EU AND INTERNATIONAL TAX COLLECTION NEWS

2014 - 2

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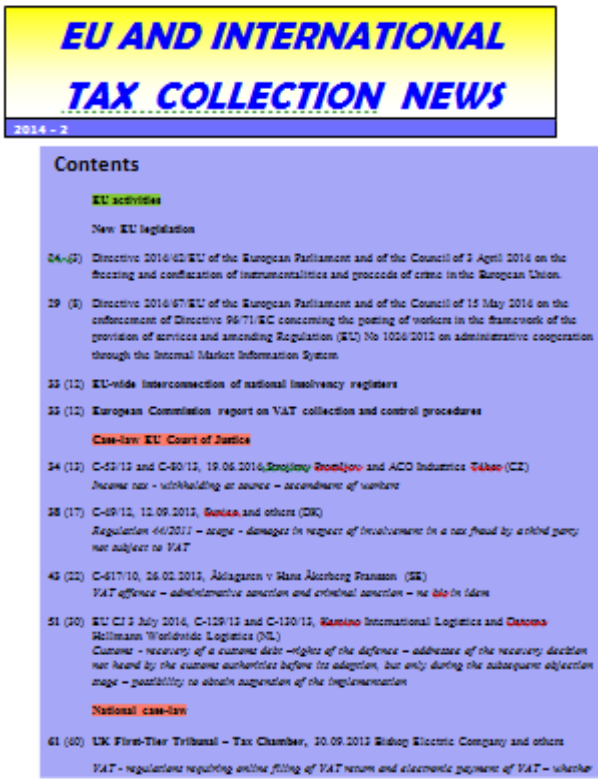
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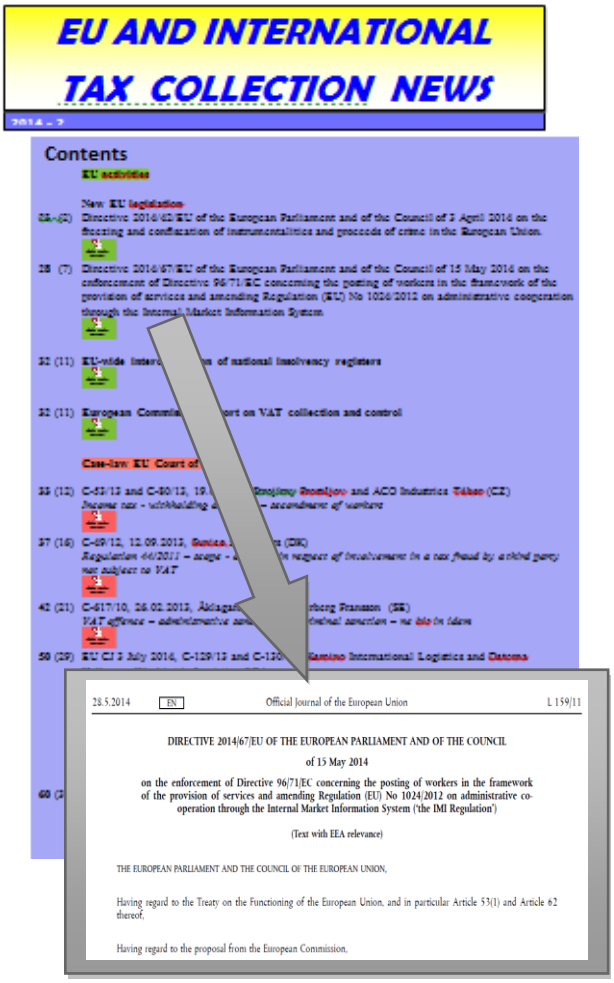
EU AND INTERNATIONAL TAX COLLECTION NEWS
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28.5.2014 EN Official Journal of the European Union L 159/11
DIRECTIVE 2014/67/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 15 May 2014
on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation')
(Text with EEA relevance)
THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 thereof,
Having regard to the proposal from the European Commission,

Editorial board

Luk Vandenberghe
Hélène Michard
Mikael Berglund
Manuel Bessa Vieira
Patrick De Mets
Cynthia Lamur

EU activities

New EU legislation

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

(OJ L 127/39 of 29.04.2014)

Among the most effective means of combating organised crime is providing for severe legal consequences for committing such crime, as well as effective detection and the freezing and confiscation of the instrumentalities and proceeds of crime.
This directive aims at adopting minimum rules to approximate the Member States' freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation.

Article 1

Subject matter

1. This Directive establishes minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters.

2. This Directive is without prejudice to the procedures that Member States may use to confiscate the property in question.

Article 2

Definitions

For the purpose of this Directive, the following definitions apply:

(1)'proceeds' means any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits;

(2) 'property' means property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property;

(3)'instrumentalities' means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

(4)'confiscation' means a final deprivation of property ordered by a court in relation to a criminal offence;

(5)'freezing' means the temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property;

(6)'criminal offence' means an offence covered by any of the instruments listed in Article 3.

Article 3

Scope

This Directive shall apply to criminal offences covered by:

(a)Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union ('Convention on the fight against corruption involving officials');

(b)Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro ;

(c)Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment;

(d)Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the

identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;

(e) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism;

(f) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;

(g) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking;

(h) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime;

(i) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA;

(j) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA;

(k) Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA,

as well as other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein.

Article 4

Confiscation

1. Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

2. Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

Article 5

Extended confiscation

1. Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

2. For the purpose of paragraph 1 of this Article, the notion of 'criminal offence' shall include at least the following:

(a) active and passive corruption in the private sector, as provided for in Article 2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials;

(b) offences relating to participation in a criminal organisation, as provided for in Article 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit;

(c) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such

purposes if the child is over the age of sexual consent, as provided for in Article 4(2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided for in Article 5(4) of that Directive; offering, supplying or making available child pornography, as provided for in Article 5(5) of that Directive; production of child pornography, as provided for in Article 5(6) of that Directive;

(d) illegal system interference and illegal data interference, as provided for in Articles 4 and 5 respectively of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, as provided for in Article 7 of that Directive, designed or adapted primarily for that purpose; the intentional production, sale, procurement for use, import, distribution or otherwise making available of tools used for committing offences, at least for cases which are not minor, as provided for in Article 7 of that Directive;

(e) a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.

Article 6

Confiscation from a third party

1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

2. Paragraph 1 shall not prejudice the rights of bona fide third parties.

Article 7

Freezing

1. Member States shall take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation. Those measures, which shall be ordered by a competent authority, shall include urgent action to be taken when necessary in order to preserve property.

2. Property in the possession of a third party, as referred to under Article 6, can be subject to freezing measures for the purposes of possible subsequent confiscation.

Article 8

Safeguards

1. Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights.

2. Member States shall take the necessary measures to ensure that the freezing order is communicated to the affected person as soon as possible after its execution. Such communication shall indicate, at least briefly, the reason or reasons for the order concerned. When it is necessary to avoid jeopardising a criminal investigation, the competent authorities may postpone communicating the freezing order to the affected person.

3. The freezing order shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation.

4. Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law. Such procedures may provide that when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court.

5. Frozen property which is not subsequently confiscated shall be returned immediately. The

conditions or procedural rules under which such property is returned shall be determined by national law.

6. Member States shall take the necessary measures to ensure that reasons are given for any confiscation order and that the order is communicated to the person affected. Member States shall provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court.

7. Without prejudice to Directive 2012/13/EU and Directive 2013/48/EU, persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights. The persons concerned shall be informed of that right.

8. In proceedings referred to in Article 5, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

9. Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 6.

10. Where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims.

Article 9

Effective confiscation and execution

Member States shall take the necessary measures to enable the detection and tracing of property to be frozen and confiscated even after a final conviction for a criminal offence or following proceedings in application of Article 4(2) and to ensure the effective execution of a confiscation order, if such an order has already been issued.

Article 10

Management of frozen and confiscated property

1. Member States shall take the necessary measures, for example by establishing centralised offices, a set of specialised offices or equivalent mechanisms, to ensure the adequate management of property frozen with a view to possible subsequent confiscation.

2. Member States shall ensure that the measures referred to in paragraph 1 include the possibility to sell or transfer property where necessary.

3. Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes.

Article 11

Statistics

(…)

Article 12

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 4 October 2015.

(…)

Article 13

Reporting

(…)

Article 14

Replacement of Joint Action 98/699/JHA and of certain provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA

1. Joint Action 98/699/JHA, point (a) of Article 1 and Articles 3 and 4 of Framework Decision 2001/500/JHA, and the first four indents of Article 1 and Article 3 of Framework Decision 2005/212/JHA, are replaced by this Directive for the Member States bound by this Directive, without prejudice to the obligations of those

Member States relating to the time limits for transposition of those Framework Decisions into national law.

2. For the Member States bound by this Directive, references to Joint Action 98/699/JHA and to the provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA referred to in paragraph 1 shall be construed as references to this Directive.

EU activities

New EU legislation

Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')

(OJ L 159/11 of 18 May 2014)

The freedom to provide services includes the right of undertakings to provide services in another Member State, to which they may post their own workers temporarily in order to provide those services there.

With respect to workers temporarily posted to carry out work in order to provide services in another Member State than the one in which they habitually carry out their work, Directive 96/71/EC of the European Parliament and of the Council establishes a core set of clearly defined terms and conditions of employment which are required to be complied with by the service provider in the Member State to which the posting takes place to ensure the minimum protection of the posted workers concerned.

Member States shall ensure that the employer of the posted worker is liable for any due entitlements resulting from the contractual relationship between the employer and that posted worker (Art. 11(6)). The directive also contains a provision on subcontracting liability (Art. 12).

Administrative penalties and/or fines, including fees and surcharges, may be imposed in case of non-compliance with Directive 96/71/EC or this directive.
Chapter VI of this directive contains common rules providing mutual assistance for the enforcement of these penalties:

CHAPTER VI

CROSS-BORDER ENFORCEMENT OF FINANCIAL ADMINISTRATIVE PENALTIES AND/OR FINES

Article 13

Scope

1. Without prejudice to the means which are or may be provided for in other Union legislation, the principles of mutual assistance and mutual recognition as well as the measures and procedures provided for in this Chapter shall apply to the cross-border enforcement of financial administrative penalties and/or fines imposed on a service provider established in a Member State, for failure to comply with the applicable rules on posting of workers in another Member State.

2. This Chapter shall apply to financial administrative penalties and / or fines, including fees and surcharges, imposed by competent authorities or confirmed by administrative or judicial bodies or, where applicable, resulting from industrial tribunals, relating to non-compliance with Directive 96/71/EC or this Directive.

This Chapter shall not apply to the enforcement of penalties which fall under the scope of application of Council Framework Decision 2005/214/JHA, Council Regulation (EC) No 44/2001 or Council Decision 2006/325/EC.

Article 15

General principles — mutual assistance and recognition

1. At the request of the requesting authority, the requested authority shall, subject to Articles 16 and 17:

(a) recover an administrative penalty and/or fine that has been imposed in accordance with the laws and procedures of the requesting Member State by a competent authority or

confirmed by an administrative or judicial body or, where applicable, by industrial tribunals, which is not subject to further appeal; or

(b)notify a decision imposing such a penalty and/or fine.

In addition, the requested authority shall notify any other relevant document related to the recovery of such a penalty and/or fine, including the judgment or final decision, which may be in the form of a certified copy, that constitutes the legal basis and title for the execution of the request for recovery.

2. The requesting authority shall ensure that the request for recovery of an administrative penalty and/or fine or the notification of a decision imposing such a penalty and/or fine is made in accordance with the laws, regulations and administrative practices in force in that Member State.

Such a request shall only be made when the requesting authority is unable to recover or to notify in accordance with its laws, regulations and administrative practices.

The requesting authority shall not make a request for recovery of an administrative penalty and/or fine or notification of a decision imposing such a penalty and/or fine if and as long as the penalty and/or fine, as well as the underlying claim and/or the instrument permitting its enforcement in the requesting Member State, are contested or challenged in that Member State.

3. The competent authority requested to recover an administrative penalty and/or fine or to notify a decision imposing such a penalty and/or fine which has been transmitted in accordance with this Chapter and Article 21, shall recognise it without any further formality being required and shall forthwith take all the necessary measures for its execution, unless that requested authority decides to invoke one of the grounds for refusal provided for in Article 17.

4. For the purpose of recovery of an administrative penalty and/or fine or notification of a decision imposing such a penalty and/or fine, the requested authority shall act in accordance with the national laws, regulations and administrative practices in force in the requested Member State applying to the same or, in the absence of the same, a similar infringement or decision.

The notification of a decision imposing an administrative penalty and/or fine by the requested authority and the request for recovery shall, in accordance with the national laws, regulations and administrative practices of the requested Member State, be deemed to have the same effect as if it had been made by the requesting Member State.

Article 16

Request for recovery or notification

1. The request of the requesting authority for recovery of an administrative penalty and/or fine as well as the notification of a decision concerning such a penalty and/or fine shall be carried out without undue delay by means of a uniform instrument and shall at least indicate:

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

(b)a summary of the facts and circumstances of the infringement, the nature of the offence and the relevant applicable rules;

(c)the instrument permitting enforcement in the requesting Member State and all other relevant information or documents, including those of a judicial nature, concerning the underlying claim, administrative penalty and/or fine; and

(d)the name, address and other contact details regarding the competent authority responsible for the assessment of the administrative penalty and/or fine, and, if different, the competent body where further information can be obtained concerning the penalty and/or fine or the possibilities for contesting the payment obligation or decision imposing it.

2. In addition to that which has been provided for in paragraph 1, the request shall indicate:

(a)in the case of notification of a decision, the purpose of the notification and the period within which it shall be effected;

(b)in the case of a request for recovery, the date when the judgment or decision has become enforceable or final, a description of the nature and amount of the administrative penalty and/or fine, any dates relevant to the enforcement process, including whether, and if so how, the judgment or decision has been served on defendant(s) and/or given in default of appearance, a confirmation from the requesting authority that the penalty and/or fine is not subject to any further appeal, and the underlying claim in respect of which the request is made and its different components.

3. The requested authority shall take all the necessary steps to notify the service provider of the request for recovery or of the decision imposing an administrative penalty and/or fine and of the relevant documents, where necessary, in accordance with its national law and/or practice as soon as possible, and no later than one month of receipt of the request.

The requested authority shall as soon as possible inform the requesting authority of:

(a)the action taken on its request for recovery and notification and, more specifically, of the date on which the addressee was notified;

(b)the grounds for refusal, in the event that it refuses to execute a request for recovery of an administrative penalty and/or fine or to notify a decision imposing an administrative penalty and/or fine in accordance with Article 17.

