Enforcement of disputed taxes, in particular customs duties

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It is in the public interest that taxes are effectively collected. At the same time, it is important to guarantee the tax debtors' right to challenge tax claims. It is not easy to find the right balance between these principles. Is it possible for the tax authorities to recover a contested tax amount or should recovery be suspended pending the dispute? In this article, the above questions are analysed in more detail, taking account of ECHR and EU case law, and focusing on the provisions of what is currently the sole European tax, namely the EU customs duties.

Introduction: a right of defence, also for tax debtors

1 Despite the absence of specific legal provisions on the observance of the right of defence in tax matters, this principle has also found its way in decisions about tax disputes. Tax claims mostly involve tax penalties, and it is well-established in the case-law of the European Court of Human Rights that these administrative penalties fall within the scope of Article 6 ECHR – which guarantees the right of defence against criminal charges – if they can be considered to have a criminal nature within the meaning of that provision.[2]

Within the area of EU law, the EU Court of Justice has confirmed that observance of the right of defence is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect a person. This general principle must also be respected by the tax authorities.[3] On this point, reference can also be made to the growing use of the EU Charter of Fundamental Rights in taxation disputes.[4]

Moreover, the interpretation of other principles and provisions, e.g. with regard to the right to individual property, also confirms the need to respect the tax debtors' right of defence.[5]

This right of defence first of all includes a right to be heard before an unfavourable administrative decision is taken (as e.g. guaranteed by Article 22(6) of the Union Customs Code). In this article, the focus is however on the next stage, i.e. on the possibility for the tax debtor to lodge an appeal against the administrative decision, and on the conditions governing such an appeal.

2 As in other fields, the right of appeal in tax matters does not have an absolute character. According to the EU Court of Justice, fundamental rights, such as respect for the right of defence, do not appear as unfettered prerogatives, but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and that they do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which

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2 The right of defence is confirmed by Articles 6 and 13 ECHR, with regard to the determination of persons' civil rights and obligations or of any criminal charge against a person. Pure tax proceedings fall outside the scope of Article 6 ECHR (European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)*, 2013, p. 12, nr. 37).

3 E.g. CJEU 17 December 2015, C-419/14, WebMindLicenses, point 84 (with regard to a VAT case); CJEU 18 December 2008, C-349/07, Sopropé, point 36 (with regard to a customs claim); CJEU 22 October 2013, C-276/12, Sabou, point 38 (with regard to exchange of information between tax authorities in the field of direct taxation).

4 The right to an effective remedy and to a fair trial has been confirmed in Article 47 of the EU Charter of Fundamental Rights, with regard to persons whose rights and freedoms guaranteed by the law of the Union are violated; but the field of application of this Charter only covers Member States when they are implementing Union law (Article 51 of the Charter). The CJEU already confirmed that the provisions of this Charter apply to tax authorities controlling VAT (e.g. CJEU 17 December 2015, C-419/14, WebMindLicenses; cf. CJEU 26 February 2013, C-617/10, Åkerberg Fransson (with regard to Article 50 of this Charter, concerning the ne bis in idem principle), to tax authorities imposing a penalty on a person who refuses to supply information in the context of an exchange of information between tax authorities based on the provisions of Directive 2011/16 (CJEU 16 May 2017, C-682/15, Berlioz), or to tax authorities who have to refund taxes levied in breach of the Treaty on the Functioning of the EU (CJEU 30 June 2016, C-205/15, Toma); cf. opinion of advocate general Jääskinen in case C-69/14, point 30). With regard to the right of defence, mentioned in Article 48 of the EU Charter of Fundamental Rights, the CJEU decided that this provision can only be invoked by a person "who has been charged" (CJEU 17 December 2015, C-419/14, WebMindLicenses, point 83).

5 The property right is confirmed by Article 1 of the First Protocol to the ECHR and in Article 17 of the EU Charter of Fundamental Rights. See e.g. ECtHR 22 September 1994, Nr. 13616/88, Hentrich v France, relating to the right of the French tax authority to substitute itself for any purchaser, even one acting in perfectly good faith, in case of underestimated sale prices of real property. In this case, the ECtHR considered that "as a selected victim of the exercise of the right of pre-emption, Mrs Hentrich "bore an individual and excessive burden" which could have been rendered legitimate only if she had had the possibility - which was refused to her - of effectively challenging the measure taken against her; the "fair balance which should be struck between the protection of the right of property and the requirements of the general interest" was therefore upset" (point 49 of the judgement).

impairs the very substance of the rights guaranteed.[6] The European Court of Human Rights took the same approach with regard to the right of access to the courts secured by Article 6(1) ECHR. This court also confirmed that this right may be subject to limitations. In this respect, the State enjoys a certain margin of appreciation. However, the limitations applied should not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Further, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[7] Otherwise, the person concerned would be deprived of an effective remedy to protect his fundamental rights, contrary to Article 13 ECHR.

3 When it comes to the collection of contested tax claims, the proportionality of such limitations of the right of defence is a difficult issue. On the one hand, it is in the public interest that taxes are effectively collected and recovered, before the tax debtor possibly disappears or before he goes bankrupt. Therefore, the right to contest a tax claim before a court and the right to appeal against a judgement at first instance may be subject to restrictions and conditions, in order to avoid that the collection of the tax is impeded by the use – and possible abuse – of review and appeal procedures. Tax debtors may indeed try to use review and appeal procedures to delay the payment and/or recovery of the tax concerned. On the other hand, the fundamental right to genuinely contest a tax claim should be respected.[8]

4 Although tax procedure aspects are mainly dealt with at national level, the EU and ECHR (case)law give a useful indication of how fundamental EU and ECHR principles are interpreted and applied in tax disputes. In this article, I examine in more detail the EU approach with regard to the (possible) suspensive effect of tax disputes on the tax payment obligation or the tax recovery, as it is applied in the EU legislation concerning customs duties. The Union Customs Code contains some provisions dealing with appeals against customs claims. These provisions are analysed in the light of the fundamental principles of EU law and the ECHR:

- the applicable EU rules of the Union Customs Code (UCC) are analysed in part 1;
- part 2 deals with the competence of the judicial authorities to suspend recovery of contested customs claims;
- in part 3, attention is paid to the conditions under which suspension of the recovery measures can be granted;
- in part 4, the approach in the field of customs claims is compared to the EU approach with regard to other related claims.

1. The EU legislation concerning appeals in the field of customs duties: a strict view on debtors' rights

1.1. The Union Customs Code confirms the right to appeal...

5 The EU customs rules are laid down in Regulation 952/2013 of 9 October 2013 laying down the Union Customs Code (UCC).[9] The preamble of this regulation contains an explicit recital concerning the protection of the appeal right of the taxpayers: recital 26 provides that *"in order to secure a balance between, on the one hand, the need for customs authorities to ensure the correct application of the customs legislation and, on the other, the right of economic operators to be treated fairly, the customs authorities should be granted extensive powers of control and economic operators a right of appeal."*[10] This explanation is quite surprising. If the law grants extensive powers of control to customs authorities, the right of appeal cannot be considered to counterbalance the (correct) use of these extensive powers as such. Moreover, the EU Court of Justice has also accepted that the non-respect of specific rules on the tax authorities' control power does not automatically lead to the invalidity of the information obtained.[11] Under these circumstances, the right of appeal does not in itself guarantee a fair treatment of the economic operators.

