EU AND INTERNATIONAL TAX COLLECTION NEWS

2015 – 1

Contents

Activities

3 EU / IOTA / OECD / countries

Legislation

4 Regulation (EU) 655/2014 of 15 May 2014 establishing a European Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters

21 Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (recast)

Case law

22 European Court of Human Rights, 16 October 2014, Göthlin v. Sweden, N° 8307/11
Detention of a tax debtor for hiding assets – Detention of 42 days – Proportionality – No violation of Art. 5 § 1 of the ECHR

30 Belgium - Supreme Court (Hof van Cassatie/Cour de Cassation) 30 October 2014
Announcement to the tax collector that a debtor introduces a request for a judicial business protection plan – Immediate action of the tax collector to register a mortgage to secure tax claims – No abuse of law

31 France – Supreme Court (Cour de Cassation) 13 May 2014
Non payment of social security contributions – Criminal prosecution of the persons responsible - Civil claims for damages corresponding to the social security debt – Not affected by the existence of specific recovery measures for social security claims

32 Netherlands – Supreme Court (Hoge Raad) 21 February 2014
Third party convicted in criminal proceedings for his complicity in illegal transactions leading to unpaid taxes – Civil claims for damages against this third party for the unpaid taxes – Subject to the (longer) limitation period applying to civil law claims – Not affected by the fact that the (shorter) limitation period for the tax claim itself has already come to its end

33 European Court of Human Rights, 20 May 2014, Pirttimäki v. Finland, N° 35232/11
Administrative penalties with a criminal nature – Ne bis in idem – No second punishment for the same offence – Distinction between offences in the corporate income taxation and the personal income taxation – No violation of Art. 4 of the 7th Protocol

39 Belgium - Court of Appeal Brussels 25 February 2014
International recovery assistance – Request for precautionary measures – Requested authority's obligation to respect the national rules when taking such precautionary measures

42 Germany – Federal Tax Court (Bundesfinanzhof) 11 December 2012
International recovery assistance –Admissibility of an application for a preventive injunction against the recovery of foreign tax debts – Proof required that the debtor will suffer irreparably

45 EU - Opinion of the advocate general, 2 October 2014, C-133/13, Q
Exchange of information – Use of recovery directive 2010/24 – Only for claims that already exist – Applying to claims that have already been determined but the levying of which depends on further conditions

This newsletter is available on the CIRCABC website managed by the European Commission.
It can be found under the category "Tax Collection" (with free access).
EUROPA > European Commission > CIRCABC > Taxation & Customs Union > Tax Collection (public group)

Direct access via this link: https://circabc.europa.eu/w/browse/96117957-aa29-4714-8bca-c45c9ba719a9

Reference recommendation: *EU & Int. Tax Coll. News*

ACTIVITIES

EU

Tax Collection Platform (FPG 33)

This EU Fiscalis project group, launched under the Fiscalis 2020 program, has established its first working program. This includes the following topics: organisation of recovery at national level, in the execution of mutual recovery assistance; precautionary measures; disqualification orders; retracing missing debtors; e-services for instalment; criteria for identifying and prioritizing tax debtors; insolvency.

Workshop "new electronic recovery request forms"

On 25 March 2015, a workshop was held in Brussels, in view of the introduction of a new release of the electronic recovery request forms.

Launching of the Fiscalis project group "PORTO"

A new Fiscalis project group has been launched in April 2015, the so-called PORTO group ("Portal for the Offical Registration of Tax Orders"). This project group examines the possibilities to facilitate the electronic notification of tax documents in cross-border situations.

A close cooperation with the TEACEP (Tax Enforcement Assistance and Cooperation Expert Group) will be established.

IOTA

On 4-6 March 2015, the IOTA Area Group on Debt Management held a meeting in Madrid (Spain), dealing with "Measuring the performance of tax debt management".

OECD

The OECD has produced a report providing a comprehensive overview of best practices in tax debt management.

For more information:
http://www.oecd.org/ctp/administration/working-smarter-in-tax-debt-management-9789264223257-en.htm

NETHERLANDS

Cross-border collection of benefit claims

Measures to cross-border collection of outstanding benefit debts by the Dutch Tax and Customs Administration

The State secretary of the Dutch Ministry of Finance announced in his letter of March 27th, 2015 to Dutch Parliament that priority will be given to the cross-border collection of incorrect received benefits. It seems that there has been an abuse of benefits by residents residing outside the Netherlands. It concerns more than 100.000 debtors in 189 countries. The State secretary plans to take several collection measures. Among others benefit debtors staying outside the Netherlands will be informed/warned by written letter about their outstanding debt. A pilot will furthermore be started to outsource the collection work to private (international) collection agencies.

FRANCE

Seminar "optimizing recovery in cases of fraud"

The French national service for the fight against fraud (DNLF) organised a seminar "optimizing recovery in cases of fraud" on 10 December 2014, with the participation of tax and social security authorities.
Special attention was paid to the fight against fraud in the area of posted workers and to the recovery possibilities offered by the national Agency for the management and recovery of seized and confiscated assets (AGRASC).

LEGISLATION

Regulation (EU) No 655/2014 of the European Parliament and of the Council

of 15 May 2014

establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters

Purpose and main elements of this Regulation

In the Stockholm Programme of December 2009, which sets freedom, security and justice priorities for 2010 to 2014, the European Council invited the Commission to assess the need for, and the feasibility of, providing for certain provisional, including protective, measures at Union level, to prevent for example the disappearance of assets before the enforcement of a claim, and to put forward appropriate proposals for improving the efficiency of enforcement of judgments in the Union regarding bank accounts and debtors' assets (preamble, point 4).

National procedures for obtaining protective measures such as account preservation orders exist in all Member States, but the conditions for the grant of such measures and the efficiency of their implementation vary considerably. Moreover, recourse to national protective measures may prove cumbersome in cases having cross-border implications, in particular when the creditor seeks to preserve several accounts located in different Member States. It therefore seemed necessary and appropriate to adopt a **binding and directly applicable legal instrument of the Union which establishes a new Union procedure allowing, in cross-border cases, for the preservation, in an efficient and speedy way, of funds held in bank accounts** (preamble, point 5).

The procedure established by this Regulation should serve as an **additional and optional means for the creditor**, who remains free to make use of any other procedure for obtaining an equivalent measure under national law (preamble, point 6).

A creditor should be able to obtain a **protective measure in the form of a European Account Preservation Order ('Preservation Order' or 'Order') preventing the transfer or withdrawal of funds held by his debtor in a bank account maintained in a Member State if there is a risk that, without such a measure, the subsequent enforcement of his claim against the debtor will be impeded or made substantially more difficult**. The preservation of funds held in the debtor's account should have the effect of preventing not only the debtor himself, but also persons authorised by him to make payments through that account, for example by way of a standing order or through direct debit or the use of a credit card, from using the funds (preamble, point 7).

The scope of this Regulation **covers all civil and commercial matters** apart from certain well-defined matters. In particular, this Regulation does not apply to claims against a debtor in insolvency proceedings. This should mean that **no Preservation Order can be issued against the debtor once insolvency proceedings as defined in Council Regulation (EC) No 1346/2000 have been opened** in relation to him. On the other hand, the exclusion allows the Preservation Order to be used to secure the recovery of detrimental payments made by such a debtor to third parties (preamble, point 8).

This Regulation **applies to cross-border cases only**. For the purposes of this Regulation, a cross-border case is considered to exist when the court dealing with the application for the Preservation Order is located in one Member State and the bank account concerned by the Order is maintained in another Member State. A cross-border case is also considered to exist when the creditor is domiciled in one Member State and the court and the bank account to be preserved are located in another Member State.
This Regulation does not apply to the preservation of accounts maintained in the Member State of the court seized of the application for the Preservation Order if the creditor's domicile is also in that Member State, even if the creditor applies at the same time for a Preservation Order which concerns an account or accounts maintained in another Member State. In such a case, the creditor should make two separate applications, one for a Preservation Order and one for a national measure (preamble, point 10).

The procedure for a Preservation Order is available to a creditor wishing **to secure the enforcement of a later judgment on the substance of the matter** prior to initiating proceedings on the substance of the matter and at any stage during such proceedings. It is **also available to a creditor who has already obtained a judgment**, court settlement or authentic instrument requiring the debtor to pay the creditor's claim (preamble, point 11).

The Preservation Order is available for the purpose of **securing claims that have already fallen due, and for claims that are not yet due as long as such claims arise from a transaction or an event that has already occurred and their amount can be**

determined, including claims relating to tort, delict or quasi-delict and civil claims for damages or restitution which are based on an act giving rise to criminal proceedings (preamble, point 12).

In order to ensure the surprise effect of the Preservation Order, and to ensure that it will be a useful tool for a creditor trying to recover debts from a debtor in cross-border cases, **the debtor is not informed about the creditor's application nor be heard prior to the issue of the Order or notified of the Order prior to its implementation**. Where, on the basis of the evidence and information provided by the creditor or, if applicable, by his witness(es), the court is not satisfied that the preservation of the account or accounts in question is justified, it should not issue the Order (preamble, point 15).

In order to overcome existing practical difficulties in obtaining information about the whereabouts of the debtor's bank account in a cross-border context, this Regulation sets out a **mechanism allowing the creditor to request that the information needed to identify the debtor's account be obtained by the court, before a Preservation Order is issued**, from the designated information authority of the Member State in which the creditor believes that the debtor holds an account (preamble, point 20).

This Regulation safeguards the **debtor's right to a fair trial and his right to an effective remedy**, as it enables him to contest the Order or its enforcement on the grounds provided for in this Regulation immediately after the implementation of the Order (preamble, point 30).

The question as to who has to provide any t**ranslations** required under this Regulation and who has to bear the costs for such translations is **left to national law** (preamble, point 33).

Jurisdiction to grant the remedies against the issue of the Preservation Order should lie with the courts of the Member State in which the Order was issued. **Jurisdiction to grant the remedies against the enforcement of the Order** should lie with the courts or, where applicable, with the competent enforcement authorities in the Member State of enforcement (preamble, point 34).

Notification of the data subject should take place in accordance with national law. However, the **notification of the debtor about the disclosure of information relating to his account or accounts should be deferred for 30 days**, in order to prevent an early notification from jeopardising the effect of the Preservation Order (preamble, point 46).

This Regulation only applies to those Member States which are bound by it in accordance with the Treaties. The procedure for obtaining a Preservation Order provided for in this Regulation is therefore only available to creditors who are domiciled in a Member State bound by this Regulation and Orders issued under this Regulation should relate only to the preservation of bank accounts which are maintained in such a Member State (preamble point 48). In this regard, the following should be observed:

- Ireland has notified its wish to take part in the adoption and application of this Regulation (preamble, point 49);
- the **United Kingdom and Denmark are not taking part in the adoption of this Regulation and are not bound by it or subject to its application** (preamble, points 50 and 51).

CHAPTER 1

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter

1. This Regulation establishes a Union procedure enabling a creditor to obtain a European Account Preservation Order ('Preservation Order' or 'Order') which prevents the subsequent enforcement of the creditor's claim from being jeopardised through the transfer or withdrawal of funds up to the amount specified in the Order which are held by the debtor or on his behalf in a bank account maintained in a Member State.

2. The Preservation Order shall be available to the creditor as an alternative to preservation measures under national law.

Article 2

Scope

1. This Regulation applies to pecuniary claims in civil and commercial matters in cross-border cases as defined in Article 3, whatever the nature of the court or tribunal concerned (the 'court'). It does not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority ('*acta iure imperii*').

2. This Regulation does not apply to:

(a) rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;

(b) wills and succession, including maintenance obligations arising by reason of death;

(c) claims against a debtor in relation to whom bankruptcy proceedings, proceedings for the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, or analogous proceedings have been opened;

(d) social security;

(e) arbitration.

3. This Regulation does not apply to bank accounts which are immune from seizure under the law of the Member State in which the account is maintained nor to accounts maintained in connection with the operation of any system as defined in point (a) of Article 2 of Directive 98/26/EC of the European Parliament and of the Council.

4. This Regulation does not apply to bank accounts held by or with central banks when acting in their capacity as monetary authorities.

Article 3

Cross-border cases

1. For the purposes of this Regulation, a cross-border case is one in which the bank account or accounts to be preserved by the Preservation Order are maintained in a Member State other than:

(a) the Member State of the court seised of the application for the Preservation Order pursuant to Article 6; or

(b) the Member State in which the creditor is domiciled.

2. The relevant moment for determining whether a case is a cross-border case is the date on which the application for the Preservation Order is lodged with the court having jurisdiction to issue the Preservation Order.

Article 4

Definitions

For the purposes of this Regulation:

(1) 'bank account' or 'account' means any account containing funds which is held with a bank in the name of the debtor or in the name of a third party on behalf of the debtor;

(2) 'bank' means a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council , including branches, within the meaning of point (17) of Article 4(1) of that Regulation, of credit institutions having their head offices inside or, in accordance with Article 47 of Directive 2013/36/EU of the European Parliament and of the Council, outside the Union where such branches are located in the Union;

(3) 'funds' means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits;

(4) 'Member State in which the bank account is maintained' means:

(a) the Member State indicated in the account's IBAN (International Bank Account Number); or

(b) for a bank account which does not have an IBAN, the Member State in which the bank with which the account is held has its head office or, where the account is held with a branch, the Member State in which the branch is located;

(5) 'claim' means a claim for payment of a specific amount of money that has fallen due or a claim for payment of a determinable amount of money arising from a transaction or an event that has already occurred, provided that such a claim can be brought before a court;

(6) 'creditor' means a natural person domiciled in a Member State or a legal person domiciled in a Member State or any other entity domiciled in a Member State having legal capacity to sue or be sued under the law of a Member State, who or which applies for, or has already obtained, a Preservation Order relating to a claim;

(7) 'debtor' means a natural person or a legal person or any other entity having legal capacity to sue or be sued under the law of a Member State, against whom or which the creditor seeks to obtain, or has already obtained, a Preservation Order relating to a claim;

(8) 'judgment' means any judgment given by a court of a Member State, whatever the judgment may be called, including a decision on the determination of costs or expenses by an officer of the court;

(9) 'court settlement' means a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings;

(10) 'authentic instrument' means a document which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

(a) relates to the signature and the content of the instrument; and

(b) has been established by a public authority or other authority empowered for that purpose;

(11) 'Member State of origin' means the Member State in which the Preservation Order was issued;

(12) 'Member State of enforcement' means the Member State in which the bank account to be preserved is maintained;

(13) 'information authority' means the authority which a Member State has designated as competent for the purposes of obtaining the necessary information on the debtor's account or accounts pursuant to Article 14;

(14) 'competent authority' means the authority or authorities which a Member State has designated as competent for receipt, transmission or service pursuant to Article 10(2), Article 23(3), (5) and (6), Articles 25(3), 27(2) and 28(3) and the

second subparagraph of Article 36(5);

(15)'domicile' means domicile as determined in accordance with Articles 62 and 63 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council .

CHAPTER 2

PROCEDURE FOR OBTAINING A PRESERVATION ORDER

Article 5

Availability

The Preservation Order shall be available to the creditor in the following situations:

(a) before the creditor initiates proceedings in a Member State against the debtor on the substance of the matter, or at any stage during such proceedings up until the issuing of the judgment or the approval or conclusion of a court settlement;

(b) after the creditor has obtained in a Member State a judgment, court settlement or authentic instrument which requires the debtor to pay the creditor's claim.

Article 6

Jurisdiction

1. Where the creditor has not yet obtained a judgment, court settlement or authentic instrument, jurisdiction to issue a Preservation Order shall lie with the courts of the Member State which have jurisdiction to rule on the substance of the matter in accordance with the relevant rules of jurisdiction applicable.

2. Notwithstanding paragraph 1, where the debtor is a consumer who has concluded a contract with the creditor for a purpose which can be regarded as being outside the debtor's trade or profession, jurisdiction to issue a Preservation Order intended to secure a claim relating to that contract shall lie only with the courts of the Member State in which the debtor is domiciled.

3. Where the creditor has already obtained a judgment or court settlement, jurisdiction to issue a Preservation Order for the claim specified in the judgment or court settlement shall lie with the courts of the Member State in which the judgment was issued or the court settlement was approved or concluded.

4. Where the creditor has obtained an authentic instrument, jurisdiction to issue a Preservation Order for the claim specified in that instrument shall lie with the courts designated for that purpose in the Member State in which that instrument was drawn up.

Article 7

Conditions for issuing a Preservation Order

1. The court shall issue the Preservation Order when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult.

2. Where the creditor has not yet obtained in a Member State a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim, the creditor shall also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor.

Article 8

Application for a Preservation Order

1. Applications for a Preservation Order shall be lodged using the form established in accordance with the advisory procedure referred to in Article 52(2).

2. The application shall include the following information:

(a) the name and address of the court with which the application is lodged;

(b) details concerning the creditor: name and contact details and, where applicable, name and contact details of the creditor's representative, and:
  (i) where the creditor is a natural person, his date of birth and, if applicable and available, his identification or passport number; or
  (ii) where the creditor is a legal person or any other entity having legal capacity to sue or be sued under the law of a Member State, the State of its incorporation, formation or registration and its identification or registration number or, where no such number exists, the date and place of its incorporation, formation or registration;

(c) details concerning the debtor: name and contact details and, where applicable, name and contact details of the debtor's representative and, if available:
  (i) where the debtor is a natural person, his date of birth and identification or passport number; or
  (ii) where the debtor is a legal person or any other entity having legal capacity to sue or be sued under the law of a Member State, the State of its incorporation, formation or registration and its identification or registration number or, where no such number exists, the date and place of its incorporation, formation or registration;

(d) a number enabling the identification of the bank, such as the IBAN or BIC and/or the name and address of the bank, with which the debtor holds one or more accounts to be preserved;

(e) if available, the number of the account or accounts to be preserved and, in such a case, an indication as to whether any other accounts held by the debtor with the same bank should be preserved;

(f) where none of the information required under point (d) can be provided, a statement that a request is made for the obtaining of account information pursuant to Article 14, where such a request is possible, and a substantiation as to why the creditor believes that the debtor holds one or more accounts with a bank in a specific Member State;

(g) the amount for which the Preservation Order is sought:
  (i) where the creditor has not yet obtained a judgment, court settlement or authentic instrument, the amount of the principal claim or part thereof and of any interest recoverable pursuant to Article 15;
  (ii) where the creditor has already obtained a judgment, court settlement or authentic instrument, the amount of the principal claim as specified in the judgment, court settlement or authentic instrument or part thereof and of any interest and costs recoverable pursuant to Article 15;

(h) where the creditor has not yet obtained a judgment, court settlement or authentic instrument:
  (i) a description of all relevant elements supporting the jurisdiction of the court with which the application for the Preservation Order is lodged;
  (ii) a description of all relevant circumstances invoked as the basis of the claim, and, where applicable, of the interest claimed;
  (iii) a statement indicating whether the creditor has already initiated proceedings against the debtor on the substance of the matter;

(i) where the creditor has already obtained a judgment, court settlement or authentic instrument, a declaration that the judgment, court settlement or authentic instrument has not yet been complied with or, where it has been complied with in part, an indication of the extent of non-compliance;

(j) a description of all relevant circumstances justifying the issuing of the Preservation Order as required by Article 7(1);

(k) where applicable, an indication of the reasons why the creditor believes he should be exempted from providing security pursuant to Article 12;

(l) a list of the evidence provided by the creditor;

(m) a declaration as provided for in Article 16 as to whether the creditor has lodged with other courts or authorities an application for an equivalent national order or whether such an order has already been obtained or refused and, if obtained, the extent to which it has been implemented;

(n) an optional indication of the creditor's bank account to be used for any voluntary payment of the claim by the debtor;

(o) a declaration that the information provided by the creditor in the application is true and complete to the best of his knowledge and that the creditor is aware that any deliberately false or incomplete statements may lead to legal consequences under the law of the Member State in which the application is lodged or to liability pursuant to Article 13.

