JUDGMENT OF THE COURT (Grand Chamber)

26 January 2010 *

In Case C-118/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 1 February 2008, received at the Court on 18 March 2008, in the proceedings

Transportes Urbanos y Servicios Generales SAL

v

Administración del Estado,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano (Rapporteur), J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann, T. von Danwitz, A. Arabadjiev and J.-J. Kasel, Judges,

* Language of the case: Spanish.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 April 2009,

after considering the observations submitted on behalf of:

— Transportes Urbanos y Servicios Generales SAL, by C. Esquerrá Andreu, abogado,

— the Spanish Government, by J. López-Medel Báscones, acting as Agent,

— the Commission of the European Communities, by R. Vidal Puig and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the principles of effectiveness and equivalence in the light of the rules applicable in the Spanish legal system to actions for damages against the State in respect of a breach of European Union law.

2 The reference has been made in proceedings between Transportes Urbanos y Servicios Generales SAL ('Transportes Urbanos') and the Administración del Estado regarding the dismissal of the action for damages brought by that company against the Spanish State in respect of a breach of European Union law.

Legal context

The Sixth Directive

3 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax:

uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) ('the Sixth Directive'), provides in Article 17(2) and (5), in the version resulting from Article 28f thereof:

'2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

(b) value added tax due or paid in respect of imported goods within the territory of the country;

(c) value added tax due pursuant to Articles 5(7)(a), 6(3) and 28a(6);

…

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

This proportion shall be determined, in accordance with Article 19, for all the transactions carried out by the taxable person.

…'

4 Article 19 of the Sixth Directive sets out the criteria for the calculation of the deductible proportion provided for in the first subparagraph of Article 17(5) thereof.

National law

5 Article 163 of the Spanish Constitution ('the Constitution') provides:

'Where a court or tribunal considers, when hearing a case, that a provision having the status of law, which is applicable to the case and upon the validity of which the judgment depends, may be contrary to the Constitution, it shall refer the matter to the Tribunal Constitucional [Constitutional Court] in the circumstances, according to the procedure and with the effects laid down by law, such effects in no case being suspensive.'

6 Law 37/1992 of 28 December 1992 on value added tax (BOE No 312 of 29 December 1992, p. 44247), as amended by Law 66/1997 of 30 December 1997 (BOE No 313 of 31 December 1997, p. 38517; 'Law 37/1992'), provides for limitations on the right of a taxable person to deduct value added tax ('VAT') on the purchase of goods or services which are subsidised. Those limitations entered into force as of the 1998 tax year.

7 Law 37/1992 also provides that every taxable person is required to file periodic tax returns, in which he must calculate the amounts of VAT due by him ('self-assessment').

8 In accordance with General Tax Law 58/2003 of 17 December 2003 (BOE No 303 of 18 December 2003, p. 44987), the taxable person has the right to request that his self-assessments be rectified and, where appropriate, to require that overpayments be refunded. According to Articles 66 and 67 of that law, the limitation period for the exercise of that right is four years, which essentially starts to run from the day following that on which the overpayment was made or that of the expiry of the time-limit for submitting the self-assessment if the overpayment was made by that time-limit.

The dispute in the main proceedings

9 By judgment of 6 October 2005 in Case C-204/03 *Commission* v *Spain* [2005] ECR I-8389, the Court held in essence that the limitations on the right to deduct VAT laid down in Law 37/1992 were incompatible with Articles 17(2) and (5) and 19 of the Sixth Directive.

10 Transportes Urbanos, which had made self-assessments for the tax years 1999 and 2000 in accordance with Law 37/1992, did not avail itself of its right to request, pursuant to General Tax Law 58/2003, the rectification of those self-assessments. It is common ground that such a right was time-barred at the date on which the Court delivered its judgment in *Commission* v *Spain*.

11 Transportes Urbanos then brought an action for damages before the Council of Ministers against the Spanish State. In that action, it submits that it suffered loss in the amount of EUR 1 228 366.39 on account of breach by the Spanish legislature of the

Sixth Directive, that breach having been established by the Court in *Commission* v *Spain*. That amount corresponds to the VAT payments unduly collected by the Spanish tax authorities during the tax years 1999 and 2000 and the repayments which Transportes Urbanos could have claimed for those years.

12 By decision of 12 January 2007, the Council of Ministers dismissed the application of Transportes Urbanos, holding that its failure to request rectification of those self-assessments within the period prescribed for that purpose had broken the direct causal link between the breach of European Union law alleged against the Spanish State and the loss allegedly sustained by that company.

13 That decision of the Council of Ministers is based in particular on two judgments of the Tribunal Supremo (Spanish Supreme Court) of 29 January 2004 and 24 May 2005 ('the contested case-law'), according to which actions for damages against the State in respect of a breach of European Union law are subject to a rule requiring prior exhaustion of administrative and judicial remedies against a challenged administrative measure adopted pursuant to national legislation contrary to European Union law.

14 On 6 June 2007, Transportes Urbanos brought an action against the decision of the Council of Ministers before the Tribunal Supremo.

