Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 8 March 2018 [1]

**Case C-34/17**

**Eamonn Donnellan**
**v**
**The Revenue Commissioners**

(Request for a preliminary ruling from the High Court (Ireland))

(Council Directive 2010/24/EU — Mutual assistance for the recovery of claims relating to taxes, duties and other measures — Notification to a person of a claim after, rather than before, the issuance of a request for its recovery by the uniform instrument permitting enforcement under Article 12 of Directive 2010/24 — Permissibility of challenge under Article 14 of Directive 2010/24 in the courts of the requested Member State to enforcement of the claim — Article 47 of the Charter of Fundamental Rights of the European Union — Right to effective judicial protection)

## I. Introduction

1. The main proceedings require the Court to rule on the consequences following when a substantial administrative fine ('the disputed claim') is imposed by Member State A (here Greece) [2] on a person resident in Member State B (here Ireland) in circumstances in which the disputed claim was not notified by Member State A to that person until after, rather than before, Member State A had issued to Member Stated B a Uniform Instrument Permitting Enforcement ('the impugned enforcement Instrument') with respect to the disputed claim. The impugned enforcement Instrument was issued pursuant to Article 12 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. [3]

2. What scope, if any, is there for such a person to challenge the impugned enforcement Instrument, and/or measures taken by the requested authority to enforce it, in the courts of Member State B (Ireland) rather than Member State A (Greece), on the basis of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and the right to effective judicial protection? [4]

1 Original language: English.

2 On whether the fine imposed in the main proceedings amounts to a criminal rather than administrative penalty, therefore falling outside of the scope of Article 2 of Directive 2010/24, and whether this is to be assessed by the courts of the requested or applicant Member State, see below point 90.

3 OJ 2010 L 84, p. 1.

4 Directive 2010/24 was preceded by Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes, and other measures (OJ 2008 L 150, p. 28) and 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 (OJ 1976 L 73, p. 18). Directive 2008/55 was repealed by Directive 2010/24 and Directive 76/308 was repealed by Directive 2008/55. Given that the time frame of this dispute falls within Directive 2008/55 and Directive 2010/24, both are relevant to the main proceedings.

3. I will approach resolving this problem by first summarising the observations submitted to the Court. I will then explain why I consider that the judgment of the Court in *Kyrian*,[5] combined with imperatives resulting from the right to effective judicial protection under Article 47[6] of the Charter, are central to resolving the dispute. I will then explain why the first paragraph of Article 14 of Directive 2010/24 must be interpreted as being subject to compliance with the sequence laid down for cooperation set out in Directive 2010/24, under which information exchange must precede notification of a claim, which must in turn precede the issue of a uniform instrument permitting enforcement under Article 12 of Directive 2010/24.

## II. Legal framework

### *A. Charter of Fundamental Rights of the European Union*

4. Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial' states as follows in its first two paragraphs:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

### *B. EU law*

5. Article 4(1) of Directive 2008/55 stated:

'At the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim.

In order to obtain this information, the requested authority shall make use of the powers provided under the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State where that authority is situated.'

6. Article 5(1) and (2) of Directive 2008/55 stated:

'1. The requested authority shall, at the request of the applicant authority, and in accordance with the rules of law in force for the notification of similar instruments or decisions in the Member State in which the requested authority is situated, notify to the addressee all instruments and decisions, including those of a judicial nature, which emanate from the Member State in which the applicant authority is situated and which relate to a claim and/or to its recovery.

5 Judgment of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11).

6 In the judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 54 and the case-law cited), the Court held that it 'should be noted …that the principle of effective judicial protection is a general principle of EU law, which is now set out in Article 47 of the Charter. Article 47 secures in EU law the protection afforded by Article 6(1) and Article 13 of the ECHR. It is necessary, therefore, to refer only to Article 47'.

2. The request for notification shall indicate the name and address of the addressee concerned and any other relevant information relating to the identification to which the applicant authority normally has access, the nature and the subject of the instrument or decision to be notified, if necessary the name, and address of the debtor and any other relevant information relating to the identification to which the applicant authority normally has access and the claim to which the instrument or decision relates, and any other useful information.'

7. Recital 4 of Directive 2010/24 states, inter alia that:

'… important adaptations are necessary, whereby a mere modification of the existing Directive 2008/55/EC would not be sufficient. The latter should therefore be repealed and replaced by a new legal instrument which builds on the achievements of Directive 2008/55/EC but provides for clearer and more precise rules where necessary.'

8. Recital 12 of Directive 2010/24 states:

'During the recovery procedure in the requested Member State, the claim, the notification made by the authorities of the applicant Member State or the instrument authorising its enforcement might be contested by the person concerned. It should be laid down that in such cases the person concerned should bring the action before the competent body of the applicant Member State and that the requested authority should suspend, unless the applicant authority requests otherwise, any enforcement proceedings which it has begun until a decision is taken by the competent body of the applicant Member State.'

9. Recital 20 of Directive 2010/24 states, inter alia, that the objective of the Directive is 'the provision of a uniform system of recovery assistance within the internal market'.

10. Recital 21 of Directive 2010/24 states:

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

11. Article 8 of Directive 2010/24 is entitled 'Request for notification of certain documents relating to claims'. Its first and second paragraphs state:

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

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

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

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

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

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

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

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

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

12. Article 14 of the Directive 2010/24 is entitled 'Disputes'. Paragraphs 1 and 2 of Article 14 state:

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

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

## III. The facts in the main proceedings and the question referred for a preliminary ruling

13. In 2002, Mr Eamonn Donnellan ('the plaintiff'), who was born in 1979 in Co. Galway, Ireland, was employed as a truck driver by TLT International Limited, Co. Westmeath. In July of 2002 the plaintiff was instructed by his employer to go to Greece in a lorry to collect 23 pallets of olive oil. On 27 July 2002, when the plaintiff was catching a ferry to Italy, and on his way back to Ireland from Greece, the Greek customs authorities inspected the lorry and discovered a large number of undeclared packages of cigarettes,[7] hidden among the pallets of olive oil in his truck. The plaintiff was held in custody and convicted two days later on charges of, inter alia, smuggling. In October 2002 the Efetio Patron (Court of Appeal, Patras, Greece) quashed the conviction and ordered the plaintiff's immediate release, whereupon he returned to Ireland.

