice of law rules (see paragraph 17(iii) above), for fraud on a foreign revenue.

35. That is not to say a foreign sovereign tax authority cannot bring a fraud claim here. Not every fraud against a foreign sovereign tax authority will be a fraud on the foreign revenue for which it is responsible. It will depend on the nature and subject matter of the fraud. A claim by SKAT alleging against a contractor that it had dishonestly overcharged SKAT for work done or services supplied, using inflated invoices overstating what was done or the time spent, would be governed by the ordinary rules of the law of contract, tort/delict, restitution, or as the case may be depending on the cause of action pursued, of the system of law that applied under ordinary choice of law rules; that would not be "*a claim that, by its nature, involves the assertion of a sovereign right*", but a claim arising "from acts that may be done not only by the King, but also by anyone else: "*actus qui a rege sed ut a quovis alio fiant*"", to quote *Mbasogo v Logo*, *supra*, at [43], adopting an articulation of the essential nature of a patrimonial claim that may be brought by a foreign sovereign as much as by a private party in an article by Dr Mann, "*The International Enforcement of Public Rights*" (1987) 19 New York University Journal of International Law and Politics 603, at 629-630. Dr Mann there concluded that "*Careful assessment and delimitation is required. The decision will not always be an easy one. Nor will the results always be universally approved, for in many cases they will depend upon legal judgment or instinct. What should not be open to dispute is the starting point and the purpose of the reasoning. … The true question is whether in substance the claim asserts a public right*."

36. The notion of a patrimonial claim capable of arising as much for a private party as for a foreign sovereign and therefore admissible when pursued by the latter as much as when pursued by the former, in contradistinction to an inadmissible sovereign claim, has been developed in relation to claims of wrongful interference with goods. Where the foreign sovereign seeks only to vindicate a title to goods in the same way as might a private party with the same kind of title to goods, the claim will be admissible, even if the title was acquired through the territorial exercise of a sovereign power, e.g. by expropriation or confiscation completed within the sovereign's territory.

37. In that context, the rule of English law is that effect will only be given to a title purportedly conferred by a foreign penal or tax law or power (for example a prerogative power of forfeiture or confiscation) if the goods had been reduced into the possession of the sovereign whilst within their territory to perfect their title. Where that had never occurred, a claim here for wrongful interference with the goods founded upon title said to be derived from the foreign public law or exercise of sovereign power is inadmissible as an attempt, in substance, to give that law or exercise of power extra-territorial effect.

38. In *Brokaw et al v Seatrain UK Ltd* [1971] 2 QB 476 household effects belonging to Mr and Mrs Shaheen, who were liable to tax in the US as citizens and residents there, were carried from the US to Southampton by the US-flagged Transoregon, owned by Seatrain Lines Inc, a US company, consigned to Interdean Ltd, an English company, for ultimate delivery to Mr and Mrs Shaheen's son-in-law, Mr Brokaw. The US Treasury served a notice of levy on the shipowners demanding that they surrender Mr

and Mrs Shaheen's belongings, with a view to securing the payment of taxes by them. The notice of levy was served when the ship was on the high seas.

39. The US Government's claim to be awarded possession of Mr and Mrs Shaheen's belongings was denied, though in form it was not a claim for payment of any tax debt. The cargo had never been in the US Government's possession; any claimed right to possession derived solely from US tax law giving effect under US law to the notice of levy. The claim therefore failed as being, in substance, a claim for the enforcement here of that foreign revenue law. Lord Denning MR explained the decision as follows, at 482G-H:

> "*It is well established in English law that our courts will not give their aid to enforce, directly or indirectly, the revenue law of another country. … The United States Government submit that that rule only applies to actions in the courts of law by which a foreign government is seeking to collect taxes, and that it does not apply to this procedure by notice of levy, which does not have recourse to the courts. I cannot accept this submission. If this notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, I think, have been enforced by these courts, because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law*.";

and at 483C-D, having concluded that the notice of levy was not sufficient to reduce the cargo into the possession of the US Government:

> "*… the United States Government are seeking the aid of these courts. They come as claimants in these interpleader proceedings. By doing so they are seeking the aid of our courts to collect tax. It is not a direct enforcement (as it would be by action for tax in a court of law), but it is certainly indirect enforcement by seizure of goods. It comes within the prohibition of our law whereby we do not enforce directly or indirectly the revenue law of another country.*"

40. In *A-G of New Zealand v Ortiz* [1984] AC 1, the Government of New Zealand (the effective plaintiff) was refused delivery up of a great carved totaro wood door, an important Maori artefact, that had been exported from New Zealand in breach of the New Zealand Historic Articles Act 1962, s.12(2) of which provided for such unlawfully exported artefacts to be forfeited to the state. The final decision in the case, by the House of Lords, was that s.12(2) did not purport to vest any title to the door in the state without its being seized.

41. The Court of Appeal had also taken that view of s.12(2), differing from Staughton J at first instance. In his speech in the House of Lords, with which the other Law Lords agreed without adding anything, Lord Brightman did not consider whether New Zealand's claim would still have failed if s.12(2) had been to different effect. The Court of Appeal dealt fully with that question, obiter, concluding that indeed the claim would still have failed:

(i) Lord Denning MR concluded, at 24E, G-H, after a masterly review of the law, that: "*… if any country should have legislation prohibiting the export of works of art, and providing for the automatic forfeiture of them to the state should they be exported, then that falls into the category of "public laws" which will not be enforced by the courts of the country to which it is exported, or any other country, because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory"; "The retrieval of such works of art must be achieved by diplomatic means. Best of all, there should be an international convention on the matter where individual countries can agree and pass the necessary legislation.*"

(ii) Ackner LJ put it thus, ibid at 33H-34C: "*… the claim is made by the Attorney-General on behalf of the state. It is not a claim by a private individual. Further, the cause of action does not concern a private right which demands reparation or compensation. It concerns a public right – the preservation of historic articles within New Zealand – which right the state seeks to vindicate. … The vindication is sought through confiscation. … It seems to me to be wholly unreal to suggest that when a foreign state seeks to enforce these forfeiture provisions in another country, it is not seeking to enforce a foreign penal statute. No doubt the general purpose of the Act of 1962 is to preserve in New Zealand its historic articles. However, this does not mean that a suit to enforce the forfeiture provisions contained in section 12 is not a suit by the state to vindicate the public justice*."

(iii) O'Connor LJ agreed with both.

42. In *Mbasogo v Logo*, *supra*, at [41], before quoting from and agreeing with Dr Mann as I mentioned in paragraph 35 above, the Court of Appeal said that: "*The importance of the speech of Lord Keith in Government of India … and the judgment of Lord Denning MR in … Ortiz … is that they both sought to explain the rationale for the well established rule that the courts will not enforce the penal and revenue laws of another country. In short, it is that the courts will not*

enforce or otherwise lend their aid to the assertion of sovereign authority by one state in the territory of another. The assertion of such authority may take different forms. Claims to enforce penal or revenue laws are good examples of acts done by a sovereign by virtue of his sovereign authority ("jure imperii"). In each case, it is necessary to see whether the relevant act is of a sovereign character. Penal and revenue laws are assumed to be of a sovereign character."

43. More recently, considering and explaining the decisions in *Brokaw* and *Ortiz*, the Court of Appeal in *Government of Iran v Barakat*, *supra*, held that title to certain antiquities, and an immediate right to possession, vested in Iran prior to their removal to England, an illegal export according to Iranian law. The claim here founded upon that title therefore did not fail on the basis of Dicey Rule 3. There was a distinction to be drawn by reference to how the foreign sovereign claimed to have acquired the title it asserted to justify a claim to goods situated abroad at the time of the suit:

> "*148. … the distinction between the two categories of case, those where the foreign state will be able to claim its property in England even if it has not reduced it into its possession, and those where it may not claim unless it has reduced the property into its possession, depends on the way in which it has acquired ownership. If it has acquired title under public law by confiscation or compulsory process from the former owner then it will not be able to claim the property in England from the former owner or his successors in title unless it has had possession. If it has taken the property into its possession then its claim will be treated as depending on recognition; if it has not had possession it will be seeking to exercise its sovereign authority.*
>
> *149. But in these proceedings Iran does not assert a claim based on its compulsory acquisition from private owners. It asserts a claim based upon title to antiquities which form part of Iran's national heritage, title conferred by legislation that is nearly 30 years old. This is a patrimonial claim, not a claim to enforce a public law or to enforce sovereign rights. We do not consider that this is within the category of case where recognition of title or the right to possess under the foreign law depends upon the state having taken possession*."

44. The subject matter in Barakat was found objects of antiquity and value with no known or identifiable owner, i.e. treasure trove. Title in such objects as found, and any question of an immediate right to possession of them in the hands of the finder, was governed by Iranian law as the lex situs; the Iranian legislation referred to by the Court of Appeal at [149] was part of that law. There was no extra-territorial enforcement of sovereign authority, in the sense eschewed by Dicey Rule 3, in proceeding to determine the claim brought here from the starting point, as a matter of Iranian legal fact, that pursuant to that legislation the Iranian State owned and had an immediate right to possession of the artefacts, at and from the moment they were found, just as there would have been no difficulty of admissibility of the claim if the legislation had conferred title upon the owner of the land on which they were found, if they had been found on privately owned land, and that owner had been the plaintiff. Either way, the founding original tort, committed in Iran, was a conversion by the finder in keeping the artefacts for themselves upon finding them.

45. The Iranian legislation, therefore, was not by nature confiscatory. Though there were provisions in the legislation that were penal in nature, indeed it was "*in large part penal in that it created criminal offences with criminal penalties for unlawfully excavating or dealing with antiquities*", the provisions in relation to ownership of antiquities when found, which were all that Iran needed, "*were not penal or confiscatory. They did not take effect retroactively. They did not deprive anyone who already owned antiquities of their title to them. They altered the law as to the ownership of antiquities that had not yet been found, with the effect that these would all be owned by the state, subject to the entitlement of the chance finder to a reward*" (*ibid*, at [111]).

46. If the rule of Iranian law for treasure trove had been 'finders, keepers', but an Iranian statute had rendered the artefacts liable to forfeiture to the state in certain subsequent circumstances, e.g. an unlicensed export as in *Ortiz*, then Dicey Rule 3 would have applied. If that had been the case, the Court of Appeal said, *obiter*, that as a matter of policy a claim by a state to recover antiquities forming part of its national heritage should not then be shut out by Dicey Rule 3. More precisely, the view expressed (at [163]) was that as a matter of public policy Dicey Rule 3 should not ground a "*refusal to recognise the title of a foreign state, conferred by its law, to antiquities unless they had come into the possession of such state …*". Read in context, this seems to me to be a view, obiter, contrary to the view taken, also *obiter*, in *Ortiz*, that the English court *would* give extra-territorial effect to foreign confiscatory legislation if it served the interest of the protection of the foreign State's cultural heritage. It will not be necessary to consider at any length that more difficult aspect of *Barakat*.

47. In *Barakat*, where the claim was for wrongful interference with goods, the effect of applying Dicey

Rule 3 (had it applied) was described as a refusal to *recognise* a title conferred by foreign law; so it is not correct to say without more that the essence of Dicey Rule 3 is a dichotomy between recognising and enforcing a foreign law or its effects. A claim founded upon and vindicating Iran's title to found objects was enforced here, and that title was derived from the Iranian treasure trove legislation. The cases arising out of alleged wrongful interference with goods also indicate that it is not sufficient, for Dicey Rule 3 to apply, that a foreign law relied on by the claimant to establish its title to sue is penal (confiscatory) in character.

48. The point that emerges from these authorities, leaving aside the controversial invocation of public policy, *obiter*, in *Barakat*, is that under English law the exercise of a sovereign penal (confiscatory) power is not accepted as being capable of vesting ownership of or a right to possession in goods *extra-territorially*, i.e. of granting proprietary or possessory title to goods situated beyond that sovereign's borders at the time of the (purported) vesting of title. As Dr Mann put it in "*Prerogative Rights of Foreign States and the Conflict of Laws*" (1955) 40 Tr Gro Soc 25, at p.27: "*The distinction between the application and the enforcement of foreign laws … is a fruitful one, provided the term "enforcement" is understood in a narrow sense. Every law that is being applied may be said to be enforced. The peculiar enforcement envisaged [by Dicey Rule 3] pre-supposes that it is a foreign State or one of its instrumentalities that asserts before an English Court the public authority conferred upon it by its own law*."

49. *Williams and Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] 1 AC 368 was therefore similar to the wrongful interference cases, but *a fortiori*, relating to shares rather than goods. English and Spanish companies pursued claims that existed prior to and independently of certain expropriation decrees vesting control over the Spanish companies in the Kingdom of Spain. It did not offend Dicey Rule 3 to admit those claims. The Spanish state ownership of the Spanish companies, achieved through expropriation, was not material to the claims, and in any event the expropriation had been completed in Spain, so the English court was not being asked to grant relief by which, directly or indirectly, the Kingdom of Spain might attain it.

50. The decision in *Williams and Humbert Ltd* says nothing on the question of characterisation that arises in this case, but observations of Lord Mackay of Clashfern about *Buchanan v McVey* and *Government of India* were relied on by SKAT. Lord Mackay said this, at 440D-441A:

> "*From the decision in the Buchanan case … counsel for the appellants sought to derive a general principle that even when an action is raised at the instance of a legal person distinct from the foreign government and even where the cause of action relied upon does not depend to any extent on the foreign law in question nevertheless if the action is brought at the instigation of the foreign government and the proceeds of the action would be applied by the foreign government for the purposes of a penal revenue or other public law of the foreign State relief cannot be given. … Most important there was [in Buchanan] an outstanding revenue claim in Scotland against the company which the whole proceeds of the action apart from the expenses of the action and the liquidation would be used to meet. No other interest was involved. …*
>
> *Having regard to the questions before this House in Government of India … I consider that it cannot be said that any approval was given by this House to the decision in the Buchanan case except to the extent that it held that there is a rule of law which precludes a state from suing in another state for taxes due under the law of the first state. No countenance was given … to the suggestion that an action in this country could be properly described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. The existence of such unsatisfied claim to the satisfaction of which the proceeds of the action will be applied appears to me to be an essential feature of the principle enunciated in the Buchanan case … for refusing to allow the action to succeed*."

51. That explanation of *Buchanan v McVey* and *Government of India* supports the defendants' argument in this case, subject to the prior question, which is the real question here, whether SKAT's unsatisfied claim to recoup what it paid out by mistake is to be regarded for the purposes of Dicey Rule 3 as a revenue claim. The claim that in Buchanan the liquidator's suit sought in substance indirectly to enforce was the Revenue's claim against the company for unpaid tax. That was, without room for argument concerning characterisation, an "*outstanding revenue claim*" or a "*claim under [a foreign revenue] law [that] remained outstanding*". Lord Mackay cannot sensibly be taken to have been expressing a view on the point raised by this case, and not raised by or considered in *Williams and Humbert Ltd*, which is whether, as the defendants say, there is no material distinction for the purpose of Dicey Rule 3, between a claim for tax due and unpaid, and a claim for the return of a tax refund mistakenly granted and paid.

52. If the defendants are right about that, then SKAT's unsatisfied claims for the return by the WHT refund applicants of tax refunds wrongly paid to them fulfil Lord Mackay's requirement. If not, then Lord Mackay's requirement is not fulfilled, but that will be because of the decision as to characterisation made now, not because what Lord Mackay said somehow already decided it.

53. Whether it is material to distinguish between, on the one hand, taxes due and unpaid, and, on the other hand, tax refunds or credits wrongly granted and not returned, was considered but in a different context by some of their Lordships in *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174. In that case, HMRC sued a Spanish company alleging participation in VAT missing trader carousel frauds. The claim was for damages for an unlawful means conspiracy causing loss to the Revenue.