Article 17

Grounds for refusal

The requested authorities shall not be obliged to execute a request for recovery or notification if the request does not contain the information referred to in Article 16(1) and (2), is incomplete or manifestly does not correspond to the underlying decision.

In addition, the requested authorities may refuse to execute a request for recovery in the following circumstances:

(a)following inquiries by the requested authority it is obvious that the envisaged costs or resources required to recover the administrative penalty and/or fine are disproportionate in relation to the amount to be recovered or would give rise to significant difficulties;

(b)the overall financial penalty and/or fine is below EUR 350 or the equivalent to that amount;

(c)fundamental rights and freedoms of defendants and legal principles that apply to them as laid down in the Constitution of the requested Member State are not respected.

Article 18

Suspension of the procedure

1. If, in the course of the recovery or notification procedure, the administrative penalty and/or fine and/or underlying claim is challenged or appealed by the service provider concerned or by an interested party, the cross-border enforcement procedure of the penalty and/or fine imposed shall be suspended pending the decision of the appropriate competent body or authority in the requesting Member State in the matter.

Any challenge or appeal shall be made to the appropriate competent body or authority in the requesting Member State.

The requesting authority shall without delay notify the requested authority of the contestation.

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

Article 19

Costs

1. Amounts recovered with respect to the penalties and/or fines referred to in this Chapter shall accrue to the requested authority.

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

which apply to similar claims in that Member State.

The requested authority shall, if necessary, in accordance with its national law and practice convert the penalty and/or fine into the currency of the requested State at the rate of exchange applying on the date when the penalty and/or fine was imposed.

2. Member States shall not claim from each other the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Directive or resulting from its application.

CHAPTER VII
FINAL PROVISIONS

Article 20

Penalties

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to this Directive and shall take all the necessary measures to ensure that they are implemented and complied with. The penalties provided for shall be effective, proportionate and dissuasive. (…)

Article 21

Internal Market Information System

1. The administrative cooperation and mutual assistance between the competent authorities of the Member States provided for in Articles 6 and 7, Article 10(3), and Articles 14 to 18 shall be implemented through the Internal Market Information System (IMI), established by Regulation (EU) No 1024/2012.

2. Member States may apply bilateral agreements or arrangements concerning administrative cooperation and mutual assistance between their competent authorities as regards the application and monitoring of the terms and conditions of employment applicable to posted workers referred to in Article 3 of Directive 96/71/EC, in so far as these agreements or arrangements do not adversely affect the rights and obligations of the workers and undertakings concerned.

Member States shall inform the Commission of the bilateral agreements and/or arrangements they apply and shall make the text of those bilateral agreements generally available.

3. In the context of bilateral agreements or arrangements referred to in paragraph 2, competent authorities of the Member States shall use IMI as much as possible. In any event, where a competent authority in one of the Member States concerned has used IMI, it shall where possible be used for any follow-up required.

Article 22

Amendment to Regulation (EU) No 1024/2012

(…)

Article 23

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 June 2016. (…)

EU activities

EU-wide interconnection of national insolvency registers

As from 7 July 2014, the e-Justice Portal contains an EU-wide interconnection of the national insolvency registers of seven Member States - the Czech Republic, Germany, Estonia, Netherlands, Austria, Romania and Slovenia - with more countries expected to join at a later stage.

This first interconnection serves as a one-stop shop for businesses, creditors and investors looking to invest in Europe. The interconnection means that business leaders and entrepreneurs can more easily carry out the same advance checks they would when investing in their home country and will also facilitate the job of creditors in following up on insolvency cases taking place in another EU Member State.

This evolution may also be of interest for tax collection and recovery authorities.

→ Source:
https://e-justice.europa.eu/newsManagement.do?action=show&idNews=93&plang=en

→ The information concerned can be found here:
https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do?clang=en

European Commission report on VAT collection and control procedures

On 12 February 2014, the Commission adopted its 7th report under Art. 12 of Regulation (EEC, Euratom) n° 1553/89 on VAT collection and control procedures
(document COM(2014) 69).

With regard to VAT collection and recovery, the report encourages some Member States to implement write-off procedures for debts proven uncollectable at a reasonable cost. The report indicates that, without an on-going write-off programme, the tax authorities risk wasting valuable resources pursuing uncollectable amounts.
The report also encourages Member States to develop non-sequential and integrated debt collection processes.

Announced

- An evaluation of the current EU legislative framework for mutual tax recovery assistance is currently undertaken by the Commission, assisted by a special project group, the Tax Enforcement Assistance and Cooperation Expert Panel (TEACEP). In this regard, the Commission also welcomes any contributions from other interested parties.
- 16-18 Sept. 2014: Fiscalis workshops "exchange of information between tax authorities and other authorities", Brussels
- 14-17 Oct. 2014: Fiscalis conference on sharing information and resources for an effective mutual assistance, Porto

EU Court of Justice case law

EU CJ 19 June 2014
C-53/13 and C-80/13, Strojírny Prostějov and ACO Industries Tábor (Czech Republic)

Freedom to provide services — Temporary employment agency — Secondment of workers by an agency established in another Member State — Undertaking using the workforce — Tax on the income of those workers withheld at source — Breach of EU law

The judgment

The question referred in Case C-53/13 and the first and third questions referred in Case C-80/13

22 By the question in Case C-53/13 and by the first and third questions in Case C-80/13, which it is appropriate to consider together, the referring courts ask, in essence, whether Articles 18 TFEU, 45 TFEU, 49 TFEU, 56 TFEU or 57 TFEU preclude legislation, such as that at issue in the main proceedings, under which companies established in one Member State using workers employed and seconded by temporary employment agencies established in another Member State, but operating in the first State through a branch, are obliged to withhold tax and to pay to the first State an advance payment on the income tax due by those workers, whereas the same obligation is not laid down for companies established in the first State which use the services of temporary employment agencies established in that State.

Preliminary observations

23 In order to reply to those questions, it must be noted at the outset that, as EU law stands at present, although direct taxation does not as such fall within the purview of the European Union, the powers retained by the Member States must nevertheless be exercised consistently with EU law (see *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 30 and the case-law cited).

24 Furthermore, as regards the question whether national legislation falls within the scope of one or other of the freedoms of movement laid down by the Treaties, it is clear from well-established case-law that the purpose of the legislation concerned must be taken into consideration (see, inter alia, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 90, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraphs 31 to 33).

25 In this case, the Czech legislation imposes on Czech undertakings wishing to avail themselves of the intermediary services of a temporary employment agency not established in the Czech Republic an obligation to withhold the income tax payable by the workers seconded for their benefit by that agency, whereas the same obligation is not imposed on Czech undertakings wishing to avail themselves of the intermediary services of a temporary employment agency established in the Czech Republic.

26 According to settled case-law, Article 56 TFEU confers rights not only on the provider of services but also on the recipient of those services (see, inter alia, *Luisi and Carbone*, 286/82 and 26/83, EU:C:1984:35, paragraph 10; *FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 32; and *X*, C-498/10, EU:C:2012:635, paragraph 23).

27 Consequently, the legislation at issue in the main proceedings is covered by the freedom to provide services.

28 It is true that, as the European Commission claims, such legislation is also liable to affect the freedom of establishment of temporary employment agencies wishing to provide their services in the Czech Republic while maintaining their seat in another Member State, particularly because, in this case, the agencies concerned carried out their activities in the Czech Republic through a branch.

29 The same is true as regards the freedom movement of workers, given that the legislation concerns detailed rules for the collection of income tax which are imposed on Czech undertakings to which those workers have been seconded in the context of a contractual relationship with the agencies of which they are employees, which is liable indirectly to affect their chance of exercising their freedom of movement.

30 However, notwithstanding the possible restrictive effects of that legislation on freedom of establishment and the free movement of workers, such effects are an unavoidable consequence of any restriction on the freedom to provide services and do not justify, in any event, an independent examination of that legislation in the light of Articles 45 TFEU and 49 TFEU (see, to that effect, *Omega*, C-36/02, EU:C:2004:614, paragraph 27, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, EU:C:2006:544, paragraph 33).

31 Finally, in those circumstances, there is also no need to proceed to an interpretation of Article 18 TFEU.

32 That provision applies independently only to situations governed by EU law for which the FEU Treaty lays down no specific rules of non-discrimination. In relation to the freedom to provide services, the principle of non-discrimination was implemented by Articles 56 TFEU to 62 TFEU (see, by analogy, *Attanasio Group*, C-384/08, EU:C:2010:133, paragraph 37, and *Schulz-Delzers and Schulz*, C-240/10, EU:C:2011:591, paragraph 29).

33 The Czech legislation at issue in the main proceedings must therefore be examined in the light of Article 56 TFEU.

Restriction on the freedom to provide services

34 In order to determine whether the legislation at issue in the main proceedings is consistent with the freedom to provide services, it should be recalled that, according to the Court's case-law, Article 56 TFEU requires the abolition of any restriction on that fundamental freedom imposed on the ground that the person providing a service is established in a Member State other than the one in which the service is provided (see *Commission* v *Germany*, 205/84, EU:C:1986:463, paragraph 25; *Commission* v *Italy*, C-180/89, EU:C:1991:78, paragraph 15; *FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 31; and *X*, EU:C:2012:635, paragraph 21).

35 Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom (*X*, EU:C:2012:635, paragraph 22 and the case-law cited).

36 Furthermore, as was noted in paragraph 26 above, Article 56 TFEU confers rights not only on the provider of services but also on their recipient.

37 It is clear that, in the present case, the obligation to withhold an advance payment on the income tax of workers supplied by temporary employment agencies not established in the Czech Republic and to pay that advance payment to the Czech State is inevitably imposed on the recipients of the services provided by those agencies and entails an additional administrative burden which is not required for the recipients of the same services provided by a resident service provider. Consequently, such an obligation is liable to render cross-border services less attractive for those recipients than services provided by resident service providers, and consequently to deter those recipients from having recourse to service providers resident in other Member States (see, to that effect, *FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 33; *Commission* v *Belgium*, C-433/04, EU:C:2006:702, paragraphs 30 to 32; and *X*, EU:C:2012:635, paragraph 28).

38 The Danish Government, relying on *Truck Center* (C-282/07, EU:C:2008:762, paragraphs 49 to 51), maintains that the situation of agencies established in the Czech Republic is objectively different from that of agencies established outside the Czech Republic and that, consequently, the restriction on the freedom to provide services at issue is not discriminatory.

39 In this respect, however, it is sufficient to note that the provider and the recipient of the services are two distinct legal entities, each with its own interests and each entitled to claim the benefit of the freedom to provide services if

their rights are infringed (*X*, EU:C:2012:635, paragraph 27).

40 In this case, the difference in treatment established by the legislation at issue in the main proceedings affects the right of recipients of services freely to choose cross-border services. In addition, in so far as those recipients reside in the Czech Republic, those who decide to have recourse to the services of resident agencies find themselves in a situation comparable to those who prefer the services of a non-resident agency.

41 It follows that legislation such as that at issue in the main proceedings constitutes a restriction on freedom to provide services, prohibited in principle by Article 56 TFEU.

42 That conclusion cannot challenged by the argument of the Czech Government that the effects of the legislation at issue are negligible, given that, according to settled case-law, a restriction on a fundamental freedom is prohibited by the Treaty even if it is of limited scope or minor importance (*Commission* v *France*, C-34/98, EU:C:2000:84, paragraph 49, and *X*, EU:C:2012:635, paragraph 30).

Justification of a restriction on the freedom to provide services

43 As regards the possibility of justifying such a restriction, none of the interested parties which have submitted observations before the Court or the referring courts consider that that restriction may be justified for reasons of public policy, public security or public health.

44 However, according to settled case-law of the Court, where national legislation falling within an area which has not been harmonised at EU level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets overriding requirements in the public interest in so far as that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, *Säger*, C-76/90, EU:C:1991:331, paragraph 15, and *Commission* v *Belgium* EU:C:2006:702, paragraph 33).

45 Both the Nejvyšší správní soud, in its request, and the Czech Government, during the hearing, in essence considered that the Czech legislation at issue in the main proceeding is justified in the light of the need to ensure the effective collection of income tax. In this respect, the Government claimed, inter alia, that withholding tax constitutes a very efficient way of recovering tax since it allows the tax administration to acquaint itself with relevant information about the person liable without delay.

46 It should be noted, in that respect, that the Court has already recognised that the need to ensure the effective collection of income tax may constitute an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services (*FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 35, and *X*, EU:C:2012:635, paragraph 39).

47 In particular, the Court even stated that the procedure of retention at source is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State of residence and the State where the services are provided (*FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 36, and *X*, EU:C:2012:635, paragraph 39).

48 However, that conclusion was based, both in *FKP Scorpio Konzertproduktionen* (EU:C:2006:630) and in *X* (EU:C:2012:635), on the fact that the service providers at issue in those cases provided occasional services in a Member State other than that in which they were established, and remained there for only a short period of time (see, in particular, *X*, EU:C:2012:635, paragraph 42).

49 As the Advocate General noted at point 70 of his Opinion, it is clear that, in this case, it cannot be claimed that the temporary employment agencies at issue in the main proceedings provide their services in the Czech Republic only on an occasional basis, given that

they acted through a branch registered in the commercial register of the Czech Republic.

50 In those circumstances, even though, as the Czech Government states, a branch, under Czech law, does not have legal personality and cannot therefore be obliged to pay taxes under Czech law, the fact remains that such a branch provides the service provider with a physical presence in the territory of the host Member State and performs certain administrative tasks on behalf of the temporary employment agency concerned such as signing contracts.

51 In this respect, not only can it not be excluded that the Czech tax authorities recover the tax due from that branch and that therefore that branch carries out the withholding at issue, but it is also apparent from the documents before the Court in Case C-80/13 that, in this case, the advance payments on the salaries of the employees concerned were in fact made by the branch of the Slovak temporary employment agency.

52 Furthermore, the imposition on the resident recipients of those services, instead of on the Czech branch of the agencies resident in other Member States, of the administrative burden linked to the withholding tax on income payable by the seconded workers does not appear to be simpler or more efficient from the point of view of the service providers or from the point of view of the Czech administration. Since the branch of the temporary employment agency of which the workers are employees has the necessary information concerning the income of those workers more easily available to it, the administrative burden connected to the withholding operation would be less onerous for that branch than for the recipient of the services.

53 It follows that, accordingly, the national legislation at issue in the main proceedings is not appropriate to ensure the effective collection of income tax.

