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TAX COLLECTION NEWS

2018 - 2

Contents

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http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/tax_recovery/index_en.htm

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LEGISLATION

EU

Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax

A new agreement between the EU and Norway provides for administrative cooperation and recovery assistance between the EU Member States and Norway.

This Agreement was published in OJ L 195/1 of 1 August 2018. It entered into force on 1 September 2018.

The text published below only contains the provisions relevant for recovery assistance.

COUNCIL DECISION (EU) 2018/1089

of 22 June 2018

on the conclusion, on behalf of the Union, of the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 in conjunction with point (b) of the second subparagraph of Article 218(6) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament ([1]),

Whereas:

(1) In accordance with Council Decision (EU) 2017/2381 ([2]), the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax ('the Agreement') was signed on 6 February 2018.

(2) The text of the Agreement, which is the result of the negotiations, duly reflects the negotiating directives issued by the Council.

(3) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council ([3]).

(4) The Agreement should be approved,

HAS ADOPTED THIS DECISION:

Article 1

The Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax is hereby approved on behalf of the Union.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council shall, on behalf of the Union, give the notification provided for in Article 44(2) of the Agreement.

Article 3

The Commission, assisted by representatives of the Member States, shall represent the Union in the Joint Committee set up under Article 41 of the Agreement.

Article 4

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

Done at Luxembourg, 22 June 2018.

For the Council
The President
V. GORANOV

([1]) Opinion of 29 May 2018 (not yet published in the Official Journal).

([2]) Council Decision (EU) 2017/2381 of 5 December 2017 on the signing, on behalf of the Union, of the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax (OJ L 340, 20.12.2017, p. 4).

([3]) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

AGREEMENT

Between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax

THE EUROPEAN UNION, hereinafter referred to as 'the Union',

and

THE KINGDOM OF NORWAY, hereinafter referred to as 'Norway',

hereinafter referred to as 'the Parties',

DESIRING to ensure the correct determination, assessment and collection of value added tax (VAT) and recovery of VAT claims, to avoid double or non-taxation and to combat VAT fraud,

AWARE that combating cross-border VAT fraud and evasion calls for close cooperation between the competent authorities responsible for the application of the legislation in that field,

RECOGNISING that cross-border VAT fraud and evasion have specific features and mechanisms that make them different from other kinds of tax fraud, therefore calling for specific legal tools for administrative cooperation, in particular for the mutual exchange of information,

AIMING to contribute to the Eurofisc network for the exchange of targeted information for combating cross-border VAT fraud, subject to the restrictions pursuant to this Agreement,

AWARE that all Contracting Parties should apply rules on confidentiality and the protection of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, including in the context of Eurofisc,

WHEREAS the assessment of the correct application of VAT on telecommunication, broadcasting and electronically supplied services can only be effective through international cooperation,

CONSIDERING that the Union and Norway are neighbours and dynamic trade partners, and are also Parties to the Agreement on the European Economic Area ('EEA Agreement'), which aims to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area,

RECOGNISING that, while tax matters fall outside the scope of the EEA Agreement, cooperation aimed at more effective application and enforcement of VAT is in the interest of the Union and Norway,

HAVE AGREED AS FOLLOWS:

TITLE I

GENERAL PROVISIONS

Article 1

Objective

The objective of this Agreement is to establish the framework for administrative cooperation between the Member States of the Union and Norway, in order to enable the authorities responsible for the application of VAT legislation to assist each other in ensuring compliance with that legislation and in protecting VAT revenue.

Article 2

Scope

1. This Agreement lays down rules and procedures for cooperation:
   (a) to exchange any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, and combat VAT fraud;
   (b) for the recovery of:
      (i) claims relating to VAT;
      (ii) administrative penalties, fines, fees and surcharges relating to the claims referred to in point (i) imposed by the administrative authorities that are competent to levy the VAT or carry out administrative enquiries with regard to it, or confirmed by administrative or judicial bodies at the request of those administrative authorities;
      (iii) interest and costs relating to the claims referred to in points (i) and (ii).
2. This Agreement shall not affect the application of the rules on administrative cooperation and combating fraud and assistance for the recovery of claims in the field of VAT between Member States of the Union.
3. This Agreement shall not affect the application of the rules on mutual assistance in criminal matters.

Article 3

Definitions

For the purpose of this Agreement, the following definitions shall apply:

(a) 'VAT' means value added tax pursuant to Council Directive 2006/112/EC on the common system of value added tax for the Union and value added tax pursuant to Norwegian Act of 19 June 2009 No 58 relating to value added tax for Norway;

(b) 'state' means a Member State of the Union or Norway;

(c) 'states' means Member States of the Union and Norway;

(d) 'third country' means a country that is neither a Member State of the Union nor Norway;

(e) 'competent authority' means the authority designated pursuant to Article 4(1);

(f) 'central liaison office' means the office designated pursuant to Article 4(2) with the principal responsibility for contacts for the application of Title II or Title III;

(g) 'liaison department' means any office other than the central liaison office designated as such pursuant to Article 4(3) to request or grant mutual assistance under Title II or Title III;

(h) 'competent official' means any official designated pursuant to Article 4(4) who can directly exchange information under Title II;

(i) 'requesting authority' means a central liaison office, a liaison department or a competent official who makes a request for assistance under Title II, on behalf of a competent authority;

(j) 'applicant authority' means a central liaison office or a liaison department of a state which makes a request under Title III;

(k) 'requested authority' means the central liaison office, the liaison department or – as far as cooperation under Title II is concerned – the competent official who receives a request from a requesting or an applicant authority;

(l) 'person' means:

(i) a natural person

(ii) a legal person;

(iii) where the legislation in force so provides, an association of persons recognised as having the capacity to perform legal acts but lacking the legal status of a legal person; or

(iv) any other legal arrangement of whatever nature and form, which has legal personality or not, subject to VAT or liable for the payment of the claims referred to in Article 2(1)(b);

(m) 'Joint Committee' means the committee responsible for ensuring the proper functioning and implementation of this Agreement pursuant to Article 41;

(n) 'administrative enquiry' means all the controls, checks and other action taken by the states in the performance of their duties with a view to ensuring the proper application of the VAT legislation;

(o) 'spontaneous exchange' means the non-systematic communication, at any moment and without prior request, of information to another state;

(p) 'automatic exchange' means the systematic communication of predefined information to another state, without prior request;

(q) 'simultaneous control' means the coordinated checking of the tax liability of one or more related taxable persons organised by two or more states with common or complementary interests;

(r) 'by electronic means' means using electronic equipment for the processing (including digital compression) and storage of data, and employing wires, radio transmission, optical technologies or other electromagnetic means;

(s) 'CCN/CSI network' means the common platform based on the common communication network ('CCN') and common system interface ('CSI'), developed by the Union to ensure all transmissions by electronic means between competent authorities in the area of taxation;

(t) 'telecommunication services, radio and television broadcasting services and electronically supplied services' means the services as defined in Articles 6a, 6b and 7 of Council Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

Article 4

Organisation

1. Each state shall designate a competent authority responsible for the application of this Agreement.

2. Each state shall designate:

(a) one central liaison office with the principal responsibility for the application of Title II of this Agreement, and

(b) one central liaison office with the principal responsibility for the application of Title III of this Agreement,

3. Each competent authority may designate, directly or by delegation:

(a) liaison departments to exchange directly information under Title II of this Agreement;

(b) liaison departments to request or grant mutual assistance under Title III of this Agreement, in relation to their specific territorial or operational competences.

4. Each competent authority may designate, directly or by delegation, competent officials who can directly exchange information on the basis of Title II of this Agreement.

5. The central liaison offices shall keep the list of liaison departments and competent officials up-to-date and make it available to the other central liaison offices.
6. Where a liaison department or a competent official sends or receives a request for assistance under this Agreement, it shall inform its central liaison office thereof.
7. Where a central liaison office, a liaison department or a competent official receives a request for mutual assistance requiring action outside its competence, it shall forward the request without delay to the competent central liaison office or liaison department, and shall inform the requesting or applicant authority thereof. In such a case, the period laid down in Article 8 shall start the day after the request for assistance has been forwarded to the competent central liaison office or the competent liaison department.
8. Each state shall inform the European Commission of its competent authority for the purposes of this Agreement within one month of the signature of this Agreement and of any change thereof without delay. The European Commission keeps the list of competent authorities updated and makes it available to the Joint Committee.

Article 5

Service level agreement

A service level agreement ensuring the technical quality and quantity of the services for the functioning of the communication and information exchange systems shall be concluded according to the procedure established by the Joint Committee.

Article 6

Confidentiality and protection of personal data

1. Any information obtained by a state under this Agreement shall be treated as confidential and protected in the same manner as information obtained under its domestic law and, to the extent necessary for the protection of personal data, in accordance with Directive 95/46/EC of the European Parliament and of the Council and safeguards which may be specified by the state supplying the information as required under its law.
2. Such information may be disclosed to persons or authorities (including courts and administrative or supervisory bodies) concerned with the application of VAT laws and for the purpose of a correct assessment of VAT as well as for the purpose of applying enforcement including recovery or precautionary measures with regard to VAT claims.
3. The information referred to in paragraph 1 may also be used for assessment and enforcement, including recovery of other taxes and compulsory social security contributions. If the information exchanged reveals or helps to prove the existence of breaches of the tax law, it may also be used for imposing administrative or criminal sanctions. Only the persons or authorities mentioned in paragraph 2 may use the information and then only for purposes set out in the preceding sentences of this paragraph. They may disclose it in public court proceedings or in judicial decisions.
4. Notwithstanding paragraphs 1 and 2, the state providing the information shall, on the basis of a reasoned request, permit its use for purposes other than those referred to in Article 2(1) by the state which receives the information if, under the legislation of the state providing the information, the information may be used for similar purposes. The requested authority shall accept or refuse any such request within one month.
5. Reports, statements and any other documents, or certified true copies or extracts thereof, obtained by a state under the assistance provided by this Agreement may be invoked as evidence in that state on the same basis as similar documents provided by another authority of that state.
6. Information provided by a state to another state may be transmitted by the latter to another state, subject to prior authorisation by the competent authority from which the information originated. The state of origin of the information may oppose such a sharing of information within ten working days of the date on which it received the communication from the state wishing to share the information.
7. The states may transmit information obtained in accordance with this Agreement to third countries subject to the following conditions:
   (a) the transmission of information is subject to the national legislation of the transmitting state implementing Article 25 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, especially as regards the adequate level of protection provided in the third country concerned;
   (b) the competent authority from which the information originates has consented to that communication;
   (c) the transmission is permitted by assistance arrangements between the state transmitting the information and that particular third country.
8. When a state receives information from a third country, the states may exchange that information,

in so far as permitted by the assistance arrangements with that particular third country.

9. Each state shall immediately notify the other states concerned regarding any breach of confidentiality, failure of safeguards of personal data and any sanctions and remedial actions consequently imposed.

10. Persons duly accredited by the Security Accreditation Authority of the European Commission may have access to this information only in so far as it is necessary for care, maintenance and development of the CCN/CSI network.

TITLE II

ADMINISTRATIVE COOPERATION AND COMBATING FRAUD

(…)

TITLE III

RECOVERY ASSISTANCE

Chapter 1

Exchange of information

Article 22

Request for information

1. At the request of the applicant authority, the requested authority shall provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims as referred to in Article 2(1)(b).

   For the purpose of providing that information, the requested authority shall arrange for the carrying-out of any administrative enquiries necessary to obtain it.

2. The requested authority shall not be obliged to supply information:

   (a) which it would not be able to obtain for the purpose of recovering similar claims on its own behalf;

   (b) which would disclose any commercial, industrial or professional secrets;

   (c) the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the state of the requested authority.

3. Paragraph 2 shall in no case be construed as permitting a requested authority to decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

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

Article 23

Exchange of information without prior request

Where a refund of taxes or duties relates to a person established or resident in another state in whose territory this Agreement applies, the state from which the refund is to be made may inform the state of establishment or residence of the pending refund.

Article 24

Presence in administrative offices and participation in administrative enquiries

1. By agreement between the applicant authority and the requested authority, and in accordance with the arrangements laid down by the latter, officials authorised by the applicant authority may, with a view to promoting mutual assistance provided for in this Title:

   (a) be present in the offices where officials of the requested state carry out their duties;

   (b) be present during administrative enquiries carried out in the territory of the requested state;

   (c) assist the competent officials of the requested state during court proceedings in that state.

2. In so far as it is permitted under applicable legislation in the requested state, the agreement referred to in paragraph 1(b) may provide that officials of the applicant authority may interview individuals and examine records.

3. Officials authorised by the applicant authority who make use of the possibility offered by paragraphs 1 and 2 must at all times be able to produce written authority stating their identity and their official capacity.

Chapter 2

Assistance for the notification of documents

Article 25

Request for notification of certain documents relating to claims

1. At the request of the applicant authority, the requested authority shall notify to the addressee all documents, including those of a judicial nature, which emanate from the state of the applicant authority and which relate to a claim as referred to in Article 2(1)(b) or to its recovery.

The request for notification shall be accompanied by a standard form containing at least the following information:

(a) name, address and other data relevant to the identification of the addressee;

(b) the purpose of the notification and the period within which notification should be effected;

(c) a description of the attached document and the nature and amount of the claim concerned;

(d) name, address and other contact details regarding:

(i) the office responsible with regard to the attached document; and, if different,

(ii) the office where further information can be obtained concerning the notified document or concerning the possibilities to contest the payment obligation.

2. The applicant authority shall make a request for notification pursuant to this article only when it is unable to notify in accordance with the rules governing the notification of the document concerned in its own state or when such notification would give rise to disproportionate difficulties.

3. The requested authority shall forthwith inform the applicant authority of any action taken on its request for notification and in particular of the date of notification of the document to the addressee.

Article 26

Means of notification

1. The requested authority shall ensure that notification in the requested state is effected in accordance with the applicable national laws, regulations and administrative practices.

2. Paragraph 1 shall be without prejudice to any other form of notification made by a competent authority of the applicant state in accordance with the rules in force in that state.

A competent authority established in the applicant state may notify any document directly by registered mail or electronically to a person in another state in whose territory this Agreement applies.

Chapter 3

Recovery or precautionary measures

Article 27

Request for recovery

1. At the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the state of the applicant authority.

2. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority, it shall forward it to the requested authority.

Article 28

Conditions governing a request for recovery

1. The applicant authority may not make a request for recovery if and as long as the claim and/or the instrument permitting its enforcement are contested in the state of the applicant authority, except in cases where the third subparagraph of Article 31(4) applies.

2. Before the applicant authority makes a request for recovery, appropriate recovery procedures available in the state of the applicant authority shall be applied, except in the following situations:

(a) where it is obvious that there are no assets for recovery in that state or that such procedures will not result in the payment in full of the claim, and the applicant authority has specific information indicating that the person concerned has assets in the state of the requested authority;

(b) where recourse to such procedures in the state of the applicant authority would give rise to disproportionate difficulty.

Article 29

Instrument permitting enforcement in the state of the requested authority and other accompanying documents

1. Any request for recovery shall be accompanied by a uniform instrument permitting enforcement in the state of the requested authority.

This uniform instrument permitting enforcement shall reflect the substantial contents of the initial instrument permitting enforcement in the state of the applicant authority, and constitute the sole basis for recovery and precautionary measures in the state of the requested authority. No act of recognition, supplementing or replacement shall be required in that state.

The uniform instrument permitting enforcement shall contain at least the following information:

(a) information relevant to the identification of the initial instrument permitting enforcement, a description of the claim, including its nature, the period covered by the claim, any dates of relevance to the enforcement process, and the amount of the claim and its different components such as principal, interest accrued, etc.;

(b) name and other data relevant to the identification of the debtor;

(c) name, address and other contact details regarding:

(i) the office responsible for the assessment of the claim; and, if different,

(ii) the office where further information can be obtained concerning the claim or the possibilities for contesting the payment obligation.

2. The request for recovery of a claim may be accompanied by other documents relating to the claim issued by the state of the applicant authority.

Article 30

Execution of the request for recovery

1. For the purpose of the recovery in the state of the requested authority, any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of that state, except where otherwise provided for in this Agreement. The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of that state applying to the same claims, except where otherwise provided for in this Agreement.

   The state of the requested authority shall not be obliged to grant to claims whose recovery is requested preferences accorded to similar claims arising in the state of the requested authority, except where otherwise agreed or provided under the law of that state. A state which, in the execution of this Agreement, grants preferences to claims arising in another state may not refuse to grant the same preferences to the same or similar claims of other Member States of the Union on the same conditions.

   The state of the requested authority shall recover the claim in its own currency.

2. The requested authority shall inform the applicant authority with due diligence of any action it has taken on the request for recovery.

3. From the date on which the recovery request is received, the requested authority shall charge interest for late payment in accordance with the laws, regulations and administrative provisions applicable to its own claims.

4. The requested authority may, where the applicable laws, regulations or administrative provisions so permit, allow the debtor time to pay or authorise payment by instalment and it may charge interest in that respect. It shall inform the applicant authority of any such decision.

5. Without prejudice to Article 37(1), the requested authority shall remit to the applicant authority the amounts recovered with respect to the claim and the interest referred to in paragraphs 3 and 4 of this Article.

Article 31

Disputes

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

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

3. Where an action as referred to in paragraph 1 has been brought, the applicant authority shall inform the requested authority thereof and shall indicate the extent to which the claim is not contested.

4. As soon as the requested authority has received the information referred to in paragraph 3, either from the applicant authority or from the interested party, it shall suspend the enforcement procedure, as far as the contested part of the claim is concerned, pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the third subparagraph of this paragraph.

   At the request of the applicant authority, or where otherwise deemed to be necessary by the requested authority, and without prejudice to Article 33, the requested authority may take precautionary measures to guarantee recovery in so far as the applicable laws or regulations allow.

   The applicant authority may, in accordance with the laws, regulations and administrative practices in force in its state, ask the requested authority to recover a contested claim or the contested part of a claim, in so far as the laws, regulations and administrative practices in force in the state of the

requested authority allow. Any such request shall be reasoned. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for reimbursing any sums recovered, together with any compensation due, in accordance with the laws in force in the state of the requested authority.

If a mutual agreement procedure has been initiated between the states of the applicant and requested authorities, and the outcome of the procedure may affect the claim in respect of which assistance has been requested, the recovery measures shall be suspended or stopped until that procedure has been terminated, unless it concerns a case of immediate urgency because of fraud or insolvency. If the recovery measures are suspended or stopped, the second subparagraph shall apply.

Article 32

Amendment or withdrawal of the request for recovery assistance

1. The applicant authority shall inform the requested authority immediately of any subsequent amendment to its request for recovery or of the withdrawal of its request, indicating the reasons for amendment or withdrawal.

2. If the amendment of the request is caused by a decision of the competent body referred to in Article 31(1), the applicant authority shall communicate this decision together with a revised uniform instrument permitting enforcement in the state of the requested authority. The requested authority shall then proceed with further recovery measures on the basis of the revised instrument.

   Recovery or precautionary measures already taken on the basis of the original uniform instrument permitting enforcement in the state of the requested authority may be continued on the basis of the revised instrument, unless the amendment of the request is due to invalidity of the initial instrument permitting enforcement in the state of the applicant authority or the original uniform instrument permitting enforcement in the state of the requested authority.

   Articles 29 and 31 shall apply in relation to the revised instrument.

Article 33

Request for precautionary measures

1. At the request of the applicant authority, the requested authority shall take precautionary measures, if allowed by its national law and in accordance with its administrative practices, to ensure recovery where a claim or the instrument permitting enforcement in the state of the applicant authority is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the state of the applicant authority, in so far as precautionary measures are possible in a similar situation under the law and administrative practices of the state of the applicant authority.

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

2. The request for precautionary measures may be accompanied by other documents relating to the claim.

Article 34

Rules governing the request for precautionary measures

In order to give effect to Article 33, Articles 27(2), 30(1) and (2), 31 and 32 shall apply *mutatis mutandis*.

Article 35

Limits to the requested authority's obligations

1. The requested authority shall not be obliged to grant the assistance provided for in Articles 27 to 33 if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the state of the requested authority, in so far as the laws, regulations and administrative practices in force in that state allow such exception for national claims.

2. The requested authority shall not be obliged to grant the assistance provided for in Articles 22 and 24 to 33 if the initial request for assistance pursuant to Article 22, 24, 25, 27 or 33 is made in respect of claims which are more than 5 years old, dating from the due date of the claim in the state of the applicant authority to the date of the initial request for assistance.

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

   Moreover, in cases where a postponement of the payment or instalment plan has been granted by the state of the applicant authority, the 5-year period shall be deemed to begin from the moment

when the entire payment period has come to its end.

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

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

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

Article 36

Questions on limitation

1. Questions concerning periods of limitation shall be governed solely by the laws in force in the state of the applicant authority.

2. In relation to the suspension, interruption or prolongation of periods of limitation, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which have the effect of suspending, interrupting or prolonging the period of limitation according to the laws in force in the state of the requested authority shall have the same effect in the state of the applicant authority, on condition that the corresponding effect is provided for under the law of the latter state.

If suspension, interruption or prolongation of the period of limitation is not possible under the laws in force in the state of the requested authority, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which, if they had been carried out by or on behalf of the applicant authority in its own state, would have had the effect of suspending, interrupting or prolonging the period of limitation according to the laws of that state shall be deemed to have been taken in the latter state, in so far as that effect is concerned.

The first and second subparagraphs shall not affect the right of the state of the applicant authority to take measures which have the effect of suspending, interrupting or prolonging the period of limitation in accordance with the laws in force in that state.

3. The applicant authority and the requested authority shall inform each other of any action which interrupts, suspends or prolongs the limitation period of the claim for which the recovery or precautionary measures were requested, or which may have this effect.

Article 37

Costs

1. In addition to the amounts referred to in Article 30(5), the requested authority shall seek to recover from the person concerned and retain the costs linked to the recovery that it incurred, in accordance with the laws and regulations of its state.

2. The states shall renounce all claims on each other for the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Agreement.

However, where recovery creates a specific problem, concerns a very large amount in costs or relates to organised crime, the applicant and requested authorities may agree reimbursement arrangements specific to the cases in question.

3. Notwithstanding paragraph 2, the state of the applicant authority shall be liable to the state of the requested authority for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument permitting enforcement and/or precautionary measures issued by the applicant authority are concerned.

Chapter 4

General rules governing all types of recovery assistance requests

Article 38

Use of languages

1. All requests for assistance, standard forms for notification and uniform instruments permitting enforcement in the state of the requested authority shall be sent in, or shall be accompanied by a translation into, the official language, or one of the official languages, of the state of the requested authority. The fact that certain parts thereof are written in a language other than the official language, or one of the official languages, of that state, shall not affect their validity or the validity of the procedure, in so far as that other language is one agreed between the states concerned.

2. The documents for which notification is requested pursuant to Article 25 may be sent to the requested authority in an official language of the state of the applicant authority.

3. Where a request is accompanied by documents other than those referred to in paragraphs 1 and 2, the requested authority may, where necessary, require from the applicant authority a translation of such documents into the official language, or one of the official languages of the state of the

requested authority, or into any other language agreed between the states concerned.

Article 39

Statistical data

By 30 June each year, the Parties shall communicate by electronic means to the Joint Committee a list of statistical data on the application of this Title.

Article 40

Standard forms and means of communication

1. Requests pursuant to Article 22(1) for information, requests pursuant to Article 25(1) for notification, requests pursuant to Article 27(1) for recovery or requests pursuant to Article 33(1) for precautionary measures and communication of statistical data pursuant to Article 39 shall be sent by electronic means, using a standard form, unless this is impracticable for technical reasons. As far as possible, these forms shall also be used for any further communication with regard to the request.

   The uniform instrument permitting enforcement in the state of the requested authority, the document permitting precautionary measures in the state of the applicant authority and the other documents referred to in Articles 29 and 33 shall also be sent by electronic means, unless this is impracticable for technical reasons.

   Where appropriate, the standard forms may be accompanied by reports, statements and any other documents, or certified true copies or extracts thereof, which shall also be sent by electronic means, unless this is impracticable for technical reasons.

   Standard forms and communication by electronic means may also be used for the exchange of information pursuant to Article 23.

2. Paragraph 1 shall not apply to the information and documentation obtained through the presence of officials in administrative offices in another state or through participation in administrative enquiries in another state, in accordance with Article 24.

3. If communication is not made by electronic means or with use of standard forms, this shall not affect the validity of the information obtained or of the measures taken in the execution of a request for assistance.

4. The electronic communication network and the standard forms adopted for the implementation of this Agreement may also be used for recovery assistance regarding other claims than the claims referred to in Article 2(1)(b), if such recovery assistance is possible under other bilateral or multilateral legally binding instruments on administrative cooperation between the states.

5. As long and in so far as no detailed rules are adopted by the Joint Committee for the implementation of this Title, the competent authorities shall make use of the rules, including the standard forms, currently adopted for the implementation of Council Directive 2010/24/EU, whereby the term "Member State" will be interpreted as including Norway.

   Notwithstanding the previous subparagraph, the state of the requested authority shall use the euro currency for the transfer of the recovered amounts to the state of the applicant authority, unless otherwise agreed between the states concerned. States where the official currency is not the euro shall agree with Norway on the currency for the transfer of the recovered amounts and notify the Joint Committee thereof.

TITLE IV

IMPLEMENTATION AND APPLICATION

Article 41

Joint Committee

1. The Parties hereby establish a Joint Committee, composed of representatives of the Parties. The Joint Committee shall ensure the proper functioning and implementation of this Agreement.

2. The Joint Committee shall make recommendations for promoting the aims of this Agreement and adopt decisions:

   (a) (…);

   (b) (…);

   (c) (…);

   (d) for the adoption of the standard form for the communication of information pursuant to Articles 21(1) and 40(1);

   (e) establishing what shall be transmitted via the CCN/CSI network or other means;

   (f) on the amount and the modalities of the financial contribution to be made by Norway to the general budget of the Union in respect of the cost generated by its participation in the European information systems, taking into account the decisions referred to in points (d) and (e);

   (g) adopting implementing rules on the practical arrangements with regard to the organisation of the contacts between the central liaison offices and liaison departments referred to in Article 4(2)(b) and (3)(b);

   (h) establishing the practical arrangements between the central liaison offices for the implementation of Article 4(5);

   (i) adopting implementing rules regarding the conversion of the sums to be recovered and the transfer of sums recovered;

(j) adopting the procedure for the conclusion of the service level agreement referred to Article 5;

(k) to amend the references to legal acts of the Union and Norway included in this Agreement.

3. The Joint Committee shall operate by unanimity. Decisions of the Joint Committee shall be binding on the Parties. The Joint Committee shall adopt its own rules of procedure.

4. The Joint Committee shall meet at least once every two years. Either Party may request that a meeting be convened. The Joint Committee shall be chaired alternately by each of the Parties. The date and place of each meeting, as well as the agenda, shall be determined by agreement between the Parties.

5. If a Party wishes to revise this Agreement , it shall lay a proposal before the Joint Committee, which shall make recommendations, in particular for the commencement of negotiations according to the rules for international negotiations of the Parties.

Article 42

Dispute settlement

Any dispute between the Parties relating to the interpretation or application of this Agreement shall be resolved through consultations within the Joint Committee. The Parties shall present the relevant information required for a thorough examination of the matter to the Joint Committee, with a view to resolving the dispute.

