Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 30 March 2017 [1]

Case C-73/16

Peter Puškár,
Parties to proceedings:
Finančné riaditeľstvo Slovenskej republiky,
Kriminálny úrad finančnej správy
(Request for a preliminary ruling

from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic)

(Reference for a preliminary ruling — Processing of personal data — Protection of fundamental rights — Need for prior proceedings — List of personal data created for the purpose of controlling tax fraud — Admissibility of the list as evidence — Principle of sincere cooperation — Relationship between the case-law of the Court of Justice of the European Union and the case-law of the European Court of Human Rights)

I. Introduction

1. Not for the first time, disagreement between the Supreme Court of the Slovak Republic and the Constitutional Court of that Member State has given rise to a reference for a preliminary ruling. [2] In this case, the dispute centres on whether the tax authorities are permitted to keep a confidential list of natural persons who purport to act as company directors of specific legal persons. This dispute raises questions about effective judicial protection: first, whether the exhaustion of an obligatory administrative remedy may be made a precondition for the bringing of legal proceedings, and second, whether the list may be rejected as inadmissible evidence if it was circulated without the consent of the tax authorities. Finally, the Court of Justice is asked to advise the national court whether its case-law or the case-law of the European Court of Human Rights (ECtHR) should be followed, where those two courts are in conflict.

1 Original language: German.

2 See judgments of 8 November 2012, *Profitube* (C-165/11, EU:C:2012:692, paragraphs 36 to 38), and of 15. January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraphs 38 to 46).

II. Legal Framework

A. EU law

2. The principle of data protection provided in Article 8 of the Charter of Fundamental Rights of the European Union ('the Charter') is given specific form in the Data Protection Directive,[3] which will shortly be replaced by the General Data Protection Regulation.[4]

3. Article 6(1) of the Data Protection Directive contains specific principles regarding the processing of personal data:

'Member States shall provide for personal data to be:

(a) processed fairly and lawfully;

…

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purpose for which they were collected or for which they are further processed, are erased or rectified;

…'

4. Article 7 of the Data Protection Directive governs the conditions under which the processing of personal data is permitted:

'Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or

…

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

…

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;

(f) processing is necessary for the purpose of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).'

3 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), as amended in certain respects by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 2016 L 119, p. 1).

5. Article 10 of the Data Protection Directive requires that the data subject from whom personal data is collected must be given specific information. Article 11 contains corresponding provisions for cases in which the data is not obtained from the data subject. Article 12 contains the right of the data subject to information on the processing of his data and the right to rectification, erasure or blocking of data the processing of which does not comply with the provisions of the Directive.

6. Exceptions to specific provisions of the Data Protection Directive are contained in Article 13(1):

'Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

…

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

…'

7. Article 14 of the Data Protection Directive contains the data subject's right to object:

'Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

…'

8. Article 22 of the Data Protection Directive contains a provision on remedies:

'Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.'

9. Article 28(4) of the Data Protection Directive provides for a right to lodge a claim with a supervisory authority:

'Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of this Directive apply. The person shall at any rate be informed that a check has taken place.'

B. Slovak law

10. Paragraph 250v(1) and (3) of the Občiansky súdny poriadok (Code of civil procedure; 'CCP'), as applicable to the main proceedings contains the following provisions on legal protection:'(1) Individuals or legal persons who claim that their rights or legally protected interests have been harmed by the unlawful action of a public authority, which does not constitute a decision, and that they were the direct addressee of that action or that its effects directly prejudiced them, may apply for protection against the action before a court, provided such action or its effects persist or may recur.

…

(3) Legal proceedings shall be inadmissible unless the claimant has exhausted the remedies available to him under specific legislation …'

11. The zákon č.9/2010 Z. z. o sťažnostiach (Law No 9/2010 on administrative complaints) provides for the possibility of a complaint against acts or omissions of the administration.

12. Paragraph 164 of the zákon č.563/2009 Z. z. o správe daní (daňový poriadok) (Law No 563/2009 on tax administration; 'Tax Code'), as applicable to the case in the main proceedings relates to the processing of personal data:

'For the purpose of tax collection, the tax authorities, the Finance Directorate (finančné riaditeľstvo) and the Ministry of Finance (ministerstvo) shall be authorised to process the personal data of taxpayers, the representatives of taxpayers and other persons in accordance with specific legislation (95);[5] personal data may be made accessible only to the authorities in their capacity as the tax authorities, the Financial Administration and the Ministry and, in connection with tax collection and the performance of their tasks under specific legislation, to any other person, court or prosecution authority that is acting within the framework of criminal proceedings. In the information systems (95), it is permissible to process the name and surname of a natural person, his or her permanent address and, if he or she was not allocated an tax identification number on registration, his or her national identity number.'

13. Paragraph 4(3)(d), (e) and (o) of zákon č.333/2011 Z. z. o orgánoch štátnej správy v oblasti daní, poplatkov a colníctva (Law No 333/2011 on state administrative bodies for taxes, duties and customs) governs the relevant tasks of the Finance Directorate for the present case:

'The Finance Directorate shall perform the following tasks:

(d) it shall create, develop and operate the Financial Administration information systems; … ; it shall notify the Ministry of its intention to carry out activities in relation to the creation and development of the Financial Administration information systems;

(e) it shall create and keep a central list of economic operators and other persons engaged in activities governed by the customs legislation and ensure that it is aligned with the relevant lists of the European Commission; it shall create and keep a central list of taxpayers and maintain and update the database; it shall create and keep that list through the Financial Administration information system;

(o) it shall inform persons about their rights and obligations in matters concerning taxes and fees and their rights and obligations under specific legislation …'

5 Footnote 95 refers to zákon č.428/2002 Z. z. o ochrane osobných údajov v znení neskorších predpisov (Law No 428/2002 on the protection of personal data) as amended.

14. The processing of data on infringements is governed by the provisions of Paragraph 5(3)(b) of Law No 333/2011:

'The Financial Administration Criminal Office (Kriminálny úrad finančnej správy) shall use the Financial Administration information systems, in which it shall collect, process, maintain, transfer, use, protect and delete information and personal data about persons who have infringed tax or customs legislation or who are suspected, on reasonable grounds, of infringing the tax or customs legislation, or persons who, within the Financial Administration's field of jurisdiction, have disrupted public order or who are suspected, on reasonable grounds, of disrupting public order, and any other information on such infringements of tax or customs legislation or disrupting public order; it shall provide or disclose that information and personal data to the Financial Directorate, the tax office or the customs office to the extent necessary for those bodies to carry out their tasks.'

III. Facts of the case

15. By an action lodged before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) on 19 November 2014, Mr Puškár sought a decision prohibiting the Finance Directorate, all tax offices under its control and the Financial Administration Criminal Office from including him in the list of natural persons (No 1 227, according to his statement) who, according to the public authorities, constitute 'biele kone' ('white horses', a commonly used colloquial term for persons who purport to act, as 'fronts', as company directors). That list, as a general rule, associates a legal person or persons (of which there are 3 369, according to the claimant's statement) with a natural person, who supposedly has acted on their behalf, together with the latter's national ID number, the tax identification number of the taxable entity for which the latter acts and his term of office. The claimant also asked that these authorities delete his name from that list or any similar list and that it be deleted from the Financial Administration information system.