6 The provisions on contesting customs claims are laid down in Articles 43-45 UCC. They provide some rules with regard to appeals against customs decisions, "concerning only a number of essential aspects relating to the protection of the traders concerned".[12] However, they do not impose a detailed procedure for appeals in this field. The reasons for this approach to merely regulate some aspects of the right of appeal – which was already adopted in the former customs regulations – were explained as follows: *"What makes harmonisation of rights of appeal special however is not only the differences between national procedures, which are in some cases considerable, but also the fact that they often apply uniformly to the*

6 CJEU 3 July 2014, C-129/13 and C-130/13, Kamino and Others, point 42; CJEU 26 September 2013, C-418/11, Texdata Software, point 84.

7 ECtHR 13 July 1995, 18139/91, Tolstoy Miloslavsky, point 59; ECtHR 21 September 1994, 17101/90, Fayed v. the United Kingdom, point 65.

8 See P. BAKER and P. PISTONE, *General report*, in *The practical protection of taxpayers' fundamental rights* (IFA 2015 Basel Congress), Vol. 100B, p. 51, point 6.5.

9 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast) OJ L 269/1 of 10 October 2013.

10 The same comment was made in recital 15 of the former Regulation 450/2008 laying down the Modernized Customs Code.

11 CJEU 17 December 2015, C-419/14, WebMindLicenses.

12 CJEU 11 January 2001, C-1/99, Kofisa, point 38.

whole field of national administrative and tax law so that the harmonisation of rights of appeal for the purposes of customs law only will fragment hitherto uniform national appeals procedures." [13]

7 Article 44(1) UCC provides that any person shall have the right to appeal against any decision taken by the customs authorities relating to the application of the customs legislation which concerns him or her directly and individually. Any person who has applied to the customs authorities for a decision and has not obtained a decision on that application within the time-limits referred to in Article 22(3) of the same regulation is also entitled to exercise the right of appeal. Article 44(2) UCC provides that the right of appeal may be exercised in at least two steps: (a) initially, before the customs authorities or a judicial authority or other body designated for that purpose by the Member States; (b) subsequently, before a higher independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States. According to Article 44(4) UCC, Member States shall ensure that the appeals procedure enables the prompt confirmation or correction of decisions taken by the customs authorities.

1.2. ... but an appeal only implies a suspension of the recovery under specific conditions

8 Article 45(1) UCC (corresponding to Article 244, first subparagraph of the former Customs Code Regulation 2913/92) provides that the submission of an appeal "shall not cause implementation of the disputed decision to be suspended". It means that contesting the customs claim in principle does not have a suspensive effect. The customs authorities can proceed with the recovery of their claim, despite the fact that the claim is challenged.

However, the authorities have to suspend their recovery actions where they have good reason to believe that the disputed decision is inconsistent with the customs legislation or that irreparable damage is to be feared for the person concerned (Article 45(2) UCC; corresponding to Article 244, second subparagraph, of the former Customs Code Regulation 2913/92). These two exceptions constitute two separate reasons, each one alone justifying suspension.[14]

In the view of the EU Court of Justice, the fact that the lodging of an appeal can only lead to a suspension under such specific conditions, is based on the general interest of the EU in recovering its own revenue as soon as possible.[15]

9 As regards the interpretation of the term 'irreparable damage', the Court has provided some clarification in case C-130/95, *Giloy*, where it confirmed that:

- this condition requires the judge hearing an application for interim measures to examine whether the possible annulment of the contested decision by the Court giving judgment in the main action would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed;
- the damage of a financial nature is, in prinicple, not considered to be serious and irreparable unless, in the event of the applicant's being successful in the main action, it could not be wholly recouped;[16]
- it is not necessary to be established with absolute certainty that harm is imminent. It is sufficient that the harm in question, particularly when it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability;
- if, despite suspension of implementation under this provision, the irreparable damage which justified suspension subsequently occurs for other reasons, the customs authorities may revoke the suspension.[17]

If immediate implementation of a contested measure may lead to the winding up of a company or require an individual to sell his flat or house, the condition concerning the existence of irreparable damage must, in those circumstances, be regarded as being satisfied.[18] In this situation, the Court considers that this damage cannot be wholly recouped. The Court further concluded that the debtor also suffers a financial loss that cannot be wholly recouped, where, once it has occurred, it cannot be quantified.[19]

10 The suspension of a customs decision is however conditional upon the provision of a guarantee, unless such a guarantee would be likely to cause the debtor serious economic or social difficulties (Article 45(3) UCC; corresponding to Article 244, third subparagraph of the former Customs Code Regulation 2913/92).

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13 CJEU 11 January 2001, C-1/99, Kofisa, point 41.
14 CJEU 17 July 1997, C-130/95, Giloy, point 31.
15 CJEU 3 July 2014, C-129/13 and C-130/13, Kamino and Datema, point 68.
16 Cf. CJEU 9 November 1995, C-465/93, Atlanta Fruchthandelsgesellschaft, point 49.
17 CJEU 17 July 1997, C-130/95, Giloy, points 36-40.
18 CJEU 17 July 1997, C-130/95, Giloy, point 38.
19 CJEU, 23 May 1990, joined cases C-51/90 R and C-59/90 R, Comos Tank, Matex Nederland and Mobil Oil, point 24.

1.3. Admissibility of this EU approach

11 The basic principle of the EU approach is thus that the lodging of an appeal does not cause implementation of the disputed decision to be suspended. As such, this approach is not considered to be conflicting with the right of appeal itself, in so far as the exceptions (doubts on the validity of the tax authorities' claim or fear for irreparable damage) permit to ensure the proportionality of this measure. This need to ensure the proportionality was indeed confirmed in the case law of the European Court of Human Rights and the EU Court of Justice.

12 The European Court of Human Rights was requested to deal with such an issue in the *Loncke* judgement.[20] This case related to the Belgian owner of a second-hand car-shop. He was prosecuted for evasion of VAT, for an amount of more than EUR 3.7 million. The tax authorities also claimed penalties for an amount up to EUR 1.8 million. At the time of this trial, the Belgian law still provided that the tax authorities could require the deposit of the outstanding tax debt before an appeal could be deemed admissible. His appeal against the negative decision of the first judge was indeed declared inadmissible, as he was unable to fulfil the deposit request of the Belgian tax authorities.

The person concerned subsequently claimed a violation of his right of access to court. He referred to Article 6 ECHR and not to Article 2(1) of the Seventh Protocol to the ECHR (which guarantees the right of appeal following a conviction for a criminal offence), since the Belgian law at that time provided the possibility of such a deposit request at all instances of the court proceedings. The ECtHR confirmed that there had been a violation of Article 6 ECHR, as the amount of money requested for deposit was disproportionate to his actual financial situation.[21]

It is however important to note that the ECtHR did not completely exclude the use of this payment requirement. It seems that the use of such provisions in itself falls within the wide margin of discretion which is left to the States. In practice, however, the proportionality condition limits the situations where such payment requirement can be applied or maintained.

13 On this point, reference can also be made to a decision of the EU Court of Justice in the *Molenheide* case.[22] This judgement dealt with a Belgian law providing that VAT credits, which resulted from a VAT return where the deductible input VAT exceeded the VAT due for a particular period, were not refunded to the taxable person, but retained by the tax authorities as a preventive attachment, in cases where a VAT debt concerning previous periods was disputed or where the authorities had grounds for presumption or evidence of VAT debts of which the actual existence and amount was not yet established. That retention had effect as a preventive attachment until the dispute had been definitively resolved, either in the administrative procedure or by a final court judgment, or until the tax authorities had closed the verification of their presumptions without establishing another claim. Although these retentions of VAT credits were applied as a preventive attachment, their effect was that large amounts of money were retained by the tax authorities, during a long period of time, till there was a final decision about the disputes about the other VAT claims. In practice, these attachments had the same effect as a (gradual and partial) deposit or recovery of the disputed claims.