54. In a missing trader carousel fraud against the UK VAT system: Company X, in another EU member state, would sell goods to Company Y, in the UK, a zero-rated supply for VAT purposes; Company Y would sell to Company Z in the UK, charging VAT; Company Z would sell to Company X, zero-rated; and Company Y would become the missing trader by failing to account in the UK for the VAT charged to Company Z.

55. There might be more intra-UK sales, not just a single sale, Y to Z; one or more of the UK links in the chain, other than Y, might be privy to the fraud, but not necessarily; that is true even of Z, i.e. they need not necessarily be privy. Ignoring any profit margins, likely to be very small, in any links in the sales chain, and since the goods start and finish with X, the substantial net value transfer is from HMRC to X/Y, the dishonest traders, through Z paying VAT to Y and claiming that amount from HMRC but Y not paying VAT to HMRC. It might be thought natural to see HMRC's loss as the VAT not paid by Y, if a failure by a tax authority to collect tax can be seen as a loss for the purposes of a common law damages claim; or it might be said that the dishonest scheme causes HMRC to pay money away to Z, a loss to HMRC in the amount paid which would be repaired by a recovery from Y but which, if unrepaired, is the loss for which damages may be awarded. If Z is privy, it may not be difficult, in addition, to construct a case around implied representations in its VAT return inducing HMRC to make a refund, again so as to argue that HMRC's loss is that refund.

56. There was an argument that by the damages claim HMRC was "*levying money for or to the use of the Crown*" without legislative basis, contrary to article 4 of the Bill of Rights (1689). That argument was rejected – pursuing a damages claim, even if the loss was a loss of tax revenue, was not itself the levying of tax under article 4 – but the House of Lords divided 3:2 on whether the Value Added Tax Act 1994 ('the VAT Act') created a code so exhaustively defining HMRC's rights and remedies in relation to VAT as to preclude the claim. Lord Scott, Lord Walker and Lord Mance said it did not; Lord Hope and Lord Neuberger dissented.

57. SKAT relied on *Total Network* in its written submissions, and Acupay responded in some detail, but I do not think it assists in deciding the issue in this case. Foreign taxation was not involved; *Total Network* is not a case on Dicey Rule 3 at all.

58. In *HMRC v Shahdadpuri et al* [2011] SGCA 30, a claim by HMRC alleging involvement in VAT carousel frauds said to have been masterminded by a Danish company, Sunico ApS, was struck out on the basis that it offended against Dicey Rule 3. The Singapore Court of Appeal allowed an appeal, reasoning that the law was not clear enough for a strike-out and saying:

(i) at [39]-[40], that the decision in Total Network "*was not a ruling that as a general principle of law, any conspiracy claim for carousel fraud was not a prerogative claim for tax or the levying of tax", and "was arrived at in the context of a purely domestic dispute governed by UK law … . It does not necessarily follow that under Singapore law, the Appellant's claim … which is similar to the claim in Total Network would not be regarded as an indirect revenue claim or as a claim to enforce the interests of the UK government*"; and

(ii) at [42], that "… *the Appellant's central interest in bringing the Present Claim was to recover the money which it had paid to the Exporter pursuant to the latter's claim for reimbursement of input tax. But, this still raised the question of whether the Appellant's claim could legitimately be characterised as an action to enforce the sovereign rights or interests of a foreign state. … This was a novel and complex issue of law which … merited a fuller consideration of the revenue rule and/or the rule against enforcing the sovereign rights of a foreign state (given, especially, the evolving environment of increasing cooperation between states to combat transnational crime)*".

59. The VAT carousel frauds alleged against Sunico ApS were also considered by the CJEU, in the context of the Brussels-Lugano regime, and I deal with the CJEU's decision below (at paragraph 142ff). In a Case Comment on *Sunico* (C-49/12, *Revenue and Customs Commissioners v Sunico ApS* [2014] QB 391) that referred also to Total Network and certain US

decisions, "*The enforcement of foreign revenue laws*" (2014) 130 LQR 353, Lord Collins took it to be plain that a claim by a foreign revenue authority brought in an English court for damages in respect of a VAT carousel fraud on that foreign revenue would be "*an inadmissible claim for the indirect enforcement of foreign taxes*" (*ibid* at 354). I refer to Professor Briggs' writing when considering Sunico. He puts forward argument on its consequences for *QRS v Frandsen*, *supra*, not all of which I accept. At this point, I note that Prof Briggs seems to agree (as his argument assumes without demur) that the tort claims made in *Sunico* (which were the same as those made in *Total Network*) are within the scope of Dicey Rule 3 on the law as it stands, given the approval of *Buchanan v McVey* by the House of Lords in *Government of India*.

60. That brings me finally, and on the facts most exotically, to the claim by the President and Government of Equatorial Guinea that Simon Mann, a former British Army officer turned private security contractor and mercenary, was part of a plot to seize control of Equatorial Guinea, intent on seizing control of the state and its assets, especially its oil and gas reserves, killing or abducting the President, Teodore Mbasogo, and installing in his place Severo Moto, a national of Equatorial Guinea living in Spain. The losses for which damages were claimed comprised (1) costs incurred in responding to or otherwise by reason of the conspiracy alleged, including costs incurred in the detention and prosecution of suspects and costs of increased security in the country, and (2) damage to the nation's commercial activities causing economic loss, including through delay to major infrastructure projects (see [2007] QB 846 at [19] on 862-864, quoting from the particulars of claim in the English proceedings).

61. In *President of the State of Equatorial Guinea et al v The Royal Bank of Scotland International et al* [2006] UKPC 7, the Privy Council allowed an appeal from the Guernsey Court of Appeal, restoring a *Norwich Pharmacal* order granted at first instance in support of the substantive claim to be pursued in England. In doing so, however, their Lordships:

(i) expressed disquiet (at [23]) that no point had been taken on whether the *Norwich Pharmacal* claim should have been dismissed under Dicey Rule 3;

(ii) said (at [24]) it was "*well arguable that the claims which the appellants say they wish to make in the English proceedings represent an exercise of sovereign authority, namely the preservation of the security of the state and its ruler*", the issue being "*whether the "central interest" of the state bringing the action is governmental in nature*" (a reference to the approach of the High Court of Australia in the *Spycatcher* case, *A-G (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 46); and

(iii) therefore (see at [28]), though they restored the *Norwich Pharmacal* order, directed that it be suspended pending a decision in the English court on the viability of the substantive claim.

62. That decision came in *Mbasogo v Logo*, supra, and was that the claim fell to be dismissed under Dicey Rule 3. The main conclusion of principle, *ibid* at [50], was that:

> "*The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim. On the other hand, if in bringing the claim the claimant is not doing an act which is of a sovereign character of by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does not seek to vindicate a sovereign act or acts, then the court will both determine and enforce it. … In deciding how to characterise a claim, the court must of course examine its substance, and not be misled by appearances … .*"

63. The Court of Appeal concluded at [63] that "*none of the pleaded claims is enforceable in our courts. Just as a claim for taxes is "an extension of the sovereign power" to use the words of Lord Keith in Government of India … [at] 511, so too is a claim for relief (damages and an injunction) arising from the claimants' exercise of sovereign power in responding to the alleged attempted coup by the defendants*."

64. That conclusion was said at [64]-[66] to be fortified by policy considerations around the undesirability of the court sitting in judgment over aspects of the claimants' conduct in their response to the attempted coup they alleged. I agree with Mr Fealy QC that this invocation of a species of comity concern was not a ground for the decision, which rested squarely "*on the distinction … between an exercise of sovereign power and an action brought by a sovereign state which might equally have been brought by an individual to recover losses for damage to property*" (*ibid* at [67]). The degree to which entertaining a claim might tend to a need to consider matters it might be thought unseemly for the English court to decide, because they seem more apt for international relations between sovereigns, might inform a decision on the issue of characterisation; but that does not

make a potential for embarrassing HMG in international relations a ground for rejecting a claim if, properly characterised, it is not, in substance, a claim to give extra-territorial effect to foreign public laws or sovereign powers.

65. That reading of the basis of decision in *Mbasogo* is confirmed by *Barakat*, *supra*, where (at [123]) the Court of Appeal concluded that: *"… the Mbasogo case … is not … a case involving the attempted enforcement of foreign public law. Although the court approved the residual category of "other public law" [i.e. in Dicey Rule 3 as stated in the textbook] the ratio is that a claim involving the exercise or assertion of a sovereign right is not justiciable. This is not far removed from the test adopted by the High Court of Australia [in Spycatcher], and the Court of Appeal [in Mbasogo] accepted, at para 50, the correctness of the expression of opinion by the Privy Council [in Equatorial Guinea v RBS], which itself appears to give some approval to [that] test …*"

66. It is inherent in the Court of Appeal's decision in *Mbasogo* (paragraph 62 above) that, in the context of Dicey Rule 3, *how loss was suffered* is an aspect of identifying the substance of the claim, in order to determine whether it is sovereign in character. That is confirmed and reinforced by how the Court of Appeal dealt with the heads of loss alleged, at [58]-[59]:

> "*58. The special damages claimed … are in respect of losses incurred as a direct result of their response to the alleged conspiracy. … With one possible exception, they are losses which could only be suffered by the governing body of the state. They arose as a direct result of the government's decisions as to how to respond to the conspiracy and (subject to the possible exception) are of a kind that could not be suffered by anyone else.*
>
> *59. The possible exception is [the plea] that, as a result of the defendants' actions, projects for roads and other civil engineering works were delayed by reason of the exodus of foreign nationals "in the wake of the coup". In our judgment, it is artificial to describe these losses as property losses caused by the defendants' actions and treat them as if they were similar in kind to, for example, the cost of repairing a government building damaged in the course of a coup. It is clear from … the pleading that it was not the defendants' action alone which caused the foreign nationals to leave. It was the claimants' declaration of a state of emergency and the security checks carried out … which affected the willingness and ability of foreign nationals to continue working in Equatorial Guinea. In our view, on a proper analysis, the [subject] losses do not fall into a different category from the other losses*."

67. I therefore accept a submission by Ms Macdonald QC that in considering the question of characterisation raised by Dicey Rule 3, the mechanism of harm is important – how it is said that allegedly wrongful conduct caused the harm in respect of which the claimant pursues a claim, including the nature (character) of any actions (including decisions) of the sovereign that were involved. It may indeed be central to the analysis in a claim brought by a sovereign entity against private parties alleging tortious conduct (e.g. deceit, conspiracy, negligence), as it was in *Mbasogo*. How the claim is put against the defendants is treated by Dicey Rule 3 as a matter of form rather than substance. The whole point of the rule, exemplified by *Buchanan v McVey* or *Mbasogo*, is to look past the fact that the claim has been framed in a way that a claim might be framed between private parties, treating that as a matter of form, to examine and identify the central interest served by the pursuit of the claim. Considering the mechanism of harm, as alleged, including the sovereign function (if any) involved therein, at the level of the factual detail of the particular case (not in the abstract as, for example, 'additional personnel costs' or 'payments induced by fraud'), is both appropriate and likely to be unavoidable in that exercise.

68. In *Mann* (1987), *supra*, some consideration is given to the characterisation, for the purpose of Dicey Rule 3, of certain types of claim by sovereign authorities for the return of benefits conferred on private parties. There is criticism of a decision in Germany to refuse as inadmissible a claim by the Dutch State to recoup unemployment benefits alleged to have been obtained fraudulently by a defendant who had emigrated to Germany (ibid, at 613-614). The true issue, it is argued, "*should have been whether the Dutch claim involved the assertion of Dutch sovereign power within Germany*"; and it is submitted that it did not. Dr Mann then generalised the thought (*ibid*, at 617*ff*), suggesting a category of claim that should not be caught by Dicey Rule 3, namely where a foreign state or public authority "*asserts a public right that in substance is so close to a private right that there should be no objection against its enforcement*." He returned to the Dutch unemployment benefits case (ibid, at 624-625) to compare it to *Regierungspraesident Land Nordrhein-Westfalen v Rosenthal* 17 A.D.2d 145, 232 N.Y.S.2d 963, in which a defendant had received payments to which he was not entitled under a German indemnification law, section 7 of which entitled Nordrhein-Westfalen to repayment: "*The action succeeded. The Appellate Division acknowledged that section 7 created a public right, but held that "[t]he object of the action is not 'vindication of the public*

justice', but 'reparation to one aggrieved.'" This, indeed, is the decisive point: damages for fraud were in issue."

69. Other examples identified by Dr Mann included: a claim by the Municipality of Vienna to recoup the cost of work carried out on the defendant's house in his absence to prevent danger to adjoining properties; a defendant in receipt of social security subject to a conditional obligation to repay if later having the means to do so; student 'loans' ("*education expenses advanced by the state on the condition that the student repay them by instalments once he begins to receive a salary*"). In such cases, Dr Mann suggested (ibid, at 618-619):

> "*… a state's claim should be allowed to succeed because it concerns payment for, or repayment of, a benefit that was voluntarily accepted. While the claim may have its basis in the state's sovereign rights, its substance is of a commercial or private law character. Thus, the state should be allowed to maintain a claim for repayment when it discharges the defendant's liabilities by paying maintenance to the defendant's spouse or child, or when it pays damages to the victim of an accident and then through assignment seeks indemnification from the defendant-wrongdoer.*
>
> *Perhaps the decisive feature of all these cases is that in the last resort the claim arises due to the defendant's voluntary act, or to phrase it differently, the defendant could have avoided the assertion of claims against him. Municipal Council of Sydney v Bull illustrates this distinction. In that case, an Australian municipality carried out improvements of a road on which the defendant's house was situated. By virtue of a local statute, the municipality held the defendant liable for a proportionate contribution payment. The claim in England failed because, among other reasons, it concerned a charge analogous to a tax. Although the defendant derived some advantage from the plaintiff's work, the benefit was imposed upon the defendant independently of his own will. Therefore, there is a marked difference between Bull and the Vienna case …, where the municipality acted for the benefit or at the (imputed) request of the defendant*." (*Municipal Council of Sydney v Bull* is reported at [1909] 1 KB 7.)

70. Dr Mann's comment that in the *Nordrhein-Westfalen* case what was decisive was that the claim was for damages for fraud is over-stated, if it means that where a claim is so framed it cannot fall within Dicey Rule 3. I do not imagine that was Dr Mann's intent, however, for that would be to judge on form, not substance, and as Dr Mann put it 30 years earlier (*Mann* (1955), *supra*, at 35): "*It is … certain that in these matters the Court will not allow itself to be misled by appearances: on the contrary, it will investigate whether what the plaintiff asserts is in substance a prerogative right the direct or indirect enforcement of which is being sought. Thus if in truth a prerogative right is being asserted, the Court will reject it, although the claimant is a person other than the foreign State and although the claim sounds in contract or in tort*."

71. I did not understand Mr Fealy QC to submit that where SKAT alleges fraud (or conspiracy to defraud), that without more, i.e. the mere fact that SKAT so frames the claim, takes the claim in question outside Dicey Rule 3. However, he did rely on Dr Mann's discussion of payments for, or repayments of, benefits conferred by a public body, together with *Briggs* (2014), "*Private International Law in English Courts*", at 3.193, contrasted with a Scottish case mentioned by Dr Mann, *Metal Industries (Salvage) Ltd v Owners of the S.T. "Harle*" 1062 S.L.T. 114, to submit that claims arising out of the defendant's voluntary act, where the defendant could have avoided the assertion of the public body's claim, should always be held to fall outside the Rule.

