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Contents

Reports

Case law

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REPORTS

EU

Case law of the EU Court of Justice on cross-border aspects of tax recovery

This is an overview of the decisions of the EU Court of Justice in cases relating to cross-border aspects of tax recovery. The overview covers questions relating to the Treaty provisions on freedom of movement, provisions of the tax recovery assistance directives, and provisions of the legislation concerning cross-border enforcement of civil claims.

Freedom of movement		
C-69/88	07.03.1990 Krantz	Power of tax authorities to seize goods, even if they are the property of a supplier in another Member State
C-434/10	17.11.2011 Aladzhov	Prohibition to leave the national territory because of the non-payment of a tax liability
C-788/19	*Pending Commission v Spain*	*Penalty payments in respect of the failure to fulfil the obligation to provide information in respect of overseas assets and rights*
Mutual tax recovery assistance		
C-361/02 and C-362/02	01.07.2004 Tsapalos and Diamantakis	Claims which arose prior to the entry into force of the Directive
C-233/08	14.01.2010 Kyrian	Notification
C-34/17	26.04.2018 Donnellan	Notification – Competence of court in the requested State to check the validity of the notification by the applicant State
C-695/17	14.03.2019 Metirato Oy	Restitution of recovered claims to the insolvency estate
C-19/19	11.06.2020 Pantochim	Preferences (now Art. 13(1), third subpara. Dir. 2010/24)
C-95/19	24.02.2021 Silcompa	Competence of court in the requested State to determine where duties should be levied
C-420/19	20.01.2021 Heavyinstall	Competence of the court in the requested State to review the need for precautionary measures
Cross-border enforcement of civil claims		
C-266/01	15.05.2003 Tiard	Action based on a guarantee contract
C-49/12	12.09.2013 Sunico	Claim for damages relating to the loss resulting from VAT fraud

FREEDOM OF MOVEMENT

7 March 1990, Case C-69/88

Krantz

Referring court: Arrondissementsrechtbank Maastricht - Netherlands.

Free movement of goods - Measures having an effect equivalent to quantitative restrictions on imports - Power of the tax authorities to seize goods sold on instalment terms with reservation

Judgment:

Article 30 of the Treaty, properly interpreted, does not prohibit national legislation which authorizes the collector of direct taxes to seize goods, other than stocks, which are found on the premises of a taxpayer even if those goods are from, and are the property of, a supplier established in another Member State.

17 November 2011, C-434/10

Aladzhov

Referring court: Administrativen sad Sofia-grad (Bulgaria)

Freedom of movement of a Union citizen – Directive 2004/38/EC – Prohibition on leaving national territory because of non-payment of a tax liability – Whether measure can be justified on grounds of public policy

Judgment:

1. European Union law does not preclude a legislative provision of a Member State which permits an administrative authority to prohibit a national of that State from leaving it on the ground that a tax liability of a company of which he is one of the managers has not been settled, subject, however, to the twofold condition that the measure at issue is intended to respond, in certain exceptional circumstances which might arise from, inter alia, the nature or amount of the debt, to a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that the objective thus pursued does not solely serve economic ends. It is for the national court to determine whether that twofold condition is satisfied.

2. Even if a measure imposing a prohibition on leaving the territory such as that applying to Mr Aladzhov in the main proceedings has been adopted under the conditions laid down in Article 27(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, the conditions laid down in Article 27(2) thereof preclude such a measure:

   – if it is founded solely on the existence of the tax liability of the company of which he is one of the joint managers, and on the basis of that status alone, without any specific assessment of the personal conduct of the person concerned and with no reference to any threat of any kind which he represents to public policy, and

   – if the prohibition on leaving the territory is not appropriate to ensure the achievement of the objective it pursues and goes beyond what is necessary to attain it.

It is for the referring court to determine whether that is the position in the case before it.

MUTUAL TAX RECOVERY ASSISTANCE

29 April 2004, C-338/01

Commission v Council of the European Union

Directive 2001/44/EC - Choice of legal basis

Judgment:

1. The choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure. If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases. No dual legal basis, however, is possible where the procedures laid down for each legal basis are incompatible with each other. In that regard, the procedures set out under Articles 93 EC and 94 EC, on the one hand, and that set out under Article 95 EC, on the other, mean that the latter article cannot be applied in conjunction with one of the other two articles mentioned above in order to serve as the legal basis for the adoption of a Community measure. Whereas unanimity is required for the adoption of a measure on the basis of Articles 93 EC and 94 EC, a qualified majority is sufficient for a measure to be capable of valid adoption on the basis of Article 95 EC. Thus, of the provisions cited above, Articles 93 EC and 94 EC alone may provide a valid dual legal basis for the adoption of a legal measure by the Council.

2. The words 'fiscal provisions' contained in Article 95(2) EC, which excludes the application to such provisions of the procedure for the adoption of approximation measures which have as their object the establishment and functioning of the internal market, as provided for under Article 95(1) EC, must be interpreted as covering not only the provisions determining taxable persons, taxable transactions, the basis of imposition, and rates of and exemptions from direct and indirect taxes, but also those relating to arrangements for the collection of such taxes.

3. The Council acted correctly in adopting Directive 2001/44 amending Directive 76/308 on mutual assistance for the recovery of certain claims on the basis of Article 93 EC and Article 94 EC, and not on the basis of Article 95 EC. Directive 2001/44 does in fact relate to 'fiscal provisions' within the meaning of Article 95(2) EC, with the result that Article 95 EC cannot constitute the correct legal basis for the adoption of that directive.

1 July 2004, C-361/02 and C-362/02

Tsapalos (C-361/02) and Diamantakis (C-362/02)

Referring Court: Diikitiko Efetio Piraeus (Greece)

Directive 76/308/EEC – Mutual assistance for the recovery of customs duties – Application to claims which arose prior to the entry into force of the Directive

Judgment:

Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, and in respect of value added tax and certain excise duties as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, is to be interpreted as applying to customs claims which arose in one Member State under an instrument issued by that State before that directive entered into force in the other Member State, where the requested authority is situated.

14 January 2010, C-233/08

Kyrian

Referring Court: Nejvyšší správní soud (Czech Republic)

Mutual assistance for the recovery of claims – Directive 76/308/EEC – Jurisdiction to review of the courts of the Member State in which the requested authority is situated – Enforceability of an instrument permitting enforcement – Lawfulness of notification of the instrument to the debtor – Notification in a language not understood by the addressee

Judgment:

1. Article 12(3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, as amended by Council Directive 2001/44/EC of 15 June 2001, must be interpreted as meaning that the courts of the Member State where the requested authority is situated do not, in principle, have jurisdiction to review the enforceability of an instrument permitting enforcement. Conversely, where a court of that Member State hears a claim against the validity or correctness of the enforcement measures, such as the notification of the instrument permitting enforcement, that court has the power to review whether those measures were correctly effected in accordance with the laws and regulations of that Member State.
2. In the framework of the mutual assistance introduced pursuant to Directive 76/308, as amended by Directive 2001/44, in order for the addressee of an instrument permitting enforcement to be placed in a position to enforce his rights, he must receive the notification of that instrument in an official language of the Member State in which the requested authority is situated. In order to ensure compliance with that right, it is for the national court to apply national law while taking care to ensure the full effectiveness of Community law.

26 April 2018, C-34/17

Donnellan

Referring Court: High Court (Ireland)

Reference for a preliminary ruling — Mutual assistance for the recovery of claims — Directive 2010/24/EU — Article 14 — Right to an effective remedy — Charter of Fundamental Rights of the European Union — Article 47 — Possibility for the requested authority to refuse recovery assistance on the basis that the claim was not duly notified

Judgment:

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

Comments:

I. De Troyer, 'The Tax Debtor' s Right of Defence in Case of Cross-Border Collection of Taxes', *EC Tax Review* 2019, p. 18-31.

L. Vandenberghe, 'Notification of tax claims', *EU & Int. Tax Coll. News* 2018-2, p. 125.

L. Vandenberghe, 'The Donnellan judgment and the non-execution of a tax recovery assistance request for reasons of 'public policy': the exception confirms the rule', *EU & Int. Tax Coll. News* 2021-1, p. 20-24.

14 March 2019, C-695/17

Metirato

Referring Court: Helsingin käräjäoikeus (Helsinki District Court, Finland)

Directive 2010/24/EU — Mutual assistance for the recovery of claims relating to taxes, duties and other measures — Article 13(1) — Article 14(2) — Enforced

recovery, by the authorities of the requested Member State, of claims of the applicant Member State — Procedure relating to an application seeking the restitution of those claims to the insolvency estate of a company established in the requested Member State — Defendant in those proceedings — Determination

Judgment:

Article 13(1) and Article 14(2) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures must be interpreted as meaning that, first, they apply to proceedings seeking restitution, to the insolvency estate of a company established in the requested Member State, of claims which were recovered at the request of the applicant Member State, if those proceedings are based on disputes concerning the enforcement measures, within the meaning of Article 14(2) and, second, the requested Member State, within the meaning of those provisions, must be regarded as the defendant in those proceedings, the fact that the amount represented by those claims has been separated from the assets of that Member State or merged with them being irrelevant in that regard.

11 June 2020, C-19/19

Pantochim

Referring Court: Cour de cassation (Court of Cassation, Belgium)

Mutual assistance for the recovery of claims — Directive 76/308/EEC — Article 6(2) and Article 10 — Directive 2008/55/EC — Second paragraph of Article 6 and Article 10 — Tax claim of requesting Member State recovered by requested Member State — Status of that claim — Concept of 'privilege' — Statutory set-off of that claim against tax debt of requested Member State

Judgment:

1. Article 6(2) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, and the second paragraph of Article 6 of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures must be interpreted as meaning that the claim of the requesting Member State is not to be treated as being a claim of the requested Member State and does not acquire the status of a claim of the requested Member State.
2. Article 10 of Directive 76/308 and Article 10 of Directive 2008/55 must be interpreted as meaning that:
   - the term 'privilege' referred to in those provisions refers to any mechanism which results, in the event of concurrent claims, in the preferential payment of a claim;
   - the option available to the requested Member State to set off claims in the event of concurrent claims constitutes a privilege, within the meaning of those provisions, where the use of that option has the effect of conferring on that Member State a preferential right or right of priority for the purposes of payment of its claims that is not available to the other creditors, which it is for the referring court to ascertain.

24 February 2021, C-95/19

Silcompa

Referring Court: Corte suprema di cassazione (Court of Cassation, Italy)

Directive 76/308/EEC – Articles 6 and 8 and Article 12(1) to (3) – Mutual assistance for the recovery of certain claims – Excise duty payable in two Member States for the same transactions – Directive 92/12/EC – Articles 6 and 20 – Release of products for consumption – Falsification of the accompanying administrative document – Offence or irregularity committed in the course of movement of products subject to excise duty under a duty suspension arrangement – Irregular departure of products from a suspension arrangement – 'Duplication of the tax claim' relating to the excise duties – Review carried out by the courts of the Member State in which the requested authority is situated – Refusal of the request for assistance made by the competent authorities of another Member State – Conditions

Judgment:

Article 12(3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, as amended by Council Directive 2001/44/EC of 15 June 2001, read in conjunction with Article 20 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 92/108/EEC of 14 December must be interpreted as meaning that, in the context of an action disputing enforcement measures taken in the Member State in which the requested authority is situated, the competent body of that Member State may refuse to grant the request to recover excise duties submitted by the competent authority of another Member State in respect of goods which irregularly departed from a suspension arrangement, for the purposes of Article 6(1) of Directive 92/12, where that request is based on the facts relating to the same export transactions which

are already subject to excise duty recovery in the Member State in which the requested authority is situated.

20 January 2021, C-420/19

Heayinstall

Referring Court: Riigikohus (Supreme Court, Estonia)

Directive 2010/24/EU – Article 16 – Recovery of claims relating to taxes, duties and other measures – Mutual assistance – Request for precautionary measures – Judicial decision of the applicant Member State for the purpose of implementing precautionary measures – Jurisdiction of the court of the requested Member State to assess and reassess the justification of those measures – Principles of mutual trust and of mutual recognition

Judgment:

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

Comments:

I. De Troyer, 'Legal Protection of Tax Debtors in Respect of Cross-Border Use of Precautionary Measures', *European Taxation* 2021, p. 258-263.

CROSS-BORDER ENFORCEMENT OF CIVIL CLAIMS

15 May 2003, C-266/01

Préservatrice foncière TIARD

Referring Court: Hoge Raad der Nederlanden (Netherlands)

Brussels Convention - Article 1 - Scope - Concept of 'civil and commercial matters' - Concept of 'customs matters' - Action based on a guarantee contract between the State and an insurance company - Contract entered into in order to satisfy a condition imposed by the State on associations of carriers, principal debtors, under Article 6 of the TIR Convention

Judgment:

The first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as follows:

- 'civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals;

- 'customs matters', within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the legal relationship between the State and the guarantor, under that contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals, even if the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

12 September 2013, C-49/12

Sunico

Referring Court: Østre Landsret (Denmark)

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

Judgment:

The concept of 'civil and commercial matters' within the meaning of Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it covers an action whereby a public authority of one Member State claims, as against natural and legal persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State.

CASE LAW

EU

Court of Justice

3 March 2020

Google Ireland

Case number: C-482/18

Penalties – Proportionality – Freedom to provide services – Article 56 TFEU – Restrictions – Tax on advertising activities – Obligations relating to registration with a tax authority – Principle of non-discrimination

Summary

Article 56 TFEU does not preclude legislation of a Member State which imposes an obligation to submit a tax declaration on suppliers of advertising services established in another Member State for the purposes of their liability to a tax on advertising, whereas suppliers of such services established in the Member State where the tax is levied are exempt from that obligation on the ground that they are subject to obligations to submit a tax declaration or to register on the basis of liability to all other taxes applicable in that Member State.

However, Article 56 TFEU does not allow to impose fines for non-compliance with the above obligation in a series of fines issued within several days, the amount of which, from the second day, is tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, leading to a total amount of several million euros, without the competent authority giving those persons the time necessary to comply with their obligations or the opportunity to submit their observations, or having itself examined the seriousness of the infringement, before adopting the final decision fixing the total amount of those fines, whereas the amount of the fine which suppliers of services established in the Member State concerned is significantly less and is not increased, in the event of continued failure to comply with such an obligation, in the same proportions, nor necessarily within such a short period of time.

1 This request for a preliminary ruling concerns the interpretation of Articles 18 and 56 TFEU and of Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Google Ireland Limited, a company established in Ireland, and the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága (National Tax and Customs Authority, Hungary; 'the tax authority') concerning decisions by which that authority imposed a series of fines on that company for having infringed the obligation to submit a tax declaration of persons exercising an activity subject to the tax on advertisements laid down in Hungarian legislation.

Legal context

The Hungarian law on the taxation of advertisements

3 Article 2(1)(e) of the reklámadóról szóló 2014. évi XXII. törvény (Law No XXII of 2014 on the taxation of advertisements), in the version in force on 1 January 2017 ('the Law on the taxation of advertisements'), provides that the publication of advertisements on the internet is to be subject to the tax on advertisements where the advertisements are mainly in Hungarian or mainly on internet pages that are in Hungarian.

4 Under Article 2(2)(b) of that law:

'the commissioning of the publication of an advertisement shall be subject to the tax unless … the customer who has commissioned the publication of the advertisement:

(ba) has requested a taxpayer within the meaning of Article 3(1) to submit the tax declaration referred to in Article 3(3) and can provide reliable evidence that it has done so;

(bb) has not received the declaration requested under subparagraph (ba) within 10 working days of receipt of the invoice or accounting document concerning publication of the advertisement; and

(bc) has submitted a declaration to the tax authority regarding the situation referred to in subparagraph (ba), the person who has published the advertisement and the payment for publication'.

5 Under Article 3(1) of that law, any person who undertakes the publication of advertisements on the internet, where the advertisements are mainly in Hungarian or mainly on internet pages that are in Hungarian, is a 'taxpayer irrespective of its place of residence'.

6 Article 3(3) of the Law on the taxation of advertisements provides:

'A taxpayer within the meaning of Article 3(1) must state in the invoice, accounting document or other document stating the payment for the publication of the advertisement (in particular, in the contract for publication of an advertisement) either that it is required to pay the tax and will comply with its obligations to submit a tax declaration and to pay the

tax, or that in that tax year it is not required to pay the tax on publication of advertisements. …'

7 Article 7/B of that law reads as follows:

'1. A taxpayer within the meaning of Article 3(1) who is not registered with the tax authority as a taxpayer for the purposes of some form of tax must register by submitting the relevant form supplied by the tax authority within 15 days of commencing an activity that is subject to the tax under Article 2(1). …

2. Where a taxpayer fails to comply with the obligation to submit a tax declaration under Article 7/B(1) — in addition to ordering him to comply — the tax authority shall impose an initial fine of 10 000 000 forint [(HUF) (approximately EUR 31 000)] for failure to comply.

3. If it is still found that there is non-compliance with the obligation, the tax authority shall impose a fine for failure to comply of three times the amount of the previous fine.

4. The tax authority shall issue daily decisions confirming non-compliance with the obligation to register under Article 7/B(1). These decisions shall be final and enforceable from the moment when notice of them is served and may be contested by way of judicial review. In the judicial review procedure, only documentary evidence shall be admissible and the court must reach its decision without holding a hearing.

5. If the taxpayer complies with the obligation to submit a tax declaration when first requested to do so by the tax authority, the fine provided for in paragraphs 2 and 3 may be reduced without limit.'

8 Article 7/D of that law states:

'The total maximum amount of the fines for failure to comply which the tax authority may impose on the same taxpayer under Article 7/B is HUF 1 000 000 000 [(approximately EUR 3 100 000)].'

The Hungarian Law on general tax procedures

9 It is clear from Article 17(1)(b) of the adózás rendjéről szóló 2003. évi XCII. törvény (Law No XCII of 2003 on general tax procedures; 'the Law on general tax procedures'), that a resident taxpayer automatically satisfies the obligation to register with the tax authority when it submits an application for registration (a completed form) plus attachments, together with an application for a tax identification number, to the court with jurisdiction with respect to the registry.

10 A taxpayer who fails to comply with any disclosure obligation, whether the obligations to register or to report any changes, to disclose data, to open a bank account or to submit a tax declaration may, pursuant to Article 172 of that law, be fined either HUF 500 000 (approximately EUR 1 550) or HUF 1 000 000 (approximately EUR 3 100), depending on the circumstances. The tax authority is also required, when it imposes a fine on that basis, to order the taxpayer to comply with the obligation which it infringed by a prescribed deadline. If the taxpayer fails to meet the prescribed deadline, the amount of the fine is to be doubled. In the event of compliance with the obligation, the fine imposed may be reduced without limit.

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

11 By decision of 16 January 2017, the tax authority found, first, that Google Ireland was exercising an activity which fell within the scope of that law and, second, that it had not registered with the tax authority within 15 days of commencing its activity contrary to Article 7/B(1) of the Law on the taxation of advertisements. Consequently, the tax authority imposed a fine of HUF 10 000 000 (approximately EUR 31 000) on Google Ireland pursuant to Article 7/B(2) of that law.

12 By decisions adopted on the following four days, the tax authority imposed four new fines on Google Ireland, each of which, in accordance with Article 7/B(3) of the Law on the taxation of advertisements, was equal to three times the amount of the fine previously imposed. Following the decision of 20 January 2017, Google Ireland had been fined, in total, the statutory maximum amount of HUF 1 000 000 000 (approximately EUR 3 100 000) laid down in Article 7/D of that law.

13 Google Ireland brought an action for the annulment of those decisions before the referring court.

14 In support of its action, Google Ireland submits, first of all, that the imposition of fines on the ground of a failure to comply with the obligation to register laid down in Article 7/B of the Law on the taxation of advertisements is contrary to Articles 18 and 56 TFEU. Furthermore, it submits that companies established in Hungary may satisfy the obligations laid down by that law more easily than those established outside Hungary. Lastly, it maintains that fines imposed on companies established outside Hungary on the ground that they fail to comply with their obligations to submit a tax declaration differ from those applicable to companies established in Hungary which fail to comply with a similar obligation, and are disproportionate to the seriousness of the infringement committed, thereby constituting a restriction on the freedom to provide services in the European Union.

15 According to Google Ireland, taxpayers established abroad are also in a less favourable situation than companies established in Hungary as regards the exercise of the right to an effective remedy. Although they have the right to judicial review of a decision imposing a fine on them, which is, pursuant to the provisions of Articles 7/B and 7/D of the Law on the taxation of advertisements, final and

enforceable merely by notification thereof, the rules governing the exercise of that right, however, restrict its scope. In particular, in the judicial review procedure under Article 7/B(4) of the Law on the taxation of advertisements, the court with jurisdiction can admit only documentary evidence and gives judgment without holding a hearing, whereas the objection procedure applicable to domestic taxpayers under the Law on general tax procedures is not subject to such limitations, since such taxpayers would have, inter alia, the right to bring an administrative law action. The provisions of the Law on the taxation of advertisements do not therefore afford the person fined the right to an effective remedy or a fair trial, as provided for in Article 47 of the Charter.

16 In that context, the referring court asks whether Articles 7/B and 7/D of the Law on the taxation of advertisements are compatible with Article 56 TFEU and the principle of non-discrimination. According to that court, the obligation to submit a tax declaration and the fines for failure to comply with that obligation — fines forming part of a very repressive and punitive system of penalties — are highly detrimental to companies established outside of Hungary and are in fact likely to restrict the freedom to provide services in the European Union. It considers in particular, as far as concerns the fines for failure to comply with the obligation to submit a tax declaration which were imposed on those companies, that the principle of proportionality was probably not observed in the present case. In that regard, it points, first, to the fact that a series of fines may be imposed on those taxpayers in five days during which the tax authority can triple the amount of the previous fine every day. Those penalties apply even before taxpayers are able to have notice of the daily tripling of the amount of the previous fine and before they can remedy the infringement, thus making it impossible for them to prevent the final fine from reaching the ceiling of HUF 1 000 000 000 (EUR 3 100 000). In the referring court's view, that fact can also give rise to the question of the compatibility of that administrative procedure with Article 41 of the Charter. Second, the referring court notes that the amount of the fine imposed under Article 7/D of the Law on the taxation of advertisements is, in total, up to 2 000 times higher than that of the fine which may be imposed on a company established in Hungary which does not comply with the obligation to register for tax purposes laid down in Article 172 of the Law on general tax procedures.

17 Lastly, the referring court raises the question of compliance with Article 47 of the Charter in so far as, in the context of the judicial review procedure provided for in Article 7/B(4) of the Law on the taxation of advertisements, unlike the ordinary procedure for administrative law actions, only documentary evidence is admitted, since the court with jurisdiction cannot hold a hearing.

18 On the ground that the case-law of the Court does not provide an answer to those questions, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Articles 18 and 56 [TFEU] and the prohibition on discrimination be interpreted as precluding a Member State's tax legislation in which the penalty provisions require, for breach of the obligation to register for the purposes of an advertisement tax, the imposition of a fine for failure to comply, the total amount of which, for companies not established in Hungary, can be, in total, 2 000 times greater than the amount of the fine for companies established in Hungary?

(2) Can the penalty described in the previous question, which involves a markedly large sum and is punitive in nature, be considered as capable of discouraging service providers who are not established in Hungary from providing services in that country?

(3) Should Article 56 TFEU and the prohibition on discrimination be interpreted as precluding legislation under which, for undertakings established in Hungary, the obligation to register is satisfied automatically, without making an explicit application, through the [mere] allocation of a Hungarian tax identification number as part of the process of registering with the Companies Registry, irrespective of whether or not the undertaking publishes advertisements, whereas for undertakings that are not established in Hungary but that publish advertisements in that country it is not satisfied automatically, and instead they have specifically to comply with the obligation to register, and can be subject to a specific penalty if they fail to do so?

(4) If the answer to the first question is in the affirmative, should Article 56 TFEU and the prohibition on discrimination be interpreted as precluding a penalty such as the one at issue in the main proceedings, imposed for breach of the obligation to register for the purposes of an advertisement tax, in so far as the aforesaid legislation may be contrary to that article?

(5) Should Article 56 TFEU and the prohibition on discrimination be interpreted as precluding a provision under which the decision to impose a fine on an undertaking established abroad is final and enforceable from the moment when notice of it is served, and the decision may be contested only through judicial proceedings in which the court may not hold a hearing and only documentary evidence is admissible, while fines imposed on undertakings established in Hungary may be contested in an administrative procedure and, moreover, the judicial proceedings are not restricted in any way?

([6]) Should Article 56 TFEU, read in the light of the right to good administration in Article 41(1) of the [Charter], be interpreted as meaning that that requirement is not satisfied where the fine for failure to comply is imposed in the form of a fine the amount of which is tripled each day in such a way that the service provider, given that it still unaware of the earlier decision, is therefore unable to remedy its omission before the imposition of the next fine?

([7]) Should Article 56 TFEU, read with the right to good administration in Article 41(1) of the Charter, the right to be heard in Article 41(2)(a) of the Charter, and the right to an effective remedy and to a fair trial in Article 47 of the Charter, be interpreted as meaning that those requirements are not satisfied where the decision cannot be contested in an administrative procedure and where, in the administrative court proceedings, only documentary evidence is admissible and the court cannot hold a hearing?'

Consideration of the questions referred

19 By its seven questions, the referring court raises, in essence, the following three categories of question.

20 First, by its third question, it asks whether Article 56 TFEU must be interpreted as precluding legislation of a Member State which imposes an obligation to submit a tax declaration on suppliers of advertising services established in another Member State for the purposes of their liability to a tax on advertising, whereas suppliers of such services established in the Member State where the tax is levied are exempt from that obligation on the ground that they are subject to obligations to submit a tax declaration or to register on the basis of liability to all other taxes applicable in that Member State.