3. The application shall be accompanied by all relevant supporting documents and, where the creditor has already obtained a judgment, court settlement or authentic instrument, by a copy of the judgment, court settlement or authentic instrument which satisfies the conditions necessary to establish its authenticity.

4. The application and supporting documents may be submitted by any means of communication, including electronic, which are accepted under the procedural rules of the Member State in which the application is lodged.

Article 9

Taking of evidence

1. The court shall take its decision by means of a written procedure on the basis of the information and evidence provided by the creditor in or with his application. If the court considers that the evidence provided is insufficient, it may, where national law so allows, request the creditor to provide additional documentary evidence.

2. Notwithstanding paragraph 1 and subject to Article 11, the court may, provided that this does not delay the proceedings unduly, also use any other appropriate method of taking evidence available under its national law, such as an oral hearing of the creditor or of his witness(es) including through videoconference or other communication technology.

Article 10

Initiation of proceedings on the substance of the matter

1. Where the creditor has applied for a Preservation Order before initiating proceedings on the substance of the matter, he shall initiate such proceedings and provide proof of such initiation to the court with which the application for the Preservation Order was lodged within 30 days of the date on which he lodged the application or within 14 days of the date of the issue of the Order, whichever date is the later. The court may also, at the request of the debtor, extend

that time period, for example in order to allow the parties to settle the claim, and shall inform the two parties accordingly.

2. If the court has not received proof of the initiation of proceedings within the time period referred to in paragraph 1, the Preservation Order shall be revoked or shall terminate and the parties shall be informed accordingly.

Where the court that issued the Order is located in the Member State of enforcement, the revocation or termination of the Order in that Member State shall be done in accordance with the law of that Member State.

Where the revocation or termination needs to be implemented in a Member State other than the Member State of origin, the court shall revoke the Preservation Order by using the revocation form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2), and shall transmit the revocation form in accordance with Article 29 to the competent authority of the Member State of enforcement. That authority shall take the necessary steps by applying Article 23 as appropriate to have the revocation or termination implemented.

3. For the purposes of paragraph 1, proceedings on the substance of the matter shall be deemed to have been initiated:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the creditor has not subsequently failed to take the steps he was required to take to have service effected on the debtor; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the creditor has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) of the first subparagraph shall be the first authority receiving the documents to be served.

Article 11

Ex parte procedure

The debtor shall not be notified of the application for a Preservation Order or be heard prior to the issuing of the Order.

Article 12

Security to be provided by the creditor

1. Before issuing a Preservation Order in a case where the creditor has not yet obtained a judgment, court settlement or authentic instrument, the court shall require the creditor to provide security for an amount sufficient to prevent abuse of the procedure provided for by this Regulation and to ensure compensation for any damage suffered by the debtor as a result of the Order to the extent that the creditor is liable for such damage pursuant to Article 13.

By way of exception, the court may dispense with the requirement set out in the first subparagraph if it considers that the provision of security referred to in that subparagraph is inappropriate in the circumstances of the case.

2. Where the creditor has already obtained a judgment, court settlement or authentic instrument, the court may, before issuing the Order, require the creditor to provide security as referred to in the first subparagraph of paragraph 1 if it considers this necessary and appropriate in the circumstances of the case.

3. If the court requires security to be provided pursuant to this Article, it shall inform the creditor of the amount required and of the forms of security acceptable under the law of the Member State in which the court is located. It shall indicate to the creditor that it will issue the Preservation Order once security in accordance with those requirements has been provided.

Article 13

Liability of the creditor

1. The creditor shall be liable for any damage caused to the debtor by the Preservation Order due to fault on the creditor's part. The burden of proof shall lie with the debtor.

2. In the following cases, the fault of the creditor shall be presumed unless he proves otherwise:

(a) if the Order is revoked because the creditor has failed to initiate proceedings on the substance of the matter, unless that omission was a consequence of the debtor's payment of the claim or another form for settlement between the parties;

(b) if the creditor has failed to request the release of over-preserved amounts as provided for in Article 27;

(c) if it is subsequently found that the issue of the Order was not appropriate or appropriate only in a lower amount due to a failure on the part of the creditor to comply with his obligations under Article 16; or

(d) if the Order is revoked or its enforcement terminated because the creditor has failed to comply with his obligations under this Regulation with regard to service or translation of documents or with regard to curing the lack of service or the lack of translation.

3. Notwithstanding paragraph 1, Member States may maintain or introduce in their national law other grounds or types of liability or rules on the burden of proof. All other aspects relating to the creditor's

liability towards the debtor not specifically addressed in paragraph 1 or 2 shall be governed by national law.

4. The law applicable to the liability of the creditor shall be the law of the Member State of enforcement.

If accounts are preserved in more than one Member State, the law applicable to the liability of the creditor shall be the law of the Member State of enforcement:

(a) in which the debtor has his habitual residence as defined in Article 23 of Regulation (EC) No 864/2007 of the European Parliament and of the Council, or, failing that,

(b) which has the closest connection with the case.

5. This Article does not deal with the question of possible liability of the creditor towards the bank or any third party.

Article 14

Request for the obtaining of account information

1. Where the creditor has obtained in a Member State an enforceable judgment, court settlement or authentic instrument which requires the debtor to pay the creditor's claim and the creditor has reasons to believe that the debtor holds one or more accounts with a bank in a specific Member State, but knows neither the name and/or address of the bank nor the IBAN, BIC or another bank number allowing the bank to be identified, he may request the court with which the application for the Preservation Order is lodged to request that the information authority of the Member State of enforcement obtain the information necessary to allow the bank or banks and the debtor's account or accounts to be identified.

Notwithstanding the first subparagraph, the creditor may make the request referred to in that subparagraph where the judgment, court settlement or authentic instrument obtained by the creditor is not yet enforceable and the amount to be preserved is substantial taking into account the relevant circumstances, and the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for account information because there is a risk that, without such information, the subsequent enforcement of the creditor's claim against the debtor is likely to be jeopardised and that this could consequently lead to a substantial deterioration of the creditor's financial situation.

2. The creditor shall make the request referred to in paragraph 1 in the application for the Preservation Order. The creditor shall substantiate why he believes that the debtor holds one or more accounts with a bank in the specific Member State and shall provide all relevant information available to him about the debtor and the account or accounts to be preserved. If the court with which the application for a Preservation Order is lodged considers that the creditor's request is not sufficiently substantiated, it shall reject it.

3. When the court is satisfied that the creditor's request is well substantiated and that all the conditions and requirements for issuing the Preservation Order are met, except for the information requirement set out in point (d) of Article 8(2) and, where applicable, the security requirement pursuant to Article 12, the court shall transmit the request for information to the information authority of the Member State of enforcement in accordance with Article 29.

4. To obtain the information referred to in paragraph 1, the information authority in the Member State of enforcement shall use one of the methods available in that Member State pursuant to paragraph 5.

5. Each Member State shall make available in its national law at least one of the following methods of obtaining the information referred to in paragraph 1:

(a) an obligation on all banks in its territory to disclose, upon request by the information authority, whether the debtor holds an account with them;

(b) access for the information authority to the relevant information where that information is held by public authorities or administrations in registers or otherwise;

(c) the possibility for its courts to oblige the debtor to disclose with which bank or banks in its territory he holds one or more accounts where such an obligation is accompanied by an in personam order by the court prohibiting the withdrawal or transfer by him of funds held in his account or accounts up to the amount to be preserved by the Preservation Order; or

(d) any other methods which are effective and efficient for the purposes of obtaining the relevant information, provided that they are not disproportionately costly or time-consuming.

Irrespective of the method or methods made available by a Member State, all authorities involved in obtaining the information shall act expeditiously.

6. As soon as the information authority of the Member State of enforcement has obtained the account information, it shall transmit it to the requesting court in accordance with Article 29.

7. If the information authority is unable to obtain the information referred to in paragraph 1, it shall inform the requesting court accordingly. Where, as a result of the unavailability of account information, the application for a Preservation Order is rejected in full, the requesting court shall without delay release any security that the creditor may have provided pursuant to Article 12.

8. Where under this Article the information authority is provided with information by a bank or is granted access to account information held by public authorities or administrations in registers, the

notification of the debtor of the disclosure of his personal data shall be deferred for 30 days, in order to prevent an early notification from jeopardising the effect of the Preservation Order.

Article 15

Interest and costs

1. At the request of the creditor, the Preservation Order shall include any interest accrued under the law applicable to the claim up to the date when the Order is issued, provided that the amount or type of interest is not such that its inclusion constitutes a violation of overriding mandatory provisions in the law of the Member State of origin.

2. Where the creditor has already obtained a judgment, court settlement or authentic instrument, the Preservation Order shall, at the request of the creditor, also include the costs of obtaining such judgment, settlement or instrument, to the extent that a determination has been made that those costs must be borne by the debtor.

Article 16

Parallel applications

1. The creditor may not submit to several courts at the same time parallel applications for a Preservation Order against the same debtor aimed at securing the same claim.

2. In his application for a Preservation Order, the creditor shall declare whether he has lodged with any other court or authority an application for an equivalent national order against the same debtor and aimed at securing the same claim or has already obtained such an order. He shall also indicate any applications for such an order which have been rejected as inadmissible or unfounded.

3. If the creditor obtains an equivalent national order against the same debtor and aimed at securing the same claim during the proceedings for the issuing of a Preservation Order, he shall without delay inform the court thereof and of any subsequent implementation of the national order granted. He shall also inform the court of any applications for an equivalent national order which have been rejected as inadmissible or unfounded.

4. Where the court is informed that the creditor has already obtained an equivalent national order, it shall consider, having regard to all the circumstances of the case, whether it is still appropriate to issue the Preservation Order, in full or in part.

Article 17

Decision on the application for the Preservation Order

1. The court seised of an application for a Preservation Order shall examine whether the conditions and requirements set out in this Regulation are met.

2. The court shall decide on the application without delay, but no later than by the expiry of the time-limits set out in Article 18.

3. Where the creditor has not provided all the information required by Article 8, the court may, unless the application is clearly inadmissible or unfounded, give the creditor the opportunity to complete or rectify the application within a period of time to be specified by the court. If the creditor fails to complete or rectify the application within that period, the application shall be rejected.

4. The Preservation Order shall be issued in the amount justified by the evidence referred to in Article 9 and as determined by the law applicable to the underlying claim, and shall include, where appropriate, interest and/or costs pursuant to Article 15.

The Order may not under any circumstances be issued in an amount exceeding the amount indicated by the creditor in his application.

5. The decision on the application shall be brought to the notice of the creditor in accordance with the procedure provided for by the law of the Member State of origin for equivalent national orders.

Article 18

Time-limits for the decision on the application for a Preservation Order

1. Where the creditor has not yet obtained a judgment, court settlement or authentic instrument, the court shall issue its decision by the end of the tenth working day after the creditor lodged or, where applicable, completed his application.

2. Where the creditor has already obtained a judgment, court settlement or authentic instrument, the court shall issue its decision by the end of the fifth working day after the creditor lodged or, where applicable, completed his application.

3. Where the court determines pursuant to Article 9(2) that an oral hearing of the creditor and, as the case may be, his witness(es) is necessary, the court shall hold the hearing without delay and shall issue its decision by the end of the fifth working day after the hearing has taken place.

4. In the situations referred to in Article 12, the time-limits set out in paragraphs 1, 2 and 3 of this Article shall apply to the decision requiring the creditor to provide security. The court shall issue its decision on the application for a Preservation Order without delay once the creditor has provided the security required.

5. Notwithstanding paragraphs 1, 2 and 3 of this Article, in situations referred to in Article 14, the court shall issue its decision without delay once it has received the information referred to in Article 14(6) or (7), provided that any security required has been provided by the creditor by that time.

Article 19

Form and content of the Preservation Order

1. The Preservation Order shall be issued using the form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2) and shall bear a stamp, a signature and/or any other authentication of the court. The form shall consist of two parts:

(a) part A, containing the information set out in paragraph 2 to be provided to the bank, the creditor and the debtor; and

(b) part B, containing the information set out in paragraph 3 to be provided to the creditor and the debtor in addition to the information pursuant to paragraph 2.

2. Part A shall include the following information:

(a) the name and address of the court and the file number of the case;

(b) details of the creditor as indicated in point (b) of Article 8(2);

(c) details of the debtor as indicated in point (c) of Article 8(2);

(d) the name and address of the bank concerned by the Order;

(e) if the creditor has provided the account number of the debtor in the application, the number of the account or accounts to be preserved, and, where applicable, an indication as to whether any other accounts held by the debtor with the same bank also have to be preserved;

(f) where applicable, an indication that the number of any account to be preserved was obtained by means of a request pursuant to Article 14 and that the bank, where necessary pursuant to the second subparagraph of Article 24(4), is to obtain the number or numbers concerned from the information authority of the Member State of enforcement;

(g) the amount to be preserved by the Order;

(h) an instruction to the bank to implement the Order in accordance with Article 24;

(i) the date of issue of the Order;

(j) if the creditor has indicated an account in his application pursuant to point (n) of Article 8(2), an authorisation to the bank pursuant to Article 24(3) to release and transfer, if so requested by the debtor and if allowed by the law of the Member State of enforcement, funds up to the amount specified in the Order from the preserved account to the account that the creditor has indicated in his application;

(k) information on where to find the electronic version of the form to be used for the declaration pursuant to Article 25.

3. Part B shall include the following information:

(a) a description of the subject matter of the case and the court's reasoning for issuing the Order;

(b) the amount of the security provided by the creditor, if any;

(c) where applicable, the time-limit for initiating the proceedings on the substance of the matter and for proving such initiation to the issuing court;

(d) where applicable, an indication as to which documents must be translated pursuant to the second sentence of Article 49(1);

(e) where applicable, an indication that the creditor is responsible for initiating the enforcement of the Order and consequently, where applicable, an indication that the creditor is responsible for transmitting it to the competent authority of the Member State of enforcement pursuant to Article 23(3) and for initiating service on the debtor pursuant to Article 28(2), (3) and (4); and

(f) information about the remedies available to the debtor.

4. Where the Preservation Order concerns accounts in different banks, a separate form (part A pursuant to paragraph 2) shall be filled in for each bank. In such a case, the form provided to the creditor and the debtor (parts A and B pursuant to paragraphs 2 and 3 respectively) shall contain a list of all banks concerned.

Article 20

Duration of the preservation

The funds preserved by the Preservation Order shall remain preserved as provided for in the Order or in any subsequent modification or limitation of that Order pursuant to Chapter 4:

(a) until the Order is revoked;

(b) until the enforcement of the Order is terminated; or

(c) until a measure to enforce a judgment, court settlement or authentic instrument obtained by the creditor relating to the claim which the Preservation Order was aimed at securing has taken effect with respect to the funds preserved by the Order.

Article 21

Appeal against a refusal to issue the Preservation Order

1. The creditor shall have the right to appeal against any decision of the court rejecting, wholly or in part, his application for a Preservation Order.

2. Such an appeal shall be lodged within 30 days of the date on which the decision referred to in paragraph 1

was brought to the notice of the creditor. It shall be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (d) of Article 50(1).

3. Where the application for the Preservation Order was rejected in whole, the appeal shall be dealt with in ex parte proceedings as provided for in Article 11.

CHAPTER 3

RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF THE PRESERVATION ORDER

Article 22

Recognition and enforceability

A Preservation Order issued in a Member State in accordance with this Regulation shall be recognised in the other Member States without any special procedure being required and shall be enforceable in the other Member States without the need for a declaration of enforceability.

Article 23

Enforcement of the Preservation Order

1. Subject to the provisions of this Chapter, the Preservation Order shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement.

2. All authorities involved in the enforcement of the Order shall act without delay.

3. Where the Preservation Order was issued in a Member State other than the Member State of enforcement, part A of the Order as indicated in Article 19(2) and a blank standard form for the declaration pursuant to Article 25 shall, for the purposes of paragraph 1 of this Article, be transmitted in accordance with Article 29 to the competent authority of the Member State of enforcement.

The transmission shall be done by the issuing court or the creditor, depending on who is responsible under the law of the Member State of origin for initiating the enforcement procedure.

4. The Order shall be accompanied, where necessary, by a translation or transliteration into the official language of the Member State of enforcement or, where there are several official languages in that Member State, the official language or one of the official languages of the place where the Order is to be implemented. Such translation or transliteration shall be provided by the issuing court by making use of the appropriate language version of the standard form referred to in Article 19.

5. The competent authority of the Member State of enforcement shall take the necessary steps to have the Order enforced in accordance with its national law.

6. Where the Preservation Order concerns more than one bank in the same Member State or in different Member States, a separate form for each bank as indicated in Article 19(4) shall be transmitted to the competent authority in the relevant Member State of enforcement.

Article 24

Implementation of the Preservation Order

1. A bank to which a Preservation Order is addressed shall implement it without delay following receipt of the Order or, where the law of the Member State of enforcement so provides, of a corresponding instruction to implement the Order.