TITLE V

FINAL PROVISIONS

Article 43

Territorial scope

This Agreement shall apply to the territory of Norway, as set forth in Article 1-2 of the Norwegian Act of 19 June 2009 no. 58 relating to Value Added Tax, and to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union apply and under the conditions laid down in those Treaties, with the exception of any territory referred to in Article 6 of Directive 2006/112/EC.

Article 44

Entry into force, duration and termination

1. This Agreement shall be approved by the Parties in accordance with their own internal legal procedures.

2. This Agreement shall enter into force the first day of the second month following the date on which the Parties have notified each other of the completion of the internal legal procedures referred to in paragraph 1.

3. This Agreement shall be valid indefinitely. Either Party may notify in writing the other Party of its intention to terminate this Agreement. The termination shall take effect six months after the date of the notification.

4. Notifications made in accordance with this Article shall be sent, in the case of the Union, to the General Secretariat of the Council of the Union and, in the case of Norway, to the Ministry of Foreign Affairs.

Article 45

Annexes

(…)

Article 46

Relation to bilateral or multilateral agreements or arrangements between the states

The provisions of this Agreement shall take precedence over the provisions of any bilateral or multilateral legally binding instrument on administrative cooperation, combating fraud and recovery of claims in the field of VAT that has been concluded between Member State(s) of the Union and Norway, in so far as the provisions of the latter are incompatible with those of this Agreement.

Article 47

Authentic text

This Agreement is drawn up in duplicate in Norwegian, Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Irish, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovene, Slovak, Spanish and Swedish languages, each of these texts being equally authentic.

Article 48

Extension of this Agreement to new Member States of the Union

Where a country becomes a Member State of the Union, the text of this Agreement in the language of the new acceding Member State as established by the Council of the Union shall be authenticated by an exchange of letters between the Union and Norway.

OPINIONS AND ARTICLES

Comparison of the EU-Norway agreement and Directive 2010/24

M. Rosado Bayon and L. Vandenberghe[1]

EU Directive

Article 2

Scope

1. This Directive shall apply to claims relating to the following:

(a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union;

(b) refunds, interventions and other measures forming part of the system of total or partial financing of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), including sums to be collected in connection with these actions;

(c) levies and other duties provided for under the common organisation of the market for the sugar sector.

2. The scope of this Directive shall include:

(a) administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested in accordance with paragraph 1, imposed by the administrative authorities that are competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authorities;

(b) fees for certificates and similar documents issued in connection with administrative procedures related to taxes and duties;

(c) interest and costs relating to the claims for which mutual assistance may be requested in accordance with paragraph 1 or point (a) or (b) of this paragraph.

3. This Directive shall not apply to:

(a) compulsory social security contributions payable to the Member State or a subdivision of the Member State, or to social security institutions established under public law;

(b) fees not referred to in paragraph 2;

(c) dues of a contractual nature, such as consideration for public utilities;

(d) criminal penalties imposed on the basis of a public prosecution or other criminal penalties not covered by paragraph 2(a).

EU-NO Agreement

Article 2

Scope

1. This Agreement lays down rules and procedures for cooperation:

(a) to exchange any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, and combat VAT fraud;

(b) for the recovery of:

(i) claims relating to VAT;

(ii) administrative penalties, fines, fees and surcharges relating to the claims referred to in point (i) imposed by the administrative authorities that are competent to levy the VAT or carry out administrative enquiries with regard to it, or confirmed by administrative or judicial bodies at the request of those administrative authorities;

(iii) interest and costs relating to the claims referred to in points (i) and (ii).

2. This Agreement shall not affect the application of rules on administratie cooperation and combating fraud and assistance for the recovery of claims in the field of VAT between Member States of the Union.

3. This Agreement shall not affect the application of the rules on mutual assistance in criminal matters.

[1] M. Rosado Bayon, Member of the Spanish CLO; L. Vandenberghe, Head of sector Tax enforcement, DG TAXUD, European Commission.

EU Directive	EU-NO Agreement
Article 3	*Article 3*
Definitions	**Definitions**
For the purpose of this Directive:	For the purpose of this Agreement, the following definitions shall apply:
	(a) 'VAT' means value added tax pursuant to Council Directive 2006/112/EC on the common system of value added tax for the Union and value added tax pursuant to Norwegian Act of 19 June 2009 No 58 relating to value added tax for Norway;
	(b) 'state' means a Member State of the Union or Norway;
	(c) 'states' means Member States of the Union and Norway;
	(d) 'third country' means a country that is neither a Member State of the Union nor Norway;
	(e) 'competent authority' means the authority designated pursuant to Article 4(1);
	(f) 'central liaison office' means the office designated pursuant to Article 4(2) with the principal responsibility for contacts for the application of Title II or Title III;
	(g) 'liaison department' means any office other than the central liaison office designated as such pursuant to Article 4(3) to request or grant mutual assistance under Title II or Title III;
	(…)
(a) 'applicant authority' means a central liaison office, a liaison office or a liaison department of a Member State which makes a request for assistance concerning a claim referred to in Article 2;	(j) 'applicant authority' means a central liaison office or a liaison department of a state which makes a request under Title III;
(b) 'requested authority' means a central liaison office, a liaison office or a liaison department of a Member State to which a request for assistance is made;	(k) 'requested authority' means the central liaison office, the liaison department (…);
(c) 'person' means:	(l) 'person' means:
(i) a natural person	(i) a natural person
(ii) a legal person;	(ii) a legal person;
(iii) where the legislation in force so provides, an association of persons recognised as having the capacity to perform legal acts but lacking the legal status of a legal person; or	(iii) where the legislation in force so provides, an association of persons recognised as having the capacity to perform legal acts but lacking the legal status of a legal person; or
(iv) any other legal arrangement of whatever nature and form, which has legal personality or not, owning or managing assets which, including income derived therefrom, are subject to any of the taxes covered by this Directive;	(iv) any other legal arrangement of whatever nature and form, which has legal personality or not, subject to VAT or liable for the payment of the claims referred to in Article 2(1)(b);

EU Directive	EU-NO Agreement
	(m) 'Joint Committee' means the committee responsible for ensuring the proper functioning and implementation of this Agreement pursuant to Article 41;
	(…)
(d) 'by electronic means' means using electronic equipment for the processing, including digital compression, and storage of data, and employing wires, radio transmission, optical technologies or other electromagnetic means;	(r) 'by electronic means' means using electronic equipment for the processing (including digital compression) and storage of data, and employing wires, radio transmission, optical technologies or other electromagnetic means;
(e) 'CCN/CSI network' means the common platform based on the common communication network ('CCN') developed by the Union for all transmissions by electronic means between competent authorities in the area of customs and taxation;	(s) 'CCN/CSI network' means the common platform based on the common communication network ('CCN') and common system interface ('CSI'), developed by the Union to ensure all transmissions by electronic means between competent authorities in the area of taxation;
	(…)
Article 4	*Article 4*
Organisation	**Organisation**
	→ see paragraph 8
1. Each Member State shall inform the Commission by 20 May 2010 of its competent authority or authorities (hereinafter respectively referred to as the 'competent authority') for the purpose of this Directive and shall inform the Commission without delay of any changes thereof. The Commission shall make the information received available to the other Member States and publish a list of the competent authorities of the Member States in the *Official Journal of the European Union*.	1. Each state shall designate a competent authority responsible for the application of this Agreement.
2. The competent authority shall designate a central liaison office which shall have principal responsibility for contacts with other Member States in the field of mutual assistance covered by this Directive. The central liaison office may also be designated as responsible for contacts with the Commission.	2. Each state shall designate: (…) (b) one central liaison office with the principal responsibility for the application of Title III of this Agreement.
3. The competent authority of each Member State may designate liaison offices which shall be responsible for contacts with other Member States concerning mutual assistance with regard to one or more specific types or categories of taxes and duties referred to in Article 2.	
4. The competent authority of each Member State may designate offices, other than the central liaison office or liaison offices, as liaison departments. Liaison departments shall request or grant mutual assistance under this Directive in relation to their specific territorial or operational competences.	3. Each competent authority may designate, directly or by delegation: (…) (b) liaison departments to request or grant mutual assistance under Title III of this Agreement, in relation to their specific territorial or operational competences.
	(…)

EU Directive	EU-NO Agreement
5. Where a liaison office or a liaison department receives a request for mutual assistance requiring action outside the competence assigned to it, it shall forward the request without delay to the competent office or department, if known, or to the central liaison office, and inorm the applicant authority thereof.	→ see paragraph 7
6. The competent authority of each Member State shall inform the Commission of its central liaison office and any liaison offices or liaison departments which it has designated. The Commission shall make the information received available to the Member States.	5. The central liaison offices shall keep the list of liaison departments (…) up-to-date and make it available to the other central liaison offices.
7. Every communication shall be sent by or on behalf or, on a case by case basis, with the agreement of the central laision office, which shall ensure effectiveness of communication.	
	6. Where a liaison department (…) sends or receives a request for assistance under this Agreement, it shall inform its central liaison office thereof.
	7. Where a central liaison office, a liaison department or (…) receives a request for mutual assistance requiring action outside its competence, it shall forward the request without delay to the competent central liaison office or liaison department, and shall inform the requesting or applicant authority thereof. (…)
see paragraph 1 ←	8. Each state shall inform the European Commission of its competent authority for the purposes of this Agreement within one month of the signature of this Agreement and of any change thereof without delay. The European Commission keeps the list of competent authorities updated and makes it available to the Joint Committee.
	(…)
	→ Art. 6 (Confidentiality and protection of personal data): see below
	(…)

EU Directive

CHAPTER II

EXCHANGE OF INFORMATION

Article 5

Request for information

1. At the request of the applicant authority, the requested authority shall provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims as referred to in Article 2.

   For the purpose of providing that information, the requested authority shall arrange for the carrying-out of any administrative enquiries necessary to obtain it.

2. The requested authority shall not be obliged to supply information:

   (a) which it would not be able to obtain for the purpose of recovering similar claims arising in the requested Member State;

   (b) which would disclose any commercial, industrial or professional secrets;

   (c) the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the requested Member State.

3. Paragraph 2 shall in no case be construed as permitting a requested authority of a Member State to decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

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

Article 6

Exchange of information without prior request

Where a refund of taxes or duties, other than value-added tax, relates to a person established or resident in another Member State, the Member State from which the refund is to be made may inform the Member State of establishment or residence of the upcoming refund.

EU-NO Agreement

TITLE III

RECOVERY ASSISTANCE

CHAPTER 1

Exchange of information

Article 22

Request for information

1. At the request of the applicant authority, the requested authority shall provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims as referred to in Article 2(1)(b).

   For the purpose of providing that information, the requested authority shall arrange for the carrying-out of any administrative enquiries necessary to obtain it.

2. The requested authority shall not be obliged to supply information:

   (a) which it would not be able to obtain for the purpose of recovering similar claims on its own behalf;

   (b) which would disclose any commercial, industrial or professional secrets;

   (c) the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the state of the requested authority.

3. Paragraph 2 shall in no case be construed as permitting a requested authority to decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

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

Article 23

Exchange of information without prior request

Where a refund of taxes or duties relates to a person established or resident in another state in whose territory this Agreement applies, the state from which the refund is to be made may inform the state of establishment or residence of the pending refund.

EU Directive

Article 7

Presence in administrative offices and participation in administrative enquiries

1. By agreement between the applicant authority and the requested authority and in accordance with the arrangements laid down by the requested authority, officials authorised by the applicant authority may, with a view to promoting mutual assistance provided for in this Directive:
   (a) be present in the offices where the administrative authorities of the requested Member State carry out their duties;
   (b) be present during administrative enquiries carried out in the territory of the requested Member State;
   (c) assist the competent officials of the requested Member State during court proceedings in that Member State.
2. In so far as it is permitted under the legislation in force in the requested Member State, the agreement referred to in paragraph 1(b) may provide that officials of the applicant Member State may interview individuals and examine records.
3. Officials authorised by the applicant authority who make use of the possibilities offered by paragraphs 1 and 2 shall at all times be able to produce written authority stating their identity and their official capacity.

EU-NO Agreement

Article 24

Presence in administrative offices and participation in administrative enquiries

1. By agreement between the applicant authority and the requested authority, and in accordance with the arrangements laid down by the latter, officials authorised by the applicant authority may, with a view to promoting mutual assistance provided for in this Title:
   (a) be present in the offices where officials of the requested state carry out their duties;
   (b) be present during administrative enquiries carried out in the territory of the requested state;
   (c) assist the competent officials of the requested state during court proceedings in that state.
2. In so far as it is permitted under applicable legislation in the requested state, the agreement referred to in paragraph 1(b) may provide that officials of the applicant authority may interview individuals and examine records.
3. Officials authorised by the applicant authority who make use of the possibility offered by paragraphs 1 and 2 must at all times be able to produce written authority stating their identity and their official capacity.

EU Directive

CHAPTER III

ASSISTANCE FOR THE NOTIFICATION OF DOCUMENTS

Article 8

Request for notification of certain documents relating to claims

1. At the request of the applicant authority, the requested authority shall notify to the addressee all documents, including those of a judicial nature, which emanate from the applicant Member State and which relate to a claim as referred to in Article 2 or to its recovery.

   The request for notification shall be accompanied by a standard form containing at least the following information:
   (a) name, address and other data relevant to the identification of the addressee;
   (b) the purpose of the notification and the period within which notification should be effected;
   (c) a description of the attached document and the nature and amount of the claim concerned;
   (d) name, address and other contact details regarding:
      (i) the office responsible with regard to the attached document, and, if different;
      (ii) the office where further information can be obtained concerning the notified document or concerning the possibilities to contest the payment obligation.
2. The applicant authority shall make a request for notification pursuant to this article only when it is unable to notify in accordance with the rules governing the notification of the document concerned in the applicant Member State, or when such notification would give rise to disproportionate difficulties.
3. The requested authority shall forthwith inform the applicant authority of any action taken on its request for notification and, more especially, of the date of notification of the document to the addressee.

Article 9

Means of notification

1. The requested authority shall ensure that notification in the requested Member State is effected in accordance with the national laws, regulations and administrative practices in force in the requested Member State.
2. Paragraph 1 shall be without prejudice to any other form of notification made by a competent authority of the applicant Member State in accordance with the rules in force in that Member State.

   A competent authority established in the applicant Member State may notify any document directly by registered mail or electronically to a person within the territory of another Member State.

EU-NO Agreement

CHAPTER 2

Assistance for the notification of documents

Article 25

Request for notification of certain documents relating to claims

1. At the request of the applicant authority, the requested authority shall notify to the addressee all documents, including those of a judicial nature, which emanate from the state of the applicant authority and which relate to a claim as referred to in Article 2(1)(b) or to its recovery.

   The request for notification shall be accompanied by a standard form containing at least the following information:
   (a) name, address and other data relevant to the identification of the addressee;
   (b) the purpose of the notification and the period within which notification should be effected;
   (c) a description of the attached document and the nature and amount of the claim concerned;
   (d) name, address and other contact details regarding:
      (i) the office responsible with regard to the attached document; and, if different,
      (ii) the office where further information can be obtained concerning the notified document or concerning the possibilities to contest the payment obligation.
2. The applicant authority shall make a request for notification pursuant to this article only when it is unable to notify in accordance with the rules governing the notification of the document concerned in its own state or when such notification would give rise to disproportionate difficulties.
3. The requested authority shall forthwith inform the applicant authority of any action taken on its request for notification and in particular of the date of notification of the document to the addressee.

Article 26

Means of notification

1. The requested authority shall ensure that notification in the requested state is effected in accordance with the applicable national laws, regulations and administrative practices.
2. Paragraph 1 shall be without prejudice to any other form of notification made by a competent authority of the applicant state in accordance with the rules in force in that state.

   A competent authority established in the applicant state may notify any document directly by registered mail or electronically to a person in another state in whose territory this Agreement applies.

EU Directive	EU-NO Agreement
CHAPTER IV **RECOVERY OR PRECAUTIONARY MEASURES**	*CHAPTER 3* **Recovery or precautionary measures**
Article 10 **Request for recovery**	Article 27 **Request for recovery**
1. At the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the applicant Member State. 2. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority, it shall forward it to the requested authority.	1. At the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the state of the applicant authority. 2. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority, it shall forward it to the requested authority.
Article 11 **Conditions governing a request for recovery**	Article 28 **Conditions governing a request for recovery**
1. The applicant authority may not make a request for recovery if and as long as the claim and/or the instrument permitting its enforcement in the applicant Member State are contested in that Member State, except in cases where the third subparagraph of Article 14(4) applies. 2. Before the applicant authority makes a request for recovery, appropriate recovery procedures available in the applicant Member State shall be applied, except in the following situations: (a) where it is obvious that there are no assets for recovery in the applicant Member State or that such procedures will not result in the payment in full of the claim, and the applicant authority has specific information indicating that the person concerned has assets in the requested Member State; (b) where recourse to such procedures in the applicant Member State would give rise to disproportionate difficulty.	1. The applicant authority may not make a request for recovery if and as long as the claim and/or the instrument permitting its enforcement are contested in the state of the applicant authority, except in cases where the third subparagraph of Article 31(4) applies. 2. Before the applicant authority makes a request for recovery, appropriate recovery procedures available in the state of the applicant authority shall be applied, except in the following situations: (a) where it is obvious that there are no assets for recovery in that state or that such procedures will not result in the payment in full of the claim, and the applicant authority has specific information indicating that the person concerned has assets in the state of the requested authority; (b) where recourse to such procedures in the state of the applicant authority would give rise to disproportionate difficulty.
Article 12 **Instrument permitting enforcement in the requested Member State and other accompanying documents**	Article 29 **Instrument permitting enforcement in the state of the requested authority and other accompanying documents**
1. Any request for recovery shall be accompanied by a uniform instrument permitting enforcement in the requested Member State. This uniform instrument permitting enforcement in the requested Member State shall reflect the substantial contents of the initial instrument permitting enforcement, and constitute the sole basis for the recovery and precautionary measures taken in the requested Member State. It shall not be subject to any act of recognition, supplementing or replacement in that Member State.	1. Any request for recovery shall be accompanied by a uniform instrument permitting enforcement in the state of the requested authority. This uniform instrument permitting enforcement shall reflect the substantial contents of the initial instrument permitting enforcement in the state of the applicant authority, and constitute the sole basis for recovery and precautionary measures in the state of the requested authority. No act of recognition, supplementing or replacement shall be required in that state.

EU Directive	EU-NO Agreement
The uniform instrument permitting enforcement shall contain at least the following information:	The uniform instrument permitting enforcement shall contain at least the following information:
(a) information relevant to the identification of the initial instrument permitting enforcement, a description of the claim, including its nature, the period covered by the claim, any dates of relevance to the enforcement process, and the amount of the claim and its different components such as principal, interest accrued, etc.;	(a) information relevant to the identification of the initial instrument permitting enforcement, a description of the claim, including its nature, the period covered by the claim, any dates of relevance to the enforcement process, and the amount of the claim and its different components such as principal, interest accrued, etc.;
(b) name and other data relevant to the identification of the debtor;	(b) name and other data relevant to the identification of the debtor;
(c) name, address and other contact details regarding:	(c) name, address and other contact details regarding:
(i) the office responsible for the assessment of the claim, and, if different;	(i) the office responsible for the assessment of the claim; and, if different,
(ii) the office where further information can be obtained concerning the claim or the possibilities for contesting the payment obligation.	(ii) the office where further information can be obtained concerning the claim or the possibilities for contesting the payment obligation.
2. The request for recovery of a claim may be accompanied by other documents relating to the claim issued in the applicant Member State.	2. The request for recovery of a claim may be accompanied by other documents relating to the claim issued by the state of the applicant authority.

EU Directive	EU-NO Agreement
Article 13	Article 30
Execution of the request for recovery	**Execution of the request for recovery**
1. For the purpose of the recovery in the requested Member State, any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State, except where otherwise provided for in this Directive. The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State applying to claims concerning the same or, in the absence of the same, a similar tax or duty, except where otherwise provided for in this Directive.	1. For the purpose of the recovery in the state of the requested authority, any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of that state, except where otherwise provided for in this Agreement. The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of that state applying to the same claims, except where otherwise provided for in this Agreement.
If the requested authority considers that the same or similar taxes or duties are not levied on its territory, it shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State which apply to claims concerning the tax levied on personal income, except where otherwise provided for in this Directive.	
The requested Member State shall not be obliged to grant other Member States' claims preferences accorded to similar claims arising in that Member State, except where otherwise agreed between the Member States concerned or provided in the law of the requested Member State. A Member State which grants preferences to another Member State's claims may not refuse to grant the same preferences to the same or similar claims of other Member States on the same conditions.	The state of the requested authority shall not be obliged to grant to claims whose recovery is requested preferences accorded to similar claims arising in the state of the requested authority, except where otherwise agreed or provided under the law of that state. A state which, in the execution of this Agreement, grants preferences to claims arising in another state may not refuse to grant the same preferences to the same or similar claims of other Member States of the Union on the same conditions.
The requested Member State shall recover the claim in its own currency.	The state of the requested authority shall recover the claim in its own currency.
2. The requested authority shall inform the applicant authority with due diligence of any action it has taken on the request for recovery.	2. The requested authority shall inform the applicant authority with due diligence of any action it has taken on the request for recovery.
3. From the date on which the recovery request is received, the requested authority shall charge interest for late payment in accordance with the laws, regulations and administrative provisions in force in the requested Member State.	3. From the date on which the recovery request is received, the requested authority shall charge interest for late payment in accordance with the laws, regulations and administrative provisions applicable to its own claims.
4. The requested authority may, where the laws, regulations or administrative provisions in force in the requested Member State so permit, allow the debtor time to pay or authorise payment by instalment and it may charge interest in that respect. It shall subsequently inform the applicant authority of any such decision.	4. The requested authority may, where the applicable laws, regulations or administrative provisions so permit, allow the debtor time to pay or authorise payment by instalment and it may charge interest in that respect. It shall inform the applicant authority of any such decision.
5. Without prejudice to Article 20(1), the requested authority shall remit to the applicant authority the amounts recovered with respect to the claim and the interest referred to in paragraphs 3 and 4 of this Article.	5. Without prejudice to Article 37(1), the requested authority shall remit to the applicant authority the amounts recovered with respect to the claim and the interest referred to in paragraphs 3 and 4 of this Article.

EU Directive	EU-NO Agreement
Article 14 **Disputes**	Article 31 **Disputes**
1. Disputes concerning the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State and disputes concerning the validity of a notification made by a competent authority of the applicant Member State shall fall within the competence of the competent bodies of the applicant Member State. If, in the course of the recovery procedure, the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State is contested by an interested party, the requested authority shall inform that party that such an action must be brought by the latter before the competent body of the applicant Member State in accordance with the laws in force there.	1. Disputes concerning the claim, the initial instrument permitting enforcement in the state of the applicant authority or the uniform instrument permitting enforcement in the state of the requested authority and disputes concerning the validity of a notification made by an applicant authority shall fall within the competence of the competent bodies of the state of the applicant authority. If, in the course of the recovery procedure, the claim, the initial instrument permitting enforcement in the state of the applicant authority or the uniform instrument permitting enforcement in the state of the requested authority is contested by an interested party, the requested authority shall inform that party that such an action must be brought by the latter before the competent body of the state of the applicant authority in accordance with the laws in force there.
2. Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by a competent authority of the requested Member State shall be brought before the competent body of that Member State in accordance with its laws and regulations.	2. Disputes concerning enforcement measures taken in the state of the requested authority or concerning the validity of a notification made by an authority of the requested state shall be brought before the competent body of that state in accordance with its laws and regulations.
3. Where an action as referred to in paragraph 1 has been brought before the competent body of the applicant Member State, the applicant authority shall inform the requested authority thereof and shall indicate the extent to which the claim is not contested.	3. Where an action as referred to in paragraph 1 has been brought, the applicant authority shall inform the requested authority thereof and shall indicate the extent to which the claim is not contested.
4. As soon as the requested authority has received the information referred to in paragraph 3, either from the applicant authority or from the interested party, it shall suspend the enforcement procedure, as far as the contested part of the claim is concerned, pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the third subparagraph of this paragraph. At the request of the applicant authority, or where otherwise deemed to be necessary by the requested authority, and without prejudice to Article 16, the requested authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the requested Member State allow such action. The applicant authority may, in accordance with the laws, regulations and administrative practices in force in the applicant Member State, ask the requested authority to recover a contested claim or the contested part of a claim, in so far as the relevant laws, regulations and administrative prac-	4. As soon as the requested authority has received the information referred to in paragraph 3, either from the applicant authority or from the interested party, it shall suspend the enforcement procedure, as far as the contested part of the claim is concerned, pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the third subparagraph of this paragraph. At the request of the applicant authority, or where otherwise deemed to be necessary by the requested authority, and without prejudice to Article 33, the requested authority may take precautionary measures to guarantee recovery in so far as the applicable laws or regulations allow. The applicant authority may, in accordance with the laws, regulations and administrative practices in force in its state, ask the requested authority to recover a contested claim or the contested part of a claim, in so far as the laws, regulations and administrative practices in force in the state of the

EU Directive	EU-NO Agreement
tices in force in the requested Member State allow such action. Any such request shall be reasoned. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for reimbursing any sums recovered, together with any compensation due, in accordance with the laws in force in the requested Member State.	requested authority allow. Any such request shall be reasoned. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for reimbursing any sums recovered, together with any compensation due, in accordance with the laws in force in the state of the requested authority.
If a mutual agreement procedure has been initiated by the competent authorities of the applicant Member State or the requested Member State, and the outcome of the procedure may affect the claim in respect of which assistance has been requested, the recovery measures shall be suspended or stopped until that procedure has been terminated, unless it concerns a case of immediate urgency because of fraud or insolvency. If the recovery measures are suspended or stopped, the second subparagraph shall apply.	If a mutual agreement procedure has been initiated between the states of the applicant and requested authorities, and the outcome of the procedure may affect the claim in respect of which assistance has been requested, the recovery measures shall be suspended or stopped until that procedure has been terminated, unless it concerns a case of immediate urgency because of fraud or insolvency. If the recovery measures are suspended or stopped, the second subparagraph shall apply.
Article 15	Article 32
Amendment or withdrawal of the request for recovery assistance	**Amendment or withdrawal of the request for recovery assistance**
1. The applicant authority shall inform the requested authority immediately of any subsequent amendment to its request for recovery or of the withdrawal of its request, indicating the reasons for amendment or withdrawal.	1. The applicant authority shall inform the requested authority immediately of any subsequent amendment to its request for recovery or of the withdrawal of its request, indicating the reasons for amendment or withdrawal.
2. If the amendment of the request is caused by a decision of the competent body referred to in Article 14(1), the applicant authority shall communicate this decision together with a revised uniform instrument permitting enforcement in the requested Member State. The requested authority shall then proceed with further recovery measures on the basis of the revised instrument.	2. If the amendment of the request is caused by a decision of the competent body referred to in Article 31(1), the applicant authority shall communicate this decision together with a revised uniform instrument permitting enforcement in the state of the requested authority. The requested authority shall then proceed with further recovery measures on the basis of the revised instrument.
Recovery or precautionary measures already taken on the basis of the original uniform instrument permitting enforcement in the requested Member State may be continued on the basis of the revised instrument, unless the amendment of the request is due to invalidity of the initial instrument permitting enforcement in the applicant Member State or the original uniform instrument permitting enforcement in the requested Member State.	Recovery or precautionary measures already taken on the basis of the original uniform instrument permitting enforcement in the state of the requested authority may be continued on the basis of the revised instrument, unless the amendment of the request is due to invalidity of the initial instrument permitting enforcement in the state of the applicant authority or the original uniform instrument permitting enforcement in the state of the requested authority.
Articles 12 and 14 shall apply in relation to the revised instrument.	Articles 29 and 31 shall apply in relation to the revised instrument.