21 Second, by its first, second, fourth and sixth questions, the referring court wishes to know, in essence, whether Article 56 TFEU must be interpreted as precluding legislation of a Member State which fines suppliers of services established in another Member State for non-compliance with an obligation to submit a tax declaration for the purposes of their liability to a tax on advertising in a series of fines issued within several days, the amount of which, from the second day, is tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, leading to a total amount of several million euros, and those suppliers are not able to comply with such an obligation to submit a tax declaration before notification of the final decision fixing the total amount of those fines, whereas the amount of the fine which suppliers of services established in the Member State where the tax is levied who fail to comply with a similar obligation to submit a tax declaration or to register, contrary to the general provisions of national tax legislation, would be significantly less and is not increased, in the event of continued failure to comply with such an obligation, in the same proportions, nor necessarily within such a short period of time.

22 Third, by its fifth and seventh questions, the referring court wishes to know, in essence, whether Article 56 TFEU, read in conjunction with Articles 41 and 47 of the Charter, must be interpreted as precluding legislation of a Member State which provides that decisions taken by a tax authority to fine a supplier of services established in another Member State, who has failed to comply with the obligation to submit a tax declaration under that legislation, are subject to judicial review in a written procedure where, contrary to the ordinary procedure of an administrative law action in tax matters, the national court with jurisdiction is not able to hold a hearing.

23 It is appropriate to consider those questions in that order.

The third question

24 As a preliminary matter, it should be noted that the referring court is not asking the Court whether the liability of suppliers of advertising services to a tax on online advertisements, such as that applicable in Hungary, constitutes a restriction on the freedom to provide services under Article 56 TFEU, but only whether the obligation imposed in that Member State on those suppliers to submit a tax declaration for the purposes of their liability to that tax constitutes such a restriction.

25 In that regard, it must be borne in mind that Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraph 135 and the case-law cited). Article 56 TFEU requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than that in which the service is provided (see, inter alia, judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 28 and the case-law cited).

26 National measures which prohibit, impede or render less attractive the exercise of the freedom to provide services are restrictions on that freedom. On the other hand, measures the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and such provision within one Member State do not fall within the scope of the prohibition laid down in Article 56 TFEU (see, inter alia, judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraphs 136 and 137 and the case-law cited).

27 In the present case, it is important to note that, under Article 7/B(1) of the Law on the taxation of advertisements, a person liable to the tax on advertisements who is not registered with the tax

authority as a taxpayer for the purposes of some form of tax must register with the tax authority by submitting the relevant form within 15 days of commencing the taxable activity.

28 It follows, first, that the obligation to submit a tax declaration, laid down in Article 7/B(1) of that law, does not impinge on the exercise of the activity of advertising online in Hungary and, second, that a supplier of advertising services who, before commencing its advertising activity which is taxable, has not registered for tax purposes in Hungary is subject to that obligation, whereas that obligation does not apply to a supplier of advertising services who is already registered for tax purposes in that Member State for the purposes of some form of tax, that being so irrespective of either supplier's place of establishment.

29 The obligation to submit a tax declaration, which is an administrative formality, does not per se constitute an obstacle to the freedom to provide services.

30 It is in no way apparent that the obligation to submit a tax declaration, laid down in Article 7/B(1) of the Law on the taxation of advertisements, means that suppliers of advertising services who are not established in Hungary are subject to an additional administrative burden in relation to that borne by suppliers of advertising services established in Hungary.

31 It is true that the suppliers of advertising services established in Hungary are exempt from that obligation. As stated by the referring court, they are considered, under national tax law, to satisfy that obligation automatically.

32 However, the fact that those suppliers are exempt from the obligation to submit a tax declaration is not, in relation to suppliers of advertising services established in other Member States, a difference in treatment capable of constituting a restriction on the freedom to provide services.

33 First of all, it is common ground that those suppliers are also exempt from the obligation to submit a tax declaration under Article 7/B(1) of the Law on the taxation of advertisements if they have already submitted a tax declaration or registered with the tax authority for the purposes of some form of direct or indirect tax levied in Hungary.

34 Next, the exemption from the obligation to submit a tax declaration, whilst mainly benefiting suppliers of services established in Hungary, does not result in deterring the cross-border supply of advertising services, but in preventing suppliers already registered with the tax authority from being required to complete a meaningless administrative formality, since the purpose of the obligation to submit a tax declaration is precisely to enable that authority to identify those persons liable to the tax on advertisements. In particular, it is clear from the information before the Court that a supplier of services established in Hungary is required to submit an application for registration with the traders registry in order to be given a tax identification number.

35 Lastly, nothing brought to the Court's attention in the course of the present proceedings suggests that the steps to be taken to satisfy the obligation to submit a tax declaration at issue are more onerous than those which must be taken both in order to register with the tax authority for the purposes of another tax and to register with the national traders registry.

36 In the light of the foregoing considerations, the answer to the third question referred is that Article 56 TFEU must be interpreted as not precluding legislation of a Member State which imposes an obligation to submit a tax declaration on suppliers of advertising services established in another Member State for the purposes of their liability to a tax on advertising, whereas suppliers of such services established in the Member State where the tax is levied are exempt from that obligation on the ground that they are subject to obligations to submit a tax declaration or to register on the basis of liability to all other taxes applicable in that Member State.

The first, second, fourth and sixth questions

37 It should be noted that, although systems of penalties in the field of taxation fall within the competencies of the Member States in the absence of harmonisation at EU level, such systems should not have the effect of jeopardising the freedoms provided for by the FEU Treaty (see, to that effect, judgment of 25 February 1988, *Drexl*, 299/86, EU:C:1988:103, paragraph 17).

38 Therefore, as the Advocate General observed, in essence, in point 63 of her Opinion, it is appropriate to consider whether the penalties connected with failure to submit the tax declaration laid down in Article 7/B(1) of the Law on the taxation of advertisements infringe the freedom to provide services under Article 56 TFEU.

39 It is clear from the information before the Court that, according to Article 7/B(2) and (3) of that law, any person liable to the tax on advertisements who is not yet registered with the tax authority as a taxpayer for the purposes of another tax and does not comply with the obligation to submit a tax declaration to which it is subject, risks being required to pay a series of fines, the first of which is set at HUF 10 000 000 (approximately EUR 31 000) and tripled every day if it is still found that that obligation has not been complied with, until several days later, pursuant to Article 7/D of that law, the total amount of the fines is capped at approximately HUF 1 000 000 000 (approximately EUR 3 100 000).

40 Strictly speaking, that system of penalties applies without distinction to all taxpayers who fail to comply with their obligation to submit a tax

declaration pursuant to the Law on the taxation of advertisements, irrespective of the Member State in which they are established.

41 However, as the Advocate General noted, in essence, in point 77 of her Opinion, only taxpayers not resident in Hungary are, in reality, capable of being fined pursuant to Article 7/B(2) and (3) and Article 7/D of the Law on the taxation of advertisements, since, in the light of the scope *ratione personae* of Article 7/B(1) of that law, suppliers which the tax authority has registered as taxpayers for the purposes of any tax in Hungary are exempt from the obligation to submit a tax declaration.

42 Indeed, suppliers of advertising services established in Hungary may be fined for failure to comply with similar obligations to submit a tax declaration and to register required of them under the general provisions of the national tax legislation.

43 However, the system of penalties, laid down in Articles 7/B and 7/D of the Law on the taxation of advertisements, enables significantly higher fines to be issued than those resulting from the application of Article 172 of the Law on general tax procedures in the event of infringement, by a supplier of advertising services established in Hungary, of its obligation to register laid down in Article 17(1)(b) of that law. Furthermore, the amount of the fines imposed under that system is not increased for continued non-compliance with the corresponding obligation to register to such an extent, nor necessarily within such a short period of time, as that applied under the system of penalties laid down in the Law on the taxation of advertisements.

44 Having regard to the difference in treatment introduced between suppliers of advertising services according to whether or not they are already registered for tax purposes in Hungary, the system of penalties at issue in the main proceedings constitutes a restriction on the freedom to provide services, which is, in principle, prohibited by Article 56 TFEU.

45 Such a restriction may nevertheless be warranted if it is justified by overriding reasons of public interest and, provided that that is the case, its application is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, to that effect, judgments of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 58, and of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 52).

46 In the present case, in order to justify that restriction, the Hungarian Government formally invokes the need to preserve the integrity of its tax regime, but essentially relies on grounds based on ensuring the effectiveness of fiscal supervision and the effective collection of tax.

47 In that regard, the Court has previously accepted that the need to ensure the effectiveness of fiscal supervision and the effective collection of tax may constitute overriding reasons in the public interest capable of justifying a restriction on the freedom to provide services. It has also held that the imposition of penalties, including criminal penalties, may be considered to be necessary in order to ensure compliance with national rules, subject, however, to the condition that the nature and amount of the penalty imposed is, in each individual case, proportionate to the gravity of the infringement which it is designed to penalise (see, to that effect, judgments of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 59, and of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 57).

48 In the first place, as regards the suitability of the system of penalties imposed by Articles 7/B and 7/D of the Law on the taxation of advertisements for securing the attainment of the objectives invoked by the Hungarian Government, it should be made clear that issuing fines of a sufficiently high amount to penalise failure to comply with the obligation to submit a tax declaration, laid down in Article 7/B(1) of that law, is capable of deterring the suppliers of advertising services subject to such an obligation from infringing it and thus preventing the Member State where the tax is levied from being deprived of the possibility of policing effectively the conditions for the application of, and exemption from, the tax in question.

49 In the second place, as to whether or not the national legislation at issue in the main proceedings goes beyond what is necessary in order to attain the objectives relied on by Hungary, as far as concerns the amount of the fines incurred in the event of failure to comply with the obligation to submit a tax declaration, it must be found that that legislation introduces a system of penalties under which a supplier who has not complied with that administrative formality may, within a few days, at intervals of only one day apart, be fined, from the second day, in amounts which are tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, thereby resulting in a total amount of HUF 1 000 000 000 (approximately EUR 3 100 000), without the competent authority giving the supplier the time necessary to comply with its obligations or the opportunity to submit its observations, or having itself examined the seriousness of the infringement. In those circumstances, such legislation is disproportionate.

50 First, there is no link between the exponential increase, within particularly short periods of time, in the total amount of the fines, which may amount to several million euros, and the seriousness of the failure to comply, within such a period, with the administrative formality constituted by the obligation to submit a tax declaration laid down in Article 7/B(1) of the Law on the taxation of advertisements. Thus, it is clear that the amount of the fines imposed is determined without taking account of turnover, which

constitutes the basis of assessment for the tax which is supposed to be recovered. In those circumstances, it is quite possible that the total amount of the penalties imposed under Article 7/B(2) and (3) of the Law on the taxation of advertisements exceeds the taxpayer's turnover.

51 Second, in so far as the legislation at issue provides for the automatic and daily adoption by the tax authority of decisions issuing fines such as those issued in the main proceedings, only a few days elapse between the adoption and notification of the initial decision to fine the taxpayer HUF 10 000 000 (approximately EUR 31 000), on the one hand, and the notification of the last decision to issue a fine, on the other, as a result of which the total amount of the fines may reach the statutory ceiling of HUF 1 000 000 000 (approximately EUR 3 100 000). Thus, even if that taxpayer acted with due diligence, it would, in any event, be in effect unable to comply with its obligation to submit a tax declaration in the Member State where the tax is levied prior to receiving the last decision in its Member State of establishment and could not therefore avoid significant increases in the amount of the previous fines. This also shows that the method of calculating fines laid down in the national legislation at issue in the main proceedings does not take account of the seriousness of the conduct of suppliers of advertising services who fail to comply with their obligation to submit a tax declaration.

52 Indeed, as the Hungarian Government claimed in its written observations, under Article 7/B(5) of the Law on the taxation of advertisements, the tax authority may reduce the amount of the fines provided for in Article 7/B(2) and (3) of that law 'without limit' if the taxpayer complies with its obligation to submit a tax declaration when requested to do so by that authority for the first time.

53 However, it is clear from the very wording of that provision, subject to verification by the referring court, that the tax authority has at its disposal a mere discretion in that regard. A fine is no less disproportionate merely because the authorities of a Member State may, at their sole discretion, reduce its amount.

54 In the light of the foregoing considerations, the answer to the first, second, fourth and sixth questions is that Article 56 TFEU must be interpreted as precluding legislation of a Member State which fines suppliers of services established in another Member State for non-compliance with the obligation to submit a tax declaration for the purposes of their liability to a tax on advertising in a series of fines issued within several days, the amount of which, from the second day, is tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, leading to a total amount of several million euros, without the competent authority giving those suppliers of services the time necessary to comply with their obligations or the opportunity to submit their observations, or having itself examined the seriousness of the infringement, before adopting the final decision fixing the total amount of those fines, whereas the amount of the fine which suppliers of services established in the Member State where the tax is levied who fail to comply with a similar obligation to submit a tax declaration or to register contrary to the general provisions of national tax legislation is significantly less and is not increased, in the event of continued failure to comply with such an obligation, in the same proportions, nor necessarily within such a short period of time.

The fifth and seventh questions

55 It is apparent from the answer given to the first, second, fourth and sixth questions that national legislation providing for a system of fines such as that applicable in the event of failure to comply with the obligation to submit a tax declaration at issue in the main proceedings is incompatible with Article 56 TFEU. Accordingly, it is not necessary to answer the fifth and seventh questions.

(…)

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

1. Article 56 TFEU must be interpreted as not precluding legislation of a Member State which imposes an obligation to submit a tax declaration on suppliers of advertising services established in another Member State for the purposes of their liability to a tax on advertising, whereas suppliers of such services established in the Member State where the tax is levied are exempt from that obligation on the ground that they are subject to obligations to submit a tax declaration or to register on the basis of liability to all other taxes applicable in that Member State.

2. Article 56 TFEU must be interpreted as precluding legislation of a Member State which fines suppliers of services established in another Member State for non-compliance with the obligation to submit a tax declaration for the purposes of their liability to a tax on advertising in a series of fines issued within several days, the amount of which, from the second day, is tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, leading to a total amount of several million euros, without the competent authority giving those suppliers of services the time necessary to comply with their obligations or the opportunity to submit their observations, or having itself examined the seriousness of the infringement, before adopting the final decision fixing the total amount of those fines, whereas the amount of the fine which suppliers of services established in the Member State where the tax is levied who fail to comply with a similar obligation to submit a tax declaration or to register contrary to the general provisions of national tax legislation is significantly less and is not increased, in the event of continued failure to comply with such an obligation, in the same proportions, nor necessarily within such a short period of time.

EU

Court of Justice

20 May 2021

ALTI

Case number: C-4/20

Liability – VAT - Joint and several liability of the recipient of a taxable supply which has exercised the right to deduct VAT knowing that the person liable for payment of that tax would not pay it – Obligation of such a recipient to pay the VAT not paid by the person liable for payment and the default interest due on account of that person's failure to pay the VAT

Summary

Article 205 of the EU value added tax (VAT) Directive (Council Directive 2006/112/EC of 28 November 2006), read in the light of the principle of proportionality, must be interpreted as not precluding national legislation pursuant to which the person held jointly and severally liable, for the purpose of that article, must pay, in addition to the VAT not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment, where it is clear that, in exercising its right of deduction, it knew or should have known that the person liable for payment would not pay that VAT.

1 This request for a preliminary ruling concerns the interpretation of Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, and corrigendum OJ 2018 L 329, p. 53).

2 The request has been made in proceedings between 'ALTI' OOD and the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Director of the 'Appeals and Tax/Social Insurance Practice' Directorate, responsible for the city of Plovdiv, within the Central Administration of the National Revenue Agency, Bulgaria) ('the director'), concerning the joint and several liability of ALTI for the payment of value added tax (VAT) together with default interest.

Legal context

EU law

3 Article 193 of Directive 2006/112 states:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199b and Article 202.'

4 Articles 194 to 200 and 202 to 204 of that directive provide, in essence, that persons other than a taxable person carrying out a taxable supply of goods or services may or shall be regarded as liable for VAT.

5 Article 205 of that directive provides:

'In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.'

Bulgarian law

6 Headed 'Liability in the event of abuse', Article 177 of the Zakon za danaka varhu dobavenata stoynost (Law on value added tax) (DV No 63 of 4 August 2006), in the version applicable at the material time ('the Law on VAT'), states:

'(1) A registered person who is the recipient of a taxable supply shall be liable for unpaid tax due from another registered person where he has exercised the right to deduct input tax directly or indirectly connected with the tax due but not paid.

(2) Liability under paragraph 1 shall be incurred where the registered person knew or should have known that the tax would not be paid, and this is proved by the investigating authority in accordance with Articles 117 to 120 of the Danachno – osiguritelen protsesualen kodeks (Tax and Social Security Procedure Code).

(3) Knowledge shall be imputed to a person for the purposes of paragraph 2 where both of the following conditions are satisfied:

1. the tax due, within the meaning of paragraph 1, for a particular tax period has in fact not been paid by any upstream supplier in respect of a taxable supply of the same goods or services, whether or not in the same, a changed or a processed form;

2. the taxable supply is fictitious, circumvents legislation or is made at a price that differs significantly from the market price.

(4) Liability under paragraph 1 shall not be dependent on obtaining a specific advantage on account of the non-payment of the tax due.

(5) In the circumstances envisaged in paragraphs 2 and 3, the upstream supplier of the taxable person who owes the unpaid tax shall also be liable.

(6) In the cases referred to in paragraphs 1 and 2, liability shall be enforced against the taxable person who is the direct recipient of the supply in respect of which the tax due has not been paid, and, where recovery fails, liability may be enforced against any downstream recipient in the chain of supply.

(7) Paragraph 6 shall also apply *mutatis mutandis* to upstream suppliers.'

7 Article 14 of the Tax and Social Security Procedure Code (DV No 105 of 29 December 2005) provides:

'Persons liable for payment shall be any natural or legal person who:

1. is liable for taxes or compulsory social security contributions;

2. is required to levy and pay taxes or compulsory social security contributions;

3. is liable for the debt of the persons referred to in paragraphs 1 and 2.'

8 Article 16 of that code provides:

'(1) A person shall be liable under Article 14(3) if, in the circumstances provided for by law, he is obliged to pay the [VAT] or compulsory social security contribution of the person liable for that tax or contribution or of a person required to levy and pay taxes or compulsory social security contributions that have not been paid within the period prescribed.

(2) Persons liable under Article 14(3) shall be subject to the rules determining the rights and obligations of a person in proceedings in accordance with this code.

(3) The liability of persons liable under Article 14(3) shall include taxes and compulsory social security contributions, interest and recovery costs.'

9 Article 121 of the Zakon za zadalzheniata i dogovorite (Law on obligations and contracts) (DV No 275 of 22 November 1950) is worded as follows:

'Except as provided for by law, joint and several liability of two or more debtors shall arise only where it has been agreed.'

10 Article 122 of that law states:

'The creditor may demand enforcement of the entire debt from the joint and several debtor of his choice.

Proceedings brought against one of the joint and several debtors shall not affect the creditor's right against the other debtors.'

11 Article 126 of that law provides:

'If the failure to perform is attributable to only one of the debtors, the creditor may claim full compensation for damage from that debtor.

The other debtors shall be jointly and severally liable only for the amount originally payable.

Default by one joint and several debtor shall produce no effects in respect of the other debtors.'

12 Article 1 of the Zakon za lihvite varhu danatsi, taksi i drugi podobni darzhavni vzemania (Law on interest on taxes, charges and other similar debts owed to the State) (DV No 91 of 12 November 1957) provides:

'The recovery of taxes, charges, deductions from profits, contributions to the budget and other similar debts owed to the State, whether or not subject to a levy, which have not been paid within the period prescribed for voluntary payment shall be subject to interest at the statutory rate.

The recovery of compulsory insurance contributions [which have not been paid] within the period prescribed for voluntary payment shall also be subject to interest at the statutory rate.

Interest on interest and on fines shall not be payable.'

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

13 ALTI is a limited liability company governed by Bulgarian law. In 2014, it acquired from 'FOTOMAG' EOOD, a single-member private limited company governed by Bulgarian law, a combine harvester, a tractor and a cart ('the agricultural equipment'), which had been the subject of an intra-Community acquisition by FOTOMAG from a company established in the United Kingdom. The supplies of the agricultural equipment to ALTI led to FOTOMAG issuing three invoices, each showing VAT. After it settled those invoices, ALTI exercised its right to deduct VAT and declared the relevant deductions in its tax returns for the April 2014 and June 2014 tax periods.

14 FOTOMAG was the subject of a tax adjustment procedure following which the Bulgarian tax authorities determined, in a tax assessment notice of 27 June 2016, that FOTOMAG had failed to pay almost all of the VAT declared in respect of the intra-Community acquisitions and calculated on the invoices issued to ALTI.

15 In a tax adjustment procedure initiated in respect of ALTI, the Bulgarian tax authorities found that ALTI and FOTOMAG had entrusted one and the same person with their accounting, the management of their bank accounts and the submission of their VAT returns, that FOTOMAG's acquisition of the agricultural equipment had been financed through a third-party company whose members were the managers of FOTOMAG and ALTI and that the transport of the combine harvester from the United Kingdom had been organised by a manager and representative of ALTI through another company. Those findings led the tax authorities to conclude that ALTI had itself organised the acquisition of the agricultural equipment by FOTOMAG through an intra-Community acquisition in order for VAT to be charged improperly and that ALTI knew that FOTOMAG would not pay the VAT on the three invoices in question. The tax authorities also took the view that, since the transaction between FOTOMAG and ALTI was intended to circumvent legislation, within the meaning of Article 177(3)(2) of the Law on VAT, ALTI should have known that the VAT would not

be paid by FOTOMAG, for the purpose of that provision.

16 In those circumstances, the Bulgarian tax authorities, in a tax assessment notice of 23 February 2018 issued to ALTI and corrected by a tax assessment notice of 6 March 2018, found ALTI to be jointly and severally liable pursuant to Article 177(3)(2) of the Law on VAT for the VAT not paid by FOTOMAG.

17 ALTI lodged an administrative appeal with the director, claiming, inter alia, that the subjective element required by Article 177(3)(2) of the Law on VAT, namely that ALTI should have known that the VAT would not be paid by FOTOMAG, was lacking.

18 That administrative appeal was dismissed by the director and ALTI brought an action before the Administrativen sad – Plovdiv (Administrative Court, Plovdiv, Bulgaria). By judgment of 22 March 2019, that court dismissed ALTI's action against the tax assessment notice as unfounded.

19 The Administrativen sad – Plovdiv (Administrative Court, Plovdiv) considered that it was apparent from the information gathered during the procedure that ALTI should have known that FOTOMAG would not perform its obligation to pay the VAT. In that regard, that court found, inter alia, that (i) in reality the relationship between ALTI and FOTOMAG went beyond a normal business relationship; (ii) FOTOMAG had never carried on business in connection with the sale of agricultural equipment and had no experience at all in that field; (iii) the managing director and shareholder of the third-party company that lent funds to FOTOMAG for the purchase of the agricultural equipment were the managers of ALTI and FOTOMAG, respectively; and (iv) one and the same person had carried out the bank transfers between ALTI, FOTOMAG and that third-party company, kept the accounts of ALTI, FOTOMAG and the company that negotiated the transport of the agricultural equipment from the United Kingdom, and submitted ALTI's and FOTOMAG's tax returns. That court concluded that the purpose of the relationship between ALTI and FOTOMAG was to circumvent legislation and that, pursuant to Article 177(3)(2) of the Law on VAT in conjunction with Article 16(3) of the Tax and Social Security Procedure Code, ALTI was obliged to pay not only the tax itself but also default interest due on account of the failure to pay that tax by the person liable for payment.

20 ALTI is contesting the judgment of the Administrativen sad – Plovdiv (Administrative Court, Plovdiv) before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria).

21 In its appeal, ALTI claims, inter alia, that while, in accordance with the case-law of the Bulgarian courts, the recipient of a taxable supply may incur liability, on the basis of Article 177(3)(2) of the Law on VAT, where it has exercised its right of deduction in respect of the tax due but not paid by its supplier, that liability does not include default interest due on account of the failure to pay that tax by the person liable for payment.

22 The referring court states that, under Article 177(3)(2) of the Law on VAT, the recipient of a taxable supply is liable for the tax due but not paid by another person where the recipient has exercised the right to deduct the input VAT linked directly or indirectly to the VAT due and not paid and that that joint and several liability is incurred where the recipient knew or should have known that that tax would not be paid. That provision is consistent with Article 205 of Directive 2006/112, as is apparent, inter alia, from the judgment of 11 May 2006, *Federation of Technological Industries and Others* (C-384/04, EU:C:2006:309).

23 However, in determining the scope of that joint and several liability, the Bulgarian legislature did not expressly state in Article 177 of the Law on VAT that the recipient of the supply is liable not only for the unpaid tax but also for default interest due from the date on which that tax became chargeable. The referring court states that such an obligation might nevertheless be inferred from Article 16(3) of the Tax and Social Security Procedure Code, even though contradictory judgments have been delivered by the Bulgarian Supreme Administrative Court on this point. In that context, the referring court explains that it is unsure whether Article 205 of Directive 2006/112 and the principle of proportionality preclude the inclusion, in the system of joint and several liability in question, of default interest due on account of the non-payment of the tax by the person liable for payment and, consequently, preclude national legislation such as Article 16(3) of that code.