16. The Financial Administration Criminal Office has confirmed the existence of a 'Biele kone' list, although it stated that that list was created by the Finance Directorate.

17. The claimant is of the opinion that the action of the Financial Directorate and the Financial Administration Criminal Office is unlawful, primarily because his inclusion in the abovementioned list infringes his personal rights, specifically the right to the protection of his good name, dignity and good reputation.

18. In different proceedings, the Supreme Court dismissed that action and the actions submitted by two other people on the list, as being unfounded — partly on procedural and partly on substantive grounds.

19. In the constitutional actions submitted by the claimant and the other persons mentioned above, the Ústavný súd (Slovak Constitutional Court) held that, by the abovementioned judgments, the Supreme Court had violated the claimants' fundamental rights to a fair hearing.

20. According to the reference for a preliminary ruling, in one case the Constitutional Court held that the Supreme Court had infringed the fundamental right to the protection of personal data against unauthorised collection and other abuses, in addition to the right to privacy. The Constitutional Court, on those legal bases, set aside all those judgments of the Supreme Court and referred the cases back to the Supreme Court to be reheard and for fresh rulings. At the same time, it pointed out that the Supreme Court is bound by the ECtHR case-law on the protection of personal data.

21. Again according to the referring court, in the Constitutional Court's other judgments, the Supreme Court has been criticised for its purely formalistic approach to the interpretation of the applicable legal norms regarding the inadmissibility of the complaint against the unlawful action of a public authority. Further, the Supreme Court is said to have failed to have regard to the constitutional implications of the fundamental right to judicial review; which allows the decisions and practices of public authorities which impair fundamental rights and freedoms to be reviewed by the courts. On the other hand, according to the referring court, the Constitutional Court did not take into account the case-law of the Court of Justice concerning the application of EU law to the protection of personal data.

22. According to what is stated in the reference for a preliminary ruling, in recent years the Slovak Constitutional Court has moved away, as a result of ECtHR case-law, from the view that an administrative complaint submitted under the Law on administrative complaints can always be considered an effective remedy against unlawful action by a public authority, or, in some circumstances, a failure of such bodies to act. Its finding that the Supreme Court is required in the case under consideration to comply unequivocally with the case-law of the ECtHR, as it currently stands, is binding under Slovak law with regard to any further proceedings in the case, and there is no need to take account to the same extent of the impact of EU law and the case-law of the Court of Justice.

IV. Requests for preliminary rulings

23. The Supreme Court of the Slovak Republic therefore refers the following questions to the Court of Justice:

'(1) Does Article 47(1) of the Charter, under which every person whose rights — including the right to privacy with respect to the processing of personal data in Article 1(1) et seq. of the Data Protection Directive — are violated has the right to an effective remedy before a court in compliance with the conditions in Article 47 of the Charter, against a provision of national law which makes the exercise of an effective remedy before a court, meaning an administrative court, conditional on the fact that the claimant, to protect his rights and freedoms, must have previously exhausted the procedures available under *lex specialis* — law on a specific subject — such as the Slovak Law on administrative complaints?

(2) Can the right to respect for private and family life, home and communications, in Article 7 of the Charter, and the right to the protection of personal data in Article 8 be interpreted to the effect that where there is an alleged violation of the right to the protection of personal data, which, with respect to the European Union, is implemented primarily through the Directive, and under which, in particular

- the Member States must protect the right to privacy with respect to the processing of personal data (Article [1](1)) and

- the Member States are authorised to process personal data where this is necessary for the implementation of a task performed in the public interest (Article 7(e)) or is necessary for the purpose of a legitimate interests that is performed by the responsible authority or by the third party or parties to whom the data are disclosed, and

- a Member State is exceptionally authorised to limit obligations and rights (Article 13(1)(e) and (f)), where such a restriction is necessary to safeguard an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters,

are interpreted in such a way as not to allow a Member State to create, without the consent of the person concerned, a list of personal data for the purposes of tax administration, so that the fact that personal data is made available to a public authority for the purpose of combating tax fraud in itself constitutes a risk?

(3) Can a list held by a financial authority of a Member State, which contains the claimant's personal data and the inaccessibility of which has been secured by appropriate technical and organisational measures for the protection of personal data against unauthorised disclosure or access within the meaning of Article 17(1) of the Data Protection Directive, be regarded as unlawful evidence by virtue of the fact that it was obtained by the claimant without the lawful agreement of the relevant financial authority, which the referring court must refuse to admit in accordance with the requirements of EU law on a fair hearing in the second paragraph of Article 47(2) of the Charter?

(4) Is the abovementioned right to an effective legal remedy and to a fair hearing (in particular under Article 47 of the Charter) consistent with an approach taken by the referring court whereby, when, in this case, there is case-law from the European Court of Human Rights which differs from the answer obtained from the Court of Justice of the European Union, the referring court, in accordance with the principle of sincere cooperation in Article 4(3) TEU and Article 267 TFEU, gives precedence to the Court of Justice's legal approach?'

24. Mr Puškár, the Slovak Republic, the Czech Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Poland and the European Commission have submitted written observations. In addition to Mr Puškár and the Slovak Republic, the Kingdom of Spain and the Commission also participated in the oral hearing on 16 February 2017.

V. Legal analysis

25. The first and third questions of the Supreme Court relate to proceedings for legal protection. Consequently they must be analysed in succession (see B and C, below), i.e. before the second question relating to the substantive law on whether the contested list can be reconciled with the protection of personal data (see D, below). Finally, the fourth question will be considered, regarding possible conflicts between the case-law of the Court of Justice and that of the ECtHR (see E, below). However, first, it is necessary to clarify the extent to which European data protection law applies to the contested list (see A, below).

A. Applicability of European data protection law

26. The Kingdom of Spain, in particular, argues that European data protection law is not applicable in the main proceedings.

27. In this regard, it is necessary to differentiate between the Data Protection Directive and Article 8 of the Charter.

28. The scope of the Data Protection Directive is limited in particular by Article 3(2). This provides that it is not applicable, inter alia, to the prosecution of criminal offences. This must also be the case where the contested list is for the purposes of criminal prosecution. [6] On the other hand, the Data Protection Directive covers the collection of taxes and, in principle, the use of the list in that regard. [7] This is also apparent from Article 13(1)(e) of the Data Protection Directive, which explicitly permits the restriction of data protection with respect to taxation.

29. The scope of the fundamental right to data protection in Article 8 of the Charter is, in contrast, not affected by Article 3(2) of the Data Protection Directive. This follows in particular from Article 51(1) of the Charter. This states that the fundamental rights guaranteed in the Union legal order apply in all situations governed by EU law. [8] As the judgment in *Åkerberg Fransson* in particular has established, the Charter is applicable to penalties in the area of taxation law, in so far as it relates to fiscal provisions of EU law. [9] Particular attention must be given in this case to VAT and excise duties. But specific questions of direct taxation are also subject to EU law, as in the area of specific harmonisation measures [10] or when fundamental freedoms are restricted. [11] Consequently, in individual cases, a national court may frequently be required to assess whether the Charter is applicable. In so far as EU law and the Charter are not applicable, comparable requirements will frequently arise under Article 8 ECHR.