EU Directive	EU-NO Agreement
Article 16	Article 33
Request for precautionary measures	**Request for precautionary measures**
1. At the request of the applicant authority, the requested authority shall take precautionary measures, if allowed by its national law and in accordance with its administrative practices, to ensure recovery where a claim or the instrument permitting enforcement in the applicant Member State is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the applicant Member State, in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant Member State. The document drawn up for permitting precautionary measures in the applicant Member State and relating to the claim for which mutual assistance is requested, if any, shall be attached to the request for precautionary measures in the requested Member State. This document shall not be subject to any act of recognition, supplementing or replacement in the requested Member State. 2. The request for precautionary measures may be accompanied by other documents relating to the claim, issued in the applicant Member State.	1. At the request of the applicant authority, the requested authority shall take precautionary measures, if allowed by its national law and in accordance with its administrative practices, to ensure recovery where a claim or the instrument permitting enforcement in the state of the applicant authority is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the state of the applicant authority, in so far as precautionary measures are possible in a similar situation under the law and administrative practices of the state of the applicant authority. The document drawn up for permitting precautionary measures in the state of the applicant authority and relating to the claim for which mutual assistance is requested, if any, shall be attached to the request for precautionary measures in the state of the requested authority. This document shall not be subject to any act of recognition, supplementing or replacement in the state of the requested authority. 2. The request for precautionary measures may be accompanied by other documents relating to the claim.
Article 17	Article 34
Rules governing the request for precautionary measures	**Rules governing the request for precautionary measures**
In order to give effect to Article 16, Articles 10(2), 13(1) and (2), 14, and 15 shall apply *mutatis mutandis*.	In order to give effect to Article 33, Articles 27(2), 30(1) and (2), 31 and 32 shall apply *mutatis mutandis*.

EU Directive

Article 18

Limits to the requested authority's obligations

1. The requested authority shall not be obliged to grant the assistance provided for in Articles 10 to 16 if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the requested Member State, in so far as the laws, regulations and administrative practices in force in that Member State allow such exception for national claims.
2. The requested authority shall not be obliged to grant the assistance provided for in Articles 5 and 7 to 16, if the initial request for assistance pursuant to Article 5, 7, 8, 10 or 16 is made in respect of claims which are more than 5 years old, dating from the due date of the claim in the applicant Member State to the date of the initial request for assistance.

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

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

   However, in those cases the requested authority shall not be obliged to grant the assistance in respect of claims which are more than 10 years old, dating from the due date of the claim in the applicant Member State.
3. A Member State shall not be obliged to grant assistance if the total amount of the claims covered by this Directive, for which assistance is requested, is less than EUR 1 500.
4. The requested authority shall inform the applicant authority of the grounds for refusing a request for assistance.

EU-NO Agreement

Article 35

Limits to the requested authority's obligations

1. The requested authority shall not be obliged to grant the assistance provided for in Articles 27 to 33 if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the state of the requested authority, in so far as the laws, regulations and administrative practices in force in that state allow such exception for national claims.
2. The requested authority shall not be obliged to grant the assistance provided for in Articles 22 and 24 to 33 if the initial request for assistance pursuant to Article 22, 24, 25, 27 or 33 is made in respect of claims which are more than 5 years old, dating from the due date of the claim in the state of the applicant authority to the date of the initial request for assistance.

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

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

   However, in those cases the requested authority shall not be obliged to grant assistance in respect of claims which are more than 10 years old, dating from the due date of the claim in the state of the applicant authority.
3. A state shall not be obliged to grant assistance if the total amount of the claims covered by this Agreement, for which assistance is requested, is less than EUR 1 500.
4. The requested authority shall inform the applicant authority of the grounds for refusing a request for assistance.

EU Directive	EU-NO Agreement
Article 19 **Questions on limitation**	Article 36 **Questions on limitation**
1. Questions concerning periods of limitation shall be governed solely by the laws in force in the applicant Member State.	1. Questions concerning periods of limitation shall be governed solely by the laws in force in the state of the applicant authority.
2. In relation to the suspension, interruption or prolongation of periods of limitation, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which have the effect of suspending, interrupting or prolonging the period of limitation according to the laws in force in the requested Member State shall be deemed to have the same effect in the applicant Member State, on condition that the corresponding effect is provided for under the laws in force in the applicant Member State. If suspension, interruption or prolongation of the period of limitation is not possible under the laws in force in the requested Member State, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which, if they had been carried out by or on behalf of the applicant authority in its Member State, would have had the effect of suspending, interrupting or prolonging the period of limitation according to the laws in force in the applicant Member State shall be deemed to have been taken in the latter State, in so far as that effect is concerned. The first and second subparagraphs shall not affect the right of the competent authorities in the applicant Member State to take measures to suspend, interrupt or prolong the period of limitation in accordance with the laws in force in that Member State.	2. In relation to the suspension, interruption or prolongation of periods of limitation, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which have the effect of suspending, interrupting or prolonging the period of limitation according to the laws in force in the state of the requested authority shall have the same effect in the state of the applicant authority, on condition that the corresponding effect is provided for under the law of the latter state. If suspension, interruption or prolongation of the period of limitation is not possible under the laws in force in the state of the requested authority, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which, if they had been carried out by or on behalf of the applicant authority in its own state, would have had the effect of suspending, interrupting or prolonging the period of limitation according to the laws of that state shall be deemed to have been taken in the latter state, in so far as that effect is concerned. The first and second subparagraphs shall not affect the right of the state of the applicant authority to take measures which have the effect of suspending, interrupting or prolonging the period of limitation in accordance with the laws in force in that state.
3. The applicant authority and the requested authority shall inform each other of any action which interrupts, suspends or prolongs the limitation period of the claim for which the recovery or precautionary measures were requested, or which may have this effect.	3. The applicant authority and the requested authority shall inform each other of any action which interrupts, suspends or prolongs the limitation period of the claim for which the recovery or precautionary measures were requested, or which may have this effect.
Article 20 **Costs**	Article 37 **Costs**
1. In addition to the amounts referred to in Article 13(5), the requested authority shall seek to recover from the person concerned and retain the costs linked to the recovery that it incurred, in accordance with the laws and regulations of the requested Member State.	1. In addition to the amounts referred to in Article 30(5), the requested authority shall seek to recover from the person concerned and retain the costs linked to the recovery that it incurred, in accordance with the laws and regulations of its state.
2. Member States shall renounce all claims on each other for the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Directive.	2. The states shall renounce all claims on each other for the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Agreement.

EU Directive	EU-NO Agreement
However, where recovery creates a specific problem, concerns a very large amount in costs or relates to organised crime, the applicant and requested authorities may agree reimbursement arrangements specific to the cases in question.	However, where recovery creates a specific problem, concerns a very large amount in costs or relates to organised crime, the applicant and requested authorities may agree reimbursement arrangements specific to the cases in question.
3. Notwithstanding paragraph 2, the applicant Member State shall remain liable to the requested Member State for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument permitting enforcement and/or precautionary measures issued by the applicant authority are concerned.	3. Notwithstanding paragraph 2, the state of the applicant authority shall be liable to the state of the requested authority for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument permitting enforcement and/or precautionary measures issued by the applicant authority are concerned.
CHAPTER V **GENERAL RULES GOVERNING ALL TYPES OF ASSISTANCE REQUESTS**	*CHAPTER 4* **General rules governing all types of recovery assistance requests**
	→ Art. 38 (use of languages): see below
	(…)
Article 21 **Standard forms and means of communication**	Article 40 **Standard forms and means of communication**
1. Requests pursuant to Article 5(1) for information, requests pursuant to Article 8(1) for notification, requests pursuant to Article 10(1) for recovery or requests pursuant to Article 16(1) for precautionary measures shall be sent by electronic means, using a standard form, unless this is impracticable for technical reasons. As far as possible, these forms shall also be used for any further communication with regard to the request.	1. Requests pursuant to Article 22(1) for information, requests pursuant to Article 25(1) for notification, requests pursuant to Article 27(1) for recovery or requests pursuant to Article 33(1) for precautionary measures and communication of statistical data pursuant to Article 39 shall be sent by electronic means, using a standard form, unless this is impracticable for technical reasons. As far as possible, these forms shall also be used for any further communication with regard to the request.
The uniform instrument permitting enforcement in the requested Member State, the document permitting precautionary measures in the applicant Member State and the other documents referred to in Articles 12 and 16 shall also be sent by electronic means, unless this is impracticable for technical reasons.	The uniform instrument permitting enforcement in the state of the requested authority, the document permitting precautionary measures in the state of the applicant authority and the other documents referred to in Articles 29 and 33 shall also be sent by electronic means, unless this is impracticable for technical reasons.
Where appropriate, the standard forms may be accompanied by reports, statements and any other documents, or certified true copies or extracts thereof, which shall also be sent by electronic means, unless this is impracticable for technical reasons.	Where appropriate, the standard forms may be accompanied by reports, statements and any other documents, or certified true copies or extracts thereof, which shall also be sent by electronic means, unless this is impracticable for technical reasons.
Standard forms and communication by electronic means may also be used for the exchange of information pursuant to Article 6.	Standard forms and communication by electronic means may also be used for the exchange of information pursuant to Article 23.
2. Paragraph 1 shall not apply to the information and documentation obtained through the presence in administrative offices in another Member State or through the participation in administrative enquiries in another Member State, in accordance with Article 7.	2. Paragraph 1 shall not apply to the information and documentation obtained through the presence of officials in administrative offices in another state or through participation in administrative enquiries in another state, in accordance with Article 24.

EU Directive	EU-NO Agreement
3. If communication is not made by electronic means or with use of standard forms, this shall not affect the validity of the information obtained or of the measures taken in the execution of a request for assistance.	3. If communication is not made by electronic means or with use of standard forms, this shall not affect the validity of the information obtained or of the measures taken in the execution of a request for assistance.
See Article 24(3) of the Directive ←	4. The electronic communication network and the standard forms adopted for the implementation of this Agreement may also be used for recovery assistance regarding other claims than the claims referred to in Article 2(1)(b), if such recovery assistance is possible under other bilateral or multilateral legally binding instruments on administrative cooperation between the states.
	5. As long and in so far as no detailed rules are adopted by the Joint Committee for the implementation of this Title, the competent authorities shall make use of the rules, including the standard forms, currently adopted for the implementation of Council Directive 2010/24/EU, whereby the term "Member State" will be interpreted as including Norway. Notwithstanding the previous subparagraph, the state of the requested authority shall use the euro currency for the transfer of the recovered amounts to the state of the applicant authority, unless otherwise agreed between the states concerned. States where the official currency is not the euro shall agree with Norway on the currency for the transfer of the recovered amounts and notify the Joint Committee thereof.
Article 22 **Use of languages**	Article 38 **Use of languages**
1. All requests for assistance, standard forms for notification and uniform instruments permitting enforcement in the requested Member States shall be sent in, or shall be accompanied by a translation into, the official language, or one of the official languages, of the requested Member State. The fact that certain parts thereof are written in a language other than the official language, or one of the official languages, of the requested Member State, shall not affect their validity or the validity of the procedure, in so far as that other language is one agreed between the Member States concerned.	1. All requests for assistance, standard forms for notification and uniform instruments permitting enforcement in the state of the requested authority shall be sent in, or shall be accompanied by a translation into, the official language, or one of the official languages, of the state of the requested authority. The fact that certain parts thereof are written in a language other than the official language, or one of the official languages, of that state, shall not affect their validity or the validity of the procedure, in so far as that other language is one agreed between the states concerned.
2. The documents for which notification is requested pursuant to Article 8 may be sent to the requested authority in an official language of the applicant Member State.	2. The documents for which notification is requested pursuant to Article 25 may be sent to the requested authority in an official language of the state of the applicant authority.
3. Where a request is accompanied by documents other than those referred to in paragraphs 1 and 2, the requested authority may, where necessary, require from the applicant authority a translation of such documents into the official language, or one of the official languages of the requested Member State, or into any other language bilaterally agreed between the Member States concerned.	3. Where a request is accompanied by documents other than those referred to in paragraphs 1 and 2, the requested authority may, where necessary, require from the applicant authority a translation of such documents into the official language, or one of the official languages of the state of the requested authority, or into any other language agreed between the states concerned.

EU Directive	EU-NO Agreement
Article 23	Article 6
Disclosure of information and documents	**Confidentiality and protection of personal data**
1. Information communicated in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it.	1. Any information obtained by a state under this Agreement shall be treated as confidential and protected in the same manner as information obtained under its domestic law and, to the extent necessary for the protection of personal data, in accordance with Directive 95/46/EC of the European Parliament and of the Council and safeguards which may be specified by the state supplying the information as required under its law.
Such information may be used for the purpose of applying enforcement or precautionary measures with regard to claims covered by this Directive. It may also be used for assessment and enforcement of compulsory social security contributions.	2. Such information may be disclosed to persons or authorities (including courts and administrative or supervisory bodies) concerned with the application of VAT laws and for the purpose of a correct assessment of VAT as well as for the purpose of applying enforcement including recovery or precautionary measures with regard to VAT claims.
2. Persons duly accredited by the Security Accreditation Authority of the European Commission may have access to this information only in so far as it is necessary for care, maintenance and development of the CCN network.	→ See paragraph 10 of this Article
	3. The information referred to in paragraph 1 may also be used for assessment and enforcement, including recovery of other taxes and compulsory social security contributions. If the information exchanged reveals or helps to prove the existence of breaches of the tax law, it may also be used for imposing administrative or criminal sanctions. Only the persons or authorities mentioned above may use the information and then only for purposes spelled out in the preceding sentences of this paragraph. They may disclose it in public court proceedings or in judicial decisions.
3. The Member State providing the information shall permit its use for purposes other than those referred to in paragraph 1 in the Member State receiving the information, if, under the legislation of the Member State providing the information, the information may be used for similar purposes.	4. Notwithstanding paragraphs 1 and 2, the state providing the information shall, on the basis of a reasoned request, permit its use for purposes other than those referred to in Article 2(1) by the state which receives the information if, under the legislation of the state providing the information, the information may be used for similar purposes. The requested authority shall accept or refuse any such request within one month.
See paragraph 6 of this Article ←	5. Reports, statements and any other documents, or certified true copies or extracts thereof, obtained by a state under the assistance provided by this Agreement may be invoked as evidence in that state on the same basis as similar documents provided by another authority of that state.

EU Directive	EU-NO Agreement
4. Where the applicant or requested authority considers that information obtained pursuant to this Directive is likely to be useful for the purposes referred to in paragraph 1 to a third Member State, it may transmit that information to that third Member State, provided this transmission is in accordance with the rules and procedures laid down in this Directive. It shall inform the Member State of origin of the information about its intention to share that information with a third Member State. The Member State of origin of the information may oppose such a sharing of information within ten working days of the date at which it received the communication from the Member State wishing to share the information.	6. Information provided by a state to another state may be transmitted by the latter to another state, subject to prior authorisation by the competent authority from which the information originated. The state of origin of the information may oppose such a sharing of information within ten working days of the date at which it received the communication from the state wishing to share the information.
5. Permission to use information pursuant to paragraph 3 which has been transmitted pursuant to paragraph 4 may be granted only by the Member State from which the information originates.	
6. Information communicated in any form pursuant to this Directive may be invoked or used as evidence by all authorities within the Member State receiving the information on the same basis as similar information obtained within that State.	→ See paragraph 5 of this Article
	7. The states shall transmit information obtained in accordance with this Agreement to third countries subject to the following conditions: (a) the transmission of information is subject to the national legislation of the transmitting state implementing Article 25 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, especially as regards the adequate level of protection provided in the third country concerned; (b) the competent authority from which the information originates has consented to that communication; (c) the transmission is permitted by assistance arrangements between the state transmitting the information and that particular third country.
	8. When a state receives information from a third country, the states may exchange that information, in so far as permitted by the assistance arrangements with that particular third country.
	9. Each state shall immediately notify the other states concerned regarding any breach of confidentiality, failure of safeguards of personal data and any sanctions and remedial actions consequently imposed.
See paragraph 2 of this Article ←	10. Persons duly accredited by the Security Accreditation Authority of the European Commission may have access to this information only in so far as it is necessary for care, maintenance and development of the CCN/CSI network.

EU Directive	EU-NO Agreement
CHAPTER VI **FINAL PROVISIONS**	
Article 24 **Application of other agreements on assistance**	
1. This Directive shall be without prejudice to the fulfilment of any obligation to provide wider assistance ensuing from bilateral or multilateral agreements or arrangements, including for the notification of legal or extra-legal acts.	
2. Where the Member States conclude such bilateral or multilateral agreements or arrangements on matters covered by this Directive other than to deal with individual cases, they shall inform the Commission thereof without delay. The Commission shall in turn inform the other Member States.	
3. When providing such greater measure of mutual assistance under a bilateral or multilateral agreement or arrangement, Member States may make use of the electronic communication network and the standard forms adopted for the implementation of this Directive.	→ See Art. 40(4) of this Agreement
	TITLE IV **IMPLEMENTATION AND APPLICATION**
Article 25 **Committee**	Article 41 **Joint Committee**
1. The Commission shall be assisted by the Recovery Committee.	1. The Parties hereby establish a Joint Committee, composed of representatives of the Parties. The Joint Committee shall ensure the proper functioning and implementation of this Agreement.
(…)	(…)
	Article 42 **Dispute settlement**
	Any dispute between the Parties relating to the interpretation or application of this Agreement shall be resolved through consultations within the Joint Committee. The Parties shall present the relevant information required for a thorough examination of the matter to the Joint Committee, with a view to resolving the dispute.
	TITLE V **FINAL PROVISIONS**
	Article 43 **Territorial scope**
	This Agreement shall apply to the territory of Norway, as set forth in Article 1-2 of the Norwegian Act of 19 June 2009 no. 58 relating to Value Added Tax, and to the territories in wich the Treaty on European Union and the Treaty on the Functioning of the European Union apply and under the conditions laid down in those Treaties, with the exception of any territory referred to in Article 6 of Directive 2006/112/EC.

Correlation tables

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OPINIONS AND ARTICLES

Administrative cooperation between the European Union and Norway in the field of VAT – New possibilities for recovery assistance

L. Vandenberghe and S. Waller [1]

The European Union and Norway have concluded a new agreement "on administrative cooperation, combating fraud and recovery of claims in the field of VAT". This agreement also provides for recovery assistance between the EU Member States and Norway (Title III of the agreement). This agreement enters into force on 1 September 2018.
This article provides some explanation with regard to the recovery assistance provisions of this agreement.

Purpose and scope of the agreement

1. The purpose of the agreement is to ensure the correct assessment and collection of VAT in the EU and in Norway, to avoid double or non-taxation and to combat fraud in the field of VAT.[2] In order to achieve this, the agreement basically reflects provisions of EU regulation 904/2010 of 7 October 2010 (which governs exchange of information and other forms of administrative cooperation between EU Member States for the assessment and audit of VAT) and provisions of EU directive 2010/24 of 16 March 2010 (which provides for tax recovery assistance between the EU Member States).

However, while the EU directive covers recovery assistance for all types of taxes, the scope of the recovery assistance under the EU-Norway agreement is more limited: in line with the purpose of the agreement, the scope of the recovery assistance only covers claims relating to VAT, administrative penalties imposed in the field of VAT, and interests and costs relating to such VAT claims and penalties (Art. 2(1) of the Agreement).

Forms of recovery assistance

2. The agreement provides for the traditional types of tax recovery assistance: exchange of information which is foreseeably relevant to the applicant authority in the recovery of the VAT related claims (Art. 22), presence in administrative offices and participation in administrative enquiries in the other State (Art. 24), assistance for the notification of documents (Art. 25), assistance for recovery measures (Art. 27) and for precautionary measures (Art. 33).

3. The agreement also permits exchange of information without prior request relating to pending refunds of taxes or duties relating to a person established or resident in another State (Art. 23). Although the agreement concerns recovery assistance for VAT related claims, the information about the upcoming refunds of other taxes or duties may indeed also be relevant in view of a possible setoff with VAT debts.

Contrary to the EU directive on tax recovery assistance, this provision does not exclude spontaneous exchange of information about upcoming VAT refunds. This can be explained by the different manner to obtain such refunds. Within the EU, VAT refund requests are submitted in the Member State of establishment (in accordance with EU directive 2008/9), which implies that this Member State is already informed about the upcoming VAT refund before the refund request is actually transferred to the refund State. That system does not apply in the relations with Norway. An EU Member State is not informed about the VAT refund that its taxable persons request in Norway and the Norwegian authorities are not informed about their taxable persons' requests for refund of VAT paid in the EU, unless that information is exchanged by the authorities of the State where that refund is requested.

Corresponding conditions, limitations and implementation rules

4. The rules governing this recovery assistance with Norway correspond to the provisions of the EU directive. The same conditions and limitations apply as between the EU Member States. This approach is also expressed in Article 40(5) of the agreement, which provides that *"As long and in so far as no detailed rules are adopted by the Joint Committee[3] for the implementation of this Title, the competent authorities shall make use of the rules, including the standard forms, currently adopted for the implementation of Council Directive 2010/24/EU, whereby the term "Member State" will be interpreted as including Norway".*

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[1] Luk Vandenberghe, Head of sector, Tax enforcement, Directorate general Taxation and Customs Union, at the European Commission;
Steffen Waller, Head of the Norwegian Recovery Unit.
The views expressed in this text are the private views of the authors and may not, under any circumstances, be interpreted as stating an official position of the European Commission or the Norwegian authorities.

[2] Recital 1 of the preamble.

[3] The proper functioning and implementation of the agreement shall be ensured by a Joint Committee (Article 41 of the agreement).

This close relation with the EU framework for recovery assistance is also confirmed by the use of the same electronic forms – assistance request forms and the harmonised standard form for notification assistance and the uniform instrument permitting enforcement in the requested State – in the relations between Norway and the EU Member States.

These common rules and forms should facilitate the work of the competent authorities.

Relation with other agreements

5. Article 46 of the agreement determines its relation with other bilateral or multilateral agreements or arrangements between the States. This provision confirms that the new agreement *"shall take precedence over the provisions of any bilateral or multilateral legally binding instrument on administrative cooperation, combating fraud and recovery of claims in the field of VAT that has been concluded between Member State(s) of the Union and Norway, in so far as the provisions of the latter are incompatible with those of this Agreement"*.

6. This implies that this agreement does not prevent Norway and EU Member States to take up any obligation to provide wider recovery assistance ensuing from other existing bilateral or multilateral agreements or arrangements. In this regard, reference can first be made to the Nordic countries' (including EU Member States Sweden, Finland and Denmark) tradition to provide a far reaching recovery assistance for each other's tax claims. For instance, the Nordic agreement on administrative assistance in tax matters provides that tax claims which, according to the law of one of the Contracting States, are enforceable in that State shall be recognized as enforceable in another Contracting State (Article 14(1) of this Nordic agreement). Similar provisions can also be found in some of Norway's more recent double taxation agreements, e.g. with Germany, the Netherlands or Poland (of which the recovery assistance provision is not limited to income taxes but covers VAT as well), obliging the requested State to take recovery measures if such measures are permitted for the claims concerned under the legislation of the applicant State, irrespective of whether these claims fulfil the conditions for taking recovery measures under the legislation that applies to the internal claims of the requested State. On this point, these bilateral agreements provide for a wider recovery assistance than Article 31(4), third subparagraph of the EU-Norway agreement, which only obliges the requested Member State to take recovery measures with regard to contested claims if the requested authorities dispose of a corresponding competence for their own claims.

7. As already mentioned, the fundamental difference between the EU-Norway agreement and the EU directive is that the scope of this agreement is limited to VAT claims. However, the agreement provides that the electronic communication network and the standard forms adopted for the implementation of this agreement may also be used for recovery assistance regarding other claims, if such recovery assistance is possible under other bilateral or multilateral legally binding instruments on administrative cooperation between the States (Art. 40(4)). If such assistance is possible under another agreement, it would indeed be easy to have all claims integrated in the same request, sent in a single request form.

CASE LAW

EU

Court of Justice

Luca Menci

20 March 2018

Case number: C-524/15

Penalties – Ne bis in idem – Failure to pay VAT due – Administrative penalty and criminal penalty for the same acts – No violation of Art. 50 of the Charter of Fundamental Rights of the EU if conditions are fulfilled

Summary

Article 50 of the Charter of Fundamental Rights of the European Union does not preclude that criminal proceedings are brought against a person for failing to pay VAT due, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature, on condition that that legislation:

- *pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,*
- *contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and*
- *provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.*

It is for the referring court to ensure that these conditions are fulfilled.

1 This request for a preliminary ruling concerns the interpretation of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

2 The request has been made in criminal proceedings against Mr Luca Menci concerning offences relating to value added tax (VAT).

Legal context

The ECHR

3 Article 4 of Protocol 7 to the ECHR, entitled 'Right not to be tried or punished twice', provides:

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

(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

(3) No derogation from this Article shall be made under Article 15 of the Convention.'

European Union law

4 Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) determines the transactions subject to VAT.

5 According to Article 273 of that directive:

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

Italian law

6 Article 13(1) of the decreto legislativo n. 471 — Riforma delle sanzioni tributarie non penali in materia di imposte dirette, di imposta sul valore aggiunto e di riscossione dei tributi, a norma dell'articolo 3, comma 133, lettera q), della legge 23 dicembre 1996, n. 662 (Legislative Decree No 471 on the reform of non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, in accordance with Article 3(133)(q) of Law No 662 of 23 December 1996) of 18 December 1997 (Ordinary Supplement to GURI No 5 of 8 January 1998), in the version in force on the date of the facts in the main proceedings ('Legislative Decree No 471/97'), was worded as follows:

'Any person who fails to pay, in whole or in part, within the prescribed periods, instalments, periodic payments, the equalisation payment or the balance of tax due on

the tax return, after deduction in those cases of the amount of the periodic payments and instalments, even if they have not been paid, shall be liable to an administrative penalty amounting to 30% of each outstanding amount, even where, after the correction of clerical or calculation errors noted during the inspection of the annual tax return, it transpires that the tax is greater or that the deductible surplus is less. …'

7 Article 10a(1) of the Decreto legislativo n. 74 — Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto, a norma dell'articolo 9 della legge 25 giugno 1999, n. 205 (Legislative Decree No 74 adopting new rules on offences relating to direct taxes and value added tax, pursuant to Article 9 of Law No 205 of 25 June 1999) of 10 March 2000 (GURI No 76 of 31 March 2000, p. 4), in its version in force on the date of the facts in the main proceedings ('Legislative Decree No 74/2000'), provided:

'Any person who fails to pay, by the deadline fixed for the filing of the withholding agent's annual tax return, the withholding tax resulting from the certification issued to the taxpayers in respect of whom tax is withheld shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 50 000 for each tax period.'

8 Article 10b(1) of that legislative decree, entitled 'Failure to pay VAT', in the version in force on the date of the facts in the main proceedings, stated:

'Article 10a shall also apply, within the limits there determined, to any person who fails to pay the value added tax owed on the basis of the annual return by the deadline for the payment on account relating to the subsequent tax period.'