72. In my judgment, that takes Dr Mann's thought too far. The question raised by each of the examples Dr Mann considered is whether the public authority's particular claim, framed as a claim for payment for or repayment of a benefit conferred, is in substance a claim to tax the defendant (or to levy payment from him akin to tax), *given the nature of the benefit allegedly conferred and how it was conferred*. In none of the examples did the benefit itself have anything to do with taxation; an alleged obligation to pay for (or repay) a non-tax benefit looks like taxation only where, as in *Municipal Council of Sydney v Bull*, it is imposed by an exercise of sovereign authority over the defendant. In this jurisdiction today, we would immediately identify the claim in *Bull*, and reject it accordingly, as effectively a claim for council tax, albeit made under a specific local law providing for a particular public road improvement scheme rather than under legislation that was by name a taxation statute.

73. That SKAT's submission takes Dr Mann's observations too far can also be seen by marking that the decision by an international investor to invest in Danish shares is a voluntary act. That would not allow SKAT to pursue the investor here for dividend tax, if SKAT did not operate a WHT scheme in relation to dividend tax. Dicey Rule 3 would lead straightforwardly to the dismissal of the claim. Then take the case of an excessive refund claim by such an investor, where there is a WHT scheme, pursuant to which he receives a tax refund payment to which he

was not entitled. Suppose 27% WHT and a full refund, but a true refund entitlement of only 12% (i.e. a true tax rate for the investor, taking into account an applicable DTA, of 15%). When SKAT pursues the investor for the excessive refund, there is on any view a serious argument that it is, in substance, seeking thereby to enforce its right to tax the investor at 15%, the upshot of the WHT collection and excessive refund having been that the investor was taxed at the time at 0%. That making the application for a full refund was a voluntary act on the part of the investor is to my mind neither here nor there in judging that argument.

74. So while, in the case of a non-tax benefit conferred at the request of the defendant, Dr Mann suggested that the request rather than any sovereign authority should be seen as, in substance, the source of any alleged obligation to pay for, or return, the benefit, that suggestion does not address the question of characterisation of a claim to recoup a tax refund wrongly paid out. As a result, it is not necessary to express a view on the correctness of Dr Mann's particular examples, but for instance, the proper characterisation of student 'loan' repayment obligations may be a nice one, given the functional equivalence of student loans to an additional income tax upon graduates, depending on earnings.

Applicable Principles

75. I draw from that review of the authorities the following principles:

(i) A claim is not admissible before this court if, in substance, it is a claim directly or indirectly to enforce the Kingdom of Denmark's sovereign right to tax dividends declared by Danish companies.

(ii) That may be the substance of a claim though it is not, in point of form, a claim for a tax debt or a claim against a party that was or could be a tax debtor.

(iii) The substance of the claim is not determined by the private law cause(s) of action pleaded, indeed the relevant issue of substance over form arises at all only when, and because, the claim is framed in that way, that being a matter of form in this context, as is the identity of the claimant (though that aspect does not arise in the present case).

(iv) Rather, the substance of the claim is determined by the central interest, in bringing the claim, of the sovereign by whom it is brought or in whose interests, directly or indirectly, it is brought.

(v) The mechanism by which harm is said to have been suffered, in respect of which a claim seeks reparation, is material to consider, and may be important, in judging whether the central interest in bringing that claim is a sovereign (governmental) interest rather than a patrimonial (private law) interest.

(vi) There is no rule of law that the voluntary act of the defendant, in engaging with the foreign sovereign, takes a case outside Dicey Rule 3 or disapplies it, though the nature of any interaction between defendant and sovereign will be one circumstance to be considered in deciding what right or interest, in substance, the claim serves to vindicate.

Application to the Facts

76. The *Kildeskattelovens* (Danish Withholding Tax Act, 'the WHT Act') is at the heart of SKAT's case. It provides the foundation for all of SKAT's claims, as pleaded, without reliance on which none of SKAT's claims could exist or be formulated.

77. By s.2(1).6 of the WHT Act, legal persons not tax resident in Denmark are liable to tax under that Act on dividends obtained from Danish companies (other than investment companies) within the scope of s.16A(1)-(2) of the *Ligningsloven* (Danish Tax Assessment Act), read with s.2(1)(c) of the *Selskabsskatteloven* (Danish Corporation Tax Act). The tax residency concept for that purpose is that of s.1(1) of the WHT Act, rendering liable to tax under the Act (i) Danish (permanent) residents, (ii) those resident in Denmark for at least six months in the tax year in question, (iii) certain categories of person serving or residing aboard Danish-registered ships and (iv) Danish public servants posted abroad. By s.2(11), the general rate of tax under s.2(1).6 is set at 27%.

78. By s.65(1) of the WHT Act, the general obligation of a Danish company resolving to pay or credit to shareholders a dividend is to withhold 27% of the dividend, the section providing that the amount withheld is called a 'dividend tax'. The company's obligation, a revenue law liability for the purposes of Dicey Rule 3, is to pay the dividend tax to SKAT. The Danish Minister for Taxation is empowered by s.65(3) of the WHT Act to make rules providing for dividend tax not to be withheld from dividends that are not taxable income in the recipient's hands and for the publication of a database of companies and associations entitled to receive dividends without any dividend tax withholding.

79. Then s.69B(1) of the WHT Act provides, so far as material, as follows:

> "*If a person who is liable to pay tax pursuant to section 2 hereof … has received dividends …, of which tax at source has been withheld pursuant to sections*

65- 65D which exceeds the final tax under a double taxation treaty …, the amount must be repaid within six months from the receipt by [SKAT] of a claim for repayment. If repayment is made after this time, the taxpayer is entitled to interest [at a specified rate]."

80. That primary provision, specifying SKAT's obligation to make WHT refund payments, is complemented by s.69B(2), providing that if SKAT cannot check whether the conditions for repayment of WHT have been met, due to the circumstances of the proposed recipient, the six-month payment period is interrupted until those circumstances "*no longer prevent control*", and by s.69B(3), providing that if SKAT assesses that payment as claimed will involve an obvious risk of loss, it may require security from the recipient, but only if the claim is disputed and not finally decided by an administrative appeals body or the courts.

81. The concept and structure is clear:

(i) dividend tax is an income tax;

(ii) a dividend payee not tax resident in Denmark is liable to dividend tax at 27%, an extra-territorial imposition of income tax by the Danish state, sometimes referred to as a 'limited' tax liability because it is limited to a particular source of income, but (I should be clear) by using the term 'dividend payee' I do not mean to express any view on when precisely there will be liability to tax, upon the proper construction of s.2(1).6 of the WHT Act, that being a contentious issue in the litigation not for determination now;

(iii) the obligation on a Danish company to pay SKAT dividend tax of 27% of a declared dividend is a tax obligation imposed on the company by the Kingdom of Denmark, a simple tax levy based on domicile;

(iv) payment of that tax by the company to SKAT will operate to discharge the dividend tax liability of those taxable on the receipt of the dividend in question, but as in (ii) above without by that meaning to express any view on who precisely is so taxable;

(v) an entitlement under s.65 of the WHT Act is therefore an entitlement to a dividend tax refund, and a payment under s.65 is appropriately called a refund or repayment although, by the nature of a withholding tax regime, the refund payee will not have made the dividend tax payment to SKAT in respect of which the refund was granted;

(vi) the WHT refund applicant will be claiming by its application that as regards the referenced dividend, the 27% dividend tax payment that SKAT will have received from the company will have been a payment discharging a dividend tax liability owed by it (the applicant) under s.2(1).6 of the WHT Act;

(vii) acceptance and payment by SKAT of a WHT refund application is therefore an acceptance of the applicant as a taxpayer pursuant to the WHT Act, and an agreement to pay, and payment of, a sum of money to the applicant qua dividend tax refund.

82. SKAT says in most of its claims that it was misled into *mistakenly* treating the refund applicant as having paid tax on the dividends in question, and the issue as regards Dicey Rule 3 is whether the fact that SKAT claims to have been misled in that way affects the proper characterisation of the substance of its claims. The exceptions, where the mistake alleged is different but still concerns the incidence or amount of tax liabilities, relate to ED&F Man Applications. As I noted in paragraph 13 above, for most of those (336 of 400), SKAT advances an alternative claim (arising if, which SKAT does not admit, dividends were received) that the WHT applicant was rightly treated as having paid tax but wrongly treated as entitled to a refund (because, SKAT says, if dividends were received, they were received beneficially for ED&F Man), and for 16 of those cases there is also a further alternative claim that if (as ED&F Man says) they were only excessive refund applications, then the WHT applicant was rightly treated as having paid tax but wrongly treated as entitled to a full refund where only a partial refund was due.

83. That the WHT Act provides the foundation for every claim made by SKAT in these proceedings means this case is not like a theft or robbery of cash from a SKAT vault, or a loss of SKAT's cash caused by actionable negligence in circumstances in which it was simply beside the point that SKAT was the Danish sovereign tax authority or that the cash may have been received in payment of taxes. Some of their Lordships in *Total Network* drew a comparison between theft or robbery of cash and the torts alleged in that VAT carousel fraud case, but that was to assess whether HMRC had power to pursue private law claims, not whether a VAT carousel fraud claim brought here by a foreign sovereign tax authority should be treated like a theft claim so as to fall outside Dicey Rule 3.

84. Nor is this case like that of a cyber-attack, or the suborning of a SKAT employee, to gain access to a SKAT bank account from which to take a payment, or negligent advice to SKAT on how it might invest its funds, or a dishonest investment trick such as inducing SKAT to put funds into a Ponzi scheme.

85. In all the examples in paragraphs 83 and 84 above, SKAT could say it had suffered loss of the same kind in the same way as might a private individual. It would not be necessary or material for SKAT to mention the WHT Act, or any other Danish taxing statute or sovereign power, to found its claim. It would be a contrivance if defendants referred to the WHT Act (or other Danish revenue laws), or SKAT's status as sovereign tax authority, to suggest that taxation was, in substance, the interest served by the pursuit of the claim.

86. In this case, by contrast, every cause of action against every defendant starts with and must be pleaded by reference to the delivery (or prospective delivery, for conspiracy allegations) of a completed Form 06.003, as required by SKAT for a "Claim to Relief from Danish Dividend Tax", and the foundational allegation that accepting and paying that claim was (or would be) a mistake, SKAT being induced by the applicant's information erroneously to conclude that the tax refund claimed was due under s.69B(1) of the WHT Act.

87. The defendants' essential point is not simply that the source of SKAT's funds is taxation. It is that making dividend tax refund payments is an integral part of SKAT's function as sovereign tax authority, and the return of a payment made by way of dividend tax refund is in substance a payment of tax, SKAT's entitlement to which, if any, derives from its power to tax Danish company dividends in the first place. That characterisation of substance, the defendants argue, should not be affected by the fact that, if SKAT is right on the facts (including as to Danish tax law) it was wrong to make the refund payment it now seeks to claw back. The WHT refund system is an aspect of the Danish system of dividend tax collection; a claim to recoup a WHT refund payment is a claim to reduce the amount of WHT given back; and a claim to reduce the amount of WHT given back is, in substance, a claim to increase the amount of dividend tax taken in. As will become apparent, I agree.

88. The decided cases on Dicey Rule 3 to date have not considered the case of a tax refund wrongly paid by a sovereign tax authority and a claim to recoup that erroneous payment, or compensation for it. The point for decision now is exactly that, i.e. whether Dicey Rule 3 should be held to cover such a case, and the arguments for and against are the same whether they are seen as arguments about extending (or not) the rule in *Government of India* on the extra-territorial collection of taxes, or as arguments over whether the recovery of tax refunds falls within the principle underlying Dicey Rule 3 and giving it content, namely that claims are not admissible that in substance (whatever the form) seek to enforce extra-territorially a foreign revenue law or other exercise of sovereign authority.

89. If a claim seeking a recovery in respect of a tax refund payment made through error induced by misrepresentation by the refund applicant is, by nature, a claim seeking directly or indirectly to enforce a foreign revenue law, that is so as much where the misrepresentation is dishonest as where it is innocent or negligent, just as a claim for tax unpaid following an under-reporting of, or total failure to report, taxable income, or an excessive or invalid claim of deductible expenses, is a tax claim whether the mis-declaration or failure to declare is honest, careless or dishonest. Depending on the rules of the system of law that would govern it, and the nature and circumstances of the particular defendant, fault of some kind or degree may be required for liability on a private law cause of action, if available; but that is a different point.

90. In saying that, I put to one side misrepresentation as to identity, on which it is not necessary to take a view to decide the present case. Mistakes as to identity can be seen as conceptually different to other errors and a decision that Dicey Rule 3 applies in the present case does not have to mean that it would apply to a case where SKAT's claim was not founded on an allegation that it had made a payment to Party A, intending to pay a tax refund to which, in error, it had assessed Party A to be entitled, but on an allegation that it had made a payment to Party B mistakenly thinking it was paying Party A (as it happens intending to pay a tax refund to Party A). Without deciding the point, I can see how it might be said in the latter case that in substance, the fact that the payment was thought to be by way of tax refund was immaterial, and SKAT was not by the claim seeking to vindicate any exercise by it of sovereign authority in relation to tax, even if the opposite is true in the present case.

91. Similarly to paragraph 89 above, if as SKAT said in its alternative submission its proprietary claims should not be regarded as claims directly or indirectly to enforce Danish revenue law, that would not be because (if this be so) such proprietary claims arise only where there has been a fraud, meaning that SKAT would have to prove fraud to establish those claims; it would be because they were regarded as cases of retrieving SKAT's property rather than as cases of enforcing foreign revenue law, even though the loss was incurred by the making of tax refund payments in error. If, as the defendants say, that last factor – the way in which the loss was suffered – means that SKAT's resulting proprietary claims are foreign revenue claims for the purposes of Dicey Rule 3 just as

much as their claims for damages or unjust enrichment, then that is so whether or not the extraction of payment from SKAT was achieved dishonestly.

92. It follows also that it does not matter whether in principle, as SKAT submitted by reference to Barakat (see paragraph 46 above), arguments of public policy can be raised against the application of Dicey Rule 3 to a case of a type falling within its scope, or whether, as the defendants submitted, the Rule is absolute, i.e. the relevant rule of public policy is that claims of such a character as to fall within the Rule are never admitted. The only countervailing public policy suggested was that of combatting or giving redress in respect of fraud, yet that has never ousted the Rule or prevented a type of claim from falling within it that otherwise would. For completeness, I venture to suggest that the proper role for a public policy argument of the kind considered, *obiter*, in *Barakat*, is only in assessing whether Dicey Rule 3 is to be extended to a category of foreign public law or species of prerogative or similar power not covered by existing authority. Where, by reference to the type of foreign law or power being considered, Dicey Rule 3 applies, it would be "*unwise … to attempt to discriminate between those claims which [the courts] would and those which they would not enforce. Safety lies only in universal rejection*", *per* Kingsmill Moore J in *Buchanan v McVey*, *supra*, at 529.

93. SKAT cannot avoid Dicey Rule 3 by pointing to the fact that it is not suing here the WHT refund applicants themselves, whose refund applications SKAT says it paid wholly or partly in error (see paragraph 18 above); and conversely if claims against the applicants themselves, to recoup the erroneous refunds, would not fall within Dicey Rule 3, then neither would any of the claims made here against other parties alleging an involvement in the making of the refund applications or the receipt of funds or other enrichment deriving therefrom. The argument on Dicey Rule 3 can and should be determined upon how claims against the allegedly wrongly paid applicants, to recoup the payments made by SKAT, would stand under the Rule. Indeed, such claims are made in the proceedings, in that a few of the defendants here were WHT refund applicants, even if for the most part litigation against applicants themselves is before courts or tribunals in other jurisdictions.