54 The Odvolací finanční ředitelství adds that the legislation may nevertheless be justified by the need to prevent tax evasion and avoidance. Furthermore, according to the Czech Government, the arrangements for administrative co-operation in the field of taxation are not sufficiently effective to prevent potential tax avoidance. The experience of the tax authorities shows that there have been numerous cases of tax evasion and avoidance in connection with the international hiring of workers.

55 It is true that the Court has held on several occasions that the prevention of tax avoidance and the need for effective fiscal supervision may be relied on to justify restrictions on the exercise of the fundamental freedoms guaranteed by the Treaty (see *Baxter and Others*, C-254/97, EU:C:1999:368, paragraph 18, and *Commission* v *Belgium* EU:C:2006:702, paragraph 35).

56 However, the Court has also stated that a general presumption of tax avoidance or evasion based on the fact that a service provider is based in another Member State is not sufficient to justify a fiscal measure which compromises the objectives of the Treaty (see, to that effect, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, paragraph 61; *Commission* v *Belgium*, EU:C:2006:702, paragraph 35; and *Commission* v *Spain*, C-153/08, EU:C:2009:618, paragraph 39).

57 First, the contentions of the Czech Republic concerning numerous cases of tax evasion and avoidance in connection with the international hiring of workers are vague, inter alia concerning the specific situation of temporary employment agencies established in other Member States with a branch registered in the Czech Republic.

58 Secondly, the fact that the branch concerned in Case C-80/13 is responsible for the administrative tasks which enable the withholding tax at issue in the main proceedings to be deducted and paid make it possible to doubt the validity of such a general presumption.

59 In those circumstances, the application of the withholding tax at issue in the main proceedings cannot be justified as being necessary for the prevention of tax evasion and avoidance.

60 In the light of the foregoing, the answer to the question in Case C-53/13 and to the first and third questions in Case C-80/13 is that **Article 56 TFEU precludes legislation, such as that at issue in the main proceedings, under which companies established in one Member State using workers employed and seconded by temporary employment agencies**

established in another Member State, but operating in the first Member State through a branch, are obliged to withhold tax and to pay to the first Member State an advance payment on the income tax due by those workers, whereas the same obligation is not imposed on companies established in the first Member State which use the services of temporary employment agencies established in that Member State.

Second question in Case C-80/13

61 By its second question in Case C-80/13 the referring court asks, in essence, whether Article 56 TFEU precludes legislation, such as that at issue in the main proceedings, under which, where the amount invoiced by the temporary employment agency resident in another Member State contains both the salary of the seconded workers and the intermediation fee, the basis of assessment for calculating that advance payment is set at at least 60% of that amount, without it being possible for the taxable person to show that the salary actually received by the workers is less than 60% of that amount.

62 It must be stated that, in so far as the procedure for calculating the withholding tax at question is closely linked to the obligation to carry out that withholding operation and, as is apparent from the order for reference in Case C-80/13, applies only where the recipient of the services at issue is called on to carry out that withholding operation, in the light of the answer given to the question in Case C-53/13 and to the first and third questions in Case C-80/13, there is no need to reply to that question.

EU CJ 12 September 2013
C-49/12, Sunico and others (Denmark)

Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Regulation (EC) No 44/2001 – Article 1(1) – Scope – Concept of 'civil and commercial matters' – Action brought by a public authority – Damages in respect of involvement in a tax fraud by a third party not subject to VAT – Claim falling within the scope

The judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The request has been submitted in proceedings between the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') and Sunico ApS, M & B Holding ApS and Mr Harwani (together 'Sunico'), concerning the procedure to determine the validity of an attachment order made at the request of the Commissioners in respect of assets belonging to Sunico and situated on Danish territory.

Legal context

European Union law
Regulation No 44/2001

3 Recitals 6 and 7 in the preamble to Regulation No 44/2001 state:

'6. In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

7. The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.'

4 Article 1(1) of Regulation No 44/2001 defines the scope *ratione materiae* of the regulation as follows:

'This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

The EC-Denmark Agreement

5 The Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Brussels on 19 October 2005 (OJ 2005 L 299, p. 62; 'the EC-Denmark Agreement', approved, on behalf of the European Union, by Council Decision 2006/325/EC of 27 April 2006 (OJ 2006 L 120, p. 22), is intended to apply Regulation No 44/2001 and its implementing provisions to relations between the European Union and the Kingdom of Denmark. It entered into force on 1 July 2007, in accordance with Article 12(2) of the EC-Denmark Agreement (OJ 2007 L 94, p. 70).

6 The preamble to that agreement reads as follows:

'…

Considering that the Court of Justice [of the European Union] should have jurisdiction under the same conditions to give preliminary rulings on questions concerning the validity and interpretation of this Agreement which are raised by a Danish court or tribunal, and that Danish courts and tribunals should therefore request preliminary rulings under the same conditions as courts and tribunals of other Member States in respect of the interpretation of [Regulation No 44/2001] and its implementing measures,

…'

7 According to Article 2(1) of that Agreement, entitled 'Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters':

'The provisions of [Regulation No 44/2001], which is annexed to this Agreement and forms part thereof, together with its implementing measures adopted pursuant to Article 74(2) of the Regulation and, in respect of implementing measures adopted after the entry into force of this Agreement, implemented by [the Kingdom of] Denmark as referred to in Article 4 of this Agreement, and the measures adopted pursuant to Article 74(1) of the Regulation, shall under international law apply to the relations between the [Union and the Kingdom of Denmark].'

8 Under the heading 'Jurisdiction of the Court of Justice [of the European Union] in relation to the interpretation of the Agreement', Article 6(1) and (6) of the Agreement provides:

'1. Where a question on the validity or interpretation of this Agreement is raised in a case pending before a Danish court or tribunal, that court or tribunal shall request the Court of Justice to give a ruling thereon whenever under the same circumstances a court or tribunal of another Member State of the European Union would be required to do so in respect of [Regulation No 44/2001] and its implementing measures referred to in Article 2(1) of this Agreement.

…

6. If the provisions of the [EC] Treaty … regarding rulings by the Court of Justice are amended with consequences for rulings in respect of [Regulation No 44/2001], [the Kingdom of Denmark] may notify the Commission of its decision not to apply the amendments in respect of this Agreement. Notification shall be given at the time of the entry into force of the amendments or within 60 days thereafter.

In such a case this Agreement shall be considered terminated. Termination shall take effect three months after the notification.'

Danish law

9 Article 634(1) of the Code of Civil Procedure provides:

'Within one week of the attachment, the creditor shall initiate proceedings on the claim in respect of which the attachment was effected, unless the debtor waives any challenge during

or after the attachment procedure. During these proceedings, the creditor shall also lodge a specific claim for confirmation of the attachment.'

10 Article 634(5) of the Code of Civil Procedure provides:

'If a case relating to the claim in question is pending before a foreign court the ruling of which is expected to have binding effect in Denmark, proceedings brought under subparagraph 1 shall be stayed until a ruling having legal force has been given in the foreign case. However, the court may immediately rule on questions regarding the confirmation of an attachment order.'

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

11 Following an alleged value added tax ('VAT') 'carousel' type fraud which had permitted evasion of output VAT, to the detriment of the United Kingdom treasury, the Commissioners brought court proceedings in the United Kingdom and in Denmark.

12 As regards the proceedings initiated in the United Kingdom, the Commissioners brought an action on 17 May 2010 before the High Court of Justice (England and Wales), (Chancery Division) (United Kingdom) against a number of natural and legal persons established in Denmark, including Sunico.

13 The question which gave rise to debate before that court was whether the Commissioners could claim from non-residents, such as Sunico, in a claim for damages, damages corresponding to the amount of VAT not paid by a person subject to VAT in the United Kingdom, on the ground that those non-residents had taken part in a 'tortious conspiracy to defraud' within the meaning of English law. More specifically, the Commissioners maintained that those non-residents were guilty, on the territory of the United Kingdom, of a VAT 'carousel' type fraud. The Commissioners also submitted that those non-residents, who were not subject to VAT in the United Kingdom, had been the real beneficiaries of the sums obtained by that tax evasion mechanism.

14 The person subject to VAT in the United Kingdom who was involved in that VAT carousel is not a party to the proceedings before the High Court of Justice or to the main proceedings.

15 Since the non-residents in question did not incur liability under the United Kingdom VAT legislation, the Commissioners based their action before the High Court of Justice on the English law of tort, which was applicable to the unlawful means conspiracy.

16 At the time when the decision to request a preliminary ruling was taken, the action before the High Court of Justice was still pending.

17 Before that action was commenced, the Danish tax authorities, at the Commissioners' request, had supplied the Commissioners with information about the non-residents sued in the High Court of Justice, on the basis of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1).

18 The Commissioners also initiated proceedings in Denmark.

19 On 18 May 2010, upon application by the Commissioners, the fogedret i København (Bailiff's Court, Copenhagen (Denmark)) made attachment orders in respect of assets belonging to Sunico and situated on Danish territory, in order to secure payment of the Commissioners' claim for damages.

20 Sunico's appeal against those attachment orders was dismissed by the Østre Landsret (Denmark) on 2 July 2010.

21 By separate application, lodged on 25 May before the Københavns byret (District Court, Copenhagen (Denmark)), the Commissioners, acting on the basis of Article 634(1) of the Code of Civil Procedure, asked that court to confirm the attachment orders authorised by the fogedret i København and also claimed payment of the sum of GBP 40 391 100.01, corresponding to the amount of VAT evaded.

22 Sunico submitted that the Commissioners' claim for payment should be rejected as inadmissible or, at least, as unfounded and, furthermore, as regards the part of the application relating to the attachments, that those protective measures should be lifted.

23 By order of 8 September 2010, the Københavns byret transferred the case to the referring court.

24 The referring court decided to deal separately with the question whether, pursuant to Article 634(5) of the Code of Civil Procedure, it should stay the proceedings before it until the proceedings pending before the High Court of Justice had been completed.

25 The referring court is uncertain, in particular, whether an action such as that lodged on 17 May 2010 before the United Kingdom courts falls within the scope of Regulation No 44/2001, so that a judgment delivered by those courts might be recognised and enforced in Denmark, in application of that regulation and the EC-Denmark Agreement.

26 In those circumstances, the Østre Landsret decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 44 of [Regulation No 44/2001] be interpreted as meaning that its scope extends to cover a case in which the authorities of a Member State bring a claim for damages against undertakings and natural persons resident in another Member State on the basis of an allegation – made pursuant to the national law of the first Member State – of a tortious conspiracy to defraud consisting in involvement in the withholding of VAT due to the first Member State?'

Consideration of the question referred

27 As a preliminary point, it must be held that the Court has jurisdiction to give a preliminary ruling on the question referred to it.

28 As the Commission confirmed at the hearing before the Court, following the entry into force of the Treaty of Lisbon, which repealed Article 68 EC, the Kingdom of Denmark did not take advantage of the opportunity provided for in Article 6(6) of the EC-Denmark Agreement to notify the Commission of its decision not to apply that amendment of the EC Treaty within 60 days following the entry into force of that amendment. Consequently, following the repeal of Article 68 EC, the extension of the right to refer questions for a preliminary ruling in relation to judicial cooperation in civil matters to courts against whose decisions there is a judicial remedy also applies to the referring court.

29 By its question, the referring court seeks to ascertain, in essence, whether the concept of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 44/2001 is to be interpreted as meaning that it includes an action whereby a public authority of one Member State claims, from natural and legal persons resident in another Member State, damages in respect of loss caused by a conspiracy to commit VAT fraud in the first Member State.

30 Sunico, which maintains that the proceedings before the referring court should be continued, claims that a judgment delivered by the United Kingdom courts in the action for damages brought against it is not capable of producing binding effects in Denmark. Such a judgment would not be enforceable in Denmark under Regulation No 44/2001, in so far as the Commissioners' claim for damages is based on the fact that a third party subject to VAT in the United Kingdom did not pay that tax, so that that claim is governed by United Kingdom VAT law. Accordingly, in Sunico's submission, such an action does not come within the scope of that regulation, since actions in revenue matters are expressly excluded.

31 The Commissioners, who submitted that the proceedings pending before the referring court should be stayed, claim that a judgment delivered by the United Kingdom courts in the action for damages against Sunico should be enforceable in Denmark, in application of Regulation No 44/2001 and the EC-Denmark Agreement.

32 As a preliminary point, it must be recalled that, in so far as Regulation No 44/2001 now replaces the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36; 'the Brussels Convention') in relations between Member States, an interpretation given by the Court concerning that convention also applies to the regulation, where its provisions and those of the Brussels Convention may be treated as equivalent (see, in particular, Case C-645/11 *Sapir and Others*

[2013] ECR I-0000, paragraph 31). Furthermore, is clear from recital 19 in the preamble to Regulation No 44/2001 that continuity in interpretation between the Brussels Convention and that regulation should be ensured.

33 In that regard, it must be stated that the scope of Regulation No 44/2001 is, like that of the Brussels Convention, limited to 'civil and commercial matters'. It follows from settled case-law of the Court that that scope is defined essentially by the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject-matter thereof (see, in particular, Case C-406/09 *Realchemie Nederland* [2011] ECR I-0000, paragraph 39, and *Sapir and Others*, paragraph 32).

34 The Court has thus held 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 (see, in particular, *Sapir and Others*, paragraph 33 and the case-law cited).

35 In order to determine whether that is the case in a dispute such as that in the main 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 (see, by analogy, Case C-271/00 *Baten* [2002] ECR I-10489, paragraph 31, and Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 23).

36 In that regard, it should be noted that the factual basis of the claim before that court is the alleged fraudulent conduct of Sunico and the other non-residents sued in that court, who are alleged to have been involved on the territory of the United Kingdom in a chain of transactions involving the sale of goods with the aim of setting up a 'VAT carousel' type tax evasion mechanism, which enabled output tax payable by a taxable person in that Member State to be evaded, and thus to have been the real beneficiaries of the sums obtained by means of that tax evasion.

37 So far as the legal basis of the Commissioners' claim is concerned, their action against Sunico is based not on United Kingdom VAT law, but on Sunico's alleged involvement in a conspiracy to defraud, which comes under the law of tort of that Member State.

38 Likewise, it is clear from the decision for reference that Sunico and the other non-residents sued in the High Court of Justice are not subject to VAT in the United Kingdom and are therefore not liable to pay VAT under the laws of that Member State.

39 As the Commission and the United Kingdom Government have observed, in the context of that legal relationship, the Commissioners do not exercise any exceptional powers by comparison with the rules applicable to relationships between persons governed by private law. In particular, as the Advocate General has stated at point 44 of her Opinion, the Commissioners cannot, as they are generally able to do in the exercise of their powers as a public authority, themselves issue the enforceable document that would enable them to recover their debt, but, in order to do so in a context such as that of the main proceedings, must proceed through the normal legal channels.