14. Six years and six months later, on 27 April 2009, the Greek customs office in Patras, through an Assessment Deed dated 27 April 2009 ('the 2009 Assessment act') imposed the disputed claim on the plaintiff. This was a fine of EUR 1 097 505.00, for the alleged smuggling of cigarettes, in breach of Greek Customs legislation in force in 2002.

15. On 19 June 2009, the Greek embassy in Ireland sent an 'invitation' by registered post to the plaintiff, addressed only by reference to his name and the name of his town of residence. The documents which the plaintiff was invited to inspect in that 'invitation' were stated to be from the Greek Ministry of Finance. But the 'invitation' did not say that these documents concerned the disputed claim.

16. The referring court says it is satisfied that the 'invitation' of 19 June 2009 was not received by the plaintiff. This is supported by the written observations of Greece which describe the 19 June 2009 'invitation' as an incidence in which the Greek embassy unsuccessfully attempted to serve the Assessment act on the plaintiff and the same was reiterated by the agent for the Greek Government at the hearing.

7 According to the case file there were 171 800 packages of them.

17. At the hearing, the agent for the Greek Government was not able to advise whether the Greek authorities had additionally secured notification of the 2009 Assessment act on the plaintiff with the assistance of the requested authority under Articles 4 and 5 of Directive 2008/55 (request for information and notification, respectively), the measures in force at the material time. There is nothing in the case file to suggest that this avenue for mutual assistance was activated.

18. According to the order for reference, as a matter of Greek law deemed notification to the plaintiff of the claim was made through publication of a notice in the Official Journal of Greece on 15 July 2009. However, at the hearing the agent for the Greek Government took the position that the plaintiff became comprehensively apprised of the case against him much later, namely on 14 November 2013, when the plaintiff received and confirmed reception of the 2009 Assessment act and a translation of it into English.[8] This occurred after the plaintiff sought to find out more about the impugned enforcement Instrument from the requested authorities through his Irish solicitors.

19. The plaintiff had been notified of the impugned enforcement Instrument a year earlier, by letter dated 14 November 2012, following a recovery request made by the applicant authority to the requested authority. The plaintiff received a letter bearing this date from the requested authority informing him of the disputed claim and seeking recovery of it, to the sum of EUR 1 507 971.88. The letter included a copy of the impugned enforcement Instrument, issued by the applicant authority in accordance with Article 12 of Directive 2010/24, but nothing more. The letter from the requested authority also included a specific demand for payment within 30 days of EUR 1 507 971.88 and the consequences of non-compliance ('the demand for payment'). These consequences included enforcement proceedings and referral to the Sheriff or County Registrar with a view to seizure of the plaintiff's goods.

20. On 11 June 2014, rather than instituting proceedings in Greece to challenge the 2009 Assessment act and the impugned enforcement Instrument, the plaintiff instituted proceedings before the High Court of Ireland against the requested authority seeking, inter alia, relief from the demand for enforcement of the claim in Ireland, damages for alleged breach of his (Irish) constitutional rights, negligence and defamation on the part of the requested authority. The plaintiff obtained on 12 December 2014 an interlocutory order restraining enforcement in Ireland of the disputed claim pending the determination of the Irish proceedings.

21. During the Irish proceedings, evidence was heard from a Greek expert in public law, who had provided a written opinion on 19 November 2015 to the effect that, under Greek law, time for an appeal by the plaintiff in the Greek courts lapsed in October 2009. According to the order for reference, this was partly because deemed service under the Greek administrative system (publication in the Greek language in an official journal and purported service through the Greek embassy in Ireland) was sufficient and binding according to judgments 2436 and 2437 of 2012 of the Symvoulio tis Epikrateias (Council of State, Greece). As noted above, this publication occurred on 15 July 2009.

22. The referring court states in the order for reference that it concludes that an appeal in the Greek courts, instituted after the demand of the requested authority of 14 November 2012, would not succeed. This finding is contested in the written observations of the Greek Government and was further contested by their agent at the hearing.

23. In those circumstances, the High Court of Ireland decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling under Article 267 TFEU.

8 C.f. the order for reference which states that the plaintiff only learned of all of the details of the 2009 Assessment act under cover of a letter dated 14 March 2014. Throughout this Opinion I will refer to the date provided by the Greek Government at the hearing.

'Is the High Court of Ireland precluded by Article 14(1) and (2) of Directive 2010/24 when determining the enforceability in Ireland of a "uniform instrument permitting enforcement" issued on 14 November 2012 by the customs office of Patras for administrative penalties and fines in the sum of EUR 1 097 505.00 imposed on 15 July 2009 for alleged smuggling on 26 July 2002 from:

(i) applying the right to an effective remedy and to a fair trial within a reasonable time for a citizen of Ireland and of the European Union in relation to the enforcement request;

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

(iii) considering the full effectiveness of community law for its citizens?'

24. Written observations were lodged by the plaintiff, the requested authority, the Greek Government, and the European Commission. All participated at the hearing which took place on 18 January 2018.

## IV. Summary of the observations submitted

25. The plaintiff acknowledges that the language of Article 14(1) of Directive 2010/24 seems to require that matters in relation to the claim, and the notification of the original Assessment act or the uniform instrument permitting enforcement should be taken in the applicant Member State (here Greece), and that Article 14(2) states that disputes concerning the enforcement measures taken in the requested Member State shall be brought before the competent body of that Member State. However, the plaintiff notes that the Court held in *Kyrian*[9] that there may be exceptions to the language of the directive to ensure fundamental rights are protected and that the Court's judgment in *Kyrian* supports his case.