30. For these proceedings, it follows that the use of the list for the purposes of tax collection is subject to the Data Protection Directive and the Charter, while only the Charter is applicable in the field of criminal law, in so far as it involves questions determined by EU law.

B. The first question — obligatory administrative legal remedy

31. The first question relates to the preconditions for judicial review in the enforcement of rights in respect of personal data. The Supreme Court asks whether the right to effective legal review in Article 47(1) of the Charter is compatible with making the admissibility of a claim dependent on whether the claimant has previously exhausted a legal remedy.

32. The rationale for this question is obviously that the Slovak Constitutional Court has called into question this precondition to a claim.

33. The Court of Justice generally answers such questions by reference to the procedural autonomy of the Member States, which must be exercised having regard to the principles of equivalence and effectiveness. [12] Procedural autonomy, however, only applies to the extent that EU law lacks specific provisions. But the Data Protection Directive contains actual provisions that at least address this question. Therefore, irrespective of the possibility of an isolated enforcement of rights under Article 8 of the Charter, [13] the provisions of the Directive must first be considered (see 2, below), before going on to discuss the relationship between the principle of effectiveness and the right to effective legal protection (see 3, below). Finally, the consequences of these provisions for an obligatory administrative legal remedy can be developed (see 4, below). First, however, some comments on the admissibility of this question are set out (see 1, below).

6 See judgments of 6 November 2003, *Lindqvist* (C-101/01, EU:C:2003:596, paragraph 43), and of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia* (C–73/07, EU:C:2008:727, paragraph 41).

7 See judgment of 16 December 2008, *Huber* (C-524/06, EU:C:2008:724, paragraph 45).

8 Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19), and of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 66).

9 Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27).

10 See, for example, judgment of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 23 et seq.).

11 Judgment of 11 June 2015, *Berlington Hungary* (C-98/14, EU:C:2015:386, paragraph 74 and the case-law cited).

12 See judgment of 8 May 2014, *N* (C-604/12, EU:C:2014:302, paragraph 41 and the case-law cited).

13 See above, point 29.

1. The admissibility of the first question

34. Mr Puškár disputes in particular the admissibility of the first question. He argues that he has sought various legal remedies, all of which were unsuccessful. Therefore this question is, in his view, hypothetical.

35. However as Mr Puškár himself admits, questions on the interpretation of EU law referred by a national court in the factual and legislative context, which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court of Justice may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[14]

36. Unfortunately, the reference for a preliminary ruling does not specify which administrative remedies Mr Puškár has exhausted. It does however state that there is agreement between the Slovak Supreme Court and the Slovak Constitutional Court on the necessity for the exhaustion of administrative remedies and their consequences in order for the claim to be admissible. Therefore this question is clearly not hypothetical, but must be answered.

2. The provisions of the Data Protection Directive

37. The Data Protection Directive addresses remedies in Articles 22 and 28. Article 22 provides that, without prejudice to the remedy referred to in Article 28(4), every person is to have a right to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.

38. Under Article 28(4) of the Data Protection Directive, each so-called supervisory authority is to hear claims lodged by any person concerning the protection of his rights and freedoms in regard to the processing of personal data. Each supervisory authority is, in particular, to hear claims for checks on the lawfulness of data processing lodged by any person.

39. In Article 22 and Article 28(4) of the Data Protection Directive, it is at first glance possible to see rules which concern the relationship between a claim and an administrative legal remedy of the person affected in the area of implementation of data protection law.

40. On closer inspection, however, it becomes clear that, at a minimum, the administrative remedy referred to in Article 28(4) of the Data Protection Directive is not the subject of the present reference for a preliminary ruling. The administrative procedure under the Data Protection Directive is carried out by the independent supervisory authority[15] provided for therein. In contrast, the administrative claim which under Slovak law is a precondition for legal proceedings is directed to the competent administrative bodies.

14 See, for example, judgment of 17 July 2014, *Y. S.* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 63 and the case-law cited).

15 Cf. judgments of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125, paragraph 17 et seq.); of 16 October 2012, *Commission* v *Austria* (C-614/10, EU:C:2012:631, paragraph 36); and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 38 et seq.).

41. The broader provisions of Article 79 of the EU General Data Protection Regulation, which will come into effect in the future, however, illustrate how the right to bring an action under data protection law should stand in relation to other legal remedies. According to those provisions, every person affected has the right to an effective legal remedy, irrespective of the availability of an administrative or non-judicial remedy, including the right to submit a complaint to a supervisory authority.

42. At least in the future, the judicial remedy will consequently be protected, regardless of the existence of any other remedies. This means that the right to bring a judicial action is without prejudice to other remedies.

43. However, this still does not clarify whether the bringing of legal proceedings may be made contingent upon exhaustion of another remedy. All that can be taken from Article 79 of the General Data Protection Regulation is that the judicial remedy must be effective. An obligation to exhaust some other remedy before bringing legal proceedings will consequently be impermissible if the judicial remedy is rendered ineffective as a result of this precondition.

44. While Article 22 of the Data Protection Directive relates only to one specific remedy, and does not expressly require that a judicial remedy be effective, the criterion of effectiveness at least is self-evident.[16] That the right to a judicial remedy should not undermine other remedies can be inferred from the fact that Article 22 does not contain any provision in this regard.

45. Consequently, the right to bring an action under the Data Protection Directive in the main proceedings also means that the exhaustion of an administrative procedure can only be required if it does not impair the effectiveness of the judicial remedy. That is the same limitation that the principle of effectiveness imposes on national procedural autonomy.

3. The principle of effectiveness and the right to an effective legal remedy

46. The principle of the procedural autonomy of the Member States means that the national legal order regulates the procedures pertaining to claims aimed at protecting the rights accorded to natural persons under EU law, where there are no applicable provisions of EU law.

47. Classically, this autonomy is limited by the principles of equivalence and effectiveness. In this case, only the latter is of interest. According to this principle, national procedures may not make the exercise of rights conferred under EU law practically impossible or excessively complicated.[17]

48. The Court of Justice has repeatedly held that, in every case where the question arises whether a national procedural rule makes the application of Community law impossible or excessively complicated, the provision must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances; in doing so, the basic principles of the domestic judicial system, such as the protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.[18]

16 See for example judgments of 9 July 1985, *Bozzetti* (C-179/84, EU:C:1985:306, paragraph 17); of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 45); of 8 March 2011, *Lesoochranárske zoskupenie*, (C-240/09, EU:C:2011:125, paragraph 47); and of 8 November 2016 in *Lesoochranárske zoskupenie VLK*, (C-243/15, EU:C:2016:838, paragraph 65).

17 See judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (C-33/76, EU:C:1976:188, paragraph 5); of 9 November 1983, *San Giorgio* (199/82, EU:C:1983:318, paragraph 12); of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 12); of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 67); of 20 October 2016, *Danqua* (C-429/15, EU:C:2016:789, paragraph 29); and of 21 December 2016, *TDC* (C-327/15, EU:C:2016:974).