24 In those circumstances, the Varhoven administrativen sad (Supreme Administrative Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 205 of [Directive 2006/112] and the principle of proportionality to be interpreted as meaning that the joint and several liability of a registered person, which is the recipient of a taxable supply, for the value added tax not paid by its supplier also includes, in addition to the supplier's principal debt (the value added tax debt), the accessory obligation to pay compensation for late payment in the amount of the statutory interest on the principal debt from the beginning of the debtor's default until the issuance of the tax assessment notice by which the joint and several liability is established or until the discharge of the debt?

(2) Are Article 205 of [Directive 2006/112] and the principle of proportionality to be interpreted as precluding a national provision such as Article 16(3) of the [Tax and Social Security Procedure Code], according to which a third party's liability for unpaid

taxes of a taxable person includes the taxes and the interest?'

Consideration of the questions referred

25 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 205 of Directive 2006/112, read in the light of the principle of proportionality, must be interpreted as precluding national legislation pursuant to which the person designated as being jointly and severally liable, for the purpose of that article, is required to pay, in addition to the VAT not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment.

26 In that regard, it should be noted that, as set out in Article 205 of Directive 2006/112, in the situations referred to in Articles 193 to 200 and 202 to 204 of that directive, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.

27 Articles 193 to 200 and 202 to 204 of Directive 2006/112 determine the persons liable for payment of VAT, in accordance with the purpose of Section 1 of Chapter 1 of Title XI of that directive, headed 'Persons liable for payment of VAT to the tax authorities'. Although Article 193 of that directive provides, as the basic rule, that VAT is payable by any taxable person carrying out a taxable supply of goods or services, the wording of that article states that other persons may or shall be liable for payment of VAT in the situations referred to in Articles 194 to 199b and 202 of that directive.

28 It is apparent from the context formed by Articles 193 to 205 of Directive 2006/112 that Article 205 of that directive is part of a set of provisions aimed at identifying the person liable for payment of VAT in various situations. Those provisions thereby seek to ensure for the public exchequer the efficient collection of VAT from the most appropriate person in the light of the specific situation, particularly where the parties to the contract are not in the same Member State or where the transaction subject to VAT relates to supplies the specific nature of which makes it necessary to identify a person other than that referred to in Article 193 of that directive.

29 In principle, therefore, Article 205 of Directive 2006/112 allows Member States to adopt, for the efficient collection of VAT, measures pursuant to which a person other than the person normally liable for that tax under Articles 193 to 200 and 202 to 204 of that directive is jointly and severally liable for payment of that tax.

30 That interpretation is also supported by the judgment of 21 December 2011, *Vlaamse Oliemaatschappij* (C-499/10, EU:C:2011:871, paragraph 19 and the case-law cited), relating to the interpretation of Article 21(3) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2001/115/EC of 20 December 2001 (OJ 2002 L 15, p. 24), which was equivalent to Article 205 of Directive 2006/112.

31 However, since Article 205 of Directive 2006/112 specifies neither the persons that Member States may designate as joint and several debtors nor the situations in which such designation may be made, it is for the Member States to determine the conditions and arrangements under which the joint and several liability provided for in that article will be incurred.

32 In that regard, it should be borne in mind that, in the exercise of that power, Member States must observe the general principles of law that form part of the EU legal order, which include, in particular, the principles of legal certainty and of proportionality (judgment of 21 December 2011, *Vlaamse Oliemaatschappij*, C-499/10, EU:C:2011:871, paragraph 20 and the case-law cited).

33 As regards specifically the principle of proportionality, the Court has held that, in accordance with that principle, Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation. Therefore, while it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the public exchequer as effectively as possible, they must not go further than is necessary for that purpose (judgment of 21 December 2011, *Vlaamse Oliemaatschappij*, C-499/10, EU:C:2011:871, paragraphs 21 and 22 and the case-law cited).

34 Accordingly, exercise of the Member States' power to designate a joint and several debtor other than the person liable for payment of the tax in order to ensure efficient collection of that tax must be justified by the factual and/or legal relationship between the two persons concerned in the light of the principles of legal certainty and of proportionality. In particular, it is for Member States to specify the particular circumstances in which a person such as the recipient of a taxable supply is to be held jointly and severally liable for payment of the tax owed by the other party to the contract even though that person has paid that tax by paying the transaction price.

35 In that context, it should be recalled that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by EU legislation on the common system of VAT and that the effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up

with the sole aim of obtaining a tax advantage (see, to that effect, judgment of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraph 46).

36 The Court has thus ruled that Article 205 of Directive 2006/112 allows a Member State to hold a person jointly and severally liable for payment of VAT where, at the time of the supply to it, that person knew or ought to have known that the tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, and to rely on presumptions in that regard, provided that such presumptions are not formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary, thereby creating a system of strict liability going beyond what is necessary to preserve the public exchequer's rights. Traders who take every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain that is fraudulent or amounts to an abuse must be able to rely on the legality of those transactions without the risk of being made jointly and severally liable to pay the VAT due from another taxable person (see, to that effect, judgment of 11 May 2006, *Federation of Technological Industries and Others*, C-384/04, EU:C:2006:309, paragraphs 32 and 33 and the case-law cited).

37 The Court has also held that the fact that a person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in abuse or fraud is excluded are points to be taken into account in deciding whether that person can be obliged to account for the VAT owed (see, to that effect, judgment of 21 December 2011, *Vlaamse Oliemaatschappij*, C-499/10, EU:C:2011:871, paragraph 26 and the case-law cited).

38 In the present case, it is apparent from the order for reference that Article 177 of the Law on VAT, headed 'Liability in the event of abuse', provides, in paragraph 2, that a person is to be held jointly and severally liable for payment of the tax due where that person has exercised its right of deduction even though it knew or should have known that the person liable for payment did not intend to pay the tax, and it is for the investigating authority to prove that those conditions have been met. It is also apparent from the order for reference that Article 177(3)(2) of that law provides that, in order to be able to presume that the person concerned should have known that the person liable for payment did not intend to pay the tax due, not only must that tax not actually have been paid by any upstream supplier, but the taxable supply must also be fictitious, circumvent legislation or be made at a price that differs significantly from the market price.

39 It is apparent from both the order for reference and the written observations of the Bulgarian Government that such a presumption is rebuttable. Moreover, it is not apparent from the documents before the Court that it would be practically impossible or excessively difficult to rebut such a presumption. Nevertheless, it is for the referring court to ascertain whether the person concerned has the opportunity to prove, for that purpose, that it acted in good faith.

40 In those circumstances, it must be held that, as the referring court states, a provision such as Article 177 of the Law on VAT meets the requirements for the application of Article 205 of Directive 2006/112, as set out in paragraphs 36 and 37 above.

41 However, the referring court states that, while, under Article 177 of the Law on VAT, the persons referred to in that article can be held jointly and severally liable only for the payment of VAT, those persons may also be required, under Article 16(3) of the Tax and Social Security Procedure Code, to pay the default interest due on account of the failure to pay the VAT by the person liable for payment.

42 In that regard, it should be noted that although, according to the wording of Article 205 of Directive 2006/112, the joint and several liability provided for in that article relates only to the payment of VAT, that wording does not preclude Member States from being able to impose on the joint and several debtor all the elements relating to that tax, such as default interest due on account of the failure to pay the tax by the person liable for payment. Nevertheless, it should be pointed out that Member States may extend the system of joint and several liability so that it encompasses such elements only if such an extension is justified in the light of the objectives pursued by Article 205 of Directive 2006/112 and, as stated in paragraph 32 above, is consistent with the principles of legal certainty and of proportionality.

43 In that regard, it should be held that, where a rule of national law requiring a joint and several debtor to pay default interest relating to the principal debt serves to combat VAT abuse, it contributes to achieving the objective of ensuring the efficient collection of VAT for the public exchequer, pursued by Article 205 of Directive 2006/112. Furthermore, since the application of such a rule presupposes that it is proved that, in exercising its right of deduction, the other party to the contract with the person liable for payment of the tax due knew or should have known that the latter would not pay it, the obligation on that other party – which is deemed, as a result of its voluntary participation in VAT abuse, to have subscribed from the outset to the unlawful intention not to pay the tax on the part of the person liable for payment – to remedy the effects of the late payment of that tax, for which it is also answerable in part, appears to be proportionate and consistent with the principle of legal certainty.

44 Such an approach is also in accordance with the objective underlying Article 205 of Directive 2006/112, as described in paragraphs 28 and 29 above, which is to enable Member States to ensure for

the public exchequer the efficient collection of VAT from the most appropriate persons in the light of the specific situation. In the case of VAT abuse such as that envisaged by the national legislation at issue in the main proceedings, the public exchequer must have the opportunity to recover, in the interests of efficiency, the tax due and all the elements relating thereto from each of the contracting parties which participated in that abuse.

45 In the light of all the foregoing, the answer to the questions referred is that Article 205 of Directive 2006/112, read in the light of the principle of proportionality, must be interpreted as not precluding national legislation pursuant to which the person held jointly and severally liable, for the purpose of that article, must pay, in addition to the VAT not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment, where it is proved that, in exercising its right of deduction, it knew or should have known that the person liable for payment would not pay that VAT.

(…)

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

Article 205 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in the light of the principle of proportionality, must be interpreted as not precluding national legislation pursuant to which the person held jointly and severally liable, for the purpose of that article, must pay, in addition to the value added tax (VAT) not paid by the person liable for payment of that tax, the default interest on that amount, due from the person liable for payment, where it is proved that, in exercising its right of deduction, it knew or should have known that the person liable for payment would not pay that VAT.

EU

Court of Justice

10 June 2021

WR

Case number: C-279/19

Liability – Excise duties – Transporter of the goods being unaware that excise duty has become chargeable in respect of those goods

Summary

Article 33(3) of the EU general excise duties directive (Council Directive 2008/118/EC) must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.

1 This request for a preliminary ruling concerns the interpretation of Article 33(3) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

2 The request has been made in proceedings between The Commissioners for Her Majesty's Revenue and Customs, United Kingdom, ('HMRC') and WR concerning the legality of an assessment addressed to WR relating to the excise duty which became chargeable in respect of the goods which WR had transported to the United Kingdom without those goods being covered by a valid administrative document proving that that movement took place under a duty suspension arrangement.

Legal context

EU law

3 Recitals 2 and 8 of Directive 2008/118 state:

'(2) Conditions for charging excise duty on the goods covered by [Council] Directive 92/12/EEC [of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1)], hereinafter "excise goods", need to remain harmonised in order to ensure the proper functioning of the internal market.

…

(8) Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at [EU] level when excise goods are released for consumption and who the person liable to pay the excise duty is.'

4 Article 1(1)(b) of that directive is worded as follows:

'This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods …:

…

(b) alcohol and alcoholic beverages covered by [Council] Directives 92/83/EEC [of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21)] and 92/84/EEC [of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages (OJ 1992 L 316, p. 29)]'.

5 Article 4 of that directive provides:

'For the purpose of this Directive as well as its implementing provisions, the following definitions shall apply:

…

7. "duty suspension arrangement" means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended;

…

11. "tax warehouse" means a place where excise goods are produced, processed, held, received or dispatched under duty suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located.'

6 Chapter II of that directive, entitled 'Chargeability, reimbursement, exemption', contains a Section 1, entitled 'Time and place of chargeability', in which Article 7 of the directive provides:

'1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

2. For the purposes of this Directive, "release for consumption" shall mean any of the following:

(a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

(b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of [EU] law and national legislation;

…'

7 Article 8 of Directive 2008/118 is worded as follows:

'1. The person liable to pay the excise duty that has become chargeable shall be:

(a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):

…

(ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure;

(b) in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods;

…

2. Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt.'

8 Chapter IV of that directive, entitled 'Movement of excise goods under suspension of excise duty', contains a Section 1, entitled 'General provisions', in which Article 17(1) of the directive provides:

'Excise goods may be moved under a duty suspension arrangement within the territory of the [European Union], including where the goods are moved via a third country or a third territory:

(a) from a tax warehouse to:

(i) another tax warehouse;

…'

9 That chapter includes a Section 2, entitled 'Procedure to be followed on a movement of excise goods under suspension of excise duty', in which Article 21 of the directive provides:

'1. A movement of excise goods shall be considered to take place under a duty suspension arrangement only if it takes place under cover of an electronic administrative document processed in accordance with paragraphs 2 and 3.

2. For the purposes of paragraph 1 of this Article, the consignor shall submit a draft electronic administrative document to the competent authorities of the Member State of dispatch using the computerised system referred to in Article 1 of Decision No 1152/2003/EC [of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of excisable products (OJ 2003 L 162, p. 5)] …

3. The competent authorities of the Member State of dispatch shall carry out an electronic verification of the data in the draft electronic administrative document.

Where these data are not valid, the consignor shall be informed thereof without delay.

Where these data are valid, the competent authorities of the Member State of dispatch shall assign to the document a unique administrative reference code and shall communicate it to the consignor.

…'

10 Under the heading 'Movement and taxation of excise goods after release for consumption', Chapter V of Directive 2008/118 contains a Section 2, entitled 'Holding in another Member State', in which Article 33 of the directive provides:

'1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

For the purposes of this Article, "holding for commercial purposes" shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

…

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.

4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the [European Union] for commercial purposes, they shall not be regarded as held for those

purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34.

…'

The law of the United Kingdom

11 Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('the 2010 Regulations') provides in paragraphs 1 and 2 as follows:

'1. Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

2. Depending on the cases referred to in paragraph 1, the person liable to pay the duty is the person –

(a) making the delivery of the goods;

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.'

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

12 On 6 September 2013, a heavy goods vehicle ('HGV') driven by WR, a self-employed worker, was stopped on arrival at Dover Docks (United Kingdom) by UK Border Agency ('UKBA') officers. The HGV contained goods subject to excise duty, namely 26 pallets of beer ('the goods at issue').

13 WR produced to the UKBA officers a 'Cargo Movement Requirement' consignment note, drawn up on the basis of the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol of 5 July 1978 ('the CMR note'). It was stated in the CMR note that the goods at issue were covered by an electronic administrative document containing an administrative reference code ('the ARC'), referred to in Article 21 of Directive 2008/118. That note also stated that the consignor was a tax warehouse in Germany and that the consignee was Seabrook Warehousing Ltd., a tax warehouse in the United Kingdom.

14 However, after consulting the Excise Movement and Control System ('the EMCS'), the UKBA officers were able to establish that the ARC stated on the CMR note had already been used for a separate delivery of beer for the same tax warehouse in the United Kingdom. Those officers therefore took the view that the goods at issue were not being moved under a duty suspension arrangement and, consequently, that the excise duty relating to those goods had become chargeable when those goods arrived in the United Kingdom. In those circumstances, the UKBA officers seized the goods at issue and the HGV carrying them.

15 Subsequently, HMRC, first, issued to WR an assessment to excise duty in the amount of GBP 22 779 (approximately EUR 26 400), pursuant to Regulation 13(1) and (2) of the 2010 Regulations ('the contested assessment to excise duty') and, second, imposed on WR a fine of GBP 4 897.48 (approximately EUR 5 700) pursuant to the provisions of Schedule 41 to the Finance Act 2008.

16 The First-tier Tribunal (Tax Chamber) (United Kingdom) upheld WR's appeal against the contested assessment to excise duty and the fine. That tribunal held that, even though he knew that the goods at issue were subject to excise duty, WR was not a conspirator in relation to the attempt to smuggle those goods. Since he did not have access to the EMCS, he had no means of verifying whether the ARC stated on the CMR note had already been used. Moreover, nothing in the documents available to him was such as to give rise to doubts in that regard. Furthermore, WR was not the owner of the HGV and had no right to or personal interest in the goods at issue, his sole aim being to collect and deliver those goods, for a fee, in accordance with the instructions received. Only the persons who had organised the smuggling attempt had the de facto and legal right of control over the goods at issue at the time when they were seized. That tribunal also found that WR had informed the person who had instructed him to transport the goods at issue that they had been seized, that the identity of those behind the smuggling attempt had not been ascertained and that HMRC had not attempted to determine the identity of those persons or that of the owner of the HGV.

17 In those circumstances, that tribunal, in accordance with the case-law of the Court of Appeal (England & Wales) (United Kingdom), held that WR was an 'innocent agent' and that, consequently, he could not be regarded as having 'held' or 'delivered' the goods at issue within the meaning of Regulation 13 of the 2010 Regulations. According to that tribunal, in the absence of actual or constructive knowledge on WR's part that he was in physical possession of smuggled goods, the imposition of liability on WR would raise serious questions of compatibility with the objectives of the applicable legislation. Accordingly, the First-tier Tribunal (Tax Chamber) annulled both the contested assessment to excise duty and the fine imposed on WR.

18 The Upper Tribunal (Tax and Chancery Chamber) (United Kingdom) dismissed the appeal brought by HMRC against that annulment decision. That tribunal held, in essence, that the status of 'innocent agent' has the effect of exempting from all liability persons who do not have actual or constructive knowledge that the goods which they are transporting are goods in respect of which excise duty should have, but has not, been paid. It would thus be contrary both to Directive 2008/118 and to national legislation to make 'the entirely innocent agent' liable for payment of the unpaid excise duty.

19 The referring court dismissed the appeal brought by HMRC against the judgment of the Upper Tribunal (Tax and Chancery Chamber) as regards the fine imposed on WR, but has doubts as to whether, in the light of Directive 2008/118, that tribunal was correct in upholding the annulment of the contested assessment to excise duty.

20 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a person … who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive [2008/118] in circumstances where that person:

(a) had no legal or beneficial interest in the excise goods;

(b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and

(c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty in Member State B at or prior to the time that they became so chargeable?

2. Is the answer to Question 1 different if [the person in question] … did not know that the goods he was in possession of were excise goods?'

Consideration of the questions referred

21 By its questions, which it is appropriate to answer together, the referring court asks, in essence, whether Article 33(3) of Directive 2008/118 must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.

22 Under Article 33(1) of Directive 2008/118, where excise goods which have already been released for consumption in one Member State are held for commercial purposes – that is to say, by a person other than a private individual or by a private individual for reasons other than his own use and transported by him – in another Member State in order to be delivered or used there, excise duty is to become chargeable in that other Member State. Under Article 33(3), 'the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State', is to be liable to pay the excise duty.

23 Directive 2008/118 does not define the concept of a person who 'holds' the goods subject to excise duty, within the meaning of Article 33(3) of that directive, nor does it make any reference to the law of the Member States for the purpose of defining that concept. In accordance with settled case-law, it follows from the requirements of the uniform application of EU law and of the principle of equal treatment that the terms of a provision of EU law which does not contain any express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must be determined according to the usual meaning of those terms in everyday language, taking into account the context in which they are used and the objectives pursued by the legislation of which they form part (see, to that effect, judgments of 9 July 2020, *Santen*, C-673/18, EU:C:2020:531, paragraph 41, and of 16 July 2020, *AFMB*, C-610/18, EU:C:2020:565, paragraph 50 and the case-law cited).

24 The concept of a person who 'holds' goods refers, in everyday language, to a person who is in physical possession of those goods. In that regard, the question whether the person concerned has a right to or any interest in the goods which that person holds is irrelevant.

25 Moreover, there is nothing in the wording of Article 33(3) of Directive 2008/118 to indicate that the status of person liable to pay the excise duty, as being 'the person holding the goods intended for delivery', depends on ascertaining whether that person is aware or should reasonably have been aware that the excise duty is chargeable under that provision.

26 That literal interpretation is borne out by the general scheme of Directive 2008/118.

27 Thus, under Article 7(1) and 7(2)(b) of that directive, excise duty is to become chargeable at the time, and in the Member State, of 'release for consumption'. The concept of 'release for consumption' is defined as the holding of excise goods outside a duty suspension arrangement, without excise duty having been levied. In such a case, the person liable to pay the excise duty is, in accordance with Article 8(1)(b) of that directive, 'the person holding [those] … goods and any other person involved in the holding of the excise goods'.

28 However, like Article 33(3) of Directive 2008/118, Article 8(1)(b) of that directive does not contain any express definition of the concept of 'holding' and does not require the person concerned to be the holder of a right or to have any interest in relation to the goods which that person holds, or that

that person be aware or that he should reasonably have been aware that the excise duty is chargeable under that provision.

29 By contrast, in a situation different from that referred to in Article 33(3) of Directive 2008/118, that is to say, in the case of an irregularity during a movement of excise goods under a duty suspension arrangement, within the meaning of Article 4(7) of that directive, Article 8(1)(a)(ii) of that directive provides for liability to pay the excise duty on the part of any person who participated in the irregular departure of those goods from the duty suspension arrangement and who, furthermore, 'was aware or who should reasonably have been aware of the irregular nature of the departure'. The EU legislature did not restate this second condition, which can be regarded as requiring an element of intention, either in Article 33(3) or, moreover, in Article 8(1)(b) of that directive (see, by analogy, judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 39).

30 It follows that, where, in Directive 2008/118, the EU legislature intended that an intentional element be taken into account for the purpose of determining the person liable to pay the excise duty, it has laid down an express provision to that effect in that directive.

31 Furthermore, an interpretation limiting the status of person liable to pay the excise duty as being 'the person … holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, to those persons who are aware or should reasonably have been aware that excise duty has become chargeable would not be consistent with the objectives pursued by Directive 2008/118, which include the prevention of possible tax evasion, avoidance and abuse (see, to that effect, judgment of 29 June 2017, *Commission* v *Portugal*, C-126/15, EU:C:2017:504, paragraph 59).

32 That directive lays down, as stated in Article 1(1) thereof, general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the goods listed in that article, in particular so that, as is apparent from recitals 2 and 8 thereof, chargeability of excise duty is identical in all Member States and the related tax debt is in fact collected (see, by analogy, judgment of 5 April 2001, *van de Water*, C-325/99, EU:C:2001:201, paragraphs 39 and 41).

33 In that regard, as the Advocate General observed in point 29 of his Opinion, the intention of the EU legislature was to lay down a broad definition, in Article 33(3) of Directive 2008/118, of the category of persons liable to pay excise duty in the event of a movement of excise goods already 'released for consumption' in one Member State and held, for commercial purposes, in another Member State in order to be delivered or used there, so as to ensure, so far as possible, that such duty is collected.

34 However, to impose an additional condition requiring that the 'person … holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, is aware or should reasonably have been aware that excise duty is chargeable would make it difficult, in practice, to collect that duty from the person with whom the competent national authorities are in direct contact and who, in many situations, is the only person from whom those authorities can, in practice, demand payment of that duty.

35 That interpretation of Article 33(3) of Directive 2008/118 is without prejudice to the possibility, where provided for by national law, for the person who, under that provision, has paid the excise duty that has become chargeable to bring an action for a contribution or indemnity against another person liable to pay that duty (see, by analogy, judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 44).

36 In the light of the foregoing, the answer to the questions referred is that Article 33(3) of Directive 2008/118 must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.

(…)

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

Article 33(3) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.

European Court of Human Rights

14 October 2021

Democracy and Human Rights Resource Center and Mustafayev v. Azerbaijan

Case number: 74288/14 and 64568/16

Deterrent measures – Freedom to travel – Travel ban in connection with an alleged tax debt, without any measures taken to collect it – Violation of the right to leave the country

Summary

A measure which seeks to restrict an individual's right to leave the country for the purpose of securing the payment of taxes may pursue the legitimate aims of maintenance of *ordre public* and protection of the rights of others (Art. 2 § 3 of Protocol No. 4).

However, any restriction on the right to leave one's country on grounds of unpaid debt can only be justified as long as it serves its aim of recovering the debt.

Such a measure does not pursue the legitimate aims set out in the above provision if the tax authorities and the domestic courts do not take any measures to collect the alleged tax debt from the money available on the applicants' bank accounts or to seize any other assets owned by them, despite the applicant's explicit request in that regard and despite the fact that the sum allegedly due was available on the bank accounts.

The European Court of Human Rights (Fifth Section), (...) delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The present two applications concern the restrictions imposed on the bank accounts of the applicants and on the freedom of movement of the applicant by the domestic authorities. The applicants raise various complaints under Articles 6, 11, 13, 18 and 34 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article 2 of Protocol No. 4 to the Convention.

THE FACTS

(...)

I. BACKGROUND INFORMATION

2. The applicant is a lawyer and a member of the Azerbaijani Bar Association. He specialised in protection of human rights and has represented applicants in a large number of cases before the Court.

3. He is also the founder and chairman of the applicant association, a non-governmental organisation specialising in legal education and protection of human rights. The applicant association was registered by the Ministry of Justice on 30 June 2006 and acquired the status of a legal entity.

4. On 22 April 2014 the Prosecutor General's Office opened criminal case no. 142006023 under Articles 308.1 (abuse of power) and 313 (forgery by an official) of the Criminal Code in connection with alleged irregularities in the financial activities of a number of non-governmental organisations. The decision did not provide an exhaustive list of the non-governmental organisations against which criminal proceedings were instituted but referred to the activities of some non-governmental organisations, without citing the name of the applicants.

5. Soon thereafter the bank accounts of numerous non-governmental organisations and civil society activists were frozen by the domestic authorities within the framework of criminal case no. 142006023. The domestic proceedings concerning the freezing of those bank accounts are the subject of the present two and other applications pending before the Court (see, for example the communicated cases, *Imranova and Others v. Azerbaijan*, nos. 59462/14 and 4 others; *Economic Research Centre and Others v. Azerbaijan*, nos. 74254/14 and 5 others; and *Abdullayev and Others v. Azerbaijan*, nos. 74363/14 and 7 others).

6. Various human rights defenders and civil society activists were also arrested within the framework of the same criminal proceedings in connection with their activities within or with various non-governmental organisations. The domestic proceedings concerning the arrest and pre-trial detention of some of those human rights defenders and civil society activists have already been examined by the Court (see, for example, *Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016; *Mammadli v. Azerbaijan*, no. 47145/14, 19 April 2018; *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, 20 September 2018; and *Yunusova and Yunusov v. Azerbaijan (no. 2)*, no. 68817/14, 16 July 2020).