26. The plaintiff refers, inter alia, to paragraphs in *Kyrian* in which it is held that the purpose of effective notification of all instruments and decisions that is inherent in Directive 76/308 cannot be attained unless it respects the legitimate interests of the addressees of notifications;[10] that one of the functions of notification is to allow the addressee to assert his rights;[11] that both the subject matter of the claim and the cause of action had to be identified with a degree of certainty[12] (which entailed in *Kyrian* notification in the official language of the Member State in which the requested authority was situated)[13] and that given that Directive 76/308 did not set out the consequences of failing to comply with this requirement 'it is for the national court to apply national law while taking care to ensure the full effectiveness of Community law, a task which may lead it to interpret a national rule which has been drawn up with only a purely domestic situation in mind in order to apply it to the cross-border situation at issue'.[14]

27. The plaintiff points out that it is not disputed that he did not know of the existence of the claim until 14 November 2012, and argues that he was deprived of his right to a fair hearing twice, in that he was never on notice of the original hearing held in Greece,[15] and he was not notified of the existence of the 2009 Assessment act to appeal it, and that under Irish law the non-allowance of

9 Judgment of 14 January 2010 (C-233/08, EU:C:2010:11).

10 Ibid., paragraph 57 and the case-law cited.

11 Ibid., paragraph 58.

12 Ibid., paragraph 59.

13 Ibid., paragraph 60.

14 Ibid., paragraph 61, citing judgment of 8 November 2005, *Leffler* (C-443/03, EU:C:2005:665).

15 This was contested by the representative of Greece at the hearing. See further below, point 76.

participation in proceedings and non-notification of a decision of the nature of the one in issue in the main proceedings renders that decision incapable of being enforced. The plaintiff points out that submissions were made to the national referring court that no effort was made by the Greek authorities to use any EU mechanism for the service of documents to ensure that he was on notice of the 2009 Assessment act, and no evidence to this effect was put to the court.

28. The plaintiff further relies on case-law of the European Court of Human Rights on the interpretation of Article 6 of the ECHR to the effect that litigants are to be summoned to court hearings in such a way not only so as to have knowledge of the date and place of hearing, but also to have enough time to prepare a case and attend a court hearing, and that a formal dispatch of a notification letter without any confidence that it will reach the applicant in good time cannot be considered to be proper notification.[16] Further, the plaintiff refers to *Kapetanios and Others v. Greece*[17] to the effect that the European Court of Human Rights has found that ordering the imposition of administrative fines on individuals accused of smuggling who had been acquitted of a criminal offence is a violation of Article 6(2) of the ECHR on the presumption of innocence and of Article 4 of Protocol No 7 on the right not to be tried or punished twice. Finally, the plaintiff queries whether, in the light of the ruling in *Kapetanios and Others v. Greece*, a fine of the dimensions in issue is suitable for categorisation as civil in nature, and is rather criminal.

29. The requested authority points out that the impugned enforcement Instrument was drawn up in English with an issue date of 14 November 2012, and delivered to the plaintiff by letter bearing the same date. No complaint is made in the main proceedings of the form or content of the impugned enforcement Instrument, or any of the steps taken by them, as the requested authority, in Ireland. The plaintiff confirmed, under cross-examination on 27 October 2015, his understanding of the impugned enforcement Instrument, and that he had been notified that any dispute in relation to the claim therein could be taken up with the applicant authority in Greece. The plaintiff also confirmed that he had been given the relevant address of the applicant authority in Greece and that he had been told by the requested authority in Ireland that it would not take any further action while he raised the matter with the applicant authority.

30. On 11 June 2014 the plaintiff commenced instead proceedings in the Irish courts culminating in an order for reference.

31. The requested authority is of the view that it is patent that under Article 14 of Directive 2010/24 complaints such as those made by the plaintiff must be raised in Greece, on the basis of both the wording of that provision and recitals 12 and 20 of Directive 2010/24. A contrary finding would drive a proverbial coach and horses through the legislative framework established by Directive 2010/24, and undermine the system of mutual assistance and particularly Article 12 of Directive 2010/24. In the light of this, questions on the procedural and substantive validity of the impugned enforcement Instrument, including the Charter, must be raised before the Greek courts.

32. The requested authority contends that, given that the plaintiff failed to challenge the impugned enforcement Instrument in Greece, the requested authority became bound pursuant to Article 13(1) of Directive 2010/24 to treat the claim as if it were a claim made under Irish law. If the plaintiff were now to take steps to contest or challenge the impugned enforcement Instrument, as a matter of Irish law any further proceedings taken by the requested authority would be automatically stayed.[18]

16 ECtHR, 1 March 2012, *Kolegovy v. Russia*, CE:ECHR:2012:0301JUD001522605, paragraph 40.

17 ECtHR, 30 April 2015, *Kapetanios and Others v. Greece*, CE:ECHR:2015:0430JUD000345312.

18 It refers to Regulation 13(1) of Statutory Instrument No 643/2011, European Union (Mutual Assistance for Recovery of Claims relating to Taxes, Duties and other Measures) Regulations 2011 (*Iris Oifigiúil*, 16 December 2011).

33. The requested authority distinguishes the ruling in *Kyrian* on the basis that it addresses a situation in which a complaint was made about the notification by the requested authority on the grounds that the notification was in a language (German) which was neither a language of the requested Member State (in *Kyrian* the Czech Republic) or a language that the recipient understood. The notification in issue in the main proceedings was in English and the plaintiff, unlike the plaintiff in *Kyrian*, takes no issue with it. Further, while the requested authority acknowledges that instruments permitting enforcement can exceptionally be set aside, those circumstances must be something intrinsic to the instrument itself, such as the language in which it is written, or the person to whom it is notified, and not a dispute on the facts as to the validity on the underlying claim.

34. The requested authority states that expert evidence given before the national referring court by a Greek lawyer was heard over its objections, and also contests whether the evidence given was unequivocal that a challenge by the applicant in Greece was doomed to fail. The applicant can argue breach of his fundamental rights before the Greek courts, and secure if necessary a reference to this Court under Article 267 TFEU from a Greek court from whose decision there is no judicial remedy.

35. Finally, the requested authority disputes that it is incontrovertible that defects in service are always an absolute defence under Irish law.

36. The Greek Government does not accept that the plaintiff would have been precluded from enforcing his fundamental rights, including the right to an effective remedy, if he had contested the 2009 Assessment act in Greece. According to settled case-law of the Symvoulio tis Epikrateias (Council of State), under Article 66(1)(A)(a) of the Code of Administrative Procedure, although it is laid down that the period for lodging an appeal begins, as a rule, on lawful notification of the act to the person concerned, it remains possible for the period to start at the time at which it is established that the person concerned is fully aware of the content of the contested act, either where the prescribed notification did not take place or where it did take place but was unlawful.[19] The Greek Government also refers to case-law of the European Court of Human Rights to this effect.[20]

37. The Greek Government takes issue with paragraph 16 of the order for reference, because the documents sent to the Greek embassy in Ireland, and which it acknowledges were not successfully served, were in fact in English.[21]

38. The order for reference is based on the erroneous assumption of the national referring court that there are clear indications that the carrying out of the fine recovery procedure in Ireland would constitute an infringement of the plaintiff's' rights under Article 47 of the Charter and Article 6 of the ECHR.