94. In my judgment, applying the principles set out in paragraph 75 above, such claims do fall within Dicey Rule 3, as submitted by the defendants, because this case is properly to be characterised as an attempt by SKAT:

(i) to vindicate its right, a creature of Danish tax law under the WHT Act and DTAs concluded by Denmark, to retain Danish company dividend tax collected by way of WHT except where refund claims are made to it by qualifying applicants under s.69B of the WHT Act,

and therefore

(ii) indirectly to enforce Denmark's underlying sovereign right, given effect by the WHT Act, to tax Danish company dividends.

95. The making of payments by way of WHT refunds pursuant to the WHT Act, and, as a resulting practical necessity, the creation and operation of a system for the making and processing of WHT refund applications, is an integral part of the taxing of Danish corporate dividends. It is a key element of the assessment and collection by SKAT of the amount that Danish law entitles it to take as tax, as an exercise of the sovereign authority of the Kingdom of Denmark, from such dividends. The taxation of dividends under the WHT Act is, in substance, a single exercise of sovereign authority to take in tax a proportion of declared Danish company dividends, the true entitlement from time to time being a function of the tax rate set by the WHT Act (27% at all times material to SKAT's claims), the international distribution of entitlements to receive dividends (in whatever sense that is required by s.2(1).6 of the WHT Act so as to create a liability to tax), and the terms of any DTAs concluded by the Kingdom of Denmark that are rendered pertinent by that distribution.

96. Collecting 27% up front and making available to non-residents a refund application system is no doubt convenient to SKAT. WHT schemes of this type, as Mr Baker QC submitted, may be seen as creatures of the international understanding that revenue laws will not be enforced extra-territorially except as may be provided for by supranational legal instruments entitling the taxing sovereign to international assistance. SKAT's right and interest are the same whether or not the technique of WHT and a refund application system is used. Where that technique is used, *ex hypothesi* the initial collection (here, 27% of dividends, collected from companies declaring them) is conditional by nature because of SKAT's obligation to pay a partial or total refund if eligibility conditions are satisfied.

97. An obligation and a right will generally be opposite sides of a single legal coin; and in my judgment that is the case here. To say that SKAT is obliged to pay a WHT refund if eligibility conditions are satisfied is to say that SKAT is entitled to keep, as tax, what it collected up front only to the extent that those

eligibility conditions are not satisfied. A conditional entitlement to keep, as tax, amounts collected up front, in effect pending final assessment of the tax due, is conceptually and functionally the same as an entitlement to assess and collect tax due by reference to those eligibility conditions; and it is that entitlement to keep as tax what it had collected up front that SKAT seeks to enforce by its claims.

98. SKAT's claim to recover from a WHT reclaim applicant an amount it had assessed as payable, and had therefore paid, by way of tax refund, founded on the proposition that the assessment was in error, is conceptually and functionally the same, for SKAT, as a claim for tax due and unpaid. It is, in substance, a tax claim. As part of that characterisation, it seems to me the defendants are correct to say that the acceptance and payment of funds by way of tax refund, in response to a WHT refund application, is an exercise of sovereign authority. That it is an assessment carried out, application by application, by Danish state tax officials, rather than the prior act of making the law those officials are seeking to apply, does not change that characterisation of their conduct.

99. The substance of SKAT's claims is in my judgment that by conduct of a kind ordinarily regarded as actionable in tort, the defendants have diverted from SKAT amounts to which it was entitled as dividend tax on Danish corporate dividends. The mechanism by which that was done, on SKAT's case, was that of WHT refund applications that SKAT was misled into accepting and paying. But in the context of Dicey Rule 3, that is a matter of form, once it is accepted (as is now long established, and was common ground before me) that in the field of foreign tax claims, Dicey Rule 3 is not restricted to claims by a foreign sovereign tax authority against a defendant alleging, in terms, a liability on the part of that defendant for unpaid tax. The question, under Dicey Rule 3, whether the substance here is an attempt by SKAT directly or indirectly to enforce the Kingdom of Denmark's sovereign right to tax Danish corporate dividends, arises only and precisely because SKAT is not pursuing, in that narrow and formal sense, a claim for unpaid tax.

100. I agree with SKAT that on its case, as alleged, at all events for the Solo etc Applications (the position for the ED&F Man Applications is more complex): the WHT refund applicant was not a person liable to tax under s.2(1).6 of the WHT Act on the dividend referenced in the application, as SKAT assessed them to have been, and the applicant therefore did not have a primary tax liability that was discharged by a WHT payment received by SKAT from a Danish company. That does not mean Dicey Rule 3 is inapplicable, though it may mean that the sense in which SKAT's claims seek to enforce Danish sovereign taxation rights is a degree more indirect than in other cases. It is just another way of saying that the case involves payments made by way of tax refund said not to have been due and raises for decision whether claims to recoup such payments should be treated any differently than claims for tax due but unpaid, from the perspective of Dicey Rule 3.

101. SKAT said as a further consequence of that premise (viz. that the WHT refund applicant had not been a person liable to tax under s.2(1).6 of the WHT Act as regards the dividend in question) that "*As a result, none of the proceeds of the present action will go to discharge any such tax or other public law liability in Denmark*". I agree that a recovery now from a WHT refund applicant (or, by extension, a recovery of damages from a defendant who was not the applicant) where the applicant never had a primary tax liability under s.2(1).6 of the WHT Act cannot discharge such a liability. If SKAT's quoted contention was intended to go further than that, it merely asserts the result desired by SKAT, begging the question for decision, which is whether the return of a tax refund payment erroneously paid, the error being that no tax refund was due as SKAT had thought when paying, should be seen as different in kind for the purpose of Dicey Rule 3.

102. What SKAT's claims seek to do is repair the hole in its dividend tax take for the years in question caused by its misjudgment of its obligations to make tax refund payments pursuant to s.69B(1) of the WHT Act. Its claims, framed as private law causes of action, that it was induced into making that misjudgment by actionable conduct on the part of the defendants, define the grounds upon which SKAT proposes that the defendants could be required by the court to repair that hole, if the claims be admissible. They do not mean that SKAT's real or central interest in bringing those claims is not the repair of that hole, which is a purely sovereign interest.

103. SKAT pleads that Danish tax legislation does not empower it to raise tax assessments against the WHT refund applicants that would have force under Danish law (subject to any rights of challenge before a Danish tax tribunal). I understand that to be contentious, but I do not need to resolve the point. If SKAT is right on it, the Danish legislature has not given SKAT, as it might have done, a separate public law mechanism for pursuing its relevant entitlement, so that (like HMRC in the *Total Network* case) SKAT has to use private law causes of action, if it can, to pursue that entitlement. That does not change the proper characterisation of the substance under Dicey Rule 3; it does not mean

that English law must allow a cause of action for this (alleged) fraud, given that substance.

104. If anything, consideration of that aspect of the matter reinforces the characterisation of SKAT's claims as, in substance, claims indirectly to enforce sovereign tax rights. It would be quite natural if Danish tax legislation granted a power of assessment, binding on the recipient, subject to any tax law appeals processes, in respect of tax refunds SKAT concluded to have been wrongly granted. If it did, then when issuing administrative decisions revoking its decisions to accept WHT refund applications (as SKAT did – it matters not whether it did so in every instance), SKAT could have raised concomitant tax assessments. It would seem perfectly fitting for Danish law, and SKAT, in that way to treat SKAT's claim to claw back the WHT refund payments as a tax demand. I do not accept the submission Mr Fealy QC made in reply that had the Danish tax legislation empowered SKAT to assess for repayment in the manner here being considered, its resulting claim founded upon an exercise of that power, if brought here, would not be rejected under Dicey Rule 3. In my view, plainly it would be so rejected, but the logic of SKAT's position indeed required it to submit otherwise as Mr Fealy QC's submission acknowledged.

105. Were I wrong in concluding that it is not necessary to resolve whether SKAT is empowered under Danish tax law to assess WHT refund applicants for sums paid to them in error as tax refunds, but rather resolving that point would determine whether Dicey Rule 3 applied, then I would wish to explore with the parties how most efficiently to resolve it as an extension of the Revenue Rule Trial. I would be interested in particular to see whether that could sensibly be achieved this summer, to conclude this phase of the litigation in good time before the Validity Trial listing. As it is, my conclusion that the point does not need to be resolved means that a final decision on Dicey Rule 3 can be made now, without any finding on that particular point of Danish law.

106. It is to my mind telling that SKAT formulated its key argument as follows:

> *"… a claim to recover money incorrectly paid out by a tax authority on the faith of misrepresentations is not properly characterised as the imposition of a "tax" (or as a claim otherwise arising under "revenue" law). Such a claim, if brought under ordinary principles of private law, does not constitute the compulsory imposition by the state of a public law liability on a subject to pay money or transfer property to the state, to which the state otherwise has no interest."*

(i) Firstly, SKAT omits a key characteristic of the case, namely that it concerns money paid out by a tax authority *by way of tax refund*. Thus SKAT over‑generalises so as to beg the question whether overpaying by mistake for, say, office supplies, and making a payment mistakenly assessed to be due by way of tax refund, should be regarded as equivalent when characterising the central interest involved in the making of a claim to recoup the payment.

(ii) Secondly, SKAT's submission in terms relies on form to characterise substance ("*Such a claim, if brought under ordinary principles of private law …*", my emphasis).

(iii) Thirdly, the submission is inconsistent with the well-established scope of Dicey Rule 3. Returning again to *Buchanan v McVey*, for instance, the claims against Mr McVey did not impose on him, if well founded, a public law liability as a British subject to pay money to the British Crown; but they were brought indirectly to enforce the Revenue's claim to tax his asset-stripped company.

(iv) Thus, SKAT's key submission, on analysis, does not answer, rather it substantially dodges, the question of characterisation that has to be answered to determine whether Dicey Rule 3 applies in this case. Of itself, that cannot mean the defendants' answer to that question must be correct, but it suggests at least that it is more difficult than SKAT's submissions sought to portray to identify why the defendants' answer is wrong. In the event, as I have sought to explain, I have concluded that the defendants' answer is correct.

107. The mechanism of alleged wrongdoing, then, may be the making of WHT refund applications conveying misinformation. But the central interest of SKAT in bringing the claim, and the right that in substance SKAT seeks to enforce by what are, in point of form, private law claims, is SKAT's interest and right in collecting what was due to it by way of dividend tax for the tax years in question. Dicey Rule 3, a mandatory rule of English law as *lex fori*, has the effect that there is no cause of action for a fraud on a foreign revenue, and I agree with the defendants' submission that at its highest SKAT here claims to have been the victim of such a fraud. It cannot sensibly say in relation to the claims pursued here that it was the victim of a fraud such as might be committed against a private individual or corporate entity. *A fortiori*, there is no cause of action for negligently causing loss to a foreign revenue.

108. As I said in paragraph 35 above, that is not to say that SKAT could never pursue here a claim for damages for a tort committed against it because it is a sovereign tax authority. Leaving aside, as I am in this judgment, any subtlety over whether strictly SKAT is a legal person in its own right at all, SKAT may be the victim of a tort that is not a tort against the Danish fisc. On one view, that is what the argument on the scope of Dicey Rule 3 comes down to. Considering the nature of SKAT's pleaded claims, in substance SKAT is alleging torts against the Danish fisc, with the collection and management of which SKAT is charged, rather than torts against SKAT as a legal person conducting personal or business affairs akin to those that might be conducted by a private party. There is no cause of action in this court for torts against a foreign revenue.

109. If it is preferred to consider the question by considering the legal relationship involved, the legal relationship of WHT refund applicant and tax authority is that of taxpayer and sovereign taxation authority. That is the relationship created by the submission to SKAT of WHT refund applications, at all events where they are accepted and paid by SKAT. If it be appropriate to apply an ordinary private law analysis to that relationship, it might be said to have been voidable if induced, as SKAT says it was, by misrepresentation. But that does not mean it was not, by nature, while it existed, a taxpayer-tax authority relationship.

110. I do not overlook that in respect of the Solo etc Applications (but not the ED&F Man Applications), SKAT has pleaded that the transactions underlying and generating the dividend vouchers issued by custodians that were submitted to SKAT with 06.003 Forms were 'manufactured', 'fictitious', or 'sham'. The primary substance of that plea is not that no transactions were entered into, but rather that given their terms and effect (in particular, taking the package of transactions as a whole) they did not create such rights, or result in any such payment or payment entitlement in respect of dividends, as might have qualified the WHT refund applicant to a refund payment from SKAT under s.69B(1) of the WHT Act.

111. SKAT says that closed loops of share sale and share lending transactions were put in place between parties none of whom had or would ever acquire any interest in or rights relating to shares in the Danish company in question, apart from any interest or rights generated by the transactions in the loop. Those transactions, it is said, therefore did not create any such interest or rights as might make for a valid WHT refund claim. The dispute about that is the central validity issue in the litigation as regards the Solo etc Applications, relevant defendants contending as they do that a bare contractual right to acquire shares as provided for by the transaction structures used *did* result in an eligible WHT refund claim.

112. That does not in my view alter the proper characterisation of SKAT's resulting claims, for the purpose of Dicey Rule 3. It remains the case that their fundamental premise is SKAT's contention that the WHT applications it accepted at the time had not qualified the applicants to the refunds sought and paid; SKAT is still, in substance, suing to recover (compensation for) making tax refund payments it was not obliged to make. From the perspective of Dicey Rule 3, those are in my view foreign revenue claims.

113. That is my conclusion also as regards the one way in which the 'fictitious' or 'sham' transactions plea is put by SKAT that might be said not to fit the description in paragraphs 110-111 above. SKAT goes as far as to say that the transactions were (purportedly) concluded without any intention to create legal relations so as to be contracts at all. Even in that case, the substance remains that the WHT refund applicants were claiming to be, and were assessed by SKAT to be, limited Danish taxpayers eligible for a tax refund. The character or quality of the payment made by SKAT, and of the return thereof (or compensation equivalent thereto) now sought by SKAT, is the same. It is inherent in, and of the essence of, the 'central interest' test for ascertaining the substance of a claim brought by or in the interests of a foreign sovereign, that the character or quality of the sovereign's relevant activity is the most material consideration.

114. This strongest version of SKAT's case – alleging that the 'transactions' were not contracts at all – is ultimately just a particular way of accusing the WHT applicants of having not merely claimed incorrectly to be limited Danish taxpayers eligible for a tax refund, but pretended to be such (i.e. made that claim knowing it to be an incorrect claim). That does not change the character or quality of SKAT's relevant activity. In accepting and paying the WHT refund claim, and now in claiming to reverse the same, even if in point of form that claim is presented by reference to the ingredients of private law causes of action, SKAT was and is acting as the Danish sovereign tax authority in the interests of the Danish fisc, and not as a private party could or might act. The central interest in pursuit of which SKAT brings these claims remains that of taxing Danish company dividends properly (accurately) in accordance with Danish tax law and DTAs, a purely sovereign interest.

115. If that be correct generally, as I have concluded that it is, SKAT argued that its proprietary claims

nonetheless fall outside Dicey Rule 3. They seek, SKAT submitted, only the recovery of SKAT's property so as to be patrimonial claims such as were considered in the wrongful interference cases culminating in Barakat. I do not agree. At this point in the analysis, it is important to be precise in the use of proprietary language (cf paragraph 9 above). SKAT's relevant claims are to equitable ownership of assets belonging to certain of the defendants, on the basis that they represent the traceable proceeds of payments made by SKAT by mistake induced by fraud. SKAT does not sue to vindicate some title it had, and claims still to have, in an asset that was situated in Denmark when SKAT acquired its title. If an analogy is to be drawn with the wrongful interference cases, the case is on the *Brokaw / Ortiz* side of the line, not the *Barakat / Williams & Humbert* side of the line.