7. In July 2014 the applicant was invited to the Prosecutor General's Office where he was questioned about the applicant association's activities. Between July 2014 and 2016 he was again questioned, on several occasions, by the prosecuting authorities about the same activities.

(...)

III. IMPOSITION OF TRAVEL BANS

(…)

B. The travel ban imposed by a court for tax debt of the applicant association

8. Following an inspection carried out by the tax authorities in respect of the applicant association's financial activities, on 12 and 13 March 2015 the tax authorities drew up a report and decided that the applicant association should pay to the State budged 4,897 Azerbaijani manats (AZN) (approximately EUR 2,450 at the material time).

9. On 14 April 2015 the applicant association lodged a claim, asking the court to declare invalid the tax authorities' report of 12 March 2015 and decision of 13 March 2015.

10. On 29 October 2015 the Sumgait Administrative-Economic Court granted the tax authorities' request, to suspend the examination of the applicant association's claim pending the criminal case in connection with its activities.

11. Following a request submitted by the tax authorities, on 8 July 2016 the Sumgait City Court decided to restrict the applicant's right to leave the country. The court relied on Articles 355-5 and 355-7 of the Code of Civil Procedure ("the CCP") and found that the applicant was the head of the executive body of the applicant association which had a tax debt in the amount of AZN 7,385 (approximatively EUR 3,700 at the material time). Although the court decision indicated that the applicant's right to leave the country was temporarily (*müvəqqəti olaraq*) restricted, it did not provide any time-limit for the imposed restriction.

12. On 28 July 2016 the applicant appealed against that decision, noting that there was no court decision finding that the applicant association had a tax debt since the relevant domestic proceedings had been suspended. In any event, even assuming that there was a tax debt, it could be paid from the sums on the applicant association's bank account and there was no reason for restricting his right to leave the country. In that connection, he also pointed out that a travel ban had already been imposed on him by the prosecuting authorities.

13. On 22 September 2016 the Sumgait Court of Appeal upheld the first-instance court's decision of 28 July 2016, holding that the existence of a previous travel ban did not prevent the imposition of a travel ban by different State authority in separate proceedings. The appellate court did not address the applicant's other arguments.

14. On 5 December 2016 the applicant lodged a cassation appeal, reiterating his previous complaints.

15. On 9 February 2017 the Supreme Court dismissed the applicant's cassation appeal.

(…)

V. FURTHER DEVELOPMENTS

16. On 19 December 2018 the applicant association paid the tax debt imposed by the tax authorities.

(…)

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

(…)

17. The relevant provisions of the domestic law relating to the right of a person to leave the country and Article 449 of the CCrP are described in detail in the Court's judgment *Mursaliyev and Others v. Azerbaijan* (nos. 66650/13 and 10 others, §§ 15-18, 13 December 2018). In addition, on 20 October 2015 the failure to pay taxes was added to Article 9.3.6-1 of the Migration Code as one of the cases in which a citizen's right to leave the country may be restricted on the basis of a court decision.

18. On 20 October 2015 a new chapter (Chapter 40-2) relating to the proceedings on temporary restriction of the right to leave the country of taxpayer physical persons or heads of executive bodies of legal persons was added to the Code of Civil Procedure ("the CCP"). In particular, in accordance with Article 355-5.1 of the CCP, the relevant domestic authority is entitled to apply to the relevant court for temporarily restricting the above-mentioned persons' right to leave the country in view of ensuring the payment of tax debt.

THE LAW

(…)

IV. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

19. The applicant complained that his right to leave his own country had been breached by the domestic authorities. The relevant part of Article 2 of Protocol No. 4 to the Convention reads as follows:

> "2. Everyone shall be free to leave any country, including his own.
>
> 3. No restrictions shall be placed on the exercise of [this right] other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others ..."

A. Admissibility

20. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

21. The applicant maintained that both travel bans imposed on him had been unlawful, had not pursued any legitimate aim and had not been a necessary measure in a democratic society.

22. The Government contested that there was a travel ban imposed on the applicant by the prosecuting authorities. As regards the travel ban imposed by the court, they submitted that it was in accordance with Article 355-5.1 of the CCP, pursued the legitimate aims of maintenance of public order and prevention of crime and was necessary in a democratic society.

2. The Court's assessment

(…)

(b) As regards the travel ban imposed by the court

23. The Court notes that it is not in dispute between the parties that the domestic courts' decision to restrict the applicant's right to leave the country amounted to an interference with his right to leave his own country within the meaning of Article 2 § 2 of Protocol No. 4. That is also the Court's opinion. It must therefore be examined whether it was "in accordance with law", pursued one or more of the legitimate aims set out in Article 2 § 3 of Protocol No. 4 and whether it was "necessary in a democratic society" to achieve such an aim.

24. Without ruling on the question whether the imposition of a travel ban on the applicant could be considered justified in the light of the suspension of the court proceedings relating to the tax dispute between the applicant association and the tax authorities, the Court observes that such a measure could be imposed in accordance with Article 9.3.6-1 of the Migration Code and Article 355-5.1 of the CCP (see paragraphs 46-47 above). The Court also notes that a measure which seeks to restrict an individual's right to leave the country for the purpose of securing the payment of taxes may pursue the legitimate aims of maintenance of *ordre public* and protection of the rights of others (see *Riener v. Bulgaria*, no. 46343/99, §§ 114-17, 23 May 2006). However, having regard to the particular circumstances of the present case, the respondent Government has not demonstrated that the impugned measure pursued any of the legitimate aims set out in Article 2 § 3 of Protocol No. 4.

25. In particular, the Court notes that neither the tax authorities nor the domestic courts sought to collect the tax debt in question without imposing a travel ban on the applicant. In particular, they did not consider deducting the alleged tax debt from the money available on the applicants' bank accounts or seizing any other assets owned by them despite the applicant's explicit request in that regard in the court proceedings (see paragraphs 29 and 31 above). The Government have not contested the applicant's submission that the sum allegedly due, AZN 7,385, was available on the bank accounts.

26. The tax authorities and the domestic courts also failed to put forward any argument how the imposition of the travel ban in question was necessary for the collection of the tax debt. In that connection, the Court reiterates that restriction on the right to leave one's country on grounds of unpaid debt can only be justified as long as it serves its aim – recovering the debt (see *Napijalo v. Croatia*, no. 66485/01, 13 November 2003, §§ 78-82, and *Stetsov v. Ukraine*, no. 5170/15, § 29, 11 May 2021).

27. The foregoing considerations are sufficient to enable the Court to conclude that the interference in question with the applicant's right to leave his country did not pursue a legitimate aim. This finding makes it unnecessary to determine whether the interference was necessary in a democratic society.

28. There has accordingly been a violation of the applicant's right to leave his country, as guaranteed by Article 2 § 2 of Protocol No. 4, on account of the travel ban imposed on him by the domestic courts.

(…)

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

(…)

Holds that there has been a violation of Article 2 of Protocol No. 4 to the Convention on account of the travel ban imposed on the applicant by the domestic courts;

(…)

European Court of Human Rights

18 November 2021

Par and Hyodo v. Azerbaijan

Case number: 54563/11 and 22428/15

Deterrent measures – Controls of cash entering or leaving the country – Obligation to declare – Infringement – Confiscation of undeclared sums of money – Seized money transferred to the State budget apparently in exchange for termination of criminal proceedings against the applicants and their being allowed to leave the country – Arbitrary act of taking money from accused persons

Summary

Two persons failed to declare sums of money to the customs authorities when they left Azerbaijan. The money was seized from these persons and criminal proceedings were launched against them. These criminal proceedings were terminated immediately after the submission of these persons' requests to transfer the money to the State budget.

Under the specific circumstances of these cases, the Court considered that the applicants' allegations that they submitted those requests under pressure while facing the risk of a prison sentence and a prolonged ban on leaving Azerbaijan were plausible.

In the Court's view, the interference in the present cases with these persons' property rights could not be considered "lawful" within the meaning of Article 1 of Protocol No. 1 to the Convention. This finding made it unnecessary to examine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the applicants' fundamental rights.

The European Court of Human Rights (Fifth Section), (…) delivers the following judgment, which was adopted on that date:

INTRODUCTION

29. The applications concern the retention by the State authorities of undeclared sums of money seized from the applicants by the customs authorities, and raise issues mainly under Article 1 of Protocol No. 1 to the Convention.

THE FACTS

30. The first applicant was born in 1960 and lives in Istanbul, Turkey. The second applicant was born in 1973 and lives in Yokohama, Japan. (…)

(…)

31. The facts of the cases, as submitted by the parties, may be summarised as follows.

I. THE FIRST APPLICANT

32. On 25 May 2010 the first applicant travelled from Istanbul to Baku. According to her, the purpose of the trip was to withdraw money that had been transferred to her bank account in Baku from a company operating in China and to take it in cash to Turkey. The following day the applicant arrived at Heydar Aliyev International Airport in Baku to travel to Istanbul. At the customs checkpoint she declared 39,900 euros (EUR) but failed to declare the sum of EUR 210,100 in her cabin bag, which was being carried by her colleague A.A., also a Turkish national. Upon the discovery of the latter amount, the customs officers drew up a report and seized the money (a copy of the report is not available in the case file).

33. A preventive measure prohibiting the applicant from "leaving her place of residence" was ordered.

34. On 9 August 2010 an investigator of the Investigation Department of the State Customs Committee ("the SCC") formally charged the applicant with smuggling by an organised group under Article 206.3.2 of the Criminal Code (see paragraph 58 below).

35. According to the applicant, the customs officials informally told her that they would terminate the criminal proceedings against her and that she could return to Turkey if she agreed to transfer the seized amount to the State budget of Azerbaijan.

36. According to the applicant, the application of the above-mentioned preventive measure and the situation as a whole limited her business activities and negatively affected her health. As a result, on 22 September 2010 she signed a written statement addressed to "the authorised State bodies". She submitted that she was engaged in business activities in Turkey and other countries. She denied forming any group with A.A., who had been unaware of the money in the bag she was carrying and expressed her regret for failing to declare it. The applicant indicated that she "agreed" to transfer the seized amount to the State budget of Azerbaijan while asking the authorities to dismiss the serious charges and bring appropriate charges against her (*verilən ağır ittihamın ləğv edilərək düzgün ittiham irəli sürülməklə*). This request was approved by a notary on the same date.

37. On 23 September 2010 the applicant's lawyer asked the SCC to terminate the criminal proceedings against her, having regard to her frank confession, her ill health, the fact that she had committed a less serious criminal offence as a first-time offender and her agreement to transfer the seized amount to the State budget.

38. On the same date the investigator charged the applicant with the less serious offence of smuggling under Article 206.1 of the Criminal Code (see paragraph 58 below). In doing so, the investigator did not refer to the decision of 9 August 2010 (see paragraph 34 above), but it appears that the new charge replaced the previous one.

39. On 24 September 2010 the investigator decided to terminate the criminal proceedings against the applicant on account of a change of circumstances (*şəraitin dəyişməsi ilə bağlı*), under Article 74 of the Criminal Code (see paragraph 57 below). The decision stated that the applicant, having been engaged in business activities and having previously travelled to Azerbaijan on numerous occasions, had committed the criminal offence of smuggling by failing to declare the sum of EUR 210,100. The decision further stated that the applicant had confessed to committing the above-mentioned criminal offence, that she had given up the money in question, which was the object of the offence, in favour of the State and that no damage had been inflicted on citizens' or the State's interests as a result of the offence.

40. On an unspecified date the applicant left Azerbaijan.

41. On 5 January and 7 February 2011 the applicant asked the investigator to send her a copy of the decision terminating the criminal proceedings against her and to return the sum of EUR 210,100 to her. Having received no reply, on 18 April 2011 she lodged a complaint against the investigator with the Yasamal District Court under the judicial supervision procedure provided for by Article 449 of the Code of Criminal Procedure, ("the CCrP") asking to have his actions, in particular his failure to return her money, declared unlawful.

42. On 17 May 2011 the Yasamal District Court dismissed the complaint without any reasoning, merely noting that there had been no unlawfulness in the investigator's actions.

43. The applicant lodged an appeal, arguing that the money in question had been brought to Azerbaijan lawfully from abroad and had been in her bank account there. Relying on Articles 51 and 206.1 of the Criminal Code and Article 132.0.4 of the CCrP (see paragraphs 55 and 58-59 below), the applicant argued that there was nothing in the case file to show that the money had been acquired by criminal means, and that therefore it could not be confiscated. She further argued that the transfer to the State budget of the money in question could not be regarded as a "change of circumstances".

44. On 22 June 2011 the Baku Court of Appeal upheld the first-instance court's decision. It held that the written request by the applicant had been submitted voluntarily. No further appeal lay against the appellate court's decision.

II. THE SECOND APPLICANT

45. On 27 March 2011 the second applicant travelled from Istanbul to Baku. According to the applicant, he brought cash with him which he had withdrawn from his bank account in Japan but had not declared upon his arrival because no one had asked him to do so. Since he wanted to buy immovable property in Azerbaijan, he converted most of his money into Azerbaijani manats (AZN) at a bank in Baku. On 30 March 2011 the applicant arrived at Heydar Aliyev International Airport to travel to Istanbul. At the customs checkpoint the customs officials discovered in his bag the sum of AZN 248,300, which he had failed to declare. That amount was seized by the officials. When asked if he had anything else to declare, the applicant admitted that he had different amounts in several foreign currencies (AZN 8,865.96 in total). Those amounts were also seized by the officials, who drew up a report on the matter (a copy of the report is not available in the case file).

46. On 4 April 2011 the applicant was formally charged with smuggling under Article 206.1 of the Criminal Code.

47. On 29 April 2011 the applicant's lawyer asked the SCC to terminate the criminal proceedings against him and to return his money. He submitted that the applicant wished to buy immovable property in Azerbaijan and had withdrawn the money from his bank account in Japan. The lawyer presented similar arguments to those put forward in the first applicant's appeal to the Baku Court of Appeal (see paragraph 43 above). In support of his arguments, he also referred to a judgment given by the Court of Appeal on 6 February 2007 in criminal proceedings instituted under Article 206.1 of the Criminal Code against another individual (see paragraph 62 below for details).

48. On 21 May 2011 the applicant revoked the power of attorney given to his lawyer. It appears that the lawyer was not informed of the revocation.

49. On 23 May 2011, apparently without his lawyer's involvement, the applicant signed a statement written in Azerbaijani and in Japanese addressed to the head of the SCC, whereby he asked for the termination of the criminal proceedings against him and assistance with his return to Japan while expressing his willingness to transfer the sum of AZN 248,300 to the State budget.

50. On 23 June 2011 the investigator decided to terminate the criminal proceedings against the applicant, referring to the same provision of the Criminal Code and to similar grounds to those put forward in the first applicant's case (see paragraph 39 above). The investigator also decided to return to the applicant the remainder of the seized money (different amounts in foreign currencies – see paragraph 45 above) because he had verbally declared them.

51. On an unspecified date the applicant left Azerbaijan.

52. Two years later, on 20 June 2013 the applicant lodged a complaint against the Investigation Department of the SCC with the Yasamal District Court under the judicial supervision procedure, asking for the termination of the criminal proceedings against him on various grounds, in particular because there had been no criminal offence, and for the return of the seized money. In addition to his previous arguments (see paragraph 47 above), the applicant complained that investigative steps had been taken in the absence of his lawyer and that there had been no legal basis for the transfer of his money to the State budget.

53. At the court hearing, N.A., a translator who had accompanied the applicant several times at the SCC, submitted that, during their previous visit there, the applicant had informed him that the investigator had instructed him to come without a lawyer or a translator on his next visit.

54. On 14 November 2013 the Yasamal District Court dismissed the complaint, finding briefly that the investigator's decision had been lawful and that there was no proof as regards any pressure against the applicant. On 3 October 2014 the Baku Court of Appeal upheld that decision without addressing the applicant's arguments. A copy of the appellate court's decision was served on the applicant on 8 December 2014.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE 2000 CRIMINAL CODE

55. Article 51 of the Code, which was in force at the material time, defined confiscation as the compulsory taking by the State, without any compensation, of (i) instruments and means used for the commission of a criminal offence, (ii) objects of a crime and (iii) property acquired by criminal means. It could be applied only where it was provided for under specific provisions of the Code.

56. Article 62 provided that a court could apply a more lenient sentence than the one provided for under specific provisions of the Code because of, *inter alia*, the existence of exceptional circumstances relating to the purpose and motive of the crime, the role of the accused in committing the criminal offence and other circumstances substantially reducing the danger to the public posed by the criminal offence.

57. Article 74 of the Code, as in force at the material time, provided that a person who had committed a minor or a less serious criminal offence for the first time could be released from criminal liability if it was established that the criminal offence or the person who had committed it no longer posed a danger to the public on account of a change of circumstances.

58. Under Article 206.1, as in force at the material time, smuggling, that is, the movement of large amounts of goods or other objects across the customs border of the Azerbaijan Republic, committed by concealing such goods from customs or combined with the non-declaration or inaccurate declaration of such goods, carried a criminal penalty of up to five years' imprisonment. Article 206.3.2, as in force at the material time, provided for a criminal penalty of five to eight years' imprisonment, with or without confiscation, for smuggling by an organised group.

II. THE 2000 CODE OF CRIMINAL PROCEDURE

59. Article 132.0.4 of the Code of Criminal Procedure, which was in force at the material time, provided that money or valuables which were acquired by criminal means or were the object of a crime had to be directed, on the basis of a court judgment, towards paying for damage inflicted as a result of the criminal offence, or transferred to the State if the victim was unknown.

60. Article 449 of the Code of Criminal Procedure provided that procedural acts or decisions of the authority conducting the criminal proceedings, including, among others, the investigator, could be contested before the supervising courts.

III. THE LAW ON CURRENCY VALUATION AND THE RULES ON IMPORT TO AND EXPORT FROM THE REPUBLIC OF AZERBAIJAN OF CURRENCY ASSETS BY PHYSICAL PERSONS

61. Article 11 of the Law on Currency Valuation of 21 October 1994 ("the Law") and Article 3 of the Rules on Import to and Export from the Republic of Azerbaijan of Currency Assets by Physical Persons, approved by the National Bank of Azerbaijan on 18 March 2002, which were in force at the material time, provided that non-residents could take out of Azerbaijan a portion of the money previously brought in cash or transferred to Azerbaijan in an amount up to the equivalent of 50,000 United States dollars (USD) in cash, without paying any duties, by declaring it to the customs authorities. Amounts exceeding the equivalent of USD 50,000 that had previously been brought to Azerbaijan in cash could be transferred abroad subject to the presentation of an official certificate from a bank or other credit institution of the country from which the money had been brought confirming that

the money in question had been issued in cash to the person. Article 11 of the Law also provided that non-residents had the right to transfer abroad currency assets previously transferred to Azerbaijan without any obstacles.

IV. DOMESTIC CASE-LAW

62. In a judgment of 6 February 2007 (case no. 2-182/2007), the Court of Appeal quashed a first-instance court's judgment convicting O.C. under Article 206.1 of the Criminal Code, sentencing him to one and a half years' imprisonment and ordering the confiscation of the undeclared money (USD 64,900). The court concluded that even though O.C. had failed to declare the money in question, it was neither acquired by criminal means nor the object of a crime. It therefore ordered the return of the money and, applying Article 62 of the Criminal Code, sentenced O.C. to a fine of AZN 2,000.

63. In a judgment of 20 April 2010 (case no. 1(102)-191/10), the Supreme Court upheld an appellate court's judgment ordering the return to F.O. of an undeclared sum of money (USD 160,000) that had been confiscated from him. The Supreme Court found that the origin of the money had not been disputed and that none of the scenarios listed in Article 51 of the Criminal Code existed in F.O.'s case. It also added that the confiscation of property could be ordered only under specific provisions of the Code and that Article 206.1 of the Code did not provide for such confiscation as a penalty.

64. In its judgments of 11 July 2017 (case no. 1(003)-273/2017) and 3 October 2017 (case no. 1(003)-367/2017), the Khazar District Court ordered the return of undeclared money seized by the customs authorities to A.G. (USD 25,000) and I.A. (EUR 68,000). It noted, *inter alia*, that the money in question had not been acquired by criminal means and that Article 206.1 of the Criminal Code did not provide for confiscation as a penalty. Applying Article 62 of the Criminal Code, it sentenced A.G. and I.A. to fines of AZN 1,000 and AZN 2,000 respectively.

THE LAW

I. JOINDER OF THE APPLICATIONS

65. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

66. The applicants complained that their money had, in fact, been confiscated unlawfully by the domestic authorities, in violation of Article 6 of the Convention and Article 1 of Protocol No. 1. The Court considers that this complaint should be examined solely under Article 1 of Protocol No. 1 (compare *Adzhigovich v. Russia*, no. 23202/05, § 17, 8 October 2009), which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

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

B. Merits

1. The parties' arguments

68. The applicants argued that they had transferred their money to the State budget not voluntarily, but under pressure from the customs authorities, which had told them informally that the criminal proceedings against them would be terminated if they did so. They argued that the text of the requests submitted by them also showed that the transfer had been conditional on "the dismissal of serious charges and the bringing of appropriate charges" in respect of the first applicant and "the termination of criminal proceedings" in respect of the second applicant.

69. The applicants further argued that Article 206.1 of the Criminal Code did not provide for the confiscation of undeclared sums of money and that the domestic law allowed such confiscation only if the money had been the object or instrument of a crime, which did not apply in their respective cases. They also referred to several domestic court decisions where the courts had ordered the return of undeclared sums to their owners in similar circumstances.

70. The Government argued that the applicants had voluntarily transferred the amounts in question to the State budget. They submitted that the first applicant had declared EUR 39,900, which at the material time was the equivalent of USD 50,000 – the amount allowed to be taken out of the country by non-residents. This fact proved that she had known the maximum amount of money she could take out of the country under domestic law. They further argued that the first applicant's statement had been duly approved by a notary, which showed that she had fully understood her actions and had not performed them under any duress.

71. As to the second applicant, the Government submitted that his statement expressing willingness to

transfer the money to the State had been written both in Azerbaijani and in Japanese and had been sent to the SCC through the Embassy of Japan in Azerbaijan. Accordingly, any allegation that it had been written against his will was untrue. They further submitted that the fact that the second applicant had lodged his complaint with the domestic court two years after the date of the termination of the criminal proceedings against him (see paragraph 25 above) cast doubt on the truthfulness of his assertions.

72. The Government argued that, in contrast to *Ismayilov v. Russia* (no. 30352/03, 6 November 2008), referred to by the first applicant in her application, there had been no confiscation, and therefore no deprivation of possessions, in the present cases.

2. The Court's assessment

73. The Court reiterates that Article 1 of Protocol No. 1 guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of possessions. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see, for example, *Ismayilov*, cited above, § 28, and *Karapetyan v. Georgia*, no. 61233/12, § 30, 15 October 2020).

74. It is not disputed that the money in question constituted the applicants' "possessions". It also appears undisputed that the amounts at issue, while initially seized by customs officers, remained the property of the applicants until the moment when they were transferred to the State budget on the basis of statements made by the applicants, not pursuant to any formal legal act emanating from the authorities (see paragraphs 36 and 49 above). Against that background, the parties are in dispute as to the existence of an interference by the State authorities. The Court must therefore first determine whether in the present cases there has been an interference by the State authorities with the applicants' rights under Article 1 of Protocol No. 1. While doing so, it is compelled to look behind the appearances and investigate the realities of the situation before it.

75. The Court firstly notes that there was a clear link between the applicants' allegedly involuntary statements to transfer the seized amounts to the State budget and developments in the criminal proceedings against them. The first applicant was prevented from leaving Azerbaijan pending the criminal proceedings against her and, more than two months after the seizure of the undeclared money, was formally charged with smuggling by an organised group – a criminal offence which carried a criminal penalty of five to eight years' imprisonment (see paragraphs 33-34 above). It was precisely one day after submitting the request by which she "agreed" to transfer the seized money to the State budget, that she was charged with a less serious offence and, on the next day, the criminal proceedings against her were terminated (see paragraphs 38-39 above). The Court observes a similar scenario in the second applicant's case. Several days after revoking the power of attorney given to his lawyer, the second applicant submitted a similar request to the SCC expressing his willingness to transfer the seized amount to the State budget, after which the criminal proceedings against him were swiftly terminated (see paragraphs 48-50 above). The text of the applicants' requests containing their statements about transferring their money to the State budget clearly show that they made those statements with the hope to obtain favourable developments in the criminal proceedings against them - the first applicant asked to have the serious charges against her dismissed, while the second applicant sought the termination of the criminal proceedings against him, which could have led to up to five years' imprisonment (see paragraphs 36 and 49 above). Moreover, there was also a clear link between the termination of the criminal proceedings and the applicants being able to leave Azerbaijan (see paragraphs 39-40 and 50-51 above).

76. The Court further observes that the decisions on terminating the criminal proceedings against the applicants referred to a change of circumstances and stated that the applicants no longer posed a "danger to the public", a statement which appears to have been mainly based on the applicants' written requests to transfer their money to the State budget.