39. At the hearing the agent for the Greek Government said that if a document is not served, as was the case in the main proceedings, or the service affected was not legal, the time limit for instituting a legal challenge in Greece only runs from the moment the addressee is fully appraised of the allegations against him. Service falling short of this can be annulled for being out of time, and a Greek judge can decide that time does not begin to run until the addressee has real and full knowledge of the content of the claim. Thus, the plaintiff could have asked the Symvoulio tis Epikrateias (Council of State) for a re-opening of the procedure on this basis when he received, on 14 November 2013, a translation into English of the 2009 Assessment act, but he did not take this course of action. If he did so now he would be out of time.

19 The Greek Government refers to 986/2016, 169/2015, 3575-7/2013, seven-member session 2436-7/2012, plenary session 2034-6/2011, 193, 1309/2006, 3696/2005, 627/2002, seven-member session 3761/1999, 537-540/1998, 3220/1990, cf. Symvoulio tis Epikrateias (Council of State) 1797/2000, 589, 2188/1972.

20 ECtHR, 14 January 2010, *Popovitsi v. Greece*, CE:ECHR:2010:0114JUD005345107, and ECtHR, 28 May 2009, *Elyasin v. Greece*, CE:ECHR:2009:0528JUD004692906.

21 Paragraph 16 of the order for reference states that 'the evidence available to the referring court suggests that the documentation was in the Greek language'.

40. Finally, the legal expert heard by the national referring court did not refer to relevant case-law, set out in the written observations of the Greek Government, of the Symvoulio tis Epikrateias (Council of State), the Areios Pagos (Court of Cassation, Greece), or the European Court of Human Rights.

41. The Commission points out that the principles of mutual trust and mutual recognition require each of the Member States, save in exceptional circumstances, to consider that the other Member States comply with EU law and particularly the fundamental rights recognised by EU law.[22] The principle of mutual recognition is given effect in Articles 10(1) and 13 of Directive 2010/24, pursuant to which Member States are in principle obliged to recover the requested claims which are the subject of an instrument permitting enforcement.

42. However, compliance with Article 47 of the Charter is binding on Member States and consequently on their courts when implementing EU law, which is the case when they are executing a request for recovery of a claim subject to an instrument permitting enforcement.[23]

43. On this point, the Court has recognised that limitations to the principle of mutual recognition and mutual trust between Member States can be made in 'exceptional circumstances', in particular, where this is necessary to ensure compliance with fundamental rights.[24]

44. The Commission notes that in the context of recognition and enforcement of foreign judgments the EU legislature has succeeded in reconciling observance of the rights of the defence and the right to an effective judicial remedy with the principal of mutual recognition.[25]

45. The Commission further relies on the passage in the *Kyrian* judgment which allows bodies in the requested State to exceptionally review whether enforcement of a uniform instrument permitting enforcement, as issued under Article 12 of Directive 2010/24, would be contrary to public policy,[26] along with the judgment of the European Court of Human Rights in *Avotiņš v. Latvia*.[27] The Commission takes the view that this ruling resolves the dilemma in the main proceedings.

46. Applying principles established in *Avotiņš v. Latvia* with respect to Article 6(1) of the ECHR and the right to a fair hearing to a case such as the present, it follows that, normally, the requested Member State is precluded from reviewing the validity or enforceability of the instrument, where the plaintiff has not exhausted local remedies. However, in exceptional cases, where the court of the requested State is satisfied beyond any reasonable doubt that no effective judicial remedy is available to the interested person in the applicant Member State, then the division of roles set out in Article 14 of Directive 2010/24 should not apply.[28] Consequently, the courts of the requested Member State may exceptionally review whether the enforcement of the instrument is liable, in particular, to lead to a manifest breach of the fundamental right to an effective judicial remedy under Article 47, first paragraph, of the Charter and a flagrant denial of justice and, in such case, refuse to execute the request for recovery of the claim.

22 The Commission refers to Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 191); judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 78).

23 The Commission refers, *mutatis mutandis*, to judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 84).

24 Judgments of 21 December 2011, *N.S.* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 80 to 82), and of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 82 and 83).

25 The Commission refers to Article 45(1)(b) of Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

26 Judgment of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11, paragraph 42).

27 ECtHR, 23 May 2016, *Avotiņš v. Latvia*, CE:ECHR:2016:0523JUD001750207.

28 The Commission refers (*mutatis mutandis*) to ECtHR, 23 May 2016, *Avotiņš v. Latvia*, CE:ECHR:2016:0523JUD001750207, paragraph 121 ff.

47. However, the refusal of the execution of the request on this ground constitutes a measure of last resort and the threshold to be met is very high. The court of the requested State must be in possession of evidence which proves beyond any reasonable doubt that no effective judicial remedy is available, and it must have taken all the reasonable steps to reach that conclusion, including asking for information from the relevant authorities of the applicant Member State. [29]

## V. Analysis

48. Based on the following analysis, I have come to the conclusion that the question referred should be answered in the negative. This is based on, however, defects in the procedure envisaged by Directive 2010/24, and its predecessor Directive 2008/55, rather than application of a legal test, as advocated by the Commission, predicated on unsubstantiated doubts to the effect that the plaintiff would have been denied an effective legal remedy had he instituted proceedings in Greece.

### *A. Preliminary observations*

#### *1. The principle of mutual trust*

49. Pursuant to the principle of mutual trust, Member States must 'save in exceptional circumstances' consider 'all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'. [30] The Court has, however, acknowledged the existence of exceptions to this principle. For example, it has supported such exceptions in the context of EU immigration and asylum law, and police and judicial cooperation in criminal matters, in the event of systemic or generalised deficiencies in a Member State so as to create a real risk of exposure of the person or persons concerned to breach of certain rights under the Charter if the principal of mutual trust were to be automatically applied. [31]

50. The Court has also held, in the context of judicial cooperation in civil and commercial matters, that the public policy exception to recognition and enforcement of a judgment issued by a court of a Member State, which was contained in Article 34(1) of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [32] and which now appears in Article 45(1)(a) of Regulation No 1215/2012, [33] will apply in the event of a manifest breach of a rule of law regarded as essential in the EU legal order, and therefore in the legal order of the Member State in which recognition is sought, or of a right recognised as being fundamental within that legal order. [34]

29 The Commission relies, *mutatis mutandis*, on judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 91 to 95).

30 Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 191).