9 Article 20 of that legislative decree, entitled 'Relationships between the criminal and tax proceedings', provides, in paragraph 1 thereof:

'The administrative proceedings for the control of taxes for the purpose of setting the amount to recover and the proceedings before the tax court may not be suspended during the criminal proceedings covering the same facts or facts on the determination of which the outcome of the conclusion of the proceedings depends.'

10 Article 21 of that legislative decree, entitled 'Administrative penalties for the offences regarded as falling within the scope of criminal law', states, in paragraphs 1 and 2 thereof:

'(1) The competent authority shall impose in any event the administrative penalties relating to the tax offences which are the subject of the notice of offence.

(2) Those penalties are not enforceable with regard to persons other than those referred to in Article 19(2), except where the criminal proceedings were concluded by dismissal of the case or by a final decision to acquit which excludes criminal liability. In the latter case, the time limits for collection shall run from the date of communication to the competent authority of the dismissal of the case, acquittal or termination of the proceedings; the communication shall be carried out by the registry of the court which made those decisions.'

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

11 Mr Menci was subject to administrative proceedings during which it was alleged that he had failed, in his capacity as proprietor of the sole trading business, to pay within the time limit stipulated by law, the VAT resulting from the annual tax return for the tax year 2011, amounting to a total of EUR 282 495.76.

12 Those proceedings gave rise to a decision of the Amministrazione Finanziaria (Tax authority, Italy) by which that authority ordered Mr Menci to pay the VAT due and also imposed on him, on the basis of Article 13(1) of Legislative Decree No 471/97, an administrative penalty of EUR 84 748.74, representing 30% of the tax debt. That decision has become final. Since the request made by Mr Menci to pay in instalments was accepted, the latter paid the first instalments.

13 After the final conclusion of those administrative proceedings, criminal proceedings were initiated with respect to the same acts against Mr Menci before the Tribunale di Bergamo (District Court, Bergamo, Italy) pursuant to a prosecution brought by the Procura della Repubblica (Public Prosecutor, Italy), on the ground that that failure to pay VAT constituted the offence provided for and punished by Article 10a(1) and Article 10b(1) of Legislative Decree No 74/2000.

14 The referring court states that, according to the provisions of Legislative Decree No 74/2000, the criminal and administrative proceedings are to be conducted independently and come within the competence, respectively, of the judicial and administrative authorities. Neither of those two proceedings could be suspended pending the outcome of the other proceedings.

15 That court adds that Article 21(2) of that legislative decree, in accordance with which administrative penalties relating to tax offences imposed by the competent administrative authorities are not enforceable unless the criminal proceedings have been finally concluded by dismissal of the case, acquittal or termination of the proceedings, which excludes criminal liability, does not prevent a person, such as Mr Menci, from being subject to criminal proceedings after having had a final administrative penalty imposed on him.

16 In those circumstances, the Tribunale di Bergamo (District Court, Bergamo) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 50 of the Charter …, interpreted in the light of Article 4 of Protocol No 7 to the [ECHR] and the related case-law of the European Court of Human Rights, preclude the possibility of conducting criminal proceedings concerning an act (non-payment of VAT) for which a final administrative penalty has been imposed on the defendant?'

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Article 50 of the Charter, read in the light of Article 4 of Protocol No 7 to the ECHR, must be interpreted as precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay VAT due within the time limit stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty.

18 First of all, it should be noted that, in relation to VAT, it follows, in particular, from Articles 2 and 273 of Directive 2006/112, read in conjunction with Article 4(3) TEU, that Member States are obliged to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing fraud (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 25 and the case-law cited).

19 Moreover, 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. The financial interests of the European Union include, in particular, revenue arising from VAT (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 30 and 31 and the case-law cited).

20 To ensure that all that revenue is collected and, thereby, to ensure the financial interests of the European Union, Member States are free to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two. Criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 33 and 34).

21 Since they seek to ensure the proper collection of VAT and to combat fraud, administrative penalties imposed by the national tax authorities and criminal proceedings initiated in respect of VAT offences, such as those at issue in the main proceedings, constitute implementation of Articles 2 and 273 of Directive 2006/112 and of Article 325 TFEU and, therefore, of EU law for the purposes of Article 51(1) of the Charter (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 27, 52 and 53, and of 5 April 2017, *Orsi and Baldetti*, C-217/15 and C-350/15, EU:C:2017:264, paragraph 16). Therefore, they must respect the fundamental right guaranteed by Article 50 of the Charter.

22 Moreover, although, as Article 6(3) TEU confirms, the fundamental rights recognised by the ECHR constitute general principles of EU law and although Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that convention, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44, and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 45 and the case-law cited).

23 According to the explanations relating to Article 51 of the Charter, paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and... that of the Court of Justice of the European Union' (judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 47, and of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, paragraph 50 and the case-law cited).

24 Therefore, examination of the question referred must be undertaken in the light of the fundamental rights guaranteed by the Charter and, in particular, Article 50 thereof (see, to that effect, judgment of 5 April 2017, *Orsi and Baldetti*, C-217/15 and C-350/15, EU:C:2017:264, paragraph 15 and the case-law cited).

25 Article 50 of the Charter provides that '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'. Therefore, the *ne bis in idem* principle prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 34).

The criminal nature of the proceedings and penalties

26 As regards assessing whether proceedings and penalties, such as those at issue in the main proceedings, are criminal in nature, it must be noted that, according to the Court's case-law, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the intrinsicnature of the offence, and the

third is the degree of severity of the penalty that the person concerned is liable to incur (see, to that effect, judgments of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319, paragraph 37, and of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 35).

27 Although it is for the referring court to assess, in the light of those criteria, whether the criminal and administrative proceedings and penalties at issue in the main proceedings are criminal in nature for the purposes of Article 50 of the Charter, the Court, when giving a preliminary ruling, may nevertheless provide clarification designed to give the national court guidance in its assessment (see, to that effect, judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, paragraph 79 and the case-law cited).

28 In this case, it should be noted at the outset that the classification as criminal, in the light of the criteria noted in paragraph 26 of the present judgment, of the criminal proceedings at issue in the main proceedings and the penalties that are liable to result therefrom, is not at issue. The question arises, on the other hand, whether the administrative procedure involving Mr Menci and the final administrative penalty imposed on him following that procedure are criminal in nature, for the purposes of Article 50 of the Charter.

29 In that regard, concerning the first criterion referred to in paragraph 26 of the present judgment, it is apparent from the case file before the Court that national law classifies the procedure giving rise to the imposition of that penalty as an administrative procedure.

30 Nevertheless, the application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as 'criminal' by national law, but extends regardless of such a classification to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria referred to in paragraph 26 of the present judgment.

31 As regards the second criterion, relating to the intrinsicnature of the offence, it must be ascertained whether the purpose of the penalty at issue is punitive (see judgment of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319, paragraph 39). It follows therefrom that a penalty with a punitive purpose is criminal in nature for the purposes of Article 50 of the Charter, and that the mere fact that it also pursues a deterrence purpose does not mean that it cannot be characterised as a criminal penalty. As the Advocate General stated in point 113 of his Opinion, it is of the intrinsicnature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature.

32 In this case, Article 13(1) of Legislative Decree No 471/97 provides, in the event of a failure to pay VAT due, for an administrative penalty which is added to the amount of VAT to be paid by the taxable person. Although that penalty is, as is contended by the Italian Government in its written observations, reduced where the tax is actually paid within a certain time limit after the failure to pay, the fact remains that the late payment of VAT due is punished by that penalty. It thus appears, which moreover corresponds with the referring court's assessment, that that penalty has a punitive purpose, which is the hallmark of a penalty of a criminal nature for the purposes of Article 50 of the Charter.

33 As regards the third criterion, it should be noted that the administrative penalty at issue in the main proceedings consists, in accordance with Article 13(1) of Legislative Decree No 471/97, of a fine of 30% of the VAT due which is added to the payment of that tax, and, without that being contested by the parties to the main proceedings, has a high degree of severity which is liable to support the view that that penalty is of a criminal nature for the purposes of Article 50 of the Charter, which it is however for the referring court to determine.

The existence of the same offence

34 It follows from the very wording of Article 50 of the Charter that it prohibits prosecuting or imposing criminal sanctions on the same person more than once for the same offence (see, to that effect, judgment of 5 April 2017, *Orsi and Baldetti*, C-217/15 and C-350/15, EU:C:2017:264, paragraph 18). As is stated by the referring court in its order for reference, the different proceedings and penalties of a criminal nature at issue in the main proceedings are directed against the same person, namely Mr Menci.

35 According to the Court's case-law, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned (see, by analogy, judgments of 18 July 2007, *Kraaijenbrink*, C-367/05, EU:C:2007:444, paragraph 26 and the case-law cited, and of 16 November 2010, *Mantello*, C-261/09, EU:C:2010:683, paragraphs 39 and 40). Therefore, Article 50 of the Charter prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of different proceedings brought for those purposes.

36 Moreover, the legal classification, under national law, of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another.

37 In this case, it is apparent from the information in the order for reference that Mr Menci was made subject to a final administrative penalty of a criminal

nature for having failed to pay, within the time limit stipulated by law, the VAT resulting from the annual tax return for the tax year 2011 and that the criminal proceedings at issue in the main proceedings relate to that omission.

38 Although, as the Italian Government contends in its written observations, the imposition of a criminal penalty following criminal proceedings, such as those at issue in the main proceedings, requires, unlike that pecuniary administrative penalty of a criminal nature, a subjective element, it must nevertheless be noted that the fact that the imposition of that criminal penalty depends on an additional constituent element in relation to the pecuniary administrative penalty of a criminal nature is not, in itself, capable of calling into question the identity of the material facts at issue. Subject to verification by the referring court, the pecuniary administrative penalty of a criminal nature and the criminal proceedings at issue in the main proceedings appear therefore to relate to the same offence.

39 In those circumstances, it appears that the national legislation at issue in the main proceedings allows criminal proceedings to be brought against a person, such as Mr Menci, in respect of an offence consisting in the failure to pay VAT due on the basis of the tax return for a tax year, after the imposition on that person, in respect of the same acts, of a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter. Such a duplication of proceedings and penalties constitutes a limitation of the fundamental right guaranteed by that article.

The justification for the limitation of the right guaranteed in Article 50 of the Charter

40 It should be noted that, in its judgment of 27 May 2014, *Spasic* (C-129/14 PPU, EU:C:2014:586, paragraphs 55 and 56), the Court ruled that a limitation to the *ne bis in idem* principle guaranteed by Article 50 of the Charter may be justified on the basis of Article 52(1) thereof.

41 In accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by that Charter must be provided for by law and respect the essence of those rights and freedoms. According to the second sentence of Article 52(1) thereof, subject to the principle of proportionality, limitations to those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

42 In this case, it is not disputed that the possibility of duplicating criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature is provided for by the law.

43 Moreover, national legislation, such as that at issue in the main proceedings, respects the essential content of Article 50 of the Charter, since, according to the information in the case file before the Court, it allows such a duplication of proceedings and penalties only under conditions which are exhaustivelydefined, thereby ensuring that the right guaranteed by Article 50 is not called into question as such.

44 As regards the question whether the limitation of the *ne bis in idem* principle resulting from national legislation, such as that at issue in the main proceedings, meets an objective of general interest, it is apparent from the case file before the Court that that legislation seeks to ensure the collection of all the VAT due. In the light of the importance that is givenin the Court's case-law, for the purposes of achieving that objective, to combating VAT offences (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 34 and the case-law cited), a duplication of criminal proceedings and penalties may be justified where those proceedings and penalties pursue, for the purpose of achieving such an objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue, which it is for the referring court to determine.

45 In that regard, in relation to VAT offences, it appears legitimate for a Member State to seek, first, to deter and punish any violation, whether intentional or not, of the rules relating to VAT returns and collection by imposing fixed administrative penalties, where appropriate, on a flat-rate basis and, secondly, to deter and punish serious violations of those rules, which are particularly damaging for society and which justify the adoption of more severe criminal penalties.

46 As regards compliance with the principle of proportionality, it requires that the duplication of proceedings and penalties provided for by national legislation, such as that at issue in the main proceedings, does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments of 25 February 2010, *Müller Fleisch*, C-562/08, EU:C:2010:93, paragraph 43; of 9 March 2010, ERG and Others, C-379/08 and C-380/08, EU:C:2010:127, paragraph 86; and of 19 October 2016, *EL-EM-2001*, C-501/14, EU:C:2016:777, paragraphs 37 and 39 and the case-law cited).

47 In that regard, it must be noted that, according to the case-law cited in paragraph 20 of the present judgment, Member States are free to choose the applicable penalties in order to ensure that all VAT revenue is collected. In the absence of harmonisation of EU law in the matter, the Member States have

therefore the right to provide eitherfor a system in which VAT offences may be subject to proceedings and penalties only once, or fora system authorising the duplication of proceedings and penalties. In those circumstances, the proportionality of national legislation, such as that at issue in the main proceedings, cannot be called into question by the mere fact that the Member State concerned made the choice to provide for the possibility of such a duplication, as otherwise that Member State would be deprived of that freedom of choice.

48 That having been clarified, it must be noted that national legislation, such as that at issue in the main proceedings, which provides for such a possibility of duplication is capable of achieving the objective referred to in paragraph 44 of the present judgment.

49 With regard to its strict necessity, national legislation, such as that at issue in the main proceedings, must, first of all, provide for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties.

50 In this case, as is apparent from the information in the case file before the Court, the national legislation at issue in the main proceedings, in particular Article 13(1) of Legislative Decree No 471/97, provides for the conditions according to which the failure to pay VAT due within the time limits prescribed by law may give rise to the imposition of an administrative penalty of a criminal nature. In accordance with Article 13(1), and underthe conditions referred to in Article 10a(1) and Article 10b(1) of Legislative Decree No 74/2000, such a failure may also, if it relates to an annual tax return covering an amount of VAT greater than EUR 50 000, be subject to a term of imprisonment of between six months and two years.

51 It thus appears, subject to verification by the referring court, that the national legislation at issue in the main proceedings clearly and precisely lays down the circumstances in which the failure to pay VAT due may be subject to a duplication of proceedings and penalties of a criminal nature.

52 Next, national legislation, such as that at issue in the main proceedings, must ensure that the disadvantages resulting, for the persons concerned, from such a duplication are limited to what is strictly necessary in order to achieve the objective referred to in paragraph 44 of the present judgment.

53 As regards, first, the duplication of proceedings of a criminal nature which, as is apparent from the information in the case file, the requirement noted in the above paragraph implies the existence of rules ensuring coordination so as to reduce to what is strictly necessary the additional disadvantage associated with such a duplication for the persons concerned.

54 In this case, although the national legislation at issue in the main proceedings allows criminal proceedings to be brought even after the imposition of an administrative penalty of a criminal nature finally concluding the administrative proceedings, it is apparent from the information in the case file and summarised in paragraph 50 of the present judgment that that legislation appears to limit criminal penalties to offences which are particularly serious, namely offences relating to an amount of unpaid VAT which exceeds EUR 50 000, in relation to which the national legislature has provided for a term of imprisonment, the severity of which appears to justify the need to initiate, in order to impose such a sentence, infringement proceedings which are independent of the administrative proceedings of a criminal nature.

55 Secondly, the duplication of penalties of a criminal nature requires rules allowing it to be guaranteed that the severity of all of the penalties imposed corresponds with the seriousness of the offence concerned, that requirement resulting not only from Article 52(1) of the Charter, but also from the principle of proportionality of penalties set out in Article 49(3) thereof. Those rules must provide for the obligation for the competent authorities, in the event of the imposition of a second penalty, to ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified.

56 In this case, it appears to follow from Article 21 of Legislative Decree No 74/2000 that the latter is not limited to providing for the suspension of the enforcement of administrative penalties of a criminal nature during the criminal proceedings, but that it definitively prevents that enforcement after the criminal conviction of the person concerned. Moreover, according to the information in the order for reference, the voluntary payment of the tax debt, in so far as it covers also the administrative penalty imposed on the person concerned, constitutes a special mitigating factor to be taken into account in the context of the criminal proceedings. It thus appears that the national legislation at issue in the main proceedings provides for the conditions appropriate for ensuring that the competent authorities limit the severity of all of the penalties imposed to what is strictly necessary in relation to the seriousness of the offence committed.

57 Therefore, it appears, subject to verification by the referring court, that national legislation, such as that at issue in the main proceedings, makes it possible to ensure that the duplication of proceedings and penalties which it authorises does not exceed what is strictly necessary in order to achieve the objective referred to in paragraph 44 of the present judgment.

58 It should again be noted that, although national legislation complying with the requirements set out in paragraphs 44, 49, 53 and 55 of the present judgment appear, in principle, capable of ensuring the necessary

balance between the different interests at issue, it must also be applied by the national authorities and national courts so that the disadvantage resulting, in the case at hand and for the person concerned, from the duplication of proceedings and penalties, is not excessive in relation to the seriousness of the offence committed.

59 It is, ultimately, for the referring court to assess the proportionality of the practical application of that legislation in the context of the main proceedings, by balancing, on the one hand, the seriousness of the tax offence at issue and, on the other hand, the actual disadvantage resulting for the person concerned from the duplication of proceedings and penalties at issue in the main proceedings.

60 Finally, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, Article 52(3) of the Charter provides that their meaning and scope are the same as those laid down by that convention. It is therefore necessary to take account of Article 4 of Protocol No 7 to the ECHR for the purpose of interpreting Article 50 of the Charter (see, to that effect, judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 77, and of 5 April 2017, *Orsi and Baldetti*, C-217/15 and C-350/15, EU:C:2017:264, paragraph 24).

61 In that regard, the European Court of Human Rights has held that a duplication of tax and criminal proceedings and penalties punishing the same violation of the tax law does not infringe the *ne bis in idem* principle enshrined in Article 4 of Protocol No 7 to the ECHR, where the tax and criminal proceedings at issue have a sufficiently close connection in substance and time (ECtHR, 15 November 2016, *A and B* v *Norway*, CE:ECHR:2016:1115JUD002413011, § 132).

62 Therefore, the conditions to which Article 50 of the Charter, read in conjunction with Article 52(1) thereof, subjects a possible duplication of criminal proceedings and penalties and of administrative proceedings and penalties of a criminal nature, as is apparent from paragraphs 44, 49, 53, 55 and 58 of the present judgment, ensure a level of protection of the *ne bis in idem* principle which is not in conflict with that guaranteed by Article 4 of Protocol No 7 to the ECHR, as interpreted by the European Court of Human Rights.

63 In the light of all of the above considerations, the answer to the question referred is that Article 50 of the Charter must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay VAT due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation

– pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating VAT offences, it being necessary for those proceedings and penalties to pursue additional objectives,

– contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and

– provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

64 It is for the referring court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

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

1. Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay value added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation

– pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,

– contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and

– provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

2. It is for the referring court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

EU

Court of Justice

Mauro Scialdone

2 May 2018

Case number: C-574/15

Penalties – Failure to timely pay VAT – Criminal offence only when the amount of the unpaid VAT exceeds a specific threshold – Lower threshold for criminalisation of failure to timely pay withholding income tax – No violation of EU law.

Summary

The VAT Directive 2006/112/EC, read in conjunction with Article 4(3) TEU and Article 325(1), does not preclude national legislation which provides that failure to pay VAT constitutes a criminal offence punishable by a custodial sentence only when the amount of unpaid VAT exceeds a criminalisation threshold of EUR 250 000, whereas a criminalisation threshold of EUR 150 000 is laid down for the offence of failing to pay withholding income tax.

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU, Article 325(1) and (2) TFEU, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive') and the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 (OJ 1995 C 316, p. 49; 'the PFI Convention').

2 The request has been made in criminal proceedings brought against Mr Mauro Scialdone for failing, in his capacity as sole director of Siderlaghi Srl, to pay, within the time limit prescribed by law, the value added tax (VAT) resulting from the company's annual return for the tax year 2012.

Legal context

EU law

The PFI Convention

3 Article 1 of the PFI Convention, entitled 'General provisions', states in paragraph 1:

'For the purposes of this Convention, fraud affecting the [Union's] financial interests shall consist of:

...

(b) in respect of revenue, any intentional act or omission relating to:

– *the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the [Union] or budgets managed by, or on behalf of, the [Union],*

– *non-disclosure of information in violation of a specific obligation, with the same effect,*

– *misapplication of a legally obtained benefit, with the same effect.'*

4 Article 2 of the PFI Convention, entitled 'Penalties', provides in paragraph 1:

'Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1(1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding [EUR] 50 000.'

The VAT Directive

5 Article 2(1) of the VAT Directive determines the transactions subject to VAT.

6 Article 206 of that directive 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 Article 250. Member States may, however, set a different date for payment of that amount or may require interim payments to be made.'

7 Under Article 250(1) of that directive:

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

8 Article 273 of that directive provides:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do

not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

…'

Italian law

9 Article 13(1) of decreto legislativo n. 471 — Riforma delle sanzioni tributarie non penali in materia di imposte dirette, di imposta sul valore aggiunto e di riscossione dei tributi, a norma dell'articolo 3, comma 133, lettera q), della legge 23 dicembre 1996, n. 662 (Legislative Decree No 471 on the reform of non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, in accordance with Article 3(133)(q) of Law No 662 of 23 December 1996) of 18 December 1997 (Ordinary Supplement to GURI No 5 of 8 January 1998; 'Legislative Decree No 471/97') is worded as follows:

'Any person who fails to pay, in whole or in part, within the prescribed periods, instalments, periodic payments, the equalisation payment or the balance of tax due on the tax return, after deduction in those cases of the amount of the periodic payments and instalments, even if they have not been paid, shall be liable to an administrative penalty amounting to 30% of each outstanding amount, even where, after the correction of clerical or calculation errors noted during the inspection of the annual tax return, it transpires that the tax is greater or that the deductible surplus is less. …'

10 Article 10 bis, entitled 'Failure to pay withholding tax owed or certified', of decreto legislativo n. 74 — Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto, a norma dell'articolo 9 della legge 25 giugno 1999, n. 205 (Legislative Decree No 74 adopting new rules on offences relating to income tax and value added tax, in accordance with Article 9 of Law No 205 of 25 June 1999) of 10 March 2000 (GURI No 76 of 31 March 2000, p. 4; 'Legislative Decree No 74/2000'), in the version in force at the material time and until 21 October 2015, provided:

'Any person who fails to pay, within the period fixed for the filing of the withholding agent's annual tax return, the withholding tax resulting from the certification issued to the taxpayers in respect of whom tax is withheld shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 50 000 for each tax period.'

11 At that time, Article 10 ter of that legislative decree, entitled 'Failure to pay VAT', stated:

'Article 10 bis shall also apply, within the limits laid down therein, to any person who fails to pay the [VAT] owed on the basis of the annual return by the deadline for the payment on account relating to the subsequent tax period.'

12 Article 13 of that legislative decree, entitled 'Mitigating circumstances. Payment of the tax debt', provided, in paragraph 1:

'The penalties prescribed for the offences referred to in this decree shall be reduced by up to one third … if, before the proceedings at first instance are declared opened, the tax debts relating to the facts constituting those offences have been discharged …'

13 Legislative Decree No 74/2000 was amended by decreto legislativo n. 158 — Revisione del sistema sanzionatorio, in attuazione dell'articolo 8, comma 1, della legge 11 marzo 2014, n. 23 (Legislative Decree No 158 revising the system of penalties implementing Article 8(1) of Law No 23 of 11 March 2014) of 24 September 2015 (Ordinary Supplement to GURI No 233 of 7 October 2015; 'Legislative Decree No 158/2015'), with effect from 22 October 2015.

14 From that date, Article 10 bis of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, provides:

'Any person who fails to pay, within the period fixed for the filing of the withholding agent's annual tax return, the withholding tax resulting from that return or from the certification issued to the taxpayers in respect of whom tax is withheld shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 150 000 for each tax period.'

15 Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, provides:

'Any person who fails to pay, by the deadline for the payment on account relating to the subsequent tax period, the [VAT] owed on the basis of the annual return shall be liable to a term of imprisonment of between six months and two years in the case where that amount exceeds EUR 250 000 for each tax period.'

16 Article 13 of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, entitled 'Ground for exemption from penalties. Payment of the debt', reads as follows:

'1. No penalties shall be imposed for the offences set out in Articles 10 bis, 10 ter … if, before the proceedings at first instance are declared opened, the tax debts, including administrative penalties and interest, have been extinguished by the payment in full of the sums owed, including where such payment results from special conciliation procedures and procedures for agreement of the assessment which are laid down by the tax rules, or from voluntary payment.

…

3. If, before the proceedings at first instance are declared opened, payment of the tax debt by instalments has been initiated, inter alia under Article 13 bis, a time limit of three months shall be set for payment of the remaining debt. In those circumstances, the limitation period shall be suspended. The court may extend that time limit only once for a maximum of three months, where it deems it necessary,

without prejudice to the suspension of the limitation period.'

The dispute in the main proceedings and the questions referred

17 The Agenzia delle Entrate (tax authorities, Italy) conducted a tax inspection of Siderlaghi. That inspection revealed that that company had failed to pay, within the time limit prescribed by law, the VAT resulting from its annual return for the tax year 2012, amounting to a total of EUR 175 272. The tax authorities notified Siderlaghi of that irregularity and asked it to regularise its situation by paying the tax due, default interest and, in accordance with Article 13(1) of Legislative Decree No 471/97, a fine in the amount of 30% of its tax debt. The company undertook to discharge the unpaid VAT in instalments within 30 days of the notification and therefore received a reduction of two-thirds of the fine.

18 On 29 May 2015, the Procura della Repubblica (public prosecutor, Italy) brought an application before the referring court, the Tribunale di Varese (District Court, Varese, Italy), seeking that Mr Scialdone be ordered to pay a fine of EUR 22 500. That application was based on the fact that the failure to pay the VAT in question constituted the offence provided for and punished by Articles 10 bis and 10 ter of Legislative Decree No 74/2000 since, inter alia, the amount of unpaid VAT exceeded the criminalisation threshold of EUR 50 000 above which such failure was punishable by the penalty laid down by those provisions, and on the fact that the offence was attributable to Mr Scialdone in his capacity as sole director of Siderlaghi.

19 On 22 October 2015, Legislative Decree No 158/2015 entered into force. The referring court states that the amendments made by that instrument to Legislative Decree No 74/2000 apply retroactively to the conduct ascribed to Mr Scialdone since they are provisions more favourable to the defendant. Consequently, the conduct in question no longer constitutes a criminal offence since Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, now lays down a criminalisation threshold of EUR 250 000 for failure to pay VAT and the tax debt of Siderlaghi is below the new threshold. Moreover, Mr Scialdone could benefit from the ground for exemption from penalties now contained in Article 13 of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, since Siderlaghi and the tax authorities agreed for the VAT debt, fine and default interest to be paid by instalments.

20 Nevertheless, the referring court harbours doubts as to whether the amendments made to Italian legislation by Legislative Decree No 158/2015 are compatible with EU law, particularly since, if those amendments were to be found incompatible with EU law, it would consider itself bound to disapply them in favour of the initial version of Legislative Decree No 74/2000, with the result that Mr Scialdone would still be liable to a criminal penalty.

21 In that regard, first, the referring court notes that, under Articles 10 bis and 10 ter of Legislative Decree No 74/2000, in its initial version, the same criminalisation threshold of EUR 50 000 applied to both the failure to pay withholding income tax and the failure to pay VAT. However, since the amendment of Legislative Decree No 74/2000 by Legislative Decree No 158/2015, that threshold is EUR 150 000 for failure to pay withholding income tax, pursuant to the new Article 10 bis, and EUR 250 000 for failure to pay declared VAT, pursuant to the new Article 10 ter. That court harbours doubts as to whether such a difference is compatible with the requirements arising from Article 4(3) TEU, Article 325 TFEU and the VAT Directive, since, in its view, it entails better protection of national financial interests than of the European Union's financial interests.