2. To implement the Preservation Order, the bank shall, subject to the provisions of Article 31, preserve the amount specified in the Order either:

(a) by ensuring that that amount is not transferred or withdrawn from the account or accounts indicated in the Order or identified pursuant to paragraph 4; or

(b) where national law so provides, by transferring that amount to an account dedicated for preservation purposes.

The final amount preserved may be subject to the settlement of transactions which are already pending at the moment when the Order or a corresponding instruction is received by the bank. However, such pending transactions may only be taken into account when they are settled before the bank issues the declaration pursuant to Article 25 by the time-limits set out in Article 25(1).

3. Notwithstanding point (a) of paragraph 2, the bank shall be authorised, at the request of the debtor, to release funds preserved and to transfer those funds to the account of the creditor indicated in the Order for the purposes of paying the creditor's claim, if all the following conditions are met:

(a) such authorisation of the bank is specifically indicated in the Order in accordance with point (j) of Article 19(2);

(b) the law of the Member State of enforcement allows for such release and transfer; and

(c) there are no competing Orders with regard to the account concerned.

4. Where the Preservation Order does not specify the number or numbers of the account or accounts of the debtor but provides only the name and other details regarding the debtor, the bank or other entity responsible for enforcing the Order shall identify the account or accounts held by the debtor with the bank indicated in the Order.

If, on the basis of the information provided in the Order, it is not possible for the bank or other entity to identify with certainty an account of the debtor, the bank shall:

(a) where, in accordance with point (f) of Article 19(2), it is indicated in the Order that the number or numbers of the account or accounts to be preserved was or were obtained by means of a request pursuant to Article 14, obtain that number or those numbers from the information authority of the Member State of enforcement; and

(b) in all other cases, not implement the Order.

5. Any funds held in the account or accounts referred to in point (a) of paragraph 2 which exceed the amount specified in the Preservation Order shall remain unaffected by the implementation of the Order.

6. Where, at the time of the implementation of the Preservation Order, the funds held in the account or accounts referred to in point (a) of paragraph 2 are insufficient to preserve the full amount specified in the Order, the Order shall be implemented only in the amount available in the account or accounts.

7. Where the Preservation Order covers several accounts held by the debtor with the same bank and those accounts contain funds that exceed the amount specified in the Order, the Order shall be implemented in the following order of priority:

(a) savings accounts in the sole name of the debtor;

(b) current accounts in the sole name of the debtor;

(c) savings accounts in joint names, subject to Article 30;

(d) current accounts in joint names, subject to Article 30.

8. Where the currency of the funds held in the account or accounts referred to in point (a) of paragraph 2 is not the same as that in which the Preservation Order was issued, the bank shall convert the amount specified in the Order into the currency of the funds by reference to the foreign exchange reference rate of the European Central Bank or the exchange rate of the central bank of the Member State of enforcement for sale of that currency on the day and at the time of the implementation of the Order, and shall preserve the corresponding amount in the currency of the funds.

Article 25

Declaration concerning the preservation of funds

1. By the end of the third working day following the implementation of the Preservation Order, the bank or other entity responsible for enforcing the Order in the Member State of enforcement shall issue a declaration using the declaration form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2), indicating whether and to what extent funds in the debtor's account or accounts have been preserved and, if so, on which date the Order was implemented. If, in exceptional circumstances, it is not possible for the bank or other entity to issue the declaration within three working days, it shall issue it as soon as possible but by no later than the end of the eighth working day following the implementation of the Order.

The declaration shall be transmitted, without delay, in accordance with paragraphs 2 and 3.

2. Where the Order was issued in the Member State of enforcement, the bank or other entity responsible for enforcing the Order shall transmit the declaration in accordance with Article 29 to the issuing court and by registered post attested by an acknowledgment of receipt, or by equivalent electronic means, to the creditor.

3. Where the Order was issued in a Member State other than the Member State of enforcement, the declaration shall be transmitted in accordance with Article 29 to the competent authority of the Member State of enforcement, unless it was issued by that same authority.

By the end of the first working day following the receipt or issue of the declaration, that authority shall transmit the declaration in accordance with Article 29 to the issuing court and by registered post attested by an acknowledgment of receipt, or by equivalent electronic means, to the creditor.

4. The bank or other entity responsible for enforcing the Preservation Order shall, upon request by the debtor, disclose to the debtor the details of the Order. The bank or entity may also do so in the absence of such a request.

Article 26

Liability of the bank

Any liability of the bank for failure to comply with its obligations under this Regulation shall be governed by the law of the Member State of enforcement.

Article 27

Duty of the creditor to request the release of over-preserved amounts

1. The creditor shall be under a duty to take the necessary steps to ensure the release of any amount which, following the implementation of the Preservation Order, exceeds the amount specified in the Preservation Order:

(a) where the Order covers several accounts in the same Member State or in different Member States; or

(b) where the Order was issued after the implementation of one or more equivalent national orders against the same debtor and aimed at securing the same claim.

2. By the end of the third working day following receipt of any declaration pursuant to Article 25 showing such over-preservation, the creditor shall, by the swiftest possible means and using the form for requesting the release of over-preserved amounts, established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2), submit a request for the release to the competent authority of the Member State of enforcement in which the over-preservation has occurred.

That authority shall, upon receipt of the request, promptly instruct the bank concerned to effect the release of the over-preserved amounts. Article 24(7) shall apply, as appropriate, in the reverse order of priority.

3. This Article shall not preclude a Member State from providing in its national law that the release of over-preserved funds from any account maintained in its territory is to be initiated by the competent enforcement authority of that Member State of its own motion.

Article 28

Service on the debtor

1. The Preservation Order, the other documents referred to in paragraph 5 of this Article and the declaration pursuant to Article 25 shall be served on the debtor in accordance with this Article.

2. Where the debtor is domiciled in the Member State of origin, service shall be effected in accordance with the law of that Member State. Service shall be initiated by the issuing court or the creditor, depending on who is responsible for initiating service in the Member State of origin, by the end of the third working day following the day of receipt of the declaration pursuant to Article 25 showing that amounts have been preserved.

3. Where the debtor is domiciled in a Member State other than the Member State of origin, the issuing court or the creditor, depending on who is responsible for initiating service in the Member State of origin, shall, by the end of the third working day following the day of receipt of the declaration pursuant to Article 25 showing that amounts have been preserved, transmit the documents referred to in paragraph 1 of this Article in accordance with Article 29 to the competent authority of the Member State in which the debtor is domiciled. That authority shall, without delay, take the necessary steps to have service effected on the debtor in accordance with the law of the Member State in which the debtor is domiciled.

Where the Member State in which the debtor is domiciled is the only Member State of enforcement, the documents referred to in paragraph 5 of this Article shall be transmitted to the competent authority of that Member State at the time of transmission of the Order in accordance with Article 23(3). In such a case, that competent authority shall initiate the service of all documents referred to in paragraph 1 of this Article by the end of the third working day following the day of receipt or issue of the declaration pursuant to Article 25 showing that amounts have been preserved.

The competent authority shall inform the issuing court or the creditor, depending on who transmitted the documents to be served, of the result of the service on the debtor.

4. Where the debtor is domiciled in a third State, service shall be effected in accordance with the rules on international service applicable in the Member State of origin.

5. The following documents shall be served on the debtor and shall, where necessary, be accompanied by a translation or transliteration as provided for in Article 49(1):

(a) the Preservation Order using parts A and B of the form referred to in Article 19(2) and (3);

(b) the application for the Preservation Order submitted by the creditor to the court;

(c) copies of all documents submitted by the creditor to the court in order to obtain the Order.

6. Where the Preservation Order concerns more than one bank, only the first declaration pursuant to Article 25 showing that amounts have been preserved shall be served on the debtor in accordance with this Article. Any subsequent declarations pursuant to Article 25 shall be brought to the notice of the debtor without delay.

Article 29

Transmission of documents

1. Where this Regulation provides for transmission of documents in accordance with this Article, such transmission may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document transmitted and that all information contained in it is easily legible.

2. The court or authority that received documents in accordance with paragraph 1 of this Article shall, by the end of the working day following the day of receipt, send to the authority, creditor or bank that transmitted the documents an acknowledgment of receipt, employing the swiftest possible means of transmission and using the standard form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2).

Article 30

Preservation of joint and nominee accounts

Funds held in accounts which, according to the bank's records, are not exclusively held by the debtor or are held by a third party on behalf of the debtor or by the debtor on behalf of a third party, may be preserved

under this Regulation only to the extent to which they may be subject to preservation under the law of the Member State of enforcement.

Article 31

Amounts exempt from preservation

1. Amounts that are exempt from seizure under the law of the Member State of enforcement shall be exempt from preservation under this Regulation.

2. Where, under the law of the Member State of enforcement, the amounts referred to in paragraph 1 are exempted from seizure without any request from the debtor, the body responsible for exempting such amounts in that Member State shall, of its own motion, exempt the relevant amounts from preservation.

3. Where, under the law of the Member State of enforcement, the amounts referred to in paragraph 1 of this Article are exempted from seizure at the request of the debtor, such amounts shall be exempted from preservation upon application by the debtor as provided for by point (a) of Article 34(1).

Article 32

Ranking of the Preservation Order

The Preservation Order shall have the same rank, if any, as an equivalent national order in the Member State of enforcement.

CHAPTER 4

REMEDIES

Article 33

Remedies of the debtor against the Preservation Order

1. Upon application by the debtor to the competent court of the Member State of origin, the Preservation Order shall be revoked or, where applicable, modified on the ground that:

(a) the conditions or requirements set out in this Regulation were not met;

(b) the Order, the declaration pursuant to Article 25 and/or the other documents referred to in Article 28(5) were not served on the debtor within 14 days of the preservation of his account or accounts;

(c) the documents served on the debtor in accordance with Article 28 did not meet the language requirements set out in Article 49(1);

(d) preserved amounts exceeding the amount of the Order were not released in accordance with Article 27;

(e) the claim the enforcement of which the creditor was seeking to secure by means of the Order has been paid in full or in part;

(f) a judgment on the substance of the matter has dismissed the claim the enforcement of which the creditor was seeking to secure by means of the Order; or

(g) the judgment on the substance of the matter, or the court settlement or authentic instrument, the enforcement of which the creditor was seeking to secure by means of the Order has been set aside or, as the case may be, annulled.

2. Upon application by the debtor to the competent court of the Member State of origin, the decision concerning the security pursuant to Article 12 shall be reviewed on the ground that the conditions or requirements of that Article were not met.

Where, on the basis of such a remedy, the court requires the creditor to provide security or additional security, the first sentence of Article 12(3) shall apply as appropriate and the court shall indicate that the Preservation Order will be revoked or modified if the (additional) security required is not provided by the time-limit specified by the court.

3. The remedy applied for under point (b) of paragraph 1 shall be granted unless the lack of service is cured within 14 days of the creditor being informed of the debtor's application for a remedy pursuant to point (b) of paragraph 1.

Unless the lack of service was already cured by other means, the lack of service shall, for the purposes of assessing whether or not the remedy pursuant to point (b) of paragraph 1 is to be granted, be deemed to be cured:

(a) if the creditor requests the body responsible for service under the law of the Member State of origin to serve the documents on the debtor; or

(b) where the debtor has indicated in his application for a remedy that he agrees to collect the documents at the court of the Member State of origin and where the creditor was responsible for providing translations, if the creditor transmits to that court any translations required pursuant to Article 49(1).

The body responsible for service under the law of the Member State of origin shall, at the request of the creditor pursuant to point (a) of the second subparagraph of this paragraph, without delay serve the documents on the debtor by registered post attested by an acknowledgment of receipt at the address indicated by the debtor in accordance with paragraph 5 of this Article.

Where the creditor was responsible for initiating the service of the documents referred to in Article 28, a lack of service may only be cured if the creditor demonstrates that he had taken all the steps he was required to take to have the initial service of the documents effected.

4. The remedy applied for under point (c) of paragraph 1 shall be granted unless the creditor provides to the debtor the translations required pursuant to this Regulation within 14 days of the creditor being informed of the application by the debtor for a remedy pursuant to point (c) of paragraph 1.

The second and third subparagraphs of paragraph 3 shall apply as appropriate.

5. In his application for a remedy under points (b) and (c) of paragraph 1, the debtor shall indicate an address to which the documents and the translations referred to in Article 28 can be sent in accordance with paragraphs 3 and 4 of this Article or, alternatively, shall indicate that he agrees to collect those documents at the court of the Member State of origin.

Article 34

Remedies of the debtor against enforcement of the Preservation Order

1. Notwithstanding Articles 33 and 35, upon application by the debtor to the competent court or, where national law so provides, to the competent enforcement authority in the Member State of enforcement, the enforcement of the Preservation Order in that Member State shall be:

(a) limited on the ground that certain amounts held in the account should be exempt from seizure in accordance with Article 31(3), or that amounts exempt from seizure have not or not correctly been taken into account in the implementation of the Order in accordance with Article 31(2); or

(b) terminated on the ground that:

(i) the account preserved is excluded from the scope of this Regulation pursuant to Article 2(3) and (4);

(ii) enforcement of the judgment, court settlement or authentic instrument which the creditor was seeking to secure by means of the Order has been refused in the Member State of enforcement;

(iii) the enforceability of the judgment the enforcement of which the creditor was seeking to secure by means of the Order has been suspended in the Member State of origin; or

(iv) point (b), (c), (d), (e), (f) or (g) of Article 33(1) applies. Article 33(3), (4) and (5) shall apply as appropriate.

2. Upon application by the debtor to the competent court in the Member State of enforcement, the enforcement of the Preservation Order in that Member State shall be terminated if it is manifestly contrary to the public policy (ordre public) of the Member State of enforcement.

Article 35

Other remedies available to the debtor and the creditor

1. The debtor or the creditor may apply to the court that issued the Preservation Order for a modification or a revocation of the Order on the ground that the circumstances on the basis of which the Order was issued have changed.

2. The court that issued the Preservation Order may also, where the law of the Member State of origin so permits, of its own motion modify or revoke the Order due to changed circumstances.

3. The debtor and the creditor may, on the ground that they have agreed to settle the claim, apply jointly to the court that issued the Preservation Order for revocation or modification of the Order or to the competent court of the Member State of enforcement or, where national law so provides, to the competent enforcement authority in that Member State, for termination or limitation of the enforcement of the Order.

4. The creditor may apply to the competent court of the Member State of enforcement or, where national law so provides, to the competent enforcement authority in that Member State, for modification of the enforcement of the Preservation Order, consisting of an adjustment to the exemption applied in that Member State pursuant to Article 31, on the ground that other exemptions have already been applied in a sufficiently high amount in relation to one or several accounts maintained in one or more other Member States and that an adjustment is therefore appropriate.

Article 36

Procedure for the remedies pursuant to Articles 33, 34 and 35

1. The application for a remedy pursuant to Article 33, 34 or 35 shall be made using the remedy form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2). The application may be made at any time and may be submitted by any means of communication, including electronic means, which are accepted under the procedural rules of the Member State in which the application is lodged.

2. The application shall be brought to the notice of the other party.

3. Except where the application was submitted by the debtor pursuant to point (a) of Article 34(1) or pursuant to Article 35(3), the decision on the application shall be issued after both parties have been given the opportunity to present their case, including by such appropriate means of communication technology as are available and accepted under the national law of each of the Member States involved.

4. The decision shall be issued without delay, but no later than 21 days after the court or, where national law so provides, the competent enforcement authority has received all the information necessary for its decision. The decision shall be brought to the notice of the parties.

5. The decision revoking or modifying the Preservation Order and the decision limiting or terminating the enforcement of the Preservation Order shall be enforceable immediately.

Where the remedy was applied for in the Member State of origin, the court shall, in accordance with Article 29, transmit the decision on the remedy without delay to the competent authority of the Member State of enforcement, using the form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2). That authority shall, immediately upon receipt, ensure that the decision on the remedy is implemented.

Where the decision on the remedy relates to a bank account maintained in the Member State of origin, it shall be implemented with respect to that bank account in accordance with the law of the Member State of origin.

Where the remedy was applied for in the Member State of enforcement, the decision on the remedy shall be implemented in accordance with the law of the Member State of enforcement.

Article 37

Right to appeal

Either party shall have the right to appeal against a decision issued pursuant to Article 33, 34 or 35. Such an appeal shall be submitted using the appeal form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2).

Article 38

Right to provide security in lieu of preservation

1. Upon application by the debtor:

(a) the court that issued the Preservation Order may order the release of the funds preserved if the debtor provides to that court security in the amount of the Order, or an alternative assurance in a form acceptable under the law of the Member State in which the court is located and of a value at least equivalent to that amount;

(b) the competent court or, where national law so provides, the competent enforcement authority of the Member State of enforcement may terminate the enforcement of the Preservation Order in the Member State of enforcement if the debtor provides to that court or authority security in the amount preserved in that Member State, or an alternative assurance in a form acceptable under the law of the Member State in which the court is located and of a value at least equivalent to that amount.

2. Articles 23 and 24 shall apply as appropriate to the release of the funds preserved. The provision of the security in lieu of preservation shall be brought to the notice of the creditor in accordance with national law.

Article 39

Right of third parties

1. The right of a third party to contest a Preservation Order shall be governed by the law of the Member State of origin.

2. The right of a third party to contest the enforcement of a Preservation Order shall be governed by the law of the Member State of enforcement.

3. Without prejudice to other rules of jurisdiction laid down in Union law or national law, jurisdiction in respect of any action brought by a third party:

(a) to contest a Preservation Order shall lie with the courts of the Member State of origin, and

(b) to contest the enforcement of the Preservation Order in the Member State of enforcement shall lie with the courts of the Member State of enforcement or, where the national law of that Member State so provides, with the competent enforcement authority.

CHAPTER 5

GENERAL PROVISIONS

Article 40

Legalisation or other similar formality

No legalisation or other similar formality shall be required in the context of this Regulation.

Article 41

Legal representation

Representation by a lawyer or other legal professional shall not be mandatory in proceedings to obtain a Preservation Order. In proceedings pursuant to Chapter 4, representation by a lawyer or another legal professional shall not be mandatory unless, under the law of the Member State of the court or authority with which the application for a remedy is lodged, such representation is mandatory irrespective of the nationality or domicile of the parties.

Article 42

Court fees

The court fees in proceedings to obtain a Preservation Order or a remedy against an Order shall not be higher than the fees for obtaining an equivalent

national order or a remedy against such a national order.

Article 43

Costs incurred by the banks

1. A bank shall be entitled to seek payment or reimbursement from the creditor or the debtor of the costs incurred in implementing a Preservation Order only where, under the law of the Member State of enforcement, the bank is entitled to such payment or reimbursement in relation to equivalent national orders.