40 It follows that the legal relationship between the Commissioners and Sunico is not a legal relationship based on public law, in this instance tax law, involving the exercise of powers of a public authority.

41 Admittedly, it is apparent from the order for reference that the amount of the damages claimed by the Commissioners corresponds to the amount of output VAT payable by a taxable person in the United Kingdom. However, the fact that the extent of Sunico's tortious liability towards the Commissioners and the amount of the Commissioners' tax claim against a taxable person are the same cannot be regarded as proof that the Commissioners' action before the High Court of Justice involves the exercise by them of public authority vis-à-vis Sunico, since it is common ground that the legal relationship between the Commissioners and Sunico is not governed by United Kingdom VAT law but by the law of tort of that Member State.

42 Last, as to whether the request for information which the Commissioners addressed to the Danish authorities on the basis of Regulation No 1798/2003 before bringing

proceedings before the High Court of Justice affects the nature of the legal relationship between the Commissioners and Sunico, it should be observed that it is not apparent from the documents in the file before the Court that in the proceedings pending before the High Court of Justice the Commissioners used evidence obtained in the exercise of their powers as a public authority.

43 However, as the Advocate General has stated at point 45 of her Opinion, it is 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.

44 In the light of the foregoing, the answer to the question referred for a preliminary ruling must be that **the concept of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that it covers an action whereby a public authority of one Member State claims, as against natural and legal persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit VAT fraud in the first Member State**.

EU CJ 26 February 2013 C-617/10, Åklagaren v Hans Åkerberg Fransson (Sweden)

Charter of Fundamental Rights of the European Union – Field of application – Article 51 – Implementation of European Union law – Punishment of conduct prejudicial to own resources of the European Union – Article 50 – Ne bis in idem principle – National system involving two separate sets of proceedings, administrative and criminal, to punish the same wrongful conduct – No prohibition to apply a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature

The judgment

1 This request for a preliminary ruling concerns the interpretation of the *ne bis in idem* principle in European Union law.

2 The request has been made in the context of a dispute between the Åklagaren (Public Prosecutor's Office) and Mr Åkerberg Fransson concerning proceedings brought by the Public Prosecutor's Office for serious tax offences.

Legal context

European Convention for the Protection of Human Rights and Fundamental Freedoms

3 In Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in Strasbourg on 22 November 1984 ('Protocol No 7 to the ECHR'), Article 4, headed 'Right not to be tried or punished twice', provides as follows:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of

the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950; "the ECHR"].'

European Union law

Charter of Fundamental Rights of the European Union

4 Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), which is headed 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', reads as follows:

'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

5 Article 51 defines the Charter's field of application in the following terms:

'1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

Sixth Directive 77/388/EEC

6 Article 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'), in the version resulting from Article 28h thereof, states:

'...

4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. ...

...

8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion ...

...'

Swedish law

7 Paragraph 2 of Law 1971:69 on tax offences (skattebrottslagen (1971:69); 'the skattebrottslagen') is worded as follows:

'Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years' imprisonment for tax offences.'

8 Paragraph 4 of the skattebrottslagen states:

'If an offence within the meaning of Paragraph 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months' imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave.'

9 Law 1990:324 on tax assessment (taxeringslagen (1990:324); 'the taxeringslagen') provides, in Paragraph 1 of Chapter 5:

'If, during the procedure, the taxable person has provided false information, other than

orally, for the purposes of the tax assessment, a special charge (tax surcharge) shall be levied. The same shall apply if the taxable person has provided such information in legal proceedings relating to taxation and the information has not been accepted following a substantive examination.

Information shall be regarded as false if it is clear that information provided by the taxable person is inaccurate or that the taxable person has omitted information for the purposes of the tax assessment which he was required to provide. However, information shall not be regarded as false if the information, together with other information provided, constitutes a sufficient basis for a correct decision. Information also shall not be regarded as false if the information is so unreasonable that it manifestly cannot form the basis for a decision.'

10 Paragraph 4 of Chapter 5 of the taxeringslagen states:

'If false information has been provided, the tax surcharge shall be 40% of the tax referred to in points 1 to 5 of the first subparagraph of Paragraph 1 of Chapter 1 which, if the false information had been accepted, would not have been charged to the taxable person or his spouse. With regard to value added tax, the tax surcharge shall be 20% of the tax which would have been wrongly credited to the taxable person.

The tax surcharge shall be calculated at 10% or, with regard to value added tax, 5% where the false information was corrected or could have been corrected with the aid of confirming documents which are normally available to the Skatteverket [(Tax Board)] and which were available to the Skatteverket before the end of November of the tax year.'

11 Paragraph 14 of Chapter 5 of the taxeringslagen states:

'The taxable person shall be exempted wholly or partially from special charges if errors or omissions become evident which are excusable or if it would be otherwise unreasonable to levy the charge at the full amount. If the taxable person is exempted partially from the charge, it shall be reduced to a half or a quarter.

...

In assessing whether it would be otherwise unreasonable to levy the charge at the full amount, particular regard shall be had to whether:

...

3. errors or omissions have also resulted in the taxable person becoming liable for offences under the skattebrottslagen ... or becoming the subject of forfeiture of proceeds of criminal activity within the meaning of Paragraph 1b of Chapter 36 of the Criminal Code (brottsbalken).'

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

12 Mr Åkerberg Fransson was summoned to appear before the Haparanda tingsrätt (Haparanda District Court) on 9 June 2009, in particular on charges of serious tax offences. He was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax ('VAT'), amounting to SEK 319 143 for 2004, of which SEK 60 000 was in respect of VAT, and to SEK 307 633 for 2005, of which SEK 87 550 was in respect of VAT. Mr Åkerberg Fransson was also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue amounting to SEK 35 690 and SEK 35 862 respectively. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

13 By decision of 24 May 2007, the Skatteverket had ordered Mr Åkerberg Fransson to pay, for the 2004 tax year, a tax surcharge of SEK 35 542 in respect of income from his economic activity, of SEK 4 872 in respect of VAT and of SEK 7 138 in respect of employers' contributions. By the same decision it had also imposed for the 2005 tax year a tax surcharge of SEK 54 240 in respect of income from his economic activity, of SEK 3 255 in respect of VAT and of SEK 7 172 in respect of employers'

contributions. Interest was payable on those penalties. Proceedings challenging the penalties were not brought before the administrative courts, the period prescribed for this purpose expiring on 31 December 2010 in relation to the 2004 tax year and on 31 December 2011 in relation to the 2005 tax year. The decision imposing the penalties was based on the same acts of providing false information as those relied upon by the Public Prosecutor's Office in the criminal proceedings.

14 Before the referring court, the question arises as to whether the charges brought against Mr Åkerberg Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter would be infringed.

15 It is in those circumstances that the Haparanda tingsrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Under Swedish law there must be clear support in the [ECHR] or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the [Charter]. Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

2. Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

3. Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

4. Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle …, to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

5. The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest … If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would not come under the *ne bis in idem* principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?'

Jurisdiction of the Court

16 The Swedish, Czech and Danish Governments, Ireland, the Netherlands Government and the European Commission dispute the admissibility of the questions referred for a preliminary ruling. In their submission, the Court would have jurisdiction to answer them only if the tax penalties imposed on Mr Åkerberg Fransson and the criminal proceedings brought against him that are the subject-matter of the main proceedings arose from implementation of European Union law. However, that is not so in the case of either the national legislation on whose basis the tax penalties were ordered to be paid or the national legislation upon which the criminal proceedings

are founded. In accordance with Article 51(1) of the Charter, those penalties and proceedings therefore do not come under the *ne bis in idem* principle secured by Article 50 of the Charter.

17 It is to be recalled in respect of those submissions that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

18 That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see inter alia, to this effect, Case C-260/89 *ERT* [1991] I-2925, paragraph 42; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15; Case C-309/96 *Annibaldi* [2007] ECR I-7493, paragraph 13; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 34; Case C-256/11 *Dereci and Others* [2011] ECR I-0000, paragraph 72; and Case C-27/11 *Vinkov* [2012] ECR I-0000, paragraph 58).

20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 *Currà and Others* [2012] ECR I-0000, paragraph 26).

23 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see *Dereci and Others*, paragraph 71).

24 In the case in point, it is to be noted at the outset that the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT.

25 In relation to VAT, it follows, first, from Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which reproduce inter alia the provisions of Article 2 of the Sixth Directive and of Article 22(4) and (8) of that directive in

the version resulting from Article 28h thereof, and second, from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion (see Case C-132/06 *Commission* v *Italy* [2008] ECR I-5457, paragraphs 37 and 46).

26 Furthermore, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests (see, to this effect, Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraphs 40 to 42). Given that the European Union's own resources include, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (see, to this effect, Case C-539/09 *Commission* v *Germany* [2011] ECR I-0000, paragraph 72).

27 It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.

28 The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

29 That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR I-0000, paragraph 60).

30 For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.

31 It follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred and to provide all the guidance as to interpretation needed in order for the referring court to determine whether the national legislation is compatible with the *ne bis in idem* principle laid down in Article 50 of the Charter.

Consideration of the questions referred

Questions 2, 3 and 4

32 By these questions, to which it is appropriate to give a joint reply, the Haparanda tingsrätt asks the Court, in essence, whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

33 Application of the *ne bis in idem* principle laid down in Article 50 of the Charter to a prosecution for tax evasion such as that which is the subject of the main proceedings presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature.

34 In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties (see, to this effect, Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 24; Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 19; and Case C-91/02 *Hannl-Hofstetter* [2003] ECR I-12077, paragraph 17). These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

35 Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 *Bonda* [2012] ECR I-0000, paragraph 37).

36 It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (see, to this effect, inter alia *Commission* v *Greece*, paragraph 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62; Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565 paragraph 65).

37 It follows from the foregoing considerations that the answer to the second, third and fourth questions is that **the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.**

Question 5

38 By its fifth question, the Haparanda tingsrätt asks the Court, in essence, whether national legislation which allows the same court to impose tax penalties in combination with criminal penalties in the event of tax evasion is compatible with the *ne bis in idem* principle guaranteed by Article 50 of the Charter.

39 It should be recalled at the outset that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-0000, paragraph 30 and the case-law cited).

40 The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the

main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to this effect, inter alia *Paint Graphos*, paragraph 31 and the case-law cited).

41 Here, it is apparent from the order for reference that the national legislation to which the Haparanda tingsrätt makes reference is not the legislation applicable to the dispute in the main proceedings and currently does not exist in Swedish law.

42 The fifth question must therefore be declared inadmissible, as the function entrusted to the Court within the framework of Article 267 TFEU is to contribute to the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, *Paint Graphos*, paragraph 32 and the case-law cited)

Question 1

43 By its first question, the Haparanda tingsrätt asks the Court, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them.

44 As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (see, to this effect, Case C-571/10 *Kamberaj* [2012] ECR I-0000, paragraph 62).

45 As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means (Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43).

46 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (*Melki and Abdeli*, paragraph 44 and the case-law cited).

47 Furthermore, in accordance with Article 267 TFEU, a national court hearing a case concerning European Union law the meaning or scope of which is not clear to it may or, in certain circumstances, must refer to the Court questions on the interpretation of the provision of European Union law at issue (see, to this effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415).

48 It follows that European Union law precludes a judicial practice which makes the

obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

49 In the light of the foregoing considerations, the answer to the first question is:

– **European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law;**

– **European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter**.

COMMENTS

1. This decision is a judgement of the Grand Chamber of the Court.

2. With regard to the same problem, see also ECHR 10 February 2009, Zolotoukhine v. Russia; ECHR 16.06.2009, Ruotsalainen v. Finland.

3. Following this judgement, the Swedish Supreme Court decided that Swedish tax surcharges are of a criminal nature. They fall under the scope of the EU recovery assistance directive (see M. Berglund, Cross-*Border Enforcement of Claims in the EU - History, Present Time and Future*, Kluwer Law International, 2nd ed., 2014, p. 149).

EU CJ 3 July 2014 C-129/13 and C-130/13, Kamino International Logistics and Datema Hellmann Worldwide Logistics (NL)

Recovery of a customs debt – Principle of respect for the rights of the defence – Right to be heard – Addressee of the recovery decision not heard by the customs authorities before its adoption, but only during the subsequent objection stage – Infringement of the rights of the defence – Determination of the legal consequences of non-observance of the rights of the defence

The judgment

Legal context

European Union law

3 Article 6(3) of the Customs Code is worded as follows:

‘Decisions adopted by the customs authorities in writing which either reject requests or are detrimental to the persons to whom they are addressed shall set out the grounds on which they are based. They shall refer to the right of appeal provided for in Article 243.’

4 In Title VII of the Customs Code, on customs debt, Chapter 3 deals with recovery of the amount of that debt. Section 1 of that chapter, entitled ‘Entry in the accounts and communication of the amount of duty to the debtor’, comprises Articles 217 to 221 of the Customs Code.

5 Article 219(1) of the Customs Code provides:

‘The time limits for entry in the accounts laid down in Article 218 may be extended:

(a) for reasons relating to the administrative organisation of the Member States, and in particular where accounts are centralised, or

(b) where special circumstances prevent the customs authorities from complying with the said time limits.

Such extended time limit shall not exceed 14 days.'

6 Pursuant to Article 220(1) of the Customs Code:

'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time limit may be extended in accordance with Article 219.'

7 Article 221 of the Customs Code provides:

'1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

…

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.

... '

8 Articles 243 to 245 of the Civil Code form part of Title VIII of that code, entitled 'Appeals'. Article 243 provides:

'1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

…

The appeal must be lodged in the Member State where the decision has been taken or applied for.

2. The right of appeal may be exercised:

(a) initially, before the customs authorities designated for that purpose by the Member States;

(b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.'

9 Article 244 of the Customs Code provides:

'The submission of an appeal shall not cause implementation of the disputed decision to be suspended.

The customs authorities shall, however, suspend implementation of such decision in whole or in part where they have good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

Where the disputed decision has the effect of causing import duties or export duties to be charged, suspension of implementation of that decision shall be subject to the existence or lodging of a security. However, such security need not be required where such a requirement would be likely, owing to the debtor's circumstances, to cause serious economic or social difficulties.'

10 Pursuant to Article 245 of the Customs Code:

'The provisions for the implementation of the appeals procedure shall be determined by the Member States.'

Netherlands law

11 According to Article 4:8(1) of the General Law on administrative law (Algemene wet bestuursrecht; 'the Awb'), before taking a decision likely to affect adversely an interested party who did not request that decision, an administrative body must give the interested party the opportunity to put forward his views if that decision relies on information relating to facts and interests which concern the interested party and the information concerned was not provided by the interested party himself.

