

## Scenario 1, speaker: Magdalena Ličková



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[Imaginary] Ms Palava is running successful business in production of red but especially white wine, located in south of Moravia, the Czech Republic. She has been object of a tax inspection for periods of 2018 and 2019. That tax inspection established irregularities and accordingly, the national competent tax authority issued a tax assessment notice imposing on Ms Palava additional VAT in the amount of 100 000 CZK by way of default interest and also a late-payment penalty.

Ms Palava challenged that tax assessment notice before the national court. She claimed, in essence, that that notice could not produce any legal effect in her respect because her rights of defence had been violated in the procedure having led to its issuance. Ms Palava's position is that there was a lot of confusion as to the elements underlying the resulting tax assessment and she should have been in case provided access to all information gathered in the file. Because she has not been provided such access, she could not have clarified properly the scope of the transactions having occurred during 2015 and 2016 that caught the tax administration's eye.

The national court observed that the way in which the tax authority proceeded complies with an [imaginary] long established national practice. Under that [imaginary] practice, the persons who are object of a tax inspection are usually invited at the end of the proceedings for an interview during which they have a possibility to exchange with the tax inspector. However, it is not usual practice [in that imaginary situation] to invite those persons to consult the file before that interview occurs. The national court agrees with Ms Palava that this practice is not ideal and agrees that the interview provides, in real terms, a very limited space to effectively deal with any unclear aspects. In those circumstances, the national court before which the matter is now pending is uncertain as to the exact implications of Article 41 of the Charter (on right to good administration) for the case in the main proceedings. It has therefore decided to suspend the proceedings and refer the following question to the Court of Justice:

'Does Article 41 of the Charter, require that a national tax authority provide to a person subject to a tax investigation a possibility to consult the documents which that tax authority has gathered, in respect of that person, and which then lead to the subsequent decision by which the tax authority imposes on that person an additional VAT obligation and a penalty?'

## **Scenario 1**

It is undisputed that the transactions subject to the litigation fall within the scope of Article 2 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive').

Article 250 (1) of the VAT Directive states:

1. Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.

Article 273 of the VAT Directive provides as follows:

'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

....'

Article 4(3) TEU reads as follows: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.'

Paragraphs 1 and 2 of Article 325 TFEU provide:

'1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.'

**Does the Charter apply?**

**Is the request for preliminary ruling admissible? Can you identify any issues in that respect?**



### **Facts and national proceeding:**

Criminal proceedings have been opened in respect of [Imaginary] Ms Palava who has been charged with the criminal offence of ‘obstructing the implementation of an official decision’. That occurred after she was intercepted driving, in early morning hours, on the streets of Milano in violation of a previous decision of an Italian authority banning her from driving motor vehicles. During the trial hearing, Ms Palava confessed that she, moreover, had stolen the very car in which she was intercepted. That had actually occurred just several minutes before the interception. Following that, the act of accusation was modified so as to include also the criminal offence of theft. That modification was communicated to Ms. Palava who, after taking advice from her legal representative, decided then to apply for a negotiated penalty. That request was, however, denied, because, pursuant to the applicable rules, it must be submitted before the opening of the trial proceedings. More specifically, that is the case where the act of accusation is changed as regards the legal reclassification of the acts, but the possibility to apply for the negotiated penalty appears still open when the change concerns the facts on which the act of accusation relies.

### **Question referred:**

The national court seized with that matter inquires into whether the national rules on the admissibility of the application for a negotiated penalty are in fact compatible with the provisions of Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings and with Article 48 of the Charter.

### **Legal Framework:**

Pursuant to Article 82 TFEU:

‘1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- (b) prevent and settle conflicts of jurisdiction between Member States;
- (c) support the training of the judiciary and judicial staff;
- (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

...’

Article 83 of the TFEU reads:

‘1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

...’.

According to recital 3 of Directive 2012/13, ‘the implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other’s criminal justice systems. ...’.

According to recital 8, ‘strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR’.

Pursuant to recital 10, ‘common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the field of information in criminal proceedings’.

**Scenario 2**, speaker : Magdalena Ličková

Pursuant to recital 29, ‘where, in the course of the criminal proceedings, the details of the accusation change to the extent that the position of suspects or accused persons is substantially affected, this should be communicated to them where necessary to safeguard the fairness of the proceedings and in due time to allow for an effective exercise of the rights of the defence’.

According to its Article 1, Directive 2012/13 ‘lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. ...’.

Pursuant to its Article 2(1), Directive 2012/13 applies ‘from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal’.

Article 3 of Directive 2012/13 is entitled ‘Right to information about rights’. It reads as follows:

‘1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

- (a) the right of access to a lawyer;
- (b) any entitlement to free legal advice and the conditions for obtaining such advice;
- (c) the right to be informed of the accusation, in accordance with Article 6;
- (d) the right to interpretation and translation;
- (e) the right to remain silent.