2. Fees charged by a bank to cover the costs referred to in paragraph 1 shall be determined taking into account the complexity of the implementation of the Preservation Order, and may not be higher than the fees charged for the implementation of equivalent national orders.

3. Fees charged by a bank to cover the costs of providing account information pursuant to Article 14 may not be higher than the costs actually incurred and, where applicable, not higher than the fees charged for the provision of account information in the context of equivalent national orders.

Article 44

Fees charged by authorities

Fees charged by any authority or other body in the Member State of enforcement which is involved in the processing or enforcement of a Preservation Order, or in providing account information pursuant to Article 14, shall be determined on the basis of a scale of fees or other set of rules established in advance by each Member State and transparently setting out the applicable fees. In establishing that scale or other set of rules, a Member State may take into account the amount of the Order and the complexity involved in processing it. Where applicable, the fees may not be higher than the fees charged in connection with equivalent national orders.

Article 45

Time frames

Where, in exceptional circumstances, it is not possible for the court or the authority involved to respect the time frames provided for in Article 14(7), Article 18, Article 23(2), the second subparagraph of Article 25(3), Article 28(2), (3) and (6), Article 33(3) and Article 36(4) and (5), the court or authority shall take the steps required by those provisions as soon as possible.

Article 46

Relationship with national procedural law

1. All procedural issues not specifically dealt with in this Regulation shall be governed by the law of the Member State in which the procedure takes place.

2. The effects of the opening of insolvency proceedings on individual enforcement actions, such as the enforcement of a Preservation Order, shall be governed by the law of the Member State in which the insolvency proceedings have been opened.

Article 47

Data protection

1. Personal data which are obtained, processed or transmitted under this Regulation shall be adequate, relevant and not excessive in relation to the purpose for which they were obtained, processed or transmitted, and shall be used only for that purpose.

2. The competent authority, the information authority and any other entity responsible for enforcing the Preservation Order may not store the data referred to in paragraph 1 beyond the period necessary for the purpose for which they were obtained, processed or transmitted, which in any event shall not be longer than six months after the proceedings have ended, and shall, during that period, ensure the appropriate protection of those data. This paragraph does not apply to data processed or stored by courts in the exercise of their judicial functions.

Article 48

Relationship with other instruments

This Regulation is without prejudice to:

(a) Regulation (EC) No 1393/2007 of the European Parliament and of the Council, except as provided for in Article 10(2), Article 14(3) and (6), Article 17(5), Article 23(3) and (6), Article 25(2) and (3), Article 28(1), (3), (5) and (6), Article 29, Article 33(3), Article 36(2) and (4), and Article 49(1) of this Regulation;

(b) Regulation (EU) No 1215/2012;

(c) Regulation (EC) No 1346/2000;

(d) Directive 95/46/EC, except as provided for in Articles 14(8) and 47 of this Regulation;

(e) Regulation (EC) No 1206/2001 of the European Parliament and of the Council;

(f) Regulation (EC) No 864/2007, except as provided for in Article 13(4) of this Regulation.

Article 49

Languages

1. Any documents listed in points (a) and (b) of Article 28(5) to be served on the debtor which are not in the official language of the Member State in which the debtor is domiciled or, where there are several official languages in that Member State, the official language or one of the official languages of the place where the debtor is domiciled or another language which he understands, shall be accompanied by a translation or transliteration into one of those languages. Documents listed in point (c) of Article 28(5) shall not be

translated unless the court decides, exceptionally, that specific documents need to be translated or transliterated in order to enable the debtor to assert his rights.

2. Any documents to be addressed under this Regulation to a court or competent authority may also be in any other official language of the institutions of the Union, if the Member State concerned has indicated that it can accept such other language.

3. Any translation made under this Regulation shall be done by a person qualified to do translations in one of the Member States.

Article 50

Information to be provided by Member States

1. By 18 July 2016, the Member States shall communicate the following information to the Commission:

(a) the courts designated as competent to issue a Preservation Order (Article 6(4));

(b) the authority designated as competent to obtain account information (Article 14);

(c) the methods of obtaining account information available under their national law (Article 14(5));

(d) the courts with which an appeal is to be lodged (Article 21);

(e) the authority or authorities designated as competent to receive, transmit and serve the Preservation Order and other documents under this Regulation (point (14) of Article 4);

(f) the authority competent to enforce the Preservation Order in accordance with Chapter 3;

(g) the extent to which joint and nominee accounts can be preserved under their national law (Article 30);

(h) the rules applicable to amounts exempt from seizure under national law (Article 31);

(i) whether, under their national law, banks are entitled to charge fees for the implementation of equivalent national orders or for providing account information and, if so, which party is liable, provisionally and finally, to pay those fees (Article 43);

(j) the scale of fees or other set of rules setting out the applicable fees charged by any authority or other body involved in the processing or enforcement of the Preservation Order (Article 44);

(k) whether any ranking is conferred on equivalent national orders under national law (Article 32);

(l) the courts or, where applicable, the enforcement authority, competent to grant a remedy (Article 33(1), Article 34(1) or (2));

(m) the courts with which an appeal is to be lodged, the period of time, if prescribed, within which such an appeal must be lodged under national law and the event marking the start of that period (Article 37);

(n) an indication of court fees (Article 42); and

(o) the languages accepted for translations of the documents (Article 49(2)).

The Member States shall apprise the Commission of any subsequent changes to that information.

2. The Commission shall make the information publicly available through any appropriate means, in particular through the European Judicial Network in civil and commercial matters.

Article 51

Establishment and subsequent amendment of the forms

The Commission shall adopt implementing acts establishing and subsequently amending the forms referred to in Articles 8(1), 10(2), 19(1), 25(1), 27(2), 29(2) and 36(1), the second subparagraph of Article 36(5) and Article 37. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 52(2).

Article 52

Committee procedure

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

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

(…)

CHAPTER 6

FINAL PROVISIONS

Article 54

Entry into force

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

It shall apply from 18 January 2017, with the exception of Article 50, which shall apply from 18 July 2016.

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

Comments

1. Although this regulation EU 655/2014 relates to cross-border debt recovery in civil and commercial matters, this does not exclude a possible use in the field of tax claims.

An example can be found in the EUCJ judgment of 12 September 2013 in case C-49/12, Sunico (*EU & Int. Tax Coll. News* 2014-2, 38), relating to the United Kingdom's public authority's claim from non-residents for damages for the loss caused by their tortious conspiracy to commit VAT fraud in the United Kingdom.

2. In this regard, it is important to be aware of a specific discussion point raised in the context of the above Sunico judgment. The request for a preliminary ruling in that case concerned the interpretation of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Before the UK authorities (HMRC) launched their claim for damages, the Danish tax authorities, at the UK's request, had supplied the UK authorities with information about the non-residents sued in the British Court, on the basis of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of VAT. One of the arguments raised by the defendant related to this preceding information exchange. In his view, the request for information which the UK authorities addressed to the Danish authorities on the basis of Regulation No 1798/2003 before bringing proceedings before the UK Court affected the nature of the legal relationship between the UK authorities and the defendant, so that the action of the UK authorities no longer fell within the category of "civil matters".

The advocate general inclined to follow this reasoning of the defendant. She stated: "The request for information is an instrument that is not available to a private applicant. It is not, however, clear from the information before the Court whether or to what extent the request for information was also relevant for the proceedings before the [UK] High Court of Justice. In any case, if it were admissible in national procedural law for HMRC to use that information and evidence obtained in the exercise of tis powers in the proceedings before the High Court of Justice, HMRC would not be acting against the defendants as a private person." (point 45 of the opinion).

The Court of Justice itself did not really confirm the advocate general's opinion on this point. The Court stated that it was for the referring court to ascertain whether the authorities concerned used evidence obtained in the exercise of their powers as a public authority and, "if appropriate", whether the Commissioners were in the same position as a person governed by private law in their action against Sunico and the other non-residents sued in the High Court of Justice (paragraph 43 of the judgment).

In a commentary on this judgement, it is considered that the use of information obtained under Council Regulation (EC) No 1798/2003 – or another legal framework for information exchange between tax authorities – should not automatically exclude the later use of assistance arrangements relating to "civil" matters (see De Troyer, *Tijdschrift Fiscaal Recht* (Belgium), 2015, N° 481, 426). In this author's view, the use of the words "if appropriate" in the Court's consideration (paragraph 43) confirms that the Court rejects the strict approach suggested by the advocate general.

Regulation (EU) 2015/848 of the European Parliament and of the Council

of 20 May 2015

on insolvency proceedings

The text of this new regulation has been published in the Official Journal of the European Union of 5 June 2015, L 141/19.

This new regulation is a recast regulation, replacing Regulation (EC) 1346/2000, which had been amended several times.

The provisions of this new regulation shall apply only to insolvency proceedings opened after 26 June 2017. Acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed (Art. 84 of this regulation).

CASE LAW

European Court of Human Rights

Göthlin v. Sweden, n° 8307/11

16 October 2014

Tax enforcement – Tax debtor's obligation to provide information about seizable assets – Non-respect of that obligation – Detention of the debtor during 42 days – Proportionate to the aim of the measure

This judgement deals with the detention of a debtor during 42 days for not having complied with his legal obligation to reveal information for enforcement purposes about where his asset, a mobile sawmill, was to be found.

The Court concluded that the detention of the debtor was not in violation of Article 5 §1 (b) of the European Convention on Human Rights. In the Court's view, it was proportionate to the legitimate aim to induce him to fulfil his legal obligation to cooperate with the authorities and give them the necessary information about his property so that they could secure the payment of his tax debt. (See paras. 67-68 of the judgement).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1943 and lives in Sundborn.

A. The writ of execution

6. On 8 September 2009 the Enforcement Authority (*Kronofogdemyndigheten*) in Falun issued a writ of execution (*beslut om utmätning*) attaching a mobile sawmill belonging to the applicant. It noted that the applicant's total enforceable tax debts amounted to SEK 246,199 (roughly EUR 27,300) and that the sawmill had an estimated value of SEK 300,000 (roughly EUR 33,400). The Authority decided to leave the sawmill in the applicant's possession but informed him that he was not allowed to sell or dispose of it or otherwise make use of it in a way that might negatively affect its value.

7. The applicant appealed against the decision to the District Court (*tingsrätten*) of Falun and also requested the Enforcement Authority to stay the sale of the sawmill while the court considered the case. The request for the interim measure was granted on 29 September 2009.

8. On 1 February 2010 the District Court rejected the applicant's appeal and upheld the writ of execution. The interim measure was consequently also lifted.

9. Upon further appeal by the applicant, both the Svea Court of Appeal (*hovrätten*) and the Supreme Court (*Högsta domstolen*) refused leave to appeal, the latter on 6 May 2010.

B. The applicant's detention

10. On 22 April 2010 the Enforcement Authority contacted the applicant in order to plan the sale of the attached sawmill. In his reply a few days later, the applicant stated that he had removed the sawmill from his property and hidden it. He also submitted a written statement specifying that he had removed and hidden the sawmill, alone when no one else was at home.

11. On 5 May 2010 the Enforcement Authority visited the applicant's property and confirmed that the sawmill was no longer there. The Authority also handed the applicant a summons for questioning on 7 May 2010 on its premises, as well as an injunction in which he was ordered to provide the Authority with the necessary information to be able to recuperate the sawmill. The injunction also informed the applicant that, according to Chapter 4, section 14, of the Enforcement Code (*Utsökningsbalken*), he was duty-bound to give information about his assets and their location. It further informed him of the Authority's intention to ask the District Court to detain him if he did not cooperate.

12. At the questioning, the applicant acknowledged that he knew that the sawmill was attached and that he was not allowed to dispose of it in any way. However, since he considered that the basis for the attachment was wrong, he had decided to hide it. He stated that he took full responsibility for his actions and that nobody but him had been involved or knew where the sawmill was. He refused to give any information about its whereabouts but admitted that he had driven some distance with it around mid-April 2010. He further claimed that it could be only partly in his possession and that he was not sure that he could retrieve it if he wanted to. He stated that he had even considered setting fire to the sawmill. Meanwhile, the applicant's wife was also questioned. She informed the Enforcement Authority that she had no information about where the sawmill was hidden.

13. On 17 May 2010 the Enforcement Authority requested the District Court to detain the applicant because he had refused to cooperate and give the required information. It relied on Chapter 2, section 16, and Chapter 4, section 14, of the Enforcement Code. On the same day, the District Court assigned a public defender for the applicant.

14. The applicant opposed the measure and claimed that it would be in violation of Articles 3 and 5 of the Convention to detain him and that no extraordinary reasons for such a measure existed.

15. On 27 May 2010, after having held an oral hearing, the District Court rejected the Enforcement Authority's request. It first considered that Swedish legislation on this point did not contravene the said provisions in the Convention. The question was whether there were extraordinary reasons to detain the applicant. In this respect, the court noted that the writ of execution had gained legal force on 6 May 2010 when the Supreme Court refused leave to appeal. Thus, the court held, only a short time had passed since the matter had been finally resolved. It further observed that the Enforcement Authority had not resorted to any other measures in order to convince the applicant to reveal the location of the property, such as imposing a conditional fine. Whilst recognising that the applicant so far had been reluctant to give any information about the location of the sawmill, the court found that it could not be ruled out that a less severe coercive measure would alter his attitude. Consequently, the court concluded that currently there did not exist such extraordinary reasons to detain the applicant.

16. The Enforcement Authority appealed to the Court of Appeal, maintaining its claims and adding that, according to the preparatory works of the Enforcement Code, it was only necessary that the debtor had received an injunction but refused to comply with it. It further submitted that having regard to the applicant's stance on the matter, the imposition of a conditional fine would most likely have no effect. Lastly, the Authority stated that it had reported the applicant to the police on the ground that he had committed a breach of an official order when he had removed and hidden the sawmill.

17. The applicant opposed the appeal, maintaining his claims and adding that he considered that, if he were detained, it would amount to imprisonment to obtain a confession. In his view, it would be clearly disproportionate to the aim pursued to detain him.

18. On 28 June 2010 the Court of Appeal quashed the lower court's decision and granted the Enforcement Authority's request. It stated that a debtor had to give necessary information about his assets and failure to do so could result in the debtor being detained, if there were extraordinary reasons for detention. Moreover, it was not necessary to impose a fine initially. Having regard to the size of the debts, the value of the hidden property and the fact that the applicant had maintained his refusal to reveal its location, the Court of Appeal found that there were extraordinary reasons to detain the applicant and that detention was proportionate to the aim pursued. In reaching its decision, the court found that the measure did not breach the Convention. Lastly, it noted that it should be informed as soon as the applicant had been detained in order to hold a hearing as to the continued detention.

19. The applicant was detained the following day. Consequently, on 30 June 2010, the Court of Appeal held an oral hearing and decided to maintain its earlier decision. At the hearing, the applicant stated that the taxes and the attachment had been imposed on him wrongly and that as long as these errors had not been corrected he would not cooperate to bring back the sawmill. The court reiterated its reasons as stated in its earlier decision and added that the applicant's detention should be reviewed every second week and that he should be released immediately if he revealed the location of the property. Moreover, under no circumstances could the applicant be kept in detention for more than three months.

20. The applicant appealed to the Supreme Court which, on 6 July 2010, refused leave to appeal.

21. On 13 July 2010 the District Court reviewed the applicant's detention and held a new hearing in the case as required by Chapter 2, section 16, of the Enforcement Code. The Enforcement Authority maintained that the applicant should be kept in detention since he still had not given any information about the location of the sawmill. It stated that it had not been able to undertake any investigative measures, since the applicant had stated that he had taken the sawmill far away from his property by car and its whereabouts thus were unknown to the Authority. The applicant, who requested his immediate release, maintained his refusal to give any information about the location of the sawmill and claimed, *inter alia*, that he suffered from high blood pressure and panic anxiety attacks, causing him difficulties sleeping. Moreover, he stated that he had recently been treated for prostate cancer and that he was not allowed to take his normal medication against his panic attacks since it contained narcotic substances. In its decision, the District Court noted that the applicant maintained his refusal to reveal the whereabouts of the sawmill and found, having regard to the proportionality of the measure, that there were extraordinary reasons for the applicant's continued detention. Hence, the District Court decided that he should remain in custody.

22. The applicant appealed to the Court of Appeal which, on 20 July 2010, rejected the appeal. Upon further appeal, the Supreme Court dismissed the appeal since a new decision had already been taken by the District Court at that time.

23. On 27 July 2010 the District Court again reviewed the detention and held a new hearing in the case. The Enforcement Authority maintained its earlier point of view and acknowledged that no investigative measure had been possible due to the applicant's continued refusal to cooperate. The applicant maintained his earlier position and added that he suffered from asthmatic symptoms due to the dry air in custody.

Having regard to his age and health problems, he considered that it was clearly disproportionate to prolong his detention. The District Court found that there were still extraordinary reasons for the applicant's continued detention and that it was not disproportionate to the aim pursued. It thus ordered that he should remain in custody.

24. The applicant appealed to the Court of Appeal which, on 2 August 2010, rejected the appeal. On 5 August 2010 the Supreme Court refused leave to appeal.

25. On 9 August 2010 the District Court once again reviewed the detention and held a hearing in the case. The parties maintained their earlier standpoints. The District Court found that continued detention of the applicant would be disproportionate to the measures he had taken. Hence, the District Court concluded that there were no extraordinary reasons for the applicant's continued detention. As a consequence, the District Court ordered his immediate release and the order was implemented the same day.

26. The Enforcement Authority appealed to the Court of Appeal which, on 13 August 2010, rejected the appeal.

27. On 7 September 2010 the Supreme Court dismissed the Enforcement Authority's further appeal and consequently, on 23 September 2010, the District Court struck the case out of its list of cases as the case was closed.

28. As concerns the Enforcement Authority's police report concerning the applicant's alleged breach of an official order pursuant to Chapter 17, section 13, of the Penal Code (*Brottsbalken*), the preliminary investigation was discontinued with reference to provisions on waiver of prosecution (*åtalsunderlåtelse*) on 13 April 2011.

29. On 4 October 2011 the Enforcement Authority decided to revoke the writ of execution concerning the sawmill since it considered that no additional circumstances had emerged that could reveal its location. Furthermore, it was considered that there were no other measures which could produce results to that end.

