



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 13 December 2012¹

Case C-565/11

Mariana Irimie

v

**Administrația Finanțelor Publice Sibiu and
Administrația Fondului pentru Mediu**

(Reference for a preliminary ruling from the Tribunalul Sibiu (Romania))

(Repayment of taxes levied by a Member State contrary to European Union law — National legislation limiting the interest payable by the Member State on the repaid tax — Principles of equivalence, effectiveness and proportionality)

I – Introduction

1. The present reference for a preliminary ruling has been made in the context of a dispute between the applicant Ms Irimie and the Administrația Finanțelor Publice Sibiu (State Finance Administration, Sibiu), and the Administrația Fondului pentru Mediu (Environment Fund Administration), in which the applicant seeks the repayment of tax charged contrary to European Union law, namely Article 110 TFEU, together with the statutory interest from the date of payment of the tax to the date of actual repayment.

2. The applicant had to pay a pollution tax upon the registration of a motor vehicle from another Member State.²

3. In *Tatu*³ concerning the tax in question, the Court held that Article 110 TFEU must be interpreted as precluding a Member State from introducing a pollution tax levied on motor vehicles on their first registration in that Member State if that tax is arranged in such a way that it discourages the placing in circulation in that Member State of second-hand vehicles purchased in other Member States without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market.

¹ — Original language: French.

² — At the time of the relevant events, a pollution tax for vehicles of classes M1 to M3 and N1 to N3 was payable under Article 3 of the Ordonanța de urgență a Guvernului pentru instituirea taxei pe poluare pentru autovehicule (Government emergency order laying down the motor vehicle pollution tax) No 50/2008 of 25 April 2008 (*Monitorul Oficial al României*, Part I, No 327, 25 April 2008), which entered into force on 1 July 2008.

³ — Case C-402/09 [2011] ECR I-2711.

4. With the reference for a preliminary ruling, lodged at the Court Registry on 10 November 2011, the referring court asks whether national legislation which provides for the payment of interest on tax to be repaid from the day following the date of the claim for repayment and not from the date of payment of the tax is compatible with European Union law. In particular, the referring court is uncertain whether the national legislation is compatible with the principles of equivalence, effectiveness and proportionality and with the right to property guaranteed by Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), read in conjunction with Article 6 TEU.

II – Legal framework under Romanian law

5. In the Romanian legal system, tax procedure is regulated by Government Order No 92 on the Code of tax procedure (*Ordonanța Guvernului nr. 92 privind Codul de procedură fiscal*) of 24 December 2003 (*Monitorul Oficial al României*, Part I, No 513, 31 July 2007), as amended and supplemented ('OG No 92/2003').

6. Following the Court's request of 3 July 2012 for clarification, the referring court stated that, under Article 124 of the OG No 92/2003, in conjunction with Article 70, interest on sums to be repaid from public funds is allowed from the day following the date of the claim for repayment. The referring court added that the national case-law is clear and unambiguous on that point.

7. The referring court also pointed out that, in reply to the request for clarification, after the judicial proceedings pending before the referring court, even if they had been preceded by an administrative procedure, it was impossible for the taxpayer to institute further judicial proceedings for the additional interest, that is to say, in respect of the period from the payment of the illegal tax to the date of the claim for repayment.

III – The dispute in the main proceedings and the question referred

8. In December 2007 the applicant purchased a motor vehicle registered in Germany.⁴ She applied to the Romanian authorities in September 2008 in order to register the vehicle for the first time in Romania and paid the sum of RON 6 707 by way of pollution tax.

9. By application of 31 August 2009, supplemented on 10 December 2009 and 7 July 2011, the applicant brought an action before the Tribunalul Sibiu (Romania) against the Administrația Finanțelor Publice Sibiu and the Administrația Fondului pentru Mediu for the repayment of the sum paid by way of pollution tax, together with the statutory interest on that tax from the date of payment of the tax.

10. The referring court finds that the decision concerning the claim for repayment of the sum paid by way of pollution tax should not pose any major problems in view of the judgment in *Tatu*.⁵ However, with regard to the claim for repayment of the entire interest on the tax, calculated from the date of payment of the tax, the referring court points out that it is not possible to allow the claim by reason of the combined provisions of Articles 70 and 124 of OG No 92/2003, which provide that interest on sums to be repaid from public funds is allowed only from the day following the date of the claim for repayment.

4 — The vehicle was registered for the first time in Germany on 23 March 1999.