31 In the context of police and judicial cooperation in criminal matters see e.g. judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198). In the context of immigration and asylum law see e.g. judgment of 21 December 2011, *N.S.* (C-411/10 and C-493/10, EU:C:2011:865).

32 OJ 2001 L 12, p. 1.

33 OJ 2012 L 351, p. 1.

34 See e.g. judgment of 16 July 2015, *Diageo Brands* (C-681/13, EU:C:2015:471, paragraph 44 and the case law cited). See similarly judgment of 19 November 2015, *P* (C-455/15 PPU, EU:C:2015:763, paragraph 39).

51. However, there is nothing in the case file to suggest the existence in Greece of compliance failure on the part of Greece with respect to the right to a fair hearing or an effective remedy under Article 47 of the Charter on such a scale as to support the development, in the circumstances of the main proceedings, of an exception to the principle of mutual trust in the context of Directive 2010/24.[35]

52. On the facts of the main proceedings, there is no evidence, for example, of exclusion of the plaintiff from participation in proceedings to take place in the Greek courts.[36] Even if there were a justified misapprehension on the part of the Irish courts that EU law or national law, including rules on time limits for bringing proceedings, would be misapplied if the plaintiff had petitioned the Greek courts rather than the Irish courts, this would be insufficient in and of itself to oust the Greek courts, on the basis of exception to the principle of mutual trust, as the proper forum for challenging the impugned enforcement Instrument, as envisaged by the text of Article 14 and recital 12 of Directive 2010/24.[37]

*2. The ruling of the Court in Kyrian*

53. However, I accept that the legal rule developed by the Court in *Kyrian* provides the benchmark for resolving the legal issues arising in the main proceedings.

54. There the Court was asked to consider the consequences following from the failure of the (German) requesting authority to supply Mr Kyrian, a Czech national resident in the Czech Republic, with documents in a language which Mr Kyrian understood. Did this entitle Mr Kyrian to challenge the enforcement of the claim in the Czech courts rather than the German courts, even though the text of Article 12(1) and (3) of Directive 76/308, the measure in force at the material time, and which is now reflected in Article 14 of Directive 2010/24, suggested that Mr Kyrian was bound to bring his challenge before the German courts?

55. In *Kyrian* the Court held, first, that the courts of the Member State where the requested authority is situated may exceptionally review the enforceability of the instrument permitting enforcement in particular for being contrary to that Member State's public policy, and where appropriate to refuse to grant assistance in whole or in part or to make it subject to fulfilling certain conditions.[38]

56. Second, and without elaborating further on the aforementioned exception, the Court held that the courts of the Member State where the requested authority is situated has jurisdiction to control whether the instrument permitting enforcement of the claim was properly notified to the debtor. In interpreting the words 'enforcement measures' in Article 12(3) of Directive 76/308, which is now reflected in Article 14(2) of Directive 2010/24, the Court noted that, pursuant to Article 5 of Directive 76/308, now reflected in Article 8 of Directive 2010/24, the first stage of enforcement in the context of mutual assistance is notification to the addressee by the requested authority of all instruments and decisions which emanate from the Member State in which the applicant authority is situated and which relate to a claim and/or to its recovery, the notification having to be carried out on the basis of the information supplied by the applicant authority.[39] It followed that notification

35 C.f. the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88). There is a short statement in the order for reference to the effect that the referring court was concerned about whether the applicant would have an effective remedy and a fair hearing in Greece within a reasonable time due to the extraordinary lapse of time to date, but this was not developed in written or oral submissions.

36 This scenario was considered in the judgment of 2 April 2009, *Gambazzi* (C-394/07, EU:C:2009:219, paragraphs 27 and 33 and the case-law cited).

37 See judgment of 16 July 2015, *Diageo Brands* (C-681/13, EU:C:2015:471, paragraph 49).

38 Judgment of 14 January 2010, *Kyrian* (C-233/08 EU:C:2010:11, paragraph 42).

39 Ibid., paragraph 46.

constitutes one of the enforcement measures referred to in Article 12(3) of Directive 76/308 and that, therefore, in accordance with that provision, it is before the competent body of the Member State in which the requested authority is situated that any action challenging that notification is to be brought.[40]

57. Third, the Court found that it was not possible to consider as correct the notification of an instrument permitting enforcement where that notification was made in the territory of the Member State in which the requested authority is situated in a language which the addressee does not understand and which is not the official language of that Member State. The Court held that the 'function of notification, in due time, is to make it possible for the addressee to understand the subject matter and the cause of the notified measure and assert his rights',[41] and that the effective notification of all instruments and decisions which emanate from the Member State in which the applicant is situated must simultaneously respect the legitimate interests of the addressees of notifications.[42] Notification in the Czech Republic in the German language did not meet the aforementioned requirements in relation to assertion of rights and respect for the addressee's legitimate interests.

58. The Court took the view that in the absence of provisions in Directive 76/308 on the consequences flowing when notification is made in a language other than the language of the requested Member State, 'it is for the national court to apply national law while taking care to ensure the full effectiveness of Community law, a task which may lead it to interpret a national rule which has been drawn up with only a purely domestic situation in mind in order to apply it to the cross border situation at issue'.[43] This was held to be subject only to the principles of equivalence and effectiveness.[44]

59. However, *Kyrian* featured no legal or factual difficulty with respect to prejudice to the sequence of assistance envisaged by Directives 2010/24 and 2008/55, namely request for information,[45] then notification to the addressee of the relevant claim by the requested authority,[46] followed by request for recovery.[47] Prejudice to this sequence is what has occurred in the main proceedings because the 2009 Assessment act was received by the plaintiff after, rather than before, the impugned enforcement Instrument. It thus falls to be considered whether failure to notify the disputed claim, *at all*, until after the issue and notification of a uniform instrument permitting enforcement under Article 12 of Directive 2010/24, is within the parameters as detailed above set by the *Kyrian* ruling, so that the enforcement of the uniform instrument permitting enforcement can be challenged in the requested Member State, even if it is written in the language of the requested Member State.