18 Judgments of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 14); of 10 April 2003, *Steffensen* (C-276/01, EU:C:2003:228, paragraph 66); and of 20 October 2016, *Danqua* (C-429/15, EU:C:2016:789, paragraph 42).

49. However, in recent times, the principle of effectiveness has increasingly been associated with the right to effective legal protection under Article 47(1) of the Charter.[19] In recent months, there have even been two relevant judgments, which are no longer based on the principle of effectiveness, but solely on Article 47(1).[20]

50. Reliance on Article 47(1) of the Charter structures the necessary review of the relevant measure, as it inevitably brings into focus the limits of fundamental rights under Article 52(1).[21] According to that provision, any limitation on fundamental rights is only justified if it is provided for by law and respects the essence of those rights and freedoms. Furthermore, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The principle of proportionality is also part of the principle of effectiveness. It is reflected in the limitation on *excessive* complication.

51. Consequently, Article 47(1) of the Charter and the principle of effectiveness ultimately embody the same legal principle and may be examined jointly using the rules in Articles 47(1) and 52(1) of the Charter.

4. The compatibility of obligatory preliminary proceedings with effective legal protection

52. It is therefore necessary to examine whether the obligatory exhaustion of an administrative remedy before legal proceedings may be brought is compatible with Article 47(1) of the Charter and with the principle of effectiveness.

53. Such a procedural rule would, at a minimum, delay access to a judicial remedy. It could also cause additional costs to be incurred. Administrative bodies may charge fees for implementation of the remedy. It also may be worthwhile or even necessary to obtain administrative assistance or expert advice.

54. In this way, an obligation to exhaust an administrative law remedy before bringing an action affects the right to an effective judicial remedy.

55. However such a procedural rule may be justified under Article 52(1) of the Charter.

56. According to the reference for a preliminary ruling, it is provided for by law in Slovakia. It is extremely unlikely that the essence of the right to effective judicial review would be affected by it, as it does not restrict the category of people who could in principle have recourse to judicial review.[22] They are simply required to take an additional procedural step.

57. What is therefore critical is the proportionality of the obligatory administrative remedy.

19 See, for example, judgments of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraphs 28 and 31); of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, EU:C:2013:221, paragraph 33); of 6 October 2015, *East Sussex County Council* (C–71/14, EU:C:2015:656, paragraph 52); and of 13 October 2016 *Polkomtel* (C-231/15, EU:C:2016:769, paragraphs 23 and 24); as well as my Opinion in the cases of *Mellor* (C–75/08, EU:C:2009:32, point 28); *Alassini* (C-317/08 to C-320/08, EU:C:2009:720, point 42); and *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:491, point 99).

20 Judgments of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 46), and of 8 November 2016 in *Lesoochranárske zoskupenie VLK*, (C-243/15, EU:C:2016:838, paragraph 65).

21 For an illustration, see judgments of 4 June 2013, *ZZ* (C-300/11, EU:C:2013:363, paragraph 51); of 17 September 2014, *Liivimaa Lihaveis* (C–562/12, EU:C:2014:2229, paragraph 67 et seq.); and of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 49 et seq.).

22 See judgments of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 95), and of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 161).

58. The principle of proportionality requires that a measure be 'appropriate, necessary and proportionate to the objective it pursues'.[23][24] As Article 52(1) of the Charter emphasises, this objective must be recognised by the Union and serve the general interest or be necessary to protect the rights and freedoms of others.

59. According to the Supreme Court, the exhaustion of the administrative remedy represents a gain in efficiency, as it provides the administrative authority with an opportunity to remedy the alleged unlawful intervention, and saves it from unwanted court proceedings. In addition, the dispute between the parties is specified in detail in these administrative proceedings, facilitating the task of the courts in the future handling of the matter. It should be added that the administrative remedy protects the courts from unnecessary proceedings and can also support the administration of justice where, for example, the person affected accepts the action after been given a convincing explanation for it, without going through judicial proceedings. Finally, an administrative remedy is usually considerably less expensive for all participants than a judicial remedy.

60. This objective is recognised in EU law, as comparable administrative proceedings show, such as those in civil service law[25] or regarding the right to access to documents.[26] Likewise, appeal bodies, such as those set up at the European Union Intellectual Property Office (EUIPO)[27] or the European Chemicals Agency[28] also serve this purpose. Last, but not least, an appeal to the European Ombudsman also requires an administrative complaint.[29]

61. I would like to add that the German legal order also recognises this objective. In the German administrative process, an administrative remedy must regularly be sought in accordance with Paragraph 68 of the Verwaltungsgerichtsordnung (German Code of Administrative Court Procedure) as a precondition to bringing legal proceedings. The usefulness of this precondition is generally undisputed.[30] In fact, the courts have already been required to rule on whether the partial abolition of the administrative remedy is compatible with higher-ranking law.[31]

62. Obligatory preliminary proceedings are undoubtedly appropriate for achieving the objectives specified in Point 59. Nor does a less onerous method suggest itself as capable of realising them to the same extent.

63. The question remains as to whether the obligatory administrative remedy is proportionate and appropriate to the objective it pursues. The answer to this question depends on the specific form of the administrative remedy. Ultimately only the national courts can assess this conclusively.

23 On this formulation, see my Opinion in *G4S Secure Solutions*, (C-157/15, EU:C:2016:382, point 98), based on the French Conseil constitutionnel, Decision No 2015-527 QPC of 22 December 2015 (FR:CC:2015:2015.527.QPC, paragraphs 4 and 12), and No 2016-536 QPC of 19 February 2016 (FR:CC:2016:2016.536.QPC, paragraphs 3 and 10); similarly the French Conseil d'État, judgment No 317827 of 26 October 2011 (FR:CEASS:2011:317827.20111026); see also the German Bundesverfassungsgericht, BVerfGE 120, 274, 318 and 319 (DE:BVerfG:2008:rs20080227.1bvr037007, paragraph 218).

24 See, for example, judgment of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 48 and the case-law cited).

25 See Articles 90 and 91 of the Staff Regulations of Officials of the European Union.

26 Article 8 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

27 Article 58 et seq. of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 226).

28 Article 89 et seq. of Regulation (EC) No 1907/2006 of the European Parliament and the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ 2006 L 396, p. 1).

29 Article 2(4) of Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ 1994 L 113, p. 15).

30 See however the decision of the Bundesverfassungsgericht (German Federal Constitutional Court) of 28 October 1975 (2 BvR 883/73, 379/74, 497/74, 526/74, Neue Juristische Wochenschrift 1976, 34, 36 and 37).

31 Decision of the Bundesverfassungsgericht of 9 May 1973 (2 BvL 43 und 44/71, Neue Juristische Wochenschrift 1973, 1683) and decisions of the Bavarian Constitutional Court of 15 November 2006, R. R. und K. N. (6-VII-05 and 12-VII-05, VerfGHE 59, 219), and of 23 October 2008, A. D.-G. (10-VII-07, VerfGHE 61, 248).