The order for reference and the question referred

15 In its order for reference, the Tribunal Supremo recalls that, according to the contested case-law, the bringing of an action for damages against the State on the basis of the unconstitutionality of legislation is not subject, unlike the same action based on the

incompatibility of that legislation with European Union law, to any condition requiring prior exhaustion of remedies against the challenged administrative measure based on that legislation.

16 The reason for the difference in treatment between those two actions arises from the differences between the actions which can be brought against an administrative measure, according to whether those actions are based on the incompatibility of that measure with European Union law or on the breach of the Constitution by the national legislation pursuant to which that measure was adopted.

17 According to the contested case-law, since national legislation is presumed to be consistent with the Constitution, administrative measures based on that legislation are also presumed to be 'lawful'. It follows that neither the administrative authorities nor the judicial authorities may annul those measures unless the legislation has been declared void on the ground that it is contrary to the Constitution, by a judgment of the Tribunal Constitucional following an action seeking a declaration of unconstitutionality brought in accordance with Article 163 of the Constitution, an action which only the court hearing the matter may refer.

18 In those circumstances, if the prior exhaustion of administrative and judicial remedies against a harmful administrative measure were required as a condition before an action for damages alleging a breach of the Constitution could be brought, that would place on individuals the burden of challenging the administrative measure enacted pursuant to the allegedly unconstitutional legislation, by recourse, first, to the administrative remedy and, second, to the judicial remedy and by exhausting all appeal procedures until such time as one of the courts hearing the matter decides finally to raise the question of the unconstitutionality of that legislation before the Tribunal Constitucional. Such a situation would be disproportionate and have unacceptable consequences.

19 On the other hand, if the competent administrative or judicial authorities hold that an administrative measure has been enacted pursuant to legislation which is incompatible with European Union law, they are bound, in accordance with the settled case-law of the Court, to disapply that legislation and the administrative measures adopted on the basis

of that legislation. Accordingly, it is possible to apply directly to those authorities for annulment of the harmful administrative measure and thus to obtain complete redress.

20 In addition, according to the contested case-law, the existence of a breach of European Union law which could lead to a finding of State liability must be established by a preliminary ruling of the Court. The effects of a judgment of the Court given under Article 267 TFEU are not comparable to those of a judgment of the Tribunal Constitucional declaring legislation to be unconstitutional, in that only the decision of the Tribunal results in that legislation's being void with retroactive effect.

21 It is in those circumstances that the Tribunal Supremo decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it contrary to the principles of equivalence and effectiveness that the Tribunal Supremo should apply differing legal principles in the [contested case-law] to actions to establish the financial liability of the State as legislature in respect of administrative measures enacted pursuant to legislation which has been declared unconstitutional and to such actions in respect of measures enacted pursuant to a rule which has been held to be contrary to [European Union] law?'

Jurisdiction of the Court

22 According to the Spanish Government, the Court lacks jurisdiction to rule upon the compatibility with European Union law of judicial decisions such as those of which the contested case-law consists, since the Tribunal Supremo itself is able to amend that case-law if it finds that it is not compatible with European Union law.

23 It must be recalled in this respect that, although it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with the legal rules of the European Union, it has repeatedly held that it has jurisdiction to give the national court full guidance on the interpretation of European Union law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see, to that effect, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8, and Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 50).

24 To that end, as the Advocate General observed at point 13 of his Opinion, the origin — whether legislative, regulatory or judicial — of the rules of national law whose compatibility with European Union law the national court must assess, in the light of the guidance on interpretation provided by the Court, has no effect whatsoever on the latter's jurisdiction to rule on the reference for a preliminary ruling.

25 Moreover, according to settled case-law, in the context of the cooperation between the Court of Justice and the courts of the Member States provided for by Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of each case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is bound, in principle, to give a ruling (see, to that effect, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; and Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 32).

26 In the present case, the Court is not called upon to interpret national law or a judgment of a national court, but to provide the referring court with guidance on the interpretation of the principles of effectiveness and equivalence, so as to permit it to assess whether, under European Union law, it is required to disapply national rules

relating to actions for damages against the State in respect of a breach of that law by national legislation (see, to that effect, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 46).

27 The Court therefore has jurisdiction to rule on the present reference for a preliminary ruling.

The question referred for a preliminary ruling

28 By its question, the national court asks in essence whether European Union law precludes a rule of a Member State under which actions for damages against the State, alleging a breach of that law by national legislation, are subject to a condition requiring prior exhaustion of remedies against a harmful administrative measure, when those actions are not subject to such a condition where they allege a breach of the Constitution by national legislation.

Preliminary observations

29 In order to answer that question, it is to be recalled at the outset that, in accordance with settled case-law, the principle of State liability for loss and damage caused to individuals as a result of breaches of European Union law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based (see, to that effect, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 19).

30 In this respect, the Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of European Union law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (see, to that effect, *Danske Slagterier*, paragraph 20 and case-law cited).

31 The Court has also had occasion to make clear that, subject to the right to reparation which thus flows directly from European Union law where those conditions are satisfied, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness) (see, to that effect, Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 58, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 123).