The EU Court of Justice held that, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the Treasury as effectively as possible, they must not go further than is necessary for that purpose. They may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct input VAT, which is a fundamental principle of the common system of VAT established by the relevant EU legislation.[23] On the basis of this proportionality condition, the Court of Justice decided in particular that:[24]

- provisions of laws or regulations which would prevent the judge hearing attachment proceedings from lifting in whole or in part the retention of the refundable VAT credit, even though there was evidence before him which would *prima facie* justify the conclusion that the findings of the official reports drawn up by the administrative authority with regard to other periods were incorrect, had to be regarded as going further than was necessary in order to ensure effective recovery and would adversely affect to a disproportionate extent the right of deduction of input VAT;
- provisions of laws or regulations which would make it impossible for the court adjudicating on the substance of the case to lift in whole or in part the retention of the refundable VAT credit before the decision on the substance of the case became definitive would be disproportionate;
- an impossibility for the taxable person to request a court to replace the retention by a different protective measure which was sufficient to

20 ECtHR, Loncke v Belgium, 25 September 2007, 20656/03.

21 In the meantime, this Belgian law has been amended. The deposit can only be requested in case of appeal against a negative first instance decision. The Belgian courts have confirmed that such a request is only acceptable if it respects proportionality, taking into account the specific circumstances of each case (cf. infra, point 29).

22 CJEU 18 December 1997, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96, Molenheide and Others.

23 Point 47-48 of the judgement.

24 Points 56-59 of the judgement.

protect the interests of the Treasury but was less onerous for the taxable person, such as, for example, provision of a bond or a bank guarantee, would also exceed the bounds of what was necessary to guarantee recovery of any sums due, in that the substitution in question might mitigate the adverse effect on the right of deduction and the grant of such a measure should be amenable to review by a court.

14 In this regard, a comparison can also be made with the use of so-called "solve et repete" schemes, which affect even more the right of appeal, as they submit the admissibility of the appeal to the advance payment of the disputed amount. The use of such advance payment obligations was recently discussed in the United Kingdom, where Chapter 3 of the Finance Act 2014 entitles the tax authorities to impose upon persons suspected of tax avoidance an obligation to pay on account the amount the tax authorities consider represents understated tax.[25] Promoters of tax avoidance schemes must notify tax avoidance schemes to the tax authorities, which can then allocate a reference number to the scheme which taxpayers who are members of the scheme must then include on their tax returns. In this way the tax authorities are alerted to the fact that a taxpayer is party to a notified tax avoidance scheme. The Act requires parties to tax avoidance schemes to pay the disputed tax within a fixed period of time from receipt of an "accelerated payment notice" ("APN") which may be issued and payment required *before* the tax is assessed.[26] The express objective of this legislation was to alter the economics of tax avoidance by stripping from parties to such schemes all of the liquidity advantages that they, hitherto, enjoyed. An important consideration leading to the new provisions was the experience of the tax authorities of dealing with aggressive delaying tactics and strategies engaged in by tax avoidance scheme promoters. The unravelling of tax avoidance schemes could take many years prior to the tax authorities being in a position to assess a taxpayer's liability and then obtain payment. In the interim participants held money that the tax authorities considered was due to the State and promoters of tax avoidance schemes continued to be in a position to promote their schemes as having longevity.[27]

The legality of the APN system was challenged in several court cases.[28] It was argued, *inter alia,* that the system was unlawful because it infringed the fundamental right to property set out in Article 1 of the First Protocol to the ECHR. The UK courts however rejected this argument. They referred to the case-law of the European Court of Human Rights, which confirms that this provision requires that the interference with the property complies with the principle of lawfulness and pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised. In the area of taxation measures in particular, it was noted that the State enjoys a wide margin of appreciation.[29] In the UK courts' views, this UK measure indeed pursued a legitimate objective and respected the proportionality test. In this regard, it was observed in the *Rowe* case that the Parliament, within its wide margin of appreciation, had decided to remove the cash flow advantage of participating in such tax avoidance schemes. It was considered there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised by this measure.[30] In this regard, it could also be underlined that this measure only applies to specific situations, where the taxpayer knows in advance that the prior notification of the avoidance scheme may lead to this payment requirement.

In the *Walapu* case, it was also emphasized that it had not been suggested that an alternative equally effective but less intrusive mechanism could be adopted which would secure for the State the legitimate public interest advantages that it presently seeks to obtain. It was also decided that the law strikes a fair balance between the rights of the taxpayer and the State by the provision of interest payable to the taxpayer if the taxpayer's view ultimately prevails.[31]

15 The general conclusion from the above case-law is that a strict approach – whereby the appeal does not imply a suspension of the recovery – cannot be applied in all cases. On this point, it can be observed that the Union Customs Code respects the rights of the debtor, in so far as it obliges the authorities to suspend their recovery actions where they have good reason to believe that the disputed decision is inconsistent with the customs legislation or that irreparable damage is to be feared for the person concerned (Article 45(2) UCC; corresponding to Article 244, second subparagraph, of the former Customs Code Regulation 2913/92).

The above case-law also confirms that the use of advance recovery measures (which imply that the appeal does not suspend the implementation of the recovery measures), just as advance payment

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25 Section 219(2)(a) of Finance Act 2014.

26 https://www.gov.uk/government/publications/compliance-checks-tax-avoidance-schemes-accelerated-payments-ccfs24.

27 Walapu v HM Revenue & Customs, 23 March 2016 [2016] EWHC 658, point 1.

28 In some cases the tax authorities had formally assessed the claimant's tax liability and from then onwards what was in dispute (through the appeal process) was a crystallised tax liability owed by the claimant to the tax authorities (Rowe and Others v HM Revenue & Customs, 31 July 2015 [2015] EWHC 2293). In another case, the person concerned had in his tax return claimed relief against past income tax assessments but he had not yet had the present claim formally assessed. The APN which had been imposed upon him required the payment on account of an unassessed tax liability that had not accrued (Walapu v HM Revenue & Customs, 23 March 2016 [2016] EWHC 658).

29 ECtHR, Bulves v Bulgaria, 22 January 2009, Nr. 3991/03.

30 Rowe and Others v HM Revenue & Customs, 31 July 2015 [2015] EWHC 2293, points 143, 146 and 147.

31 Walapu v HM Revenue & Customs, 23 March 2016 [2016] EWHC 658, point 121.

obligations (which imply that the amount of the disputed tax claim must be paid in order to make the appeal admissible), need to be balanced against the legitimate interests of the tax debtors. In this regard, it it important to limit the recovery measures to those situations where the interests of the Treasury cannot sufficiently be protected by other measures. The last comment of the EU Court of Justice in the *Molenheide* case, that there should be a possibility to replace the retention of the VAT credits by another measure "which is sufficient to protect the interests of the Treasury but is less onerous for the taxable person" is in line with the approach adopted in Article 45 of the UCC, namely to permit the suspension of implementation of the customs decision *"upon the provision of a guarantee"*.