22 Second, the referring court infers from those provisions and from the PFI Convention that Member States might be required to penalise failures to pay VAT, such as the failure at issue in the main proceedings, by custodial sentences where the unpaid amount exceeds EUR 50 000. If that were the case, Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, would be incompatible with EU law since the penalty provided for by that article applies only to failure to pay an amount greater than or equal to EUR 250 000. For similar reasons, that court has doubts as to whether a ground for exemption from penalties such as that provided for in Article 13 of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, is compatible with EU law.

23 In those circumstances the Tribunale di Varese (District Court, Varese) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May EU law, and more particularly Article 4(3) TEU, in conjunction with Article 325 TFEU and [the VAT Directive], which lay down for the Member States the duty of equal treatment so far as concerns policies relating to penalties, be interpreted as precluding the enactment of a provision of national law providing that the penal consequences of failure to pay VAT follow once a financial threshold is crossed greater than the threshold provided for in the case of failure to pay income tax?

(2) May EU law, and more particularly Article 4(3) TEU in conjunction with Article 325 TFEU and [the VAT Directive], which oblige the Member States to provide effective, dissuasive and proportionate penalties to protect the financial interests of the European Union, be interpreted as precluding the enactment of a national provision which exempts the defendant (whether a director, legal representative,

person to whom responsibility for fiscal matters has been delegated or an accessory to the offence) from liability to punishment if the entity with legal personality concerned has made late payment both of the tax itself and of the administrative penalties owed in connection with VAT, even though the tax assessment has already been made, criminal proceedings and indictment initiated, and the establishment of *inter partes* proceedings duly confirmed, but before trial proceedings have been declared opened, in a system that does not impose on that director, legal representative, or delegate and accessory to the offence any other penalty, not even an administrative penalty?

(3) Must the concept of fraud governed by Article 1 of the PFI Convention be interpreted as encompassing cases of failure to pay or of partial or late payment of VAT and, consequently, does Article 2 of that convention require the Member State to punish with a term of imprisonment failure to pay or partial or late payment of VAT in relation to sums in excess of EUR 50 000? If the answer is in the negative, it will be necessary to determine whether the rule under Article 325 TFEU, which requires the Member States to provide penalties, including criminal penalties, which are dissuasive, proportionate and effective, must be interpreted as precluding national legislation which exempts from criminal and administrative liability the directors and legal representatives of legal persons, or the persons to whom the functions of those legal persons are delegated and persons who are accessories to the offence, for failure to pay or partial or late payment of VAT in relation to sums equivalent to three or five times the minimum threshold laid down in case of fraud, that is to say, EUR 50 000.'

Consideration of the questions referred

The first and third questions

Preliminary observations

24 By its first and third questions, which it is appropriate to examine together, the referring court essentially asks whether EU law, in particular Article 4(3) TEU, Article 325 TFEU, the VAT Directive and the PFI Convention, precludes national legislation which, first, provides that failure to pay, within the time limit prescribed by law, the VAT resulting from the annual tax return for a given financial year constitutes a criminal offence punishable by a custodial sentence only when the amount of unpaid VAT exceeds a criminalisation threshold of EUR 250 000 and, second, provides for a criminalisation threshold of EUR 150 000 for the offence of failing to pay withholding income tax.

25 In that regard, it should be recalled that the VAT Directive does not harmonise the penalties to be applied in relation to VAT. That sphere falls, in principle, within the competence of the Member States.

26 Nevertheless, it follows, first, from Articles 2 and 273 of the VAT Directive, read in conjunction with Article 4(3) TEU, that Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing fraud (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 18 and the case-law cited).

27 Second, under Article 325(1) TFEU, Member States are required to counter fraud and any other illegal activities affecting the financial interests of the European Union through effective deterrent measures. The financial interests of the European Union include, in particular, revenue arising from VAT (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 19 and the case-law cited).

28 Lastly, in accordance with the settled case-law of the Court, while the choice of penalties remains within their discretion, Member States must ensure that infringements of EU law, including the harmonised rules deriving from the VAT Directive, are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see, to that effect, judgments of 21 September 1989, *Commission* v *Greece*, 68/88, EU:C:1989:339, paragraph 24; of 8 July 1999, *Nunes and de Matos*, C-186/98, EU:C:1999:376, paragraph 10; and of 3 May 2005, *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraph 65).

29 It follows from all the foregoing that, even though the penalties established by Member States in order to counter infringements of harmonised VAT rules fall within their procedural and institutional autonomy, that autonomy is nevertheless limited by, first, the principle of equivalence, which means that those penalties must be analogous to those applicable to infringements of national law of a similar nature and importance that affect national financial interests, and, second, the principle of effectiveness, which requires that such penalties be effective and dissuasive, in addition to the principle of proportionality, the application of which is not in point in the present case.

30 It is therefore necessary to answer the first and third questions in the light of the first two principles, examining initially the principle of effectiveness and then, in a second step, the principle of equivalence.

The principle of effectiveness

31 As is apparent from the order for reference, two types of penalties are provided for by Italian legislation in order to combat the failure to pay, within the time limit prescribed by law, the VAT resulting from the VAT return for a given financial year. On the one hand, the defaulting taxable person is liable, in

accordance with Article 13(1) of Legislative Decree No 471/97, both for fines, amounting, in principle, to 30% of the tax due, and for default interest. On the other hand, Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, provides that where the amount of unpaid VAT exceeds a criminalisation threshold of EUR 250 000, a penalty of six months to two years of imprisonment may be imposed on natural persons.

32 In the view of the referring court, EU law might nevertheless require custodial sentences to be imposed on persons responsible for such a failure to pay VAT where the unpaid amount is greater than or equal to EUR 50 000.

33 In that regard, it follows from paragraphs 25 to 29 above that, notwithstanding the fact that, at the material time, there was no harmonisation of the penalties to be applied in the field of VAT, the principle of effectiveness requires Member States to establish effective and dissuasive penalties to counter infringements of harmonised VAT rules and protect the financial interests of the European Union, without, however, in principle requiring that those penalties be of a particular nature.

34 Thus, the Court has repeatedly held that, in order to ensure that all VAT revenue is collected, and thereby that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 34; of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 33; and of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 20).

35 It is true that the Court has also held that criminal penalties may be essential to combat certain cases of serious VAT fraud in an effective and dissuasive manner. Accordingly, in that regard, Member States are required to adopt criminal penalties that are effective and dissuasive (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 34 and 35).

36 The freedom of choice of Member States is, moreover, limited by the PFI Convention. Under Article 2(1) of that convention, Member States must take the necessary measures to ensure that fraud affecting the financial interests of the European Union, as defined in Article 1(1) of the convention, including VAT fraud (judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 41), is punishable by criminal penalties, including, at least in cases of serious fraud, namely those involving a minimum amount which may not be set by Member States at a sum exceeding EUR 50 000, penalties involving deprivation of liberty which can give rise to extradition.

37 However, it must be pointed out that a failure to pay VAT such as that at issue in the main proceedings is characterised by the fact that the taxable person, having submitted a complete and correct VAT return for the tax year in question, in accordance with Article 250(1) of the VAT Directive, fails to pay the VAT resulting from that tax return to the Treasury within the time limit prescribed by law, in contravention of the requirements of Article 206 of that directive.

38 As all the parties who have submitted observations to the Court have maintained, in so far as the taxable person has duly complied with his obligations to declare VAT, such a failure to pay VAT does not constitute 'fraud', within the meaning of Article 325 TFEU, irrespective of whether the failure is intentional or not.

39 Likewise, a failure to pay declared VAT does not constitute 'fraud' within the meaning of the PFI Convention. For the purposes of that convention, according to Article 1(1)(b) thereof, 'fraud' in respect of EU revenue involves 'non-disclosure of information in violation of a specific obligation' or the 'use or presentation of false, incorrect or incomplete statements or documents'. As is apparent from paragraph 37 above, such failures to comply with declaration obligations are not at issue in the present case. Moreover, while that provision also refers to the 'misapplication of a legally obtained benefit', it should be pointed out, as the German Government observes, that failure to pay declared VAT within the time limit prescribed by law does not give the taxable person such a benefit since the tax is still payable and the taxable person is acting unlawfully by failing to pay it.

40 It follows that neither the Court's interpretation of Article 325(1) TFEU in relation to cases of VAT fraud nor the PFI Convention is applicable to the case of failure to pay declared VAT. Accordingly, the amount of EUR 50 000 laid down in Article 2(1) of that convention is irrelevant in such a case.

41 Moreover, it must be pointed out that such failures to pay declared VAT do not present the same degree of seriousness as VAT fraud.

42 As soon as the taxable person has duly fulfilled his declaration obligations, the authorities have the necessary data to establish the amount of VAT chargeable and whether there is a failure to pay it.

43 Therefore, while criminal penalties may be essential to combat certain cases of serious VAT fraud in an effective and dissuasive manner, as recalled in paragraph 35 above, such penalties are not correspondingly essential to combat failures to pay declared VAT.

44 Nevertheless, the fact remains that such failures to pay, particularly where they result from the taxable person using, for his own purposes, the funds corresponding to the tax payable to the detriment of the Treasury, constitute 'illegal activities' liable to

affect the financial interests of the European Union, within the meaning of Article 325(1) TFEU, which accordingly require the application of effective and dissuasive penalties.

45 That interpretation cannot be called into question by the argument of the German and Netherlands Governments that the phrase 'any other illegal activities' contained in Article 325(1) TFEU refers solely to acts of the same nature and gravity as fraud. As observed by the Advocate General in points 68 and 69 of his Opinion, the term 'illegal activities' usually denotes unlawful behaviour, and the use of the word 'any' indicates the intention to encompass all unlawful behaviour, without distinction. Furthermore, in view of the importance that should be accorded to protecting the financial interests of the European Union, which in itself constitutes an objective of the latter (see, to that effect, judgment of 18 November 1999, *Commission* v *Council*, C-209/97, EU:C:1999:559, paragraph 29), the concept of 'illegal activities' cannot be interpreted restrictively.

46 Moreover, in accordance with the settled case-law referred to in paragraph 28 above, any infringement of EU law, including harmonised VAT rules, must be subject to effective, proportionate and dissuasive penalties.

47 In the present case, as all the parties which submitted observations to the Court maintained, penalties such as those provided for by Article 13(1) of Legislative Decree No 471/97 may be regarded, in the light of the discretion enjoyed by Member States in this context, as being sufficiently effective and dissuasive.

48 Those penalties take the form of fines amounting, in principle, to 30% of the tax due, although, depending on the period within which the irregularity is rectified, the taxable person may receive a reduction in that fine. In addition, the tax authorities require default interest to be paid.

49 Given that they display a high degree of severity (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 33), fines of that kind are such as to lead taxable persons to abandon any notion to delay or omit VAT payment and are thus dissuasive in nature. In addition, those fines, coupled with the mechanism for receiving a reduction and the requirement to pay default interest, encourage defaulting taxable persons to discharge the amount of tax payable as soon as possible and may, therefore, be regarded, in principle, as effective (see, by analogy, judgment of 20 June 2013, *Rodopi-M 91*, C-259/12, EU:C:2013:414, paragraph 40).

50 Finally, the fact that, in a situation, such as that at issue in the main proceedings, where the taxable person is a legal person, those same penalties are applied to that legal person and not its managers does not call into question the interpretation in paragraph 47 above.

51 The determination as to who the penalties are applied to also falls within the procedural and institutional autonomy of Member States. Member States are thus at liberty to provide for penalties to be applied to the taxable person or, where the latter is a legal person, to its managers, or to both the legal person and its managers, provided the effectiveness of the fight against the infringement of EU law in question is not jeopardised. As regards a failure to pay declared VAT, penalties such as those described in paragraph 48 above do not appear to cease being effective or dissuasive when imposed solely on the taxable legal person, on account of the repercussions they are likely to have on the legal person's assets and, consequently, on its economic activity.

52 In the light of all the foregoing, it must be held that the principle of effectiveness does not preclude national legislation, such as that at issue in the main proceedings, which provides that failure to pay, within the time limit prescribed by law, the VAT resulting from the annual tax return for a given financial year constitutes a criminal offence punishable by a custodial sentence only when the amount of unpaid VAT exceeds a criminalisation threshold of EUR 250 000.

The principle of equivalence

53 It follows from paragraphs 25 to 29 above that the freedom of choice of Member States, stemming from their institutional and procedural autonomy, when they impose penalties for infringements of EU law is limited by their obligation to ensure that such penalties satisfy conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance.

54 In the present case, Italian legislation provides that both a failure to pay withholding income tax and a failure to pay declared VAT constitute a criminal offence punishable by a penalty of six months to two years of imprisonment where the unpaid amount exceeds a certain criminalisation threshold. However, since the entry into force of Article 10 ter of Legislative Decree No 74/2000 as amended by Legislative Decree No 158/2015, the criminalisation threshold is set at EUR 250 000 for a failure to pay VAT whereas, in accordance with Article 10 bis of Legislative Decree No 74/2000 as amended by Legislative Decree No 158/2015, it is set at only EUR 150 000 for a failure to pay withholding income tax.

55 In order to assess whether a difference such as that between the thresholds laid down in, respectively, Article 10 bis and Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, complies with the principle of equivalence, it is necessary, in accordance with the considerations set out in paragraph 53 above, to determine whether a failure to pay withholding

income tax may be regarded as an infringement of national law of a similar nature and importance to a failure to pay declared VAT.

56 In that regard, it is true that both a failure to pay VAT and a failure to pay withholding income tax are characterised by non-compliance with the obligation to pay the tax due within the time limit prescribed by law. It is also apparent from the order for reference that the Italian legislature pursued the same objective in providing that both such forms of conduct constitute an offence, namely ensuring that the Treasury is paid tax in good time and, thus, that all tax revenue is collected.

57 However, as the Italian Government asserts, the offences defined and penalised, respectively, by Article 10 bis and Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015, can be distinguished by both their constituent elements and the difficulty involved in their detection.

58 Whereas the second offence relates to the conduct of taxable persons subject to VAT, the first offence relates not to the actions of persons subject to income tax but to the actions of the withholding agents required to remit the tax withheld in that regard. Moreover, it is apparent from the documents before the Court that, under Italian tax law, when such a withholding agent withholds an amount from the income of a person subject to tax, he is required to provide that person with a document called 'certification', which will allow him to demonstrate to the tax authorities that the amount in question has been withheld and, thus, that he has paid the tax due, even if, subsequently, the withholding agent fails to remit the amount withheld to the Treasury. That being so, the failure of the withholding agent to remit the tax withheld to the tax authorities may, on account of the issuance of that certification, prove more difficult to detect than a failure to pay declared VAT.

59 In view of those factors, those two offences cannot be regarded as being of a similar nature and importance, within the meaning of the case-law referred to in paragraph 28 above. Where two categories of offences can be distinguished by various circumstances concerning both the constituent elements of the offence and the degree of ease with which it can be detected, those differences mean, in particular, that the Member State concerned is not required to have an identical system of rules for the two categories of offences (judgment of 25 February 1988, *Drexl*, 299/86, EU:C:1988:103, paragraph 22).

60 Consequently, the principle of equivalence does not preclude a difference such as that between the thresholds laid down, respectively, in Article 10 bis and Article 10 ter of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015.

61 In the light of all the foregoing considerations, the answer to the first and third questions is that the VAT Directive, read in conjunction with Article 4(3) TEU, and Article 325(1) TFEU must be interpreted as not precluding national legislation which provides that failure to pay, within the time limit prescribed by law, the VAT resulting from the annual tax return for a given financial year constitutes a criminal offence punishable by a custodial sentence only when the amount of unpaid VAT exceeds a criminalisation threshold of EUR 250 000, whereas a criminalisation threshold of EUR 150 000 is laid down for the offence of failing to pay withholding income tax.

The second question

62 In view of the answer to the first and third questions, there is no need to reply to the second question.

(…)

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

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 4(3) TEU, and Article 325(1) TFEU must be interpreted as not precluding national legislation which provides that failure to pay, within the time limit prescribed by law, the value added tax (VAT) resulting from the annual tax return for a given financial year constitutes a criminal offence punishable by a custodial sentence only when the amount of unpaid VAT exceeds a criminalisation threshold of EUR 250 000, whereas a criminalisation threshold of EUR 150 000 is laid down for the offence of failing to pay withholding income tax.

Belgium

Supreme Court (Court of Cassation)

18 January 2018

Case number: F.17.0003.N.

Human rights – Presumption of innocence – Recovery of an administrative penalty before the end of the judicial proceedings – Interest due on the amount of the fine - No violation

Summary

The presumption of innocence does not preclude that the tax authorities proceed with the recovery of an administrative fine before the tax dispute has led to a final judicial decision, and that the tax authorities charge interest on the amount of that penalty, insofar as (1°) a judicial review against that penalty is possible and (2°) the recovery is done within reasonable limits.

1. The presumption of innocence guaranteed by Article 6.2 of the ECHR does not prevent the tax authorities from being entrusted with the task of imposing administrative fines in the event of violation of the Tax Code, even if these penalties are severe, insofar as the taxpayer has the possibility to ask for a judicial review of the penalty by a judge with full jurisdiction. Under the same condition, Article 6.2 of the ECHR does not preclude interest on the amount of the fine in the event of non-payment.

2. In principle, the presumption of innocence guaranteed by Article 6.2 ECHR does not preclude that the authorities proceed with the enforcement of the administrative fine before the taxpayer has been found guilty in a final judicial decision. In view of the serious consequences that immediate enforcement may have for the person concerned, the tax authorities are obliged to proceed to such immediate implementation within reasonable limits, while maintaining a fair balance between all the interests at stake.

(…)

Comments

The recovery of administrative penalties and the presumption of innocence: need for a fair balance

1. The above judgment of the Belgian Supreme Court is in line with the decision of the European Court of Human Rights of 23 July 2002 in the case *Janosevic v. Sweden* (point 106): *"The Court notes that neither Article 6 nor, indeed, any other provision of the Convention can be seen as excluding, in principle, enforcement measures being taken before decisions on tax surcharges have become final. Moreover, provisions allowing early enforcement of certain criminal penalties can be found in the laws of other Contracting States. However, considering that the early enforcement of tax surcharges may have serious implications for the person concerned and may adversely affect his or her defence in the subsequent court proceedings, as with the position with the use of presumptions in criminal law, the States are required to confine such enforcement within reasonable limits that strike a fair balance between the interests involved. This is especially important in cases like the present one in which enforcement measures were taken on the basis of decisions by an administrative authority, that is, before there had been a court determination of the liability to pay the surcharges in question."*

2. This is also relevant for international tax recovery assistance with regard to such penalties and surcharges. Article 2(2)(a) of Directive 2010/24 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures provides that the scope of this Directive includes: *"administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested in accordance with paragraph 1, imposed by the administrative authorities that are competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authorities"*.

L. Vandenberghe

EU

Court of Justice

Eamonn Donnellan

26 April 2018

Case number: C-34/17

1. International recovery assistance – Refusal to provide assistance on the basis that the claim was not duly notified – Justified for reasons of public policy of the requested State.

2. Notification of tax claims – Validity – Condition that the addressee is able to know the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons.

Summary

1. Recovery assistance Directive 2010/24 does not preclude an authority of a Member State from refusing to enforce a request for recovery concerning a tax fine imposed in another Member State, on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery.

2. A notification of tax claims is only valid if it permits the addressee to know the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons. There is no valid notification to a tax debtor in another country if his debt is only published in the national Official Journal or in case the addressee is simply invited to contact the embassy in that other country.

1 This request for a preliminary ruling concerns the interpretation of Article 14(1) and (2) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1).

2 The request has been made in proceedings between Mr Eamonn Donnellan and the Revenue Commissioners ('the Commissioners'), concerning the recovery of a claim consisting of a fine imposed on Mr Donnellan by a Greek customs authority and the interest, costs or penalties relating to that fine.

Legal context

Directive 2010/24

3 Directive 2010/24 was adopted on the basis of Articles 113 and 115 TFEU. Recitals 1, 7, 17, 20 and 21 of that directive state as follows:

'(1) Mutual assistance between the Member States for the recovery of each others' claims and those of the Union with respect to certain taxes and other measures contributes to the proper functioning of the internal market. …

…

(7) Mutual assistance may consist of the following: the requested authority may supply the applicant authority with the information which the latter needs in order to recover claims arising in the applicant Member State and notify to the debtor all documents relating to such claims emanating from the applicant Member State. The requested authority may also recover, at the request of the applicant authority, the claims arising in the applicant Member State, or take precautionary measures to guarantee the recovery of these claims.

…

(17) This Directive should not prevent the fulfilment of any obligation to provide wider assistance ensuing from bilateral or multilateral agreements or arrangements.

…

(20) Since the objectives of this Directive, namely the provision of a uniform system of recovery assistance within the internal market, cannot be sufficiently achieved by the Member States and can therefore … be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity …

(21) This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union.'

4 Article 1 of that directive, entitled 'Subject matter', states that the directive 'lays down the rules under which the Member States are to provide assistance for the recovery in a Member State of any claims referred to in Article 2 which arise in another Member State'.

5 Article 2 of that directive, entitled 'Scope', provides:

'1. This Directive shall apply to claims relating to the following:

(a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union;

…

2. The scope of this Directive shall include:

(a) administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested in accordance with paragraph 1, imposed by the administrative authorities that are competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authorities;

…

(c) interest and costs relating to the claims for which mutual assistance may be requested in accordance with paragraph 1 or point (a) or (b) of this paragraph.

…'

6 Article 8 of that directive, entitled 'Request for notification of certain documents relating to claims', states:

'1. At the request of the applicant authority, the requested authority shall notify to the addressee all documents, including those of a judicial nature, which emanate from the applicant Member State and which relate to a claim as referred to in Article 2 or to its recovery.

…'

7 Article 10 of Directive 2010/24, entitled 'Request for recovery', provides, in paragraph 1:

'At the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the applicant Member State.'

8 Article 11 of that directive, entitled 'Conditions governing a request for recovery', provides, in paragraph 1:

'The applicant authority may not make a request for recovery if and as long as the claim and/or the instrument permitting its enforcement in the applicant Member State are contested in that Member State, except in cases where the third subparagraph of Article 14(4) applies.'

9 Article 12 of that directive, entitled 'Instrument permitting enforcement in the requested Member State and other accompanying documents', provides:

'1. Any request for recovery shall be accompanied by a uniform instrument permitting enforcement in the requested Member State.

This uniform instrument permitting enforcement in the requested Member State shall reflect the substantial contents of the initial instrument permitting enforcement, and constitute the sole basis for the recovery and precautionary measures taken in the requested Member State. It shall not be subject to any act of recognition, supplementing or replacement in that Member State.

The uniform instrument permitting enforcement shall contain at least the following information:

(a) information relevant to the identification of the initial instrument permitting enforcement, a description of the claim, including its nature, the period covered by the claim, any dates of relevance to the enforcement process, and the amount of the claim and its different components such as principal, interest accrued, etc.;

(b) name and other data relevant to the identification of the debtor;

(c) name, address and other contact details regarding:

(i) the office responsible for the assessment of the claim, and, if different;

(ii) the office where further information can be obtained concerning the claim or the possibilities for contesting the payment obligation.

…'

10 Article 13 of Directive 2010/24, entitled 'Execution of the request for recovery', provides:

'1. For the purpose of the recovery in the requested Member State, any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State, except where otherwise provided for in this Directive. The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State applying to claims concerning the same or, in the absence of the same, a similar tax or duty, except where otherwise provided for in this Directive.

…

3. From the date on which the recovery request is received, the requested authority shall charge interest for late payment in accordance with the laws, regulations and administrative provisions in force in the requested Member State.

…'

11 Article 14 of Directive 2010/24, entitled 'Disputes', provides:

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

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

3. Where an action as referred to in paragraph 1 has been brought before the competent body of the applicant Member State, the applicant authority shall inform the requested authority thereof and shall indicate the extent to which the claim is not contested.

4. As soon as the requested authority has received the information referred to in paragraph 3, either from the applicant authority or from the interested party, it shall suspend the enforcement procedure, as far as the contested part of the claim is concerned, pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the third subparagraph of this paragraph.

At the request of the applicant authority, or where otherwise deemed to be necessary by the requested authority, … the requested authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the requested Member State allow such action.

The applicant authority may, in accordance with the laws, regulations and administrative practices in force in the applicant Member State, ask the requested authority to recover a contested claim or the contested part of a claim, in so far as the relevant laws, regulations and administrative practices in force in the requested Member State allow such action. Any such request shall be reasoned. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for reimbursing any sums recovered, together with any compensation due, in accordance with the laws in force in the requested Member State.

… '

12 Under Article 28 of that directive, Member States were required to adopt and publish, by 31 December 2011, the laws, regulations and administrative provisions necessary to comply with that directive and to apply those provisions from 1 January 2012.

13 Article 29 of Directive 2010/24 repealed, with effect from 1 January 2012, Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28).

14 Directive 2008/55 had codified Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18) and the acts amending it.

Implementing Regulation (EU) No 1189/2011

15 Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Directive 2010/24 (OJ 2011 L 302, p. 16) states, in Article 15(1):

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

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

16 Mr Donnellan, who is an Irish national, was recruited in 2002 as a driver of heavy goods vehicles by TLT International Ltd, a transport undertaking established under Irish law.

17 In July 2002, Mr Donnellan, on the instructions of that undertaking, collected, from a trader established in Greece, 23 pallets of olive oil. The consignment note relating to those goods indicated that the consignee of those goods was an undertaking operating supermarkets in Ireland.

18 On 26 July 2002, Mr Donnellan presented that consignment note to the customs office of the port of Patras (Greece). On that occasion, a customs agent, during an inspection of those goods, discovered, in addition to the olive oil, 171 800 packets of contraband cigarettes. Following that discovery, Mr Donnellan was arrested and the vehicle and its cargo were seized.

19 On 29 July 2002, Mr Donnellan was found guilty at first instance of smuggling and issuing fictitious tax data. Those offences led to the sentencing of Mr Donnellan to prison sentences of three years and one year respectively. Mr Donnellan was imprisoned immediately.

20 On 17 October 2002, Mr Donnellan was acquitted of both charges on appeal and was released immediately.

21 On 27 April 2009, the customs office of Patras issued a notice for the imposition on Mr Donnellan of an administrative penalty of EUR 1 097 505 on the basis that the cargo seized in July 2002 contained 171 800 packets of contraband cigarettes.

22 On 19 June 2009, the Greek Embassy in Ireland sent a letter by recorded delivery to 'Mr Donnellan Eamonn Ballyhaunis, Ireland', inviting him to make contact with the embassy's services as soon as possible so that he could come to receive and sign important documents concerning him.

23 By decision of 15 July 2009, by way of a follow-up to the notice of 27 April 2009, the customs office of Patras imposed a fine of EUR 1 097 505 on Mr Donnellan. The same day, that fine was published in the *Official Journal of the Hellenic Republic*.

24 On 14 November 2012, the Greek authorities sent to the Commissioners, in English, a request for recovery, within the meaning of Article 10 of Directive 2010/24, relating to that fine of EUR 1 097 505, increased by interest of EUR 384 126.76 and costs or penalties of EUR 26 340.12.