64. This applies in particular to the point put forward by Mr Puškár, namely the alleged uncertainty as to whether the time limit for bringing an action begins to run before a decision has been made in the administrative action. If the national courts determine that this uncertainty actually existed at the crucial point, it would hardly be reasonable to make the admissibility of a claim dependent on the exhaustion of the administrative remedy.

65. In addition, the Court of Justice has held in consumer law cases that an obligatory dispute resolution procedure before bringing an action before the courts was permissible because, inter alia, the bringing of the action was not significantly delayed and did not cause the consumer to incur any costs or only very low costs. [32]

66. These two aspects are also important in the assessment of an obligatory administrative remedy. Significant delays or excessive costs for a legal claimant would certainly place a question mark over the appropriateness of such a procedural model.

67. As far as delays are concerned, Article 47(2) of the Charter establishes the right of every person to have their case dealt with within a reasonable period of time. While this right in fact relates to judicial proceedings, naturally it may not be undermined by a condition for the bringing of an action. Therefore the ECtHR includes the duration of obligatory administrative remedies in examining the duration of the judicial proceedings. [33] Even if one were to reject the application of Article 47(2) of the Charter, comparable requirements would arise from a general principle of EU law. [34]

68. With regard to costs, Article 47(3) of the Charter only requires legal aid when it is necessary to ensure effective access to justice. In principle, reasonable fees for the conduct of an administrative procedure cannot be objected to. [35]

69. The levying of fees for an obligatory administrative remedy must however be subject to stricter limits, as these preliminary proceedings are an obstacle to the exercise of the judicial remedy guaranteed by Article 47 of the Charter and their costs are added to the costs of the judicial remedy. [36] The principle on which the right to legal aid is based therefore also has regard to the costs of an obligatory administrative remedy. Moreover, in a Union governed by law, the fact that the administrative authority monitors itself, as is inherent in the administrative remedy, is not only in the interests of the person affected, but in the public interest.

5. Intermediate conclusion

70. The right to effective judicial review under Article 47 of the Charter and the principle of effectiveness thus do not preclude an obligation to exhaust an administrative remedy being a condition on bringing legal proceedings if the rules governing that remedy do not disproportionately impair the effectiveness of judicial protection. Consequently, the obligatory administrative remedy must not cause unreasonable delay or excessive costs for the overall legal remedy.

32 Judgment of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraphs 55 and 57).

33 ECtHR, judgments of 28 June 1978, *König v. Germany* (6232/73, CE:ECHR:1980:0310JUD000623273, § 98); of 20 December 2001, *Janssen v. Germany* (23959/94, CE:ECHR:2001:1220JUD002395994, §§ 13 and 40); and of 2 December 2014, *Siermiński v. Poland* (53339/09, CE:ECHR:2014:1202JUD005333909, § 65).

34 Judgment of 8 May 2014, *N* (C-604/12, EU:C:2014:302, paragraph 50).

35 Judgment of 9 November 2006, *Commission* v *Ireland* (C-216/05, EU:C:2006:706, paragraph 33). See also ECtHR, judgments of 19 June 2001, *Kreuz v. Poland* (28249/95, CE:ECHR:2001:0619JUD002824995, § 59), and of 24 May 2006, *Weissman and Others v. Romania* (63945/00, CE:ECHR:2006:0524JUD006394500, § 35).

36 See judgment of 12 December 2013, *X* (C-486/12, EU:C:2013:836, paragraph 29), on the costs of obtaining information on the processing of personal information.

71. It is however necessary to make clear that the compatibility of an obligatory administrative remedy with EU law does not preclude such a procedural model of judicial review from being incompatible with national constitutional law.

C. The third question — exclusion of the list as evidence

72. By the third question, which will be answered before the second question, the Supreme Court wishes to know whether the contested list may be excluded as evidence due to the fact that it came into the possession of Mr Puškár without the consent of the competent authorities.

1. The admissibility of the question

73. The Slovak Republic and Mr Puškár regard this question as inadmissible because, in the absence of applicable provisions in EU law, it relates only to the interpretation of national law.

74. However this objection fails to recognise that, as with an obligatory administrative remedy, rules of evidence are also procedural rules which can impair the effectiveness of judicial review in the exercise of rights granted under EU law. EU law can therefore also restrict the procedural autonomy of the Member States in this area.

75. In contrast, the Czech Republic is sceptical as to whether this question is relevant to the decision, since one of the authorities involved in the main proceedings, the Financial Administration Criminal Office, has admitted that the list exists and that it was drawn up by another of the authorities involved, the Finance Directorate. Accordingly, one might assume that it requires no further proof, and that the question is hypothetical.

76. However, particularly during the oral hearing, it became clear that the other authority involved in the main proceedings, the Finance Directorate, denied having drawn up the list or having any knowledge of it. It is any case unclear whether the information relating to Mr Puškár is part of this list. Finally, it cannot be ruled out that the Supreme Court will still have to make a decision on the admissibility of the list as evidence, irrespective of the outcome of the legal dispute.

77. Therefore it must be assumed that an answer to this question is necessary for a decision on the main proceedings.

2. The answer to the question

78. As in the context of the first question, the procedural autonomy of the Member States comes to the fore in relation to the rules of evidence. Subject to the principles of equivalence and effectiveness, it is for the Member States to determine what constitutes admissible evidence, if there are no provisions under EU law. [37]

79. There is nothing to suggest, with respect to this question, that the principle of equivalence would be infringed. As a result, it again depends solely on the principle of effectiveness, which must be applied in conjunction with the right to effective judicial review in accordance with Article 47 of the Charter.

37 Judgments of 9 February 1999, *Dilexport* (C-343/96, EU:C:1999:59, paragraph 48 (mentions only the principle of effectiveness)); of 10 April 2003, *Steffensen* (C-276/01, EU:C:2003:228, paragraph 63); of 28 January 2010, *Direct Parcel Distribution Belgium* (C-264/08, EU:C:2010:43, paragraphs 33 and 34); of 23 October 2014, *Unitrading* (C-437/13, EU:C:2014:2318, paragraph 27); of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraph 64); of 15 October 2015, *Nike European Operations Netherlands* (C-310/14, EU:C:2015:690, paragraphs 27 and 28); and of 6 October 2015, *Capoda Import-Export* (C-354/14, EU:C:2015:658, paragraph 44).

80. A restriction on the evidence admissible to prove a breach of a right granted under EU law interferes with the fundamental right to effective legal protection. It must therefore be justified under Article 52(1) of the Charter.

81. As only potential evidence is affected, the essence of the right to effective judicial review is not affected. As a result, proportionality must again be examined.

82. The objective of preventing the unauthorised use of internal documents in court proceedings has already been fundamentally recognised by the Court of Justice. [38] As the Supreme Court correctly emphasises, this objective must be considered with reference to the principle of a fair hearing, and in particular the concept of a level procedural playing field, both of which are in Article 47 of the Charter, [39] since illegal access to internal information can significantly disadvantage the affected party. State agencies can also appeal on the basis of these principles, provided they are party to a legal dispute. [40] The rejection as evidence of internal documents that are produced without authorisation is appropriate to achieve this objective.

83. The unconditional rejection of such evidence is however not the least onerous method. Instead, a review should be carried out to determine whether the person affected has a right of access to the information in question. If this were the case, the interest in preventing unauthorised use would no longer merit protection.