116. The proprietary interests asserted are remedial in nature. They require SKAT first to establish one or more of the alleged personal liabilities the pursuit of which I have concluded offends against Dicey Rule 3. It would not have assisted in *Buchanan v McVey* to allege that Mr McVey's companies had proprietary claims founded upon dishonest breaches of fiduciary duty; and indeed he was sued alleging a liability to account *inter alia* as trustee (see [1955] AC at 520), and on the facts (*ibid* at 518-519) it seems that some at least of the funds Mr McVey dishonestly extracted from his company, so as to evade the Revenue, were put to his personal use. If that did not save the claims against Mr McVey from the operation of Dicey Rule 3, then neither can SKAT's assertion of proprietary rights in some of its claims save those claims from the Rule if otherwise it applies in this type of case.

117. Although I apprehend it was legitimate to use the language of SKAT seeking a 'return' of WHT refund payments when examining the central interest behind SKAT's claims, as required for a consideration of Dicey Rule 3, that does not mean Mr Fealy QC was correct to contend as he did that by its proprietary claims SKAT is merely seeking the return of its property, as a private legal person might whose property has been converted. In this case, SKAT had and has no property rights it can ask this court to vindicate but that it first succeed before the court on claims the pursuit of which is denied to it by Dicey Rule 3.

Conclusion

118. For the reasons set out above, my conclusion is that all of SKAT's claims are, in substance, claims seeking to enforce here the Kingdom of Denmark's sovereign right to tax dividends declared by Danish companies, and the WHT and WHT refund systems established by the WHT Act, the Danish tax statute by which that right is given specific content. The central interest of SKAT, and of the Kingdom of Denmark in whose interests the claim is brought (if it is meaningful to distinguish between SKAT and the Danish state), in bringing all these claims, is to vindicate that sovereign right and have it enforced indirectly here.

119. Though SKAT has framed its claims as private law causes of action, what those claims seek, in substance, is payment to SKAT of amounts of dividend tax it failed to take in the tax years in question, it not being right to distinguish when characterising substance for the purpose of Dicey Rule 3 between dividend tax never paid and dividend tax conditionally collected as WHT but paid away by SKAT by way of WHT refunds. SKAT's claim against the WHT refund applicants for the WHT refund to be returned is, in substance, a claim to tax. Such claims are not admissible in this court. Or again – if this is saying anything different – the central interest in SKAT bringing its claims here is to vindicate its right to pay WHT refunds only where applicable revenue law eligibility conditions are satisfied, in other words its right to keep, as tax, 27% of Danish company dividends except where those conditions are satisfied.

120. In that way, considering substance rather than form, SKAT's claims seek indirectly to enforce here Danish revenue law. Unless the Brussels-Lugano regime mandates a different outcome for SKAT's claims against Brussels-Lugano defendants, all of SKAT's claims fall to be dismissed by operation of Dicey Rule 3.

Coda – MARD et al.

121. On the view I have taken, it is not necessary to consider a further argument advanced principally by Mr Baker QC, so I shall deal with it only briefly and not in any detail, though that may do a disservice to the expert skill with which Mr Baker QC developed the point. The argument, in essence, was that in line with a long public international law history, the cross-border recovery of tax refunds wrongfully procured is seen as or assumed to be a matter of revenue law requiring to be dealt with (if at all) by supranational legal instrument.

122. Mr Baker QC submitted, for example, going back to a 1925 League of Nations experts' report, "*Double Taxation and Tax Evasion*" (Document F.212, February 1925), that for at least a century, "*abuse of claims for relief from taxation, in as much as we are dealing both with exemption from and repayment of tax*" (*ibid* at p.23), has been seen as a cross-border problem requiring a public international law solution.

123. The cross-border solution presently adopted by the EU is MARD. By Article 2(1)(a), it applies *inter alia*

"*to claims relating to … (a) all taxes and duties of any kind levied by or on behalf of a Member State …*". Mr Fealy QC submitted that a claim by SKAT to recover from a WHT refund applicant a WHT refund paid out in error would not fall within the scope of MARD. That is, I think, an impossible submission on the language of Article 2(1)(a). I cannot imagine Denmark wishing to advance it but that it was perceived to assist its desire to avoid the operation of Dicey Rule 3 in this litigation.

124. There were points of detail, with which I shall not lengthen this judgment, as to whether the substantive provisions of MARD would afford SKAT (or, it may be, the Kingdom of Denmark acting by a different instrumentality) an effective remedy for the recovery from payees domiciled in the EU or the UK* of WHT refunds erroneously paid out. Whether or not they would, I think it inconceivable that a request for assistance in respect of recovering a WHT refund said by the requesting tax authority to have been wrongly paid out could or would be resisted on the ground that it fell outside the scope of MARD as defined by Article 2(1)(a).

> * MARD has effect in the UK for an extended period, beyond the EU exit transitional period that expired at the end of 2020.

125. Whether SKAT could have made use of MARD, or could still do so, against EU or UK domiciled parties, it could and did make use of Article 26(1) of the US-Denmark DTA, so as to obtain information from the IRS in connection with SKAT's claims, though that mutual assistance provision covers only "*such information as is relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention …, including information relating to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention*". Rather starkly, SKAT has confirmation from the IRS that it may disclose the information provided in these proceedings because the view has been taken that they are concerned with the administration of a Danish tax falling within the scope of the Convention (which, in context, must mean Danish state income tax as referred to in Article 2(1)(b)(i) of the DTA).

126. The IRS's view that by these proceedings this court is (in the language of Article 26(1) of the DTA) "*involved in the assessment, collection, or administration of [or] the enforcement or prosecution in respect of*" Danish income tax no doubt does not bind SKAT, or the court; and if the IRS provided their assistance on a mistaken basis, so be it, that would not render the evidence obtained by SKAT inadmissible or the proceedings here an abuse. That said:

(i) It is not obvious that the IRS's view might be wrong. On the language of Articles 27.1, 27.4 and 27.9 of the US-Denmark DTA, a claim by Denmark to be repaid an amount erroneously paid to a US party by way of WHT refund seems to be treated as a "*revenue claim*", and acceptance by the US of an application by Denmark for its collection is to be treated by the US as a tax assessment under US law against the party from whom collection is sought:

> *"Art 27.1 The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in Article 2 (Taxes Covered), together with interest, costs, additions to such taxes, and civil penalties, referred to in this Article as a "revenue claim".*
>
> *Art 27.4 Where an application for collection of a revenue claim in respect of a taxpayer is accepted*
>
> *a) by the United States, the revenue claim shall be treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received; and*
>
> *b) by Denmark, the revenue claim shall be treated by Denmark as an assessment under Danish laws against the taxpayer as of the time the application is received.*
>
> *Art 27.9 Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not inure to the benefit of persons not entitled thereto."*

(ii) Mr Baker QC's main point was that the court can and should take comfort, from the way the US-Denmark DTA has been naturally and successfully invoked, that the claims brought here do indeed serve, as the central interest behind their pursuit, the Kingdom of Denmark's sovereign rights of taxation rather than interests of a private law character.

127. In my judgment, there is something in Mr Baker QC's point, even though Mr Fealy QC was also correct to submit that there need not be a perfect antithesis between the scope of Dicey Rule 3, as regards foreign taxes, and the scope of any given supranational instrument relating to cross-border taxation. There is something in Mr Baker QC's point nonetheless because

it focuses not so much on the specifics of whether a particular cross-border instrument does apply but on an overarching international understanding that clawing back tax refunds or credits or reliefs is taxation. Since that was my conclusion, so far as concerns Dicey Rule 3, in any event, I shall not attempt the intellectual gymnastics of saying whether Mr Baker QC's point had enough about it to tip the argument on Dicey Rule 3 in his favour if he had not been winning it anyway.

Coda – Buchanan v McVey again

128. I said in paragraph 88 above that the prior authorities on Dicey Rule 3 do not decide the case of a claim to recoup a tax refund said to have been paid in error. That was in fact common ground. A theme of this judgment, though, is the need to confront the implications of the doctrine of indirect enforcement (of inter alia foreign revenue laws), and the idea of a central interest served by the bringing of private law claims, first strikingly illustrated by *Buchanan v McVey*, as approved by the House of Lords in *Government of India* (even if, as I remarked in paragraph 28 above, there was a degree less indirectness on the facts in the latter case).

129. If my analysis of the implications of the case law on Dicey Rule 3 as it stands is correct, then SKAT's difficulty, ultimately, may be the turn English law thus took in 1955, which is not something that SKAT said it wished to question, or that I would be entitled to question. Indeed, Mr Fealy QC confirmed SKAT's position to be that "*Dicey Rule 3, as a matter of common law, is the same now as it was 50 years ago*".

Brussels-Lugano

130. SKAT submitted that (i) these proceedings are a 'civil and commercial matter' under the Brussels-Lugano regime and (ii) the English court therefore cannot dismiss SKAT's claims against Brussels-Lugano defendants by reference to Dicey Rule 3. For (i), SKAT accepted that the use of public powers can transform what would otherwise be a civil or commercial matter into a public law matter outside the Brussels-Lugano regime, but said that was so only if public powers would be used so as to rely on substantive or procedural rules of law applicable in the litigation that confer special privileges upon the claimant by reason of its status as a public body or upon evidence deployed by the claimant by reason of its public powers source. There has been and could be no such use of public law powers in these proceedings. For example, material obtained by SKAT through the use of public law powers, such as through assistance from foreign tax authorities under DTAs, would be treated like any other documentary evidence. For (ii), SKAT argued that to refuse to admit its claims under Dicey Rule 3 would derogate from and impair the effectiveness of the Brussels-Lugano regime.

131. The defendants say that the Brussels-Lugano regime is irrelevant. It governed the question whether SKAT could bring Brussels-Lugano defendants before the court, given the types of claims that as a matter of form SKAT has pleaded, but not whether those claims are of a type this court will admit or uphold. Dicey Rule 3 is a rule of substance, not a rule as to jurisdiction in the sense dealt with by the Brussels-Lugano regime. If that is wrong, then the defendants argued that:

(i) essentially for the same reasons as they said led to the application of Dicey Rule 3 at common law, these proceedings should be recognised as a revenue matter and not a 'civil and commercial matter' under the Brussels-Lugano regime, and

(ii) even if that would not otherwise be correct, it becomes correct, i.e. these proceedings must be seen as a public law matter, not a civil and commercial matter, because of the use by SKAT of public law powers in the investigation and gathering of evidence, and its use of some of the information and evidence gathered as a result, for the purpose of, and in the course of, the proceedings.

Compatibility of Dicey Rule 3

132. I note at the outset that the Brussels-Lugano regime's concept of a 'civil and commercial matter', and by contrast a 'revenue, customs or administrative matter', is a classification of types of court proceedings. That is clear from the full language of the first sentence of Article 1(1) – the subject matter of the Brussels-Lugano regime is "*civil and commercial matters whatever the nature of the court or tribunal*" (my emphasis). The Brussels-Lugano regime then ensures that in civil or commercial proceedings, as opposed to criminal proceedings or (civil rather than criminal) public law proceedings, a common set of rules will apply in all Brussels-Lugano member states as regards personal jurisdiction (i.e. whether a particular defendant can be sued in a particular court) and the recognition and enforcement of resulting judgments.

133. It is well established that Article 1(1) is to be given an autonomous meaning, but it may be observed that its origins lie in continental legal systems in which public law proceedings are not classified as civil matters, whereas here public law proceedings (e.g. judicial review) would generally be classified as a species of civil proceedings. Thus, the inapplicability of the Brussels-Lugano regime to 'revenue, customs or

administrative matters' is because they are treated as not 'civil and commercial matters'. They are not excepted types of 'civil and commercial matters' requiring to be excluded by Article 1(2) if the regime is not to apply to them (as with, e.g., bankruptcy or arbitration).

134. The purpose of the Brussels-Lugano regime is not the harmonisation of the substantive laws of member states, i.e. their rules of law determining whether a claim will succeed or fail, or their choice of law rules for ascertaining the system of law whose substantive rules of law govern any given claim. The former, so far as material to this case, given the causes of action alleged, have not been subject to EU harmonisation; the latter, again so far as material, are harmonised by the Rome II Regulation, Regulation (EC) No 864/2007, on the law applicable to non-contractual obligations.

135. In *In re Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723, the House of Lords had to consider letters rogatory issued by a Norwegian court requesting the examination of two witnesses before the English court for the purpose of a tax claim in respect of Norwegian taxes being pursued in the Norwegian court against the estate of a wealthy Norwegian shipowner. The central question was whether the proceedings in Norway were "*proceedings in any civil or commercial matter*" within s.9(1) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, because by s.1(b) of that Act the power that was sought to be exercised was only available if the evidence sought was to be obtained "*for the purposes of civil proceedings*" in the requesting court, and s.9(1) was the applicable definition of "*civil proceedings*".

136. In that purely English law context, the House of Lords concluded that the 1975 Act distinguished by ss.1(b)/9(1) between civil and criminal proceedings, and did not have in mind any further distinction between private law and public law matters (cf paragraph 133 above). Meanwhile, Dicey Rule 3 was not engaged, even though the ultimate goal was avowedly the recovery of foreign tax, because, *per* Lord Goff at 809F-G, "*I cannot see any extraterritorial exercise of sovereign authority in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue laws of Norway in Norway itself*." The House of Lords' decision thus confirms, as Mr Fealy QC submitted, that Dicey Rule 3 does not apply merely because there is some connection between a claim brought here and foreign tax or a foreign revenue system; the nature of the connection needs to be examined to assess whether, in substance, the claim is, directly or indirectly, an attempt to enforce here the foreign sovereign's right to tax.

137. In paragraph 29 above, I referred to *QRS v Frandsen* for its confirmation that the case of an asset-stripped company or its liquidator suing the company's former owner for breaches of the latter's duties to the company, in substance to secure the recovery by a foreign sovereign tax authority of taxes due from and unpaid by the company, fell within Dicey Rule 3. The matter arose on an application by the defendant to strike out the claims against him of his former companies on the ground that they were bound to fail. The claims were struck out at first instance; the Court of Appeal dismissed an appeal.

138. The Court of Appeal confirmed that Dicey Rule 3 applied, indeed the contrary was barely argued, as I noted in paragraph 29 above. The substantial argument against the striking out of the claims, therefore, was not that Dicey Rule 3 would not apply to them at common law, but was instead an argument that:

(i) the proceedings were a 'civil and commercial matter', not a 'revenue, customs or administrative matter', within Article 1(1) of the Brussels Convention (then the governing Brussels-Lugano instrument);

and

(ii) it was incompatible with the Brussels Convention to apply Dicey Rule 3 to dismiss a claim, and therefore impossible to strike a claim out as bound to fail by reference to the Rule.

139. The Court of Appeal concluded:

(i) that the proceedings were a 'revenue [etc] matter' and not a 'civil and commercial matter' for the purpose of the Brussels Convention, in that:

  (a) the claims brought were in substance (though not in form) indirect revenue claims, as had been held in relation to such claims in *Buchanan v McVey*, the plaintiffs having sought to argue that they were private law claims "*not merely in form but in substance*" (see at 2174F–G), and

  (b) the consequent characterisation of the claims as revenue matters would be accepted (the Court of Appeal suggested) by all member states under the Convention (see at 2177C);

  and, *obiter*

(ii) that had the proceedings been a 'civil and commercial matter' for the purpose of the Brussels Convention, then the claims could not have been struck out, on the logic that "*under*

> *article 2 there is jurisdiction to bring [the claims] in England against the defendant as someone domiciled here, [and therefore] rule 3 of Dicey & Morris cannot properly be invoked so that the court immediately then declines to exercise its jurisdiction: such an application of rule 3 of Dicey & Morris would clearly "impair the effectiveness of the Convention"*", *per* Simon Brown LJ at [1999] 1 WLR 2178C-D, stating the plaintiffs' argument which at 2178E he said was "*plainly right*".