25 That request contained, inter alia, by way of a declaration, as required by Article 15 of Implementing Regulation No 1189/2011, that the conditions laid down in Directive 2010/24 for initiating the mutual assistance procedure had been fulfilled, the following information:

– 'The claim(s) is (are) not contested';

– 'The claim(s) may no longer be contested by an administrative appeal/by an appeal to the courts';

– 'Appropriate recovery procedures have been applied in the State of the applicant authority but will not result in the payment in full of the claim'.

26 On 15 November 2012, Mr Donnellan received a letter from the Commissioners, dated 14 November 2012, reclaiming from him, within 30 days, the amount of EUR 1 507 971.88 by way of recovery of the fine, interest and costs or penalties which formed the subject matter of the request made by the Greek authorities.

27 Attached to that letter, in English, was the 'uniform instrument' referred to in Article 12 of Directive 2010/24. That instrument made reference to the abovementioned decision of the customs office of Patras and described the claim in question as follows: 'Multiple duties for illegal cigarette trading'.

28 That instrument stated Mr Donnellan's passport number and described his address as 'known'.

29 As soon as he had received that letter of 14 November 2012, Mr Donnellan engaged the services of a solicitor with a view to seeking clarifications regarding the decision of the customs office of Patras.

30 On 11 June 2014, Mr Donnellan brought proceedings before the High Court (Ireland) seeking relief from the demand for enforcement of the request for recovery of the amounts claimed.

31 On 12 December 2014, an interlocutory injunction order restraining enforcement was granted by that court, pending a ruling on the substance of the case.

32 The Commissioners argue before the High Court that, in the absence of an action brought by Mr Donnellan in Greece with regard to the claim in question, they are required to give a positive response to the request for recovery and to proceed with enforcement of that request.

33 Mr Donnellan argues that he was deprived of his right to an effective remedy in Greece and that, in those circumstances, a positive response to that request for recovery cannot be given by the Commissioners.

34 In that regard, Mr Donnellan produced, inter alia, before the referring court a report drawn up by Mr Siaperas, an expert in Greek law. According to that report, the last date on which Mr Donnellan could have brought an action against the decision of the customs office of Patras was 13 October 2009, that is to say, 90 days following the publication of the fine in the *Official Journal of the Hellenic Republic*.

35 The referring court infers from all of the documents in the case file, first, that the registered letter of 19 June 2009, addressed by the Greek Embassy to Mr Donnellan, was not delivered to him, secondly, that Mr Donnellan became aware of the existence of the decision imposing the fine on him on 15 November 2012, and, thirdly, that he was informed of the content of, and the reasons for, that decision only by subsequent letters, inter alia by letters of 31 March 2014 and of 29 December 2015 from the Greek Ministry of Finance.

36 According to the referring court, it is apparent from the settled case-law of the Irish courts, the Irish Constitution and Ireland's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), that no Irish court could authorise the enforcement of a decision, such as that at issue in the main proceedings, which was not notified to the person concerned and which is, moreover, based on facts in respect of which that person was found to be innocent. The enforcement of such a decision would, in the referring court's view, be contrary to public policy in Ireland.

37 While finding that Directive 2010/24 does not permit the legality of the decision of the Greek authorities to be contested before the Irish courts, the referring court takes the view that the principles of EU law, as set out in the judgment of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11), suggest nonetheless that exceptional circumstances may allow the referring court to rely on the Charter of Fundamental Rights of the European Union ('the Charter') in order to refuse enforcement of a request for recovery such as that at issue in the main proceedings.

38 In those circumstances, the High Court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the High Court of Ireland precluded by Article 14(1) and (2) of Directive 2010/24 when determining the enforceability in Ireland of a "uniform instrument permitting enforcement" issued on 14 November 2012 by the customs office of Patras for administrative penalties and fines in the sum of EUR 1 097 505 imposed on 15 July 2009 for alleged smuggling on 26 July 2002 [increased to EUR 1 507 971.88 by virtue of interest and penalties] from:

– applying the right to an effective remedy and to a fair trial within a reasonable time for a citizen of Ireland and of the European Union in relation to the enforcement request [Article 47 of the Charter and Articles 6 and 13 of the ECHR, which correspond with rights for citizens under Articles 34, 38 and 40.3 of the Irish Constitution, in circumstances where the procedure involved was only first explained to [the person concerned] in a "non-official translation" to English … in a letter dated [29 December 2015] from the Ministry of Finance of the Hellenic Republic … to the Irish Revenue and the solicitors in Ireland for [the person concerned]];

– taking account of the objectives of Directive 2010/24 to provide mutual assistance (recital 20 of Directive 2010/24) and to abide by the obligation to provide wider assistance ensuing from the ECHR (recital 17 of Directive 2010/24) such as the right to an effective remedy for citizens under Article 47 of the Charter and Article 13 of the ECHR;

– considering the full effectiveness of EU law for its citizens [having regard, in particular, to paragraph 63 of the judgment of 14 January 2010, *Kyrian*, C-233/08, [EU:C:2010:11]]?'

Consideration of the question referred

39 By its question, the referring court asks, in essence, whether Article 14(1) and (2) of Directive 2010/24 must be interpreted as precluding an authority of a Member State from refusing to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State on grounds connected to the right of the person concerned to an effective remedy before a court or tribunal.

40 It should be noted at the outset that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 191 and the case-law cited).

41 While coming within the area of the internal market, and not that of freedom, security and justice, Directive 2010/24 is also based on the principle of mutual trust referred to above. The implementation of the system of mutual assistance established by that directive depends on the existence of such trust between the national authorities concerned.

42 It is apparent, in particular, from Article 12(1) of that directive that recovery of the claim in the requested Member State is based on the 'uniform instrument' by which the applicant authority sends to the requested authority information contained in the original instrument permitting enforcement in the applicant Member State. That uniform instrument is not subject to any act of recognition, supplementing or replacement in the requested Member State.

43 Moreover, it follows from Article 14(1) of Directive 2010/24 that any contestation of that claim, initial instrument, uniform instrument or notification made by a competent authority of the applicant Member State must be brought before the competent bodies of that Member State and not before those of the requested Member State.

44 Far from giving the bodies of the requested Member State the power to review the acts of the applicant Member State, Article 14(2) of Directive 2010/24 explicitly limits the power of review of those bodies to acts of the requested Member State.

45 Even though the acts taken by Member States pursuant to the system of mutual assistance established by Directive 2010/24 must be in accordance with the fundamental rights of the European Union, which include the right to an effective remedy enshrined in Article 47 of the Charter, it does not in any way follow that the acts of the applicant Member State must be capable of being challenged both before the courts of that Member State and before those of the requested Member State. On the contrary, that system of mutual assistance, as it is based, in particular, on the principle of mutual trust, increases legal certainty with regard to the determination of the Member State in which disputes are settled and thus makes it possible to avoid forum shopping (see, by analogy, judgment of 21 November 2011, *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 79).

46 It follows that the action which the person concerned brings in the requested Member State, seeking rejection of the demand for payment addressed to him by the authority of that Member State which is competent for the recovery of the claim made in the applicant Member State, cannot lead to an assessment of the legality of that claim.

47 By contrast, as the Court has previously held, it cannot be ruled out that the requested authority may, exceptionally, decide not to grant its assistance to the applicant authority. Enforcement of the request for recovery of the claim may thus, inter alia, be refused if it is shown that such enforcement is liable to be contrary to the public policy of the Member State of the requested authority (see, with regard to Article 12 of Directive 76/308, to which, in essence, Article 14 of Directive 2010/24 corresponds, judgment of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 42).

48 In this regard, it is important to point out that, in accordance with Article 13(1) of Directive 2010/24, the claim in respect of which a request for recovery has been made is to be treated as if it were a claim of

the requested Member State, that latter Member State being thus required to make use of the powers and procedures provided for under the laws, regulations or administrative provisions applying to claims concerning identical or similar taxes or duties in its legal system. It is difficult to imagine that an instrument permitting enforcement of an identical or similar claim of the requested Member State would be enforced by that State if that enforcement were liable to be contrary to its own public policy (see, by analogy, with regard to Directive 76/308, judgment of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 43).

49 That being said, it is for the Court to review the limits within which the authorities of a Member State may refuse, by reference to national views such as those relating to the public policy of that State, to grant their assistance to another Member State within the context of a system of cooperation established by the EU legislature (see, to that effect, judgments of 28 April 2009, *Apostolides*, C-420/07, EU:C:2009:271, paragraphs 56 and 57, and of 25 May 2016, *Meroni*, C-559/14, EU:C:2016:349, paragraphs 39 and 40).

50 It has also consistently been held that limitations on the principle of mutual trust must be interpreted strictly (see, inter alia, judgments of 14 November 2013, *Baláž*, C-60/12, EU:C:2013:733, paragraph 29; of 16 July 2015, *Diageo Brands*, C-681/13, EU:C:2015:471, paragraph 41; of 25 May 2016, *Meroni*, C-559/14, EU:C:2016:349, paragraph 38; and of 23 January 2018, *Piotrowski*, C-367/16, EU:C:2018:27, paragraph 48).

51 In the present case, notwithstanding the statement, contained in the request for recovery, that recovery procedures were applied in the applicant Member State, it is not disputed, according to the order for reference, that it was only on the date on which the competent authority of the requested Member State sent the person concerned the request for payment accompanied by the uniform instrument that that person became aware of the fact that, several years earlier, a fine had been imposed on him in the applicant Member State. The referring court finds, moreover, that it was a long time after becoming aware of the existence of that fine that the person concerned received more specific information on the content of and the reasons for the decision imposing that fine on him.

52 In those circumstances, the referring court takes the view that a refusal to enforce the request for recovery could be justified on grounds connected to the right to an effective judicial remedy and to the fact that, in Ireland, enforcement of a fine which has not been notified to the person concerned is contrary to public policy.

53 In order to assess whether circumstances such as those referred to by the national court may, without disregarding the principle of mutual trust, lead to a refusal to enforce, it is necessary to note, first of all, that the function of the uniform instrument, addressed by the applicant authority to the requested authority for the purposes of the recovery of a claim and sent by the requested authority to the person concerned attached to a request for payment, is not to notify the person concerned of the decision, adopted in the Member State of the applicant authority, on which that claim is based. That instrument, which, as was noted in paragraph 9 above, refers to, inter alia, the type and quantum of the claim and the personal data of the person concerned, is intended to allow the authorities of the requested Member State to adopt enforcement measures and thus to assist in the recovery. By contrast, the communication of that instrument, without the decision imposing the fine and the reasoning for that decision being sent to the person concerned, does not constitute a notification of that decision.

54 Next, it should be noted that the system of mutual assistance for the recovery of claims seeks, inter alia, to ensure the effective notification of all instruments and decisions which emanate from the Member State in which the applicant authority is situated and which relate to a claim or to its recovery (see, with regard to Directive 76/308, judgment of 14 January 2010, *Kyrian*, C-233/08, EU:C:2010:11, paragraph 57). Article 8 of Directive 2010/24 provides, in that regard, for the possibility for the authority which issued the claim to seek assistance, from the competent authority in the Member State of residence of the person concerned, with the notification of the documents relating to that claim.

55 Lastly, it should be noted that, in order to be able to exercise his right to an effective legal remedy, within the meaning of Article 47 of the Charter, against a decision adversely affecting his interests, the person concerned must know the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, in order that he may defend his rights in the best possible conditions and decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction (judgment of 4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, paragraph 53 and the case-law cited).

56 In circumstances such as those established by the referring court in the case in the main proceedings, the person concerned is subject to the enforcement procedure relating to the request for recovery covered by Directive 2010/24, notwithstanding the fact that the fine in question was not notified to him. The person concerned is thus placed in a situation in which payment of the amount of that fine, together with the interest and costs referred to in Article 2(2)(c) of that directive and interest for late payment referred to in Article 13(3) thereof, is claimed from him by the requested

authority even though, due to a lack of sufficient knowledge of the content of and the reasoning for the decision imposing the fine on him, he was not in a position to contest that decision in the Member State of the applicant authority.

57 As the Advocate General noted, in essence, in point 70 of his Opinion, a situation in which the applicant authority seeks recovery of a claim based on a decision which was not notified to the person concerned does not satisfy the condition governing requests for recovery, laid down in Article 11(1) of Directive 2010/24. Since, according to that provision, a request for recovery within the meaning of that directive cannot be made as long as the claim and/or the instrument permitting enforcement of its recovery in the Member State of transmission is contested in that Member State, it follows that such a request also cannot be made when the person concerned has not been informed of the very existence of that claim, that information being a necessary prerequisite for the ability to contest that claim.

58 Moreover, this interpretation is supported by Article 47 of the Charter and by the case-law of the Court concerning the service and notification of judicial documents. It follows in particular from that case-law that, in order to ensure respect for the rights laid down in Article 47 of the Charter, it is important not only to ensure that the addressee of a document actually receives the document in question but also that he is able to know and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able effectively to assert his rights in the Member State of transmission (see, to that effect, judgment of 16 September 2015, *Alpha Bank Cyprus*, C-519/13, EU:C:2015:603, paragraphs 31 and 32 and the case-law cited). Such considerations are also relevant in the context of Directive 2010/24.

59 Consequently, in the case where a request for recovery is presented, even though the person concerned has not had the opportunity to raise the matter before the courts of the applicant Member State under conditions compatible with the fundamental right to an effective remedy, the rule laid down in Article 14(1) of Directive 210/24, as transposed into national law, cannot reasonably be invoked against that person.

60 That is a fortiori so where, as in the present case, the applicant authority itself indicated, in the request for recovery, and therefore at a point in time earlier than that at which the person concerned became aware of the existence of the claim in question, that it was no longer possible to bring administrative or judicial proceedings in the applicant Member State with a view to contesting that claim. Although, admittedly, the Greek Government subsequently, in its observations before the Court, asserted the contrary, submitting that the possibility to bring proceedings was not extinguished following the expiry of the period for bringing an action triggered by the publication of that claim in the *Official Journal of the Hellenic Republic*, the person concerned cannot be criticised for having taken into consideration the information provided by the applicant authority in the request for recovery, information of which the person concerned, after becoming aware of the existence of that claim, had received a copy and which he had caused to be checked by an expert in Greek law, who confirmed it.

61 It follows from the foregoing that an exceptional situation such as that at issue in the main proceedings in the present case, in which an authority of a Member State requests an authority of another Member State to recover a claim relating to a fine of which the person concerned was unaware, may legitimately lead to a refusal of assistance with the recovery by that latter authority. The assistance provided for in Directive 2010/24 is, as is indicated by the title and various recitals of that directive, described as 'mutual', which implies, in particular, that it is for the applicant authority to create, before it makes a request for recovery, the conditions under which the requested authority will be able to grant its assistance in a meaningful manner and in conformity with the fundamental principles of EU law.

62 In the light of all of the foregoing considerations, the answer to the question referred is that Article 14(1) and (2) of Directive 2010/24, read in the light of Article 47 of the Charter, must be interpreted as not precluding an authority of a Member State from refusing to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State, such as that at issue in the main proceedings, on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to that authority pursuant to that directive.

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

Article 14(1) and (2) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding an authority of a Member State from refusing to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State, such as that at issue in the main proceedings, on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to that authority pursuant to that directive.

Comments

Notification of tax claims

1. A tax debtor can only be expected to pay a tax or a tax related claim if he is properly informed about that tax or tax related claim. It is therefore important for the tax authorities to proceed with a valid notification before they launch recovery measures. This requirement also applies in a cross-border context of mutual recovery assistance.

2. The notification implies that *"the person concerned must know the reasons upon which the decision taken in relation to him is based,* ***either by reading the decision itself or by requesting and obtaining notification of those reasons****, in order that he may defend his rights in the best possible conditions and decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction"* (point 55 of the judgment).

This consideration of the judgment confirms the validity of the approach underlying the Uniform Notification Form (to be used if the notification in another country is done by the requested authorities; see Article 8(1) of Directive 2010/24/EU). This standard form provides some important information about the claim and informs the debtor about the office where further information can be obtained. Given the automated translation of the standard form, this information can be provided in the official language of the requested Member State, as required by the EU Court of Justice in its Kyrian judgment (C-233/08). If needed, the debtor can contact this office in order to obtain more information, so as to have a full knowledge of all the relevant facts. In this way, his right of defence is well respected.

The above consideration of the judgment also confirms the usefulness of the Direct Notification Form, i.e. the standard form that can be used by tax authorities if a notification in another country is directly done by the authorities of the Member State where the claim is due (see Article 9(2) of Directive 2010/24/EU).

3. The Court of Justice further confirms that "*the* ***function of the uniform instrument (…) is not to notify the person concerned*** *of the decision, adopted in the Member State of the applicant authority, on which that claim is based. That instrument (…) is intended to allow the authorities of the requested Member State to adopt enforcement measures and thus to assist in the recovery. By contrast, the communication of that instrument, without the decision imposing the fine and the reasoning for that decision being sent to the person concerned, does not constitute a notification of that decision"* (point 53 of the judgment).

Accordingly, there is no obligation under EU law for the requested authorities to notify this uniform instrument permitting enforcement before launching recovery measures.

The above consideration of the Court with regard to the function of the uniform instrument permitting enforcement is also in line with the approach underlying Article 17 of Regulation 1189/2011, which provides that: *"The addressee of a request for recovery or precautionary measures may not rely on the notification or communication of the uniform instrument permitting enforcement in the requested Member State to claim a prolongation or a re-opening of the time period to contest the claim or the initial instrument permitting enforcement if that has been validly notified."*

4. The above judgment confirms that a so-called "deemed notification" (such as the publication of a tax claim in the national Official Journal in the case at stake), which does not effectively reach the tax debtor, cannot be taken into account as a starting point to determine the time period for contesting the claim concerned. This does not imply that such a deemed notification is completely useless. Tax authorities may still use a deemed notification if the address of the debtor is unknown, so that an effective notification is not possible at the time of that deemed notification. In this way, a deemed notification may be an element of proof that the time period for recovery of that claim did not yet come to an end (depending on the national law of the Member State concerned).

L. Vandenberghe

Portugal

Supreme Administrative Court

8 February 2017

Case number: 0177/15

Guarantees for tax collection – Petition from the debtor to provide a guarantee – No decision with regard to that petition – Suspension of the recovery procedure

Summary

Tax recovery proceedings must remain suspended until the tax authorities reply to the tax debtor's petition requesting the determination of the value of the guarantee or security that he offers to provide.

Notwithstanding the fact that Article 60 of the CPPT provides that tax acts of a competent tax authority, relating to the matter, are final in determining the taxpayers' rights, without prejudice to their possible review or challenge under the law (here, in relation to the certainty and the amount due of debts in the civil forum), they are only enforceable if they are duly notified and the period of voluntary payment has expired. This means that the fulfillment of the payment obligation cannot be requested or imposed on the other party before a certain period has elapsed or before the arrival of a specific date.

However, if the notification has been done and after this payment period has elapsed, the tax authorities can start the recovery (given the principle of the definitive character of the tax claims) and this can only be obstructed (suspended) if the certainty and the amount due of the debt is challenged by means of a voluntary or contentious procedure and if the guarantee (as referred to in Article 169 of the CPPT) is provided; (…)

What has been said follows from the principle that administrative acts are enforceable as soon as they are effective and can be imposed coercively by the authorities without recourse to the courts, provided that the taxation is made in the ways and in the terms permitted by law.

Thus, the simple presentation of an administrative complaint against the assessment does not prevent the extraction of a certificate of debt (as soon as the period for voluntary payment has elapsed, and even in the beginning of the period for administrative or judicial contestations) and its remittance to the finance department and initiation of enforcement measures for the recovery, since the tax assessment constitutes a tax act that enjoys the aforementioned definitive character, thereby giving rise to the possibility of immediate execution, and the debt may be immediately recovered. The execution can only be suspended if the debt is guaranteed (or if a guarantee waiver request has been accepted).

However, in the present case the administrative complaint contained, in the initial petition, a request to provide a guarantee. As we will demonstrate, this has some specific effects.

Although Article 69 (f) of the CPPT includes, as from the outset, the rule that the presentation of an administrative complaint does not have a suspensory effect on the collection of the tax, which (according to Jorge Lopes de Sousa (note 7 on his commentary on article 69 CPPT, 6th edition 2011) means that the tax authorities can enforce the tax act which is the subject of the complaint; the following exception follows: "unless an adequate guarantee is provided under the provisions of this Code ..." which leads the same author to express in the same place and work cited that "if the enforcement procedure has not yet been opened when a guarantee is provided, the suspensory effect of this guarantee prevents the opening of the enforcement procedure". On this point, he refers to the decisions of this Administrative Supreme Court of 11/10/2006 (513/06) and 09/09/2009 (347/09) as accepting the same possibility.

Do we therefore have to consider that the suspensive effect of the administrative complaint can take place before the commencement of the enforcement, and even before the guarantee is lodged, as a result of the petition for a guarantee?

The rule is that any petition to provide a guarantee has the power to suspend the collection procedure and if, as in the present case, no recovery procedure was initiated, this cannot be done until a decision has been reached on the guarantee, given the need to respect the rules of articles 266 and 268 of the Constitution.

If the opponent/appellant has lodged a complaint and presented a petition to provide a guarantee, and if he is waiting for the tax authorities to determine the amount to be guaranteed, the enforcement procedure should not be initiated, because in itself the opening of the enforcement is already detrimental to the interests of the taxpayer since it affects or may affect his patrimonial sphere (and this applies to natural persons as well as to companies), and his financial credibility and economic solvency may be questioned by third parties, which may have immediate negative effects for obtaining credits or for doing business *(in the sense that the simple initiation of disciplinary proceedings by the Magistrate is already a harmful act, as decided by the Administrative Litigation Section of this Supreme Administrative Court in Nr. 0362/07 of*

06/14/2007 which has been followed in other cases and has influenced the case-law previously set in the opposite direction).

We consider that the tax authorities are legally obliged to rule on the petitions submitted to them. In the absence of such a decision on the petition for the provision of guarantee presented in the administrative complaint, the tax authorities should refrain from any action tending to the collection procedure, including the initiation of the recovery procedure.

Australia

Federal Court of Australia

Commissioners of Taxation v C.

17 July 2018

Case number: WAD320 of 2018 – [2018] FCA 1087

Precautionary measures – Freezing of assets – Good arguable case – Danger that prospective judgment will be unsatisfied through particular activities by the debtor – Balance of convenience

Summary

A freezing order may be made to meet a danger that a prospective judgment of the Court will not be satisfied because the prospective judgment debtor might abscond or remove assets or dispose or deal with the assets or diminish them in values.

In this regard, the tax authority has to demonstrate a good arguable case, the danger that a judgment will be unsatisfied and that the balance of convenience favours the grant of the order sought to preserve its position for a short period of time until the matter can come back before the court. It is not necessary for the tax authority to show that the time for payment of the assessments has elapsed.

A high degree of caution must be exercised in considering whether a freezing order should be made. It must be kept in mind that a freezing order is a substantial encroachment upon basic rights in respect of property. Even so, a positive intention to frustrate a judgment need not be demonstrated.

With regard to the required balance, the form of orders proposed by the tax authority has a number of protections. They only apply to steps that would diminish the assets of the person concerned up to the amount of the assessed tax liability (including steps in relation to assets under his control). They do not prohibit that person from paying his ordinary living expenses, his reasonable legal expenses, Australian business and legal expenses bona fide and properly incurred, and (with notice to the tax authority) contractual obligations already incurred. The orders only apply until the matter is returned before the Court.

THE COURT ORDERS THAT:

1. This interlocutory application be returnable immediately.

2. A freezing order be made against the respondent in the terms specified in Annexure 'A' up to and including 5.00 pm on 1 August 2018.

3. The respondent be restrained from disposing of, dealing with or diminishing the value of any assets held by him until either:

(a) the freezing order made against the respondent in these proceedings on 17 July 2018 is discharged; or

(b) further order.

4. The Registrar of Titles for Western Australia be and is hereby restrained from registering any dealing which affects the properties known as:

(...)

until either:

(a) the freezing order set out in Annexure 'A', made against the respondent in these proceedings is discharged; or

(b) further order.

5. The Registrar-General for South Australia be and is hereby restrained from registering any dealing which affects the property known as (...), until either:

(a) the freezing order set out in Annexure 'A', made against the respondent in these proceedings is discharged; or

(b) further order.

6. The Registrar-General for New South Wales be and is hereby restrained from registering any dealing which affects the property known as (...), until either:

(a) the freezing order set out in Annexure 'A', made against the respondent in these proceedings is discharged; or

(b) further order.

7. The Registrar of Titles for Queensland be and is hereby restrained from registering any dealing which affects the property known as (...) until either:

(a) the freezing order set out in Annexure 'A', made against the respondent in these proceedings is discharged; or

(b) further order.

The applicant serve the Documents* on the respondent within two (2) business days of the making of these orders.

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* In this Minute of Proposed Orders, 'Documents' means:

(i) the Originating Application filed in these proceedings on 16 July 2018;

(ii) the Interlocutory Application filed in these proceedings on 16 July 2018;

(iii) the Affidavit of Mr. Z. sworn on 17 July 2018 and the annexures to that affidavit;

(iv) the Affidavit of Mr. E. sworn on 17 July 2018 and the annexures to that affidavit;

(v) the submissions filed on behalf of the applicant in support of the Interlocutory Application; and

(vi) the Orders of the Court made on the interlocutory application.

8. On or before 5.00 pm AWST 18 July 2018, a sealed copy of the orders be served by facsimile on the Registrar of Titles for Western Australia, Complex Dealings Section, to facsimile number (...).

9. On or before 5.00 pm AWST 18 July 2018, a sealed copy of the orders be served on the Registrar General for South Australia by lodging the orders on the Registrar General for South Australia.

10. On or before 5.00 pm AWST 18 July 2018, a sealed copy of the orders be served on the Registrar General for New South Wales by lodging the orders on the Registrar General for New South Wales.

11. On or before 5.00 pm AWST 18 July 2018, a sealed copy of the orders be served on the Registrar of Titles for Queensland by lodging the orders on the Registrar of Titles for Queensland and by email to (...).

12. On or before 5.00 pm AWST 18 July 2018, a sealed copy of the orders be served on the Commonwealth Bank of Australia by email at (...) and by express post to (...).

13. On or before 5.00 pm AWST 18 July 2018, a sealed copy of the orders be served by express post on the National Australia Bank at (...).

14. On or before 5.00 pm AWST 18 July 2018, a sealed copy of the orders be served by express post on the AMP Bank Limited at (...).

15. The matter be listed for a directions hearing at 11.00 am 1 August 2018.

16. Liberty to apply be granted on 24 hours notice.

ANNEXURE A

PENAL NOTICE

TO: Mr. C.

IF YOU (BEING THE PERSON BOUND BY THIS ORDER)

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU TO ABSTAIN FROM DOING,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

TO: Mr. C.

This is a '*freezing order*' made against you on 17 July 2018 by Justice Colvin at a hearing without notice to you after the Court was given the undertakings set out in Schedule A to this order and after the Court read the affidavits listed in Schedule B to this order.

1. THE COURT ORDERS:

2. INTRODUCTION

1. (a) The application for this order is made returnable immediately.

   (b) The time for service of the application, supporting affidavits and originating process is abridged and service is to be effected by 5 pm on 18 July 2018.

2. Subject to the next paragraph, this order has effect up to and including 5.00 pm on 1 August 2018 ('**the Return Date**'). On the Return Date at 11.00 am there will be a further hearing in respect of this order before Justice Colvin.