12 Article 4:12(1) of the Awb reads as follows:

'An administrative body may decline to apply the provisions of Articles 4:7 and 4:8 when taking a decision that sets out a financial obligation or financial right if:

(a) an objection or administrative appeal may be lodged against that decision, and

(b) the adverse consequences of the decision are likely to be nullified in their entirety as a result of the objection or appeal.'

13 Article 6:22(1) of the Awb states:

'A decision against which an objection or appeal is lodged may, notwithstanding the infringement of a written or unwritten legal rule or of a general legal principle, be upheld by the body which decides on the objection or appeal, if it may be considered that the infringement of the rule or principle did not adversely affect the interested parties.'

14 Article 7:2 of the Awb provides:

'1. Before deciding on the objection, the administrative body shall give the interested party the opportunity to be heard.

2. In all cases, the administrative body shall notify the decision to the party that lodged the objection and to the interested parties who, in the course of preparing the decision, have made their views known.'

15 Administrative decisions may subsequently be challenged before the courts, with the possibility of an appeal and a further appeal on a point of law.

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

16 In each of the actions in the main proceedings, a customs agent, namely Kamino in Case C-129/13 and Datema in Case C-130/13, acting on the instructions of the same undertaking, filed in 2002 and 2003 declarations for the release for free circulation of specified goods, described as 'garden pavilions/party tents and side walls'. Kamino and Datema declared those goods under code 6 601 10 00 of the Combined Nomenclature ('Garden or similar umbrellas') and paid customs duty at the rate of 4.7% cited for that code.

17 Following an inspection by the Netherlands customs authorities, the tax inspector found that the classification was incorrect and that the goods concerned should be classified under code 6 306 99 00 of the Combined Nomenclature ('Tents and camping goods'), to which a higher rate of customs duty of 12.2% applies.

18 As a result, the tax inspector sent, by decisions of 2 and 28 April 2005, demands for payment on the basis of Articles 220(1) and 221(1) of the Customs Code, in order to effect the recovery of the additional customs duties still due from Kamino and Datema, respectively.

19 Kamino and Datema did not have the opportunity to be heard before the demands for payment were issued.

20 They lodged an objection against the relevant demand with the tax inspector, who dismissed it after considering the arguments made.

21 Their appeals against those dismissal decisions were declared unfounded by the Rechtbank te Haarlem. On further appeal, the Gerechtshof te Amsterdam upheld the judgment of the Rechtbank te Haarlem in so far as it required Kamino and Datema to perform their obligations under the demands for payment at issue.

22 Both Kamino and Datema then appealed on a point of law to the Hoge Raad der Nederlanden.

23 In its orders for reference, the Hoge Raad der Nederlanden notes that, on appeal, the Gerechtshof te Amsterdam found, in the light of the judgment of the Court in *Sopropé*, C-349/07, EU:C:2008:746, that the tax inspector had infringed the principle of respect for the rights of the defence in so far as he had not offered the interested parties, before issuing the demands for payment at issue, the opportunity to express their views on the information on which the post-clearance recovery of the customs duties was based.

24 The Hoge Raad der Nederlanden notes, however, that neither the Customs Code nor the applicable national law contains procedural provisions requiring customs authorities to give a customs debtor, before effecting the communication of a customs debt under Article 221(1) of the Customs Code, the opportunity to make known his views as regards the information on which the post-clearance recovery is based.

25 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions, which are formulated in the same terms in Cases C-129/13 and C-130/13, to the Court for a preliminary ruling:

‘1. Does the European law principle of respect for the rights of the defence by the authorities lend itself to direct application by the national courts?

2. If the answer to Question 1 is in the affirmative:

(a) Must the European law principle of respect for the rights of the defence by the authorities be interpreted to mean that the principle is infringed where the addressee of an intended decision was not given a hearing before the authorities adopted a measure which adversely affected it but was given the opportunity to be heard at a subsequent administrative (objection) stage, which precedes access to the national courts?

(b) Are the legal consequences of the infringement by the authorities of the European law principle of respect for the rights of the defence governed by national law?

3. If the answer to Question 2(b) is in the negative, what circumstances may the national courts take into account when determining the legal consequences, and in particular may they take into account whether it is likely that, without the infringement by the authorities of the European law principle of respect for the rights of the defence, the proceedings would have had a different outcome?’

Consideration of the questions referred

The first question

27 By its first question, the referring court essentially wishes to know whether the principle of respect for the rights of the defence by the authorities and the resulting right of every person to be heard before the adoption of any decision liable adversely to affect his interests, as they apply in the context of the Customs Code, may be relied on directly by individuals before national courts.

28 In that regard, it should be noted that observance of the rights of the defence is a fundamental principle of European Union law, in which the right to be heard in all proceedings is inherent (*Sopropé*, EU:C:2008:746, paragraphs 33 and 36, and *M*, C-277/11, EU:C:2012:744, paragraphs 81 and 82).

29 The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (*M*, EU:C:2012:744, paragraphs 82 and 83). However, as the Charter of Fundamental Rights of the European Union entered into force on 1 December 2009, it does not apply as such to the proceedings that led to the demands for payment of 2 and 28 April 2005 (see, by analogy, *Sabou*, C-276/12, EU:C:2013:678, paragraph 25).

30 In accordance with that principle, which applies where the authorities are minded to adopt a measure which will adversely affect an individual (*Sopropé*, EU:C:2008:746, paragraph 36), the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision (*Sopropé*, EU:C:2008:746, paragraph 37).

31 The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of European Union law, even though the legislation applicable does not expressly provide for such a procedural requirement (see *Sopropé*, EU:C:2008:746, paragraph 38; *M*, EU:C:2012:744, paragraph 86; and *G and R*, C-383/13 PPU, EU:C:2013:533, paragraph 32).

32 In the cases in the main proceedings, neither the Customs Code nor the applicable national legislation provides, in the context of proceedings for the post-clearance recovery of customs duties on imports, for a right to be heard by the competent customs authority before the issue of demands for payment. As regards proceedings relating to the post-clearance recovery of customs duties and, consequently, a decision falling within the scope of European Union law, it is moreover

not in dispute that the principle of respect for the rights of the defence applies to the Member States.

33 Lastly, in paragraph 44 of the judgment in *Sopropé*, EU:C:2008:746, a case in which the Court was asked about the compatibility of the requirements of the principle of respect for the rights of the defence with the 8 to 15 day period laid down by national law for the exercise by a taxpayer of his right to be heard before the adoption of a recovery decision, the Court stated that, where national legislation sets a time-limit for collecting the observations of the parties concerned, it is for the national court to ensure, while duly taking into account the specific facts of the case, that that period corresponds with the particular situation of the person or undertaking in question and that it allows them to exercise their rights of defence in accordance with the principle of effectiveness.

34 It is clear from the foregoing considerations not only that national authorities are required to respect the rights of the defence when they take decisions falling within the scope of European Union law, but also that interested parties must be able to rely on them directly before the national courts.

35 Accordingly, the answer to the first question is that **the principle of respect for the rights of the defence by the authorities and the resulting right of every person to be heard before the adoption of any decision liable adversely to affect his interests, as they apply in the context of the Customs Code, may be relied on directly by individuals before national courts.**

The second question, part (a)

36 By part (a) of its second question, the referring court essentially wishes to ascertain whether the principle of respect for the rights of the defence and, in particular, the right of every person to be heard before the adoption of an adverse individual measure must be interpreted as meaning that the rights of defence of the addressee of a demand for payment adopted in a procedure for the post-clearance recovery of customs duties on imports, under the Customs Code, are infringed if he has not been heard by the authorities before the adoption of the decision, even though he may express his views during a subsequent administrative objection stage.

37 In order to reply to that question, the objective pursued by the principle of respect for the rights of the defence, in particular in respect of the right to be heard, should first be recalled.

38 According to the Court, the purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before the decision is adopted is to enable the competent authority effectively to take into account all relevant information. In order to ensure that the person or undertaking concerned is in fact protected, the purpose of that rule is, inter alia, to enable them to correct an error or submit such information relating to their personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content (*Sopropé*, EU:C:2008:746, paragraph 49).

39 In accordance with established case-law, the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely (see *M*, EU:C:2012:744, paragraph 87 and the case-law cited). As indicated in paragraph 31 above, that right is required even where the applicable legislation does not expressly provide for such a procedural requirement (see *G and R*, EU:C:2013:533, paragraph 32 and the case-law cited).

40 In that regard, it is undisputed that, in the cases in the main proceedings, the addressees of the demands for payment were not heard prior to the adoption of the decisions adversely affecting them.

41 In those circumstances, it should be considered that the adoption of the demands for payment, on the basis of Articles 220(1) and 221(1) of the Customs Code and the administrative procedure applicable under national legislation such as that at issue in the main proceedings, implementing Article 243 of the Customs Code, entails a limitation of the right to be heard of the addressees of those demands for payment.

42 However, settled case-law also holds that fundamental rights, such as respect for the rights of the defence, do not appear as unfettered prerogatives, but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and that they do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed (*G and R*, EU:C:2013:533, paragraph 33, and *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 84).

43 It must be examined whether, in a situation such as that of the cases in the main proceedings, the limitation of the right to be heard at issue in the main proceedings may be justified in the light of the case-law cited in the preceding paragraph.

44 The Netherlands Government argues that, were the Court to find that the national authorities, in cases of post-clearance recovery, must in principle hear interested parties before the issue of a demand for payment, there are grounds of justification for deviating from that rule. In particular, hearing the interested party before the issue of a demand for payment is incompatible with binding rules on accounting and collection in the Customs Code. Because of the time-limits imposed by the Customs Code, the customs authorities must, once they have been able to determine the customs debt, be able to enter it in the accounts and issue the demand for payment as promptly as possible. The public interest pursued is an interest of administrative simplification and of efficient administration of proceedings. Because of the very large number of demands for payment, a prior hearing of the interested parties would not be efficient.

45 The Netherlands Government also maintains that, in the light of all the characteristics of the national administrative procedure in question, the absence of a hearing before the adoption of a demand for payment does not prejudice the rights of the defence in their very essence, because the addressees of demands for payment have, by virtue of Article 7:2 of the Awb, the opportunity to be heard in a subsequent procedure when an objection is brought against those demands. Given that the same legal effects may be attained by that objection and that the element having strong effects may be postponed, the core of the principle of respect for the rights of the defence, which lies in being able to challenge a given decision without subsequent prejudice, is preserved.

46 In that respect, regard should be had, first, to the time-limits imposed by the Customs Code for the subsequent entry in the accounts of the duties resulting from a customs debt and, secondly, to the characteristics of the national administrative procedure at issue in the main proceedings.

47 With regard to, in the first place, the time-limits imposed by the Customs Code, Article 220(1) of that code requires, where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 of the code, or has been entered in the accounts at a level lower than the amount legally owed, that the amount of duty to be recovered or which remains to be recovered must be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor. That time-limit may be extended pursuant to Article 219 of the Customs Code for specific reasons, but may not exceed 14 days. Article 221 of the code adds that the amount of duty must be communicated to the debtor as soon as it has been entered in the accounts.

48 According to the Netherlands Government, a mandatory time-limit of two days appears difficult to reconcile with the obligation to hear the interested party before the issue of a demand for payment.

49 In that regard, it must be noted, however, that the Court has previously ruled in *Commission* v *Spain*, C-546/03, EU:C:2006:132 and *Commission* v *Italy*, C-423/08, EU:C:2010:347 on the need for Member States to observe the time-limit for the subsequent entry in the accounts of the amount of duty resulting from customs debt laid down in Article 220(1) of the Customs Code, in the context of infringement proceedings in which, in attempting to justify the non-compliance with such a time-limit which had caused a delay in the making available of the European

Community's own resources, the Member States concerned had relied on the obligation to observe the rights of the defence of the persons liable for the customs debt.

50 In paragraphs 33 and 45 respectively of *Commission* v *Spain*, EU:C:2006:132 and *Commission* v *Italy*, EU:C:2010:347, the Court distinguished between, on the one hand, the relations between the Member States and the European Union and, on the other hand, the relations between the person liable for the customs debt and the national customs authorities, in the context of which the rights of the defence must be respected.

51 The Court has held that, while the principle of respect for the rights of the defence applies, inter alia, to a post-clearance recovery procedure, in relations between a debtor and a Member State, it cannot however, as regards the relations between the Member States and the European Union, result in a Member State being entitled to disregard its obligation to enter in the accounts, within the time-limits laid down by European Union legislation, the entitlement of the European Union to its own resources (*Commission* v *Spain*, EU:C:2006:132, paragraph 33, and *Commission* v *Italy*, EU:C:2010:347, paragraph 45).

52 It should also be stated, as the European Commission observed during the hearing, that the time-limit of two days, laid down in Article 220(1) of the Customs Code for the entering in the accounts of the amount of duty resulting from a customs debt, may be extended pursuant to Article 219 of that code. In accordance with Article 219(1)(b), the time-limit for entry in the accounts may, in particular, be extended, although not beyond 14 days, owing to special circumstances preventing the customs authorities from complying with that time-limit.

53 Lastly, in paragraph 46 of *Commission* v *Italy*, EU:C:2010:347, the Court also noted that entry in the accounts and notification of the amount of customs duty owed, and the crediting of the own resources, do not prevent the debtor challenging, under Article 243 et seq. of the Customs Code, the obligation imposed on him by means of all the arguments at his disposal.

54 As regards, in the second place, the question of whether the rights of the defence of the interested parties in the main proceedings were observed, when they could submit their observations only in the objection procedure, it must be noted that the general interest of the European Union, in particular the interest in recovering its own revenue as soon as possible, means that inspections must be capable of being carried out promptly and effectively (*Sopropé*, EU:C:2008:746, paragraph 41).

55 Moreover, it is apparent from the case-law of the Court that, in the context of an appeal lodged against an adverse decision, a subsequent hearing may, under certain conditions, be able to ensure observance of the right to be heard (see, by analogy, *Texdata Software*, EU:C:2013:588, paragraph 85).

56 With regard to decisions of the customs authorities, according to the first subparagraph of Article 243 of the Customs Code, any person has the right to appeal against decisions taken pursuant to customs legislation which concern him directly and individually. However, as the referring court and the Commission point out, the lodging of an appeal pursuant to Article 243 of the Customs Code does not, under the first subparagraph of Article 244 of that code, in principle, cause implementation of the disputed decision to be suspended. As the appeal does not have suspensory effect, it does not preclude the immediate implementation of that decision. The second subparagraph of Article 244 of the Customs Code, however, authorises the customs authorities to suspend, in whole or in part, implementation of the decision where they have good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned. Moreover, the third subparagraph of Article 244 of the Customs Code requires, in that case, the lodging of a security.