77. Having regard to the above-mentioned factors, the sequence of events and, in particular, the termination of the criminal proceedings against the applicants immediately after the submission of their requests to transfer the money to the State budget, the Court considers that the applicants' allegations that they submitted those requests under pressure while facing the risk of a prison sentence and a prolonged ban on leaving Azerbaijan are plausible. It is also significant that, as is apparent from the case files, neither of the applicants was accompanied by a lawyer while signing the requests. As to the Government's arguments that the approval of the first applicant's statement by a notary and the submission of the second applicant's request in an additional Japanese version proved that there had been no pressure on them, the Court considers that, in the light of the above-mentioned elements, it is highly probable that the applicants had taken those steps under the customs authorities' instructions and not of their own motion. Therefore, the Court is of the view that the situation in the applicants' respective cases whereby their money was transferred to the State budget, apparently in

exchange for the termination of criminal proceedings against them and, consequently, their being allowed to leave Azerbaijan, amounted to an interference with the applicants' right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1.

78. The parties did not make submissions on the question of the rule of Article 1 of Protocol No. 1 under which the case should be examined. The Court considers that there is no need to resolve this issue because the principles governing the question of justification are substantially the same, involving as they do the legitimacy of the aim of any interference, as well as its proportionality and the preservation of a fair balance (compare *Denisova and Moiseyeva v. Russia*, no. 16903/03, § 55, 1 April 2010, and *Credit Europe Leasing Ifn S.A. v. Romania*, no. 38072/11, § 71, 21 July 2020).

79. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be "lawful" (see *Baklanov v. Russia*, no. 68443/01, § 39, 9 June 2005, and *Rafig Aliyev v. Azerbaijan*, no. 45875/06, § 119, 6 December 2011).

80. The Court observes that, after having left Azerbaijan, both applicants brought proceedings before the domestic courts in Azerbaijan asking for the return of their money, but to no avail. The domestic courts, without any adequate examination, briefly dismissed the applicants' arguments that they had been unlawfully forced to transfer their money to the State budget.

81. The Court notes that plea bargaining or out-of-court settlement procedure in criminal proceedings are possible in some legal systems (see, for a comparative study in the Council of Europe member States, *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, §§ 62-75, ECHR 2014 (extracts)). Under these mechanisms it is possible to change or drop charges against the accused person by reaching an agreement which is entered into voluntarily and is in accordance with applicable procedural and substantive rules. It appears that no equivalent mechanisms exist in Azerbaijan (ibid., § 62).

82. The Court accepts that its power to review compliance with domestic law is limited as it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention "incorporates" the rules of that law, since the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018, with further references). However, the Court notes in the present cases that when holding that the applicants had voluntarily transferred their money to the State budget, the domestic courts failed to refer to any legal provision which could have served as a legal basis for such a procedure.

83. Likewise, the Government failed to cite any legal provision that could have served as a basis for the transfer of such substantial amounts by the applicants to the State budget.

84. Moreover, the applicants had submitted their written requests in the absence of consultation with a lawyer or any other procedural guarantees. In such case, the Court cannot but conclude that the situation at hand amounted to an arbitrary act of taking money from an accused person.

85. Having regard to the above considerations, the Court finds that the interference in the present cases with the applicants' property rights cannot be considered "lawful" within the meaning of Article 1 of Protocol No. 1 to the Convention. This finding makes it unnecessary to examine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the applicants' fundamental rights.

86. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

(…)

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

(…)

Holds that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

European Court of Human Rights

9 December 2021

Yaremiychuk and Others v. Ukraine

Case number: 2720/13, 38071/13, 70418/13, 74638/13, 9832/15, 39154/15, 60818/15

Deterrent measures – Controls of cash entering or leaving the country – Obligation to declare – Infringement – Confiscation of undeclared sums of money – Proportionality

Summary

Persons entering into Ukrainian territory had to declare to the customs authorities the cash that they were carrying when it was more than EUR 10.000. The excess amount was confiscated in the event of failure to comply with that obligation.

The Court decides that States have a legitimate interest and also a duty by virtue of various international treaties to implement measures to detect and monitor the movement of cash across their borders, since large amounts of cash may be used for money laundering, drug trafficking, financing terrorism or organised crime, tax evasion or other serious financial offences. The general declaration requirement applicable to any individual crossing the State border prevents cash from entering or leaving the country undetected and the confiscation measure which the failure to declare cash to the customs authorities results in is part of the general regulatory scheme designed to combat those offences. In this regard, the Court considers that the confiscation measure conformed to the general interest of the community.

However, the Ukrainian customs code did not leave any discretion to the national courts as regards the sanction to be imposed, as confiscation of the excess amount was mandatory with no exceptions allowed.

The Court is of the view that such a rigid legislative approach is in itself incapable of ensuring the requisite fair balance between the requirements of the general interest and the protection of an individual's right to property (Art. 1 of the first Protocol).

The European Court of Human Rights (Fifth Section), (…) delivers the following judgment:

INTRODUCTION

87. The present cases mainly concern the applicants' complaint under Article 1 of Protocol No. 1 that the imposition of fines as well as the confiscation in full of their lawfully acquired money following their failure to declare it to the customs authorities had been an unlawful and disproportionate measure.

THE FACTS

(…)

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

89. When crossing the Ukrainian border the applicants used the "green channel" to pass through the customs control area without making a written declaration in respect of the cash they were carrying, which amounted to more than 10,000 euros (EUR). The domestic courts found the applicants guilty of having breached customs control procedures in the simplified customs control area (Article 471 of the Customs Code). Fines for the amount specified in Article 471 ranging between 73 and 165 euros were imposed on the applicants and the confiscation of the portion of cash in excess of EUR 10,000 was ordered in each case, with the exception of application no. 38071/13, in which the entire sum of cash carried by the applicant was seized (see the Appendix below for more details). In determining the case, the domestic courts essentially relied on the Regulation on the transportation of cash and precious metals across Ukraine's customs border, which provided for the mandatory declaration in writing at the border of any foreign currency amounting to more than EUR 10,000; that provision placed, in the courts' view, a restriction on bringing any foreign currency into Ukraine (see paragraph 92 below). The applicants' arguments that their failure to declare the money had not been intentional, that the money in issue had been lawfully acquired and the amount was not insignificant to the applicants, as well as Mr Popelyuk's argument that he owned only part of the money (no. 74638/13) were disregarded or dismissed by the domestic courts.

90. On 21 July 2021 the Constitutional Court declared the part of Article 471 of the Customs Code providing for the mandatory confiscation of all undeclared cash to be unconstitutional. It found, in particular, that such a measure was not capable of ensuring the requisite balance between the public interest and an individual's right to the peaceful enjoyment of his or her possessions and that therefore it was contrary to the rule of law. The Constitutional Court further ruled that the impugned provision of the Customs Code would continue to apply for six months in order to give the authorities time to draft an alternative regulation concerning liability for the administrative offence in issue. On 14 September 2021 the relevant legislative amendments were submitted to parliament.

RELEVANT LEGAL FRAMEWORK

91. The Customs Code of 13 March 2012, as worded at the material time, provided as follows:

Article 197
Restrictions on the movement of certain goods across the customs border of Ukraine

"1. In the cases provided for by law, certain goods shall be subject to restrictions on their movement across the customs border of Ukraine. The release of such goods across the customs border of Ukraine, and customs clearance, shall be carried out by the revenue and duties authorities on the basis of the documents obtained by use of information technology confirming that those restrictions have been observed, issued by the public authorities vested with carrying out appropriate checks and other legal entities authorised to issue them, if the presentation of such documents to the revenue and duties authorities is provided for in the laws of Ukraine.

2. Lists of such goods (with their description and code under the Ukrainian Classification of Goods for Foreign Economic Activity), and the procedure for the issuing of authorisations and their circulation with the use of information technology, shall be approved by the Cabinet of Ministers of Ukraine. ...

3. Restrictions on importing and exporting currency into and from Ukraine, and the procedure for moving currency across the customs border of Ukraine, including specific provisions on declaring currency (in particular, the specification of the amount subject to written or oral declaration) may be determined by the National Bank of Ukraine."

Article 366
Dual-channel system of customs supervision of goods and means of transport moved by individuals across the customs border of Ukraine

"1. The dual-channel system is a simplified system of customs control that allows citizens to proceed, with a declaration, through one of the two channels for entry (including driving through by means of private transport) across the customs border of Ukraine.

2. The channel marked with the colour green ('green channel') shall be intended for citizens who declare that they are moving goods across the customs border of Ukraine which: (i) are in amounts that are not subject to customs charges; (ii) do not fall under the prohibition or restriction on importation into or exportation from the customs territory of Ukraine as established by legislation; and (iii) are not subject to a written declaration.

...

5. The choice of passing through the green channel shall be regarded as an individual's statement that the goods moved by him or her across the customs border of Ukraine are not subject to a written declaration, customs fees, or any prohibitions and/or restrictions on importing/exporting into and out of the customs territory of Ukraine, and shall constitute acts of legal significance.

6. Citizens entering (or driving) through the green channel shall be exempted from filling out a customs declaration. Exemption from filling out the customs declaration shall not discharge the individuals concerned from compliance with the procedure for the movement of goods across the customs border of Ukraine."

Article 471
Violations of the customs control procedure in simplified customs control areas (channels)

"1. Violations of the customs control procedure in simplified customs control areas (channels), as specified by this Code, that is, where an individual who has chosen to go through a green channel is carrying goods that are prohibited from being carried across the customs border of Ukraine or subject to restrictions in that regard, or is carrying them in quantities exceeding the non-taxable limit set for the movement of such goods across the customs border of Ukraine,

– shall be punishable by a fine of one hundred times the minimum personal tax-free allowance and, when direct objects of the offences are goods whose movement across the customs border of Ukraine is prohibited or restricted by the legislation of Ukraine, by their confiscation."

92. The Regulation on the transportation of cash and precious metals across Ukraine's customs border, approved by Decree no. 148 of the National Bank of Ukraine of 27 May 2008 (as amended on 25 July 2012), provided as follows:

"2. Bringing cash into and out of Ukraine

1. Individuals may bring up to EUR 10,000 in cash (or the equivalent) into and out of Ukraine without declaring it in writing at the customs office.

2. Individual residents may bring more than EUR 10,000 in cash (or the equivalent) into and out of Ukraine subject to making a full declaration in writing at the customs office and furnishing a withdrawal receipt issued by a bank (financial institution) for the portion exceeding EUR 10,000 (or the equivalent). Withdrawal receipts shall be valid for thirty calendar days from the issue date.

3. Individual non-residents may bring more than EUR 10,000 in cash (or the equivalent) into Ukraine subject to making a full declaration in writing at the customs office.

4. Individual non-residents may bring more than EUR 10,000 in cash (or the equivalent) out of Ukraine if the amount does not exceed the amount declared by the individual at the customs office on his or her arrival in Ukraine. In this case, the cash is subject to a full declaration being made in writing at the customs office."

THE LAW

(...)

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

93. The applicants complained that the imposition of fines as well as the confiscation in full of their lawfully acquired money following their failure to declare it to the customs authorities had been an unlawful and disproportionate measure. They relied on Article 1 of Protocol No. 1, which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and

subject to the conditions provided for by law and by the general principles of international law.

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

A. Admissibility

94. The Government did not raise any objections as regards the admissibility of the complaints. The Court notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

95. Mr Rogach (no. 39154/15), Mr Gordeyev (no. 38071/13), Mr Tarakhovskyy (no. 60818/15) and Mr Sheverdinov (no. 70418/13) submitted that the confiscation measure had been unlawful and unforeseeable. Article 471 of the Customs Code, relied on by the domestic courts, provided that the confiscation measure applied solely to goods whose import into Ukraine was prohibited or restricted. However, while physical persons were obliged to declare at the border any cash amounting to more than EUR 10,000, this was purely for information purposes and did not represent a "restriction" within the meaning of Article 471 of the Customs Code. The applicants referred, *inter alia*, to Article 366 of the Customs Code, which established the framework for using the green channel and distinguished between goods which were subject to a written declaration and those whose import into Ukraine was prohibited or restricted (see paragraph 91 above).

96. Mr Gordeyev (no. 38071/13) complained further that the entire sum of cash he had been carrying had been confiscated from him, not just the portion exceeding EUR 10,000.

97. According to all the applicants, the confiscation measure was an excessive and disproportionate measure: it had not been illegal to carry foreign currency across the customs border of Ukraine; the money had been legally acquired and had not been concealed but had been presented to customs officers at their request; the failure to declare the money had not been intentional and had not caused any damage to the State; and the confiscated amounts represented a not insignificant sum of money for the applicants. Despite being aware of all those factors, the domestic courts had nevertheless imposed the confiscation order, even though a fine would have been sufficient in the circumstances of their cases. According to the applicants, their situation was very similar to that of the applicant in *Sadocha v. Ukraine* (no. 77508/11, 11 July 2019), in which the Court had found that the undeclared money had been confiscated from the applicant in breach of Article 1 of Protocol No. 1.

(b) The Government

98. The Government conceded that there had been an interference with the applicants' right of property when the domestic authorities had confiscated the undeclared cash from the applicants. However, the interference had been lawful and proportionate. Without specifically addressing the applicants' arguments as regards the lawfulness of the application of the confiscation measure in their cases, they submitted that the confiscation, as a sanction for the administrative offence in question, had been provided for by Article 471 of the Customs Code and that the applicants were or should have been aware that the transfer of a considerable sum of cash across the border was subject to certain restrictions provided for by law. They could have reasonably been expected to make some enquiries into this matter before setting out on a journey.

99. The State also had a right and a duty to detect and monitor the movement of cash across its borders, since large sums of cash might be used for money-laundering, drug trafficking, the financing of terrorism or organised crime, tax evasion or the commission of other serious financial offences.

2. The Court's assessment

100. The Court notes that it is not in dispute between the parties that the confiscated money constituted the applicants' possession, except for Mr Popelyuk, who claimed he had only owned a part of the confiscated sum, and whose alleged "possession" at issue in the present case is the money he claims as his own (see No. 4 in the Appendix). It is likewise not in dispute that domestic courts' decisions ordering confiscation of the undeclared cash amounted to an interference with the applicants' right to the peaceful enjoyment of their possessions guaranteed by Article 1 of Protocol No. 1. The Court finds no reason to hold otherwise.

101. It further reiterates its consistent approach according to which a confiscation measure, even though it involves a deprivation of possessions, constitutes control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. However, this provision must be construed in the light of the general principle set out in the first sentence of the first paragraph (see, among other authorities, *Perdigão v. Portugal* [GC], no. 24768/06, § 57, 16 November 2010; *Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria*, no. 3503/08, § 36, 13 October 2015; and *Gyrlyan v. Russia*, no. 35943/15, § 21, 9 October 2018).

102. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The existence of a legal

basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness which, in addition, presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see, among other authorities, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 187, ECHR 2012, and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 96, 25 October 2012).

103. The Court has also acknowledged in its case-law that, however clearly drafted a legal provision may be, in any system of law there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adapting to changing circumstances. Again, while certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 568, 20 September 2011).

104. Turning to the circumstances of the present case, the Court notes that the applicants were essentially found guilty of failure to declare to the customs authorities the sum of cash that they were carrying. The obligation to declare the total sum of cash, when it was more than EUR 10,000, was set out in the Regulation issued by the National Bank of Ukraine (see paragraph 92 above). The regulatory framework for using the green channel, which excluded the use of that channel by a person carrying goods that were subject to a written declaration, was laid down in Article 366 of the Customs Code (see paragraph 91 above). The applicants' conduct was defined by the domestic authorities as the offence of breaching the customs control procedure in simplified customs control areas (Article 471 of the Customs Code), which applied, as specified by the wording of this provision, to instances where an individual who had chosen to go through a green channel was carrying goods that were prohibited from being carried across the customs border of Ukraine or subject to restrictions in that regard, or was carrying them in quantities exceeding the non-taxable limit set for the movement of such goods across the customs border of Ukraine (ibid.). The sanction for this offence was a fine and – in the case of goods that were either prohibited from being carried across the customs border or subject to restrictions in that regard – confiscation of the goods.

105. As regards Article 471 of the Customs Code, which was drafted in a manner which could give raise to difficulties, it was for the domestic courts to interpret and clarify any issues raised. A large number of similar applications pending before the Court and the judgment delivered in *Sadocha* (cited above) show that the domestic authorities had consistently interpreted and applied Article 471 to the effect that cash was a good whose entry into Ukrainian territory was subject to a restriction in the form of an obligation to declare it to the customs authorities where the amount was more than EUR 10,000, and that confiscation of the excess amount was applicable in the event of failure to comply with that obligation (see § 8 of *Sadocha*, cited above).

106. In these circumstances, and being bound by its subsidiary role, the Court accepts that the interference complained of met the lawfulness requirement under the Convention in respect of all applicants except Mr Gordeyev (no. 38071/13), who was deprived of all the cash he carried, not just the portion that exceeded EUR 10,000, contrary to the general practice of the domestic courts. In the absence of any reason advanced in this regard by the domestic courts or the Government, the Court finds that the interference with Mr Gordeyev's property rights was unlawful.

107. The Court further notes that States have a legitimate interest and also a duty by virtue of various international treaties to implement measures to detect and monitor the movement of cash across their borders, since large amounts of cash may be used for money laundering, drug trafficking, financing terrorism or organised crime, tax evasion or the commission of other serious financial offences. The general declaration requirement applicable to any individual crossing the State border prevents cash from entering or leaving the country undetected and the confiscation measure which the failure to declare cash to the customs authorities results in is part of the general regulatory scheme designed to combat those offences. In this regard, the Court considers that the confiscation measure conformed to the general interest of the community (see, for example, *Sadocha*, cited above, § 26).

108. The remaining question to determine is whether the interference struck the requisite fair balance between the protection of the right of property and the requirements of the general interest, taking into account the margin of appreciation left to the respondent State in that area. The requisite balance will not be achieved if the property owner concerned has had to bear "an individual and excessive burden". Moreover, although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicants a reasonable opportunity to put their cases to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake (see, among other authorities, *Boljević v. Croatia*, no. 43492/11, § 41, 31 January 2017).

109. The Court notes that Article 471 of the Customs Code did not leave any discretion to the courts as regards the sanction to be imposed, as confiscation of the excess amount was mandatory with no exceptions allowed. It also notes that in 2021, a number of years

after the events in the present case, the Constitutional Court of Ukraine declared part of that provision unconstitutional, considering, in particular, that such a mandatory confiscation was not capable of ensuring the requisite balance between the public interest and an individual's right to the peaceful enjoyment of his or her possessions (see paragraph 90 above).

110. Like the Constitutional Court, the Court is of the view that such a rigid legislative approach is in itself incapable of ensuring the requisite fair balance between the requirements of the general interest and the protection of an individual's right to property (see, *mutatis mutandis*, *Gyrlyan*, cited above, § 31). In fact, it leaves no room for an assessment of the proportionality of the interference by the domestic courts by making any such assessment futile. Similarly, the automatic confiscation deprived the applicants of any possibility to argue their cases and have any prospect of success in the proceedings against them (see, *mutatis mutandis*, *Andonoski v. the former Yugoslav Republic of Macedonia*, no. 16225/08, § 38, 17 September 2015).

111. The lack of any discretion left to the domestic courts as regards the sanction to be imposed distinguishes the present case from that of *Sadocha* (cited above) referred to by the applicants (see paragraph 97 above), in which, pursuant to the legislation then in force, the Ukrainian courts did have a choice in the matter but were found by the Court to have failed to duly perform the proportionality assessment when choosing the applicable sanction However, the Court's task is not to review domestic law *in abstracto*, but to determine whether the manner in which it was applied to, or affected, the applicant gave rise to a violation of the Convention (see, for example, *Karapetyan v. Georgia*, no. 61233/12, § 36, 15 October 2020 and *Imeri v. Croatia*, no. 77668/14, § 76, 24 June 2021).

112. The Court notes in this respect that the act of taking foreign currency into and out of Ukraine was not illegal under Ukrainian law. Not only was it permissible to move the foreign currency across the customs border, but the sum was not, in principle, restricted at the time of the events, if declared (see paragraph 92 above). Furthermore, the case files suggest that it was not established by the domestic authorities in the present cases that the confiscated cash had been unlawfully obtained by the applicants or that the applicants had been engaged in money laundering or any other criminal activity.

113. The Court accepts that the confiscation measure in question was deterrent and punitive in its purpose. However, as established above, the mandatory nature of the confiscation of all the excess cash and a fine as a sanction precluded the domestic authorities from performing due analysis as to what measures would have been appropriate in the circumstances of each individual case.

114. The foregoing considerations are sufficient to enable the Court to conclude that the interference with the applicants' property rights was unlawful in the case of Mr Gordeyev (see paragraph 106 above) and imposed a disproportionate burden on the remaining applicants in view of the mandatory application of confiscation of all excess cash as the sanction, in addition to a fine.

115. There has accordingly been a violation of Article 1 of Protocol No. 1.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

116. On the basis of the same facts, some of the applicants further complained that the administrative-offence proceedings which had resulted in the confiscation order had been unfair. They relied, expressly or in substance, on Article 6 § 1 and Article 13 in conjunction with Article 6 of the Convention and Article 1 of Protocol No. 1.

117. Having regard to its findings under Article 1 of Protocol No. 1 (see paragraph 114 above), the Court considers that the main issue at the heart of the applicants' complaint, specifically the lawfulness of the confiscation of the undeclared amount of money following the administrative proceedings against them, has been addressed by the Court and that it is not necessary to give a separate ruling on the admissibility and merits of the allegation of a breach of Articles 6 and 13 of the Convention (see, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, with further references, and *Mocanu and Others v. the Republic of Moldova*, no. 8141/07, § 37, 26 June 2018).

(…)

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

(…)

Holds that there have been violations of Article 1 of Protocol No.1 in respect of all applicants;

(…)

European Court of Human Rights

31 August 2021

Milošević v. Croatia

Case number: 12022/16

Penalties – Ne bis in idem (Right not to be tried or punished twice) – Minor-offence penalty - Excise duties increased one hundred times in tax proceedings – Two sets of proceedings not sufficiently linked in substance to form a coherent whole

Summary

A person was fined by way of a minor-offence penalty notice for having used a type of heating oil for a purpose which was not allowed by the Excise Duties Act. Three days later, he was ordered to pay excise duties on the heating oil he had used, increased one hundred times.

The Court noted that the two sets of proceedings sanctioned the same behaviour, defining and qualifying the illegal use of heating oil in the same manner and prescribing two separate sanctions which were not of a different nature. This was sufficient for the Court to conclude that the present case did not address different aspects of the wrongdoing in a manner forming a coherent whole.

In addition, the fine imposed in the minor-offence proceedings was not taken into account in the subsequent administrative tax proceedings.

Notwithstanding their foreseeability, the two sets of proceedings had not been sufficiently linked in substance, as required under the Court's case-law, to be considered to form part of an integral scheme of sanctions under Croatian law, as in force at the material time, for illegal use of specially-taxed heating oil as fuel. On the contrary, having been punished twice for the same conduct, the person had in the Court's view suffered disproportionate prejudice resulting from the duplication of proceedings and penalties, which did not form a coherent and proportionate whole in his case.

In such circumstances, the Court found it unnecessary to review whether the two sets of proceedings were sufficiently connected in time. There had accordingly been a violation of Article 4 of Protocol No. 7 to the Europan Convention of Human Rights.

The European Court of Human Rights (First Section), (…) delivers the following judgment (…):

INTRODUCTION

118. The case concerns the applicant's punishment in minor-offence proceedings for using prohibited heating oil as fuel in his truck and the subsequent imposition of excise duties for the use of that oil increased one hundred times. The applicant alleges that this infringed his right not to be tried and punished twice for the same offence.

THE FACTS

119. The applicant was born in 1966 and lives in Bosanski Brod. (…)

(…)

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

121. On 29 June 2012 an inspection by the authorised Vukovar Customs Office (*Carinarnica Vukovar*), in cooperation with the police, found that the fuel in a truck owned by the applicant was a special state-supported heating oil, which could not be used as fuel for motor vehicles.

122. On the same day, the Customs Office found the applicant guilty of a minor offence under the Excise Duties Act for the use of the heating oil in his truck contrary to section 74(2) of that Act and fined him with 4,800 Croatian kunas (HRK; approximately 640 euros (EUR)). The relevant part of the penalty notice (*prekršajni nalog*) reads as follows:

> "The [applicant] ... is guilty... because on 29 June 2012 ... a truck owned by him... was using red tinted heating oil as fuel,
>
> whereby he was acting in violation of section 74(2) of the Excise Duties Act,
>
> punishable under section 80(3) of the Excise Duties Act...
>
> ...
>
> In accordance with section 34(3) of the Minor Offences Act, if the [applicant] fails to pay the fine in full or in part, it shall be collected by force, and if such enforcement is unsuccessful within a period of one year from initiation of the enforcement proceedings, the competent minor offences court shall convert the [fine] to imprisonment of 16 days...
>
> ...
>
> It has been established from the record of the inspection of the proper use of fuel ... and the record of sampling ... that [the applicant's vehicle] used red tinted heating oil as fuel.
>
> In view of the above, the minor-offences committee of this Customs Office has established that the actions of the [applicant] fulfil all characteristics of the minor offence he has been charged with because, as the owner of a motor

vehicle, he is responsible for the breach of the Excise Duties Act as stated in the operative part of this penalty notice...

By his action, the [applicant] has violated section 74(2) of the Excise Duties Act, which provides that [heating] oils enumerated in section 73 of that Act could not be used as fuel in motor vehicles, boats or other machines, or for any purpose other than heating..."

123. Since the applicant did not appeal, this decision became final and he duly paid his fine.

124. On the same day, the Vukovar Customs Office sent the relevant record of the inspection of the proper use of fuel and the record of sampling to its administrative department in order to calculate the amount of tax surcharges due.

125. On 2 July 2012 the Osijek Customs Office (*Carinarnica Osijek*) ordered the applicant to pay HRK 123,000 (approximately EUR 16,700) in respect of excise duties, consisting of the amount of excise duties for the amount of oil in question increased one hundred times due to its illegal use on 29 June 2012. This decision was based on section 76(2) of the Excise Duties Act.