3. Anyone served with or notified of this order, including you, may apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified.

4. In this order:

   (a) 'applicant', if there is more than one applicant, includes all the applicants;

   (b) 'you', where there is more than one of you, includes all of you and includes you if you are a corporation;

   (c) 'third party' means a person other than you and the applicant;

   (d) 'unencumbered value' means value free of mortgages, charges, liens or other encumbrances.

5. (a) If you are ordered to do something, you must do it by yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions.

   (b) If you are ordered not to do something, you must not do it yourself or through directors, officers, partners, employees, agents or others acting on your behalf or on your instructions or with your encouragement or in any other way.

Article I. FREEZING OF ASSETS

6. (a) You must not remove from Australia or in any way dispose of, deal with or diminish the value of any of your assets in Australia ('**Australian assets**') up to the unencumbered value of AUD$ (...) ('**the Relevant Amount**').

   (b) If the unencumbered value of your Australian assets exceeds the Relevant Amount, you may remove any of those assets from Australia or dispose of or deal with them or diminish their value, so long as the total unencumbered value of your Australian assets still exceeds the Relevant Amount.

(c) If the unencumbered value of your Australian assets is less than the Relevant Amount:

(i) you must not dispose of, deal with or diminish the value of any of your Australian assets and ex-Australian assets up to the unencumbered value of your Australian and ex-Australian assets of the Relevant Amount; and

(ii) you may dispose of, deal with or diminish the value of any of your ex-Australian assets, so long as the unencumbered value of your Australian assets and ex-Australian assets still exceeds the Relevant Amount.

7. For the purposes of this order,

(1) your assets include:

(a) all your assets, whether or not they are in your name and whether they are solely or co-owned;

(b) any asset which you have the power, directly or indirectly, to dispose of or deal with as if it were your own (you are to be regarded as having such power if a third party holds or controls the asset in accordance with your direct or indirect instructions); and

(c) the value of your assets is the value of the interest you have individually in your assets, and

(2) the following assets in particular:

(i) the following real property: (…)

(ii) any money held in or on behalf of the following accounts: (…)

Article II. PROVISION OF INFORMATION

8. Subject to paragraph 9, you must:

(a) at or before the further hearing on the Return Date, (or within such further time as the Court may allow) to the best of your ability inform the applicant in writing of all your assets world wide, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets;

(b) within 10 working days after being served with this order, swear and serve on the applicant an affidavit setting out the above information.

9. (a) This paragraph 9 applies if you are not a corporation and you wish to object to complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that you:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(b) ... This paragraph 9 also applies if you are a corporation and all of the persons who are able to comply with paragraph 8 on your behalf and with whom you have been able to communicate, wish to object to your complying with paragraph 8 on the grounds that some or all of the information required to be disclosed may tend to prove that they respectively:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(c) ... You must:

(i) disclose so much of the information required to be disclosed to which no objection is taken; and

(ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and

(iii) file and serve on each other party a separate affidavit setting out the basis of the objection.

Article III. EXCEPTIONS TO THIS ORDER

10. This order does not prohibit you from:

(a) paying your ordinary living expenses;

(b) paying your reasonable legal expenses;

(c) dealing with or disposing of any of your assets in the ordinary and proper course of your business for the purposes of paying Australian business and legal expenses bona fide and properly incurred or for making payment to the Commissioner of Taxation; and

(d) in relation to matters not falling within (a), (b), or (c), dealing with or disposing of any of your assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that within a reasonable time before doing so you give the applicant written notice of the particulars of the obligation, which notice shall wherever possible be at least two working days.

11. You and the applicant may agree in writing that the exceptions in the preceding paragraph are to be varied. In that case the applicant or you must as soon as practicable file with the Court and serve on the other a minute of a proposed consent order recording the variation signed by or on behalf of the applicant and you, and the Court may order that the exceptions are varied accordingly.

12. (a) This order will cease to have effect if you:

(i) pay the sum of $7,599,252.32 into Court; or

(ii) pay that sum into a joint bank account in the name of your lawyer and the lawyer for the applicant as agreed in writing between them; or

(iii) provide security in that sum by a method agreed in writing with the applicant to be held subject to the order of the Court.

(b) Any such payment and any such security will not provide the applicant with any priority over your other creditors in the event of your insolvency.

(c) If this order ceases to have effect pursuant (a), you must as soon as practicable file with the Court and serve on the applicant notice of that fact.

Article IV. COSTS

13. The costs of this application are reserved to the Court hearing the application on the Return Date.

Article V. PERSONS OTHER THAN THE APPLICANT AND RESPONDENT

14. **Set off by banks**

This order does not prevent any bank from exercising any right of set off it has in respect of any facility which it gave you before it was notified of this order.

15. **Bank withdrawals by the respondent**

No bank need inquire as to the application or proposed application of any money withdrawn by you if the withdrawal appears to be permitted by this order.

16. **Persons outside Australia**

(a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.

(b) The terms of this order will affect the following persons outside Australia:

(i) you and your employees and agents (except banks and financial institutions);

(ii) any person (including a bank or financial institution) who:

(A) is subject to the jurisdiction of this Court; and

(B) has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and

(C) is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience of the terms of this order; and

(iii) any other person (including a bank or financial institution), only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has jurisdiction over that person or over any of that person's assets.

17. **Assets located outside Australia**

Nothing in this order shall, in respect of assets located outside Australia, prevent any third party from complying or acting in conformity with what it reasonably believes to be its bona fide and properly incurred legal obligations, whether contractual or pursuant to a court order or otherwise, under the law of the country or state in which those assets are situated or under the proper law of any contract between a third party and you, provided that in the case of any future order of a court of that country or state made on your or the third party's application, reasonable written notice of the making of the application is given to the applicant.

18. **Notices under s260-5 of Schedule 1 to the *Taxation Administration Act***

Nothing in this order shall prevent any third party complying with the terms of a notice issued by the Commissioner of Taxation to the third party pursuant to s260-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) in respect of any money which the third party may owe or may later owe to the respondent.

SCHEDULE A

Article VI. UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

(1) The applicant undertakes to submit to such order (if any) as the Court may consider to be just for

the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.

(2) As soon as practicable, the applicant will file and serve upon the first respondent copies of:

(a) this order;

(b) the application for this order for hearing on the return date;

(c) the following material in so far as it was relied on by the applicant at the hearing when the order was made:

(i) affidavits (or draft affidavits);

(ii) exhibits capable of being copied;

(iii) any written submission; and

(iv) any other document that was provided to the Court.

(d) .. a transcript, or, if none is available, a note, of any exclusively oral allegation of fact that was made and of any exclusively oral submission that was put, to the Court;

(e) .. the originating process, or, if none was filed, any draft originating process produced to the Court.

(3) As soon as practicable, the applicant will cause anyone notified of this order to be given a copy of it.

(4) The applicant will pay the reasonable costs of anyone other than the first respondent which have been incurred as a result of this order, including the costs of finding out whether that person holds any of the first respondent's assets.

(5) If this order ceases to have effect the applicant will promptly take all reasonable steps to inform in writing anyone to who has been notified of this order, or who he has reasonable grounds for supposing may act upon this order, that it has ceased to have effect.

(6) The applicant will not, without leave of the Court, use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in or outside Australia, other than this proceeding.

(7) The applicant will not, without leave of the Court, seek to enforce this order in any country outside Australia or seek in any country outside Australia an order of a similar nature or an order conferring a charge or other security against the first respondent or the first respondent's assets.

(…)

REASONS FOR JUDGMENT

(…)

1 On 17 July 2018 I heard an application by the Commissioner of Taxation for freezing orders against Mr C. under Division 7.4 of the *Federal Court Rules 2011* (Cth). An affidavit of Mr Z., an executive officer with the Australian Taxation Office, was sworn in support of the application. After hearing counsel for the Commission, I made orders substantially in the terms sought (which reflected the terms of the example freezing order annexed to the *Freezing Orders Practice Note* (*GPN-FRZG*)). At the time I indicated that I would provide my reasons for making those orders. These are my reasons.

2 The Commissioner relied upon a claim based upon the statutory debt that arises when an assessment is made under the *Income Tax Assessment Act 1997* (Cth). Assessments for a total amount of more than $7.5 million were served on Mr C. prior to the hearing on 17 July 2018.

3 Relevantly for present purposes, a freezing order may be made to meet a danger that a prospective judgment of the Court will not be satisfied: r 7.32. There must be a good arguable case on a claim within the court's jurisdiction: r 7.35(1)(b). Also, the Court must be satisfied that there is a danger that the prospective judgment will be unsatisfied because the prospective judgment debtor might abscond or remove assets or dispose or deal with the assets or diminish them in value: r 7.35(4).

4 So, the Commissioner had to demonstrate a good arguable case, a danger that a judgment will be unsatisfied and that the balance of convenience favoured the grant of relief.

Section 6.01 Good arguable case

5 A good arguable case is one which is more than barely capable of serious argument, yet not necessarily one that would have a better than even chance of success: *Curtis v NID Pty Ltd* [2010] FCA 1072 at [6]. The assessments establish that the Commissioner has a case of that kind: *Commissioner of Taxation v Growth Investment Fund SA* [2014] FCA 780 at [7]-[13]. It is not necessary for the Commissioner to show that the time for payment of the assessments has elapsed: *Deputy Commissioner of Taxation (ACT) v Sharp* (1988) 91 FLR 70, 74.

Section 6.02 Danger that prospective judgment will be unsatisfied

6 In order to demonstrate that there is a danger that a judgment will be unsatisfied there must be shown to be a real risk that dissipation of the kind described in r 7.35(4) will occur: *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 322-323. The risk must be sufficiently likely to support the grant of an order in the particular terms sought and in the particular circumstances of the case:

Deputy Commissioner of Taxation v Hua Wang Bank Berhad [2010] FCA 1014 at [9] (dealing with the rule that was the predecessor to the current rule).

7 A freezing order is made to preserve the status quo in order to protect the processes of the court from abuse, not to provide security in the interests of particular litigants. It is a protection against the danger that a judgment will be unsatisfied through particular activities by the judgment debtor. A high degree of caution must be exercised in considering whether a freezing order should be made. It must be kept in mind that a freezing order is a substantial encroachment upon basic rights in respect of property.

8 Even so, a positive intention to frustrate a judgment need not be demonstrated: *Deputy Commissioner of Taxation v Hua Wang Bank Berhad* at [10].

9 In this case, these requirements are met on the basis of the matters stated in the affidavit of Mr Z. In particular:

(1) Mr C. is an Indian citizen who travels on an Indian passport;

(2) Mr C. is married to H.C.;

(3) Mr C. has lodged income tax returns in Australia since 2006, the last of which was for the 2015-2016 financial year;

(4) since 2012, the returns have been lodged on the basis that he is a non-resident for Australian taxation;

(5) Mr C. is a director of S. Ltd. The other directors are Mrs C. and one of their children. The shareholders are Mr and Mrs C.;

(6) Mr and Mrs C. have interests in a company incorporated in India and another company incorporated in Hong Kong;

(7) Mr C.'s business interests concern trading in sandalwood;

(8) in the exercise of statutory functions, the Australian Taxation Office has conducted an audit of the affairs of Mr C.;

(9) the audit determined that Mr C. derived income in each of the income years between 2008 and 2016 that he failed to disclose;

(10) as I have noted already, assessments have issued for more than $7.5 million based on matters revealed by the audit;

(11) the income disclosed by Mr C. is about 6% of the assessed income;

(12) Mr and Mrs C. jointly own a number of properties in Australia and there is information to the effect that their equity in those properties is about $4 million;

(13) Mr C. was, as at 14 August 2009, the registered proprietor of a property in K.;

(14) Mr C., or Mr and Mrs C. jointly, have a number of bank accounts in Australia and a number of overseas bank accounts in Vanuatu, Fiji, Hong Kong and India;

(15) large amounts have been moved between certain bank accounts (although the Commissioner does not claim that this demonstrates impropriety, it does demonstrate the propensity for monies to be moved readily overseas or to other accounts);

(16) there has been international movement of funds between the identified bank accounts in the past 11 years involving approximately 80 transactions in a total amount of over $14.5 million;

(17) Mr C. has reported some income for taxation purposes in India on the basis that he is not an Indian resident for tax purposes; and

(18) Mr C. travels in and out of Australia on a frequent basis.

10 In addition the Commissioner relies upon the following matters as giving rise to a basis for concern as to the lack of honesty on the part of Mr C. in his business dealings:

(1) the matters disclosed by the audit;

(2) despite the matters stated above, in all Australian tax returns lodged by him since 2008, Mr C. has said that he does not have a direct or indirect interest in a controlled foreign company, had never directly or indirectly caused the transfer of property including money or eservices to a non-resident trust estate and did not own or have an interest in assets located outside Australia with a value of $50,000 or more; and

(3) Mr C. has been charged with 42 counts of breaching s 15 of the *Export Control Act 1982* (Cth) in relation to the export of sandalwood.

11 The charges are yet to be tried. Nevertheless they indicate that a view has been formed that there is a proper basis to bring the charges.

12 It is apparent from the above evidence that Mr C. has a sophisticated international business structure and dealings in a number of jurisdictions. The evidence is sufficient to demonstrate a proper basis for a concern as to the honesty of Mr C. The assessed taxation liability is large. From the evidence as to Mr C.'s past behaviour there is also a proper basis for a concern that he has taken steps to evade his taxation liabilities and for a concern that he has moved considerable funds through international bank accounts. In all the circumstances I have described there is, in my view, a real risk of dissipation or steps being taken by Mr C. that may seriously compromise the ability of Mr C. to meet a prospective judgement based on the assessments.

13 Also, there is a proper basis for the orders to extend to foreign held assets. The practice of making such orders was recognised in: *Walter Rau Neusser Oel und Fett ADG v Cross Pacific Trading Ltd* [2005] FCA 399 at [5].

Section 6.03 Balance of convenience

14 The form of orders proposed by the Commissioner has a number of protections. They reflect the usual form of orders in cases of this kind. They only apply to steps that would diminish the assets of Mr C. up to the amount of the assessed tax liability (including steps in relation to assets under his control). They do not prohibit Mr C. from paying his ordinary living expenses, his reasonable legal expenses, Australian business and legal expenses bona fide and properly incurred, and (with notice to the Commissioner) contractual obligations already incurred.

15 The orders that I made were only to apply until the matter was returned before me on 1 August 2018 with liberty to apply at short notice.

16 In those circumstances, the balance of convenience favoured the grant of the orders sought to preserve the position for a short period of time until the matter could come back before the court.

Belgium

Constitutional Court

4 October 2018

ING Lease Belgium and Others

Case number: 124/2018

Right of defence – Seizure of vehicles – No obligation for the tax authorities whether the tax debtor owns the eized vehicle – No concrete and effective appeal for the lessor of the vehicle – Violation of the right of access to justice

Summary

A law authorised customs and excise officials to check cars on the public highway and to seize cars if these checks revealed the non-payment of customs and excise duties (or penal fines) by the owner of the vehicle or by the person who was the holder of the registration number of the vehicle. If these debts were not paid within 10 working days, the collection officials could proceed with the sale of the vehicle, even for debts.

The tax officials did not have to ascertain whether the debtor of the sums actually owned the seized vehicle. Leasing vehicles registered in the name of the lessee could also be seized and sold if the lessee did not pay his debts, even though the vehicle was the property of the leasing company

Leasing companies argued that this law infringed the right of access of vehicle owners to a court, because the seizure and sale of the vehicle took place without any action by a judge and because there was no procedural guarantee to protect their property right.

The Court indeed annulled the contested provisions. The Court decided that there was no "concrete and effective" appeal for the lessor against the seizure and possible subsequent sale of the vehicle, with an independent and impartial judge. The Court rejected the counterargument that leasing companies had the free choice to have the leased vehicle registered in their name in order to avoid seizure of their property. In the Court's view, the substantially higher operational, administrative and tax costs entailed by a registration in the name of the leasing company substantially limited this "free choice".

B.1.1. The requesting parties claim the annulment of Chapter 3 ("Improvement of the collection of customs and excise duties and penal fines") of Title 3 of the Program Law of 25 December 2016. The contested provisions extend the scope of the Act of 17 June 2013 relating to the improved collection of penalties (hereinafter: the law of 17 June 2013, abolished by the contested Article 56) and change the procedure.

B.1.2. The aforementioned chapter 3 comprises articles 51 to 58 and states:

"Art. 51. For the purposes of this chapter, the term sums of money shall mean:

1° all definitive and enforceable customs and excise duties claims;

2° all sums of money that were imposed in an enforceable order to pay as referred to in article 65/1, § 1, of the law of 16 March 1968 concerning the police on road traffic or in a judgment of a court having the force of res judicata.

Art. 52. If a check on the public highway by officials of the General Administration of Customs and Excise reveals the non-payment of the sums referred to in Article 51, due by the owner of the vehicle or by the person who is the holder of the registration number of the vehicle, the driver must pay the sums of money to these officials at the moment of that check.

The officials referred to in the first paragraph are authorized to check the identity of the driver of the vehicle, in view of the objectives of this chapter.

Art. 53. In the event of non-payment of the sums referred to in Article 51, the vehicle may be seized by the officials of the General Administration of Customs and Excise.

The notice of seizure is sent within two working days to the address of the holder, stated on the registration certificate. If the driver is the holder of the registration number, the notice of seizure can be immediately handed to him.

The notice of seizure shall be deemed to have been received by the holder of the registration number of the vehicle on the third working day following its dispatch.

The holder of the registration number of the vehicle is obliged to send the notice of seizure to the owner of the vehicle without delay and is liable to that owner for any damage caused by not or not timely fulfillment of that obligation.

The notice of seizure corresponds to the attached model and is drawn up in an original and a copy.

The vehicle is seized at the expense and risk of the owner or the person mentioned as the holder of the registration number of the vehicle.

The seizure shall be lifted at the earliest on the day of full payment of the sums referred to in Article 51, plus the costs of seizure, including the hoist costs and the parking costs of the vehicle, to the authorized recipient.

Art. 54. If the sums and costs are not paid to the authorized tax collector within ten working days of the date of delivery or receipt of the notice of seizure, this tax collector may proceed to sell the vehicle.

Art. 55. The allocation of the proceeds from the sale of the vehicle first takes place on the customs debts, then on the selling costs and the costs of the seizure, then on the excise duties and finally on the sums referred to in Article 51, 2°, without prejudice to the application of Article 49, second paragraph, of the Penal Code and of Article 29, last paragraph, of the Act of 1 August 1985 on tax and other provisions.

Any surplus will be refunded to the holder of the registration number of the vehicle or to the former owner of the vehicle.

(…)

Art. 58. This chapter shall enter into force on 1 January 2017".

B.2.1. As the title of the contested Chapter 3 indicates, the contested provisions are intended to improve the collection of enforceable customs and excise duties and penal fines. The parliamentary preparation document states:

"[To] the officials of the General Administration of Customs and Excise who, during a roadside inspection, detect a vehicle whose owner or holder of the vehicle registration number still has outstanding penal fines and customs and excise duties, [the] option is to seize this vehicle, without first requesting the authorization of the attachment judge.

The procedure of immobilization as provided for in the law of 17 June 2013 is rather cumbersome and can lead to high hoist and parking costs. It is therefore advisable for officials of the General Administration of Customs and Excise to proceed immediately to the seizure of the vehicle. If the overdue debts are subsequently not paid within a certain period, the authorized tax collection official can proceed to the sale of the vehicle" (Parl Doc., Chamber, 2016-2017, DOC 54-2208 / 001, p.35).

B.2.2. The contested articles of the program law of 25 December 2016 fundamentally reform the law of 17 June 2013.

First of all, the scope *ratione materiae* is extended to all enforceable customs and excise duties and all sums of money that are imposed in an enforceable payment order, as referred to in article 65/1, § 1, of the law of 16 March 1968 concerning the police on road traffic or in a final judgment (Article 51).

The scope of application is extended *ratione personae* by introducing a "form of registration plate liability" (Parl Doc., Chamber, 2016-2017, DOC 54-2208 / 001, page 36). As a result, the scope of the law is no longer limited to the owner of a vehicle – as the debtor of unpaid sums of money – but is extended to the holder of the registration number (Article 52).

Furthermore, Article 53 of the program law of 25 December 2016, in the absence of an immediate payment of the sums due, provides for the seizure of the vehicle, in contrast to the previous legislation in which the vehicle was immobilized. This attachment can only be lifted at the earliest on the day of full payment of the sums due, plus the costs of seizure.

Article 54 makes it possible that, if the due sums are not paid within ten working days of the date of delivery or receipt of the notice of seizure, the authorized tax collection official can proceed to the sale of the vehicle without any judicial intervention. With the proceeds from the sale of the vehicle, first the customs debts are paid, then the selling costs and the costs of seizure, then the excise duties and finally the other sums, without prejudice to the application of Article 49, second paragraph, of the Penal Code and of Article 29, last paragraph of the law of 1 August 1985 on fiscal and other provisions. Any surplus will be refunded to the holder of the registration number of the vehicle or the former owner (Article 55).

Article 56 of the Program Law abolishes the law of 17 June 2013. Article 57 lays down the procedure for vehicles that had already been immobilized before the entry into force of Chapter 3 of Title 3 of the Program Act and Article 58 stipulates that the relevant chapter will enter into force on 1 January 2017.

B.3. The complaints made by the requesting parties relate only to the situation where the debtor of the debts envisaged by Chapter 3 of Title 3 of the Program Law of 25 December 2016 is not the owner of the vehicle of which he is the holder of the registration plate.

B.4. The first plea is based on the infringement of Article 16 of the Constitution, read in conjunction with Article 1 of the First Additional Protocol to the European Convention on Human Rights (first part of the first plea) and Article 13 of the Constitution, read in conjunction with Article 6.1 of the European Convention on Human Rights (second part of the first ground of appeal), whether or not read in conjunction with Articles 10 and 11 of the Constitution.

B.5. In the second part of the first plea, the applicants argue that the contested articles of the program law of 25 December 2016 infringe the right of access of vehicle owners to a court, because the seizure and sale of the vehicle take place without any action by a judge and because there is no procedural guarantee to protect the property right.

B.6.1. Article 13 of the Constitution includes a right of access to the competent court. This right is also guaranteed by Article 6.1 of the European Convention on Human Rights, by Article 14 (1) of the International Covenant on Civil and Political Rights and by a general principle of law.

B.6.2. The right of access to justice, which is part of the right to a fair trail, ensures that disputes are handled by an independent and impartial judge who has full jurisdiction to investigate the grievances of the claimants.

B.6.3. In accordance with established case law of the European Court of Human Rights (Large Chamber, 5 April 2018, Zubac v. Croatia, § 77), the right of access to justice should be "concrete and effective" and not theoretical and illusory:

> *"This remark applies in particular to the safeguards provided for in Article 6, given the prominent place of the right to a fair trial in a democratic society (Prince Hans-Adam II of Liechtenstein v. Germany [GK], no. / 98, § 45, ECHR 2001-VIII, and Paroisse Gréco-Catholique Lupeni and others, aforementioned, § 86)".*

This means that, in order to be regarded as effective, the claimant must have "a clear and concrete possibility to challenge an act that constitutes interference in his rights" (ECHR, 4 December 1995, Bellet v. France, § 36):

> *"The fact that the internal remedies could be used, but only to declare the claims inadmissible as a result of the law, does not always meet the requirements of article 6, paragraph 1 [...]: also the degree of access provided by national legislation must be sufficient to guarantee an individual the 'right to a judge', having regard to the principle of the primacy of law in a democratic society. An effective exercise of the right of access requires that an individual has a clear and concrete opportunity to challenge an act that constitutes interference in his rights (see the judgment in de Geouffre de la Pradelle, page 43, § 34)".*

B.7.1. First of all, it is apparent from the contested provisions that no obligation to investigate is imposed on officials of the General Administration of Customs and Excise in order to ascertain whether the debtor of the sums actually owns the seized vehicle.

Moreover, the contested provisions expressly introduce a form of registration plate liability in order to improve the collection of customs and excise duties and penal fines.

The conclusion that leasing companies may have the free choice to have the leased vehicle registered in their name in order to avoid seizure of their property does not change this. The substantially higher operational, administrative and tax costs entailed by a registration in the name of the leasing company substantially limit this "free choice".

B.7.2. Even if it were accepted that the vehicle owner could bring an action for revocation to the seizure judge (Article 1514 of the Judicial Code), which could force any third party in the possession of the vehicle to render it to the real owner (Cass., May 3, 1996, AR C.95.0016.F), the seizure judge would only be able to establish that the seizure by the officials of the General Administration of Customs and Excise was done in accordance with the powers conferred on them by the contested provisions. The Belgian State is entitled to seize the lessor's vehicle and this irrespective of the fact that it is not the vehicle owner but the registration number holder who is the debtor of the sums in question.

The appeal to the seizure judge therefore does not have any useful effect for the lessor and can not therefore be regarded as being "concrete and effective".

B.7.3. The possibility for the lessor to demand compensation from the registration number holder pursuant to Article 1382 of the Civil Code also does not resolve the lack of access to a judge. Not only does such a claim require a separate procedure; nor is the lessor allowed to take action against the seizure and any subsequent sale of his vehicle.

B.8. Since there is no "concrete and effective" appeal for the lessor against the seizure and possible subsequent sale of the vehicle, with an independent and impartial judge, the second part of the first ground of the plea is well founded and the contested provisions must be annulled.

B.9. The first part of the first plea and the second plea must not be examined, since that examination cannot result in a broader annulment.

United Kingdom

Supreme Court

Totel Ltd v Commissioners for Her Majesty's Revenue and Customs

26 July 2018

Case number: [2018] UKSC 44

Right of defence – Appeal against VAT assessments – obligation to first pay or deposit the tax – So similar condition for appealing other tax assessments – No violation of the EU law principle of equivalence

Summary

Traders who wish to appeal against assessments to Value Added Tax (VAT) in the United Kingdom are required first to pay or deposit the tax notified by the assessment with HMRC, unless they can demonstrate that to do so would cause them to suffer hardship. Such a condition does exist for appealing assessments to income tax or some other taxes.

It was argued that the requirement to pay or deposit the disputed VAT as a condition for the appeals being entertained offended against the EU law principle of equivalence.

The Court decided that a trader seeking to appeal a VAT assessment is typically in a significantly different position from a taxpayer seeking to appeal an assessment to any of those other taxes, and in a manner which is properly to be regarded as sufficiently connected with the imposition of a pay-first requirement. The Court concluded that there had not been shown to be any true comparator among domestic claims sufficient to engage the principle of equivalence in relation to the imposition of a pay-first requirement upon traders seeking to appeal assessments to VAT.

LORD BRIGGS (WITH WHOM LADY HALE, LORD SUMPTION, LORD CARNWATH AND LORD HODGE AGREE)

Introduction

1. Traders who wish to appeal against assessments to Value Added Tax ("VAT") in the United Kingdom are required, by section 84 of the Value Added Tax Act 1994, first to pay or deposit the tax notified by the assessment with HMRC, unless they can demonstrate that to do so would cause them to suffer hardship. Otherwise, their appeal will not be entertained. This "pay-first" requirement is a feature of the procedural regime for appealing assessments to a number of other types of tax, including Insurance Premium Tax, Landfill Tax, Climate Change Levy and Aggregates Levy. But it is not a condition for appealing assessments to Income Tax, Capital Gains Tax ("CGT"), Corporation Tax or Stamp Duty Land Tax ("SDLT").