57 As is apparent from Article 245 of the Customs Code, the provisions for the implementation of the appeals procedure are to be determined by the Member States.

58 The administrative procedure at issue in the cases in the main proceedings is organised by the Awb. In principle, under Article 4:8 of the Awb, administrative bodies, before taking a decision likely to affect adversely an interested party who did not request that decision, must

allow him to put forward his views on the envisaged decision.

59 In accordance with Article 4:12 of the Awb, it is possible for that principle not to apply, however, in the case of decisions of a financial nature if an objection or administrative appeal may be lodged against such a decision and the adverse consequences of the decision are likely to be nullified in their entirety as a result of the objection or appeal.

60 That provision was applied in the cases in the main proceedings.

61 Before being able to lodge a legal challenge, with the possibility of an appeal and a further appeal on a point of law, the interested parties had the opportunity to lodge an objection with the decision-maker and, pursuant to Article 7:2 of the Awb, to be heard in the context of that objection.

62 It appears, moreover, from the observations of the Netherlands Government that that objection takes place on the basis of the relevant legal provisions and facts as they stand when the decision on the objection is taken, so that the adverse consequences of the initial decision may be nullified as a result of the objection proceedings. In the present case, the possible adverse consequences of demands for payment such as those at issue in the main proceedings may be nullified subsequently, in that the payment may be postponed in the case of objection and the decision on demand for payment suspended pending the outcome of the objection (and of the appeal) pursuant to the national rules.

63 However, the Netherlands Government stated during the hearing that suspension of implementation of the decision on demand for payment was not automatic, but had to be requested by the addressee of the demand for payment in his objection. The government also claimed that suspension was generally granted, and that such grant as a matter of principle was provided for by ministerial circular.

64 Thus, the objection procedure does not have the effect of automatically suspending implementation of the adverse decision and rendering it immediately inoperable.

65 It follows from paragraph 85 of *Texdata Software*, EU:C:2013:588 that the latter characteristic may be of some importance when considering possible justifications for restricting the right to be heard before the adoption of an adverse decision.

66 Thus, in that judgment, the Court held that the imposition of a penalty without prior notice or the opportunity to be heard before the penalty is imposed does not appear to impair the core of the fundamental right at issue, since the submission of a reasoned objection against the decision imposing the penalty renders that decision immediately inoperable and triggers an ordinary procedure under which there is a right to be heard (*Texdata Software*, EU:C:2013:588, paragraph 85).

67 However, it cannot be inferred from the case-law cited in the previous paragraph that, in the absence of a hearing before the adoption of a demand for payment, the lodging of an objection or administrative appeal against that demand for payment must necessarily have the effect of automatically suspending implementation of the demand for payment in order to ensure observance of the right to be heard in connection with that objection or appeal.

68 Having regard to the general interest of the European Union in recovering its own revenue as soon as possible, noted in paragraph 54 above, the second subparagraph of Article 244 of the Customs Code provides that the lodging of an appeal against a demand for payment has the effect of suspending implementation of that demand only where there is good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

69 It should be recalled that the Court has consistently held that provisions of European Union law, such as those of the Customs Code, must be interpreted in the light of the fundamental rights which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures (see, to that effect, judgment in *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 68, and *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 68).

70 In such circumstances, the national provisions implementing the conditions laid down by the second subparagraph of Article 244 of the Customs Code for the grant of suspension of implementation should, in the absence of a prior hearing, ensure that those conditions, namely the existence of good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned, are not applied or interpreted restrictively.

71 In the cases in the main proceedings, suspension of implementation of the demands for payment in case of objection is granted pursuant to ministerial circular. It is for the referring court to ascertain whether that circular is such as to allow the addressees of demands for payment, in the absence of a prior hearing, to obtain suspension of their implementation until their possible amendment, so that the right to obtain such suspension of operation is effective.

72 In any event, the national administrative procedure implementing the second subparagraph of Article 244 of the Customs Code cannot restrict the grant of such suspension where there is good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.

73 In those circumstances, the answer to part (a) of the second question is that **the principle of respect for the rights of the defence and, in particular, the right of every person to be heard before the adoption of an adverse individual measure must be interpreted as meaning that, where the addressee of a demand for payment adopted in a procedure for the post-clearance recovery of customs duties on imports, under the Customs Code, has not been heard by the authorities before the adoption of the decision, his rights of defence are infringed even though he can express his views during a subsequent administrative objection stage, if national legislation does not allow the addressees of such demands, in the absence of a prior hearing, to obtain suspension of their implementation until their possible amendment. Such is the case, in any event, if the national administrative procedure implementing the second subparagraph of Article 244 of the Customs Code restricts the grant of such suspension where there is good reason to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned.**

The second question, part (b), and the third question

74 By part (b) of its second question, and its third question, which should be examined together, the referring court is essentially asking whether the legal consequences of infringements by the authorities of the principle of respect for the rights of the defence are governed by national law and what circumstances may be taken into account by the national court in the context of its review. It is asking, in particular, whether the national court may take into consideration whether the result of the decision-making process would have been the same, had the right to be heard before it been observed.

75 In that regard, it should be noted at the outset that the Court has previously stated that, where neither the conditions under which observance of the rights of the defence is to be ensured nor the consequences of the infringement of those rights are laid down by European Union law, those conditions and consequences are governed by national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness) (see *G and R*, EU:C:2013:533, paragraph 35 and the case-law cited).

76 That conclusion is applicable to customs matters in so far as Article 245 of the Customs Code expressly refers to national law, stipulating that '[t]he provisions for the implementation of the appeals procedure shall be determined by the Member States'.

77 None the less, while the Member States may allow the exercise of the rights of the defence under the same rules as those governing internal situations, those rules must comply with European Union law and, in particular, must not undermine the effectiveness of the Customs Code (*G and R*, EU:C:2013:533, paragraph 36).

78 As indicated by the Commission, the obligation of the national court to ensure that European Union law is fully effective does not have the effect of requiring that a disputed decision, because it has been adopted in infringement of the rights of the defence, in particular the right to be heard, must be annulled in all cases.

79 According to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different (see, to that effect, *France* v *Commission*, C-301/87, EU:C:1990:67, paragraph 31; *Germany* v *Commission*, C-288/96, EU:C:2000:537, paragraph 101; *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598, paragraph 94; and *G and R*, EU:C:2013:533, paragraph 38).

80 Consequently, an infringement of the principle of respect for the rights of the defence results in the annulment of the decision in question only if, had it not been for that infringement, the outcome of the procedure could have been different.

81 It should be noted that, in the cases in the main proceedings, the interested parties themselves admit that the objection procedure would not have had a different outcome, had they been heard prior to the disputed decision, in so far as they are not contesting the tariff classification applied by the tax authority.

82 In view of the foregoing considerations, the answer to part (b) of the second question and the third question is that **the conditions under which observance of the rights of the defence is to be ensured and the consequences of the infringement of those rights are governed by national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness).**

The national court, which is under an obligation to ensure that European Union law is fully effective, may, when assessing the consequences of an infringement of the rights of the defence, in particular the right to be heard, consider that such an infringement entails the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different.

UK – First-Tier Tribunal – Tax Chamber, 30 September 2013, Bishop Electric Company and others
TC02910

Appeal numbers: TC/2010/2825, TC/2010/2719, TC/2010/3004 & TC/2010/5291

VAT – regulations requiring online filing of VAT return and electronic payment of VAT – whether breach of the human rights of old or disabled people – whether breach of EU law as disproportionate – whether breach of human rights as requiring taxpayer to use (allegedly) unsafe means of payment – appeals of first three appellants allowed – fourth appellant's appeal dismissed

1. All four appellants appeal against Notices served by HMRC mandating them to file their VAT returns online and pay VAT electronically.

2. Compulsory VAT online filing was introduced for all businesses with a turnover of over £100,000, and any newly registered business, with effect from 1 April 2010 and for all businesses with effect from April 2012. HMRC refers to businesses liable to registered for online filing from April 2010 as "first tranche" and those only required to be registered from 2012 as "second tranche". All four appellants were in the first tranche.

4. (…) The first three appellants (which I refer to as the 'joint appellants') were selected as test cases from the pool of appellants who had contacted the LITRG and would therefore be represented at the hearing. (…) The selection from within the group of represented taxpayers was on the grounds that the joint appellants offered a representative selection of fact patterns of persons who might have difficulties in filing online.

5. The fourth appellant ('Brinklow') was in a rather different position. (…) Its complaint was not that it would have difficulties in filing online, but that the risks in filing VAT returns and paying VAT online were such that (in its view) the law should not compel it to do so.

21. Regulation 25A was inserted by HMRC into the VAT Regulations in reliance on s 135 FA 2002. This provided that with effect from 12 December 2009.

25A

(…)

(3) A specified person must make a specified return using an electronic return system.

(…)

(5) In this regulation a 'specified person' means a person who –

(a) is registered for VAT with an effective date of registration on or after 1 April 2010 whether or not such a person is registered in substitution for another person under regulation 6 (transfer of a going concern), or

(b) is registered for VAT with an effective date of registration on or before 31 March 2010 and has as at 31 December 2009 or any date thereafter an annual VAT exclusive turnover of £100,000 or more whether or not that person's turnover falls below this level,

provided that, in each case, that person has been notified as required by paragraph (7) below.

(6) However a person –

(a) who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications, or

(b) to whom an insolvency procedure as described in any of paragraphs (a) to (f) of section 81(4B) of the Act is applied at the time when he would otherwise be notified under paragraph (7) below

is not a specified person for the purposes of this regulation.

(7) Where the Commissioners consider that a person is a specified person, they shall notify that person of that fact in writing.

(…)

22. Regulation 40(2) deals with the obligation to make electronic payment and was made under s 132 FA 1999.

(…)

(2A) Where a return is made or is required to be made in accordance with regulations 25 and 25A above using an electronic return system, the relevant payment to the controller required by paragraph (2) above shall be made solely by means of electronic communications that are acceptable to the Commissioners for this purpose.

(…)

24. As I have said the joint appellants' cases were that the decisions that they should file online were wrong in law and the fourth appellant's case was that the decision letter which informed him that he must file online and pay electronically was wrong in law.

(…)

254. The appellants' case is that online filing is a breach of their human rights, a breach of domestic public law and a breach of their rights under EU law. In order to determine this as a matter of law, I need to establish the facts. In particular, it would assist me to know the answers to at least the following questions:

(a) Why don't the appellants use a computer?

(b) how much money does online filing save HMRC?

(c) How much money does a computer cost?

(d) How much money does using a profession agent cost?

(e) Is a disabled person less likely to use a computer?

(f) Is an older person less likely to be 5 able to use a computer?

(g) Is an older person less likely to own a computer?

(h) Is it harder for an older person to learn to use a computer?

(i) How long would it take to learn to use a computer to file online?

(j) What is a bank giro payment?

(k) How safe is it to use the internet or make online payments?

Below I summarise what the witnesses said and then attempt to answer these questions based on the evidence I was given.

(…)

Are the regulations a breach of the appellants' human rights?

523. There is nothing in the Convention about whether it is lawful to require persons to communicate with the state by online means only. This is scarcely surprising: it is a very general document dealing with overarching general principles quite apart from the fact that it predates the electronic communications revolution.

524. Nevertheless, that is not to say that the Convention is irrelevant.

525. The fourth appellant's complaint is at least superficially straightforward. It objects to the obligation to both pay and file online. It objects because it requires it to commit financial data to the internet, and in the case of the obligation to pay online, in addition it complains that this would require it to commit banking details to the internet and actually make the payment over the internet. It considers this to be a breach of its right to privacy. It also complains that the regulations are a breach of the Charter but that aspect of its claim I deal with when I look at the law of the European Union at §§ 812 onwards.

526. The joint appellants' complaints are rather different. Like the fourth appellant they consider that they should have been given exemption from the rules but the basis of their claim is not that filing online requires them to put private information on to the internet but because a failure to give them exemption is a breach of their human right to property, to non-discrimination or to a private life because using any of the possible methods of filing online leads to a breach of one or more of these rights.

527. The only way that the joint appellants' case can be approached is to consider the multiplicity of methods by which the appellants could comply with the regulations and make their VAT returns online. The state does not dictate how the appellants made their online VAT return: the choice is the appellants'. For instance, a taxpayer could engage an agent to make the online return on his behalf or he could use a friend's computer and do it himself. The state does not dictate the option chosen by the taxpayer.

528. The methods of compliance with the obligation to file online are not compulsory. To that extent it is therefore irrelevant if one of the methods, would, if compulsory, involve a breach of the taxpayer's human rights. The taxpayer could comply by using a different method which did not involve a breach of his human rights.

529. But if ALL of the various methods that are open to the taxpayer to use to comply with the obligation to file online would, if compulsory, involve a breach of the taxpayer's human rights, then the regulations themselves must involve a breach of human rights because the requirement to file online is compulsory.

530. However, if only one of the methods would not involve a breach of human rights if compulsory then the taxpayer has a method by which he can comply with the regulations without suffering a breach of human rights and, in my opinion, the state can lawfully impose the regulations (so far as the Convention is concerned).

531. So to determine whether there is a breach of human rights in the compulsory online filing regulations, I have to determine all the possible methods of compliance which the appellants could adopt and determine if at least one of them does *not* involve a breach of human rights. If at least one of them does not, then the regulations are lawful so far as the Convention is concerned.

532. I make the proviso that a method would need to be a practical method for the taxpayer concerned to be relevant: for instance, using his own computer would not be practical for a taxpayer too disabled to use a computer.

533. The possible methods of compliance discussed at the hearing were as follows:

(a) The taxpayer could use his own computer and internet link. For taxpayers without an online computer this would involve capital expenditure on the purchase of hardware and software and income expenditure on a monthly contract for broadband or dial-up link to the internet;

(b) The taxpayer could use an online computer belonging to a friend or family member assuming that friend or family member gave permission. This would not be expected to involve expenditure on the part of the taxpayer.

(c) The taxpayer could use a public computer free of charge at a public library.

(d) The taxpayer could engage a professional agent to make the online submission on behalf of the taxpayer.

(e) At the request of the taxpayer, a friend or family member could make the online return submission on behalf of the taxpayer.

(f) The taxpayer could use HMRC's "phone filing" facility. I mention this option but I have already determined that HMRC cannot rely on it in these proceedings, so it is irrelevant as an option.

(g) The taxpayer could use free of charge a dedicated stand-alone computer at an HMRC enquiry centre but I have already determined that HMRC cannot rely on this option in these proceedings, so it is irrelevant as an option.