126. The applicant challenged this decision before the Ministry of Finance (*Ministarstvo financija*), and on 31 October 2013 the Ministry quashed the first-instance decision on the grounds that the quantity of the heating oil subject to excise duties had not been properly determined.

127. On 15 January 2014 the Osijek Custom Office rendered a fresh decision ordering the applicant payment of HRK 83,025 (approximately EUR 11,300), which consisted of the amount of excise duties for the amount of heating oil in question increased one hundred times due to its illegal use on 29 June 2012. This decision was upheld on appeal.

128. The applicant then lodged an administrative action, challenging the decision of the administrative authorities.

129. On 20 January 2015 the Osijek Administrative Court (*Upravni sud u Osijeku*) dismissed the applicant's action. That decision was upheld on appeal by the High Administrative Court (*Visoki upravni sud Republike Hrvatske*).

130. Subsequently, the applicant lodged a constitutional complaint before the Constitutional Court (*Ustavni sud Republike Hrvatske*) complaining, *inter alia*, that he had been punished twice for the same act, contrary to Article 4 of Protocol No. 7.

131. On 20 January 2016 the Constitutional Court declared the applicant's complaint inadmissible as manifestly ill-founded, without providing a reply to his *ne bis in idem* complaint.

RELEVANT LEGAL FRAMEWORK

132. The relevant provisions of the Excise Duties Act (*Zakon o trošarinama*, Official Gazette no. 83/09), as in force at the material time, read as follows:

Section 1

"This Act regulates the excise duties system of taxation of alcohol and alcoholic drinks, tobacco, energy sources and electricity ... which are released on the market within the territory of the Republic of Croatia."

Section 73

"1. Gas oils subject to tariff codes ..., which are used as heating oil, must be labelled by a prescribed indicator ..."

Section 74

"1. Labelled gas oils referred to in section 73 of this Act may be used and sold solely for the purpose prescribed by this Act.

2. Labelled gas oils referred to in section 73 of this Act may not be used to power motor vehicles ... or for any other purpose except as heating oil."

Section 76

"2. If it is established during an inspection of motor vehicles ..., that gas oils referred to in section 73 of this Act have been used for purposes and in the manner other than those prescribed by section 74 of this Act, the owner of the motor vehicle ... shall be charged with excise duties with respect to the quantities corresponding to the volume of the motor fuel tank, multiplied by a factor of one hundred..."

Excise duties minor-offences
Section 80

"1. A legal person shall be fined in the amount ... for an offence...

47. if they do not use gas oils in the prescribed manner (section 74(2)) ...

3. A natural person shall also be fined for an offence referred to in paragraph 1, point... 47 of this section, in the amount between HRK 2,000 and HRK 10,000."

133. In 2015 the Excise Duties Act was amended to exclude the increase by one hundred times of the amount of excise duties due in case of the use of gas oils contrary to that Act. According to the final proposal of the Amendments to the Excise Duties Act dated September 2015, such an increase of excise duties due had been contrary to the *ne bis in idem* principle and the Act was amended in order to comply with the jurisprudence of the Court of Justice of the European Union and best practices of other EU Member States. The provision on the excise duties minor offence relating to illegal use of gas oils as fuel in motor vehicles remained unchanged.

134. Section 34 of the Minor Offences Act (*Prekršajni zakon*, Official Gazette no. 107/07), as in force at the material time, provided that any unpaid fine imposed in minor-offence proceedings was to be executed by force and, if such enforcement failed, that it was to be replaced by imprisonment, calculating each day as HRK 300.

THE LAW

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

135. The applicant complained that he had been tried and punished twice for the same offence contrary to Article 4 of Protocol No. 7 to the Convention, the relevant part of which 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."

A. Admissibility

136. The Government submitted that the applicant had failed to exhaust domestic remedies since he had not raised his *ne bis in idem* complaint before the administrative authorities deciding his case.

137. The applicant disagreed. He maintained that he had raised the said argument in his constitutional complaint. He further pointed out that a copy of the Court's judgment in the case *Ruotsalainen v. Finland* (no. 13079/03, 16 June 2009), which was identical to his, had formed part of his case file before the Administrative Court, as submitted by the Government. The administrative authorities must have therefore been aware of his *ne bis in idem* grievance.

138. The Court notes that the applicant expressly raised a complaint under Article 4 Protocol No. 7 in his constitutional complaint and that he received no reply. The applicant thereby provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely that of putting right the violations alleged against them (see, for instance, *Arps v. Croatia*, no. 23444/12, § 20, 25 October 2016). The Government's object must therefore be dismissed.

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

B. Merits

1. The parties' arguments

140. The applicant maintained that both the minor-offence and the subsequent administrative (tax) proceeding concerned the same event and had been based on the same legal provision. The fact that the excise duties imposed on him had been increased one hundred times proved that the said measure had been criminal in nature and had not been solely aimed at prevention of tax evasion.

141. The Government maintained that the two proceedings constituted a single integrated response to the unlawful conduct by the applicant. The minor-offence proceedings were primarily aimed at protection of traffic safety since heating oil was damaging to the engine of the vehicle that used it, whereas the administrative (tax) proceedings were aimed at collecting excise duties and therefore punishing and preventing tax evasion. Since heating oil was significantly cheaper than diesel or petrol fuel, due to a number of fiscal and parafiscal burdens the latter entailed, using heating oil in vehicles constituted a form of tax evasion because the unlawful use of heating oil to power motor vehicles caused the State to lose revenue it would otherwise have made by selling diesel or petrol fuel to drivers.

142. The Government further asserted that the two proceedings had been a foreseeable consequence of the applicant's illegal behaviour and that there had been no duplication in the collection and assessment of evidence, primarily because the minor-offence penalty notice had been issued in a summary procedure. Moreover, the penalties for the two proceedings had been integrated on the level of the law and the applicant's fine in the minor-offence proceedings had been only slightly above the legal minimum. Finally, in the Government's view, the two sets of proceedings had also been sufficiently connected in time since the administrative (tax) proceedings were initiated on the next working day following the applicant had been issued the minor-offence penalty notice.

2. The Court's assessment

(a) General principles

143. Article 4 of Protocol No. 7 to the Convention is 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 (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 82, ECHR 2009; *Marguš v. Croatia* [GC], no. 4455/10, § 114, ECHR 2014; and *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, § 108, 15 November 2016).

144. In cases raising an issue under Article 4 of Protocol No. 7, it should be determined whether the specific national measure complained of entails, in

substance or in effect, double jeopardy to the detriment of the individual or whether, in contrast, it is the product of an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice (see *A and B v. Norway*, cited above, § 122). The object of Article 4 of Protocol No. 7 is to prevent the injustice of a person's being prosecuted or punished twice for the same criminalised conduct. It does not, however, outlaw legal systems which take an "integrated" approach to the social wrongdoing in question, in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes (ibid., § 123).

(b) Application of the principles in the present case

(i) Whether both sets of proceedings were criminal in nature

145. The Court notes at the outset that neither the minor-offence nor the subsequent administrative (tax) proceedings at issue in the present case concerned the "hard core of criminal law". However, 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 *Sergey Zolotukhin*, cited above, § 52; and *Seražin v. Croatia* (dec.), no. 19120/15, § 64, 9 October 2018; see also *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, § 76, 22 December 2020**).**

146. 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 does not, however, 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).

147. Turning to the present case, the Court has held in a number of previous cases against Croatia that minor-offence proceedings were to be considered "criminal" for the purposes of Article 4 of Protocol No. 7 (see *Bajčić v. Croatia*, no. 67334/13, § 27, 8 October 2020, with further references; see also, in the context of Article 6, *Marčan v. Croatia*, no. 40820/12, § 33, 10 July 2014). The Court sees no reason to hold otherwise in the present case (see, in particular, paragraphs 122 and 134 above).

148. As regards the subsequent administrative (tax) proceedings, the Court observes that the relevant provision of the Excise Duties Act was directed towards all citizens rather than only a group possessing a special status and that the applicant was ordered to pay excise duties in his capacity as owner of a motor vehicle (see paragraph 132 above). Moreover, the amount of the excise duties due was increased one hundred times on account of illegal use of heating oil as fuel (see paragraph 127 above). This must, in the Court's view, be seen as a punishment to deter re-offending, recognised as a characteristic feature of criminal penalties (see *Ezeh and Connors*, cited above, §§ 102 and 105). Bearing in mind its previous case-law on the matter (see *Ruotsalainen v. Finland*, no. 13079/03, §§ 42-47, 16 June 2009; and *Rinas v. Finland*, no. 17039/13, §§ 40-43, 27 January 2015), the Court concludes that the excise duties in the present case were imposed by a rule whose purpose was not merely compensatory but also deterrent and punitive, which is sufficient to establish the criminal nature of the proceedings at issue, within the autonomous meaning of Article 4 of Protocol No. 7.

(ii) Whether the offences were the same in nature (idem)

149. The notion of the "same offence" – the *idem* element of the *ne bis in idem* principle in Article 4 of Protocol No. 7 – was clarified in *Sergey Zolotukhin* (cited above, §§ 78-84). Following the approach adopted in that judgment, it is clear that the determination as to whether the offences in question were the same (*idem*) depends on a facts-based assessment (ibid., § 84), rather than, for example, a formal assessment consisting in comparing the "essential elements" of the offences. The prohibition in Article 4 of Protocol No. 7 to the Convention concerns the prosecution or trial of a second "offence" in so far as the latter arises from identical facts or facts which are substantially the same (ibid., § 82). In the Court's view, statements of fact concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused are an appropriate starting-point for its determination of the issue whether the facts in both proceedings were identical or substantially the same (see, in this connection, *Sergey Zolotukhin*, cited above, § 83). The

Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings (ibid., § 84).

150. In the present case, there is no doubt that both the minor-offence proceedings and the subsequent administrative proceedings concerned an inspection of the fuel used in a truck owned by the applicant, which took place on 29 June October 2012, and the establishment of the fact that the fuel tank contained hearing oil (see paragraph 121 above). Consequently, the *idem* element of the *ne bis in idem* principle is present (see *Ruotsalainen*, cited above, §§ 50-56).

(iii) Whether there was a duplication of proceedings (bis)

151. As the Grand Chamber explained in *A and B v. Norway* (cited above, § 130), Article 4 of Protocol No. 7 does not preclude the conduct of dual proceedings, provided that certain conditions are fulfilled. In particular, for the Court to be satisfied that there is no duplication of trial or punishment (*bis*) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question were "sufficiently closely connected in substance and in time". In other words, it must be shown that they were combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected (ibid., § 130). As regards the conditions to be satisfied in order for dual criminal and administrative proceedings to be regarded as sufficiently connected in substance and in time and thus compatible with the *bis* criterion in Article 4 of Protocol No. 7, the material factors for determining whether there was a sufficiently close connection in substance include:

– whether the different proceedings pursue complementary purposes and thus addressed, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;

– whether the duality of proceedings concerned was a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*);

– whether the relevant sets of proceedings were conducted in such a manner as to avoid as far as possible any additional disadvantages resulting from duplication of proceedings and in particular duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to ensure that the establishment of the facts in one set of proceedings is replicated in the other;

– and, above all, whether the sanction imposed in the proceedings which became final first was taken into account in those which became final last, so as to prevent the individual concerned from being in the end made to bear an excessive burden; this latter risk is least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate (ibid., §§ 131-32).

Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law (ibid., § 133).

152. In the present case, following an inspection on 29 June 2012, the applicant was fined by way of a minor-offence penalty notice for having used a type of heating oil for a purpose which was not allowed by the Excise Duties Act. Three days later, he was ordered to pay excise duties on the heating oil he had used increased one hundred times.

153. Assessing the connection in substance between the minor-offence and the administrative (tax) proceedings in the present case, the Government maintained that the two sets of proceedings pursued complementary purposes. While the administrative (tax) proceedings had been aimed at punishing the perpetrator for attempted tax evasion, the Government claimed that the purpose of the minor-offence proceedings was primarily traffic safety, since the use of heating oil as fuel was generally unsafe and could damage the engine of the vehicle using it as fuel (see paragraph 141 above).

154. In this connection, the Court firstly notes that the provision on the basis of which the applicant had been issued the minor-offence fine forms part of the Excise Duties Act, which regulates the excise duties system of taxation of energy sources, and is classified in that Act under the title "excise duties minor-offence" (see paragraph 132 above). Secondly, the competent customs office made no mention of any traffic safety concerns when issuing the minor offences penalty notice (see paragraph 122 above). Most significantly, however, when amending the Excise Duties Act in 2015, while admitting that the existing legislative solution had been contrary to the *ne bis in idem principle*, the legislator removed the increase of one hundred times of the excise duties due, while maintaining the minor offence provision as the sole taxation-related penalty for the illegal use of heating oil as fuel (see paragraph 133 above). In the Court's view, notwithstanding possible traffic safety considerations the use of heating oil as fuel may generally entail, the foregoing clearly indicates that the primary purpose of the fine imposed on the

applicant in the minor-offence proceedings had been to punish him for a taxation-related minor-offence.

155. The Court further notes that the subsequent administrative (tax) proceedings against the applicant ordering him to pay excise duties on the fuel used were also conducted with the aim of addressing the taxation-related consequence of his illegal behaviour. Moreover, as already observed by the Court (see paragraph 148 above), the amount the applicant was ordered to pay in those proceedings did not consist of a simple calculation of the excise duties due, but instead an increase of that amount by one hundred times because he had used heating oil contrary to section 74(2) of the Excise Duties Act. That amount thereby also pursued a punitive aim of punishing the applicant for attempted tax evasion. It can therefore not be said that the two sets of proceedings pursued merely complementary purposes in addressing different aspects of the failure to respect regulations on the use of heating oil (conversely *Bajčić*, cited above, § 41).

156. The Court notes that the two sets of proceedings complained of therefore sanctioned the same behaviour, defining and qualifying the illegal use of heating oil in the same manner and prescribing two separate sanctions which were not of a different nature (compare *Nodet v. France*, no. 47342/14, § 48, 6 June 2019). This is sufficient for the Court to conclude that the present case did not address different aspects of the wrongdoing in a manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice (see paragraph 151 above).

157. In addition, the Court observes that the fine imposed on the applicant in the minor-offence proceedings was not taken into account in subsequent administrative (tax) proceedings. Indeed, none of the four instances of administrative authorities and courts deciding the applicant's case referred to the fine previously imposed on him by the Vukovar Customs Office, let alone lowered the amount of excise duties which the applicant was ultimately ordered to pay. Given the clear wording of section 76 of the Excise Duties Act as in force at the material time, it would appear that they did not even have leeway to reduce the amount prescribed therein (see paragraph 132 above).

158. The foregoing reinforces the Court's conclusion that, notwithstanding their foreseeability, the two sets of proceedings had not been sufficiently linked in substance, as required under the Court's case-law, to be considered to form part of an integral scheme of sanctions under Croatian law, as in force at the material time, for illegal use of specially-taxed heating oil as fuel. On the contrary, having been punished twice for the same conduct, the applicant had in the Court's view suffered disproportionate prejudice resulting from the duplication of proceedings and penalties, which did not form a coherent and proportionate whole in his case (see, *mutatis mutandis*, *A and B v. Norway*, cited above, §§ 112, 130 and 147). In such circumstances, the Court finds it unnecessary to review whether the two sets of proceedings were sufficiently connected in time (see the relevant criteria set out in *A and B v. Norway*, cited at paragraph 151 above; see also *Tsonyo Tsonev v. Bulgaria (no. 4)*, no. 35623/11, § 50, 6 April 2021). The Court is thus of the opinion, and agrees with the domestic authorities who subsequently amended the relevant provisions of the Excise Duties Act (see paragraph 133 above), that the duplication of the proceedings in the present case had been the direct consequence of the domestic law which, on the one hand, prescribed a fine for illegal use of special heating oil as fuel and, at the same time foresaw a hundred times increase of the tax surcharge that the perpetrator had to pay for such use.

159. There has accordingly been a violation of Article 4 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

160. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

161. The applicant claimed reimbursement of EUR 689 in respect the amount he had paid for the fine in the minor-offences proceedings. He also claimed non-pecuniary damage, leaving the amount to the judgment of the Court.

162. The Government contested that claim.

163. The Court considers that the applicant incurred both pecuniary and non-pecuniary damage in connection with the duplication of proceedings against him (see *Khmel v. Russia*, no. 20383/04, § 76, 12 December 2013). Accordingly, it awards him an aggregate amount of EUR 3,000 in respect of pecuniary and non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

164. The applicant also claimed EUR 1,185 for the costs and expenses incurred before the domestic courts and EUR 135 for translation expenses. He also sought the costs of his legal representation before the Court without specifying the amount.

165. The Government contested those claims.

166. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that the applicant only submitted itemised claims and supporting documents concerning part of the costs and expenses incurred in the domestic proceedings amounting to EUR 685. On the other hand, he failed to submit itemised claims and supporting documents or particulars concerning costs and expenses incurred in the proceedings before the Court, as required under Rule 60 §§ 2 and 3 of the Rules of Court. In such circumstances, the Court awards the applicant EUR 685 under this hear, plus any tax that may be chargeable to him.

C. Default interest

167. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:

      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;

      (ii) EUR 685 (six hundred and eighty-five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

European Court of Human Rights

31 August 2021

Bragi Guðmundur Kristjánsson v. Iceland

Case number: 12951/18

Penalties – Ne bis in idem (Right not to be tried or punished twice) – Duplication of proceedings leading to imposition of tax surcharges and conviction of major tax offences, insufficiently connected in substance and time

Summary

Article 4 of Protocol No. 7 (concerning the right not to be tried or punished twice) does not exclude the conducting of dual proceedings, even to their term, provided that certain conditions are fulfilled. In order to avoid a duplication of trial or punishment, the State has to demonstrate convincingly that the dual proceedings in question are "sufficiently closely connected in substance and in time" to be combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.

In determining whether dual criminal and administrative proceedings are sufficiently connected in substance, several factors should be taken into account. It should be assessed whether (i) the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved, (ii) the duality of the proceedings concerned was a foreseeable consequence, both in law and in practice, of the same impugned conduct, (iii) the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence – notably through adequate interaction between the various competent authorities in order to ensure that the establishment of facts in one set of proceedings is also used in the other set of proceedings, and (iv) most importantly, the sanction imposed in the proceedings which become final first is taken into account in the proceedings which become final last, in order to prevent the individual concerned being ultimately made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of the penalties imposed is proportionate. Regard should also be paid to the extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings. Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions imposed in the proceedings not formally classified as "criminal" are specific to the conduct in question and thus differ from "the hard core of criminal law", as the significantly lower level of stigma attached to such proceedings renders it less likely that the combination of proceedings will give rise to a disproportionate burden being placed on the accused person.

In determining whether dual criminal and administrative proceedings are sufficiently connected in time, that requirement should not be interpreted as meaning that the two sets of proceedings have to be conducted simultaneously from beginning to end. However, the connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time. The weaker the connection in time, the greater the burden on the State to explain and justify any such delays as may be attributable to its conduct of the proceedings.

In the present case, the applicant was tried and punished for the same or substantially the same conduct by different authorities in two different sets of proceedings that lacked the required connection. There was therefore a violation of Article 4 of Protocol No. 7 to the European Convention of Human Rights.

The European Court of Human Rights (Third Section), (...) delivers the following judgment (...):

INTRODUCTION

168. The present case concerns proceedings against the applicant for tax code violations. Pursuant to administrative proceedings, the applicant's taxes were re-assessed and a 25% surcharge was imposed. Subsequently, pursuant to criminal proceedings, the applicant was convicted of aggravated tax offences and sentenced to three months' imprisonment and a fine of approximately 84,000 euros (EUR). The applicant complains that he was tried twice for the same offence, in violation of the *ne bis in idem* principle enshrined in Article 4 of Protocol No. 7 to the Convention.

THE FACTS

169. The applicant was born in 1944 and lives in Reykjavik. The applicant was represented by Mr Ragnar Halldór Hall, a lawyer practising in Reykjavik.

170. The Government were represented by their Agent, Mr Einar Karl Hallvarðsson, State Attorney General.

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

I. TAX PROCEEDINGS

172. On 3 May 2011 the Directorate of Tax Investigations (*Skattrannsóknarstjóri ríkisins*) initiated an audit of the applicant's tax returns for the tax years 2007 and 2008. The audit was aimed at examining whether the applicant had failed to report his financial income, including income arising from forward contracts concluded with a bank. The applicant was questioned by the Directorate of Tax Investigations on 30 June and 30 November 2011. On 10 October 2011, the accountant who had prepared the applicant's tax returns was questioned.

173. By a letter of 13 December 2011, the Directorate of Tax Investigations sent the applicant the report of the audit, dated 9 December 2011, and invited him to submit his comments. By a letter of 23 December 2011, the applicant raised certain objections. The Directorate of Tax Investigations thereafter prepared an amended report, dated 30 December 2011. The conclusion of that report was that the applicant had filed substantially incorrect tax returns for the tax years 2007 and 2008.

174. By a letter of 30 December 2011, the Directorate of Tax Investigations forwarded the applicant's case to the Directorate of Internal Revenue (*Ríkisskattstjóri*) for the possible reassessment of his taxes. The applicant was informed of this on the same day by letter, wherein he was also informed that the Directorate of Tax Investigations would shortly reach a decision on whether to initiate criminal proceedings, listing the possible avenues that such criminal proceedings might take and giving the applicant thirty days to comment thereon.

175. By a letter of 27 January 2012, the applicant objected to any criminal proceedings, stating that the audit had revealed that the conditions for guilt were not satisfied and that there had been no intention to file incorrect tax returns. Should the case not be discontinued, the applicant requested that the case be concluded with the imposition of a fine.

176. By a letter of 5 November 2012 the Directorate of Internal Revenue stated its intention to re-assess the applicant's taxes for the tax years 2007 and 2008 and to impose a 25% surcharge on the unreported tax base. The Directorate of Tax Investigation's report was attached to the letter.

177. By a letter of 22 November 2012, the applicant objected to the planned re-assessment. He also demanded that a 25% surcharge not be imposed, since he had had no intention of filing substantially incorrect tax returns. His letter furthermore submitted that the applicant had himself, by a letter to the Directorate of Internal Revenue dated 25 July 2011, requested a correction to the taxes that he had paid for the 2007 and 2008 tax years.

178. By a decision of 30 November 2012, the Directorate of Internal Revenue re-assessed the applicant's taxes for the tax years 2007 and 2008, revising upwards the income declared by, respectively, 43,843,930 and 48,542,671 Icelandic *krónur* (ISK – approximately EUR 266,000 and EUR 294,500, respectively, at the material time). In addition, the Directorate of Internal Revenue imposed a 25% surcharge, noting that taxpayers could not absolve themselves of their responsibility to file correct tax returns by entrusting others with the task of preparing and filing them.

179. The applicant lodged an appeal against this decision with the State Internal Revenue Board ("the Internal Revenue Board") on 28 February 2013. By a ruling of 12 March 2014, the Board rejected the applicant's primary demand for the annulment of the Directorate's decision. However, the Internal Revenue Board deemed that the Directorate of Internal Revenue had neglected to take certain deductibles into account and reduced the upwards revision of the applicant's income accordingly. The Board furthermore dismissed the applicant's secondary claim to annul the imposition of a surcharge, as it found that neither section 108(3) of the Income Tax Act nor any other considerations justified dropping the surcharge (see paragraph 201 below).

180. The applicant did not seek judicial review of the Internal Revenue Board's ruling, which thus acquired legal force six months later, on 12 September 2014, when the time-limit for bringing judicial appeal proceedings expired.

II. CRIMINAL PROCEEDINGS

181. In the meantime, by a letter of 12 November 2012 the Directorate of Tax Investigations referred the applicant's case to the Office of the Special Prosecutor for investigation, forwarding its audit report concerning the applicant. On the same day the applicant was informed by letter that his case had been referred to the Office of the Special Prosecutor.

182. On 11 April 2013, the applicant was interviewed by the Office of the Special Prosecutor ("the prosecutor"). The applicant was informed that the investigation concerned the offences that he was alleged by the Directorate of Tax Investigations to have committed. On 14 August 2013, the applicant was again interviewed by the prosecutor.

183. On 21 May 2014 the prosecutor indicted the applicant for major tax offences. The applicant was indicted for having filed substantially incorrect tax returns for the tax years 2007 and 2008, failing to declare profits from the sale of shares and from forward swap contracts totalling undeclared income of ISK 87,007,094 (approximately EUR 527,900 at the material time). The case was registered with the Reykjavik District Court on 10 June 2014, at a hearing that the applicant did not attend. The case was next

heard on 11 September 2014, when the applicant attended and pleaded not guilty.

184. At that hearing, the District Court decided at the applicant's request to postpone hearing the case against him, pending "a judgment of the European Court of Human Rights concerning double jeopardy". The case was subsequently repeatedly postponed, with the comment that "the European Court of Human Rights' judgment on double jeopardy is still not available". The case was eventually heard on 25 February 2016, at which time the following was entered in the record of the court hearing:

> "This case has, at the request of the applicant, been repeatedly stayed pending a judgment from the European Court of Human Rights on double jeopardy. That judgment is still not available. The judge deemed it impossible to stay the case any longer, and the main hearing in the case was therefore scheduled for today."

185. By a judgment of 15 March 2016, the District Court convicted the applicant as charged. Regarding the issue of the alleged duplication of proceedings ("double jeopardy"), the District Court's judgment noted that the Supreme Court of Iceland had not deemed that the imposition of a tax surcharge and the subsequent pursuit of criminal proceedings for tax violations had violated the principle of *ne bis in idem*. The case could therefore not be dismissed owing to the previous imposition of a tax surcharge.