84. The Court of Justice has in fact held, in rejecting documents used without authorisation, that it is conceivable that the court itself could order them to be presented. [41] It also stressed that protection against unauthorised use was based on the documents in question not being public. [42] Finally, the case-law of the Court of Justice on the right of access to documents demonstrates that withholding internal documents may require justification. [43] As a result, the right of access to documents is of indicative value in deliberations regarding the rejection of internal documents used without authorisation. [44]

85. In the main proceedings, it should be noted that under the second sentence of Article 8(2) of the Charter and Article 12 of the Data Protection Directive, everyone has the right of access to data which has been collected concerning him or her. This also applies in principle to data being recorded in the contested list. Furthermore, the persons so affected would, by virtue of the collection of the data, have to be informed of the use of the data, under either Article 10 or Article 11 of the Data Protection Directive.

38 Orders of 23 October 2002, *Austria* v *Council* (C-445/00, EU:C:2002:607, paragraph 12); of 23 March 2007, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* (C-221/06, EU:C:2007:185, paragraph 19); and of 29 January 2009, *Donnici* v *Parliament*, (C-9/08, not published, EU:C:2009:40, paragraph 13).

39 Judgments of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 48), and of 30 June 2016, *Toma und Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraphs 36 and 47).

40 Judgments of 9 June 2005, *Spain* v *Commission* (C-287/02, EU:C:2005:368, paragraph 37, on the rights of defence of the Member States); of 2 December 2009, *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 53, on the institutions of the Union); and of 18 February 2016, *Council* v *Bank Mellat* (C-176/13 P, EU:C:2016:96, paragraph 49, on an establishment in Iran).

41 Rulings of 23 October 2002, *Austria* v *Council* (C-445/00, EU:C:2002:607, paragraph 12); of 23 March 2007, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* (C-221/06, EU:C:2007:185, paragraph 19); and of 29 January 2009, *Donnici* v *Parliament* (C-9/08, not published, EU:C:2009:40, paragraph 13).

42 Ruling of 23 March 2007, *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* (C-221/06, EU:C:2007:185, paragraph 19).

43 Cf. judgments of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C–52/05 P, EU:C:2008:374), and of 21 July 2011, *Sweden* v *MyTravel and Commission* (C-506/08 P, EU:C:2011:496, paragraph 77 et seq.).

44 Decision of 29 January 2009, *Donnici* v *Parliament* (C-9/08, not published, EU:C:2009:40, paragraph 17).

86. Article 13(1) of the Data Protection Directive does allow this right to information to be restricted, if this is necessary in particular for the prevention, investigation, detection and prosecution of criminal offences (d), or an important economic or financial interest of a Member State, including taxation matters (e), and an associated monitoring, inspection or regulatory function (f).[45] Nevertheless, Article 13 expressly requires that such restrictions be imposed by legislative measures.

87. If such provisions exist, it is conceivable that restriction of the information rights of persons affected may be necessary. There is a potential risk that inspection and monitoring activities based on the list would be less effective if it were known who was named on that list.

88. Before the competent courts can reject the use of the contested list as evidence, they must therefore examine whether a restriction of the right of information of this kind is provided for and, where appropriate, justified. In the proceedings before the Court of Justice, however, no submissions were made on any of these points.

89. Even if there are indications of a legitimate interest in a hypothetical, legally justified non-disclosure of the list in question, the national courts must also examine whether in the individual case these outweigh the legitimate interests of the individual in bringing the proceedings.

90. Regarding customs legislation, the Court of Justice has held that the exercise of the rights of the person in question are excessively complicated if he is required to present data not available to him.[46] This examination of proportionality may have a different outcome in other areas, where interests of greater weight than customs revenue are in play.[47] However, that tax revenue is to be accorded a higher priority than customs revenue cannot automatically be assumed.

91. In addition, the interest in the confidentiality of the list in the main proceedings has become considerably less important, as it has already been published by third parties, and the Financial Administration Criminal Office has confirmed its existence. The hypothetical damage has therefore already occurred.

92. Admittedly, it is possible that a person may be prevented from relying on the list if he himself was party to its unauthorised dissemination. This would prevent the parties to proceedings from benefiting from their own unlawful conduct. But it would hardly be justifiable to criticise an individual such as Mr Puškár for the conduct of third parties.

93. Therefore the third question must be answered as follows: the principle of a fair hearing enshrined in Article 47(2) of the Charter allows in principle that the internal documents of an authority involved in proceedings obtained by another party to the proceedings without the authority's consent may be refused as inadmissible evidence. This refusal is not however possible if the list is held by a financial authority of a Member State and contains the personal data of the legal claimant which the authority is required to disclose to the legal claimant under Article 12 and 13 of the Data Protection Directive.

45 Judgment of 1 October 2015, *Bara and Others* (C-201/14, EU:C:2015:638, paragraph 39).

46 Judgment of 23 October 2014, *Unitrading* (C-437/13, EU:C:2014:2318, paragraph 28).

47 For an illustration, see judgments of 4 June 2013, *ZZ* (C-300/11, EU:C:2013:363, paragraph 64 to 68), and of 18 July 2013, *Commission* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 128 and 129).

D. The second question — admissibility of the list under data protection law

94. The second question relates to the substantive dispute in the main proceedings. The question is whether rights to privacy and data protection and the Data Protection Directive prohibit a Member State from creating a list of personal data for the purposes of tax collection without the consent of the persons concerned. According to the Supreme Court, in this case the fact that a public authority has the power of disposal over personal data for the purpose of combating tax fraud in itself constitutes such a risk.

95. However the main proceedings do not require an answer to the general question of whether tax authorities may collect personal data without the consent of the people concerned. This is not questioned by any of the parties. Instead what needs to be clarified is whether the tax authorities are permitted to keep a list, for the purpose of combating tax fraud, of persons who purport to act as company directors of specific legal persons and who have not consented to being named on this list. This question is primarily to be answered in the light of the Data Protection Directive, as this specifies the rights to privacy and data protection. In so far as, particularly in the area of the prosecution of criminal offences within the scope of EU law, only fundamental rights apply, it is necessary again to verify whether any different parameters arise.

96. It is common ground among the parties, quite rightly, that recording a person's name on a list of this nature and linking it to a specific legal person is to be viewed as the processing of personal data within the meaning of Article 2(b) of the Data Protection Directive.

97. According to the provisions of Chapter II of the Data Protection Directive ('General Rules on the Lawfulness of the Processing of Personal Data'), all processing of personal data — apart from the exceptions allowed for in Article 13 — must comply with the principles in Article 6 regarding the quality of data and the principles listed in Article 7 regarding the legitimacy of the processing of data. [48]

98. As the question referred indicates, both Article 7 (see 1, below) and Article 13 of the Data Protection Directive (see 2, below) may be considered as the basis for the creation of the contested list.

1. Article 7 of the Data Protection Directive

99. According to Article 7 of the Data Protection Directive, the processing of personal data may only be carried out if one of the six conditions in the provision is met. In the question referred, the cases mentioned in (e) and (f) are addressed, namely the necessity for the performance of a task carried out in the public interest, or for the purpose of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed. One might also think of Article 7(c), namely the necessity for compliance with a legal obligation.