140. Commenting on *QRS v Frandsen* in *The British Year Book of International Law 1999*, Professor Briggs argued for a reconsideration of Dicey Rule 3 in which a claim such as that in *Buchanan v McVey* or *QRS v Frandsen* would be admitted (*ibid*, at pp.341- 343). Prof Briggs' comment as regards the Brussels Convention (*ibid*, at p.343-344) was that:

(i) the conclusion that the proceedings were a 'revenue [etc] matter' was debateable, and

(ii) the notion that Dicey Rule 3 would be displaced by a conclusion that the proceedings were a 'civil and commercial matter' was wrong.

On the latter aspect, Prof Briggs' view was expressed in trenchant terms but on rather complex reasoning: "*Now it must be conceded that the question was artificial, and that Simon Brown LJ was dealing with it only for good measure. But it is inconceivable that he was right. If revenue matters had been within the scope of the Convention, it is as certain as certain can be that they would have been made subject to exclusive jurisdiction of the taxing State. ... That no such exclusive jurisdiction was created for revenue claims is perhaps the clearest indication that such claims were always intended to be outside the scope of the Convention. ... [As] there is no exclusive jurisdiction, nor Webb exception [a reference to C-294/92, Webb v Webb [1994] ECR I-1717], it would be unacceptable for them to be brought within the scope of the Convention. It was therefore an exercise in artificiality for Simon Brown LJ to opine that Rule 3 would have been required to be set aside, for there was never any plausible chance that an English court should have been asked to enforce a Danish tax law*."

141. The Editors of *Dicey* also take the view that Simon Brown LJ's *obiter* view in *QRS v Frandsen* is wrong, but for a simpler reason. Dicey Rule 3, they say, is not affected by the Brussels-Lugano regime, the contrary view expressed by Simon Brown LJ being "*open to the criticism that Rule 3 ... is not really a rule of jurisdiction, but a substantive rule of law*" (15th Edition, para 5-022). The 15th Edition of Dicey pre-dates the decision of the CJEU in *Sunico* (C-49/12, *Revenue and Customs Commissioners v Sunico ApS* [2014] QB 391), to which I turn next; but the view I have just quoted has not been altered in the *Dicey* Supplement noting that decision.

142. In *Sunico*, the CJEU considered claims brought by HMRC alleging missing trader VAT carousel frauds that also led to the litigation in Singapore in *HMRC v Shahdadpuri* (see paragraph 58 above). The substantive claims, for damages at common law for an alleged tortious conspiracy to defraud, were pursued here against defendants domiciled in Denmark. HMRC also brought ancillary proceedings in Denmark to attach assets with a view to enforcing any damages judgment obtained in England. Those Danish proceedings were objected to on the basis that they were a 'revenue [etc] matter' excluded from the Brussels Regulation, Regulation No 44/2001, then the Brussels-Lugano instrument in force. The Danish court referred the matter to the CJEU.

143. The CJEU applied a principle stated in these terms, at [34]-[35], namely that "*although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No 44/2001, it is otherwise where the public authority is acting in the exercise of its public powers ...*" and that "*to determine whether that is the case in a dispute such as that in the main proceedings [i.e. the Danish ancillary relief proceedings], it is necessary to examine the basis of, and the detailed rules applicable to, the action brought by the commissioners, in the United Kingdom, before the High Court of Justice ...*". Thus, the Brussels-Lugano classification of the Danish proceedings for ancillary relief was to be that of the English proceedings to which they were ancillary.

144. Focusing exclusively on matters of form, as they would be characterised by Dicey Rule 3, at [36]-[40], the CJEU concluded at [41]-[43], essentially, that because the claim was framed in tort and not as a claim under a tax law, the proceedings were a 'civil and commercial matter' and not a 'revenue [etc] matter' for the purpose of Article 1(1) of the Brussels Regulation, so long as "*the commissioners were in the same position as a person governed by private law in their action against Sunico and the other non-residents sued in the High Court of Justice*" (*ibid* at [43]). That last qualification harks back to the requirement, within the principle stated at [35], to examine the rules applicable to the action brought by HMRC, to see whether it was a public law claim after all. It concerns the possibility of the use of sovereign (public law) powers in connection with proceedings that would otherwise be a 'civil and commercial matter' transforming them into public law proceedings.

145. The CJEU considered it a matter for the referring Danish court, not clear on the material before the CJEU, whether HMRC was in the same position as

would be a private litigant in the English proceedings. I was shown that the Danish court concluded, when the proceedings resumed before it, that HMRC was materially not in the same position as a private litigant, but that decision seems to have been based upon a misunderstanding of the 'public law powers' qualification, the meaning and extent of which was clarified by the later CJEU decisions in C-597/17, *BUAK Bauarbeiter-Urlaubs u.Abfertigungskasse v Gradgenistvo Korana d.o.o*. [2019] I.L.Pr. 12, and C-73/19, *Belgische Staat v Movic BV*. I shall come back to that below.

146. For now, what matters is that this 'public law powers' qualification within the CJEU case-law on the meaning of 'civil and commercial matters' reinforces the view that it has reference to the type of proceedings before the court, and that the substantive rules of law (including choice of law rules to determine the system of law that will govern the decision) by which claims properly brought before the court (so far as concerns the court's jurisdiction over the defendants) either succeed or fail are a matter for the national court (save where they have been harmonised by other instruments, e.g. Rome II).

147. I agree with the Editors of *Dicey* that Dicey Rule 3 is a substantive rule of English law unaffected by the Brussels-Lugano regime. As is clear from the oldest of *dicta* (see paragraph 24 above), Dicey Rule 3 has never concerned personal jurisdiction in the conflict of laws sense, i.e. which defendants can be brought before the court to answer a claim of a given type. Rather, it is a rule of English law, available to be invoked by a defendant amenable to the jurisdiction of the court when answering a suit. It is an overriding or mandatory rule of English law as the *lex fori*, a substantive rule of law that applies even if the applicable choice of law rule says that, in general, the suit in question is not governed by English law.

148. Dicey Rule 3 has sometimes been referred to as a rule of judicial self-restraint whereby the court declines to exercise the jurisdiction it has, but that is to distinguish it from rules of non-justiciability that identify questions the court is incapable of addressing; and, that said, the label of justiciability has also been used (in *Mbasogo v Logo*, for example). Labels ought not to be determinative, but for what they may be worth, I have preferred 'admissibility': English law, as a mandatory rule of the *lex fori* overriding ordinary choice of law rules, does not admit claims that are, in substance, attempts by a foreign sovereign, directly or indirectly, to exercise their sovereign power through the English courts. I do not agree with a submission SKAT made on the compatibility issue that Dicey Rule 3 is, or is akin to, a doctrine of *forum conveniens*. Nor was that SKAT's submission when addressing Dicey Rule 3, the submission there, with which I agree, being that "*the existence of parallel proceedings may engage the forum non conveniens doctrine. It may engage the res judicata doctrine or the abuse or process doctrine, but it doesn't engage Dicey Rule 3*."

149. The decision of the Court of Appeal in *QRS v Frandsen* that the proceedings there were not a 'civil and commercial matter' appears to me to be inconsistent with the CJEU's decision in *Sunico*, subject to the use of public powers point, and therefore no longer binding on me, although it was part of the *ratio*. But in my judgment, the decision in the case, to strike out the claims, was still correct because, contrary to the view expressed, *obiter*, by Simon Brown LJ, the classification of proceedings as a 'civil and commercial matter' or a 'revenue [etc] matter' for the purpose of applying the Brussels-Lugano regime does not touch the question whether Dicey Rule 3 applies so as to defeat the claim.

150. There is of course an overlap: there will be claims the form of which would make proceedings upon them a 'revenue matter' under the Brussels-Lugano regime and the substance of which from the point of view of Dicey Rule 3, because it matches the form, would engage the Rule. But precisely because Dicey Rule 3 is a rule of substance, the applicability of which is determined by reference to an assessment that looks beyond the way in which a claim is framed, whereas the Brussels-Lugano classification is formalistic, as Mr Goldsmith QC for SKAT accepted, a claim may be, in substance, a revenue claim, from the perspective of Dicey Rule 3, brought in proceedings that are a 'civil and commercial matter' from the perspective of the Brussels-Lugano regime. In my view, there is nothing in that regime that purports to exclude the application of Dicey Rule 3 to such a case.

151. The Brussels-Lugano classification of proceedings is also used by the Rome II Regulation, which thus also applies in 'civil and commercial matters' and not in 'revenue [etc] matters'. It follows from *Sunico*, again subject to the use of public powers point, that proceedings pursuing claims in tort for damages for a VAT carousel fraud, or proceedings pursuing causes of action such as those pleaded in *Buchanan v McVey* or *QRS v Frandsen*, will be, and, given the causes of action pleaded by SKAT, these proceedings are, a 'civil and commercial matter' within the Brussels-Lugano regime and the Rome II Regulation. Dicey Rule 3 continues to operate however, and if applicable will lead to the dismissal of the claims brought, because (a) the Brussels-Lugano regime does not preclude such a dismissal and (b) even if under Rome II the governing law is, in general,

not English law, Dicey Rule 3, if applicable, will apply under Article 16, which provides that: "*Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation*."

152. Following *Sunico*, Prof Briggs proposed in "*Private International Law in English Courts*" (2014), at 2.118, that *QRS v Frandsen* must now be regarded as wrongly decided, i.e. the claim in that case now could not be struck out under Dicey Rule 3. That view is also taken by *Cheshire, North & Fawcett*, "*Private International Law*", 15th Ed. at pp.125-126. Prof Briggs' argument was that because proceedings upon a claim for damages for a VAT carousel fraud would be a 'civil and commercial matter' (see *Sunico*):

(i) a foreign court's judgment upon such a claim would have to be enforced under the Brussels-Lugano regime "*and the contention that the enforcement of the judgment would involve the enforcement of a foreign penal law is apparently irrelevant unless it triggers a defence in terms of public policy*", and

(ii) "*It ought to follow that a claim by a company against a corporate officer who has stolen or diverted corporate assets may be brought and the relevant rule of foreign law applied, even if the company is bringing the claim at the behest of a receiver or administrator … with a view to discharging the tax liability of the company …*";

and at 2.119, Prof Briggs proposed, as further consequence, that "*Where, therefore, the court has personal jurisdiction over a claim according to the Brussels I Regulation, or is required by the rules set out in the Rome I or Rome II Regulation to apply a particular foreign law, the proposition that the court may still invoke a common law principle of English private international law to derail the conclusion which it is heading towards must surely be wrong*."

153. I respectfully disagree with those views. *Sunico* may mean that a foreign judgment on a VAT carousel fraud damages claim would have to be enforced here subject only to a public policy defence (it is not necessary to take a final view on that), but Dicey Rule 3 is by nature an English law public policy rule. In any event, in my view it does not follow from the proposition that such a judgment would have to be enforced (if that were the position) that an English court seized of the foreign sovereign authority's claim could not apply Dicey Rule 3 to dismiss it.

154. The view that it "*must surely be wrong*" to invoke Dicey Rule 3 where Rome II provides for a system of law other than English law to be the governing law of a claim is tempered somewhat later in the same paragraph, 2.119. Prof Briggs acknowledges that the issue is not foreclosed without more by characterising the proceedings as a 'civil and commercial matter', but rather, as he says, the question then arises "*whether the application of a rule of Danish law that a wrongdoer pay compensation for his wrong would, in circumstances in which the indirect but admitted beneficiary of doing so would be the Danish tax authority, be contrary to the fundamental principles of English law, or be contrary to a rule of English law which is of fundamental importance to the legal system*." Prof Briggs contends that "*It is hard to see how the answer to that question could be an affirmative one, though the point would, no doubt, be liable to be argued. But, as is always the case, the important thing is to formulate the right question*."

155. I agree with that last observation, of course, the importance of formulating the correct question. On the point itself, I respectfully do not find it difficult to see how the answer to the question Prof Briggs identified as the right question to ask should be in the affirmative, and that is how I answer it. Although, as I have noted above, Dicey Rule 3 did not require the rejection of the claim in *In re Norway's Application (Nos 1 & 2)*, it was described by Lord Goff at 808D as a "*fundamental rule of English law*", a description I respectfully adopt.

156. It is apparent from Prof Briggs' writing that he would have English law reconsider radically the scope of Dicey Rule 3, restricting it so far as concerns revenue laws to causes of action that are, in terms, claims for sums due under a foreign tax law and so, e.g., departing from *Buchanan v McVey*. That is not a path open to me even if SKAT proposed it and I had an inclination to follow it. Assuming however that there might be room to debate the appropriate breadth of the rule, that does not affect its nature and importance. Even if some may feel it is of wider scope than it should be, that does not make it any less fundamental a rule of English law, as *lex fori*, that is to say it is no less a mandatory and overriding principle of English law, applicable even though English choice of law rules provide generally for a different system of law to govern a claim, if, as at all events Prof Briggs contends, there is room to debate whether its scope should be reconsidered. Here, as I have said, the English choice of law rules in question, in this litigation, are those of the Rome II Regulation; and Article 16 of Rome II caters for a rule such as Dicey Rule 3.

157. This issue of compatibility – or "*The inter-action of English and EU law*" – is given thoughtful consideration in *Dickinson*, "*Acts of state and the*

frontiers of private (international) law" (2018) 14 J.Pr.Int.L 1, at 25*ff*. Professor Dickinson notes, at 26, that "*the subject matter of proceedings may be characterised as "civil and commercial", and within the material scope of the EU instruments [Brussels-Lugano, Rome I and Rome II], notwithstanding that a governmental or other sovereign act is in some sense "in play"*", and mentions Blair J's decision in *The Law Debenture Trust Corporation plc v Ukraine* [2017] EWHC 655 (Comm), at [258]-[313], that the English law act of state doctrine as explained in *Belhaj et al v Straw et al* [2017] UKSC 3 still fell to be applied although the Rome I Regulation governed the question of applicable law, the issue being whether a contract was voidable for duress.

158. At 26-27, Prof Dickinson turns to Dicey Rule 3, *QRS v Frandsen* and *Mbasogo v Logo*. He proposes (as I have concluded) that the Court of Appeal's view in *QRS v Frandsen* that "*the Brussels Convention … did not apply to a claim to recover [damages for] lost tax revenue by means of a private law action*" cannot sit with *Sunico*, and suggests that the claim in *Mbasogo* could not have been said to fall outside Brussels-Lugano, which I think is also correct: the claim was framed as a private law claim for damages for a tortious conspiracy to injure; the sovereign interest in play (and sufficient, as the Court of Appeal held, to engage Dicey Rule 3) would not have changed the rules of the litigation game if the claim had not been struck out. I note that it does not appear to have occurred to anyone involved in *Mbasogo v Logo* (or to the Privy Council in *President of Equatorial Guinea*) that the Brussels-Lugano regime had anything to say on whether the claim should be struck out under Dicey Rule 3. If the incompatibility argument be correct, however, the claim in *Mbasogo v Logo* should not have been struck out against defendants domiciled here.

159. Prof Dickinson continues thus:

> "*In cases of this kind, there is undoubtedly a potential dissonance between EU and English law. The European Court has held that the rules of private international law contained in the relevant EU legislative instruments are mandatory and exhaustive in character. Furthermore, the principle of effectiveness in EU law operates to restrain the application of rules of domestic law if their application would be such as to make the application of a relevant provision of EU law impossible or excessively difficult, even though the domestic rules in question may be of a different character to those harmonised by EU law*."; citing, inter alia, C-159/02, *Turner v Grovit* [2004] ECR I-3565 at [29], for that last proposition.