32 As the national court has observed, it is therefore in the light of those principles that the question referred must be examined.

Principle of equivalence

33 In relation to the principle of equivalence, it should be borne in mind that, according to settled case-law, this requires that all the rules applicable to actions apply without distinction to actions alleging infringement of European Union law and to similar

actions alleging infringement of national law (see, to that effect, Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 36; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41; Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 55; and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 62).

34 However, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a certain field of law (*Levez*, paragraph 42; Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 27; and Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 45).

35 In order to determine whether the principle of equivalence has been complied with in the case in the main proceedings, it is therefore necessary to examine whether, in the light of their purpose and their essential characteristics, the action for damages brought by Transportes Urbanos, alleging breach of European Union law, and the action which that company could have brought on the basis of a possible breach of the Constitution may be regarded as similar (see, to that effect, *Preston and Others*, paragraph 49).

36 As regards the purpose of the two actions for damages referred to in the previous paragraph, the Court notes that they have exactly the same purpose, namely compensation for the loss suffered by the person harmed as a result of an act or an omission of the State.

37 As regards their essential characteristics, it should be borne in mind that the rule requiring prior exhaustion of all remedies, at issue in the main proceedings, draws a distinction between those actions, in that it requires that the applicant has previously exhausted the remedies against the harmful administrative measure solely where the action for damages alleges breach of European Union law by the national legislation pursuant to which that measure was adopted.

38 It should be pointed out that, contrary to what certain aspects of the contested case-law recalled in paragraph 20 of this judgment seem to suggest, reparation of the damage caused by a breach of European Union law by a Member State is not conditional on the requirement that the existence of such a breach must be clear from a preliminary ruling delivered by the Court (see, to that effect, *Brasserie du pêcheur and Factortame*, paragraphs 94 to 96; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 28; and *Danske Slagterier*, paragraph 37).

39 However, in the case in the main proceedings, Transportes Urbanos has expressly based its action for damages on the judgment in *Commission* v *Spain*, given pursuant to Article 226 EC, in which the Court found that Law 37/1992 was in breach of the Sixth Directive.

40 It is also clear from the order for reference that Transportes Urbanos brought this action before the Council of Ministers on account of the fact that the time-limits for requesting rectification of the self-assessments made in respect of the tax years 1999 and 2000 had expired by the date on which the judgment in *Commission* v *Spain* was delivered.

41 None the less, as was stated at paragraphs 12 and 13 of this judgment, that action was dismissed by the Council of Ministers precisely on the ground that Transportes Urbanos had not, prior to bringing that action, requested the rectification of its self-assessments.

42 However, according to the order for reference, if Transportes Urbanos had been able to base its action for damages on a judgment of the Tribunal Constitucional declaring the legislation in question to be void on the ground of breach of the Constitution, that

action might have succeeded, irrespective of the fact that that company had not requested the rectification of those self-assessments before the time-limits for doing so had expired.

43 It appears from the foregoing considerations that, in the specific context which gave rise to the case in the main proceedings as described in the order for reference, the only difference between the two actions referred to in paragraph 35 of this judgment is the fact that the breaches of law on which they are based are established, in respect of one, by the Court in a judgment given pursuant to Article 226 EC and, in respect of the other, by a judgment of the Tribunal Constitucional.

44 This fact alone, in the absence of any mention in the order for reference of other factors demonstrating that there are further differences between the action for damages against the State actually brought by Transportes Urbanos and the action which it might have brought on the basis of a breach of the Constitution established by the Tribunal Constitucional cannot suffice to establish a distinction between those two actions in the light of the principle of equivalence.

45 In that situation, the two abovementioned actions may be regarded as similar for the purposes of the case-law referred to in paragraph 35 of this judgment.

46 It follows that, in the light of the circumstances described in the order for reference, the principle of equivalence precludes the application of a rule such as that at issue in the main proceedings.

47 In view of this conclusion, it is not necessary to examine the rule requiring prior exhaustion of the remedies in question in the case in the main proceedings in the light of the principle of effectiveness.

48 It follows from the foregoing that the answer to the question referred is that European Union law precludes the application of a rule of a Member State under which an action for damages against the State, alleging a breach of that law by national legislation which has been established by a judgment of the Court given pursuant to Article 226 EC, can succeed only if the applicant has previously exhausted all domestic remedies for challenging the validity of a harmful administrative measure adopted on the basis of that legislation, when such a rule is not applicable to an action for damages against the State alleging breach of the Constitution by national legislation which has been established by the competent court.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

European Union law precludes the application of a rule of a Member State under which an action for damages against the State, alleging a breach of that law by national legislation which has been established by a judgment of the Court of Justice of the European Communities given pursuant to Article 226 EC, can succeed only if the applicant has previously exhausted all domestic remedies for challenging the validity of a harmful administrative measure adopted on the basis of that legislation, when such a rule is not applicable to an action for damages

against the State alleging breach of the Constitution by national legislation which has been established by the competent court.

[Signatures]