5 — The referring court also cites the cases confirming that case-law, in particular the orders of 8 April 2011 in Joined Cases C-136/10 and C-178/10 *Obreja and Darmi*; Case C-336/10 *Ijac*; Joined Cases C-29/11 and C-30/11 *Sfichi and Ilaș*; the judgment in Case C-263/10 *Nisipeanu*; and the orders of 13 July 2011 in Case C-335/10 *Vijulan*; Case C-438/10 *Druțu*, and Case C-573/10 *Micșa*. Following the request for clarification of 3 July 2012, the referring court also added that, since the judgment in *Tatu*, the national courts are allowing actions brought by taxpayers and ordering the repayment of tax with interest from the day following the date of the claim for repayment.

11. The referring court doubts whether such a rule is consistent with European Union law, in particular the principles of equivalence, effectiveness and proportionality of actions for compensation which individuals are entitled to bring as a consequence of an infringement of European Union law, and with the right to property guaranteed by Article 17 of the Charter, read in conjunction with Article 6 TEU.

12. In those circumstances, the Tribunalul Sibiu decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Can the principles of the effectiveness, equivalence and proportionality of remedies in relation to infringements of [European Union] law to which individuals are subjected as the result of the application of legislation which does not conform to [European Union] law, [principles] arising from the case-law of the Court of Justice of the European Union and the right to property laid down in Article 6 TEU and Article 17 of the Charter ..., be [interpreted] as precluding provisions of national law which limit the amount of damage[s] which could be recovered by an individual who has suffered an infringement of his rights?’

IV – Procedure before the Court

13. Written observations were submitted by the applicant, Romania, the Kingdom of Spain, the Portuguese Republic and the European Commission. The applicant, Romania, the Kingdom of Spain and the Commission made oral observations at the hearing on 17 October 2012.

14. The applicant observes that European Union law precludes national legislation which limits the amount of damages (loss of profit) which are payable in full to an individual who has paid a tax which is contrary to European Union law, by allowing interest only from the date of the claim for repayment and not from the date of payment of the illegal tax.

15. Romania observes that the Romanian legislation permits full compensation for the loss suffered by taxpayers who have been obliged to pay a tax subsequently found to be illegal. In addition, according to Romania, the Member States have the right to lay down the conditions for allowing interest on compensation for the loss caused to individuals by the payment of taxes charged contrary to European Union law, in accordance with the principles of the effectiveness, equivalence and proportionality of remedies.

16. The Kingdom of Spain considers that European Union law does not, in principle, preclude provisions of national law which limit either the compensation that may be obtained by an individual whose right is infringed or the amount to be repaid by reason of a payment that was not due. According to the Kingdom of Spain, there is inconsistency with the principle of effectiveness only if the interest payment was so small that it would considerably limit, ‘render meaningless’ or reduce to zero the right to payment of interest. The Kingdom of Spain considers that the payment of interest from the date of the claim for repayment of the illegal tax does not render that right meaningless.

17. The Portuguese Republic considers that it is for the Member States to lay down the details of the amount to which the individual is entitled by reason of the infringement of European Union law, provided that those details do not entail a substantial reduction in the amount to which the individual is entitled and cannot be regarded as an obstacle to the exercise of that same right.

18. According to the Commission, a provision of national law which, as in the present case, limits considerably the taxpayer’s right to recover losses incurred as a result of the non-availability of the amount illegally levied is not consistent with the principle of effectiveness.

V – Analysis

19. First of all, it is not for the Court of Justice to assign a legal classification to the application made by the applicant before the referring court. It is for the applicant in the main proceedings to specify the nature and basis of her action (whether it is an action for restitution or an action for compensation for damage), subject to the supervision of the referring court.⁶

20. It could appear from the wording of the question referred that the applicant's action before the referring court is an action for compensation for damage caused by an infringement of European Union law. However, subject to verification by the referring court and following the case file submitted to the Court of Justice, it appears that the applicant's action before the referring court seeks repayment of a tax which was paid but not due, contrary to European Union law and, to be precise, Article 110 TFEU,⁷ together with the payment of the statutory interest for the period from the date of payment of the tax to actual repayment.

21. It has long been established that, although there are no provisions in European Union law concerning the repayment of national taxes incompatible with European Union law, the right to obtain repayment of such taxes is the consequence and complement of the rights conferred on individuals by the provisions of European Union law as interpreted by the Court. The Member State is therefore required⁸ to repay charges levied in breach of European Union law, the right to repayment being a subjective right derived from the legal order of the European Union.⁹

22. Given the lack of European Union rules on the subject, it is for the domestic legal system of each Member State to designate, in accordance with the principle of procedural autonomy, the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness).¹⁰ In addition, contrary to the arguments of the Kingdom of Spain and the Portuguese Republic set out in points 16 and 17 above, although the principle of procedural autonomy leaves it to the domestic legal system of each Member State to determine the procedural remedies for safeguarding rights which individuals derive from European Union law, that principle cannot have the consequence of restricting or undermining the substance of those rights.