100. Nevertheless, I should make clear at this point that I regard the examination of Article 7(c) or (f) as superfluous in this case. This is because all parties acknowledge that tax collection and combating tax fraud are tasks in the public interest within the meaning of Article 7(e) of the Data Protection Directive.

48 Judgments of 16 December 2008, *Huber* (C-524/06, EU:C:2008:724, paragraph 48), and of 1 October 2015, *Bara and Others* (C-201/14, EU:C:2015:638, paragraph 30).

101. However, Mr Puškár takes the view that the list was drawn up by the Finance Directorate without a legal basis, because only the Financial Administration Criminal Office is authorised to create such a list. This view is based on Paragraph 5(3)(b) of Law No 333/2011, which authorises the Financial Administration Criminal Office to collect data on infringements or suspected infringements.

102. In examining Article 7(e) of the Data Protection Directive, one could understand this submission to mean that, according to Mr Puškár, the task of bringing proceedings against 'figureheads' had not been given to the Finance Directorate.

103. Against this, Slovakia argues that Paragraph 164 of Law No 563/2009 constitutes a sufficient legal basis. According to this, for the purpose of tax administration, the tax authorities, the Finance Directorate and the Ministry (of Finance) are authorised to process the personal data of taxpayers, their representatives and other persons.

104. Only the national courts can decide which tasks are assigned to which authority in Slovakia according to these provisions. The same applies to the question of whether both provisions are to be interpreted as meaning that the authorities mentioned are permitted to draw up the contested list.

105. The Court of Justice can, however, express a view on the requirements of EU law which the delegation of the task required under Article 7(e) of the Data Protection Directive must satisfy.

106. While Article 7(e) of the Data Protection Directive does not contain any indications in this regard, this provision must be read in conjunction with the principles of Article 6. According to Article 6(1)(b), personal data must only be collected for specified, explicit and legitimate purposes. Within the scope of Article 7(e), the purpose of the data processing is inseparably linked to the delegated tasks. Consequently, the transfer of the task must clearly include the purpose of the processing.

107. As the reference for a preliminary ruling does not specify the purpose of the contested list in any further detail, it is for the Supreme Court to look further into this question. However, it does appear possible that the contested list is of use for the 'purposes of the Finance Directorate', specified in Paragraph 164 of Law No 563/2009. While this does not expressly refer to the storage of personal data on the suspicion of infringements, the persons concerned have to expect that the tax authorities store such data so as to know to which persons they must pay particular attention. Much clearer, however, is the benefit of such data for the tasks of the Financial Administration Criminal Office under Paragraph 5(3)(b) of Law No 333/2011. Consequently, its storage by this authority is in any event foreseeable.

108. As a further step, the Supreme Court will have to examine whether the creation and use of the contested list and in particular the naming of Mr Puškár is necessary for the claimed public interest. The protection of the fundamental right to privacy in Article 7 of the Charter requires exceptions and restrictions relating to the protection of personal data to be kept to the absolute minimum.[49] That means that the principle of proportionality must be considered,[50] in other words, the data processing must be 'appropriate, necessary and proportionate to the objective it pursues'.

109. The Supreme Court will therefore have to examine closely whether naming Mr Puškár is appropriate for achieving the various objectives of the list, whether there are possibly less onerous but equally effective methods, and in particular whether naming him is proportionate to these objectives.

49 Judgments of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia* (C-73/07, EU:C:2008:727, paragraph 56); of 7 November 2013, *IPI* (C-473/12, EU:C:2013:715, paragraph 39); of 11 December 2014, *Ryneš* (C-212/13, EU:C:2014:2428, paragraph 28); and of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 92).

50 Judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, EU:C:2016:970, paragraph 96).

110. While there is no specific information on the objective of the list, it is not in doubt that being named on the contested list constitutes a considerable interference with the rights of the person concerned. It affects his reputation and could also lead to serious, practical disadvantages in his dealings with the tax authorities. At the same time, his being named touches on the presumption of innocence in Article 48(1) of the Charter.[51] In addition, the legal persons associated with the person concerned will be affected in terms of their freedom to conduct business under Article 16 of the Charter.

111. Such a serious interference of this kind can only be proportionate if there are *sufficient grounds* for the suspicion that the person concerned purported to act as a company director of the legal persons associated with him and in so doing undermined the public interest in the collection of taxes and combating tax fraud.[52]

2. Article 13 of the Data Protection Directive

112. Article 13 of the Data Protection Directive permits Member States to deviate from some provisions of the Directive on specific grounds. However Article 7 is not mentioned there. Therefore Article 13 cannot cast doubt on the result of the interpretation of Article 7(e).

113. However, Article 13, as previously stated,[53] is relevant to the question of whether the contested list is permitted to be kept confidential, despite the fact that Articles 10, 11 and 12 of the Data Protection Directive provide that the persons affected are generally to be informed of data processing. This information is a necessary precondition to whether the person concerned can exercise the rights accorded to them under the Data Protection Directive and the fundamental rights to privacy and the protection of personal data.[54] But, ultimately, the question of whether the contested list may justifiably be kept confidential cannot have any effect on whether Mr Puškár is properly included on this list.

3. The fundamental rights to privacy and data protection

114. The fundamental rights to privacy, Article 7 of the Charter, and data protection, Article 8, which are of particular interest for criminal law measures in the application of EU law, lead to the same outcome as the application of Article 7(e) of the Data Protection Directive.

115. The naming of a person on the contested list would affect both fundamental rights. These interferences are only justified according to Article 52(1) of the Charter, if they have a sufficient legal basis, respect the essence of both fundamental rights, and preserve the principle of proportionality.

116. Of those two aspects, only respect for the essence of the rights has not yet been addressed. But, despite the adverse effects associated with inclusion on the contested list, those interferences do not meet the threshold of a breach of the essence of those rights, if the principle of proportionality is otherwise respected.

51 Cf. ECtHR, judgments of 4 December 2008, *S and Marper v. United Kingdom* (30562/04 and 30566/04, CE:ECHR:2008:1204JUD003056204, § 122), and of 18 October 2011, *Khelili v. Switzerland* (16188/07, CE:ECHR:2011:1018JUD001618807, § 68).

52 Cf. judgments of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraphs 58 and 59); of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, EU:C:2016:970, paragraphs 105 and 106); as well as ECtHR, judgment of 18 October 2011, *Khelili v. Switzerland* (16188/07, CE:ECHR:2011:1018JUD001618807, §§ 66 to 68).

53 See above, point 86 et seq.

54 Judgments of 7 May 2009, *Rijkeboer* (C-553/07, EU:C:2009:293, paragraph 49), and of 17 July 2014, *Y. S.* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 44).

4. Intermediate conclusion

117. The reply to the third question must therefore be: the tax authorities are permitted for their own purposes in accordance with Article 7(e) to keep a list of persons who purport to act as company directors of specific legal persons and who have not consented to being named on this list. This assumes that the task was legally assigned to the tax authorities, the use of the list is appropriate and necessary for the purposes of the tax authorities and there are sufficient grounds to suspect that these persons should be on the list. Neither the fundamental rights to privacy, Article 7 of the Charter, or data protection, Article 8, would in this case prevent the creation and use of the list.