C. The complaint to the Chancellor of Justice

30. On 26 April 2012 the applicant submitted a claim for damages to the Chancellor of Justice (*Justitiekanslern*), pursuant to the Act on Compensation for Deprivation of Liberty and Other Coercive Measures (*Lagen om ersättning vid frihetsberövande och andra tvångsåtgärder*, 1998:714), in the amount of SEK 80,000 for the suffering he had endured during the 42 days he was deprived of his liberty. He further demanded to be reimbursed SEK 2,940 for costs which had been deducted from his pension during his time in detention.

31. On 15 October 2012 the Chancellor of Justice rejected the claim. The Chancellor noted that the decision to detain the applicant had been taken by a court of law, in accordance with relevant legal provisions. Moreover, the examination of the case showed no basis for finding that the decision had been taken on erroneous grounds and therefore was incorrect.

II. RELEVANT DOMESTIC LAW AND PRACTICE

32. According to Chapter 4, section 14, of the Enforcement Code (*Utsökningsbalken*, 1981:774), a debtor is liable to provide the information about his assets that is needed in the case. The Enforcement Authority may order the debtor to submit a list of his assets and, if necessary, it may appoint an appropriate person to assist the debtor in the preparation of the list. The debtor may also be ordered to confirm in writing, on his honour and faith, the information about his assets that he has provided on questioning or in a list.

33. The preparatory works to this provision (Government Bill 1980/81:8, p. 405) specify that the debtor's liability not only applies to what assets he or she owns but also to their whereabouts. Moreover, this liability applies as long as the matter is under consideration by the Enforcement Authority.

34. It follows from Chapter 2, section 15, of the Enforcement Code that when the Enforcement Authority, in accordance with Chapter 4, section 14, orders the debtor to do or to cease doing something, the Authority may order the imposition of a conditional fine (*vite*) in the amount considered necessary. Issues concerning the confirmation of conditional fines that have been ordered in this manner are considered, upon request by the Enforcement Authority, by the District Court.

35. Chapter 2, section 16, of the Enforcement Code provides that if a debtor does not comply with an order pursuant to Chapter 4, section 14, he or she may be detained if there are extraordinary reasons. Following a request by the Enforcement Authority, the District Court shall examine the issue of detention. The court shall hold an oral hearing to which the Enforcement Authority and the debtor shall be summoned. The provisions of the Code of Judicial Procedure concerning defenders and concerning litigation costs in criminal cases shall apply correspondingly to issues concerning the right to counsel and costs in the case. Following the first hearing, the Court shall, at intervals of at most two weeks, hold hearings in order to consider whether the debtor should still be detained. If there are no longer reasons for detention, the Court shall immediately order the release of the debtor. No one may be kept in detention for longer than three months.

As regards the processing otherwise of matters concerning detention under this provision, the relevant rules in the Code of Judicial Procedure concerning detention of suspected persons shall apply.

36. In this respect, the preparatory works (Government Bill 1980/81:8, p. 246) state that there is no requirement that a conditional fine be imposed before the debtor may be detained pursuant to Chapter 2, section 16, of the Enforcement Code. Provided that extraordinary reasons for detention are considered to be at hand, it is sufficient that the debtor has been served, and has failed to comply with, an order to fulfil his obligations under Chapter 4, section 14, of the Code.

37. According to Chapter 4, section 29, of the Enforcement Code, when attachment has been decided the debtor may not to the detriment of the creditor control the property by a transfer or in any other way, unless the Enforcement Service after hearing the creditor allows this for special reasons.

38. To follow on from this, Chapter 17, section 13, of the Penal Code (*Brottsbalken*, 1962:700) states that a person who unlawfully moves, damages or otherwise disposes of property that has been, *inter alia*, seized or attached shall be convicted of breach of an official order and sentenced to a fine or imprisonment for at most one year.

39. The Code of Judicial Procedure (*Rättegångsbalken*, 1942:740) provides in Chapter 20, section 7, that a prosecutor may waive prosecution (waiver of prosecution, [*åtalsunderlåtelse*]), provided that no compelling public or private interest is disregarded, *inter alia*, if it may be presumed that the offence would not result in a sanction other than a fine or the sanction would be a conditional sentence and special reasons justify waiver of prosecution. Moreover, prosecution may be waived in cases other than those mentioned above if it is manifest by reason of special circumstances that no sanction is required to prevent the suspect from engaging in further criminal activity and that, in view of the circumstances, the institution of a prosecution is not required for other reasons.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

40. The applicant complained that his detention from 29 June 2010 until 9 August 2010 violated Article 5 § 1 of the Convention, which, in its relevant parts, reads as follows:
"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
..."

A. Admissibility

(…)

B. Merits

1. The submissions of the parties

(a) The applicant

48. The applicant maintained that his deprivation of liberty was in violation of Article 5 § 1 of the Convention. Although he acknowledged that his detention had been carried out in accordance with the law, he contested that it had been proportionate to the aim pursued. In the applicant's view, the authorities should have resorted to less intrusive measures before using the most intrusive measure available. Moreover, during his detention, he was not interrogated or asked to submit any information and neither was his family or anyone else. Furthermore, the Enforcement Authority had not investigated the whereabouts of the sawmill; instead it had stated that it had no intention of searching for it. In this respect the applicant admitted to having hidden it at an unknown location far away from Falun, the closest city. However, detaining him had served no purpose since there was no risk of him hindering the investigation to find the sawmill. Thus, the applicant submitted that the sole reason for the detention was to force him to reveal the location of the property and that this measure was clearly disproportionate to that aim.

(b) The Government

49. The Government submitted that the applicant's detention fell within Article 5 § 1 (b) of the Convention and that it had been consistent with its requirements of lawfulness and proportionality.

50. As concerned the lawfulness, they noted that the relevant provisions in the Enforcement Code were clear and that the applicant's detention was in conformity with a procedure prescribed in law and subject to appeal and review. The Government underlined that the legal ground for his detention was his failure to fulfil his obligation to provide information about the property and that, in their view, this contained no punitive elements.

51. As regards the proportionality of the applicant's detention, the Government first noted that the domestic courts had explicitly assessed the proportionality of the measure in their decisions. They then submitted that the applicant had been detained in order to induce him to provide information vital for the enforcement of the writ of execution relating to a

substantial tax debt. It was essential that such decisions could be enforced in order to secure the payment of taxes and it was therefore a legitimate aim of great importance.

52. The Government further argued that the applicant had obstructed justice by not complying with the writ of execution and the injunction to provide information about the sawmill, fully aware that his action was against the law and might lead to his detention. In their view, it would not have been possible to induce the applicant to provide the information needed with a less intrusive measure than detention since he had refused to submit any information for nearly two months after the writ of execution had gained legal force. Moreover, the Government stated that it had not emerged that the applicant had any other assets which could be attached to cover a conditional fine.

53. Furthermore, the Government submitted that consideration must be given to the fact that the applicant, during the domestic proceedings, had stated that he had removed the attached property to a fairly distant location in order to make it impossible for the Enforcement Authority to enforce the writ of execution. It would therefore have been virtually impossible for the Enforcement Authority to find the property without allocating an unreasonable amount of resources for this purpose. Other investigative measures, *inter alia,* an asset investigation and formal questioning of the applicant and his wife, had been conducted and thus no other reasonable and potentially effective measures, besides detention, remained.

54. As regards the length of the detention, the Government noted that the applicant had been detained for 42 days, that is less than half of the maximum detention time permitted by law. They also claimed that certain restrictions had to be accepted by a detainee and that it was unavoidable that this could give rise to certain inconvenience without the measure thereby becoming disproportionate. Thus, the Government concluded that the applicant's detention had been consistent with the principle of proportionality contained in Article 5 § 1 of the Convention.

2. The Court's assessment

55. The Court notes from the outset that it is not disputed in the case that the applicant was "deprived of his liberty" within the meaning of Article 5 § 1 of the Convention. Moreover, the parties also agree that the measure was lawful under domestic law, namely Chapter 4, section 14, and Chapter 2, section 16, of the Enforcement Code. The Court further observes that the applicant's detention as such was in accordance with a procedure prescribed by Swedish law. He was provided with legal counsel, his detention was reviewed, and an oral hearing was held every second week and each time he could, and did, appeal to the appellate courts against the District Court's decision.

56. The Government have further submitted that the applicant's detention should be considered under Article 5 § 1 (b) since the applicant refused to comply with the writ of execution and the injunction to provide information about the whereabouts of the sawmill. The applicant has not objected to this classification in his observations and the Court finds that the complaint should indeed be examined under this sub-paragraph.

57. In this respect, the Court reiterates that detention is authorised under sub-paragraph (b) of Article 5 § 1 only to "secure the fulfilment" of the obligation prescribed by law. It follows that, at the very least, there must be an unfulfilled obligation incumbent on the person concerned and the arrest and detention must be for the purpose of securing its fulfilment and not punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist (see *Vasileva v. Denmark*, no. 52792/99, § 36, 25 September 2003).

58. Moreover, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty. The duration of detention is also a relevant factor in drawing such a balance (see, *inter alia*, *Vasileva*, cited above, §37, with further references).

59. In the present case, the Court notes that the writ of execution attaching the applicant's sawmill gained legal force when his appeal to the Supreme Court was refused on 6 May 2010. It further observes that the Enforcement Authority summoned the applicant for questioning on 7 May 2010 and then also handed him an injunction ordering him to provide the Authority with the necessary information to be able to recuperate the sawmill and sell it. Moreover, the injunction explicitly stated that, according to Chapter 4, section 14, of the Enforcement Code, the applicant was duty-bound to give the required information, failing which the Authority intended to request the District Court to detain him. It is thus clear to the Court that the applicant was detained for the purpose of securing the fulfilment of the obligation prescribed by law, namely, to tell the Enforcement Authority where he had hidden the sawmill. The circumstances of the case do not reveal that this measure was of punitive or other character. Here, it finds it worth emphasising that the preliminary investigation initiated against the applicant, and later discontinued, concerned the criminal act of hiding the sawmill and did not relate to the applicant's refusal to disclose its location.

60. Moreover, it is clear from Chapter 2, section 16, of the Enforcement Code that if the applicant had provided the information necessary to locate the

sawmill, he would have been immediately released from detention, as required by Article 5 § 1 (b).

61. Thus, what remains for the Court is to decide whether the measure of depriving the applicant of his liberty was proportionate to the aim pursued by the authorities, namely to get information about where the attached property was located. In this assessment the Court considers the following points relevant: the nature of the obligation arising from the relevant legislation including its underlying object and purpose; the person being detained and the particular circumstances leading to detention; and the length of the detention (see, *Vasileva*, cited above, § 38).

62. In so far as concerns the nature of the obligation and its underlying object and purpose, the Court reiterates that the applicant was arrested exclusively because he consistently refused to give information about the attached property, thereby failing to fulfil the obligation prescribed in Chapter 4, section 14, of the Enforcement Code. However, the underlying object and purpose of the obligation can be found in the decision to attach and sell the applicant's property in order to recover his quite substantial tax debt to the State and thereby secure the payment of taxes. In this context the Court underlines that Article 1 of Protocol No. 1 to the Convention concedes wide powers to the State "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties" (see also *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 59, Series A no. 306-B). Thus, it is clear to the Court that measures of that kind, taken in order to facilitate the enforcement of tax debts and secure tax revenue to the State, are in the general interest and of significant importance, especially when, like in the present case, the debtor has sufficient assets to cover the debt but does not want to use them to pay.

63. Turning to the person being detained and the particular circumstances leading to the detention, the Court notes that the applicant was 67 years old at the time of his detention. It further notes that the applicant has claimed that he had certain health problems for which he was taking medication when detained. However, he has submitted no medical certificates or other evidence to substantiate this claim, nor is there any evidence that he complained thereof to the prison authorities. Thus, on the basis of the case-file, the Court does not find the applicant to have been particularly vulnerable or otherwise unfit to be detained. As to the particular circumstances leading to the detention, the Court first observes that the applicant acknowledged that he had hidden the sawmill and that he underlined that he had done so by himself and that his wife and other family members did not know its whereabouts. Moreover, the Enforcement Authority visited the applicant's home to look for the sawmill and found that it was missing. It further questioned both the applicant and his wife without result, having informed the applicant of his obligation to cooperate. It had also served the injunction upon him, which made it clear that the Authority intended to take further action against him if he failed to cooperate, by requesting the District Court to detain him. Thus, the applicant was aware of the possible consequences if he insisted on not fulfilling the legal obligation to give the required information.

64. Here, the Court notes that the applicant has argued that the authorities should have tried less intrusive measures before detaining him, such as the imposition of a conditional fine. While the Court agrees that less intrusive measures in principle should be resorted to first, it observes that in the present case the applicant was in the situation at hand because he did not have money to pay his tax debts and, as stated by the Government, he had no other assets to cover further debts. In the Court's view, ordering the applicant to comply with his obligation to cooperate with the Enforcement Authority by imposing a conditional fine would in these circumstances have served no purpose, in particular as, during the questioning on 7 May 2010, he had stated that he took full responsibility for his actions and that he refused to cooperate with the Enforcement Authority, knowing that the refusal might lead to him being detained.

65. Lastly, the Court notes that the detention lasted for 42 days, which must be considered a relatively long time (see, *Gatt v. Malta*, no. 28221/08, ECHR 2010, with further references). However, it must be taken into account that the applicant would have been released earlier, and immediately, if he had fulfilled the obligation incumbent on him. Moreover, the lawfulness and reasonableness of his continued detention was reviewed every other week by the District Court, where the applicant was heard in person and the applicant could, and did, appeal against its decision to the appellate courts. Furthermore, according to the relevant provision in domestic law, the detention could have continued up to three months if the District Court had not found that it was no longer justified to keep the applicant detained, in its decision of 9 August 2010.

66. The applicant has claimed that the duration was excessive having regard to the fact that the Enforcement Authority took no action during this period to locate the sawmill, such as questioning him and his family members or searching for it. The Court notes, however, that the applicant had been questioned but had refused to give any information. Moreover, he had expressly stated that he alone was responsible for removing the property and that no one in his family knew of its whereabouts. Still, his wife had also been questioned on 7 May 2010 but had said that she did not know where the sawmill was. In these circumstances, the Court cannot discern any reason

for the Enforcement Authority to repeat the questioning, in particular as the applicant was heard before the District Court every other week when his detention was reviewed and he thus had the possibility to give the required information on these occasions or, for that matter, at any moment during his detention. As concerns an obligation on the Enforcement Authority to search for the property, the Court observes that the applicant had told the Authority, during questioning on 7 May 2010, that he had driven some distance with it and that he was not sure if he could retrieve it if he wanted to. With so little information, it is difficult to imagine that the Enforcement Authority would have been able to carry out any useful or effective search for the property.

67. The foregoing considerations are sufficient to enable the Court to conclude that in the circumstances of the present case, the measure to detain the applicant was in accordance with Article 5 § 1 (b) as it was proportionate to the legitimate aim to induce him to fulfil his legal obligation to cooperate with the authorities and give them the necessary information about his property so that they could secure the payment of his tax debt.

68. There has accordingly been no violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

69. The applicant further complained that the conditions of his detention amounted to inhuman and degrading treatment, contrary to Article 3 of the Convention. This provision reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

70. The Government contested that argument.

71. The Court notes that the applicant claims that he was held in isolation for long periods, without being allowed his normal medication, and that he was detained with dangerous criminals. However, he has submitted no evidence to the Court to substantiate his claims or to show that he complained about these matters to the personnel at the detention centre or to the Swedish Prison and Probation Service (*Kriminalvården*).

72. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 5 § 1 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 5 § 1 of the Convention.

***

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Power-Forde is annexed to this judgment.

CONCURRING OPINION OF JUDGE POWER-FORDE

1. It was with some unease that I cast my vote in the instant case. There is something disconcerting about the imprisonment of a sixty-seven-year-old man with medical complications for failure to pay a tax debt.

2. The Court of Appeal on the 28th of June 2010 found that there were 'extraordinary reasons' that warranted the detention of the applicant. Those reasons were said to be (i) the size of the debt, (ii) the value of the hidden property and (iii) the fact that the applicant had maintained his refusal to reveal the property's location (§ 18).

3. The first review of his detention took place on 30 June 2010 (see § 19). The court reiterated its reasons for detaining the applicant. A second review took place on 13 July 2010. On this date, the applicant, in seeking to be released, informed the district court that he suffered from high blood pressure, panic and anxiety attacks which caused him difficulties in sleeping. He apprised the court of the fact that he had recently been treated for prostate cancer and that he was not permitted to take his normal medication for panic attacks. Somewhat disconcertingly, the district court did not address the applicant's medical condition. It maintained that there remained 'extraordinary reasons' for the applicant's continued detention (see § 21).

4. A third review of detention took place on 27 July 2010. An additional medical complication exacerbated by incarceration was brought to the district court's attention, namely, the applicant's asthmatic condition. Once again, he called attention to his general health problems and submitted that, having regard to his age and his medical condition, his detention was disproportionate to the aim pursued. The district court failed, again, to consider and/or respond to these submissions. It continued to find that there were 'extraordinary reasons' for the applicant's detention.

5. On 9 August 2010 a fourth review took place and the district court concluded that there were no longer 'extraordinary reasons' for the applicant's detention. To where, one wonders, did those 'extraordinary reasons' that had justified his incarceration for 42 days disappear? The size of the debt, the value of the hidden property, and the applicant's attitude to disclosing its whereabouts had not changed.

6. I accept that the applicant was obliged to obey the law and that his own conduct contributed to the events that unfolded. Nevertheless, having regard to the foregoing and, in particular, to the failure of the domestic courts to address issues pertaining to the applicant's health, I cannot but have doubts about the proportionality of the coercive measure deployed in this case.

Comments

The case of *Göthlin v. Sweden* is unique in the sense that it is the first time that the ECHR treats complaints about the detention of a debtor according to Chapter 2 §16 of the Swedish Enforcement Code for not, after an injunction, having fulfilled his legal obligation to provide information for enforcement purposes about the whereabouts of his asset, a mobile mill saw.

Enforcement actions were instituted based on the tax debts of the debtor. The ECHR ruled that there was no violation of Article 5.1 (b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, in its relevant parts, provides that: *"(…) No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (…) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law"*.

The above case related to the public law area. It may be observed that the situation is different in the civil law area, where Article 1 of Protocol 4 to the Convention provides that nobody may be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation. Consequently, this prohibition applies to such private debts in enforcement proceedings.

See for further comments, Berglund, Mikael, Europadomstolens dom i målet Göthlin mot Sverige om häktning av gäldenär, *Juridisk Tidskrift* (Sweden) 2014-15 nr 3, pp. 610- 618.