534. There was dispute about the extent to which some of these methods of compliance were available to the appellants. It was the evidence of at least one of the appellant's that none of his friends and family had computers. Some of the appellants' evidence was that they did not know how to use a computer and/or their disabilities were such that they could not use a computer so in practice options (a), (b), and (c) were useless to them. I consider these matters in more detail in my conclusion.

535. In the meantime, I move on to consider the potentially relevant articles of the Convention in the context of the various methods by which the appellants could comply with the obligation to file online, but first a short note about fairness and the relevance of the Convention to the two corporate appellants.

(…)

562. I therefore consider that the Convention properly interpreted applies to give human rights to companies where those companies are the alter egos of their owners. Companies have a right to a private life where that private life is the private life of the alter ego of the company.

563. In conclusion, I consider that it is irrelevant to the first and fourth appellant's case that they are incorporated companies: they have the same human rights as their owners would have had had they chosen to conduct their business without incorporation.

The right to peaceful possession of property

564. The Convention includes the protocols to it. The very well known first article of the first protocol, which I will in accordance with common practice refer to as "A1P1", states as follows:

*"**First article of the first protocol ("A1P1")***

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."

565. A1P1 is only suggested to be relevant to some of the methods of compliance with the regulations, in particular:

(a) Use own computer and internet link. For taxpayers without an online computer this would involve capital expenditure on the purchase of hardware and software and income expenditure on a monthly contract for broadband or dial-up link to the internet; and

(d)Engaging a professional agent to make the online submission on behalf of the taxpayer.

And I consider A1P1 in the context of these two types of expenditure. So far as (a) is concerned I consider this on the assumption that the appellant does not have a computer. To state the obvious, if the appellant already has an internet linked computer, then this method of compliance could not involve a breach of A1P1. (…)

566. To determine whether A1P1 has any application in this appeal, I have to consider a number of questions. The first is to consider whether the appellants come within the first paragraph which establishes the bare human right not to be deprived of possessions. Second I have to consider the second paragraph which sets out exceptions to the right not to be deprived of possessions. And as part of the consideration of exceptions, it is well established in cases dealing with human rights that I have to look at public interest and proportionality: the rights of all persons impinge on those of others to a greater or lesser extent and the right balance must be struck. (…)

567. So I will consider these issues as a series of questions:

(a) Do the appellants have a possession within the meaning of A1P1?

(b) If they do, do the regulations (which HMRC's decisions the subject to this appeal give effect to) interfere with it?

(c) Is the interference lawful because (in accordance with the second paragraph of A1P1) it is to secure the payment of taxes?

(d) Is the interference lawful because (in accordance with the second paragraph of A1P1) it is in the public interest?

(e) Is the interference in the public interest but nevertheless unlawful because it is not within the State's margin of appreciation?

(…)

Conclusion

608. If the regulation required taxpayers who did not possess one to purchase an online computer then I would conclude that the measure was outside the state's margin of appreciation as it imposed on those taxpayers an individual and excessive burden. Unless it can be justified, it would be a breach of A1P1 and a breach of their rights. The question of justification would have to be addressed and I do this below.

609. However, the taxpayers affected could employ an agent. While this does engage A1P1, and imposes an individual burden on those without a computer or unable to use a computer, I do not think it is an excessive burden. Nevertheless, that does not necessarily mean that the measure is within the state's margin of appreciation. The measure also must not discriminate – or at least it must not discriminate without justification. There is therefore symmetry. If there is unlawful discrimination under A14 (addressed below) there will be a breach of A1P1. Otherwise there is not.

610. So my conclusion under A1P1 on the question of employing an agent is necessarily the same conclusion as I reach under consideration of A14 combined with A1P1. It comes down to a question of whether there is discrimination and if there is whether that discrimination can be justified and I consider this at §§ 706-726 (discrimination) and §§760-789 (justification) below.

The right to respect for private and family life and correspondence

611. The joint appellants also based their case on A8 of the Convention of the right to respect for private and family life. The fourth appellant also relied on this.

612. Art 8 Convention provides:

"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 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."

613. As with A1P1, whether there is a breach of A8 can be addressed as a series of questions.

(1) Will there be an interference with right to respect for private or family life?
(2) If so, is the interference of such gravity to engage Art 8?
(3) If so, is such an interference in accordance with the law?
(4) If so, is it 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?
(5) If so, is such interference proportionate to legitimate public end sought?

(…)

Discrimination - Article 14 Convention

679. Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, natural or social origin, association with a national minority, property, birth or other status."

(…)

683. Again it is helpful to consider the application of A14 as a series of questions. I understood the parties to be agreed that the relevant questions for A14 are:

(a) Do the appellants have a characteristic protected by A14?
(b) Have the appellants been discriminated against because of this protected characteristic?
(c) Was the discrimination is within the ambit of a convention right (in other words, did the discrimination occur during the exercise of a right protected by the Convention?)
(d) Is the discrimination nevertheless justified?

(…)

Conclusions on the different methods of compliance

790. The possible methods of compliance were:

(a) The taxpayer could use his own computer and internet link. For taxpayers without an online computer this would involve capital expenditure on the purchase of hardware and software and income expenditure on a monthly contract for broadband or dial-up link to the internet;
(b) The taxpayer could use an online computer belonging to a friend or family member assuming that friend or family member gave permission. This would not be expected to involve expenditure on the part of the taxpayer.
(c) The taxpayer could use a public computer free of charge at a public library.
(d) The taxpayer could engage a professional agent to make the online submission on behalf of the taxpayer.
(e) At the request of the taxpayer, a friend or family member could make the online return submission on behalf of the taxpayer.
(f) The taxpayer could use HMRC's "phone filing" facility;
(g) The taxpayer could use computer at an online enquiry centre.

791. To what extent would any of these, if compulsory, involve a breach of the appellants' human rights?

(a) Use of own computer

792. If the appellant already owned an online computer, I do not consider that there would be a breach of ECHR in compelling the taxpayer to use it (if he could) in order to file its VAT return.

793. If the appellant did not own an online computer, compelling the taxpayer to buy one in order to file its VAT return would in my view be a breach of A1P1 as it would be an interference with the possessions of the taxpayer beyond the margin of appreciation allowed to governments because it would be out of all proportion to the cost benefit to HMRC and discriminatory against persons who were old as they are less likely to know how to use a

computer and therefore to own one; in any event it would also be a breach of A1P1 combined with A14 for the same reason.

794. It would also involve a computer illiterate person learning how to use a computer. Elderly persons are less likely to know this: this is why they are less likely to own a computer in the first place. To this extent it is also not a practical option. To the extent that it is the UK Government's case that such persons should learn how to use a computer, this has cost implications which would bring compliance by learning to be computer literate within A1P1 at least in combination with A14. As elderly persons are computer illiterate by reason of their age, this would be a breach of A1P1 in combination with A14.

(b) use of computer belonging to a friend or family member and (f) have friend or family member as agent

795. I consider that if a taxpayer were compelled by law to use a computer belonging to a friend or family member, or ask such a person to act as their agent, than this would be a breach of A8, irrespective of the question of discrimination. Nevertheless, it is also a breach of A8 combined with A14. It would be discrimination against disabled or old people or persons who live remotely as these are the persons who will not have their own computer and/or be able to use one.

796. The same comments on becoming computer literate would apply in respect of elderly persons as above at § 794.

*(*c) use a computer at a public library.

797. I consider that by itself this option would not be a breach of A8 because the risk of third party interception is not shown to be so high that this would amount to interference with the correspondence by HMRC. Nevertheless, because the UK Government has recognised a taxpayer's right to confidentiality in their tax affairs, this brings the VAT online mandation regulations within the ambit of A8 which means that the UK Government must not recognise the taxpayers' right to confidentiality in a discriminatory fashion. HMRC recognise that it would be a breach of their duty of confidentiality to use a public library to transmit a details about a taxpayer's tax affairs: by requiring this of some taxpayers, however, there is discrimination.

798. The discrimination is against elderly persons, and those who live remotely. This is because by reason of old age, an elderly person is less likely to own a computer. They are therefore the persons who would be obliged to use a public library to file. This therefore is discrimination against elderly persons. The regulations fail to accord to elderly persons the same right to confidentiality that younger, computer owning and computer literate persons are given by the Government. This is a breach of A8 combined with A14.

799. The same comments on becoming computer literate would apply in respect of elderly persons as above at § 794.

800. A person who has to use a public library because they live too remotely is also not given by these regulations the same right to confidentiality that persons living in the vast majority of the UK which is served by reliable broadband connections. This is a breach of A8 combined with A14.

801. There is an irony in HMRC's position that taxpayers ought to use a public library as Lord Carter's report stated

> "HMRC have assured us that they take security and taxpayer confidentiality very seriously, and all their online filing services for tax incorporate industry best practices to ensure that transaction online with these systems is both safe and secure".

802. (d) use a professional agent: I have found this to be a breach of A1P1 alone or in conjunction with A14 because of its discriminatory nature in so far as it applies to those who are computer illiterate due to their age, persons who are too disabled to use a computer reliably or without pain, and those who live remotely, and for the reasons given above, such discrimination cannot be justified.

Conclusion

803. These conclusions are sufficient to allow the appeals in favour of the joint appellants.

804. I have found Mr Sheldon is too disabled to use a computer accurately. The only

options practically available to him to file online are using friends & family as an agent, or paying a professional agent. For reasons given above, the first of these options does not respect his right to a private life; the second of these options does not respect his right to non interference with his possessions, because they indirectly discriminate against him because of his disability.

805. I have found that Mr Bishop is too disabled to use a computer without pain, and that because he would be required to learn how to use a computer in order to be able to file online, this would cause him more pain than making a paper return. Like Mr Sheldon the only real options available to him are using friends & family, or paying an agent. For reasons given above, the first of these options does not respect his right to a private life; the second of these options does not respect his right to non interference with his possessions, because they indirectly discriminate against him because of his disability.

806. Like Mr Tay he is also computer illiterate due to his age and the same comments apply as to Mr Tay.

807. I have found that Mr Tay is computer illiterate due to his age. By reason of his age he does not know how to use a computer. This is a major (if not the only) factor in the reason why he does not own one. The only practical options available to him are using friends and family or employing an agent. For reasons given above, the first of these options does not respect his right to a private life; the second of these options does not respect his right to non interference with his possessions, because they indirectly discriminate against him because of his disability.

808. In so far as it is HMRC's case that Mr Tay ought to cure his inability to use a computer by learning to use one, I find that this would involve a breach of A1P1 combined with A14. The means options (a) to use his own computer, (b) use friends and family computer or (c) use a public library computer are not available without a breach of the convention.

809. Putting aside his computer illiteracy, as he lives remotely, Mr Tay in practice only has options (b)/(e) friends and family, (c) public library and (d) professional agent. For the reasons already given (b)/(e) is a breach of A8. Option (c) public library is a breach of A14 combined A1P1 as it involves the taxpayer in expense that those living remotely do not have. Option (d) is a breach of A14 with A1P1 as it involves the taxpayer in expense that those living remotely do not have.

810. Putting aside option (b)/(e) which is an interference with the right to a private life, all the other options involve the taxpayers in expense, which while it might not be excessive by itself and disproportionate, nevertheless is an interference with the right to property because it discriminates against the elderly, the disabled, and those living remotely because it puts them to expense other persons do not need to incur. Interference with A8 or A1P1 can be justified, and the state has a wide margin of appreciation. Nevertheless, in this case, respecting the state's margin of appreciation and its recognition that the elderly disabled and those living remotely should be exempted, I have to conclude that none of the interference is justified for the reasons given.

811. While I have agreed with HMRC that s 3 HRA must be considered before s 6, in this case (unlike *Blackburn)* there is no possibility of interpreting Reg 25A, even on a strained reading, to be consistent with the rights of the old, disabled and those living remotely. Therefore, applying s 6 HRA, Reg 25A must be disapplied in so far as it applies to the joint appellants and their appeals allowed.

Community Law

812. The joint appellants and the fourth appellant also relied on European Community law. The joint appellants have won under the Convention so it is strictly unnecessary to consider European Community Law in their case. It remains relevant to the fourth appellant who has not won its case on the Convention.

818. I will consider the lawfulness under EU law of the online filing and electronic payment regulations under the following headings:

(a) Compatibility with the Connvention;
(b) Compatibility with the Charter;
(c) 'Ultra Vires' - whether the regulations are within the scope of the PVD;
(d) Proportionality.

Compatibility with the Convention

The Convention is part of EU law

819. The Treaty of Amsterdam (which currently provides the constitution of the EU) provides:

"[Art 6 (2)] The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as 10 they result from the constitutional traditions common to Member States, as general principles of Community law."

820. In other words the Convention is deemed to be part of European Law and Directives made under the Treaty must be interpreted consistently with the Convention because the Council of the European Union must act consistently with the Convention.

821. Therefore, to the extent that the appellants win (or lose) their appeal under the Convention, the same applies to their case under EU law.

Compatibility with the Charter

Is Reg 40(2A) ultra vires the Treaty because of the Charter?

825. The European Union also recognises as part of its laws the rights set out in the Charter of Fundamental Rights of the European Union ("the Charter"). HMRC accept that the UK must abide by Charter when implementing VAT. (…)

827. But is Regulation 40(2A) inconsistent with the Charter?

828. Private and family life: The fourth appellant relies on Article 7 of the Charter which is identical to Article 8 of the Convention: the right to respect to private and family life. In fact the "Explanations" to the Charter state that Article 7 of the Charter has the same scope as Art 8 Convention.

829. Therefore, all that I have said in respect of the fourth appellant's case on the Convention (see §§ 632-654 above) applies equally here.

830. Protection of personal data: The Convention has no corresponding provision to Article 8 of the Charter. This provides as follows:

*"**Article 8 Protection of personal data***

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access todata which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority."

831. HMRC's position is that this refers to 'personal data' and therefore cannot be relevant to the obligation to pay electronically. I don't agree. Electronic payments necessitate the use of a person's banking details. Details of a person's bank account (such as its number and sort code) must be personal data of a sort that can be protected by Art 8.

832. But the appellant accepts that the UK's Data Protection Act ("DPA") satisfies Art 8 of the Charter and he does not suggest that the rules on online filing and electronic payment breach the Data Protection Act. In any event, the fourth appellant has the right to pay by bank giro which does not require him to transmit his banking details over the internet.