2. VAT is, in the UK and elsewhere in the European Union, regulated by the provisions of EU Directives, currently of VAT Directive 2006/112. An appeal against an assessment to VAT is therefore a claim based on EU law. All the other taxes and levies referred to above are regulated by domestic law, so that appeals against assessments to any of them are based on domestic law.

3. The appellant Totel Ltd ("Totel") seeks to appeal a number of assessments to VAT but has been unable to demonstrate that a requirement to pay or deposit the tax in dispute would cause it hardship. But Totel claims that the requirement to pay or deposit the disputed tax as a condition for its appeals being entertained offends against the EU law principle of equivalence. In outline, this principle requires that the procedural rules of member states applicable to claims based on EU law are not less favourable than those governing similar domestic claims. It is submitted that appeals against assessment to Income Tax, CGT and SDLT are claims which are similar to appeals against assessment to VAT and that, because a VAT appeal is subjected to the pay-first requirement whereas those other appeals are not, then the UK's procedural rules for VAT appeals are less favourable than those governing similar domestic claims.

4. In the course of a convoluted but irrelevant procedural history Totel first raised its challenge based upon the principle of equivalence when (successfully) seeking permission to appeal from the Upper Tribunal (Tax and Chancery Chamber) to the Court of Appeal. In December 2016 the Court of Appeal rejected that challenge on two grounds. Logically the first (although the second to be dealt with in the leading judgment of Arden LJ) was that none of the domestic taxes (Income Tax, CGT and SDLT) relied upon by Totel were true comparators with VAT for the purpose of the application of the principle of equivalence. The second ground was that, even if they were, there were other domestic taxes (namely those described in para 1 above) which subjected appeals against assessments to the same pay-first requirement, so that it could not be said that EU-derived VAT appeals had been picked out for the worst procedural treatment. Accordingly, what is commonly called the "no most favourable treatment proviso" ("the Proviso") applied so as to prevent infringement of the principle of equivalence.

5. In this court Totel challenges both those conclusions of the Court of Appeal. For their part, HMRC challenge (for the first time) the underlying assumption that, when viewed in the round, the

procedure for appeals against tax assessments is rendered less favourable to the taxpayer by the imposition of the pay-first requirement in relation to only some of them.

6. The principle of equivalence and its qualifying Proviso are creatures of the jurisprudence of the CJEU (and its predecessors), and take effect within the general context that it is for each member state to establish its own national procedures for the vindication of rights conferred by EU law: see *EDIS v Ministero delle Finanze* (Case C-231/96, [1998] EUECJ C-231/96) at paras 19 and 34 of the judgment. Further, it has been repeatedly stated by the CJEU that it is for the courts of each member state to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis: see *Palmisani v Istituto Nazionale della Previdenza Sociale* (Case C-261/95) at para 38, and *Levez v TH Jennings (Harlow Pools) Ltd* (Case C-326/96) [1999] ICR 521, para 43.

The search for a true comparator

7. The principle of equivalence works hand in hand with the principle of effectiveness. That principle imposes a purely qualitative test, which invalidates a national procedure if it renders the enforcement of a right conferred by EU law either virtually impossible or excessively difficult. By contrast, the principle of equivalence is essentially comparative. The identification of one or more similar procedures for the enforcement of claims arising in domestic law is an essential pre-requisite for its operation. If there is no true comparator, then the principle of equivalence can have no operation at all: see the *Palmisani* case, at para 39. The identification of one or more true comparators is therefore the essential first step in any examination of an assertion that the principle of equivalence has been infringed.

8. Plainly, the question whether any, and if so which, procedures for the pursuit of domestic law claims are to be regarded as true comparators with a procedure relating to an EU law claim will depend critically upon the level of generality at which the process of comparison is conducted. Is it sufficient that both claims are tax appeals, or (as Totel submits) appeals against the assessment of tax, or that they must both be made to the same tribunal? Or is it necessary to conduct some more granular analysis of the different claims, and the economic structures in which they arise? Or is there some simple yardstick which would prevent claims from being truly comparable, such as, in the present case, the difference between claims arising out of the assessment of liability to direct and indirect taxes, (as HMRC submits)? Decisions of the CJEU provide considerable assistance in identifying the correct approach to this task, although the guidance to be gained from some of them is not always that which springs from an over- simplistic analysis of particular phraseology.

9. First, the question whether any proposed domestic claim is a true comparator with an EU law claim is context-specific. As Lord Neuberger put it in *Revenue and Customs Comrs v Stringer* [2009] UKHL 31; [2009] ICR 985 at para 88:

> *"It seems to me that the question of similarity, in the context of the principle of equivalence, has to be considered by reference to the context in which the principle is being invoked."*

This proposition was not in dispute between counsel, and it is therefore unnecessary to cite decisions of the CJEU in support of it, although most of those to which reference is made below illustrate or mandate the conduct of a context-specific enquiry.

10. The domestic court must focus on the purpose and essential characteristics of allegedly similar claims: see the *Levez* case, at para 43 of the judgment:

> *"In order to determine whether the principle of equivalence has been complied with in the present case the national court - which alone has direct knowledge of the procedural rules governing actions in the field of employment law - must consider both the purpose and essential characteristics of allegedly similar domestic actions."*

To the same effect is para 35 of the judgment of the Grand Chamber in *Transportes Urbanos y Servicios Generales SAL v Administración del Estado* (Case C-118/08, [2010] EUECJ C-118/08). In *Littlewoods Retail Ltd v Revenue and Customs Comrs* (Case C-591/10) [2012] STC 1714, the Court at para 31 used the phrase "similar purpose and cause of action", without in my view thereby intending to change the underlying meaning from that described in the earlier cases.

11. Of particular importance within the relevant context is the specific procedural provision which is alleged to constitute less favourable treatment of the EU law claim. This is really a matter of common sense. Differences in the procedural rules applicable to different types of civil claim are legion, and are frequently attributable to, or at least connected with, differences in the underlying claim. A common example is to be found in different limitation periods. Thus, in England and Wales, the primary limitation period for personal injury claims is three years, whereas the primary limitation period for most other claims is six years. There is a 20 year prescription period for property claims in Scotland. To treat personal injury and, for example, property claims as true comparators for the purpose of deciding whether the shorter limitation period for personal injury

claims constituted less favourable treatment would make no sense. This is because it is no part of the purpose of the principle of equivalence to prevent member states from applying different procedural requirements to different types of claim, where the differences in those procedural requirements are attributable to, or connected with, differences in the underlying claims.

12. Mr Michael Firth for Totel drew the court's attention to some passages in European authorities which, he submitted, justified addressing the similarity question at a very high level of generality, in support of his broad submission that all UK appeals against tax assessments are true comparators with an appeal against a VAT assessment. He relied, for example, on the following passage in the court's judgment in the *Transportes Urbanos* case, at para 36:

> *"As regards the purpose of the two actions for damages referred to in the previous paragraph, the Court notes that they have exactly the same purpose, namely compensation for the loss suffered by a person harmed as a result of an act or omission of the State."*

Accordingly, he submitted, all claims against the state for compensation for loss were, at least in principle, capably of being truly comparable for the purposes of the principle of equivalence. Taken out of context, that citation might appear at first sight to support Mr Firth's submission, but a closer analysis of that case shows that it does nothing of the kind. The claimant complained that it had been over-charged to VAT, and its consequential loss could be remedied if either the charge in question was contrary to European law, or if it was contrary to the Spanish Constitution. In the former case Spanish procedural law imposed a condition requiring prior exhaustion of remedies, whereas it did not for the latter. The alternative claims were held to be true comparables for the purposes of the principle of equivalence not because they were both, viewed in the abstract, claims against the state for compensation for loss, but because they were alternative legal bases for claiming compensation for precisely the same loss. This is, in particular, apparent from para 43 of the Court's judgment. Alternative types of claim for compensation for exactly the same loss are a common example of true comparators: see eg *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] 2 AC 455.

13. For his part, Mr Jonathan Swift QC for HMRC submitted that dicta in European and domestic authority justified a conclusion that there could never be a true comparator with an appeal against a VAT assessment, apart from some other assessment to VAT. In short, he submitted that VAT, and all claims relating to it, were sui generis, with no true comparator arising from any other type of tax. He began with the following dictum of Moses J in *Marks& Spencer plc v Comrs of Customs and Excise* [1999] 1 CMLR 1152, a case in which a limitation period for the recovery of overpaid VAT was alleged to offend the principle of equivalence. At paras 61-62 he said:

> *"In my judgment no comparison can be made with other types of tax such as income tax payable in respect of an individual's profits or the tax on a document imposed by stamp duty. Other forms of indirect taxation, such as excise duty, are wholly different types of tax.*
>
> *It seems to me that the jurisprudence of the European Court of Justice, exemplified in EDILIZIA, requires a comparison between the approach of a member state to the recovery of tax charged in breach of Community rules and the recovery of the* ***same tax*** *in breach of domestic rules. Any wider enquiry would invite unnecessary argument as to whether there is a true comparison."* (My emphasis)

Referring to the principle of equivalence, he concluded:

> *"The principle is designed to protect Community law rights: adequate protection is afforded by focusing upon the way a member state deals with the same tax in a domestic as opposed to Community context."*

14. The difficulty with this analysis, as Mr Firth pointed out, is that (as Mr Swift agreed) all claims to recover overpaid VAT are necessarily based on EU law, because VAT is a tax regulated by EU law. Moses J's analysis was approved by the Court of Appeal in *Littlewoods Ltd v Revenue & Customs Comrs* (CA) [2015] EWCA Civ 515; [2016] Ch 373, paras 133-134 in the judgment of Arden LJ. But it appears that her analysis was based on the same concession, namely that there could be purely domestic claims for recovery of overpaid VAT.

15. Mr Swift obtained more persuasive assistance from *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* (Case C-35/05) [2007] ECR I-2452. It was alleged in that case that a provision limiting the identity of those who could claim a VAT repayment offended against the principle of equivalence because there was no comparable restriction in relation to the recovery of overpaid direct tax. At paras 94 and 95 of her opinion, Advocate General Sharpston agreed with the following submission of the Commission:

> *"In general … a situation in that (direct tax) field is unlikely to be comparable to that in the field of VAT. In the latter it is in principle only the supplier who is in a direct legal relationship with the tax authority. Indeed, the whole system of direct taxation is unrelated to that of VAT. Since the principle of non-discrimination concerns only comparable situations, it is thus not relevant here."*

16. In its judgment, the Court adopted the more general part of the Commission's argument at para 45:

> *"In the present case, the system of direct taxation, as a whole, is not related to the VAT system."*

Accordingly, the Court concluded that none of the EU anti-discriminatory principles, including the principle of equivalence, were engaged by the comparison between VAT and direct taxation.

17. *Compass Contract Services Ltd v Comrs for Her Majesty's Revenue and Customs* (Case C-38/16) EU:C:2017:454 involved a comparison between different limitation periods applicable to claims to recover overpaid VAT, and claims to deduct input tax from VAT otherwise due, for the purposes of the equal treatment principle. The Fourth Chamber of the CJEU concluded that, even within the confines of the VAT regime, the two claims were not truly comparable: see paras 36-39 of the judgment.

18. Taken together, these authorities certainly justify the exercise of very considerable caution by a national court when faced with the assertion that a VAT claim should be treated as truly comparable, for the purposes of the principle of equivalence, with a claim relating to some domestic tax, and in particular with any direct tax. But I do not consider it necessary or appropriate to go so far as to conclude that, for all purposes connected with the principle of equivalence, VAT claims must be treated as sui generis, with no possibility of there being a true comparator in a claim arising out of some other tax. My reasons follow.

19. First, the identification of any such general rule would run counter to the context-specific basis upon which it is clear that the examination of comparators for the purposes of the principle of equivalence must be conducted. It would, in particular, rule out any analysis of the question whether the particular procedural provision alleged to amount to less favourable treatment had any connection with underlying differences between VAT and some different domestic tax.

20. Secondly, although the court's ruling in the *Reemtsma* case appears to come quite close to such a general conclusion, the principle of equivalence lay only at the fringe of the issues there being considered by the CJEU, with the result that, unsurprisingly, the point was addressed with what may fairly be described as extreme brevity. The case was mainly about the related principles of neutrality, effectiveness and non-discrimination.

21. Thirdly, if the *Reemtsma* case had established such a general rule in 2007, namely that VAT is for this purpose sui generis, with no true comparators, it is difficult to understand why this did not constitute a simple solution to the question referred to the CJEU in the *Littlewoods* case (Case C-591/10) [2012] STC 1714, which included the question whether the restriction of a successful claimant to a VAT repayment to simple interest offended the principle of equivalence, when compared with interest payable on other types of claim for repayment of tax under domestic law. It is evident from paras 42 to 48 of the opinion of Advocate General Trstenjak that there was a wide range of submissions as to potential comparators, including a concession from the UK government that, in principle, repayment claims under domestic indirect taxation were comparable for the purposes of the principle of equivalence, in the context of different entitlement to interest. In accordance with the Advocate General's advice, the Court of Justice referred the comparability question to the UK courts. This must have been on the basis either that there was no rule of general application for all purposes that VAT claims could in no circumstances be treated as truly comparable with claims for repayment of domestic tax, or that the CJEU regarded claims for restitution against the state as falling within a separate category.

22. Nevertheless, applying the context-specific analysis called for by the European jurisprudence which I have described, the Court of Appeal was in my judgment correct to conclude that none of the domestic taxes (namely Income Tax, CGT and SDLT) proposed by Totel constituted true comparators with VAT for the purpose of deciding whether the imposition in the VAT context of a pay-first requirement constituted less favourable treatment contrary to the principle of equivalence. This is because a trader seeking to appeal a VAT assessment is typically in a significantly different position from a taxpayer seeking to appeal an assessment to any of those other taxes, and in a manner which is properly to be regarded as sufficiently connected with the imposition of a pay-first requirement. In that respect my reasoning is closely aligned with that of the Court of Appeal, as explained in para 54 of Arden LJ's judgment.

23. Subject to certain exceptions to which I refer below, VAT is a tax of which the economic burden falls upon the ultimate consumer, but which is collected by the trader from the consumer, and accounted for by the trader to HMRC. By contrast, taxpayers seeking to appeal an assessment to Income Tax, CGT and SDLT are being required to pay, from their own resources, something of which the economic burden falls on them, and which they have not collected, for the benefit of the Revenue, from anyone else. It is therefore no less than appropriate that traders assessed to VAT should be required (in the absence of proof of hardship) to pay or deposit the tax in dispute, which they have, or should have, collected, while no similar requirement is imposed upon the taxpayers in those other, and different, contexts.

24. I do not by reference to this connection between the pay-first requirement and the trader's paradigm status as a tax collector rather than a taxpayer mean to suggest that it is a condition of the recognition of this important difference separating VAT from other taxes that the pay-first requirement was devised for that specific reason. The evidence before the court did not show what, in fact, the reason was. The existence of a logical rather than causal connection is sufficient

to justify the conclusion that VAT is different from those other taxes in this context, rather than a true comparator, regardless of the reason for the imposition of the pay-first requirement.

25. Mr Firth sought to challenge this distinction between VAT and those other taxes. First, he submitted that the portrayal of the VAT registered trader as a collector rather than a payer of tax was true only for one of the three types of liability for VAT, the other two being acquisition from other member states and imports from outside the EU. That is, I agree, true of those heads of liability, but they arise only in a cross-border context, and for the purpose of making the VAT scheme work as a whole. The paradigm remains that of the trader who collects VAT from his customers and accounts for it to the Revenue.

26. Secondly, Mr Firth submitted that by no means in every case would a trader seeking to appeal a VAT assessment already have collected the relevant tax from his customer. The appeal might be about whether his supply was subject to VAT, in circumstances where he had not charged VAT at all. That is, again, true as far as it goes, but it does not significantly impact on the paradigm. More typical are those appeals where the underlying dispute is whether the trader is entitled to deduct from tax collected on his supplies the VAT paid by him on his inputs.

27. Thirdly, Mr Firth submitted that even if the VAT trader could generally be regarded as a collector rather than payer of tax, the same was equally true of an employer deducting and accounting for employees' Income Tax under the PAYE scheme so that Income Tax was, nonetheless, a true comparator with VAT. I would, again, acknowledge that there is an element of similarity between the two, but there are important differences. First, in circumstances of wilful failure to deduct by the employer the employee remains liable to the Revenue for Income Tax whereas, in the VAT context, the only recourse of HMRC is to the trader rather than the consumer. This distinction is closely connected with the existence of a pay-first condition for a VAT appeal but not in a PAYE context. Secondly, the employer has not charged and received a payment from employees creating a fund for which the employer is accountable. Thirdly, the PAYE scheme is only a sub-set of the Income Tax scheme viewed as a whole, and lies nowhere near so close to the essential nature of the relevant tax structure as does the quasi-collector status of the VAT trader.

28. Finally, it was no part of Totel's case that, for the purposes of the principle of equivalence, the PAYE part of the Income Tax scheme was the sole true comparator with VAT for the purpose of testing whether the pay-first requirement represented less favourable treatment. Rather, Totel's case was that, simply because all appeals against assessments to tax are made for the same general purpose, and to the same tribunal, they could all properly be regarded as true comparators with appeals of assessments to VAT. That requires the similarity question to be addressed at a level of generality which is so high as to place it outside the entirety of the relevant jurisprudence about the principle of equivalence. It must therefore be rejected.

29. My conclusion on this issue is sufficient to dispose of this appeal. The issue as to the meaning and application of the Proviso has content only against the hypothetical assumption that appeals against assessment to all kinds of direct and indirect domestic tax are true comparators with VAT appeals, and the unreality of that hypothesis makes it difficult to conduct a reliable analysis of the second issue. But it has been fully argued, and it was the first plank upon which the Court of Appeal dealt with the case. I shall therefore make some limited observations about it although, had it been necessary to decide this issue for the resolution of this appeal, I might have regarded it as deserving of a reference to the CJEU. But first it is convenient to deal with the new submission of HMRC that the imposition of the pay-first requirement does not in any event amount to less favourable treatment.

Does the pay-first requirement amount to less favourable treatment?

30. This issue would arise if, contrary to my conclusion, there had been a truly comparable domestic tax in relation to which an appeal against an assessment was not subjected to the pay-first requirement which affects VAT appeals. It is an issue which would therefore arise if any of Income Tax, CGT or SDLT had been a true comparator for the purposes of the principle of equivalence.

31. Less favourable treatment is not, of course, established merely because the procedure for one type of claim contains a restriction or condition which is absent from the procedure for another type of claim. It is common to find that different claims are subjected to a package of procedural requirements, such that some of those affecting claim A are less favourable, but others more favourable, than those affecting claim B. A good example is to be found in *Preston v Wolverhampton NHS Trust (No 2)* [2001] 2 AC 455, illustrated in paras 29 to 31 in the speech of Lord Slynn.

32. In the present case, for the first time in this court, HMRC point out that appeals against assessment to Income Tax, CGT and SDLT are subject to a procedural regime such that the tax in dispute may still be collected pending the outcome of the appeal, by processes of enforcement which may include the presentation of a winding-up petition against the taxpaying company, unless the taxpayer can obtain postponement of payment, by demonstrating that there are reasonable grounds for believing that the tax in dispute has been overcharged: see, in relation to Income Tax, section 55 of the Taxes Management Act 1970 and, in relation to SDLT:

paragraph 39 of Schedule 10 to the Finance Act 2003. If the taxpayer faces a winding-up petition on the basis of the tax in dispute, then it may defend that petition by showing that the amount in dispute is *bona fide* disputed on substantial grounds.

33. HMRC concedes that the same principles about postponement, and the defence of a winding-up petition, apply also to the collection of VAT pending an appeal: see *Revenue and Customs Comrs v Changtel Solutions UK Ltd* [2015] EWCA Civ 29; [2015] 1 WLR 3911. Nonetheless Mr Swift submits that, in practice, a trader who has obtained disapplication of the pay-first requirement by demonstrating hardship would not thereafter be subjected to any process of enforced collection of the disputed tax, pending the outcome of the appeal.

34. Mr Swift's point is not so much that the pay-first requirement in relation to VAT is balanced out by the provisions about collection and postponement pending appeal in relation to Income Tax, CGT and SDLT. Rather, he submits that, looked at in the round, the two regimes have broadly the same effect, so that the VAT regime cannot be described as less favourable.

35. Viewed from the perspective of a trader with a good case for proving hardship, together with a reasonable prospect of success on appeal, that might in practice be so, although I would not accept that in no circumstances could a tax demand be enforced against a VAT trader who had established hardship. The two statutory tests are not the same. Nonetheless, from the perspective of a trader who cannot demonstrate hardship, the position seems to me to be rather different. Such a trader would have to raise and lodge the tax in dispute up front, before commencing an appeal. By contrast a taxpayer under Income Tax, CGT or SDLT is at liberty to initiate an appeal against an assessment, and may or may not be faced with an application for collection by HMRC. More generally, there is in my view no escape from the fact that the pay-first requirement is additional to, rather than a substitute for, the regime for collection and postponement so that, in principle, it constitutes less favourable treatment for VAT appellants even if, in certain types of supposedly comparable cases, it may make no difference to the outcome, in terms of the ability to prosecute an appeal without paying the tax in dispute.

The no most favourable treatment Proviso

36. This issue arises if the search for true comparators with the EU claim discloses more than one comparable domestic claim with, viewed in the round, different levels of favourableness in procedural treatment. On almost every occasion when it has referred to the principle of equivalence the CJEU has added the proviso that the principle does not require the EU claim to be treated as favourably as the most favourably treated comparable domestic claim. In the earliest of the cases cited to this court, the *EDIS* case, the proviso is explained thus, at para 36:

> *"That principle (the principle of equivalence) cannot, however, be interpreted as obliging a member state to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law."*

Similar statements appear in the *Levez* case at para 45, in *Pontin v T-Comalux SA* (Case C-63/08) [2009] ECR I-10467, at para 45, in the *Transportes Urbanos* case, at para 34 and in the *Littlewoods* case, at para 31. But none of these cases provide any more comprehensive explanation of how the Proviso is to be applied in practice. This may be because its detailed operation is a matter for national courts, and the CJEU considers that the Proviso as described above is sufficiently self-explanatory for that purpose.

37. The issue of interpretation of the Proviso arises in the present case on the assumption that truly comparable domestic tax claims may include appeals against assessment not only to domestic taxes like Income Tax, where the procedure does not include a pay-first requirement, but also to other taxes like Insurance Premium Tax and Landfill Tax, which do. Thus VAT claims are treated less favourably than one or more true comparators, but equally favourably with others. There are only two levels of differently favourable treatment on this particular domestic spectrum of supposedly comparable claims, but it is easy to imagine a spectrum with several levels, with treatment of the comparable EU claim lying at the top, in the middle, or at (or below) the bottom of that spectrum.

38. In *Revenue and Customs Comrs v Stringer* [2009] ICR 985, probably thinking of a spectrum of the latter kind, Lord Neuberger said this (obiter) about the Proviso:

> *"This is therefore not a case where it could be said that the appellants are seeking to benefit from the 'most favourable rules' of limitation, which I understand to mean exceptional or unusually beneficial rules (as mentioned by the Court of Justice in Levez v TH Jennings (Harlow Pools) Ltd, at para 42)."*

In para 42 of the *Levez* case the CJEU merely repeated the Proviso as enunciated in the *EDIS* case and set out above, slightly adjusting the language to suit the facts, but without any underlying change in meaning.

39. In the present case Mr Swift submitted that the Proviso should be treated as a reflection of the underlying purpose of the principle of equivalence, namely that national procedural rules should not single out EU claims for worse treatment, and specifically not discriminate against them by reason of their EU, rather than national, origin. If therefore the procedure for any true domestic comparator gave

treatment to its claimant no more favourable than given to the EU claim, then the principle of equivalence was satisfied. If in the present case Insurance Premium Tax and Landfill Tax are true comparators, then the treatment of VAT appeals does not infringe the principle of equivalence.

40. By contrast Mr Firth submitted that once any true comparator was identified the procedure for which treated its claimants better than did the procedure for the EU claim, then the principle of equivalence was infringed, unless the better domestic treatment fell into that exceptional category identified by Lord Neuberger in the *Stringer* case as excluded by the Proviso. Income Tax, CGT and SDLT could not be excluded as conferring exceptionally favourable treatment, and the fact that there were other domestic tax appeals treated equally favourably with VAT was neither here or there. The fact that domestic appellants in Insurance Premium Tax cases also received less favourable treatment than Income Tax appellants did not mean that the EU based claims by VAT registered traders were not less favourably treated. One example of discrimination does not, so it is said, justify another.

41. Both sides sought to squeeze out of the language of the CJEU decisions some titbits favourable to their sharply opposing cases on this point. For example, in the paragraph of the judgment in the *EDIS* case following the statement of the Proviso (para 37) is it stated:

> *"Thus, Community law does not preclude the legislation of a member state from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies."*

That last sentence, said Mr Swift, clearly allowed a member state to resist an allegation of breach of the principle of equivalence if any similar domestic procedure included a pay-first requirement.

42. In the present case the Court of Appeal applied that dictum, at para 47, as follows:

> *"The jurisprudence of the CJEU shows that it is open to a member state to apply any available set of rules, which are already applied to similar claims, to an EU-derived claim, provided that an EU-derived claim is not selected for the worst treatment. No one suggests that that is the position here."*

43. Mr Firth relied by contrast first upon dicta from the *Levez* case, at paras 39 to 45 of the judgment. In my view, taken in context, they are neutral on the point. The high-water mark of his citations was this passage from the *Pontin* case, at para 56 of the judgment:

> *"If it emerges that one or more of the actions referred to in the order for reference, or even other national remedies that have not been put before the Court, are similar to an action for nullity and reinstatement, it would also be for the referring court to consider whether such actions involve more favourable procedural rules."*

The implication was, he said, that the discovery of any comparable domestic claim with more favourable treatment that the EU claim would offend the principle of equivalence.

44. I do not consider that any reliable answer to this question can be found by the minute textual analysis of the CJEU authorities. Nor was Lord Neuberger's instinctive conclusion about the limited meaning of the Proviso in the *Stringer* case intended to be a fully reasoned or comprehensive explanation of its full purpose and effect. I need reach no final conclusion in this case, but would tentatively suggest the following analysis.

45. First, the Proviso should not be regarded as some free-standing rule, separate from the principle of equivalence. Rather it is part of the Court of Justice's expression of the principle of equivalence itself, directed to explaining the standard of treatment which that principle imposes upon member states when providing procedures for the vindication of rights based in EU law. What is required is that the procedure should be broadly as favourable as that available for truly comparable domestic claims, rather than the very best available.

46. Secondly, the Proviso is, like the principle of equivalence of which it forms part, best understood in the light of its purpose. Although nowhere expressly stated, I consider that HMRC were correct to submit that it is to prevent member states from discriminating against claims based upon EU law by affording them inferior procedural treatment from that afforded to comparable domestic claims.

47. On that basis I consider that the conclusion of the Court of Appeal on this issue, set out in the passage quoted above from the judgment of Arden LJ, is broadly correct. I would only add that this would not justify the choice of some exceptionally tough set of procedural rules already applied to some domestic claim for reasons particular to that type of claim. But such a claim would be most unlikely to be a true comparator in any event.

Conclusion

48. I would therefore dismiss this appeal, on the ground that there has not been shown to be any true comparator among domestic claims sufficient to engage the principle of equivalence in relation to the imposition of a pay-first requirement upon traders seeking to appeal assessments to VAT.