M. Berglund

Belgium

Supreme Court (Hof van Cassatie/Cour de Cassation)

30 October 2014

Announcement to the tax collector that a debtor introduces a request for a judicial business protection plan, in order to avoid bankruptcy – Immediate action of the tax collector to register a mortgage, in order to avoid negative consequences of the business protection plan on the tax claim – No abuse of law by the tax collector

The Belgian law on the continuity of enterprises allows companies facing financial difficulties to submit a business continuity plan to the judge. The opening of such business continuity proceedings implies that creditors cannot start bankruptcy proceedings against that company, so that the company concerned can propose a reorganisation, in view of continuing its business. If adopted by the judge, the business continuity plan may impose the reduction of claims, except for claims which are guaranteed by a special privilege or a mortgage.

A Belgian company introduced a request for such business continuity proceedings. As soon as the request was submitted at the local court, it informed the tax authority. The tax collector immediately registered a mortgage (in accordance with the provisions of the Belgian VAT law). The company claimed that this registration of a mortgage was abusive. The Belgian Supreme Court that this immediate action of the tax collector did not prove any abuse of law.

The Belgian Supreme Court annulled a judgment of the Court of Appeal of Mons for the following reasons:

Abuse of a right means that a right is used in a way which exceeds the limits of the use of this right by a person who is acting carefully. This applies in particular when the right is used for a purpose not intended by the law. When assessing the interests at stake, the judge has to take account of all the circumstances of a case.

Art. 86 of the VAT code provides that the authorities can take a mortgage on all the immovable property, located in Belgium, of a person who has outstanding VAT debts. This provision ensures the recovery of the VAT claim where that is justified by the situation or the behaviour of the debtor.

Art. 2, d) of the law of 31 January 2009 concerning the continuity of enterprises provides that extraordinary claims are those which are guaranteed by a special privilege or a mortgage (…).

In accordance with Art. 49(1) of the same law, a plan submitted to ensure the continuity of a business and to avoid its bankruptcy, may provide a reduction of claims and a delayed payment of certain categories or claims, taking into account their amount or nature.

Art. 50 of this law provides that such a plan cannot provide a suspension of the exercise of the rights of creditors with extraordinary claims for more than 24 months (which may be prolonged with 12 months).

These provisions imply that such a continuity plan can impose the reduction of claims of a normal creditor; with regard to extraordinary claims, the creditor's right for a total payment can only be suspended for a limited period of time.

The contested judgment [of the Court of Appeal] notes that the tax authority registered its mortgage after the company's request for judicial proceedings to ensure the continuity of the business (introduced on 29 September 2010) but before the judgment opening these proceedings (on 14 October 2010).

After confirming that "the sole circumstance that the creditor exercised his right to register the mortgage, even after the introduction of the request for the judicial proceedings to ensure the continuity of the business, is not in itself to be considered as abusive, and [that] it is up to the claimant [the company concerned] to prove the particular circumstances under which this mortgage registration could be considered abusive", the contested judgment decides that "it is because the tax authority was informed by the company about the introduction of its request for a business continuity plan, that the tax authority rushed to register the mortgage with the essential aim of avoiding any measures that could be imposed on normal creditors".

On the basis of this motivation, which confirms that the tax authority registered the mortgage to ensure the total payment of its claim and to avoid a treatment as a normal creditor which could imply a reduction of its claim, the contested judgment could not validly conclude that the tax authority has abused its right to register the mortgage.

France

Supreme Court (Cour de Cassation)

13 May 2014

Fraud consisting in hidden remuneration payments – non payment of social security contributions – criminal proceedings against the persons responsible – civil claim for damages corresponding to the social security debt – possibility to introduce this civil claim in the criminal proceedings

A French football club made hidden payments to its football players, without paying social security contributions on this remuneration. Following a denunciation, this practice was revealed and the social security offices made a civil claim for damages in the criminal case against the persons responsible.
The Court of appeal rejected this claim, as it considered that the social security office should use the specific social security recovery measures to recover its claim.
The Supreme Court annulled the judgement of the Court of Appeal and confirmed that a civil claim for damages was possible.

Case 13-81.240

(…)

It results from the judgment under appeal that a denunciation has allowed to discover the existence of non-declared complementary remuneration payments to players of the Paris Saint-Germain football club.

Having regard to Art. 1832 of the Civil Code [which provides that any act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage];

The damage resulting from an infringement has to be fixed completely, without losses or profits for any of the parties;

The Court of Appeal, which was requested to judge on the damages caused to the social security office [URSSAF] by the hidden work payments, for which Mr X and Mr Y were convicted by a criminal court, has decided that the social security office [URSSAF], which calculated the amount of the prejudice on the basis of the social security contributions debt of the football club, in fact asked the criminal court to condemn the accused to the payment of these social security contributions, while recovery actions concerning these contributions respond to specific rules established by the Social security Code;

As a consequence the Court of appeal rejected the civil action for damages in this criminal case;

By adopting this decision, even though the social security office justified the damage resulting from the non payment of the social security contributions, the Court of appeal has not respected the above provision and principle.

Comments

The above judgment related to a social security debt. It is however clear that the same principle also applies with regard to tax debt cases.

Netherlands

Supreme Court (Hoge Raad)

21 February 2014

Third party convicted in criminal proceedings for his complicity in illegal transactions leading to unpaid taxes - Civil claims for damages against this third party for the unpaid taxes – Subject to the (longer) limitation period applying to civil law claims – Not affected by the fact that the (shorter) limitation period for the tax claim itself has already come to its end

A person was convicted in criminal proceedings for his complicity in transactions which hindered the recovery of taxes due by another person. The tax collector initiatied a civil law liability claim for damages against this person. At that moment, the limitation period for the recovery of the tax claim had already come to its end. However, it was decided that the (longer) limitation period for civil law actions applied to the liability claim at stake.

Case 11/03900, Claimant against Tax collector Haaglanden and Tax collector Amsterdam

ECLI:NL:HR:2014:397

(…)

(3.1.) The claimant is a tax consultant. He was convicted in criminal proceedings for his complicity in transactions which involved the transfer of cash amounts from companies to foreign bank accounts, leaving Dutch corporate taxes unpaid.

(…) A part of the corporate tax is still due, for which the tax collector has initiated a civil liability claim against the claimant. (…)

(3.4.) (…) The claimant argues that the Court of appeal of Amsterdam has not – or not sufficiently – responded to his argument that this civil liability claim has to be rejected since the limitation period for the recovery of the tax claim itself was already expired.

(3.5.) The (former) provision of Art. 3(2) of the Recovery Act (1990) contains an "open system", allowing the tax collector to decide how to recover tax claims. This implies that he can also make use of the civil law actions that are available to him in his creditor position. His choice is only limited by the provisions of the Recovery Instructions (1990) and by the principles of good governance. In its judgement of 28.06.1996, the Supreme Court (Hoge Raad) decided that the competence of a creditor – including the tax collector – allows him to take measures against actions affecting his recourse possibilities. The (former) provision of Art. 3(2) of the Recovery Act (1990) thus allows the tax collector to hold a third person – like the claimant – liable for damages caused by the fact that this third person wrongfully impeded the recovery of taxes. It is hereby noted that the same applies under the current Art. 4:124 General Administration Law (Awb).

(3.6.) The (former) Art. 3(2) Recovery Act (1990) – as the current Art. 4:124 General Administration Law – does not imply that the civil law powers of the tax collector are submitted to other rules than those applicable under civil law. Therefore, the tax collector's action for damages, based on fault liability – initiated against the tax debtor or a third person, such as the claimant – follow the Civil Code rules concerning limitation periods.

(3.7.1.) In some situations, it follows from the Recovery Instructions (1990) that the tax collector may be hindered in the exercise of his civil law powers. In this regard, the claimant refers to Art. 27 § 1 of these Recovery Instructions. (…) This provision however concerns the situation where the tax collector makes use of civil law to ***recover taxes***. (…) It does not concern the situation at stake, where the tax collector claims damages from another person than the tax debtor, on the basis of the wrongful actions committed by that person, which had the effect of obstructing the recovery of the taxes.

(3.7.2.) It is also in vain that the claimant relies on Art. 27 § 2 of the Recovery Instructions (1990) (…) which also relates to the recovery of the tax claim itself – and to the limitation period applying to that claim – and not to the above liability claim for damages.

3.8. Further, the principles of good governance do not imply that the tax collector is not allowed to initiate the proceedings at stake, after the end of the limitation period of the tax claim of which the recovery was wrongfully hindered. (…) In this regard, it should also be noted that the identity of third parties involved may have been hidden for a long time. This contributes to the Court's opinion that the tax collector can initiate liability claims for damages till the end of the limitation period of the Civil Code (art. 3:310 Civil Code).

Decision

The Court (Hoge Raad) rejects the claimant's appeal.

European Court of Human Rights

Pirttimäki v. Finland, n° 35232/11

20 May 2014

Administrative penalties with a criminal nature - Ne bis in idem – No second punishment for the same offence – Distinction between offences in the the corporate income taxation and the personal income taxation – No violation of Art. 4 of the 7th Protocol

Article 4 of Protocol No. 7 to the European Convention of Human Rights provides that 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.

In this case, it was undisputed that the Finnish administrative proceedings on tax surcharges fell within the domain of criminal law and thus under the ne bis in idem principle. The question at stake was whether the offences for which the applicant was prosecuted were the same (idem)?

The Finnish authorities held that the tax surcharges imposed on the applicant and his tax fraud sentence were based on separate incidents:
- the tax authorities had imposed tax surcharges on the applicant in his personal taxation on the ground that he had received disguised dividends from the company;
- by contrast, the tax fraud charges pressed against the applicant had been based on his conduct in the company.

The Court considered that the two impugned sets of proceedings did not constitute a single set of concrete factual circumstances arising from identical facts or facts which were substantially the same. Accordingly, there had been no violation of Article 4 of Protocol No. 7 to the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

(…)

6. The applicant owned shares in a limited liability company. In 2001 and 2002 a tax inspection was conducted in the company for the tax years 1996 to 2001. The tax inspectors found that the company was not owned by four different English companies but in reality the applicant and three other Finnish persons owned it, with equal shares.

A. Administrative proceedings against the company

7. On 26 February 2003 additional taxes and tax surcharges (veronkorotus, skatteförhöjning) were imposed on the company for the tax years 1997 to 1999 and 2001.

8. The company sought rectification from the local Tax Rectification Committee (verotuksen oikaisulautakunta, prövningsnämnden i beskattningsärenden).

9. On 16 March 2005 the Tax Rectification Committee partly accepted, partly rejected the company's applications.

10. The applicant, in the name of the company, appealed to the Administrative Court (hallinto-oikeus, förvaltningsdomstolen), claiming that he owned the whole company through four English companies.

11. On 28 February 2007 the Helsinki Administrative Court rejected the company's appeal and upheld the taxation decisions. It found that there was no proof that the English companies had in fact been sold to the applicant but, on the contrary, the case documents showed that in reality all four Finnish persons behind the English companies had equally exercised their powers in the company.

12. On 10 August 2009 the Supreme Administrative Court (korkein hallinto-oikeus, högsta förvaltningsdomstolen) refused the company leave to appeal.

B. Administrative proceedings against the applicant

13. In connection with the company taxation, additional taxes and tax surcharges were also imposed on the applicant as he had received disguised dividends from the company. He was to pay 8,500 Finnish marks (FIM) in tax surcharges for the tax year 1997 (1,429.60 euros, EUR), FIM 5,000 for the tax year 1998 (EUR 1,021.43), FIM 6,000 for the tax year 1999 (EUR 1,211.64) and FIM 10,000 for the tax year 2001 (EUR 1,904.50).

14. The applicant sought rectification from two local Tax Rectification Committees.

15. On 25 April 2005 the Sisä-Suomi Tax Rectification Committee rejected the applicant's applications in respect of the tax years 1998, 1999 and 2001.

16. On 31 May 2005 the Kaakkois-Suomi Tax Rectification Committee rejected the applicant's application in respect of the tax year 1997.

17. The applicant appealed to the Administrative Court, claiming that there was no reason to impose additional taxes and tax surcharges as he was the only shareholder in the company.

18. On 16 April 2007 the Hämeenlinna Administrative Court rejected the applicant's appeal against the decisions concerning the tax years 1998, 1999 and 2001. It found that in reality the company was owned

by four Finnish persons with equal shares and therefore the taxation decisions were not incorrect.

19. On 30 December 2008 the Kouvola Administrative Court rejected the applicant's appeal against the decision concerning the tax year 1997. It found, like the other courts, that the applicant could not be regarded as the sole owner of the company.

20. On 10 August 2009 the Supreme Administrative Court refused the applicant leave to appeal against any of the above-mentioned tax decisions.

C. Criminal proceedings against the applicant

21. On 7 March 2002, on the basis of the tax inspection, the tax authorities requested the police to investigate the matter. The applicant was arrested on 4 June 2002 and his office was searched the same day. He was questioned by the police for the first time on 5 June 2002 and was released thereafter. The pre-trial investigation was concluded on 29 December 2006.

22. On 11 July 2008 the public prosecutor pressed charges against the applicant. The applicant was accused, on the company's count, of an accounting offence (kirjanpitorikos, bokföringsbrott) for having introduced incorrect and misleading information in the company bookkeeping between 1997 and 2001, and of aggravated tax fraud (törkeä veropetos, grovt skattebedrägeri) for having given incorrect information to the tax authorities between 1998 and 2002. As a result, the company had evaded EUR 59,335.69 in taxes.

23. On 30 September 2009 the Kotka District Court (käräjäoikeus, tingsrätten) convicted the applicant as charged and sentenced him to a one- year suspended sentence. As to the length of the proceedings, the court noted that the proceedings had lasted by then 7 years and 4 months. The proceedings had been unusually long and the length was not attributable to the applicant. The proper sentence for the applicant would have been imprisonment for one year but due to the excessive length it was turned into a suspended sentence.

24. The applicant appealed to the Appeal Court (hovioikeus, hovrätten), requesting that the charges be dropped as he had already been convicted in the matter: tax surcharges had been imposed on him and a final decision delivered.

25. On 2 July 2010 the Kouvola Appeal Court upheld the District Court's judgment. As to ne bis in idem, the court found that the decisions containing tax surcharges had become final on 10 August 2009. As the charges had been pressed before that, on 11 July 2008, there was no impediment to the examination of the case as the charges had been brought before the administrative proceedings became final. As to the merits, the court found that the applicant's true position in the company had been concealed in order to avoid his responsibilities and that in reality he had been as much involved as the other shareholders. He could thus be held responsible for the company's bookkeeping as well as the incorrect information given to the tax authorities.

26. By letter dated 30 August 2010 the applicant appealed to the Supreme Court (korkein oikeus, högsta domstolen), reiterating the grounds of appeal already presented before the Appeal Court and claiming in particular that he had been convicted twice in the same matter. He also pointed out that the proceedings had already lasted for more than 8 years.

27. On 14 December 2010 the Supreme Court refused the applicant leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Tax Assessment Procedure Act

28. Section 57, subsection 1, of the Tax Assessment Procedure Act (laki verotusmenettelystä, lagen om beskattningsförfarande, Act no. 1558/1995, as amended by Act no. 1079/2005) provides that if a person has failed to make the required tax returns or has given incomplete, misleading or false information to taxation authorities and tax has therefore been incompletely or partially levied, the taxpayer shall be ordered to pay unpaid taxes together with an additional tax and a tax surcharge.

B. Penal Code

29. According to Chapter 29, sections 1 and 2, of the Penal Code (rikoslaki, strafflagen; as amended by Acts no. 1228/1997 and no. 769/1990), a person who (1) gives a taxation authority false information on a fact that influences the assessment of tax, (2) files a tax return concealing a fact that influences the assessment of tax, (3) for the purpose of avoiding tax, fails to observe a duty pertaining to taxation, influencing the assessment of tax, or (4) acts otherwise fraudulently and thereby causes or attempts to cause a tax not to be assessed, or too low a tax to be assessed or a tax to be unduly refunded, shall be sentenced for tax fraud to a fine or to imprisonment for a period of up to two years.

30. If by the tax fraud (1) considerable financial benefit is sought or (2) the offence is committed in a particularly methodical manner and the tax fraud is aggravated when assessed as a whole, the offender shall be sentenced for aggravated tax fraud to imprisonment for a period between four months and four years.

C. Supreme Court's case-law

31. The Supreme Court has taken a stand on the ne bis in idem principle in its case KKO 2010:46 which concerned tax surcharges and aggravated tax fraud. In that case it found, inter alia, that even though a final judgment in a taxation case, in which tax surcharges had been imposed, prevented criminal charges being brought about the same matter, such preventive effect could not be accorded to pending cases (lis pendens)

crossing from administrative proceedings to criminal proceedings or vice versa.

32. On 20 September 2012 the Supreme Court issued another judgment (KKO:2012:79) concerning ne bis in idem. It stated that in some cases a tax surcharge decision could be considered final even before the time-limit for ordinary appeal against the decision had expired. However, it was required that an objective assessment of such a case permitted the conclusion that the taxpayer, by his or her own conduct, had intended to settle the tax surcharge matter with final effect. The assessment had to concern the situation as a whole, and it could give significance to such questions as to how logically the taxpayer had acted in order to settle the taxes and tax surcharges, to what extent he or she had paid taxes and tax surcharges, and at which stage of the criminal proceedings the payments had been made. In the case at issue taxes and tax surcharges had been imposed on A on account of action related to disguised dividends, by decisions of 2 March 2009 for tax years 2005 and 2006, and 7 September 2009 for the tax year 2007. In the charge, which became pending on 28 June 2011, the prosecutor demanded that A be sentenced to punishment for aggravated tax fraud on account of the same action. A had paid the taxes and tax surcharges entirely before the charge became pending. The time-limit for seeking rectification in respect of the tax year 2005 had expired on 31 December 2011 without A having sought rectification. A declared that he had no intention of appealing against the decisions concerning the other tax years, either. The Supreme Court held that the charge of aggravated fraud was inadmissible as A had paid the taxes and tax surcharges before the charge became pending.