16 In practice, a debtor may nevertheless prefer to pay immediately the amount of the contested claim, in order to avoid the subsequent charging of interest. If the claim would afterwards be annulled or reduced, the tax authorities are under an obligation to repay not only the principal amount which had been unduly paid, but also the default interest on that amount. In evaluating the most interesting option, the debtor may also take account of the costs related to specific guarantees that he would have to lodge in order to obtain a suspension of the recovery measures. If the debtor decides himself not to comply with the payment obligation, but rather to provide e.g. a bank guarantee – if that option is offered or permitted by the tax authorities – he normally cannot ask the authorities to reimburse the costs of this bank guarantee if the tax authorities' claim is ultimately annulled or reduced.[32]

17 A final comment can be made with regard to the recovery of the administrative penalties included in the tax authorities' claim. According to the case-law of the European Court of Human Rights, such penalties may have a criminal character within the meaning of Article 6 ECHR, which guarantees the right to a fair trial in case of criminal charges. According to the second paragraph of this provision, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Hence, the question is whether the non-suspension of the recovery of a penalty relating to the contested claim respects the presumption of innocence. None of the above judgements paid attention to the question whether a specific treatment should be applied to the administrative penalties having a criminal character within the sense of Article 6 ECHR. Although it could be argued that a preventive deposit of the amount of these penalties – or another measure of conservancy – is not incompatible with the presumption of innocence,[33] the question can be raised whether the same can be held with regard to the actual recovery of the penalties that are included in a contested claim. It could indeed be argued that real recovery actions (going further than precautionary measures) with regard to these penalties infringe the presumption of innocence, enshrined in Article 6(2) ECHR.

2. The competence of the judicial authorities with regard to the suspension of the recovery

2.1. The mystery of Article 43 UCC

18 Insofar as Article 45 UCC provides that the authorities have to suspend their recovery actions "where they have good reason to believe" that the disputed decision is unlawful or that irreparable damage is to be feared for the person concerned, this wording gives the impression that the customs authorities have an exclusive and discretionary power with regard to the possible suspension of their recovery actions. At the same time, it is hard to imagine situations where customs authorities, on the basis of Article 45(2) UCC, will break rank and conclude that other customs authorities took decisions that were inconsistent with customs legislation, which should lead to a suspension of the recovery measures on the first ground (i.e. that the customs authorities have good reason to believe that the disputed decision is inconsistent with the customs legislation).[34] Under these circumstances, questions can be raised with regard to the role and the competence of the courts, in particular when courts have to deal with appeals lodged against the decisions of the customs authorities.

19 On this point, a further complication is caused by Article 43 UCC, which deals with 'decisions taken by a judicial authority'. According to this provision:

"Articles 44 and 45 shall not apply to appeals lodged with a view to the annulment, revocation or amendment of a decision relating to the application of the customs legislation taken by a judicial authority, or by customs authorities acting as judicial authorities."

Insofar as the latter provision excludes the application of Article 44 UCC, it could be understood as denying the right of appeal against the first decision that is taken by a judicial authority "or by customs

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32 Cf. EU Court of first instance, 21 April 2005, T-28/03, Holcim v Commission, points 117 and 122-123; EU Court of first instance, 12 December 2007, T-113/04, Atlantic Container Line and Others v Commission, point 38 and 43 (relating to the repayment of the cost of bank guarantees provided in order to defer payment of a fine imposed by the Commission in cases of violation of the EU competition rules).

33 This is comparable to the freezing of the proceeds of an offence, in order to provisionally prevent the transfer or disposal of these assets, with a view to a possible confiscation, to be imposed by a court at the end of the criminal proceedings, when the person concerned is convicted for the criminal offence.

34 T. WALSH, *European Union Customs Code*, Kluwer, Alphen aan den Rijn, 2015, p. 137.

authorities acting as judicial authorities".[35] This interpretation would be conflicting with the text of Article 44(2) UCC, which provides that the right of appeal may be organised initially before (*inter alia*) a judicial authority and subsequently before a higher independent body. Moreover, it should be noted that customs claims normally include penalties for non-compliance with the customs legislation. Under these circumstances, refusing a right of appeal against the first judgement would be contrary to Article 2 of Protocol No. 7 to the ECHR, which guarantees that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.[36] Irrespective of what is (not) foreseen in the UCC Regulation, it must be emphasized that the national law must anyhow respect the fundamental rights of the tax debtor. On this point, it can also be noted that the Council of the EU did not preclude that national customs law might authorise a trader to lodge an appeal directly before an independent authority (judge).[37]

20 Insofar as Article 43 UCC excludes the application of Article 45 UCC with regard to appeals against a judicial decision – or a decision taken by customs authorities acting as judicial authorities – this provision creates uncertainty about the question whether the submission of that appeal may have a suspensive effect or not.

One could try to find some clarification and guidance in the initial Commission proposal concerning customs appeal provisions. This initial proposal was presented to the Council on 29 January 1981.[38] According to Article 7 of this proposal, the lodging of an appeal should not cause implementation of the disputed decision to be suspended, but the customs authority could suspend enforcement of this decision in whole or in part if it had good reason to believe that the disputed decision was inconsistent with the customs rules. The proposal also provided: *"Suspension of enforcement may, where appropriate, be subject to the lodging of a security."*

Article 2, paragraph 3, of the same proposal mentioned:

"The right of appeal referred to in paragraphs 1 and 2 may be exercised:

(i) initially, before the customs authority designated for this purpose;

(ii) subsequently, before the authority referred to in Article 12(1) (i.e. an authority which is independent of the customs authority and which is empowered by virtue of its structure to refer the matter to the Court of Justice. This independent authority could be a judicial authority or a specialized body, depending on the provisions in force in the Member States)."

In the preamble of this proposal, the Commission explicitly noted: *"Whereas, although precise provisions can be laid down with regard to the appeal procedure in its initial stage, as Community law stands at present, the organization of the appeal procedure in its second stage should be left to the discretion of the Member States"*. It could be argued that this idea is reflected in the text of what is now Article 43 UCC: the intention of this provision is not to confirm that the right of appeal and the possibility of suspension are excluded with regard to decisions taken by a judicial authority or by customs authorities acting as judicial authorities, but merely to confirm that the Union Customs Code does not regulate these issues (appeal and suspension of implementation) for decisions taken by a judicial authority or by customs authorities acting as judicial authorities. Article 43 UCC is just meant to confirm that this appeal, and the possible suspension of the decision contested in appeal, are regulated by national law.

It should however be noted that there is no direct and clear link between the Commission proposal of 29 January 1981 and Article 43 UCC. The text of this Article 43 UCC was copied from the former Article 22 of Council Regulation 450/2008. The correlation table attached to Regulation 450/2008 indicates that this Article 22 corresponded to Article 246 of Regulation 2913/92. The text of the latter provision was however quite different, as it said: *"This title shall not apply to appeals lodged with a view to the annulment or revision of a decision taken by the customs authorities on the basis of criminal law."*

Hence, although the initial Commission proposal sheds some light on the real intention of Article 43 UCC, the previous versions of this provision do not completely take away the above uncertainty concerning the precise meaning of this provision, which seems to be conflicting with the text of Articles 44 and 45 UCC.

21 Anyhow, there is no justification for refusing a court of appeal to analyse the circumstances of a customs dispute in the same way as a court of first instance, and to permit a suspension under the same conditions as the ones that are applied by the customs authorities or by a lower court.[39] In order to give a

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35 It can be doubted whether the condition of impartiality can always be fulfilled by "customs authorities acting as judicial authorities". (Cf. M. CADESKY, I. HAYES and D. RUSSELL, "Towards greater fairness in taxation. A model taxpayer charter", http://www.taxpayercharter.com/topics.asp?id=102, point 4.15.)

36 Article 2(2) of this Protocol No. 7 provides that this right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. However, these exceptional circumstances do not apply to normal customs disputes.

37 CJEU, C-1/99, Kofisa, point 39.

38 Proposal for a Council Directive on the harmonization of provisions laid down by law, regulation or administrative action concerning the exercise of the right of appeal in respect of customs matters, *OJ* C 33/2 of 14 February 1981.