2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.’

Article 6 of Directive 2012/13 is entitled ‘Right to information about the accusation’:

‘1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

**Scenario 2, speaker : Magdalena Ličková**

3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.'

**Does Directive 2012/13 apply to the case in the main proceedings?**

**Does the Court have jurisdiction to give a preliminary ruling?**

**Is the situation pending before the national court within the scope of application of EU law?**



## **Facts**

[Imaginary] Ms Palava was prosecuted in Slovakia for several offences allegedly committed in 1995. In 1998, the president of that State issued an amnesty that covered those offences. Later, in 2001, the competent national court terminated the prosecution based on that amnesty. That decision became final, and was endowed, under national law, with the same effects as an acquittal. However, in application of the respective national law, the amnesty was revoked in 2017. The revocation of that amnesty meant that the initial criminal prosecution resumed.

The referring court observes that Ms Palava's whereabouts are currently unknown. It is unclear whether she is currently within the territory of the Union or has perhaps travelled to Australia. Be it as it may, the referring court does not exclude issuing a European arrest warrant. It is nevertheless not certain whether, in those circumstances, the surrender of Ms Palava for the purposes of conducting a criminal prosecution is possible or became precluded by the principle of *ne bis in idem*.

## **Question referred:**

Is it possible to issue a European arrest warrant when the person concerned was already subject to previous criminal proceedings that were closed, due to an amnesty, by a judicial decision that amounted to an acquittal, when that amnesty was subsequently revoked? Or is the issuing of a European arrest warrant under those circumstances precluded by Article 50 of the Charter?

The referring court has also requested that the case be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.

## **Legal Framework**

Article 107 of the Rules of Procedure of the Court provides:

1. A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules.
2. The referring court or tribunal shall set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and shall, in so far as possible, indicate the answer that it proposes to the questions referred.'

[...]

Article 3 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States sets out the 'Grounds for mandatory non-execution of the European arrest warrant' in the following terms:

### Scenario 3

‘The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.’

Article 8(1) of the framework decision requires certain information to be contained in a European arrest warrant: ‘The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

...

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

...’

Article 17 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, entitled ‘Time limits and procedures for the decision to execute the European arrest warrant’, provides in paragraph 1:

‘A European arrest warrant shall be dealt with and executed as a matter of urgency.’

#### **Questions to be considered:**

Does the Court have jurisdiction to give preliminary ruling (*ratione temporis*)?

Can that question be held as inadmissible due to its hypothetical nature?

Does the Charter apply in those circumstances?

(And what about the request made under Article 107 of the Rules of Procedure of the Court?)

## Scenario 4, speaker: Magdalena Ličková



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### Facts

By application lodged with [an imaginary] district court in Marseille, [imaginary] Ms Palava, who is a lawyer based in Marseille, asked that court to issue [imaginary] Mr K (who resides in Hamburg) with a payment order for an amount owed to her as consideration for the professional services rendered by her in connection with legal proceedings in Germany. The district court issued a payment order for the sum of EUR 20.000, plus interest and costs. That order was not challenged and became final. Ms Palava then requested the district court in Marseille to issue the Article 53 Certificate, in application of Regulation No 1215/2012, with respect to that order. At that stage, the district court realized that it should have never confirmed its international jurisdiction given that the relationship between MR K and Ms Palava was one between a consumer and a professional. In fact, pursuant to Article 18(2) of Regulation No 1215/2012, Ms Palava should have brought proceedings against his client in the courts of the Member State in which Mr K is domiciled (that is in Germany).

That court is of the view that the automatic issue of the Article 53 Certificate under those circumstances might deprive Mr K of an effective remedy. It therefore decided to suspend the proceedings and refer to the Court of Justice the following question:

### Question referred:

‘Should Article 47 of the Charter be interpreted as meaning that it is not possible for the court of origin, which has been requested to issue the Article 53 Certificate with regard to a judgment that has become final, to exercise powers of its own motion to ascertain whether there has been a breach of the rules set out in Regulation No 1215/2012?’

Pursuant to Article 4 (1) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

Article 17 of Regulation 1215/2012 (which makes pars of Chapter II, Section 4 of that regulation) states:

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

- (a) it is a contract for the sale of goods on instalment credit terms;
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

## Scenario 4

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

...

Article 18 of Regulation 1215/2012 provides:

'1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

...'

Pursuant to Article 45 of Regulation 1215/2012

1. On the application of any interested party, the recognition of a judgment shall be refused:

...

(e) if the judgment conflicts with:

- (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or

...

Pursuant to Article 47 (1) of Regulation 1215/2012 'For the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with:

- a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
- b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest

According to Article 53: 'The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I.'

### Questions to be considered:

Does the Charter apply?

If yes, with what effect?

Does Directive 93/13 on unfair terms in consumer contracts has any bearing in this context?