33. In its newest case-law (KKO:2013:59 of 5 July 2013), the Supreme Court reversed its earlier line of interpretation, finding that charges for tax fraud could no longer be brought if there was already a decision to order or not to order tax surcharges in the same matter. If the taxation authorities had exercised their decision-making powers regarding tax surcharges, a criminal charge could no longer be brought for a tax fraud offence based on the same facts, or if such a charge was already pending, it could no longer be pursued. The court assessed whether the preventive effect of the first set of proceedings had to be attributed to the fact that 1) tax surcharge proceedings were pending, 2) a tax surcharge issue was decided, or 3) to the finality of such a tax surcharge decision, and found the second option the most justifiable.

D. Legislative amendments

34. In December 2012 the Government submitted to Parliament a proposal for an Act on Tax Surcharges and Customs Duty Surcharges Imposed by a Separate Decision and for certain related Acts (HE 191/2012 vp). After the entry into force of the Act, the tax authorities could, when making a tax decision, assess whether to impose a tax surcharge or to report the matter to the police. The tax authorities could decide not to impose a tax surcharge. If they had not reported the matter to the police, a tax surcharge could be imposed by a separate decision by the end of the calendar year following the actual tax decision. If the tax authorities had imposed tax surcharges, they could no longer report the same matter to the police unless, after imposing the tax surcharges, they had received evidence of new or recently revealed facts. If the tax authorities had reported the matter to the police, tax surcharges could, as a rule, no longer be imposed. The purpose of the proposed Act is thus to ensure that a tax or a customs duty matter is processed and possibly punished in only one set of proceedings.

35. The proposed Act on Tax Surcharges and Customs Duty Surcharges Imposed by a Separate Decision (laki erillisellä päätöksellä määrättävästä veron- tai tullinkorotuksesta, lagen om skatteförhöjning och tullhöjning som påförs genom ett särskilt beslut, Act no. 781/2013) has already been passed by Parliament and it entered into force on 1 December 2013. The Act does not, however, contain any transitional provisions extending its scope retroactively.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

36. The applicant complained under Article 4 of Protocol No. 7 to the Convention that he had been tried and convicted twice for the same offences as the taxation decisions had become final on 10 August 2009 and he had been convicted of an accounting offence and aggravated tax fraud thereafter.

37. Article 4 of Protocol No. 7 to the Convention reads as follows:

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

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

3. No derogation from this Article shall be made under Article 15 of the Convention."

38. The Government contested that argument.

A. Admissibility

(…)

B. Merits

1. The parties' submissions

(a) The applicant

40. The applicant agreed with the Government that two administrative sets of proceedings had been criminal in nature but disagreed with them that the proceedings concerned separate incidents. The facts had been identical in all three sets of proceedings. The tax surcharges imposed had been based on the same facts as the sentencing in the criminal proceedings. However, the applicant admitted that he had not been charged for tax offence in relation to his personal income and taxation. The company had paid all taxes imposed on it in the taxation proceedings.

41. The applicant claimed that the tax surcharges imposed on the company had had direct impact on him. Moreover, the fact that the criminal proceedings had been started before the taxation proceedings became final had no relevance in the present case. This did not justify punishing the applicant twice for the same offence as had happened in the present case. The Supreme Court's previous line of interpretation had not been correct.

(b) The Government

42. In the Government's view it was undisputed that the Finnish administrative proceedings on tax surcharges fell within the domain of criminal law and thus under the ne bis in idem principle. However, the tax surcharges imposed on the applicant and his tax fraud sentence were based on separate incidents. The tax authorities had imposed tax surcharges on the applicant in his personal taxation on the ground that he had received disguised dividends from the company. By contrast, the tax fraud charges pressed against the applicant had been based on his conduct in the company.

43. As the applicant owned 25% of the company shares, the tax surcharges imposed on the company had had an indirect impact on the applicant's financial situation, too. However, a limited liability company was an independent legal subject for whose debts and sanctions the shareholders were not liable. In the Government's view not only did the proceedings concern different matters, they also concerned different objects of protection. Thus the applicant had not been tried or punished twice for the same offence and Article 4 of Protocol No. 7 to the Convention was not applicable to the case.

44. In any event, the Government noted that the first two sets of proceedings concerning the tax surcharges had not yet become final within the meaning of Article 4 of Protocol No. 7 to the Convention when the second set of proceedings concerning the aggravated tax fraud became pending. According to the Supreme Court's previous interpretation, it was not an obstacle that the proceedings took place simultaneously as a final ruling in the first two sets of proceedings did not prevent the completion of the second set of proceedings. As to the Supreme Court's new line of interpretation as expressed by its new case KKO:2013:59, the Government noted that the Supreme Court's ruling did not imply that the earlier line of interpretation by that court was in contradiction with the Court's case-law.

2. The Court's assessment

(a) Whether the first sanction was criminal in nature?

45. The Court reiterates that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of ne bis in idem under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention (see for example Storbråten v. Norway (dec.), no. 12277/04, ECHR 2007-... (extracts), with further references). The notion of "penal procedure" in the text of Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 of the Convention respectively (see Haarvig v. Norway (dec.), no. 11187/05, 11 December 2007; Rosenquist v. Sweden (dec.), no. 60619/00, 14 September 2004; Manasson v. Sweden (dec.), no. 41265/98, 8 April 2003; Göktan v. France, no. 33402/96, § 48, ECHR 2002-V; Malige v. France, 23 September 1998, § 35, Reports of Judgments and Decisions 1998-VII; and Nilsson v. Sweden (dec.), no. 73661/01, ECHR 2005-XIII).

46. The Court's established case-law sets out three criteria, commonly known as the "Engel criteria" (see Engel and Others v. the Netherlands, 8 June 1976, Series A no. 22), to be considered in determining whether or not there was a "criminal charge". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not rule out a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see Jussila v. Finland [GC], no. 73053/01, §§ 30-31, ECHR 2006-XIV; and Ezeh and Connors v. the United Kingdom [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECHR 2003-X).

47. The Court has taken stand on the criminal nature of tax surcharges, in the context of Article 6 of the Convention, in the case Jussila v. Finland (cited above). In that case the Court found that, regarding the first criterion, it was apparent that the tax surcharges were not classified as criminal but as part of the fiscal regime. This was, however, not decisive but the

second criterion, the nature of the offence, was more important. The Court observed that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. Further, under Finnish law, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. The surcharges were thus imposed by a rule, the purpose of which was deterrent and punitive. The Court considered that this established the criminal nature of the offence. Regarding the third Engel criterion, the minor nature of the penalty did not remove the matter from the scope of Article 6. Hence, Article 6 applied under its criminal head notwithstanding the minor nature of the tax surcharge (see Jussila v. Finland [GC], cited above, §§ 37-38). Consequently, proceedings involving tax surcharges are "criminal" also for the purpose of Article 4 of Protocol No. 7.

48. Therefore, in the present case, the Court considers that it is clear that all three sets of proceedings are to be regarded as criminal for the purposes of Article 4 of Protocol No. 7 to the Convention. The parties also find this to be undisputed.

(b) Whether the offences for which the applicant was prosecuted were the same (idem)?

49. The Court acknowledged in the case of Sergey Zolotukhin v. Russia (see Sergey Zolotukhin v. Russia [GC], no. 14939/03, §§ 81-84, ECHR 2009) the existence of several approaches to the question whether the offences for which an applicant was prosecuted were the same. The Court presented an overview of the existing three different approaches to this question. It found that the existence of a variety of approaches engendered legal uncertainty incompatible with the fundamental right not to be prosecuted twice for the same offence. It was against this background that the Court provided in that case a harmonised interpretation of the notion of the "same offence" for the purposes of Article 4 of Protocol No. 7. In the Zolotukhin case the Court thus found that an approach which emphasised the legal characterisation of the two offences was too restrictive on the rights of the individual. If the Court limited itself to finding that a person was prosecuted for offences having a different legal classification, it risked undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention. Accordingly, the Court took the view that Article 4 of Protocol No. 7 had to be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arose from identical facts or facts which were substantially the same. It was therefore important to focus on those facts which constituted a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which had to be demonstrated in order to secure a conviction or institute criminal proceedings.

50. In the present case the parties disagree on whether the three sets of proceedings arose from the same facts. The Court notes that the first two sets of proceedings arose from the fact that the company as well as the applicant, in his personal taxation, had failed to declare some income for the tax years 1997, 1998, 1999 and 2001. In the second set of proceedings the applicant was accused, as a representative of the company, of aggravated tax fraud for having given incorrect information on behalf of the company to the tax authorities between 1998 and 2002. The two sets of proceedings which are relevant in the present case are thus the taxation proceedings against the applicant as well as the criminal proceedings.

51. The Court considers that these two sets of facts are different. First of all, the legal entities involved in these proceedings were not the same: in the first set of proceedings it was the applicant and in the second set of proceedings the company (see Isaksen v. Norway (dec.), no. 13596/02, 2 October 2003; and, mutatis mutandis, Pokis v. Latvia (dec.), no. 528/02, ECHR 2006-XV; and Agrotexim and Others v. Greece, 24 October 1995, §§ 66-68, Series A no. 330-A). Even assuming that it had in fact been the applicant who was making the tax declaration in both cases, the circumstances were still not the same: making a tax declaration in personal taxation differs from making a tax declaration for a company as these declarations are made in different forms, they may have been made at a different point of time and, in the case of the company, may also have involved other persons.

52. The Court therefore considers that the two impugned sets of proceedings did not constitute a single set of concrete factual circumstances arising from identical facts or facts which were substantially the same. Accordingly, there has been no violation of Article 4 of Protocol No. 7 to the Convention.

(...)

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

53. The applicant complained under Article 6 § 1 of the Convention about the excessive length of the criminal proceedings against him.

(...)

III. REMAINDER OF THE APPLICATION

66. The applicant also complained that Articles 6 § 2 and 7 of the Convention had been violated when he had been convicted of an accounting offence and aggravated tax fraud even though he had had nothing to do with the company bookkeeping or tax declarations. He claimed that he had not even been in a position in the company to be able to commit these crimes.

67. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

Accordingly, this part of the application must be rejected as manifestly ill-founded and declared inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares the complaint concerning ne bis in idem admissible and the remainder of the application inadmissible;

2. Holds that there has been no violation of Article 4 of Protocol No. 7 to the Convention.

Belgium

Court of Appeal – Brussels

25 February 2014

International recovery assistance – request for precautionary measures – requested authority's obligation to respect the national rules when taking such precautionary measures

Council Directive 2010/24/EU allows Member States to request the competent authorities of other Member States to take precautionary measures, in order to guarantee the recovery of a claim. In that case, 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 Belgian tax authority received a request for precautionary measures from France. Under Belgian law, precautionary measures with regard to a contested tax claim are subject to the condition that the case requires prompt action. This rule also applies to an attachment carried out at the request of a foreign authority.

The Belgian court considered that the precautionary attachments carried out by the Belgian tax authority did not comply with that condition, as the Belgian authority did not produce any evidence to establish that the case required prompt action.

Case: Belgian State, Minister of Finance v. H. and C. (N° 2009/AR/1821)

1. Facts

1. The French Government has identified several constraints following the registration of income tax to be paid by C. for the years from 2006 to 2008. It emerges from the documents in the file that the taxes registered for collection were the subject of a complaint lodged by C. on 26 April 2011 and that a decision rejecting the complaint was taken on 10 October 2011. C. lodged an appeal against this decision by means of an application on 6 December 2011. In a decision handed down on 28 May 2013, the administrative court of Orléans dismissed the appeal. C. lodged an appeal against this dismissal in an application on 30 July 2013. This is currently pending before the administrative court of appeal of Nantes.

2. In the meantime, the French Government implemented Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of amounts owed for taxes, duties and other measures, and requested the assistance of the Belgian Government.
In a letter of 17 July 2012, the tax collector announced to H. that he intended to demand a mortgage registration shortly on a property located in Ixelles (Belgium) if the taxes registered were not paid. This was not in fact carried out as the building in question does not, apparently, belong to C.
By means of a process served on 18 March 2013, the Belgian Government carried out a precautionary attachment at s.a. BNP Paribas Fortis concerning all sums, securities and property that it held that belonged to the spouses, H and C.
By means of a process served on 21 March 2013, the Belgian Government also carried out a precautionary attachment concerning the spouses, H and C, at ING Belgique.
The precautionary attachments were carried out in the context of a request for assistance with recovery made by the French Government in accordance with the above European Directive, incorporated into Belgian legislation by the law of 9 January 2012.
The attachments were notified to the debtors by processes dated 21 and 25 March 2013.

3. By letter dated 4 June 2013, the direct taxation collector informed H. that he intended to take steps to recover the sum of EUR 172 103.62, saying that '*these measures are thus of a precautionary nature*'.
In an e-mail dated 9 October 2013, the competent French authorities asked that the precautionary measures should be carried out to protect their rights.

2. Proceedings

4. The spouses H. and C. had a process served on the Belgian Government (Finance Ministry) on 5 April 2013 aimed at obtaining the cancellation or at least lifting of the precautionary attachments and the payment of a token euro by way of damages.
The Belgian Government pleaded that there were no grounds for this request.

5. In his judgment, which was appealed on 17 June 2012, the first judge acceded to the request, ordering the Belgian Government to lift the precautionary attachments carried out at its request with respect to the spouses, H and C, and ordering it to pay a token euro to the latter by way of compensation for unfair attachments.
The first judge considered, in effect, that the onus was on the Belgian Government, which had not applied for

the prior authorisation of the attachments judge, to establish that it had a private or authentic instrument within the meaning of Article 1445 of the Judicial Code stating that a debt existed, in accordance with Article 1415 of the Judicial Code, and that the case required prompt action, in line with Article 1413 of the Judicial Code. Moreover, it had not established that the case required and requires prompt action, and had not provided evidence that its debt was in danger because of circumstances indicating that the solvency of the debtor was at risk.

6. The Belgian Government appealed this decision and asked the court to reverse the judgment referred to it with respect to the order to lift the two precautionary attachments and pay a token euro to the persons whose goods had been attached by way of damages.
The spouses, H and C, pleaded that the appeal was without merit.
In the alternative, they asked the court to decide that the precautionary attachment carried out on 18 March 2013 was null and void, and to issue a ruling in this respect.

3. On the grounds for the appeal

7. According to Article 21 of the Law of 9 January 2012 incorporating Council Directive 2010/24/UE of 16 March 2010, '*at the request of the foreign authority, the Belgian 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*'.
Under this provision, an attachment carried out at the request of a foreign authority must comply with the conditions laid down in Belgian national law.
In accordance with Article 1413 of the Judicial Code, creditors can, in cases requiring prompt action, ask a judge to authorise the precautionary attachment of attachable goods belonging to the debtor.
The first judge found that the Belgian State had carried out contentious precautionary attachments without applying for the prior authorisation of the attachments judge.
Therefore the onus is on it to establish that it had an authentic or private document, within the meaning of Article 1445 of the Judicial Code, testifying to the existence of a debt in accordance with Article 1415 of the Judicial Code, and that the case requires prompt action within the meaning of Article 1413 of the Judicial Code.

8. It is accepted that '*there is a need for prompt action where a creditor can seriously fear damage consisting of a threat to the recovery of the debt, or where a debtor organises or attempts to organise its own insolvency, or where objective indications reveal a current or imminent situation of insolvency assessed on the basis of the liquidity available to cover reimbursement of the debt*'.
It is considered that '*the fear felt by the creditor must be serious, and the latter must justify the danger that should be redressed; while negligent conduct need not be established, the requester cannot confine itself simply to declarations concerning insolvency*'.

9. The Belgian State has not produced any evidence to establish that the condition of prompt action was met at the time when the contentious precautionary attachments were carried out.
The processes produced contain no grounds regarding this (the law does not make this compulsory).
The Belgian State considers that the condition of prompt action is met because the spouses, H and C, '*had full opportunity to reassure the tax authority as to their solvency*'.
The court states, however, that C. proposed depositing as security the shares of the company SCI C. in order to guarantee the tax registered for payment by the spouses, but in a letter dated 3 October 2011, the French authorities refused to accept this security on the grounds that the shares were worth less than the amount of tax owed and no additional bank guarantee had been offered.
The Belgian State then wrongly says that '*it was not possible to obtain any guarantee on a voluntary basis'.*
Similarly, the Belgian State's comments on the property owned by the debtors and the absence of a legal mortgage registration in favour of the Finance Ministry and of the obligation to notify the notaries in the event of the debiting of foreign taxes are irrelevant since it has not been established that the building where the spouses live in Belgium belongs, even on the basis of co-ownership, to C and could be used to guarantee the rights of the requesting authority.
Lastly, it does not emerge from any document in the file that C. is insolvent or is organising his insolvency.

10. The circumstance that on 11 April 2013, in other words after the contentious attachments, the spouses submitted a request to rent property from a real estate agency located in Switzerland (Sion) '*for our old age*' does not in itself imply that they intend to evade their tax obligations.
On the contrary, it is significant that, notwithstanding the order handed down by the first judge to the Belgian State to lift the contentious attachments within 48 hours of the judgment being appealed, '*otherwise the latter shall apply* ', the spouses did not remove the seized assets.
The planned move (it is not established, on the basis of the documents produced, that the spouses had in fact moved to Switzerland) constitutes a new circumstance that had not existed at the time when the contentious attachments were carried out and which the court, in the absence of any evidence

pointing to the existence of the condition for prompt action at the time of the attachment, should not take into account. It is in fact accepted that '*in the event that the attachment is carried out without prior authorisation by the attachments judge, the need for prompt action must exist at the time of the attachment and it is for the attaching creditor to assess this requirement or be subject to a potential order to pay damages on the grounds of the spurious and vexatious nature of the attachment*'.

For these reasons, the Court rejects the appeal of the Belgian State.

Germany

Federal Tax Court (Bundesfinanzhof)

11 December 2012

International recovery assistance – Admissibility of an application for a preventative injunction against the recovery of foreign tax debts – Proof required that the debtor will suffer irreparably

An application for a preventative injunction against the enforcement of a foreign recovery request can only be granted if the debtor proves that he/she will suffer irreparably as a result of the recovery.

Grounds

I. The Applicant and Appellant (Applicant) is a lawyer registered in Germany and Majorca and a managing partner of a Spanish company. Because the company has irrecoverable tax debts, the Tax Office for collecting taxes in the Balearic Islands (FA in Spanish) made a claim against the Applicant with a notice of liability of 19 November 2007. The complaint against this tax decision and the application to the Tax Court of the Balearic Islands (FG in Spanish) were unsuccessful. The Applicant claims that he has appealed against this judgment to the Central Tax Court, without providing any proof of this. The Applicant has not made any statement concerning the legal action taken by the company against the tax assessment.