39 In a recent Belgian case, the Court of Appeal of Brussels took this approach, taking account of its general competence (in

useful interpretation to these provisions – i.e. an interpretation not affecting their validity – it can be concluded that, when adopting Article 45 UCC, the EU legislature intended to regulate administrative appeals (at the level of the customs authorities) and did not focus on appeals before judicial authorities,

Of course, judicial authorities must also dispose of the competence to suspend the implementation of a disputed decision. This was explicitly confirmed by the EU Court of Justice in the judgment reported in the next paragraph.

2.2. "Exclusive" tax authorities' competence of Art. 45(2) UCC does not exclude the competence of the courts

22 In two Italian cases, *Kofisa* and *Siples*, a local court raised the preliminary question whether it was allowed to suspend the recovery of customs claims, despite its national law (which did not give this competence to the ordinary courts).[40] The EU Court of Justice confirmed that it follows from the wording of Article 45(2) UCC (at that time: Article 244, second subparagraph, of the Customs Code Regulation 2913/92) that this provision confers the power to suspend the recovery exclusively on the customs authorities.[41] The Court however emphasized that this provision cannot restrict the right to effective judicial protection. The Court held that the requirement of judicial control of any decision of a national authority reflected a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR. Therefore, the Court concluded *"that a court seised of a dispute governed by Community law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law"*.[42] This case-law thus confirms that the customs authorities' decision with regard to the suspension of their claim is subject to judicial review.[43]

23 The EU Court of Justice further observed that Article 44(2) UCC (at that time: Article 243, second subparagraph of the former Customs Code Regulation 2913/92) provides that the right of appeal may be exercised initially before the customs authorities and subsequently before an independent body, which may be a judicial authority. The Court of Justice concluded that there was nothing in the wording of that provision to indicate that the appeal before the customs authority is a mandatory stage prior to lodging an appeal before the independent body.[44] Under these circumstances, the Court of Justice concluded that the local court was also competent to suspend the recovery of the contested claim, despite the fact that this was not foreseen under national law. With regard to this judicial competence, the Court did not refer to the circumstances – nor to the limiting conditions – of the customs code, but only to the general need to ensure the full effectiveness of the EU law.[45]

3. Conditions for suspension of the recovery of the customs claims

3.1. A wide interpretation of the conditions for suspension

24 The EU Court of Justice emphasized that the national provisions implementing the conditions for the suspension of the recovery, namely the existence of good reasons to believe that the disputed decision is inconsistent with customs legislation or that irreparable damage is to be feared for the person concerned (Art. 45(2) UCC), should not be applied or interpreted restrictively.[46]

3.2. No automatic suspension before the moment the debtor is heard

25 A further clarification of this provision was requested by the Supreme Court of the Netherlands in the *Kamino and Datema* cases. The Dutch authorities found that the customs classifications declared by these companies were incorrect, and the authorities requested the payment of additional customs duties. The companies were not heard before the demands for payment were issued. They lodged an objection with the tax inspector, who dismissed their objections. Both companies then appealed to the Dutch courts. The EU Court of Justice accepted that the parties

accordance with the national Judicial Code) to impose provisional measures in a court dispute (judgement of 15 February 2017).

40 CJEU 11 January 2001, C-226/99, Siples, point 9; EUCJ 11 January 2001, C-1/99, Kofisa, point 9. The *Kofisa* case related to a VAT claim (including penalties) levied on importation of goods. The national law referred, in regard to disputes and penalties relating to VAT levied on importation, to the provisions of the customs legislation. In this case, the debtor challenged the claim of the customs authorities before a national court, without first lodging an administrative appeal.

41 CJEU 11 January 2001, C-226/99, Siples, point 20; CJEU 11 January 2001, C-1/99, Kofisa, point 45.

42 CJEU 11 January 2001, C-1/99, Kofisa, points 46 and 48; CJEU 11 January 2001, C-226/99, Siples.

43 T. WALSH, *European Union Customs Code*, Kluwer, Alphen aan den Rijn, 2015, p. 1017.

44 CJEU, 11 January 2001, C-1/99, Kofisa, point 36.

45 Point 48 of the Kofisa judgement; point 19 of the Siples judgement; cf. CJEU 19 June 1990, Factortame, point 21.

46 CJEU, 3 July 2014, C-129/13 and C-130/13, Kamino and Datema, point 70.

concerned should not necessarily be heard by the authorities before the assessment of the claim. The fact that they could express their views during the subsequent administrative objection stage was sufficient to ensure observance of the right to be heard.[47] However, the Court further decided that the right of defence was infringed – even though the debtor could express his views during a subsequent administrative objection stage – if national legislation did not allow the addressees of such demands, in the absence of a prior hearing, to obtain a suspension until the possible amendment of these claims. Such was the case, in any event, if the national administrative procedure restricted the grant of such suspension, even though there was good reason to believe that the disputed decision was inconsistent with customs legislation or that irreparable damage was to be feared for the person concerned.[48]

In this case, the Court did not follow the opinion of the advocate general, who considered that the Dutch rules did not 'in a sufficiently automatic manner' suspend the legal effects of the demand for payment until the debtor had been able to exercise his right to be heard.[49] The advocate general had come to this conclusion as it was apparent from other case-law of the Court that the automatic suspensory effect was a factor of decisive importance when considering possible justifications for restricting the right to be heard prior to the adoption of an adverse decision.[50-51]

47 See points 54-55 of the judgement. Cf. CJEU 7 December 2000, C-213/99, de Andrade, point 32.
In earlier case-law relating to other areas, not related to customs, the Court of Justice held that every person should have the right to be heard before the adoption of a decision capable of adversely affecting him (CJEU 24.10.1996, C-32/95 P, point 30; concerning a Commission Decision to reduce financial assistance initially granted). In other areas, granting a right to be heard before a decision is taken may affect the effectivity of the decision concerned (see e.g. with regard to the freezing of funds and economic resources in the context of anti-terrorism measures: CJEU, joined cases C-402/05 P and C-415/05 P-Kadi and Al Barakaat International Foundation, point 336).

48 Point 73 of the judgement.

49 Point 67 of the opinion of advocate general Wathelet of 25 February 2014.

50 Point 74 of the opinion of the advocate general, with reference to the Texdata Software case (C-418/11, point 85). In this case, the Court had decided that the imposition of an initial penalty of EUR 700 without prior notice or any opportunity for the debtor to make known his views before the penalty was imposed, did not impair the substance of the fundamental right to be heard, 'since the submission of a reasoned objection against the decision imposing the penalty immediately rendered that decision inoperable and triggered an ordinary procedure under which there was a right to be heard'.

51 With regard to the time period that should be granted for submitting observations, see CJEU 18 December 2008, C-349/07, Sopropé; EUCJ, 21.09.2000, C-462/98 P, Mediocurso, point 38 (with regard to a decision to reduce the financial assistance granted under the European Social Fund).

3.3. Requirement to provide a guarantee

26 Article 45(3) UCC (corresponding to Article 244, third subparagraph, of the former Customs Code Regulation 2913/92) provides that the suspension of implementation of the customs decision *'shall be conditional upon the provision of a guarantee, unless it is established, on the basis of a documented assessment, that such a guarantee would be likely to cause the debtor serious economic or social difficulties'*.