40 Ibid., paragraph 47.

41 Ibid., paragraph 58.

42 Ibid., paragraph 57.

43 Ibid., paragraph 61 and the case-law cited.

44 Ibid., paragraph 62 and the case-law cited.

45 Article 4 of Directive 2008/55 and Articles 5 and 6 of Directive 2010/24.

46 Article 5 of Directive 2008/55 and Articles 8 and 9 of Directive 2010/24.

47 Articles 6 to 18 of Directive 2008/55 and Articles 10 to 18 of Directive 2010/24.

*3. The Charter and the main proceedings*

60. As soon as a Member State makes a request for one of the forms of assistance featured in Directive 2010/24, that situation comes to be one that is 'governed' by EU law.[48] This means that all of Directive 2010/24, including Article 14, falls to be interpreted in conformity with general principles of law and fundamental rights, such as the right to effective judicial protection and its components,[49] as reflected in Article 47 of the Charter. It also means that any discretion to engage in judicial review in the hands of the courts of the requested Member State is not confined solely, as may have been inferred from *Kyrian*, to the principles of effectiveness and equivalence.[50]

61. Further, although box 7 of the impugned enforcement Instrument states that the date 'of notification of the initial instrument permitting enforcement' was 15 July 2009 (which corresponds to the date of publication of the disputed claim in the Official Journal of Greece), it is stated in the written observations of the Greek Government that the parallel attempt at notification on the plaintiff via its embassy in Dublin was not successful. It was further stated by the agent for the Greek Government at the hearing that the plaintiff did not become fully appraised of the case against him until 14 November 2013, upon receipt of the translation into English of the 2009 Assessment act.[51]

62. I therefore accept that the date of notification of the disputed claim, in detail sufficient for the plaintiff to have a fair opportunity to mount an effective defence, as required by Article 47 of the Charter,[52] was 14 November 2013, upon receipt by him of translation into English of the Assessment Act of 2009.

## *B. The procedure envisaged by Directives 2010/24 and 2008/55*

63. It is settled case-law that, when interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.[53] In order to ensure that Directive 2010/24 is given full effect and an autonomous interpretation, reference should be made principally to its general scheme and objectives.[54]

64. As noted above, the Court held in *Kyrian* that 'the first stage' of enforcement in the context of mutual assistance is, notification to the addressee by the requested authority of all instruments and decisions which emanate from the Member State in which the applicant authority is situated and which relate to a claim and/or its recovery, the notification having to be carried out on the basis of information supplied by the applicant authority.[55] As will be illustrated below, the same must necessarily apply when a Member States attempts to notify a claim without the assistance of a requested authority, as is the case in the main proceedings.

48 Judgment of 7 March 2017, *X and X* (C-638/16 PPU, EU:C:2017:173, paragraph 45). See similarly, in the context of Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 32 to 42).

49 See below, point 72.

50 Above, point 58.

51 I note that, in the absence of a request for mutual assistance, or the presence of some other measure of EU law that is relevant to a dispute, the giving of notice by publication in the official journal of Greece is a matter that is wholly internal to that Member State, and therefore any challenge to it will be governed exclusively by the law of that Member State. See judgments of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60), and of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 29).

52 The Court held at paragraph 100 of judgment of 18 July 2013, *Commission* v *Kadi and Others* (C-584/10 P, C-593/10 P, C-595/10 P, EU:C:2013:518), that Article 47 of the Charter requires disclosure of sufficient information 'so as to make it possible for' litigants to defend their rights 'in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in … applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question'.

53 E.g. judgment of 6 June 2013, *MA and Others* (C-648/11, EU:C:2013:367, paragraph 50 and the case-law cited).

54 Judgment of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11, paragraph 35).

55 Above point 56.

65. This imperative is equally reflected in the general scheme of both Directives 2010/24 and 2008/55, which set out a sequence providing for assistance by way of exchange of information,[56] then notification,[57] then recovery,[58] and the fact that both directives preclude the making of a request for recovery if the claim itself and/or the instrument permitting enforcement[59] are contested in the applicant Member State.[60] This implies that notification of the claim precedes request for its recovery and enforcement.

66. In addition to this, both Commission Implementing Regulation No 1189/2011,[61] and its predecessor, Commission Regulation (EC) No 1179/2008,[62] the implementing measures accompanying Directives 2010/24 and 2008/55 respectively, provide for standard and sequentially organised forms to execute the processes of notification and recovery.[63]

67. In terms of the origins of Directive 2010/24, the Commission's initial proposal emphasised the Commission's attachment to 'simplifying and clarifying Community law'.[64] Further, the purpose of Directive 2010/24, as stated in one of its recitals, is the provision of a system of recovery assistance in the internal market that is 'uniform'.[65]

68. That said, it is clear from the text of Articles 4 and 5 of Directive 2008/55, the mutual assistance provisions in force at the relevant time, that the Greek authorities were not obliged to seek the assistance of the Irish authorities to secure more information than that held on its files with respect to the applicant's address, or to request the Irish authorities to notify the 2009 Assessment act to the applicant.[66] Both of these functions are termed in Articles 4 and 5 of Directive 2008/55 to be 'at the request of the applicant authority', and the discretionary nature of these functions has been retained by Directive 2010/24.[67]

69. However, if the result of non-utilisation of these options is that the first step of notification does not take place until after the issue of a uniform instrument permitting enforcement of a claim under Article 12 of Directive 2010/24, enforcement of the claim can be challenged, pursuant to the *Kyrian* case, before the courts of the requested State, with the latter remaining free to apply Member State law, subject to compliance with general principles of law and fundamental rights that are pertinent to the enforcement process (such as the right to effective judicial protection under Article 47 of the Charter) along with the principles of equivalence and effectiveness.[68]

70. Otherwise, Member States would be vested with the opportunity to cure their own failings with respect to notification of a claim simply by issuing a uniform instrument permitting enforcement under Article 12 of Directive 2010/24 and commencing the recovery process.

56 Above, note 45.

57 Above, note 46.

58 Above, note 47.

59 The 'instrument permitting enforcement' is distinct from the 'uniform instrument permitting enforcement' provided for under Article 12 of Directive 2010/24, the latter being the instrument that applies to requests for recovery.