186. The District Court sentenced the applicant to three months' imprisonment, suspended for two years, and the payment of a fine of 13,800,000 ISK (approximately 83,700 EUR at the material time). In fixing the fine the District Court took into account the tax surcharges that had already been imposed on the applicant, albeit without providing any details regarding the calculations in this respect. The fine was to be paid within four weeks of the publication of the judgment, failing which it would be converted to seven months' imprisonment. As the applicant's defence counsel had not demanded the reimbursement of legal fees in the event of the applicant's conviction, the applicant was not ordered to bear any legal costs.

187. The applicant lodged an appeal against that judgment (by way of an appeal lodged by the Director of Public Prosecutions at his request) with the Supreme Court on 11 April 2016. He argued, *inter alia,* that the case against him should be dismissed on account of the fact that the dual proceedings violated the *ne bis in idem* principle.

188. The case was scheduled to be heard by the Supreme Court on 6 February 2017, but the Supreme Court decided on its own initiative to postpone the hearing of the case until 4 September 2017, pending the delivery of the Court's judgment in the case of *Jón Ásgeir Jóhannesson and Others v. Iceland*, no. 22007/11, 18 May 2017.

189. By a judgment of 21 September 2017, the Supreme Court upheld the applicant's conviction and sentence. The judgment firstly found that the two sets of proceedings against the applicant – the tax proceedings on the one hand and the criminal proceedings on the other hand – had constituted dual criminal proceedings concerning the same facts, within the meaning of Article 4 of Protocol No. 7 to the Convention. It noted that the European Court of Human Rights did not consider that such dual proceedings constituted a violation of the provision in question *per se*, but that such proceedings had to fulfil the requirement that they be sufficiently connected, both in time and in substance, in order to avoid duplication. In that regard, the judgment referred, *inter alia*, to the Court's judgments in the cases of *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECHR 2009, *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016, and *Jón Ásgeir Jóhannesson and Others* (cited above). The latter judgment was summarised in detail, including the domestic proceedings preceding the case before the Court.

190. The judgment continued with an analysis of the applicant's case, which took into account the necessity of a connection in both time and substance, as established by the Court's case-law. In this respect, the judgment contains, *inter alia*, the following reasoning:

> "According to the case-law of the [European Court of Human Rights], two separate proceedings against the same party or concerning the same or similar events must satisfy the criterion that the proceedings be complementary or supplementary. An audit by tax authorities and the imposition of sanctions for violations of tax law [are] subject to other legal rules than [is] a police investigation, which can subsequently form the basis for indictment and conviction by a court. An audit by tax authorities furthermore has different objectives than does a police investigation, as it is aimed in cases such as this primarily at revealing whether suspicions that income has been unreported in a tax return are justified. If this proves to be the case, the taxpayer's taxes are re-assessed and he is subjected to a surcharge, regardless of the taxpayer's subjective intention [*hugræn afstaða*].
>
> This does not apply in the case of a police investigation into violations of tax law. Under section 109(1) of Act no. 90/2003, a person liable to pay tax who has deliberately or through gross negligence reported wrongly or misleadingly aspects of significance for his income tax [liability] shall pay a fine amounting to up to ten times the tax payable on the taxable income that was [undeclared] and no lower than the equivalent of double the amount of tax payable [on the undeclared income]. Major violations of the provision are punishable under Article 262(1) of the General Penal Code. In the same

manner, intent or gross negligence in committing major violations of tax law is a condition for the imposition, under Article 262(1) of the General Penal Code, of a prison sentence, in addition to which that provision authorises the imposition of a fine, under applicable provisions of tax law, alongside the imposition of a prison sentence.

It follows from the above that proceedings pursued by the tax authorities are aimed at revealing other factors than those investigated by the police and adjudicated by the courts in connection with the same violation of tax law. Furthermore, the applicable penalties and conditions for their imposition differ. [It] must [therefore] be concluded that the legal arrangements for proceedings in respect of a criminal case that can lead to the conviction of a taxpayer are, according to the criteria of the [European Court of Human Rights], in their substance complementary or supplementary to the handling of that case by the tax authorities."

191. The judgment went on to find that the investigation by the prosecutor had been aimed primarily at establishing aspects of significance for the purposes of determining whether the applicant's alleged offences had been major, whether they had been carried out with intent or gross negligence, and whether persons other than the applicant had been involved. The Supreme Court found that the gathering and assessment of evidence had overlapped in the two sets of proceedings "to the extent that this [had been] unavoidable and [could] be considered normal". Furthermore, additional documentation had been gathered during the course of the criminal investigation as was "necessary owing to the different penalties and different requirements for their application". In the light of this, the Supreme Court deemed that the prosecutor's investigation had not constituted an unnecessary duplication of the administrative proceedings, but that they had formed one integrated whole. Furthermore, the Supreme Court found that the applicant had enjoyed all appropriate procedural guarantees and that the District Court's judgment had evidently taken into account the surcharge previously imposed when fixing the applicant's fine, in accordance with section 109(1) of the Income Tax Act. Having regard to all of those elements, the Supreme Court found that the dual proceedings against the applicant had complied with the requirement that there be a connection in substance and had formed one integrated whole. Therefore, the question of whether or not the tax authorities' decision in the case had constituted a "final decision" within the meaning of the case-law of the European Court of Human Rights was not decisive in respect of whether the dual proceedings were compliant with the Convention.

192. Turning to the issue of a sufficient connection in time, the Supreme Court noted that the length of both sets of proceedings against the applicant had totalled six years and four months, counted from the initiation of the Directorate of Tax Investigations' audit of the applicant's tax returns until the hearing before the Supreme Court. By contrast, the Supreme Court noted that the total length of the proceedings regarding *A and B v. Norway* (cited above) had amounted to approximately five years, and the total length of the proceedings regarding in *Jón Ásgeir Jóhannesson and Others* (cited above) had amounted to nine years and three months.

193. The Supreme Court observed that of the total length of both sets of proceedings, the criminal proceedings had been stayed at the applicant's own request for a period of one year and five months, pending the judgment of the European Court of Human Rights (see paragraph 184 above). Furthermore, the Supreme Court hearing in the case had been stayed for the same reason, on the Supreme Court's own initiative, for a period of seven months.

194. The Supreme Court then noted that the length of the tax proceedings, from the initiation of the audit to the pronouncement of the Internal Revenue Board's ruling, had amounted to two years and ten months, compared to over three years in respect of *A and B v. Norway* (cited above) and three years and nine months in respect of *Jón Ásgeir Jóhannesson and Others* (cited above). The criminal proceedings in respect of the present case had continued for a further three years and six months, counted from the pronouncement of the Internal Revenue Board's ruling until the hearing before the Supreme Court, compared to one year and ten months in respect of *A and B v. Norway* (cited above) and five years and five months in respect of *Jón Ásgeir Jóhannesson and Others* (cited above).

195. Furthermore, the Supreme Court remarked that the applicant had been indicted just over two months after the Internal Revenue Board had given its ruling and before that ruling had become final under section 15(2) of Act no. 30/1992 on the Internal Revenue Board (see paragraph 202 below). By contrast, the Supreme Court noted that in *A and B v. Norway* (cited above), an indictment had been issued one month and ten days before the ruling of the Norwegian Internal Revenue Board, but that in *Jón Ásgeir Jóhannesson and Others* (cited above) one year and almost four months had passed from the giving of the ruling until the indictment.

196. The Supreme Court then noted that in the applicant's case, three years and almost four months had elapsed from the indictment until the case had been heard by the Supreme Court, compared to one year and just over eleven months from the relevant indictment until the Supreme Court judgment in *A and B v. Norway* (cited above), and four years and almost two months in *Jón Ásgeir Jóhannesson and Others* (cited above). In that respect, the Supreme Court deemed that the repeated staying of the judicial proceedings against the applicant in anticipation of

the judgment in the case of *Jón Ásgeir Jóhannesson and Others* had to be taken into account.

197. Lastly, the Supreme Court observed that the two sets of proceedings had been conducted in parallel for a period of eleven months, counting from the applicant's first questioning as a suspect until the Internal Revenue Board had given its ruling. By contrast, the proceedings in respect of *A and B v. Norway* (cited above) had been conducted in parallel for just over eleven months, and the proceedings in respect of *Jón Ásgeir Jóhannesson and Others* (cited above) had been conducted in parallel for twelve months.

198. Taking all of the above into account, the Supreme Court found as follows:

> "According to what has been recounted here regarding the length of time of the proceedings against the accused it must be concluded, in the same manner as did the [European Court of Human Rights] in the case of [*A and B v. Norway* (cited above)] that the criterion of a sufficient connection in time was satisfied. In the overall assessment of all time factors involved this conclusion is not altered, despite the difference that in the [applicant's] case on the one hand, and the case of *A and B v. Norway* on the other hand, the indictment in the former case was issued two months and nine days after the conclusion of the administrative proceedings and in the latter case one month and ten days before the conclusion of the administrative proceedings in Norway. It cannot be concluded that this fact on its own caused the [applicant] immoderate uncertainty or resulted in unnecessary delays in the proceedings. In this regard it must be borne in mind that the Internal Revenue Board's ruling in the [applicant's] case had not become finally binding when the indictment against him was issued. It must also be noted that the [European Court of Human Rights] has found that proceedings in respect of two separate cases need not be completely parallel from beginning to end, but that the State involved has leeway to conduct proceedings progressively where doing so is motivated by interests of efficiency and the proper administration of justice in the light of different social purposes. Mere chance can determine whether an indictment is issued shortly before or after the conclusion of a case at the administrative level."

199. Having regard to all of the above, the Supreme Court concluded that the proceedings against the applicant had complied with the requirement that they be sufficiently connected in both time and substance, and had therefore not violated Article 4 of Protocol No. 7 to the Convention. The Supreme Court accordingly dismissed the applicant's demand for the dismissal of the case against him (see paragraph 20 above). Finding no fault with the substance of the District Court's judgment, the Supreme Court went on to uphold both the applicant's conviction and his sentence. The Supreme Court furthermore sentenced the applicant to pay appeal costs in the amount of ISK 1,782,579, including the legal fees of his appointed counsel, which amounted to ISK 1,736,000 (approximately EUR 10,500 at the material time).

200. One of the seven judges sitting on the bench hearing the applicant's case appended a dissenting opinion to the judgment, finding that the requirements regarding a sufficient connection in substance and in time had not been fulfilled and that the case against the applicant should accordingly be dismissed. The dissenting opinion noted that the police were not under an obligation to merely extend a tax investigation that had already been conducted by other authorities, and found that the prosecutor's questioning of the applicant had involved a duplication of the investigation that had previously been conducted. The dissenting opinion furthermore noted that the applicant had been indicted after the Internal Revenue Board had given its ruling, and reasoned that the fact that the criminal proceedings in question had lasted for three and a half years could not be justified by the postponement of the case in question pending the delivery of the judgment of the European Court of Human Rights in respect of the case of *Jón Ásgeir Jóhannesson and Others* (cited above). The dissenting opinion thus found the two sets of proceedings to be so disconnected as to violate the principle of *ne bis in idem* and require the dismissal of the case.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

201. The relevant sections of the Income Tax Act (*Lög um tekjuskatt*) read as follows at the material time:

Section 108

> "If an entity that is obliged to submit a tax return does not do so by the given deadline, the Director of Internal Revenue is permitted to add a surcharge of up to 15% to his tax-base estimate. The Director of Internal Revenue is nonetheless required to take note of the extent to which taxation has taken place through the withholding of taxes [at source]. The Director of Internal Revenue sets out further rules regarding that point. If a tax return on the basis of which taxes will be levied is submitted after the filing deadline, but before a Local Tax Commissioner completes [his or her] assessment of the taxes due, then a surcharge of only 0.5% may be added to the tax base for each day that the filing of the tax return [in question] has been delayed after the deadline in question, [up to a total surcharge of no more than] 10%.
>
> If a tax return is incorrect, as noted in section 96, or specific items [on a tax return] are declared erroneously, the Director of Internal Revenue can add a 25% surcharge to the

estimated or erroneously declared tax base. If a tax entity corrects such errors or adjusts specific items in the tax return before taxes are assessed, the surcharge imposed by the Director of Internal Revenue may not be higher than 15%.

Additional surcharges, in accordance with this section, are to be cancelled if a tax entity can show (citing justifying factors) that it is not to blame for faults in a tax return or for a failure to file one, that *force majeure* rendered it impossible by the relevant deadline, to file a tax return, to rectify an error in a tax return, or to correct specific items contained therein.

Complaints to the Directorate of Internal Revenue and the Internal Revenue Board are subject to the provisions of section 99 of the Act and the provisions of Act no. 30/1992 on the Internal Revenue Board."

Section 109

"If a taxable person, intentionally or through gross negligence, makes false or misleading statements about something that affects [that person's] liability for income tax, that person shall pay a fine of up to ten times the tax amount of the tax base that was concealed [but] a fine no lower than double [that] amount. Tax paid on a surcharge pursuant to section 108 shall be deducted from the fine. Paragraph 1 of Article 262 of the Penal Code applies to major offences against this provision.

If a taxable person, intentionally or through gross negligence, neglects to file a tax return, that violation shall incur a fine no lower than double the tax that should have been paid on the undeclared tax base, if the tax evaluation proved to be too low when taxes were re-assessed, in accordance with paragraph 2 of section 96 of this Act, in which case the tax on the added surcharge shall be deducted from the amount of the fine, in accordance with section 108. Paragraph 1 of Article 262 of the Penal Code applies to major offences against this provision.

If a taxable person gives false or misleading information on any aspects regarding [his or her] tax return, then that person can be made to pay a fine, even if the information cannot affect his liability to pay taxes or [make] tax payments.

If violations of paragraph 1 or paragraph 2 of the provision are discovered when the estate of a deceased person is wound up, then the estate shall pay a fine of up to four times the amount of tax owed on the tax base that was evaded, but no less than [that] amount plus half of that amount [again]. Tax on a surcharge pursuant to section 108 shall be deducted from such a fine. Under the circumstances stated in paragraph 3, the estate may be fined.

Any person who wilfully or through gross negligence provides tax authorities with wrongful or misleading information or documentation regarding the tax returns of other parties, or assists [in the submission of] a wrongful or misleading tax return to tax authorities, shall be subject to the punishment provided in paragraph 1 of this section.

If a person, intentionally or through gross negligence, has neglected his duties, as listed under the provisions of sections 90, 92 or 94, he shall pay a fine or be sentenced to imprisonment for up to two years.

An attempted violation [or acting as an] accessory to a violation of this Act is punishable under the provisions of Chapter III of the Penal Code and is subject to a fine of up to the maximum amount stated in other provisions of this section.

A legal entity may be fined for a violation of this Act, irrespective of whether the violation may be attributable to the criminal act of an officer or employee of that legal entity. If one of its officers or employees has been guilty of violating this Act, the legal entity in question may be subject to a fine and the withdrawal of its operating licence, in addition to the imposition of punishment, in the event that the violation was committed for the benefit of that legal entity and it has profited from that violation."

Section 110

"The Internal Revenue Board rules on fines [imposed] under section 109, unless a case is referred for investigation and judicial treatment, in accordance with paragraph 4 [of this provision]. Act 30/1992 on the Internal Revenue Board applies to the Board's handling of cases.

The Directorate of Tax Investigations in Iceland appears before the Board on behalf of the State when [the Board] rules on fines. The rulings of the Board are final.

Notwithstanding the provision set out in paragraph 1, the Directorate of Tax Investigations (or a legal representative thereof) is permitted to offer a party the option of ending the criminal proceedings in respect of a case by paying a fine to the Treasury, provided that the offence is considered to be proven beyond doubt, in which event the case is neither to be sent to the police for investigation nor to fine proceedings with the Internal Revenue Board. When deciding the amount of the fine [to be paid], note is to be taken of the nature and scale of the offence [in question]. Fines may amount to between ISK 100,000 and ISK 6,000,000. The entity in the case is to be informed of the proposed amount of the fine [in question] before it agrees to end the case in such a manner. A

decision on the amount of a fine under this provision must be made within six months of the end of the investigation conducted by the Directorate of Tax Investigations.

Decisions delivered by the Directorate of Tax Investigations shall provide no alternative penalty. Regarding the collection of a fine imposed by the Directorate of Tax Investigations the same rules apply under this Act as those regarding taxes – including the right to carry out distraint. The Director of Public Prosecutions is to be sent a record of all cases that have been closed under this provision. If the Director of Public Prosecutions believes that an innocent person has been subjected to a fine under paragraph 2, or that the manner of concluding the case has been improbable [*fjarstæð*] in other ways, he can refer the case to a judge in order to have the decision of the Directorate of Tax Investigations overturned.

The Directorate of Tax Investigations can, of its own accord [or] at the request of the accused (if he is opposed to the case being dealt with by the Internal Revenue Board, in accordance with paragraph 1), refer a case to the police for investigation.

Claims for tax may be made and adjudicated in criminal proceedings for offences against the Act.

Fines [collected] for offences against this Act go to the Treasury.

Internal Revenue Board rulings imposing a fine shall not provide an alternative penalty. Regarding the collection of a fine issued by the Internal Revenue Board the same rules apply under this Act as those regarding taxes – including the right to carry out distraint.

[Offences] under section 109 become time-barred after six years. The limitation period may be interrupted by the opening of an investigation by the Directorate of Tax Investigations, as long as there are no unnecessary delays in the investigation of the case in question or in sentencing."

202. The relevant sections of the Internal Revenue Board Act (*Lög um yfirskattanefnd*) read as follows at the material time, in so far as relevant:

Section 5

"The time-limit for appealing to the Internal Revenue Board shall be three months from the dispatch by post of the ruling of the Directorate of Internal Revenue.

..."

Section 15

"...

The Minister's time-limit for instituting judicial proceedings in relation to a ruling of the Internal Revenue Board is six months.

..."

203. Article 262 of the General Penal Code (*Almenn hegningarlög*) stipulates:

"Any person who intentionally or through gross negligence is guilty of a major violation of the first, second or fifth paragraphs of section 109 of Act no. 90/2003 on Income Tax (see also section 22 of the Act on Municipal Tax Revenues and the first, second and seventh paragraphs of section 30 of the Act on the Withholding of Public Levies [*opinber gjöld*] at Source – see also section 11 of the Act on Payroll Taxes) and the first and sixth paragraphs of section 40 of the Act on Value Added Tax shall be subject to a maximum of six years' imprisonment. An additional fine may be imposed by virtue of the provisions of the tax laws cited above.

The same punishment may be imposed on a person who intentionally or through gross negligence is guilty of a major violation of the third paragraph of section 30 of the Act on the Withholding of Public Levies at Source; of the second paragraph of section 40 of the Act on Value Added Tax; of sections 37 and 38 (in conjunction with section 36) of the Act on Accounting; or of sections 83-85 (in conjunction with section 82) of the Act on Annual Accounts, including [such violations that are perpetrated] with the intent to conceal an acquisitive offence [*auðgunarbrot*] committed by oneself or by others.

An action constitutes a major violation under the first and second paragraphs of this Act if the violation involves significant amounts of money [or] if the action is committed in a particularly flagrant manner or under circumstances that greatly exacerbate the culpability of the violation, and also if the person to be sentenced to punishment for any of the violations referred to in the first or second paragraph has previously been convicted for a similar violation or any other violation covered by those provisions."

THE LAW

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

204. The applicant complained that, through the imposition of tax surcharges and the subsequent criminal trial and conviction for major tax offences, he had been tried and punished twice for the same offence. He relied on Article 4 of Protocol No. 7 to the

Convention, which, in so far as relevant, 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.
>
> ..."

A. Admissibility

205. The Government did not raise any objections to the admissibility of the complaint under Article 4 of Protocol No. 7 to the Convention. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

206. The applicant submitted that the two sets of proceedings against him had both constituted "criminal proceedings" for the purpose of Article 4 of Protocol No. 7 to the Convention and that both sets of proceedings had concerned the "same offence".

207. Concerning the element of a connection in substance between the two sets of proceedings, the applicant submitted that despite having access to the report of the Directorate of Tax Investigation, the prosecutor had nevertheless conducted an independent investigation, significantly delaying the criminal proceedings. The applicant submitted that his conduct and liability under tax and criminal law had been examined by different authorities in proceedings that had been largely, if not entirely, independent of each other.

208. Concerning the element of a connection in time between the two sets of proceedings, the applicant submitted that the criminal proceedings could not be considered to have been initiated until 11 April 2013, when the applicant had been first interrogated by the police. The applicant submitted that the two sets of proceedings had thus only progressed in parallel for eleven months, and that the criminal proceedings had later continued for another three years and six months.

209. Concerning the postponement of the proceedings before the District Court (see paragraph 184 above), the applicant protested the characterisation of the postponement as having been decided at the request of the applicant, submitting that the postponement had been decided on the District Court's own initiative.

(b) The Government

210. The Government did not deny that the imposition of a tax surcharge, pursuant to section 108(2) of the Income Tax Act, had constituted a penalty for the purposes of Article 4 of Protocol No. 7 to the Convention. Furthermore, the Government did not deny that the two sets of proceedings had been rooted in the same events.

211. The Government submitted that it was not necessary to determine whether and when the first set of proceedings had become final, as there had been a sufficient connection in time and substance between the two sets of proceedings as to avoid duplication. They submitted that the two sets of proceedings had constituted the foreseeable consequences of the applicant's conduct and that they had been initiated and conducted in accordance with the applicable legislation, which pursued separate and complementary objectives. Furthermore, the Government submitted that the applicant had enjoyed the guarantees afforded him in both sets of proceedings and that proportionality had been ensured.

212. Concerning the element of a connection in substance between the two sets of proceedings, the Government submitted that the audit by the tax authorities and the investigation by the prosecutor had pursued different objectives, since the respective penalties – and the conditions regarding the application of those penalties – had differed. They submitted that investigative material had been shared between the authorities involved and that the gathering and assessment of evidence had overlapped only to the extent that it had been unavoidable. Furthermore, the Government referred to section 109(1) of the Income Tax Act (see paragraph 201 above) and submitted that the surcharge imposed on the applicant by the tax authorities had been taken into account in the determination of the fine imposed on him in the criminal proceedings.

213. As regards the element of a connection in time, the Government reiterated the reasoning set out by the Supreme Court of Iceland, submitting that the connection had been sufficient to render the two sets of proceedings one integrated whole. In that respect, the Government noted that the applicant had been indicted before the Internal Revenue Board's ruling became final and that the total time of the proceedings against the applicant had been six years and four months. The Government noted that the two sets of proceedings had been conducted in parallel for eleven months, but reasoned that if the criminal proceedings were counted from the time of the referral of the applicant's case from the Directorate of Tax

Investigations to the prosecutor, the parallel conduct had lasted one year and four months.

214. Furthermore, the Government submitted that consideration should be given to (i) the length of time for which the hearing of the case by the District Court had been postponed at the applicant's request, pending the Court's judgment in the case of *Jón Ásgeir Jóhannesson and Others v. Iceland* (no. 22007/11, 18 May 2017), which had amounted to one year and five months, and (ii) the staying of the hearing by the Supreme Court on its own initiative for almost seven months, for the same reason. In that regard, the Government objected to the applicant's submission that the District Court had decided on postponement on its own initiative. The Government noted that the court records reflected that the initial postponement had occurred at the applicant's explicit request, pending the awaited judgment. The subsequent postponements had been justified by the statement that the awaited judgment had still not been delivered, without any objection on the part of the applicant being entered in the record. Lastly, the records of the main hearing reflected the fact that the case had, "at the request of the applicant" been "repeatedly stayed pending a judgment from the European Court of Human Rights on double jeopardy", and the record reflected no objection to that statement by the applicant. The Government thus submitted that the postponement had been made at the applicant's request, which should be taken into account for the purposes of the assessment of the connection in time.

2. The Court's assessment

215. Under Article 4 of Protocol No. 7 to the Convention, the Court has to determine whether the imposition of tax surcharges was criminal in nature, whether the criminal offence for which the applicant was prosecuted and convicted was the same as that for which the tax surcharges were imposed (the notion of the "same offence" – the *idem* element of the *ne bis in idem* principle), whether there was a final decision and whether there was duplication of the proceedings (the *bis* element of the *ne bis in idem* principle).

(a) Whether the imposition of surcharges was criminal in nature

216. In comparable cases involving the imposition of tax surcharges, the Court has held, on the basis of the "Engel criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22), that the proceedings in question were "criminal" in nature, not only for the purposes of Article 6 of the Convention but also for the purposes of Article 4 of Protocol No. 7 to the Convention (see, among other authorities, *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 107, 136 and 138, 15 November 2016, and *Jón Ásgeir Jóhannesson and Others*, cited above, § 43).

217. Noting that the parties did not dispute this, the Court concludes that both sets of proceedings in the present case concerned a "criminal" offence, within the autonomous meaning of Article 4 of Protocol No. 7.

(b) Whether the criminal offence for which the applicant was prosecuted and convicted was the same as that for which the tax surcharges were imposed

218. The notion of the "same offence" – the *idem* element of the *ne bis in idem* principle in Article 4 of Protocol No. 7 – is to be understood as a second "offence" arising from identical facts or facts which are substantially the same (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 78-84, ECHR 2009).

219. In the criminal proceedings in the present case, the applicant was indicted and convicted for major tax offences. It is undisputed between the parties that the facts underlying the indictment and conviction were the same or substantially the same as those leading to the imposition of tax surcharges.