27 The question has been raised – in a situation where it was considered that irreparable damage may be suffered by the person concerned in the event of immediate implementation of the disputed decision – whether this circumstance necessarily prevents the customs authorities from making suspension of execution subject to provision of security. This question was raised by a German court with regard to the initial German version of Article 244, third subparagraph of the Customs Code Regulation 2913/92. That initial German text – as well as the initial Italian translation – provided that the provision of security 'could not be requested' if such a guarantee was likely to cause the debtor serious economic or social difficulties. At the time when the Court of Justice delivered its judgement, the German and Italian version of this provision had already been amended, in order to bring them into line with the other language versions, which provided that, in such circumstances, the customs authorities could decide not to request the lodging of security.

The Court of Justice decided that it was clear from the wording of all the other language versions of this provision that the customs authorities 'are always entitled' to make suspension of implementation conditional upon the lodging of security, and that these authorities 'are free to decide' not to require such security to be lodged if the requirement to lodge security is likely, owing to the debtor's circumstances, to cause serious economic or social difficulties.[52]

The Court also confirmed that in determining whether requiring a debtor to lodge security would be likely to cause him such difficulties, the customs authorities must take account of all the person's circumstances, in particular those concerning his financial situation.[53] Making suspension of implementation of a disputed customs decision subject to the lodging of security would be likely to 'cause serious economic or social difficulties' for a debtor who does not have sufficient means to provide such a security.[54]

The Court finally decided that where suspension of a disputed customs decision is subject to the lodging of security, the amount of that security must be set at the precise amount of the debt or, if this cannot be

52 CJEU 17 July 1997, C-130/95, Giloy, points 48, 49 and 53.

53 CJEU 17 July 1997, C-130/95, Giloy, point 51.

54 CJEU 17 July 1997, C-130/95, Giloy, point 54.

established with certainty, at the maximum amount of the debt which has been, or may be, incurred,[55] unless the requirement to provide security is likely to cause the debtor serious economic or social difficulties; if that is the case, the amount of security may be set, taking into account the debtor's financial situation, at an amount less than the total amount of the debt concerned.[56]

28 In my view, it is regrettable that the Court of Justice's judgement did not go more deeply into some issues of the customs authorities' competence with regard to the guarantee that they can require from the debtor. First, in its decision on the customs authorities' power to require a security to be lodged, the Court of Justice could have emphasized – as it already did with regard to Article 45(2) UCC (Article 244, second subparagraph, of the former Customs Code Regulation 2913/92) (cf. supra, point 22) – that the power of the customs authorities to require a security or to relieve the debtor of lodging a security cannot restrict the right to effective judicial protection, so that the courts must be in a position to revise also that decision of the customs authorities, if needed. Such a revision possibility is indeed justified in case the customs authorities reject the debtor's arguments with regard to the serious economic or social difficulties that would follow from an obligation to lodge a security. The exercise of the right of defence in accordance with the principle of effectiveness then implies that the judge sets a time-limit for providing the guarantee, if he comes to the conclusion that the authorities have good reasons to require a guarantee.

29 Next, the Court of Justice's judgement clearly indicates that the security which is requested from the debtor should take account of his (financial) possibilities. However, instead of judging that where the debtor cannot provide security, the customs authorities '**are entitled**' not to make suspension of implementation of a disputed decision subject to provision of security, the Court should have confirmed more explicitly that under such economic circumstances, there should be no other option for the customs authorities than to waive the security requirement, and the debtor's appeal should be declared admissible despite the lack of security. There may indeed be situations where the economic difficulties of the debtor make it impossible for him to lodge a security. In that case, it cannot be accepted that the customs authorities 'are free to decide' not to require such security to be lodged.

In this regard, reference can also be made to a decision of the Belgian Constitutional Court with regard to the Belgian rule which enables the tax authorities to require the deposit of the VAT amounts which a debtor is condemned to pay following a court decision in first instance. The purpose of this rule is to avoid that tax debtors enter an appeal to the judgement of the lower court, with the sole aim to delay the execution of that first judicial decision. The Constitutional Court decided that a debtor who does not have the means to fulfil the deposit obligation would be discriminated against, if this circumstance would make it impossible for him to exercise his right to have his sentence reviewed by a higher court.[57] The Belgian Supreme Court (Cassation) also decided that it is contrary to Article 6 ECHR to oblige the debtor to deposit this amount if he does not have the financial means to do so.[58]

30 Moreover, the Court of Justice could have paid more attention to the possible conflict between, on the one hand, its answer to the second question, that the customs authorities may 'always' make suspension of implementation conditional upon the lodging of security (unless such a guarantee would be likely to cause the debtor serious economic or social difficulties) and, on the other hand, its answer to the first question, that suspension 'must be granted' where there is a risk of irreparable damage for the person concerned or where there is a reason to believe that the disputed decision is inconsistent with customs legislation. It is true that this conflict risk is imbedded in the text of the second and third paragraph of Article 45 UCC (and Article 244 of the former Regulation 2913/92). Here the question can be raised why the Council of the EU did not provide a possibility not to require a security to be lodged in situations where there are good reasons to believe that the disputed decision is unlawful, and why this possibility was limited to cases of serious economic or social difficulties (which can be considered to be broader – and thus to cover – the risk of irreparable damage).

On this point, it can be observed that the latter approach – taking account of the seriousness of the claim when deciding on the guarantee to be provided – was already supported by the EU Court of Justice in its *Molenheide* judgement (cf. supra, point 13), in a dispute about preventive attachments of VAT amounts that blocked by way of a precautionary measure the refundable VAT credit where either there were serious grounds for presumption of tax evasion or there was a VAT debt claimed by the tax authority, that debt being contested by the taxable person.

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55 The Court of Justice came to this conclusion, taking into account Article 192, first paragraph, of Regulation 2913/92, which required the amount of a compulsory security to be equal to the precise amount of a debt or, if that amount could not be established with certainty, to the maximum amount of the debt which had been, or could be, incurred (points 56-57 of the judgement). The above provision was copied in Article 57(1) of Regulation 450/2008, which however emphasized that a compulsory guarantee should be at the level of the precise amount of the customs debt "and of other charges" which have been or may be incurred. The latter wording is now repeated in Article 90(1) UCC.

56 CJEU 17 July 1997, C-130/95, Giloy, point 63.

57 Belgian Constitutional Court 6 June 1995, Case 44/95 and 9 November 1995, case 75/95.

58 Belgian Supreme Court (Cassation) 4 June 2015, Case F.12.0098.F.

According to the Belgian legislation, such retention of VAT credits operated as a preventive attachment until the dispute had been finally determined, either by administrative measure or by a judgement which had become definitive. In this case, the Court of Justice decided that:

"(...) provisions of laws or regulations which would prevent the judge hearing attachment proceedings from lifting in whole or in part the retention of the refundable VAT balance, ***even though there is evidence before him which would prima facie justify the conclusion that the findings of the official reports drawn up by the administrative authority were incorrect, should be regarded as going further than is necessary in order to ensure recovery*** *(...).*

Similarly, provisions of laws or regulations which would make it impossible for the court adjudicating on the substance of the case to lift in whole or in part the retention of the refundable VAT balance before the decision on the substance of the case becomes definitive would be disproportionate." [59]

In this regard, it should also be noted that lodging a security may entail costs for the debtor. The burden of this security may become very high. This cost adds to the cost of the proceedings themselves. Lengthy proceedings over many years are very costly. Cost and delay often force a tax debtor to give up and settle.[60]

The EU Court of Justice's approach in the *Molenheide* case was confirmed in another VAT case, relating to a Polish law which permitted the VAT authorities to postpone refunds of VAT credits to taxable persons who had started their VAT activities less than 12 months before they notified the tax authority of their first intra-Community supply or acquisition.[61] In such cases, the normal period for refunds of VAT credits was extended from 60 days to 180 days, unless the taxable person lodged a guarantee to the value of approximately 60.000 €. The Polish government argued that the lengthening of the refund period was justified by the fact that the persons concerned were taxable persons newly liable to VAT, in relation to whom the VAT authorities had to make more extensive inquiries in order to prevent any tax evasion and avoidance. The Court of Justice however rejected the argument of the Polish government. The Court held that the national legislation did not respect the proportionality principle. Taxable persons were not permitted to demonstrate the absence of tax evasion or avoidance in order to take advantage of less restrictive VAT refund conditions. As regards the possibility offered to the taxable persons to lodge a security deposit in order to obtain VAT refunds within the normal refund period, the Court also considered that the security deposit was not proportionate either to the amount of the excess VAT to be repaid or to the economic size of the taxable person. The Court emphasized that the amount of the security deposit implied a considerable financial burden, in particular for new companies. Therefore, the Court concluded that this Polish legislation was not in confirmity with the VAT Directive and the principle of proportionality.