When the Applicant failed to make payment in response to the notice of liability, on 1 February 2008 the Regional Tax Office of the Balearic Islands issued an enforcement order, which was served on the Applicant's lawyer on 15 February 2008.

The State Tax Administration Authority in Madrid sent an electronic recovery request via the CCN/CSI network to the Federal Central Tax Office (BZSt) in an e-mail of 22 June 2009. A Pdf file containing the enforcement order and a Word file containing the "Request for recovery under Article 6 of Directive 2008/55/EC" were attached to the e-mail. BZSt forwarded the e-mail to the ... Tax Authority, which sent it to the Defendant and Respondent (Tax Office -- FA).

The tax office issued a payment order on 24 July 2009 in response to this request. The Applicant appealed against the order and applied for suspension of enforcement (AdV). In a letter dated 31 August 2009, the tax office confirmed the details to which the Applicant had objected and rejected the application for suspension of enforcement. The appeal has yet to be decided upon.

As at 27 August 2009, the tax office, as third-party debtor, attached the Applicant's current tax assets associated with recovery of the claim of the Spanish tax authority and ordered collection. The Applicant appealed against the attachment and collection order and in doing so applied for suspension of enforcement.

At the request of the Applicant, the Tax Court (FG) suspended enforcement, against provision of security, because it had doubts concerning the lawfulness of the "demand for payment", since it had been transmitted electronically. In response to a complaint by the tax office, the Federal Fiscal Court (BFH) overturned this judgment and rejected the application for suspension of enforcement. It ruled that the payment order was not a demand for payment, which had already been linked to the Spanish notice of liability.

The application for suspension of further enforcement of the debt or, in the alternative, for a ruling that enforcement arising from the recovery request is unlawful, was rejected. In the application proceedings, the Spanish tax authority sent the enforcement order of 1 February 2008 as a hard copy.

The Tax Court dismissed the injunction against enforcement as inadmissible, because the Applicant had failed to prove that he would suffer irreparably if the tax office took further enforcement measures against which he then appealed or which he then contested, while at the same time applying for suspension of enforcement. It also dismissed as inadmissible the application for a ruling that the enforcement measures already taken were unlawful, because it was subsidiary to the appeal and action for avoidance. On the other hand, the Court accepted the procedural admissibility of the action for a declaratory judgment that further enforcement measures not yet taken were unlawful because of defects in the recovery request and in particular because of the requirement for effective legal protection, but rejected the action as unfounded.

The Tax Court has accepted as admissible the appeal to clarify whether objections regarding the lawfulness of the recovery assistance can be made in general and, if so, through which type of application, even in the absence of any claim that impending enforcement might cause irreparable harm. The judgment is published in *Entscheidungen der Finanzgerichte* [tax court judgments] 2012, 482.

In its appeal, the Applicant essentially disputes the claims by the Tax Court that the action for a declaratory judgment was unfounded.

The Applicant makes the following applications:

- that the judgment of the Tax Court be overturned and the tax office be ordered to refrain from further enforcement measures arising from the recovery request from the Regional Tax Office of the Balearics;

- in the alternative: that enforcement of the recovery request be ruled to be unlawful.

The Tax Office is applying for: the appeal to be rejected.

It essentially agrees with the statements of the Tax Court and also doubts whether the tax authorities are bound to consider public policy, which is rather a matter for the courts.

II. The appeal is unfounded. The judgment of the Tax Court admittedly contravenes federal law (§ 118 para. 1 of *Finanzgerichtsordnung* [Tax Court Ordinance]--FGO --) in so far as it rejects the preventative action for a declaratory judgment as being unfounded rather than inadmissible, but is valid because the operative part of the judgment is correct (§ 126 para. 4 FGO).

1. The Tax Court was correct in considering the Applicant's main application to be an application for an injunction, and to be inadmissible.

By making the application, the Applicant wishes to prevent the tax office from taking further enforcement measures in connection with the Spanish recovery request. The legal protection system of FGO is such that there must be a very strong interest in legal protection for preventative legal protection of this type to be granted. If the aim is to prevent an official measure, the FGO offers the person seeking legal protection a temporary remedy through suspension of enforcement (§ 69FGO) or a temporary order (§ 114FGO), in addition to an appeal and action for avoidance. An application for an injunction can only be granted if the desired objective cannot be achieved with these temporary legal remedies, i.e. if evidence is provided and it is conclusively established that the rights of the Applicant will be infringed by a future expected action by an authority and that it is unreasonable to wait for the infringement to actually occur, because the infringement cannot then be made good or can only be done so with difficulty.

According to the findings of the Tax Court (§ 118 para. 2 FGO), which are binding on the appeal court judges, the Applicant has failed to show how he will suffer irreparably if he takes action against further enforcement measures of the tax office through appeal, application and action for avoidance. In the appeal, too, the Applicant generally refers to "impending interference with property and wealth", but fails to show how he would suffer irreparably as a result.

2. The application that the enforcement measures already taken be deemed unlawful has already been rightly ruled to be inadmissible by the Tax Court on the ground that an action for a declaratory judgment is subordinate to an action for avoidance under § 41 para. 2 sentence 1 FGO.

3. Contrary to the opinion of the Tax Court, the application is also inadmissible in so far as it is to be used to determine the unlawfulness of a future enforcement of the recovery request. The Applicant has no justifiable interest in the rapid determination of a legal relationship under § 41 para. 1 FGO. The interest in such determination is a special form of the general legal protection requirement. This means that no action for a declaratory judgment is permitted if an Applicant can achieve the purpose of his/her action more quickly, easily and cheaply by other means.

In this case, the Applicant essentially wishes to obtain a ruling that the Spanish recovery request is not a valid basis for enforcement. The question as to whether or not his application is lawful has already been raised as a subsidiary question in the application procedure initiated by the Applicant against the attachment and collection order, which means that further proceedings would constitute an unnecessary duplication of costs. There is no obvious reason for his question to be decided upon separately from the actual enforcement measure already taken.

Otherwise, the action for a declaratory judgment might prove to be admissible when enforcement of the disputed recovery request is about to occur for the first time. In this case, the considerations that led to the Tax Court finding in favour of admissibility might be justifiable, since it would then be necessary to consider whether the requirement for effective legal protection makes it necessary for a court to determine the conditions for enforcement in advance, at least if the expected enforcement measures bring about significant impairments beyond a simple monetary payment, against which suspension of enforcement would be able to afford no protection.

Such a situation clearly formed the basis for the appeal court judgment of 3 November 2010 (VII R 21/10) invoked by the Tax Court, since in this case, the question as to whether a recovery request might cause an enforcement measure to be unlawful because of infringement of public policy needed to be decided in connection with the impending enforcement of a security, i.e. the commencement of enforcement proceedings. Although the judges of the court of appeal did not expressly comment on the admissibility of the action for a declaratory judgment, it can be assumed that the action for a declaratory judgment was indirectly found to be admissible. The Applicant could not invoke the avoidance of an enforcement measure already taken, and so an action for a declaratory judgment is the appropriate remedy. Contrary to the view taken by the Tax Court, this judgment does not mean that preventative action for a declaratory judgment is always admissible as a way of determining the conditions for enforcement, if, as in this instance, the case can be clarified through avoidance proceedings, and therefore at a higher-priority level.

The further argument put forward by the Tax Court in favour of the admissibility of the action for a declaratory judgment - namely that refraining from enforcement if a temporary order is issued against the tax office prior to an initial enforcement measure can never result in an action for avoidance in which the

objections to the conditions for enforcement might be examined - is not relevant given the nature of this case, as described above, in which enforcement has already occurred.

4. Furthermore, it is inconsistent to admit an action for a declaratory judgment while at the same time finding an action for an injunction to be inadmissible in this case. There is actually no interest in bringing an action for an injunction since, according to the findings of the Tax Court, there is sufficient legal protection for the Applicant, who is able to effect suspension of enforcement; this point, too, indicates that there is no special interest in an action for a declaratory judgment under § 41 para. 1 FGO.

EU – Opinion of the advocate general

C-133/13, Q

2 October 2014

Exchange of information – Use of recovery directive 2010/24 – Only for claims that already exist – Applying to claims that have already been determined but the levying of which depends on further conditions

It is evident from Art. 2(1) of Directive 2010/24/EU that it applies only to claims that already exist.

Recovery Directive 2010/24/EU forms the legal basis for mutual assistance with regard to taxes which have already been determined but the levying of which depends on further conditions.

(…)

Procedure before the Court of Justice

On 13 March 2013, the Raad van State (Council of State), before which the dispute is now pending, referred the following questions to the Court pursuant to Article 267 TFEU:

1. Does the importance of the conservation of national natural heritage and cultural and historical heritage, as addressed in the Natuurschoonwet 1928, constitute an overriding reason in the public interest which justifies a scheme whereby the application of an exemption from gift tax (tax benefit) is limited to estates situated in the Netherlands?

2a. May the authorities of a Member State, in the context of an investigation into whether an immovable property situated in another Member State may be designated as an estate for the purposes of the Natuurschoonwet 1928, rely on [Recovery Directive 2010/24] for assistance from the authorities of the Member State in which the immovable property is situated, when the designation as an estate pursuant to that law will result in an exemption being granted from the recovery of the gift tax which will be payable upon donation of that immovable property?

2b. If question 2(a) must be answered in the affirmative, must the concept of 'administrative enquiry' in Article 3(7) of [Cooperation Directive 2011/16] be interpreted as meaning that it also covers an on-site investigation?

2c. If question 2(b) must be answered in the affirmative, may clarification of the term 'administrative enquiries' in Article 5(1) of [Recovery Directive 2010/24] be sought in the definition of the term 'administrative enquiry' in Article 3(7) of [Cooperation Directive 2011/16]?

(…)

Legal assessment

(…)

57. (…) The question arises, however, as to whether the necessary controls at the place where the immovable property is situated may be carried out by the authorities of other Member States by means of mutual assistance.

a) The applicable directive

58. In the light of the foregoing, by question 2a, the referring court first of all wishes to ascertain whether the Netherlands authorities may obtain mutual assistance under Recovery Directive 2010/24 from the authorities of the Member State in which the immovable property is situated.

59. However, Recovery Directive 2010/24 does not offer any possibility of mutual assistance in respect of the decision at issue in the main proceedings as to whether an immovable property satisfies the conditions of an 'estate' within the meaning of Article 1(1)(a) of the Natuurschoonwet 1928, since it is evident from Article 2(1) thereof that it applies only to claims that already exist. In the present case, however, gift tax has not yet arisen.

60. Nevertheless, the Netherlands authorities may, in principle, rely on Cooperation Directive 2011/16 to that end.

61. According to Article 2(1) of that directive, it applies to all taxes. Gift tax is not among the taxes that are excluded from its scope in accordance with Article 2(2) of the directive.

62. I cannot share the view taken by the Federal Republic of Germany that Cooperation Directive 2011/16 nevertheless does not apply to administrative proceedings which precede taxation. The declaration at issue in the main proceedings as to whether an immovable property may be recognised as an estate within the meaning of the Natuurschoonwet 1928 is clearly a general administrative act which has various legal effects. According to the referring court, the declaration also has the consequence that a tax advantage in respect of gift tax is granted in the event of a gift. Pursuant to Article 1(1) of Cooperation Directive 2011/16, its scope is broad and includes all information that is 'foreseeably relevant' to the administration and enforcement of the domestic laws concerning taxes. If the binding declaration in accordance with national law can therefore affect the determination of a tax falling within the scope of Cooperation Directive 2011/16, information regarding that declaration is also foreseeably relevant to taxation.

63. However, recourse cannot be had to Cooperation Directive 2011/16 for the subsequent monitoring of compliance with the conditions for the tax advantage set out in the first sentence of Article 7(1) of the

Natuurschoonwet 1928. The Kingdom of the Netherlands has rightly pointed out that Recovery Directive 2010/24 applies in that respect. In accordance with the Netherlands scheme, it is only a proportion of the full amount of tax determined that is not collected under certain conditions. In addition, as the Court has already indicated in its judgment in *National Grid Indus*, Recovery Directive 2010/24 forms the legal basis for mutual assistance with regard to taxes which have already been determined but the levying of which depends on further conditions. (See judgment in *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 78) in relation to Council Directive 2008/55/EC of 26 May 2008).

64. Consequently, in the present case, for the purposes of fiscal supervision, the Netherlands authorities may, in principle, have recourse to Cooperation Directive 2011/16 first of all, and then to Recovery Directive 2010/24.

b) The extent of the administrative enquiries by the requested Member State

65. By its questions 2b and 2c, the referring court also wishes to ascertain whether the authorities of the requested Member State are obliged to carry out the necessary on-site controls of the immovable property. Since both Cooperation Directive 2011/16 and then Recovery Directive 2010/24 would apply in the present case, the requested Member State's obligations resulting from those directives must be examined separately.

i) Cooperation Directive 2011/16

66. Pursuant to Article 5 of Cooperation Directive 2011/16, the authorities of the requested Member State are to communicate the information that they have in their possession or 'that [they obtain] as a result of administrative enquiries'. The concept of administrative enquiries is defined in Article 3(7) of the directive. In accordance with that provision, administrative enquiry means 'all controls, checks and other action taken by Member States in the performance of their duties with a view to ensuring the proper application of tax legislation'.

67. That broad definition easily includes on-site controls. This is borne out by Article 6(1) of Cooperation Directive 2011/16, in accordance with which the requested authority is to carry out 'any … enquiries necessary to obtain the information …'. The Commission has also rightly referred to Article 11(1)(a) and (b) of the directive, from which it is apparent that administrative enquiries outside offices may be carried out in the whole territory of the requested Member State. This answers question 2b.

68. However, the Kingdom of the Netherlands has submitted that controls where the immovable property is situated should also be unannounced in order to be able to monitor the grant of public access in accordance with the second sentence of Article 7(1) of the Natuurschoonwet 1928. The United Kingdom takes the view in that regard that, in accordance with Article 17(2) and Article 6(3) of Cooperation Directive 2011/16, its authorities are not obliged to carry out unannounced controls. In accordance with United Kingdom procedural law, controls at the place where an immovable property is situated require prior notice to the owner of the immovable property.

69. Under Article 17(2) of Cooperation Directive 2011/16, the requested Member State is not obliged 'to carry out enquiries …, if it would be contrary to its legislation to conduct such enquiries … for its own purposes'. In addition, Article 6(3) of Cooperation Directive 2011/16 provides that the requested authority is to conduct the enquiry requested 'follow[ing] the same procedures as it would when acting on its own initiative …'.

70. The Court has already held with regard to the predecessor provision to Article 17(2) of Cooperation Directive 2011/16 that, as a derogating provision, it must be narrowly construed and, by virtue of the principle of sincere cooperation (now Article 4(3) TEU), the Member States are required truly to engage in the exchange of information provided for under the directive. (Judgment in *Établissements Rimbaud* (EU:C:2010:645, paragraph. 48), with regard to Article 8 of Council Directive 77/799/EEC) That case-law applies to the present case in two respects. First, on that basis, I agree with the submissions of the Federal Republic of Germany and the United Kingdom that the principle of sincere cooperation is specifically laid down in the present directives on cross-border mutual assistance and must be observed for the purposes of applying them, but does not itself establish mutual assistance obligations contrary to those provisions. This answers the third question referred.

71. Secondly, interpreting Article 17(2) of Cooperation Directive 2011/16 narrowly, I do not at present see any justification for the United Kingdom to refuse to monitor public access to an immovable property without prior notice. The information concerned is publicly available, and obtaining it does not require the exercise of sovereignty. On the contrary, the procedural rules invoked by the United Kingdom in these proceedings seem to concern the monitoring of immovable properties which are not accessible to the public.

72. However, with regard to providing mutual assistance, should it transpire that, by reason of a corresponding prohibition in their procedural law, the United Kingdom authorities are in fact prevented from monitoring public access to an immovable property without prior notice, the Netherlands authorities could still carry out the necessary controls of public access to the immovable property sufficiently on the basis of pre-announced on-site checks and additional evidence, such as witness statements, for example.

ii) Recovery Directive 2010/24

73. In so far as ongoing controls of the immovable property over a period of 25 years are necessary

following recognition of an immovable property as an 'estate' and the setting of gift tax, the Netherlands authorities may rely on requests for information under Article 5 of Recovery Directive 2010/24.

74. The 'administrative enquiries' that the requested authority carries out in accordance with the second subparagraph of Article 5(1) of Recovery Directive 2010/24 in order to obtain information also include investigations on site, for the directive does not restrict these to certain investigation measures only. Moreover, pursuant to the second subparagraph of Article 5(1), these should be any enquiries 'necessary' for the purpose of providing the information. Furthermore, it is clear from Article 7(1)(a) and (b) of Recovery Directive 2010/24 that enquiries may take place both within and outside the offices in the whole of the territory of the requested Member State. This also answers question 2c.

75. With regard to Article 5(2)(a) of Recovery Directive 2010/24, which precludes an obligation on the part of the requested authority to provide information 'which it would not be able to obtain for the purpose of recovering similar claims arising in the requested Member State', no objection arising out of national procedural law was raised by the United Kingdom in the present case. Moreover, my comments above with regard to the limits of the obligation to carry out enquiries under Cooperation Directive 2011/16 also apply. (See points 70 to 72 above.)

76. Finally, I cannot concur with the view taken by the Federal Republic of Germany that the ongoing controls by the requested Member State necessary for the tax advantage at issue in the present case are unreasonable on account of the expenditure associated with them. There may be exceptional cases in which the provision of information is disproportionate for the requested Member State. However, in principle, even extensive investigations are reasonable, because cooperation between Member States' tax administrations is on a reciprocal basis. In addition, unlike Article 54(1)(a) of Council Regulation (EC) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, Recovery Directive 2010/24 does not provide for a general restriction on the obligation to provide mutual assistance in the event of a disproportionate administrative burden. However, in the light of the principle of sincere cooperation pursuant to Article 4(3) TEU, the requesting Member State must not demand more frequent or intensive controls by the requested Member State than it would carry out itself.

c) Conclusion

77. The restriction on the free movement of capital in the present case is therefore not justified by the need for effective fiscal supervision because, with the assistance of requests for information pursuant to Article 5 of Cooperation Directive 2011/16 or Article 5 of Recovery Directive 2010/24, the Netherlands authorities are able to carry out the necessary controls. The fourth question referred, which concerns the carrying out by the Netherlands authorities of their own controls abroad, therefore does not need to be answered.

Comments

In its judgement of 18 December 2014, the Court of Justice considered that it was not necessary to answer the above questions, given its reply to the preceding question.