220. The Court agrees with the parties. The applicant's conviction and the imposition of tax surcharges were based on the same failure to declare income. Moreover, the tax proceedings and the criminal proceedings concerned the same period of time and the same amount in evaded taxes. Consequently, the *idem* part of the *ne bis in idem* principle is present.

(c) Whether there was a final decision

221. In the past, before determining whether there has been a duplication of proceedings (*bis*), in some cases the Court has first undertaken an examination of whether and, if so, when there was a "final" decision in one set of proceedings (potentially barring the continuation of the other set). However, the issue of whether a decision is "final" is devoid of relevance if there is no real duplication of proceedings but rather a combination of proceedings considered to constitute an integrated whole. In the present case, the Court does not find it necessary to determine whether and when the first set of proceedings – the tax proceedings – became "final", as this circumstance does not affect the assessment given below of the relationship between them (see the above-cited cases of *A and B v. Norway*, §§ 126 and 142, and *Jón Ásgeir Jóhannesson and Others*, § 48).

(d) Whether there was a duplication of the proceedings *(bis)*

222. In the Grand Chamber judgment in the case of *A and B v. Norway* (cited above), the Court explained that Article 4 of Protocol No. 7 had not excluded the conducting of dual proceedings, even to their term, provided that certain conditions were fulfilled. In order to avoid a duplication of trial or punishment (*bis*) as proscribed by the provision, the respondent State had to demonstrate convincingly that the dual

proceedings in question were "sufficiently closely connected in substance and in time" to be combined in an integrated manner so as to form a coherent whole. This implied not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.

223. In determining whether dual criminal and administrative proceedings are sufficiently connected in substance, several factors should be taken into account (ibid., §§ 131-133). It should be assessed whether (i) the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved, (ii) the duality of the proceedings concerned was a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*), (iii) the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence – notably through adequate interaction between the various competent authorities in order to ensure that the establishment of facts in one set of proceedings is also used in the other set of proceedings, and (iv) most importantly, the sanction imposed in the proceedings which become final first is taken into account in the proceedings which become final last, in order to prevent the individual concerned being ultimately made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of the penalties imposed is proportionate. Regard should also be paid to the extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings. Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions imposed in the proceedings not formally classified as "criminal" are specific to the conduct in question and thus differ from "the hard core of criminal law", as the significantly lower level of stigma attached to such proceedings renders it less likely that the combination of proceedings will give rise to a disproportionate burden being placed on the accused person (see *A and B v. Norway* (cited above), § 133).

224. In determining whether dual criminal and administrative proceedings are sufficiently connected in time, that requirement should not be interpreted as meaning that the two sets of proceedings have to be conducted simultaneously from beginning to end (ibid., § 134). However, the connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time. The weaker the connection in time, the greater the burden on the State to explain and justify any such delays as may be attributable to its conduct of the proceedings.

225. In *A and B v. Norway* (cited above), the Court found that the conducting of dual proceedings, with the possibility of a combination of different penalties, had been foreseeable for the applicants, who must have known from the outset that criminal prosecution as well as the imposition of tax penalties was possible, or even likely, given the facts of their cases. The Court observed that the administrative and criminal proceedings had been conducted in parallel and were interconnected. The facts established in one of the sets of proceedings had been relied on in the other set and, as regards the proportionality of the overall punishment, the sentence imposed in the criminal trial had taken account of the tax penalty. The Court was satisfied that, while different penalties had been imposed by two different authorities within the context of different procedures, there had nevertheless been a sufficiently close connection between them, both in substance and in time, for them to be regarded as forming part of an overall scheme of sanctions under Norwegian law.

226. By contrast, in the case of *Jón Ásgeir Jóhannesson and Others* (cited above), for example, the Court found that the two individual applicants had been tried and punished twice for the same conduct. In particular, this was because the two sets of proceedings had both been "criminal" in nature; they had been based on substantially the same facts; and they had not been sufficiently interlinked for it to be considered that the authorities had avoided a duplication of proceedings. Although Article 4 of Protocol No. 7 did not rule out the carrying out of parallel administrative and criminal proceedings in relation to the same offending conduct, such sets of proceedings had to have a sufficiently close connection in substance and in time to avoid duplication. The Court held that there had not been a sufficiently close connection between the sets of proceedings in that case.

(i) Connection in substance

(α) Complementarity of purposes

227. Turning to an assessment of the case at hand, the Court must first determine whether the different sets of proceedings pursued complementary purposes and thus addressed different aspects of the social misconduct involved, not only *in abstracto* but also *in concreto* (see paragraph 223 above). The Court accepts that the two sets of proceedings pursued a complementary purpose in addressing the issue of a taxpayer's failure to comply with the legal requirements relating to the filing of tax returns (see, *inter alia*, *Ragnar Þórisson v. Iceland* [Committee], no. 52623/14, § 46, 12 February 2019, and *Jón Ásgeir Jóhannesson and Others*, cited above, § 51).

(β) Foreseeability

228. Secondly, the Court must determine whether the duality of the proceedings concerned was a foreseeable consequence, both in law and in practice, of the same impugned conduct (see paragraph 223

above). In the present case, the Court accepts that the consequences of the applicant's conduct were foreseeable. Both the imposition of tax surcharges and the indictment and conviction for tax offences form part of the actions taken and sanctions levied under Icelandic law for failure to provide accurate information in a tax return (see, *inter alia*, the above-cited cases of *Jón Ásgeir Jóhannesson and Others*, § 51, and *Ragnar Þórisson*, § 46). Furthermore, the applicant was notified of the possible tax and criminal avenues that his case might take by a letter from the Directorate of Tax Investigation dated 30 December 2011 (see paragraph 187 above).

(γ) Avoidance of duplication in the collection and assessment of evidence

229. Thirdly, the Court must assess whether the relevant sets of proceedings were conducted in such a manner as to avoid as far as possible any duplication in the collection and the assessment of the evidence (see paragraph 223 above). In the present case, it is clear that the prosecutor had access to the report issued by the Directorate of Tax Investigations and its annexes, as well as the correspondence between the applicant and the Directorates of Tax Investigation and Internal Revenue (including the applicant's objections to the planned criminal proceedings – see paragraph 181 above). However, it is not clear to what extent the prosecutor's investigation relied on the findings made by the Directorate of Tax Investigations in order to avoid duplication between the two investigations. In this regard, documents pertaining to the details of the prosecutor's investigation (including transcripts of the questioning by the prosecutor of the applicant and other witnesses) have not been submitted to the Court.

230. In its judgment the Supreme Court held that there had been a sufficient connection in substance between the two sets of proceedings, as the tax proceedings had merely been aimed at uncovering whether the applicant had filed incorrect tax returns, whereas the criminal proceedings had been aimed at uncovering whether the requirements for the imposition of criminal sanctions – including the presence of intent or gross negligence – had been met. The Supreme Court furthermore found that the two sets of proceedings had not overlapped in terms of securing and assessing of evidence except to the extent that such an overlap had been unavoidable.

231. The issue of documents pertaining to the prosecutor's investigation (see paragraph 62 above) notwithstanding, it is clear that the prosecutor undertook an investigation that lasted eighteen months, counting from the referral of the case to the prosecutor until the issuance of the indictment against the applicant. In *A and B v. Norway*, the Court emphasised that the avoidance of duplication should be achieved through adequate interaction between the various competent authorities in order to ensure that the facts established in one set of proceedings would also be used in the other set (see *A and B v. Norway*, cited above, § 132). Nevertheless, during the course of their investigation, the prosecutor interviewed the applicant twice, even though he had previously been questioned twice by the Directorate of Tax Investigation. The prosecutor also interviewed the witness that had previously been interviewed by the Directorate of Tax Investigation, along with three additional witnesses. Although the Court can accept that a criminal investigation under such circumstances aims at uncovering additional elements necessary for the pursuit of criminal charges and, as such, may have some unavoidable overlap with the tax investigation, the apparent overlap in the two investigations in the present case is considerable.

232. In the light of this, the Court harbours serious doubt as to whether the two sets of proceedings were conducted so as to avoid, to the extent possible, duplication in the obtaining and assessment of evidence.

(δ) Regard for previously imposed sanctions and their classification

233. Fourthly, the Court must ascertain whether the sanctions imposed in the proceedings that became final first were taken into account in those that became final last. The District Court – by a judgment that was subsequently upheld by the Supreme Court – sentenced the applicant to three months' imprisonment, suspended for two years, and ordered him to pay a fine. In fixing the fine the District Court took into account the tax surcharges that had already been imposed on the applicant, albeit without providing any details regarding the calculations in this respect. Nevertheless, the Court considers that the sanctions already imposed in the tax proceedings were sufficiently taken into account in the sentencing in the criminal proceedings.

234. Additionally, under this element, regard may be had to whether the sanction imposed in the proceedings not formally classified as "criminal" was specific to the conduct in question and the extent to which those proceedings bore the hallmarks of ordinary criminal proceedings (see paragraph 223 above). In this respect, the Court notes that the tax surcharge imposed on the applicant in the tax proceedings was specific to the conduct concerned (that is to say filing incorrect tax returns) and was directly linked to the incorrectly filed tax base (see paragraph 201 above). Proceedings before the Directorate of Internal Revenue resulting in the imposition of such a surcharge are not classified as "criminal" under domestic law and are free of many of the hallmarks of ordinary criminal proceedings, such as public hearings and the person involved acquiring a criminal record. Thus, these proceedings are to a significant extent free of the stigmatising factors typically associated with proceedings belonging to "the hard core of criminal law". The combined proceedings in the present case were correspondingly less likely to have placed a disproportionate burden

on the applicant (see *A and B v. Norway*, cited above, § 134).

(ε) Conclusion concerning the connection in substance

235. In the light of the foregoing considerations, particularly the overlap in the two investigations, there is serious doubt as to whether the connection in substance between the two sets of proceedings was sufficiently close as to form a coherent, integrated whole. The Court will nevertheless proceed to an assessment of the connection in time, which the proceedings must also satisfy in order to comply with Article 4 of Protocol No. 7 (see *A and B v. Norway*, cited above, § 134).

(ii) Connection in time

(α) Demarcation of the relevant timeframe

236. At the outset of the assessment of a connection in time between the two sets of proceedings, the Court must determine the timeframe to be taken into account. In this regard, the Court recalls that a "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 249, 13 September 2016, with further references).

237. On 3 May 2011 the Directorate of Tax Investigation initiated a tax audit of the applicant and interviewed him on 30 June and 30 November 2011. The investigation was finalised with the issuing of a report on 30 December 2011 and the matter was forwarded to the Directorate of Internal Revenue, which corresponded with the applicant and subsequently re-assessed his taxes by a decision of 30 November 2012. An appeal against that decision was lodged by the applicant with the Internal Revenue Board on 28 February 2013. The Board gave its ruling on 12 March 2014 and that ruling became final six months later.

238. Meanwhile, the Directorate of Tax Investigation referred the applicant's case to the prosecutor on 12 November 2012, forwarding its report and additional material that it had collected in the course of its investigation. Five months later, on 11 April 2013, the applicant was questioned by the prosecutor. He was questioned by the prosecutor again on 14 August 2013. The prosecutor also questioned four additional witnesses, one of whom had previously been questioned by the Directorate of Tax Investigations.

239. The prosecutor indicted the applicant on 21 May 2014. By a judgment of 15 March 2016, the District Court convicted the applicant of major tax offences. On 21 September 2017, the Supreme Court upheld the applicant's conviction. Thus, the overall length of the two sets of proceedings, from the initiation of the audit until the Supreme Court's final ruling, was about six years and four months.

(β) Assessment

240. The Court observes that within that overall period of six years and four months, the two sets of proceedings progressed concurrently between 11 April 2013 (when the applicant was questioned by the prosecutor) and 12 March 2014 (when the Internal Revenue Board issued its ruling on the applicant's tax appeal – see *Jón Ásgeir Jóhannesson and Others*, cited above, § 54). The proceedings were thus conducted in parallel for eleven months. If considered from the time when the matter was referred to the prosecutor for criminal investigation, of which the applicant was notified, the two sets of proceedings progressed in parallel for one year and four months (see *Bjarni Ármannsson v. Iceland* [Committee], no. 72098/14, § 56, 16 April 2019). The applicant was indicted on 21 May 2014, about two months after the Internal Revenue Board issued its ruling but four months before that ruling became final. The criminal proceedings then continued for three years after the Internal Revenue Board's ruling became final – a substantial amount of time, especially when compared to the length of the parallel proceedings. The burden on the State to explain and justify the delay consequently increases (see *A and B v. Norway*, cited above, § 134).

241. The Court notes that a substantial part of the delay in the procedure before the District Court was due to the applicant's request that a hearing in the case be stayed, pending the Court's judgment in the case of *Jón Ásgeir Jóhannesson and Others* (cited above). The court records confirm that the hearing of the case was stayed repeatedly from September 2014 until February 2016. In this regard, the Court notes that the submitted court records indicate that the initial postponement occurred at the applicant's request, that the records of the main hearing indicate that the repeated further postponements were made "at the request of the applicant" (see paragraph 184 above), and that the applicant apparently did not contest the accuracy of those records before submitting his observations to the Court. Such a delay at the request of the applicant will, in the Court's view, weigh less heavily on the assessment of a connection in time than delays that can be attributed to the authorities.

242. Nevertheless, the eleven months during which the two sets of proceedings ran parallel constitute only a small proportion of the six years and four months total (see paragraph 239 above). In addition, the fact that the proceedings ran in parallel at all was due only to the fact that the applicant lodged an appeal in the tax proceedings, prolonging those proceedings by one year and almost four months. Had he not done so, the decision of the Directorate of Internal Revenue would have become final on 28 February 2013 (see paragraph 202 above) – two

months before the applicant was first questioned by the prosecutor. In this regard, the Court reiterates that it is for the respondent State to demonstrate convincingly that the dual proceedings in question were sufficiently closely connected in substance and in time (see *A and B v. Norway*, cited above, § 130) and that it is incumbent on a State that conducts dual proceedings in respect of criminal offences to ensure that such proceedings are conducted in a manner compliant with the requirements of the *ne bis in idem* rule (see the above-cited cases of *A and B v. Norway*, § 117, and *Bjarni Ármannsson*, cited above, § 57). In ensuring such compliance, the State cannot rely on the affected person's exhaustion of available appeals in one part of the proceedings in question to create a link in time with the second part of the proceedings. Such a conclusion would work to the detriment of those who choose to pursue avenues of appeal, which should not weaken the rights they enjoy under Article 4 of Protocol No. 7.

243. In view of the above, the Court finds that the connection in time between the two sets of proceedings was insufficient to avoid a duplication of the proceedings.

(iii) Conclusion

244. The Court thus finds that the dual proceedings against the applicant were neither sufficiently connected in substance nor in time as to avoid a duplication of the proceedings. Consequently, the applicant was tried and punished for the same or substantially the same conduct by different authorities in two different sets of proceedings that lacked the required connection. There has therefore been a violation of Article 4 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

245. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

246. The applicant claimed ISK 13,800,000 (approximately EUR 86,250 on 4 August 2020, when the applicant submitted his just satisfaction claims), the amount of the fine imposed on him, in respect of pecuniary damage. In this respect, he submitted documentation indicating that the fine had been paid.

247. The Government objected to the claim for pecuniary damage.

248. Having found that the two sets of proceedings against the applicant were insufficiently linked as to avoid a duplication, and that the criminal proceedings that resulted in the above-mentioned fine were thus in violation of Article 4 of Protocol No. 7, the Court considers that there is a causal link between the violation found and the pecuniary damage alleged. Furthermore, the applicant submitted documentation indicating that the fine had been paid in full. Consequently, the Court awards him in full the amount claimed – EUR 86,250, plus any tax that may be chargeable.

2. Non-pecuniary damage

249. The applicant claimed just satisfaction in respect of non-pecuniary damage in whatever amount the Court deemed appropriate.

250. The Government argued that if a violation of Article 4 of Protocol No. 7 to the Convention were to be found, such a finding by the Court would itself constitute just satisfaction for any non-pecuniary damage claimed.

251. The finding of a violation cannot be said to fully compensate the applicant for the sense of injustice and frustration that he must have felt. Making its assessment on an equitable basis, the Court therefore awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

252. The applicant claimed ISK 2,693,549 (approximately EUR 16,800) for the costs and expenses incurred before the domestic courts and an undetermined amount for costs incurred in the proceedings before the Court. He submitted legal-fee invoices and records of transfers of money from his account to that of his representative's law firm, bearing dates between September 2013 and November 2017, the last of which contains a reference to the hearing of the case by the Supreme Court. No invoices or bank-transfer receipts relating to the proceedings before the Court have been submitted.

253. The Government objected to the claim for costs and expenses.

254. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 16,800 in respect of costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

255. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

5. *Declares*, unanimously, the complaint concerning Article 4 of Protocol No. 7 admissible;

6. *Holds*, by four votes to three, that there has been a violation of Article 4 of Protocol No. 7 to the Convention;

7. *Holds*, by four votes to three,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 86,250 (eighty-six thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 16,800 (sixteen thousand eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

Dismisses, unanimously, the remainder of the applicant's claim for just satisfaction.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Lemmens, Dedov and Pavli is annexed to this judgment.

JOINT DISSENTING OPINION OF JUDGES LEMMENS, DEDOV AND PAVLI

1. To our regret, we are unable to agree with the majority's finding of a violation of Article 4 of Protocol No. 7 to the Convention. In our opinion, the Supreme Court correctly concluded that the existence of two separate proceedings did not violate the principle of "*ne bis in idem*".

We agree with the majority that both sets of proceedings concerned a "criminal" offence, within the autonomous meaning of Article 4 of Protocol No. 7, and that the criminal offence for which the applicant was prosecuted and convicted was the same as that for which the tax surcharges had been imposed. We also agree that the issue as to whether or not there was a final decision in the tax proceedings is devoid of relevance in the present case.

Our disagreement concerns the question whether there was a duplication of the proceedings (the "*bis*" element of the "*ne bis in idem*" principle) (see paragraphs 55-77 of the judgment).

2. At the outset, we wish to express our agreement with the general principles set out in *A and B v. Norway* ([GC], nos. 24130/11 and 29758/11, § 130, 15 November 2016) and reiterated in paragraph 55 of the present judgment. In particular, we agree that, for the Court to be satisfied that there is no duplication of trial or punishment as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time" or, in other words, that both proceedings have been combined in an integrated manner so as to form "a coherent whole".

Connection in substance

3. Turning, first, to the connection in substance between the tax proceedings and the criminal proceedings in the present case, we agree with the majority that the two sets of proceedings pursued a complementary purpose (see paragraph 60 of the judgment). It seems to us, however, that the majority do not attach appropriate weight to this aspect of the test, which in our opinion is of crucial importance.

We would recall that the tax surcharge was imposed because of the filing of incorrect tax returns (see section 108, second paragraph, of the Income Tax Act). The applicant was further charged with the criminal offence of making false or misleading statements "intentionally or through gross negligence" (section 109, first paragraph, of the Income Tax Act), with the aggravating circumstance that the offence was a "major" one (Article 262, paragraph 1, of the General Penal Code). We therefore agree with the Supreme Court that the "proceedings pursued by the tax authorities [were] aimed at revealing other factors than those investigated by the police and adjudicated by the courts" (see paragraph 23).

There is a remarkable correspondence between the statutory provisions that were applied in the applicant's case and those that were applied in the Norwegian cases of A and B. With respect to the latter, the Court observed that "the administrative penalty of a tax surcharge served as a general deterrent, as a reaction to a taxpayer's having provided, perhaps innocently, incorrect or incomplete returns or information", whereas the "criminal conviction ... served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud" (see *A and B v. Norway*, cited above, § 144). We find that a similar assessment can be made in the applicant's case.

We find, moreover, that the Icelandic legislature had good reasons to opt for "[the regulation of] the socially undesirable conduct of non-payment of taxes in an integrated dual (administrative/criminal) process", and that the competent authorities had good reasons to choose, in the applicant's case, "to deal separately with the more serious and socially reprehensible aspect of [intentionally or through gross negligence making false or misleading statements] in a criminal procedure rather than in the ordinary administrative procedure" (see *A and B v. Norway*, cited above, § 146; see also ibid., § 152).

4. Furthermore, like the majority, we are of the opinion that the conduct of dual proceedings, with the possibility of different cumulated penalties, was foreseeable for the applicant (see paragraph 61 of the judgment). Apart from the legislative framework, which made it clear that the failure to provide accurate information in a tax return could lead to tax surcharges as well as to criminal sanctions, the applicant was from the outset explicitly informed of the possibility, or even the likeliness, of criminal proceedings, in addition to the tax proceedings, and he was also informed, at an early stage, of the actual reference of his case by the tax authorities to the Office of the Special Prosecutor (see paragraphs 7, 14 and 61; compare *A and B v. Norway*, cited above, §§ 146 and 152).

5. The majority consider that "the apparent overlap in the two investigations in the present case is considerable" (see paragraph 64 of the judgment) and therefore "[harbour] serious doubt as to whether the two sets of proceedings were conducted so as to avoid, to the extent possible, duplication in the obtaining and assessment of evidence" (see paragraph 65).

On this point, we respectfully disagree.

As acknowledged by the majority, "it is clear that the prosecutor had access to the report issued by the Directorate of Tax Investigations and its annexes, as well as to the correspondence between the applicant and the Directorates of Tax Investigation and Internal Revenue (including the applicant's objections to the planned criminal proceedings)" (see paragraph 62). The prosecutor nevertheless also undertook his own investigation. It is true that he interviewed the applicant twice, and that he also interviewed the one witness who had previously been questioned by the Directorate of Tax Investigations. However, he also questioned three additional witnesses who had not previously been questioned by the Directorate (see paragraph 64). As the Supreme Court underlined, the prosecutor's investigation "had been aimed primarily at [uncovering] whether the applicant's alleged offences had been major, whether they had been carried out with intent or gross negligence, and whether persons other than the applicant had been involved" (see paragraph 24).

We find it difficult to conclude, in these circumstances, that the overlap in the two investigations was "considerable". Rather, we find that the two sets of proceedings were interconnected: on 12 November 2012 the tax audit report was forwarded to the Office of the Special Prosecutor (see paragraph 14 of the judgment) and the prosecutor's indictment of 21 May 2014 was obviously based on the State Internal Revenue Board's ruling of 12 March 2014 revising upwards the applicant's income and re-assessing the applicant's tax liability accordingly (see paragraphs 12 and 16). The chronology of the facts thus makes it clear that the establishment of facts made in the tax proceedings, in particular the finding that the applicant had submitted incorrect tax returns, was relied upon in the criminal proceedings (compare *A and B v. Norway*, cited above, §§ 146 and 152; see also *Matthildur Ingvarsdóttir v. Iceland* (committee) (dec.), no. 22779/14, § 59, 4 December 2018, and, *a contrario*, *Jóhannesson and Others v. Iceland*, no. 22007/11, § 53, 18 May 2017). In short, the criminal investigation built on the findings in the tax proceedings: while the applicant's failure to file correct tax returns was established in the tax proceedings, it was on the basis of that finding that the criminal investigation examined the further question whether the offences had been carried out with intent or gross negligence. There was therefore an "adequate" "interaction" between the two proceedings (compare *Bajćić v. Croatia*, no. 67334/13, § 43, 8 October 2020).

The mere fact that the applicant and one of the witnesses were interviewed both by the tax authorities and by the prosecutor is, in our opinion, not enough to conclude that there was no sufficiently close connection in substance between the two sets of proceedings.

6. Finally, we note that the majority admit that the sanctions imposed in the tax proceedings were taken into sufficient account at the sentencing stage of the criminal proceedings (see paragraph 66 of the judgment; compare *A and B v. Norway*, cited above, §§ 146 and 152). We agree.

In our opinion, this is a very important feature of the second set of proceedings, since it ensures "that the overall amount of [the] penalties imposed is proportionate" (see *A and B v. Norway*, cited above, § 132).

Connection in time

7. Turning, next, to the connection in time between the tax proceedings and the criminal proceedings, we note that the majority, following the approach adopted by the Supreme Court (see paragraphs 25-31 of the judgment), place great emphasis on the overall length of the two sets of proceedings (see paragraphs 69-72) and on the duration of the criminal proceedings after the ruling in the tax proceedings had become final (see paragraphs 73-75).

On this point, again, we respectfully disagree.

The connection in time is not a matter of the *duration* of proceedings, even if the requirement of a close connection in time is intended "to protect the individual from being subjected to uncertainty and delay from proceedings becoming protracted over time" (see *A and B v. Norway*, cited above, § 134). It is the temporal *connection* between the two proceedings that matters.

8. In our opinion, there was indeed a close connection in time.

At a point when the tax proceedings were ongoing, the Directorate of the Tax Investigations referred the case to the Office of the Special Prosecutor (see paragraph 14 of the judgment). The prosecutor undertook his own investigation while the tax proceedings were still ongoing (see paragraph 15). As soon as the tax proceedings had come to an end, the prosecutor indicted the applicant and filed the case with the District Court (see paragraph 16). In our view, this sequence of events is indicative of a close connection in time between the two sets of proceedings.

It is true that the criminal proceedings then proceeded for a further three years and four months, until the Supreme Court's judgment of 21 September 2017. While this is a lengthy period, we do not think that it suffices to sever the close connection in time established at the outset between the two sets of proceedings.

Overall conclusion

9. For the reasons set out above, we are of the opinion that, "whilst different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, to consider them as forming part of an integral scheme of sanctions" for failure to declare income on tax returns correctly (see, *mutatis mutandis*, *A and B v. Norway*, cited above, § 147; see also ibid., § 153, and *Matthildur Ingvarsdóttir*, cited above, § 64).

Accordingly, we conclude that there has been no violation of Article 4 of Protocol No. 7.