31 As already observed, the Union Customs Code does not regulate the issues of appeal and suspension of implementation for decisions in customs matters taken by a judicial authority (cf. supra, points 19-20). Of course, the right of defence should also be respected in this next stage of appeal.

In this regard, it should be taken into account that tax claims (including customs claims) mostly include a substantial amount of administrative penalties, which may be considered to have a criminal nature within the sense of the European Convention on Human Rights. Article 2(1) of the Seventh Protocol to the ECHR provides that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. This provision is complementary to Article 6(1) ECHR. In the introduction, it was already observed that the limitations to the right of access to the courts, which is secured by this Article 6(1), should not restrict or reduce this access in such a way or to such an extent that the very essence of that right is impaired.

According to Article 2(1) of the Seventh Protocol to the ECHR, the exercise of this right of appeal against decisions involving sanctions with a criminal nature, including the grounds on which it may be exercised, shall be governed by law. States have a lot of discretion on how this provision is implemented so long as they do not destroy the essence of the right. Thus, they do not have to allow an appeal on the merits of the judgement, may restrict the right of appeal to points of law only and may require that leave to appeal be sought first.[62] However, restrictions to the right of appeal, just as restrictions to the general right of access to a court, must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Consequently, when the higher court applies its national legislation to decide on the suspension of the implementation of the lower court's decision concerning the customs claim, it should check the proportionality of the measures requested by the tax authorities, which implies that they also take account of the above criteria, relating to the (lack of) serious character of the appeal claim, the debtor's ability to pay or to provide a guarantee and the risk for the tax authorities.

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59 CJEU 18 December 1997, Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96, Garage Molenheide and Others, points 55-57.

60 Cf. M. CADESKY, I. HAYES and D. RUSSELL, "Towards greater fairness in taxation. A model taxpayer charter", http://www.taxpayercharter.com/topics.asp?id=102, point 4.15.

61 CJEU 10 July 2008, C-25/07, Sosnowska.

62 http://www.coe.int/en/web/echr-toolkit/protocole-7.

This was illustrated by the judgement of the European Court of Human Rights in the *Loncke* case, about a car dealer who was prosecuted for evasion of VAT (cf. supra, point 12).[63] His appeal against the conviction by the first judge was declared inadmissible, as he was unable to fulfil the deposit request of the Belgian tax authorities. The European Court of Human Rights considered that this inadmissibility decision of the court of appeal did not respect the appeal right of the person concerned.

4. The approach with regard to customs related claims

4.1. A similar approach ...

32 The basic principles of the approach in the customs legislation correspond to the principles set out by the EU Court of Justice in related areas. An important judgement related to the effects of disputes about the validity of a Council Regulation of 1987 introducing a special levy in the sugar sector, to eliminate the losses suffered by the European Community due to the high export refunds which the Community was required to pay in order to ensure that excess sugar production within the Community could be disposed of in non-member countries. Two debtors lodged an objection against such claims imposed by national customs offices. They argued that these claims were based on a European regulation which was invalid. The national court asked the Court of Justice for a preliminary ruling with regard to its competence to suspend, by way of an interim measure, the operation of the national decisions based on the contested Council regulation. The Court of Justice observed that the need to ensure the full effectiveness of the European regulations in all the Member States did not constitute an obstacle to the legal protection which Community law conferred on individuals. This legal protection implied that the national court which had referred questions on the interpretation or the validity of EU legislation to the Court of Justice, had to be able to grant interim relief and to suspend the application of the disputed national measures which were based on that EU legislation, until such time as the national court could deliver its judgement on the basis of the decision of the Court of Justice.[64]

The national court also wanted to know under what conditions national courts may order the suspension of enforcement of a national administrative measure based on a Community regulation, in view of the doubts which they may have as to the validity of that regulation. On this point, the Court of Justice decided that this interim relief can be ordered by a national court only if:

- that court entertains serious doubts as to the validity of the EU act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice (as suspension of enforcement must retain the character of an interim measure);
- there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief. With regard to the nature of the damage, purely financial damage cannot be regarded in principle as irreparable.

33 The same conclusions can be found in a judgement about a domestic administrative decision demanding for repayment of export refunds.[65] The Court of Justice confirmed that a national court is entitled to suspend implementation of such a domestic administrative decision if it has doubts as to the validity of the EU act which serves as its basis.[66]

The Court of Justice also took the same approach with regard to the suspension of national measures implementing a Council regulation on the allocation of import quotas for third-country bananas. In the *Atlanta* case, the Court of Justice confirmed that the above conditions must also be observed when a national court orders a 'positive' interim measure (which in this case implied: rendering the regulation whose validity was challenged provisionally inapplicable as regards the company concerned, allowing that company to disregard the provisional import quota).[67]

34 In the above cases, the Court of Justice further empasized that:

- in its assessment of all the conditions for the interim measures, the national court should respect any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the EU act or on an application for interim measures seeking similar interim relief at EU level; and[68]
- the national court should take due account of the EU interest, namely that the EU legislation concerned should not be set aside without proper guarantees. In order to comply with that obligation, the national court to which an application for interim measures has been made should first examine whether the EU act in

63 ECtHR 25 September 2007, 20656/03, Loncke v Belgium.

64 CJEU 21 February 1991, Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen ad Zuckerfabrik Soest, points 16-21, with references to CJEU 22 October 1987, 314/85, Foto-Frost and 19 June 1990, C-213/89, Factortame and Others.

65 It was decided that Article 45 UCC (Article 244 of the former Community Customs Code Regulation 2913/92) is not applicable to demands for repayment of export refunds.

66 CJEU 17 July 1997, C-334/95, Krüger, point 44.

67 CJEU 9 November 1995, C-465/93, Atlanta Fruchthandelsgesellschaft.

68 CJEU 17 July 1997, C-334/95, Krüger, point 44.

question would be deprived of all effectiveness if not immediately implemented, and must take account in that respect of the damage which may be caused to the legal regime established by the regulation for the EU as a whole. It also means that if the grant of interim relief represents a financial risk for the EU, the national court must be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security.[69]

4.2. ... but not an identical approach?

35 It should be emphasized that the above case-law does not oblige the national court always to require a guarantee.[70] The Court of Justice only decided that the national judge must have the possibility to do so, taking into account the financial risk for the EU as a whole. However, this does not prevent the local judge from taking account of other elements, namely the financial, economic and social situation of the debtor (as confirmed in Article 45(3) UCC with regard to customs claims) and/or the serious character of the arguments invoked by this debtor (not confirmed in Article 45(3) UCC).