160. At 28, Prof Dickinson notes that in *Lucasfilm v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208, *obiter* at [112], Lord Collins and Lord Walker appear to take the view that Brussels-Lugano could not require the English court to adjudicate on its primary merits a claim that the English law act of state doctrine would hold to be non-justiciable here. The claim there was for infringement of a foreign copyright and was held to fall outside the act of state doctrine. Prof Dickinson is critical of the reasoning of Lord Collins and Lord Walker, to the extent it suggested that it would be "*contrary to international law (or, perhaps more accurately, put the United Kingdom in breach of international law)*" for the English court to be required, by virtue of the Brussels-Lugano regime, to adjudicate upon a claim it would otherwise have said was non-justiciable under the act of state doctrine (*ibid*, at 29), and therefore proposes that the questions properly to be addressed are these:

> "*First, is the rule of English law relied on of such a character that its application is excluded in terms by the relevant EU instrument? Secondly, assuming a negative answer to the first question, does the application of the rule of English law relied on nevertheless make it impossible or excessively difficult to apply any relevant provision within an EU legislative instrument, so as to engage the principle of effectiveness?*"

161. At 30-35, Prof Dickinson discusses those two questions, as regards the act of state doctrine (rather than Dicey Rule 3), concluding that the first is to be answered in the negative but suggesting that there is a strong argument for answering the second in the affirmative. I agree with the first conclusion, and do not need to take a view on the second. That discussion leads Prof Dickinson, at 35*ff,* to turn back to Dicey Rule 3 and to suggest that the Editors of *Dicey* "*too readily reject the contention that the mandatory and exhaustive nature of the rules of jurisdiction, applicable law and recognition and enforcement of judgments within the Brussels I, Rome I and Rome II Regulations, coupled with [the] principle of effectiveness under EU law, dictate that the rules and principles falling within the scope of the Rule will operate in such cases only at the margins, when those instruments incorporate rules of national law or permit derogation on public policy or other grounds*." The more fully considered resolution of the compatibility issue he suggests is "*that the first limb of Rule 3 is best understood as a choice of law rule covering the range of matters which, for reasons which have their roots in the constitution, fall within the exclusive dominion of English public law. In such cases, a foreign legal rule is incapable of creating a right of a kind that is actionable in the English courts*."

162. I agree, and apprehend that this essentially matches the conclusion to which I have come. So far as material to the present case, Dicey Rule 3 operates in the realm of the Rome II Regulation, and its continued application by the English court in proceedings notwithstanding that they are a 'civil and commercial matter' for Brussels-Lugano and Rome II purposes is authorised by Article 16 of Rome II.

Civil and commercial matter or revenue matter

163. In point of form, SKAT has commenced ordinary civil litigation in this court, and has pleaded only private law causes of action. Whether or not, as I have concluded, the claims are to be regarded for the purpose of Dicey Rule 3 as claims brought, in substance, indirectly to enforce Danish tax law and/or sovereign authority, these proceedings are a 'civil and commercial matter' for the purpose of the Brussels-Lugano regime, unless the use of public powers qualification in the CJEU case-law concerning that concept makes them public law proceedings after all.

164. I have effectively explained that already in dealing, above, with the question of the compatibility of Dicey Rule 3 with EU law. In short, if *QRS v Frandsen* remained good law to the effect (essentially) that 'revenue [etc] matters' within Article 1(1) of the Brussels-Lugano regime encompassed any proceedings in which the claim fell foul of Dicey Rule 3, then the position would be different. My conclusion on Dicey Rule 3 would then also dictate the answer on Article 1(1). But *QRS v Frandsen* is not now authority for that proposition, because it is inconsistent with the decision of the CJEU in *Sunico*. Unless the use of public powers qualification expressed in *Sunico* and clarified by the decisions in *BUAK and Movic* changes things, these proceedings are a 'civil and commercial matter', not a 'revenue [etc] matter', within Article 1(1), even though they are proceedings in which SKAT pursues claims that are inadmissible here under Dicey Rule 3.

Use of public powers

165. There was an ambiguity in *Sunico* about the nature of the use of public powers qualification upon its basic doctrine of judging whether proceedings are a 'civil and commercial matter' by the way in which the claim in question has been framed. The ambiguity arose in this way:

(i) The established case-law by the time of *Sunico* had already established, as A-G Kokott put it in her opinion at [41], that in order to say whether proceedings relate to civil and commercial matters, "*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 …*". The legal relationship asserted by the claim, and the basis for and rules governing the pursuit of the claim, must both not have a public law nature, if the proceedings are to be a 'civil and commercial matter'.

(ii) In relation to the basis for and rules governing the pursuit of the claim, it was submitted (*ibid* at [44]) that HMRC were not exercising powers going beyond those of ordinary civil litigation: "*The same procedural rules apply as for anyone else, and the proceedings are governed by civil procedure. In particular, contrary to customary practice in the exercise of public powers and especially in tax law, the commissioners cannot … enforce and execute the claim but must pursue it through the general courts of law*."

(iii) A-G Kokott, at [45], noting that HMRC had used public law powers not available to a private litigant to obtain information from the Danish authorities, expressed the opinion that "*if it were admissible in national procedural law for the commissioners to use that information and evidence obtained in the exercise of its powers in the proceedings before the High Court of Justice, the commissioners would not be acting against the defendants as a private person. Whether and to what extent that is the case must be determined by the referring court*."

(iv) Depending on what A-G Kokott meant by it being "*admissible … for the commissioners to use that information*", that may have been a view that if evidence obtained using a public law power (e.g. through Treaty request for assistance from a fellow sovereign) can be adduced in the proceedings, then they cannot be a 'civil and commercial matter'.

(v) If that was A-G Kokott's meaning, then the Court expressed the public law powers qualification rather differently, noting at [42] that it could not say whether evidence obtained using public law powers had been used in the proceedings, and concluding at [43] that it was "*for the referring court to ascertain whether that was the case and, if appropriate, whether the commissioners were in the same position as a person governed by private law in their action against Sunico and the other non-residents sued in the High Court of Justice*."

(vi) In my view, the sense of "*if appropriate*" in that formulation of principle is "*if so*". The Court was saying that it is not enough, as A-G Kokott might be taken to have suggested, that evidence obtained using a public law power could be deployed in the proceedings. What is required to

transform what appear to be civil and commercial proceedings into something else is the use of such material in such a way as to change the character of the process.

(vii) However, the Court prefaced what it said at [43] (as quoted in (v) above) with "*… as the Advocate General has stated at point 45 of her opinion*". If that were endorsement of more than A-G Kokott's view that the case had to be referred back to the Danish court, and if A-G Kokott was suggesting a wider test for when the use of public powers will take a case outside the Brussels-Lugano regime, then it might be considered that the Court endorsed her wider test, even though the Court's own formulation would seem to indicate otherwise.

166. It is not necessary to decide how far the CJEU's reference to A-G Kokott's view was intended to go, or exactly what A-G Kokott meant by her [45]. That is because the subsequent decisions in *BUAK and Movic*, *supra*, make clear that the relevant doctrine is narrower than A-G Kokott might be read as suggesting. The use of public law powers unavailable to a private entity, to investigate and gather evidence that can be deployed in support of a claim is, without more, irrelevant to the classification of the proceedings as a 'civil and commercial matter' or 'revenue [etc] matter'. What tips the scales, if present, is deployment of material such that, under the substantive or procedural rules that will be applied by the national court, it has some different status, as deployed by the public body litigant, than it would have if deployed by a private entity.

167. The real touchstone, in other words, is whether the rules of the litigation game will be different, because the public body is what it is or because of its use of public law powers in relation to the claim (and I note that is how, in effect, A-G Saugmandsgaard Øe understood the CJEU case-law in C-186/19, *Supreme Site Services GmbH v Supreme Headquarters Allied Powers Europe* [2021] 1 WLR 955 at 971-972, [89]-[92]). SKAT being able to use public law powers that a private litigant would not have in connection with the claims it has brought here does not change the rules of the game in this litigation. For example, it does not turn what would be the burden upon a private legal person as claimant to prove the ingredients of each cause of action asserted into some sort of limited judicial review of SKAT's decisions that the WHT refund applicants had not been entitled to the WHT refunds SKAT paid that are now the subject of its claims in the litigation.

168. In *BUAK*, claims were brought by an Austrian public body to pursue annual leave pay for non-resident workers. The determinative question was not whether BUAK had and/or exercised public law powers to investigate and/or pursue the claim. As the CJEU later put it in *Movic*, at [56]: "*to hold that proceedings brought by a public authority are outside the scope of [the Brussels Regulation (recast)] merely because of the use by that authority of evidence gathered by virtue of its public powers would undermine the practical effectiveness of one of the models of implementation of consumer protection envisaged by the EU legislature [in which], in contrast to the [model] in which it is the administrative authority itself that determines the consequences that are to follow from an infringement, … the public authority is assigned the task of defending the interests of consumers before the courts*". What mattered was whether the claims brought would fall to be judged in the same way as they would if brought by individual workers or a private law collective body taking action on workers' behalf.

169. It was contentious between the parties whether under a certain provision of the applicable Austrian statute, "*the court's powers are limited to a simple examination of the conditions for the application of that provision, with the result that, if those conditions are satisfied, the court cannot carry out a detailed examination of the accuracy of the claim relied on by BUAK*" (*BUAK,* at [57]). The decision of the CJEU, at [60]-[61], was that if and only if that was the position, that would place BUAK "*in a legal position which derogates from the rules of general law regulating the exercise of an action for payment, by attributing a constitutive effect to the determination by it of the claim and by excluding … the possibility for the court hearing such an action to control the validity of the information on which that determination is based*", so that in pursuing the claim BUAK would be acting "*under a public law prerogative of its own conferred by law*" and the proceedings would be a public law matter (in effect judicial review proceedings) and not a 'civil and commercial matter'.

170. By contrast, BUAK's powers of investigation did *not* confer a public law character on the proceedings; they did not influence "*the capacity in which BUAK acts in the context of a procedure such as that in the main proceedings*" and did not "*modify the nature or determine the evolution thereof*" (*ibid* at [64]).

171. Most recently, in *Movic*, proceedings were commenced by Belgian public authorities aimed at determining and stopping unfair commercial practices in the context of live event ticket resales. The CJEU confirmed that by nature such proceedings were 'civil and commercial matters', subject to the use of public powers qualification (*ibid*, at [42]-[43]). The rules by

which the court would judge whether the Belgian authorities had a sufficient interest to bring the claim were comparable to the rules that would apply were such a claim brought by a private law consumer protection association (*ibid*, at [[48]-[51]).

172. Critically for my purpose, at [55]-[58], the CJEU rejected the contention that the use by the Belgian authorities of their own reports and investigative findings, generated through public powers, meant that the proceedings were public law proceedings and not a 'civil and commercial matter' after all. In particular, the principle was clearly stated as follows at [57]: "*Only where, due to the use to which a public authority has put certain pieces of evidence, it is not specifically in the same position as a person governed by private law in the context of a similar action, would it be appropriate to make a finding that such an authority has, in a particular case, exercised public powers*."

173. The proceedings brought by the Belgian authorities were therefore a 'civil and commercial matter', notwithstanding the availability and use of public law investigative, evidence-gathering or evidence-generating powers, except only that, at [62], "*as regards the application by the Belgian authorities to the referring court that it should be granted the power to determine future infringements simply by means of a report issued, on oath, by an official of the Directorate-General for Economic Inspection, …, such an application cannot be said to come within the scope of 'civil and commercial matters', as that application relates in actual fact to special powers that go beyond those arising from the ordinary legal rules applicable to relationships between private individuals*."

174. In the present litigation, I agree with the defendants that it is, as they put it, blindingly obvious that SKAT made use, and might well have continued to make use, of powers it has as a sovereign tax authority that no private litigant would have, to investigate and obtain evidence that it could use if it wished in the litigation and has to a material extent already used in the litigation. On the authority of *BUAK* and *Movic*, however, that is beside the point. SKAT was neither attempting nor able to change the rules of the litigation game, either as to the substantive rules of law that would apply in determining its claims, or as regards the procedural rules applicable in the litigation, or as regards the status or effect of any of the evidence it might deploy or disclose. SKAT was not by this litigation pursuing public law proceedings, in which liabilities are determined as if this were a judicial review of SKAT's actions, decisions or exercise of public law powers, rather than upon the same legal basis, substantive and procedural, as claims of the kind it seeks to pursue, e.g. for damages for deceit or for negligence, brought by a private law entity.

Conclusion

175. That brings me full circle to Dicey Rule 3. It can apply (and, I have concluded, does apply), notwithstanding that in form SKAT does not assert tax law causes of action and that these are civil litigation proceedings subject to the ordinary rules of such proceedings, because Dicey Rule 3, as an overriding rule of English law as the *lex fori*, looks beyond such matters of form to examine the substance, in the sense of the central interest in bringing the claim of the sovereign authority by which or in whose interests the claim is brought (and I have concluded that the central interest here is the Kingdom of Denmark's sovereign right to tax Danish company dividends). But the fact that SKAT asserted, in point of form, only private law causes of action, not tax claims, in civil litigation proceedings that are subject to the ordinary rules of such proceedings, means the proceedings are a 'civil and commercial' matter, not a 'revenue [etc] matter' within Article 1(1) of the Brussels-Lugano regime.

176. To the extent that SKAT relied on the Brussels-Lugano regime as the basis for this court having jurisdiction over the Brussels-Lugano defendants that have been sued, including it may be for serving proceedings out of the jurisdiction, in my judgment it was right to do so. But its having been entitled to do so did not oust or disapply Dicey Rule 3 in respect of those defendants.

Result

177. The result is that by the application of Dicey Rule 3 in these proceedings, all of SKAT's claims fall to be dismissed.

SKAT – Revenue Rule Trial

Appendix:

Rival Contentions on Dicey Rule 3

SKAT

178. SKAT made the following substantive points about Dicey Rule 3:

(i) A foreign state can sue in the English courts for recovery of state property or compensation for its loss.

(ii) Dicey Rule 3 is only concerned with the *enforcement* of sovereign rights. Mere recognition of a foreign rule of law or its effect falls outside Dicey Rule 3. In the revenue law context, for the

Rule to apply there must be an outstanding and unsatisfied foreign tax claim sought to be satisfied by the claim brought here. It is irrelevant if, in connection with or as background to the claim advanced, there was a sovereign act that had already been completed or a previously satisfied sovereign claim.

(iii) If SKAT's claims do not infringe the rule in Government of India, there are no proper grounds to say that they infringe any wider principle. Given the revenue nature of the case (stated in general terms), the rule in Government of India states and delimits the relevant policy of English law, so that if the claim is not within that rule there is no reason to subject it to any further scrutiny. No defendant points to any non-revenue sovereign power as providing the foundation of the claim.

(iv) The rule in *Government of India* is absolute: if the claim is in substance (directly or indirectly) a revenue claim, there is no room for discretion on the part of the English court to adjudicate the claim.

(v) However, there is a public policy exemption in the wider rule: a claim will not infringe Dicey Rule 3 if it would be contrary to public policy for the Court to decline to hear it.

179. SKAT argued that its claims are of the same character as claims that could be bought by a private law entity that made payments in response to fraud, false representations of fact or otherwise by mistake; it is not claiming for unpaid taxes, and no outstanding tax debts are pursued by these claims. It is irrelevant that the sums paid by SKAT may in some sense represent the proceeds of sums originally collected as taxes, or that the relevant inducement by the defendants was for SKAT to pay a tax refund. If that is not sufficient to take all of its claims outside Dicey Rule 3, then on any view its proprietary claims are not caught, in which SKAT asserts that traceable proceeds of fraud are held on trust for it.