60 Article 11 of Directive 2010/24 and Article 7 of Directive 2008/55.

61 Regulation of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24, OJ 2011 L 302, p. 16.

62 Regulation of 28 November 2008 laying down detailed rules for implementing certain provisions of Directive 2008/55 (OJ 2008 L 319, p. 21).

63 Commission Regulation No 1179/2008 included a form to govern requests for information, but this was not provided for in Regulation No 1189/2011.

64 COM(2006) 605 final, Brussels 19.10.2006, p. 2.

65 See recital 20.

66 Cf. the mandatory system established under Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ 2007 L 324, p. 79). For a recent discussion see the judgment of 2 March 2017, *Henderson* (C-354/15, EU:C:2017:157).

67 See Articles 5, 8 and 10 of Directive 2010/24. Note that the attenuation of the circumstances in which applicant authorities may request notification assistance that appears in Article 8 of Directive 2010/24 EU, when compared with Article 5 of Directive 2008/55, was not in force when the 2009 Assessment act was issued on 27 April 2009.

68 Above, point 60.

71. As will be shown below, this analysis is supported by the case-law of the Court regarding the rights of the defence in the context of the right to effective judicial protection under Article 47 of the Charter.

### *C. Breach of Article 47 of the Charter*

72. The principle of effective judicial protection of the rights which individuals derive from EU law, as reflected in Article 47 of the Charter, comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.[69] The principle of equality of arms, pursuant to which each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent,[70] applies in EU law to public law proceedings as well as civil proceedings.[71]

73. The Court has also held that the question of whether there has been an infringement of the rights of the defence and the right to effective judicial protection must be examined in relation to the specific circumstances of each case, including the nature of the act at issue, the context in which it was adopted and the legal rules governing the matter in question.[72]

74. If the information, notification, and request for enforcement sequence were inverted, so that notification of a claim could occur after the issue of a uniform instrument permitting enforcement, problems would almost inevitably be generated in terms of compliance with the right to effective judicial protection under Article 47 of the Charter. Indeed, this is exemplified by the facts arising in the main proceedings.

75. Observance of the rights of the defence is a general principle of EU law which applies where the authorities are minded to adopt in respect of a person a measure which will adversely affect him. In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of EU law, even if the EU legislation applicable does not expressly provide for such a procedural requirement.[73]

76. It was contended at the hearing by the agent for the Greek Government that the plaintiff was put on notice, with interpretation into the English language and other assistance, in July 2002, of the customs investigation that led to the issue of the 2009 Assessment act. However, he elected not to make his views known at that time. If this were the case, and this is contested in the written observations of the plaintiff, no question would arise with respect to non-observance of the rights of the defence at this early stage of the procedure.[74]

69 Judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 32 and the case-law cited).

70 ECtHR, 23 May 2016, *Avotiņš v. Latvia*, CE:ECHR:2016:0523JUD001750207, paragraph 119.

71 See e.g. judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others* (C-543/14, EU:C:2016:605, paragraphs 40 to 42).

72 Judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 41 and the case-law cited).

73 Judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 84 and the case-law cited).

74 While the Court intimated in its judgment of 3 July 2014, *Kamino International Logisitics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 29), that the right to good administration under Article 41 of the Charter, and the rights of the defence, under Article 48 of the Charter, applied to Member State authorities implementing the Community Customs Code, it held on 17 July 2014, in the judgment in *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67), that Article 41 of the Charter applies only to the institutions, bodies, offices and agencies of the Union. See also judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 83), where the Court added that Article 48 of the Charter protects the presumption of innocence and rights of the defence only with respect to a person 'who has been charged'. For a recent discussion of the scope of Article 41 of the Charter, along with the general principles of law on respect for the rights of the defence and good administration, see the Opinion of Advocate General Bobek, *Ispas*, (C-298/16, EU:C:2017:650, points 74 to 91).

77. However, in all events, problems, in terms of compliance with the rights of the defence in the context of the right to effective judicial protection under Article 47 of the Charter arose later, because the 2009 Assessment act was not notified to the applicant, and therefore the details of the disputed claim, until *after* notification to him by the requested authority of the impugned enforcement Instrument. The latter came with the demand for payment dated 14 November 2012 from the requested authority, while the details of the disputed claim were notified to the plaintiff one year later upon receipt, with translation into English, of the 2009 Assessment act.

78. This sequence placed the plaintiff at a substantial disadvantage vis-à-vis the requesting authority, because the former was not able 'to understand the subject matter and the cause of the notified measure and assert his rights', as required by the ruling of the Court in *Kyrian*,[75] when he received on 14 November 2012 the demand for payment from the requested authority, containing only the impugned enforcement Instrument.

79. Further, under case-law of the Court, albeit elaborated in the context of judicial cooperation in civil matters, it is established that the right to a fair hearing, as protected under Article 47 of the Charter, requires that all judgments be reasoned to enable the defendant to understand why the judgment has been pronounced against him and to bring an appropriate and effective appeal against it.[76] The same must necessarily apply in the context of interpretation of Directive 2010/24, and the consequences flowing from failure of a Member State to have recourse to the option for assistance in the process of notification of claims that is provided for now by Articles 8 and 9 of Directive 2010/24.[77]

80. The plaintiff in the main proceedings was not supplied with a reasonable opportunity to present his case because the impugned enforcement Instrument supplied only, in essence, the following information: the amount of the disputed claim, that it related to customs duties, the Member State of origin, the date of the establishment of the disputed claim and when it became enforceable, the (purported) date of notification of the initial instrument permitting enforcement (which, in the main proceedings, is the 2009 Assessment act) and the address of the customs office responsible. This dearth of information was exacerbated by the acute lapse of time between the facts giving rise the disputed claim, which occurred in July 2002, and notification by the applicant authority of the 2009 Assessment act, in English, in November of 2013. Put simply, these factors combined meant that the plaintiff was not able to identify the subject matter of the claim and the cause of action against him.[78]

81. Thus, the lack of detail in the impugned enforcement Instrument concerning the information supplied to the plaintiff does not respect the essence of either the right to effective judicial protection or fairness rights inherent in Article 47 of the Charter or comply with the principle of proportionality, all of which are among what is required by Article 52(1) of the Charter if a limitation on a Charter right is to be lawful.[79]

75 Above point 57.

76 Judgment of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraph 53 and the case-law cited). See also judgment of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraphs 51 and 52).