E. The fourth question — the relationship between the Court of Justice and the ECtHR

118. The fourth question is aimed at clarifying whether a national court may follow the case-law of the Court of Justice of the European Union where this conflicts with the case-law of the ECtHR.

119. As various parties have noted, the admissibility of the question in this form is dubious, particularly as the Supreme Court does not state on which issue the two European courts supposedly are in conflict and the extent to which such a conflict is significant for the decision in the main proceedings. A reference for a preliminary ruling cannot be submitted in order to obtain advice on general or hypothetical questions. [55]

120. Nevertheless, this question does contain a factor which may be of significance for the final decision in the main proceedings. According to the reference for a preliminary ruling, this case involves a dispute between the Slovak Constitutional Court and the Slovak Supreme Court, in which the former refers to the case-law of the ECtHR, but does not express a view on the case-law of the Court of Justice. The other questions referred demonstrate that the referring court is not certain whether the case-law of our Court of Justice leads to the same outcome as that of the Slovak Constitutional Court. It is therefore reasonable to set out what should be done if the referring court — possibly in light of a decision of the Slovak Constitutional Court — arrives at the view that the two European courts are in conflict on an issue relevant to the decision in the main proceedings.

121. Incidentally, the Court of Justice previously ruled in similar fashion when it was asked to specify the extent of the power or obligation to make a reference for a preliminary ruling in accordance with Article 267 of the Treaty on the functioning of the European Union (TFEU). [56] Often, these references for a preliminary ruling already contain the specific questions which must be answered in order to decide on the main proceedings. Nevertheless, the Court of Justice also answers the general question in the context of Article 267 TFEU. Otherwise, it would be very unlikely that the Court of Justice would get the opportunity to express a view on such questions. At the same time, there would be reason to fear that the national courts would remain unsure of their power or obligation to make use of the preliminary ruling procedure and would make preventable mistakes in the application of EU law as a result.

55 Judgment of 21 December 2016, *Tele2 Sverige and Watson* (C-203/15 and C–698/15, EU:C:2016:970, paragraph 130 and the case-law cited).

56 See judgments of 27 June 1991, *Mecanarte* (C-348/89, EU:C:1991:278, paragraph 42 et seq.); of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 80 et seq.); and of 18 July 2013, *Consiglio Nazionale dei Geologi* (C-136/12, EU:C:2013:489, paragraph 21 et seq.).

122. As regards the reformulated question referred, the first sentence of Article 52(3) of the Charter states that the rights in the Charter, which correspond to rights guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), have the same meaning and scope as conferred by the ECHR. According to the explanatory notes on this provision, the meaning and scope of the guaranteed rights are not determined by the wording of the ECHR, but *inter alia* also by the case-law of the ECtHR.[57] However, the second sentence of Article 52(3) of the Charter permits EU law to accord more extensive protection.

123. Consequently, EU law permits the Court of Justice to deviate from the case-law of the ECtHR only to the extent that the former ascribes more extensive protection to specific fundamental rights than the latter. This deviation in turn is only permitted provided that it does not also cause another fundamental right in the Charter corresponding to a right in the ECHR to be accorded less protection than in the case-law of the ECtHR. One thinks, for example, of cases in which a trade-off must be made between specific fundamental rights.[58]

124. If a permissible, more extensive, protection for a fundamental right is provided for in the case-law of the Court of Justice, the primacy of EU law obliges national courts to follow the case-law of the Court of Justice in the application of EU law and to grant this protection.

125. However if the national court comes to the conclusion that the case-law of the Court of Justice provides less protection than the case-law of the ECtHR in respect of a specific fundamental right provided for in both the Charter and in the ECHR, this inevitably leads to a question of the interpretation of EU law with regard to the fundamental right in question and Article 52(3) of the Charter. That conclusion by the national court would amount to the view that the interpretation of the fundamental right in question by the Court of Justice is not compatible with Article 52(3).

126. Provided that such a question is relevant to the determination of a legal dispute before the national court, it may call on the Court of Justice to decide this question in accordance with Article 267(2) TFEU. However, if there is no judicial remedy against the decision of the national court, according to Article 267(3) TFEU, it is in fact *obliged* to bring the matter to the Court of Justice.

127. The reply to the fourth question must therefore be: if a national court comes to the conclusion that the decision in a case before it would be affected by case-law of the Court of Justice under which rights in the Charter, which correspond to rights guaranteed by the ECHR, are afforded less protection than under the case-law of the ECtHR, it may call on the Court of Justice to ascertain how EU law is to be interpreted in that situation. If there is no judicial remedy against the decisions of the national court itself under national law, it is obliged to bring the matter to the Court of Justice.

VI. Conclusions

128. I therefore propose that the Court rule as follows:

(1) The use of personal data for the purposes of tax collection is governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of

57 Judgments of 22 December 2010, *DEB* (C-279/09, EU:C:2010:811, paragraphs 35 and 37), and of 30 June 2016, *Toma und Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 41).

58 See, for example, judgment of 29 January 2008, *Promusicae* (C-275/06, EU:C:2008:54, paragraph 68).

29 September 2003 and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, while in the sphere of criminal law only Articles 7 and 8 of the Charter are applicable, in so far as questions governed by EU law are at issue.

(2) The right to effective judicial protection under Article 47 of the Charter and the principle of effectiveness do not preclude an obligation to exhaust an administrative remedy as a condition on bringing legal proceedings, if the rules governing that remedy do not disproportionately impair the effectiveness of judicial protection. Consequently, the obligatory administrative remedy must not cause unreasonable delay or excessive costs for the overall redress procedures.

(3) The tax authorities are permitted for their own purposes in accordance with Article 7(e) of Directive 95/46/EC to keep a list of persons who purport to act as company directors of specific legal persons and who have not consented to being named on this list. This assumes that the task was legally assigned to the tax authorities, that the use of the list is appropriate and necessary for the purpose of the tax authorities and there are reasonable grounds to suspect that these persons are properly named on the list. Neither the fundamental rights to privacy, Article 7 of the Charter, or data protection, Article 8 of the Charter, would in this case preclude the creation and use of the list.

(4) The principle of a fair hearing enshrined in Article 47(2) of the Charter allows in principle for the internal documents of an authority involved in legal proceedings obtained by another party to the proceedings without the authority's consent to be refused as inadmissible evidence. That refusal is not, however, possible if the list is held by a financial authority of a Member State and contains the legal claimant's personal data which the authority is required to disclose to the legal claimant under Article 12 and 13 of Directive 95/46/EC.

(5) If a national court comes to the conclusion that the decision on proceedings pending before it would be affected by case-law of the Court of Justice, under which rights in the Charter, which correspond to rights guaranteed by the ECHR, are afforded less protection than under the case-law of the ECtHR, it may call on the Court of Justice to ascertain how EU law is to be interpreted in respect of those proceedings. If there is no judicial remedy under national law against the decisions of the national court itself, it is obliged to bring the matter before the Court of Justice.