180. SKAT says in its claim that the dividend arbitrage trading transactions or purported transactions upon which the Solo etc Applications or the ED&F Man Applications were based did not result in the beneficial ownership of shares or receipt of dividends net of WHT deductions required for the WHT refund claims in question to have been valid claims on the part of the applicants making the claims. Thus, SKAT says, the WHT applicants had not been liable to tax in Denmark; the tax, a refund in respect of which was claimed, had not been withheld from the applicants making the refund claims, so no withheld tax could validly be reclaimed by them; there is no claim (by SKAT) that those applicants had or have an unpaid tax liability under Danish law, there was no relevant tax relationship; any obligation SKAT mistakenly considered itself to owe was the consequence of the applicants' voluntary conduct in applying for a WHT refund, rather than an exercise of sovereign authority to tax them. As such, the claims do not directly or indirectly enforce Danish revenue law.

181. SKAT contended that neither do their claims constitute the exercise or assertion of a sovereign right for the purpose of Dicey Rule 3 more broadly. That the Danish tax regime was the setting for a fraud on SKAT (or the setting for the non-fraud defendants' negligence or receipt of funds) does not mean that the claim involves the exercise or assertion of a sovereign right *by* SKAT. The running of a tax system is not a sovereign act; the relevant refunds, and therefore SKAT's losses, are due to administrative acts triggered by the applicants' misstatements, not the exercise of sovereign power, and this is a patrimonial claim for the recovery of state property, or compensation for its loss, not a claim to enforce sovereign rights.

182. SKAT again submitted, in the alternative, that if that is not sufficient to take all of its claims outside Dicey Rule 3, then on any view its proprietary claims are not caught by it.

183. The use of public investigative powers cannot engage Dicey Rule 3, the sole focus of which is the nature of the claim brought. It is irrelevant whether the claimant has used sovereign powers to obtain information or evidence with a view to deploying it in support of SKAT's claims, or which has been, will be, or could be so deployed.

184. If SKAT's claims are patrimonial claims, they are admissible in an English court even if the issues that will fall to be determined in them have the potential for embarrassment that an English court may have to rule on the soundness of the administration of the Danish tax system, or the competence (or perhaps even the honesty) of officials involved in that administration. The court is called upon to make findings critical of public institutions of foreign states on occasion. Just as the 'act of state' doctrine must not "*degenerate into a mere immunity against international embarrassment*" (*Belhaj*, *supra*, *per* Lord Sumption JSC at [240]), so Dicey Rule 3 is not concerned with causing or not causing international offence or embarrassment, it is concerned with the type of claim being brought.

185. Whether there are alternative remedies under international tax instruments, for example MARD, or bilateral arrangements such as individual DTAs, is

nothing to the point. They provide additional rights and do not purport to remove rights that a sovereign entity would otherwise have. They may be concluded against a background of the general international unavailability of private law actions for the extra‑territorial recovery of taxes, but they do not purport to define the limits of any such doctrine under any given domestic legal system. SKAT's position was that these alternative routes for vindicating its rights to recover (the value of) WHT refunds erroneously paid in fact were not available to it, but even if they were, enforcement through MARD or international treaty, and enforcement in private law, are not mutually exclusive – they are not the opposite sides of a single coin.

Defendants

186. The nine defendants or defendant groups who made submissions in this trial, written or oral or both, pursued arguments that overlap or complement each other. They divide into two lines of attack, and all the defendants participated to a degree in each:

(i) SKAT's claims are revenue claims in disguise (i.e. fall foul of the rule in *Government of India*);

(ii) only a sovereign power would be in the position to bring the claims SKAT brings (i.e. the claim is born of the exercise of sovereign powers rather than being a patrimonial claim).

187. There were also arguments about the rationale for Dicey Rule 3, which it was said should influence the conclusion in a number of ways.

Disguised Revenue Claim

188. Acupay dealt in some detail with the mechanism and workings of cross-border taxation and WHT schemes in particular. There are sovereign choices to be made on how to levy tax on dividends declared by companies liable to taxation in the sovereign's state while honouring DTAs the sovereign may have concluded. At the material time, the Danish sovereign choice, so far as material, was for SKAT to receive as tax 27% of dividends declared by a Danish company, paid by the company to SKAT, i.e. a WHT system, and to operate a WHT refund system available to legal persons tax resident in states with which Denmark had concluded a DTA (the primary focus in this case being Denmark's DTAs with the USA and Malaysia).

189. The Sanjay Shah Defendants presented the most detailed analysis of SKAT's claims, as pleaded by SKAT, though the defendants were all agreed on their conclusions. The claims bought by SKAT are premised on allegations of erroneous refunds of WHT paid to the WHT applicants. On SKAT's pleaded case, these refunds were paid because the applicants misrepresented to SKAT matters relevant to their entitlement to a payment under Denmark's WHT refund system administered by SKAT. So the foundation and basis for all of the claims made is an allegedly erroneous assessment by SKAT of the applicants' liability to tax, in light of the information provided. The substance of SKAT's claims, whatever their form (i.e. whatever private law causes of action it says the facts of the case may fit), is to enforce an element of the Danish dividend tax regime enacted by Danish tax legislation and administered by SKAT as the Danish sovereign tax authority.

190. Further, the alleged invalidity of the WHT reclaim applications is the founding premise for all of SKAT's various claims here, rather than being sufficient in itself to justify those claims, only because the claims brought here are not the simple claims against the WHT refund applicants for a return of refunds wrongly paid to them that is the most obvious cause of action SKAT might have. A direct attempt to claw back tax refund payments made to WHT refund applicants would be, in substance, an attempt to collect tax. What are in essence revenue claims within Dicey Rule 3 do not have a different character because SKAT has sued in respect of it parties against whom additional ingredients must be established for there to be liability.

191. Acupay submitted that it makes no sense from a tax lawyer's perspective to distinguish between an action to recover unpaid tax and an action to recover a WHT refund. This is as true, the defendants submitted, of SKAT's claims for proprietary remedies as it is of claims for damages or personal restitutionary remedies. Those 'proprietary claims' are still revenue claims, because they all depend on the prior finding as to the true position under Danish tax law and the voidability, on the basis thereof, of decisions by SKAT to make tax refund payments (or as to the amounts to be paid as tax refunds). The possible vesting of beneficial entitlements in SKAT in assets situated outside Denmark, as a remedy in respect of SKAT's having been induced to make tax refund payments in error, is an extra-territorial enforcement of SKAT's rights in relation to its WHT refund system, i.e. sovereign rights under Danish tax law, just as much as would be an award of damages.

192. Messrs Knott & Hoogewerf also raised the point that, under English law, it is at least an open question whether there is a constructive trust prior to the court imposing one where equity requires it as a remedy. As such, SKAT may not currently have a proprietary right to the funds paid out. This was raised not to resolve

the issue, but to reinforce the point on characterisation.

193. Messrs Knott & Hoogewerf further submitted that SKAT's claims constitute the enforcement of Danish revenue law because they are premised on an allegation of a contravention of that law; but when tested, that added nothing to the debate. It was accepted on their behalf, certain language in their written submissions notwithstanding, that SKAT's claims did not allege breach of an obligation imposed on the WHT refund applicants by the WHT Act in submitting, if they did, invalid WHT refund claims. The sense in which there was a 'contravention' of Danish tax law was that, as alleged by SKAT, the WHT refund applicants had induced tax refund payments to be made by SKAT in circumstances when they should not have been paid, which just returns the argument to the question whether English law should characterise SKAT's resulting claim to claw back its payment as a tax claim, for the purpose of Dicey Rule 3. This was therefore, in reality, the same argument as made by Messrs Fletcher, Jain and Godson, summarised in the next paragraph.

194. Messrs Fletcher, Jain and Godson, representing themselves, argued that the natural characterisation of SKAT's claim is to say it sues for a tax fraud, and pointed out that in a number of other jurisdictions that is how SKAT itself has categorised the case. The effect of Dicey Rule 3, they submitted, as epitomised by cases such as *Buchanan v McVey*, is that there is no cause of action in the English court for fraud on a foreign revenue, any more than for the collection of foreign tax debts. SKAT, they submitted, seeks artificially to re-characterise the case as one of commercial fraud.

195. Those defendants variously addressed also, at least in outline, their respective contentions on the merits why their US pension plans (in the case of Mr Fletcher and Mr Godson) or Malaysian (Labuan) companies (in the case of Mr Jain) *were*, they say, relevant beneficial owners entitled to dividend payments in a sense sufficient to be able to claim to have had dividend tax withheld by operation of the Danish WHT system so as to found valid claims for refunds under that system; and they noted that the validity of their entities' positions is the subject of pending Danish tax tribunal proceedings (or court proceedings on appeal therefrom).

196. As I explained after hearing those submissions, and so that there was no need for SKAT to take up time replying to them, the correctness or otherwise of those submissions is beyond the scope of this trial. That debate, or important particular elements of it at least, is the subject matter of the Validity Trial fixed for later this year for any of SKAT's claims that survive this first preliminary issue trial. The fact that that is the foundational debate underpinning all of SKAT's claims is relevant for present purposes, the essential question being whether that means that SKAT is, in substance, seeking outside the Kingdom of Denmark to enforce Danish revenue law or otherwise to vindicate the exercise of Danish sovereign power.

Uniquely Sovereign Circumstances

197. The defendants pointed to matters they say indicate that SKAT's position is and can only be that of a sovereign authority, not a position that in substance could arise for a private litigant. As Ms Macdonald QC put it in the course of her oral submissions, the proper question is "*the importance of the mechanism by which the loss was sustained and whether there was a sovereign mechanism or sovereign decision in play*." This is preferable to SKAT's formalistic distinction between a wrong extracting a payment from SKAT, and a wrong causing SKAT to be underpaid, in which the former does not engage Dicey Rule 3 while the latter does. She also submitted that for Dicey Rule 3 to apply sovereign acts or decisions need not have been the sole cause of loss; *Mbasogo v Logo* shows that it is sufficient if sovereign decisions or acts are one of several contributing causes.

198. The indicia, then, that SKAT's claims are sovereign, not patrimonial, were said to be these, namely that:

(i) SKAT is a function of the Danish Government, and is acting on behalf of the Kingdom of Denmark.

(ii) Imposing, administering and giving refunds of tax are sovereign acts which could not be delegated. A private individual could not suffer loss by paying out tax refunds not properly due (or not properly due in the full amount paid out).

(iii) SKAT's claims are advanced on the basis of SKAT's statutory right to tax in its capacity as the competent fiscal authority of Denmark. This is a paradigmatic exercise of sovereignty, with no non-governmental interest involved.

(iv) The losses are the Danish Treasury's, and any amount recovered will be for the Danish Treasury, not just in the formal sense that since SKAT is an organ of the Danish state, all 'its' assets in fact belong to the Kingdom of Denmark, but in the sense that recoveries from this litigation will rightly be considered to be direct credits to the Danish *fisc*, repairing a net under-collection of dividend taxes for the tax years in question so that it is properly in line (as SKAT alleges it was not at the time) with the DTAs

Denmark then had in place. It is to be noted that SKAT acknowledges it must give credit for any recoveries made from the WHT applicants following determination of the validity (or as SKAT says, invalidity) of their refund claims by the Danish tax tribunal system (or on appeal therefrom).

(v) SKAT seeks to infer falsity from its own preliminary decisions taken under Danish law annulling its previous decisions to accept the WHT Applications. The claim relies on SKAT's own sovereign acts.

(vi) The claims critically and necessarily invoke SKAT's sovereign powers and allege that the WHT refunds paid out were not properly due under Danish law; and in pursuit of those claims SKAT has used and can be expected to use investigative powers and entitlements to mutual assistance from foreign sovereign authorities that only a sovereign might possess.

199. SKAT used sovereign powers to gather information as to how large sums came to be paid out by way of (as it says) WHT refunds that it was not liable to make, and relied on information so obtained when seeking and obtaining freezing orders and an order in Dubai giving it access to a mass of Solo-related documents, and when pleading its claims. The defendants argued that this gives the proceedings a sovereign character and that SKAT cannot avoid that conclusion by noting that there may have been routes by which a private party could have obtained the same evidence.

Comity

200. The Sanjay Shah, Lui and DWF Defendants, and Acupay, supported their various submissions by raising the issue of comity. I did not understand any of them to be contending for a freestanding rule that a claim must be dismissed, or Dicey Rule 3 must be treated as applicable, if it would infringe notions of comity to entertain the claim. The defendants thus appeared to me ultimately all to share the stance adopted by Messrs Knott & Hoogewerf, namely that comity is an aspect of the single, unitary rule that is Dicey Rule 3 and its need to characterise a claim as either sovereign or patrimonial, the greater the seeming affront to comity the more likely the conclusion that as a matter of substance the claim is sovereign in nature.

201. In oral argument the DWF Defendants took the lead on the comity issue, whatever its relevance to the present decision. Dicey Rule 3 is predicated on a foundational principle of public international law, *viz*. that there are territorial limits to sovereignty. The live issues in these proceedings would inevitably mean this court making judgments on the legality and adequacy of Danish sovereign acts on Danish soil. This would require the English court, in substance, to sit in judgment over the internal affairs of the Danish sovereign state, in breach of the principle of comity.

202. As an adjunct to this argument, the Sanjay Shah and DWF Defendants submitted that the court ought to consider the claim as a whole, by which they meant not just SKAT's pleaded case but also the matters raised in the various Defences. If that be right, then the defendants pointed to the following matters which, they say, would have to be determined at a full trial of all issues:

(i) whether there had been a valid, lawful and reasonable exercise of sovereign power to tax by Denmark;

(ii) whether SKAT, as the Danish tax authority, was aware of market practice in trading and owning shares and receiving dividends relevant to the operation of any WHT system;

(iii) whether SKAT failed to interpret, apply and adhere to Danish and international tax law and its own guidelines or failed to take account of prevalent market practice;

(iv) whether SKAT's WHT reclaim procedure was inadequate, including the vetting and oversight of the implementation of that regime;

(v) whether the actions, decisions and internal administrative procedures undertaken to approve the relevant WHT refunds and later reverse those same decisions were adequate or lawful;

(vi) whether despite making available and participating in Danish tax tribunal proceedings to determine the validity of the WHT refund applicants' claims, the Kingdom of Denmark should not have treated these matters as tax matters at all;

(vii) whether SKAT's interpretation of Denmark's obligations under the relevant DTAs was correct and whether Denmark's treaty obligations thereunder were complied with;

(viii) whether Denmark's differential treatment of Danish and non-Danish resident taxpayers under the WHT Act is compatible with the Article 63 TFEU, the free movement of capital.

203. Further, Acupay submitted that Dicey Rule 3 ensures cross-border assistance is kept in its proper place with regards to the separation of powers. Cross-border assistance should be the exclusive preserve of

arrangements between states on the international plane, which can regulate these issues by agreement between them, including appropriate safeguards. This includes bi-lateral treaties, multilateral conventions and MARD.

Act of State

204. The DWF Defendants, supported by the Sanjay Shah Defendants, further submitted in writing that the 'act of state' doctrine applies to render SKAT's claims non-justiciable, by which I understood them to be referring to the second of the rules of law sometimes given that label, as described by Lord Neuberger in *Belhaj*, *supra*, at [122]. But this was not developed separately in oral argument, and in my judgment cannot provide a defence against claims brought by SKAT, disavowing its acceptance of WHT tax refund claims as having been by mistake induced by misrepresentation and asking the court to consider and determine whatever issues properly arose. If SKAT's claims are to be dismissed on the basis of an overriding conflict of laws rule, it must be Dicey Rule 3, not the act of state doctrine.

Discretion

205. The defendants made common cause that if (as a matter of substance) SKAT's claims fall within Dicey Rule 3, then there is no room for a further exercise of discretion, or assessment as a matter of public policy, as to whether or not the claims should be enforced here. The Rule is an absolute, exclusionary rule, and represents the applicable public policy. That Denmark may lose this case because of it is nothing to the point. The Rule supports and respects the practice of international relations between sovereigns.