77 See similarly, in the context of Article 6(1) of the ECHR, ECtHR, 31 May 2016, *Gankin and Others v. Russia*, CE:ECHR:2016:0531JUD000243006, paragraph 39. Litigants must be 'afforded an adequate opportunity to present their case effectively.'

78 Order of 28 April 2016, *Alta Realitat* (C-384/14, EU:C:2016:316, paragraph 86).

79 Judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 62).

82. Moreover, the provision of an address in the impugned enforcement Instrument from which the applicant could secure 'further information concerning the claim'[80] cannot cure the failure to notify the disputed claim. No such obligation appears in the Irish measure implementing Directive 2010/24,[81] and nor can it be imposed by or inferred from Directive 2010/24, given that directives in and of themselves cannot cast obligations on private individuals.[82]

83. That being so, the applicant cannot be criticised for entering into correspondence with the requested authority, by recourse to Irish solicitors, between 28 November 2012 and 14 May 2014, with a view to finding out more. This included a specific demand by the plaintiff's solicitors to the requested authority to forward to them the 2009 Assessment act.

84. Nor can the plaintiff be criticised for securing legal advice from a Greek lawyer on 19 November 2015 to find out whether or not any challenge to the 2009 Assessment act was out of time under Greek law. Moreover, the advice of 19 November 2015 created a justified apprehension, or misapprehension, that the time limit for challenging the 2009 Assessment act had expired.

85. The applicant authority might have acted in compliance with the the Charter as follows. It could have imposed the administrative fine at the same time as the criminal penalty, thereby averting compliance concerns with respect *ne bis in idem* under Article 50 of the Charter (see further below point 90).

86. The requesting authority could also have moved to impose the disputed claim sooner than six years and six months after the plaintiff was acquitted of the criminal charges brought against him, particularly given that Directive 2010/24 contains a time bar with respect to requests for assistance, and which might be viewed as implying a due diligence obligation on requesting Member States. Article 18(2) of Directive 2010/24 excuses the requested authority from providing the forms of assistance set out in Articles 5 and 7 to 16, 'if the initial request for assistance pursuant to Articles 5, 7, 8, 10 or 16 is made in respect of claims which are more than 5 years old, dating from the due date of the claim in the applicant Member State to the date of the initial request for assistance'. This would have averted complications with respect to delay and Article 47 of the Charter.

87. And once the applicant authority elected, in June 2009, to notify the plaintiff of the 2009 Assessment act, it could have taken advantage of the facility in Directive 2008/55, the mutual assistance directive in force at the relevant time, to both secure from the requested authority further precision of the information it held with respect to the plaintiff's address (Article 4), and compel the requested authority to notify the applicant of the claim (Article 5). This might have averted the difficulties generated with respect to compliance with the right to effective judicial protection under Article 47 of the Charter.

88. If the applicant authority had done so, the requested authority, once it received the impugned enforcement Instrument, would have been fully appraised of the dispute, and the sequence imposed by Directive 2010/21 and its predecessors of information exchange, notification, and then enforcement request, would have been respected. Recourse to the Greek embassy and the sending of the above described 'invitation'[83] did not secure notification under conditions ensuring compliance with Article 47 of the Charter.

80 Box 8 of the impugned enforcement Instrument.

81 Statutory Instrument No 643/2011, above note 18.

82 See most recently judgment of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 31 and the case-law cited). Even in the context of Regulation No 44/2001, the Court has held that Article 34(2) of that regulation, which concerns judgments issued in default of appearance, 'does not mean that the defendant is required to take additional steps going beyond normal diligence in the defence of his rights, such as steps to inform himself of the contents of a judgment delivered in another Member State'. See judgment of 7 July 2016, *Lebek* (C-70/15, EU:C:2016:524, paragraph 40).

83 Above, points 15 and 16.

89. I therefore take the view that the letter of demand sent by the requested authority on 14 November 2012 amounted to an enforcement measure within the meaning of Article 14(2) of Directive 2010/24, and one that was issued by the requested authority under conditions that were not in compliance with the right to effective judicial protection under Article 47 of the Charter, given that it was sent to the plaintiff prior to notification of the disputed claim. In the alternative, the competence of the bodies of requested Member States under Article 14(1) of Directive 2010/24 with respect to disputes concerning enforcement instruments is to be read subject to compliance with the sequence of request for information, notification and enforcement that is established by Directive 2010/24, the text of Article 14(1) and recital 12 notwithstanding. In its absence, it is for the competent bodies of the requested Member States to review compliance of the enforcement process with Article 47 of the Charter.

90. As such, the latitude vested in the Irish courts in the main proceedings does not extend to matters such as whether the claim complies with *ne bis in idem* (Article 50 of the Charter) as considered by the European Court of Human Rights in its ruling in *Kapetanios and Others v. Greece*,[84] or whether the disputed claim in fact relates to a criminal charge, rather than one of the claims listed in Article 2 of Directive 2010/24. Broadening the powers of the national referring court beyond the consequences arising from issue by the requesting authority of a uniform instrument permitting enforcement prior to notification of the disputed claim would be inconsistent with the status of mutual assistance as a structural principle of EU law.

## VI. Final remarks

91. According to the case file, the plaintiff is seeking damages from the requested authority on a number of different bases. Given that no question has been referred on the EU law aspects of this part of the dispute, it suffices to say that there is nothing in the case file to suggest that any of the criteria for this form of liability, as set out in the case-law of the Court, have been made out.[85]

## VII. Conclusion

92. In the light of the foregoing considerations, I consider that the question referred by the High Court (Ireland) should be answered as follows:

In the circumstances of the main proceedings, and considering the full effectiveness of EU law, a national court is not precluded by 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 when determining the enforceability of a 'uniform instrument permitting enforcement' from:

(i) applying the right to effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union in relation to the enforcement request;

(ii) taking account of the objectives of Directive 2010/24 to provide mutual assistance while abiding by the right to effective judicial protection under Article 47 of the Charter.

84 ECtHR, 30 April 2015, *Kapetanios and Others v. Greece*, CE:ECHR:2015:0430JUD000345312.

85 See recently e.g. judgment of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraph 22 and the case-law cited).