833. I do not see that the fourth appellant's case is advanced by reliance on *Narinen v Finland* [2004] ECHR 45027/98 (a case where the ECHR found a breach of A8 where a trustee in bankruptcy opened a private letter addressed to the bankrupt) or *Weiser and Bicos Beteilgungen GmbH v Austria* (2008) 46 EHRR 54 (a case where there was a breach of A8 where a lawyer's offices were searched and material seized). These are cases which involve actual interception. The appellant's complaint is about exposure to risk of interception: not only has it failed to prove the degree of risk to which it is subject, it has not made out a case that the regulations in issue are in breach of the DPA and accepts that the DPA respects A8 of the Charter.

834. And its complaint in so far as electronic payment is concerned fails in any event because he has the option to use bank giro.

835. Freedom to conduct business: As with Art 8, there is no counter part to Article 16 in the Convention. It provides:

*"**Article 16 Freedom to conduct a business***

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised."

836. The fourth appellant claims a right to conduct his business off-line and without making electronic payments. But I agree with HMRC that the appellant's freedom to conduct its business is not affected by the obligation to file online and pay electronically.

837. The fourth appellant's argument is the same as reported at § 185 which is that there is a fundamental right to pay by cheque. He says that this is because a person is free to conduct a business how he chooses. But I do not agree. There is a right to conduct business: but not a right to conduct it in whatever manner a person chooses. As A16 itself provides, the right to conduct a business is only to conduct it in accordance with national laws. National law requires payment of VAT by electronic means.

838. The case of *Sims* , relied on by the fourth appellant, has no relevance, as there is no fundamental right to pay by cheque.

Conclusion

839. In conclusion I find out that the fourth appellant has not made out its case that Regulation 40(2A) was in breach of the Charter. The Charter formed no part of the joint appellants' case.

Ultra vires – whether the regulations are within the scope of the PVD

Regulations expressly permitted by European Directive?

840. HMRC's position is that not only the regulations lawful, they are expressly permitted by EU law. The appellants do not agree. The disagreement relates to the Principle VAT Directive ("PVD"), which is the instrument which sets out VAT law across the EU and (an earlier version of) which was implemented into UK law by VATA.

841. Art 288 of the current version of the European Treaty provides:

"… A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods…."

842. In other words, to be lawful under the Treaty, and therefore under the European Communities Act of 1972, the United Kingdom must implement a directive.

843. The Principal VAT Directive ("PVD") 2006/112 provides as follows:

*"**Article 250***

1. Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and for deductions to be made including, in so far as it necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.

2. Member States shall allow, and may require, the VAT return referred to in paragraph 1 to be submitted by electronic means, in accordance with conditions which they may lay down."

844. This requires member States to permit a taxpayer to file their VAT return online. It also provides that member States "may require" the VAT return be submitted by electronic means: and it is this provision that HMRC rely on in defence to the joint appellants' claims that Regulation 25A is unlawful under European law.

845. HMRC's case is that this permits Regulation 25A to require universal online mandation and permits HMRC to grant no exceptions to it.

846. I do not agree. As a matter of law, while Art 250 of the PVD says that member States "may require, the VAT return…to be submitted by electronic means" it does not say that member States may require all taxpayers to make electronic returns. The joint appellants, if not the fourth appellant, accept that member States have the right to mandate most taxpayers.

(…)

Is Reg 40(2A) ultra vires the PVD?

850. There is nothing in the PVD about how VAT should be paid. Article 206 of the PVD allows member States to require payment of VAT and to require interim payment of VAT but as to methods of payment the PVD is silent. It provides:

"Any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Art 250. Member States may, however, set a different date for payment of that amount or may require interim payments to be made."

This means that it is within the discretion of individual member states. There is nothing in the PVD which requires a member State to permit payment by cheque.

851. The fourth appellant's case is that, therefore, the UK has purported to exercise a discretion it does not have in requiring the taxpayer to pay its VAT by electronic means. Mr De Mello says that the UK is the only member State which requires compulsory online filing and compulsory electronic payment. Whether or not this is true is not relevant. The methods of payment are something over which the PVD is not prescriptive and therefore something within the discretion of the individual member State. The UK is permitted in this context to impose rules that are not imposed elsewhere in the EU.

852. As the PVD does not state the method or methods by which a taxpayer may pay its VAT liability, therefore, I find that, within the parameters of the PVD itself as interpreted by the CJEU, it is within the discretion of a member State to enact rules on permitted methods of payment.

853. I find that that the fourth appellant has not made out a case that Reg 40(2A) goes further than lawfully permitted by the PVD.

854. As with the joint appellants, the fourth appellant's case was also that the UK has exceeded its discretion because it has enacted a measure that (they say) is disproportionate whereas the exercise of a discretion conferred by the the PVD (or other directives) must be proportionate. I deal with this below.

Proportionality in EU law

855. Irrespective of the question of whether Regulation 25A was a breach of the appellants' human rights, and rights under the Charter, there is a question whether, as a matter of EU law Regulation 25A and 40(2A) had to be, and were, proportional.

(…)

873. I find that the UK government, as a matter of UK law (ie the ECA) must act proportionately when implementing the PVD and in particular Art 273. Put another way, it seems taxpayers have a directly effective right that measures implementing the Directive should be proportionate. Member States must exercise the discretion given to them by Directives proportionately.

874. I therefore need to consider whether the online filing and electronic payment regulations were proportionate as the UK, in its decision to require some but not all tax payers to file online and pay electronically, is required to act proportionately under the PVD.

Is mandatory online filing proportionate?

875. HMRC's case is that it is proportionate because the PVD permits universal mandatory online filing: adopting an option permitted by the PVD could not be disproportionate.

876. I have already stated that I am unable to agree with this interpretation of Art 250. Article 250(2) permits some tax returns to be mandated: it does not say that mandation could be universal. Precisely which VAT returns could be mandated to be online would depend on the member State's discretion subject to the requirement that that discretion be used proportionately.

(…)

885. There is really no relevant authority on the point at all so I am driven to basics and to considering the list put forward by Ms Redston at §§ above:

(a) It has a legitimate aim;
(b) It is appropriate to that legitimate aim;
(c) It goes no further than necessary and, where there is a choice, has recourse to the least onerous measure; and
(d) Its disadvantages are not disproportionate to its aim.

(…)

Does it go further than necessary?

887. The joint appellants do say the regulations go further than necessary because they fail to give exemption to the old and disabled and those who are computer illiterate.

(…)

894. All these indicate that HMRC's view of the regulations is (as they stand) that they are not appropriate to the legitimate aim. And I agree with that assessment. It is clearly possible for HMRC to make exemptions for old and disabled persons and they have done so for PAYE and purported to do so for VAT. The

failure of Regulation 25A to include exemption for old and disabled persons and those who have no access to broadband due to their location is not appropriate to its legitimate aim of online mandation.

(…)

Disadvantages not disproportionate to its aim

902. Having found for the joint appellants under the third heading, the fourth does not need to be considered. But it would seem to fail under this head and for the same reason: the disadvantages of universal mandation to disabled persons, persons who are computer illiterate because of their age, or persons who cannot access broadband are, for the reasons given above disproportionate to the aim of saving HMRC cost.

903. The conclusion is that three appellants win their case under the European Communities Act as well as and for much the same reasons as their case under the Human Rights Act.

Is the obligation to pay electronically disproportionate?

904. I have said at §§ 873 above why the regulations must be proportionate. That applies as much to the regulations regarding payment of VAT as the regulations regarding how returns of VAT liability are made.

905. The fourth appellant's case is that the Carter report was wrong because it did not properly consider the security risks to taxpayers of online filing and payment. I agree with the fourth appellant that the Carter report's consideration of security appears to be cursory, but that does not necessarily make the regulations disproportionate.

906. The fourth appellant does not consider that mandatory online filing nor the concomitant liability to pay electronically is a legitimate aim because of the security risks. In particular as I have said the fourth appellant objects to payments online as it views the internet as susceptible to interception and in any event the legal risk of loss is on the payer.

907. I have some sympathy with the appellant's view that it would be disproportionate to force a taxpayer to discharge its tax liability by making an online money transfer where the risk of third party interference falls on the taxpayer. I certainly think that if the risks of third party interference were shown to be significant, and significantly more risky than other means of payment, then it might well be disproportionate for a member State to compel payment by that method.

908. But that is not the case here so I do not have to express a concluded view on it. Firstly, while I have had evidence that there are risks associated with online payments, I have not had sufficient evidence to show that the risks are statistically significant and significantly more risky than other means of payment.

909. Secondly, in any event it is not the case that Regulation 40(2A) compels online payments to be made. A taxpayer is given other options. Although, for reasons explained, I consider that all the options offered are *electronic*, not all require the taxpayer to commit their banking details to electronic communications. In particular, payment by bank giro has not been shown to suffer from any of the risks that the appellant associates with online payments.

910. So while it might be possible to make out such a case on the law, the appellant has not made it out on the facts of this case.

911. The appellant's complaint about payment by bank giro is not that it is risky but that it is inconvenient. It considers it disproportionate.

912. I accept that HMRC's refusal to permit payment by cheque has a legitimate aim. As explained (see § 360 above) it is costly for HMRC to receive payment by cheque as an officer has to determine to whose account it should be credited and for which period. It has then to be paid into HMRC's bank. In contrast, a bank giro credit results in an automatic credit for HMRC to the right taxpayer's account for the right period without HMRC taking any action at all.

913. But does Regulation 40(2A) go further than necessary and are the disadvantages to the taxpayer disproportionate to its aim? I find it does not go further than necessary: it would fail in its legitimate aim of saving HMRC costs if payment by cheque were permitted. Are the disadvantages to the taxpayer disproportionate to its aim? The appellant's case here fails on the facts, irrespective of the legal position. Mr

Hallam did not know whether he could post a cheque to his bank with his bank giro slip rather than present them over the counter. If he could post them, as a matter of fact this would be no more inconvenient than posting a cheque to HMRC. As a matter of law, in any event, I am not satisfied that the inconvenience (if it could have been proved) to taxpayers of having to present a bank giro slip to their bank four times a year is disproportionate to the costs saving to HMRC of receiving bank giro payments.

914. There is no right to pay by cheque.

(…)

916. In conclusion in so far as the appellant's concerns on security risks of online payments and inconvenience of payments by bank giro are concerned, I do not consider that Regulation 25A or Regulation 40(2A) (and the rules under it) are unlawful under the PVD or the EU Treaty or the Charter, nor do I consider either of them, in this context, disproportionate.

Conclusion

917. This seems a very unusual case. Not only is it fairly unusual for the Convention to be relevant in a tax case, it is fairly unusual case under the Convention. Counsel for HMRC commented frequently that the appellants were unable to put forward a single Convention case with even remotely comparable facts. This is true but it makes no difference.

918. The case involves an irony for HMRC. At the hearing, HMRC relied heavily on the telephone filing exemption as a sort of "get out of jail free" card. They said this concession would always trump any possibility that the bare regulations unlawfully discriminated against the elderly, the disabled, or those living remotely. Yet I have found that while the existence of the concession did demonstrate that the discrimination was outside the State's own assessment of its margin of appreciation, nevertheless the State could not rely on it as a defence because the concession was unlawfully implemented, largely because there was an unjustified policy to keep it unpublished. While this might be ironic for HMRC, it seems logical. The existence of the concession indicates the failure to exempt was discriminatory, nevertheless it would be wrong for HMRC to use as a defence a concession which did not exist at the time, was then kept largely secret from the very persons it was intended to benefit, and which, no doubt due to a failure to consider the law of agency, was in conflict with the regulations which permitted only paper returns as an exemption.

919. Another unusual feature of the case is that the appeal is to some extent hypothetical or unreal so far as the joint appellants are concerned. The appeal was against decisions issued by HMRC. Yet by concession HMRC have never implemented the decisions. So far there has been no breach of the appellants' human rights in practice. And in the interim since the issue of the decisions, the law has moved on. While the online filing regulations still exits, a taxpayer's liability to file online no longer depends on a decision by HMRC. It is very unsatisfactory, but the only way a taxpayer now has to challenge the regulations is by judicial review proceedings or by appealing against a penalty imposed for non-compliance (see my decision in *Le Bistingo Ltd).*

920. In summary my decision in respect of the three joint appellants is as follows:

921. S 83(1)(zc) VATA gives this Tribunal jurisdiction to consider the lawfulness of the decision issued by HMRC that the three appellants must file online; consideration of the lawfulness of those decisions extends to whether the regulations themselves were lawful under the Convention or under the Principle VAT Directive; it also extends to a limited extent to consideration of whether they were lawful under national public law.

922. I have found that because of its disproportionate application to persons who are computer illiterate because of their age, or who have a disability which makes using a computer accurately very difficult or painful, or those who live too remotely for a reliable internet connection, that the regulations were an interference with Convention rights under A1P1 and A8 combined with A14 which was not justified.

923. I did not find the decision to be unlawful to the extent that the Tribunal has jurisdiction to consider matters of public law. However, I did find that the tribunal has jurisdiction to consider some matters of public law and in particular while I consider that HMRC could in general rely on a concession in

this Tribunal because a concession is properly justiciable in this Tribunal, nevertheless it could not rely on an unlawful concession and for this reason could not rely on the two concessions on which it sought to rely (enquiry offices and telephone filing concessions).

924. So far as EU law was concerned I found the obligations to be disproportionate because they failed to make exemptions for the elderly, disabled persons or persons living too remotely for reliable internet access.

925. For these reasons, HMRC's decision, to apply regulations which were, so far as the joint appellants were concerned, unlawful, was unlawful and for that reason I must allow the joint appellants' appeals.

926. In summary in respect of the fourth appellant my decision is as follows:

927. S 83(1)(zc) only gives me jurisdiction to consider the legality of the decision that it must file online and as that necessarily carries with it the liability to pay electronically, I could also consider whether that obligation was lawful.

928. So far as the obligation to file online was concerned, I did not consider that this by itself was unlawful under the Convention, nor under EU Law nor as a matter of UK public law (in so far as I could consider it). In particular, while the appellant demonstrated that there was a risk of interception by third parties with encrypted internet communications, the degree of the risk was not shown. As I do not accept that the Convention gives a right for persons to be guaranteed risk-free communications, this meant that the appellant had failed to demonstrate that there was a breach of A8 and the right to respect for correspondence.

929. So far as the obligation to pay electronically was concerned, the alleged breach by being required to correspond on the internet, this was not made out on the facts as the regulations did not require the taxpayer to commit its private banking details to the internet.

930. I did not find the obligation to file online or to pay electronically to be a breach of UK public law (in so far as I had jurisdiction to consider the matter). In particular, they were not unlawful under the primary enabling legislation.

931. So far as EU law was concerned, I did not find there to be a breach of the Charter, nor were the regulations as they applied to the fourth appellant disproportionate.

932. I dismiss the fourth appellant's appeal.