36 It was mentioned before that Article 43 UCC could be interpreted in such a way that it does not regulate the issues of appeal and suspension of implementation for decisions in customs matters taken by a judicial authority or by customs authorities acting as judicial authorities. According to a former Commission proposal, the organization of the appeal procedure in its second stage had to be left to the discretion of the Member States (see point 20). However, that view is not in line with the approach of the Court of Justice with regard to customs related claims. In the *Zuckerfabrik* cases, the Court of Justice expressed the opinion that national differences concerning the powers of judges to order the suspension of enforcement of administrative measures may jeopardize the uniform application of EU law.[71] In this regard, it should make no difference whether the dispute is raised before a court of first instance or a court of appeal.

5. Comparison with recovery of unlawful state aid

37 The above approach with regard to customs duties is similar to the EU policy with regard to the implementation of decisions of the European Commission ordering the recovery of state aid which is considered unlawful and incompatible with EU law. The purpose of such recovery is to re-establish the competitive situation that existed on the market prior to the granting of the unlawful state aid. The Commission's recovery decision imposes a recovery obligation upon the Member State concerned. It requires the Member State concerned to recover a certain amount of aid from a beneficiary or a number of beneficiaries within a given time frame.

The Commission may also adopt a decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market ('recovery injunction'), if all the following criteria are fulfilled:

(a) according to an established practice there are no doubts about the aid character of the measure concerned;

(b) there is an urgency to act;

(c) there is a serious risk of substantial and irreparable damage to a competitor (Article 13(2) of Regulation 2015/1589.

With regard to the execution of the Commission's decisions, Article 16(3) of Council Regulation (EU) 2015/1589 provides that: *"Without prejudice to any order of the Court of Justice of the European Union pursuant to Article 278 TFEU, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law".*[72] This provision is in line with the text of Article 14(3) of the former procedural

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[69] CJEU 9 November 1995, C-465/93, Atlanta Fruchthandelsgesellschaft, points 42-45; EUCJ 21 February 1991, Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest, points 30-32. (See also CJEU, 17 July 1997, C-334/95, Krüger, points 45 and 46, about the national court's task to obtain all relevant information on the EU act concerned).

[70] As clearly confirmed in the German – which was the language of all these cases – and the French language version of point 47 of the *Atlanta* judgement and point 32 of the *Zuckerfabrik* judgement.

[71] Points 25-27 of this judgement.

[72] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, *OJ* L 248, 24.9.2015, p. 9.
It should be noted that the beneficiary of the aid (who may become the debtor in case of recovery of that aid) is informed if the Commission decides to initiate a formal investigation procedure. As an interested party, he will be invited to submit comments (in accordance with Article 6 of Regulation (EU) 2015/1589, or he may even be required to provide information (in accordance with Article 7 of the same Regulation). However, this possibility to be heard does not in itself guarantee a full right of defence for this interested party.

regulation concerning state aid (Regulation 659/1999).[73]

38 The impact of this provision was discussed in case C-232/05, Commission v France.[74] In 2000, the European Commission had taken a decision ordering France to recover some illegal aid. Following the Commission's decision, the French authorities issued several assessments, which were contested before a French court.[75] According to French law, these actions challenging the authorities' assessments had automatic suspensory effect.

The EU Court of Justice decided that the French law could not be considered to allow the 'immediate and effective' execution of the Commisison's decision. On the contrary, by granting the suspensory effect, the contestation procedure could considerably delay the recovery of the aid. In the view of the Court of Justice, this situation prolonged the unfair competitive advantage resulting from the unlawful aid at issue. Accordingly, the court ordered that the French rule providing for the suspensory effect of the action brought against the demand for repayment of the state aid should be left unapplied.[76]

In the same case, the company concerned also brought an action for annulment of the Commission's decision before the Court of First Instance of the European Communities. However, the company had not requested that the application of that Commission's decision be suspended under Article 278 TFEU (ex Art. 242 TEC), which provides that: *"Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended."* Suspension of such a decision can thus only be granted if the application for suspension states the circumstances giving rise to urgency and contains the pleas of fact and law establishing a prima facie case for the interim measures being applied for.[77]

In a communication of 2007, the Commission analysed the possible consequences of litigation before the EU courts and before national courts, and the conditions for obtaining an interim relief of the national measures to implement the Commission's recovery decision.[78] With regard to these conditions, the Commission explicitly referred to the conditions established by the Court of Justice in the cases *Zuckerfabrik* [79] and *Atlanta Fruchthandelsgesellschaft* [80]: *"According to settled case-law, interim relief can be ordered by the national court only if:*

1. that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

2. there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

3. the court takes due account of the Community interest; and

4. in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level."

6. Conclusions

37 The strict approach of the EU legislature with regard to the possibility to suspend the recovery of contested customs claims appears to be inspired by the fact that customs duties constitute own resources for the EU budget. It is indeed reasonable, for customs duties as well as for other taxes, that tax authorities request guarantees to ensure the recovery of disputed customs or other tax claims. The same approach is also followed in other areas, such as the recovery of unlawful state aid.

Of course, there must be a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[81] As the right of defence is a fundamental right, tax authorities should respect the right of tax debtors to contest tax claims. Therefore, there should be a clear and effective mechanism for providing or requesting an interim suspension of payment or collection of disputed taxes in duly justified cases.[82]

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73 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (*OJ* L 83, 27.3.1999, p. 1). Article 14(3) of this Regulation specified that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision.'

74 EUCJ, 5 October 2006, C-232/05, Commission v France (the *Scott* case).

75 In fact, the Commission initially made an error in the calculation of the amount of the aid and the Commission had to rectify its decision.

76 Points 51-53 of this judgement.

77 Cf. Notice of the Commission, Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (2007/C 272/05), *OJ* C 272/4 of 15.11.2007, point 25.

78 Notice of the Commission, Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (2007/C 272/05), *OJ* C 272/4 of 15.11.2007, section 3.2.3., points 55-59.

79 Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen and Others.

80 Case C-465/93, Atlanta Fruchthandelsgesellschaft mbH a.o.

81 ECtHR, 25 October 2011, Valkov and Others v Bulgaria, 2033/04 and others, point 91.

82 P. BAKER and P. PISTONE, General report, in *The practical protection of taxpayers' fundamental rights* (IFA 2015 Basel Congress), Vol. 100B, p. 51, point 6.5.

With regard to customs claims, it appears that the Union Customs Code Regulation 952/2013 only sets out some rules concerning the effect of disputes on the recovery of customs claims. The provisions for the implementation of the appeals procedure are largely to be determined by the Member States.[83]

The above analysis shows that this part of the Council regulation – in particular Article 43 UCC – is somewhat unclear with regard to the important aspect of the judicial authority's competence. However, the limited provisions of the Union Customs Code do not exclude the debtors' right to a fair trial, and this right should also be guaranteed beyond any possibly restrictive rule of national laws implementing this Union Customs Code.[84]

It can be deplored that this Council regulation did not pay attention to some possibilities to improve the tax debtor's right of appeal by explicitly providing for a possibility for the debtor to have the recovery replaced by less onerous guarantees, or for a possibility for the authorities to waive guarantees if there are doubts about the validity of the customs claims. On these points, the case-law of the EU Court of Justice with regard to (suspension of) recovery of VAT claims or other customs related claims may also be exemplary for the approach to be followed in customs disputes.

At the same time, the EU Court of Justice could have confirmed more explicitly that the provision of a security cannot be imposed if the debtor is simply unable to execute that request.

[83] CJEU 3 July 2014, C-129/13 and C-130/13, Kamino and Datema, point 57.

[84] Cf. CJEU 21 September 2000, C-462/98 P, Mediocurso v Commission, point 36.