23. Although it was an established principle that national taxes incompatible with European Union law were to be repaid, it was uncertain whether a Member State which had received tax contrary to the provisions of European Union law had an obligation to pay interest on the principal sum repayable.

6 — Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 81; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 201; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 109.

7 — It must be observed that Article 110 TFEU is directly applicable. See Case 17/81 *Pabst & Richarz* [1982] ECR 1331. Therefore all authorities of the Member States must ensure compliance with it in the framework of their powers.

8 — Since a refusal of reimbursement of a tax paid but not due is a limitation of a subjective right derived from the legal order of the European Union, the Court considers that it must be interpreted narrowly. The direct passing on to the purchaser of the tax wrongly levied constitutes the sole exception to the right to reimbursement of tax levied in breach of European Union law if it entails unjust enrichment of the taxpayer (Case C-398/09 *Lady & Kid and Others* [2011] ECR I-7375, paragraph 20). On that point, at paragraph 21 of the same judgment the Court repeated its case-law stating that, even where it is established that the burden of the charge levied though not due has been passed on to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment, since even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his sales.

9 — Case C-591/10 *Littlewoods Retail and Others* [2012] ECR, paragraph 24 and the case-law cited.

10 — See, to that effect the two judgments cited above: *Metallgesellschaft and Others*, paragraph 85, and *Test Claimants in the FII Group Litigation*, paragraph 203.

24. Accordingly, in *Ansaldo Energia and Others*,¹¹ the payment of interest was considered to be an ancillary question to the payment of the tax which was incompatible with European Union law and it was for the national authorities to regulate that question by applying their domestic rules concerning the rate of interest and the date from which interest was to be calculated.

25. That approach could be understood as leaving essentially to national law the question not only of the method of calculating the interest on the tax to be repaid, but also the question of the actual right of the taxpayer to receive interest.

26. Although at paragraph 86 of the judgment in *Metallgesellschaft and Others* the Court repeated that the payment¹² of interest on taxes improperly levied was an ancillary question, it nevertheless found, in relation to that particular case, that the claim for payment of interest covering the cost of loss of the use of the sums paid contrary to European Union law was not ancillary, but was the very objective sought by the applicants' actions in the main proceedings. According to the Court, the infringement of the European Union law in question arose, not from the payment of the tax itself, but from the fact that it was payable in advance.¹³ In those circumstances, the award of interest represented the 'reimbursement' of that which had been improperly paid and appeared to be essential for complying with the rules of the Treaty. Consequently the applicants in the main proceedings were entitled to interest on the sums paid in the period from the advance payment of the tax to the date when it fell due.

27. It would no doubt be possible to imagine limiting the *Metallgesellschaft and Others* judgment to the specific facts of those cases, that is to say, the advance payment of tax. However, in *Test Claimants in the FII Group Litigation*,¹⁴ the Court held, more generally with regard to the payment of discriminatory taxes,¹⁵ that where a Member State has levied charges in breach of the rules of European Union law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax.

28. Furthermore, in the recent judgment in *Littlewoods Retail and Others* the Court, following the case-law in *Metallgesellschaft and Others* and *Test Claimants in the FII Group Litigation*, held that the Member States had an obligation to repay with interest amounts of tax levied in breach of EU law.¹⁶ The Court added that, although it was for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, referring to the rate and the method of calculation of the interest, the national rules should not deprive the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of the tax.¹⁷

11 — Joined Cases C-279/96 to C-281/96 [1998] ECR I-5025, paragraph 20. See also Case C-470/04 *N* [2006] ECR I-7409, paragraph 61.

12 — It should be observed that the word 'éventuel' (possible) does not appear in the English version of the judgment in that case, English being the language of the case.

13 — The Court stated that what was contrary to European Union law was not the levying of a tax in the United Kingdom on the payment of dividends by a subsidiary to its parent company but the fact that subsidiaries, resident in the United Kingdom, of parent companies having their seat in another Member State were required to pay that tax in advance whereas resident subsidiaries of resident parent companies were able to avoid that requirement (paragraph 83).

14 — See also *Test Claimants in the Thin Cap Group Litigation*, paragraph 112.

15 — In that case, it was not a question of the advance payment of tax, but of the incompatibility of the tax with the Treaty.

16 — *Littlewoods Retail and Others*, paragraphs 25 and 26.

17 — It is clear from paragraph 8 of *Littlewoods Retail and Others* that the date from which interest should have been calculated under English law in that case was the date on which the British tax authorities received the overpayment of VAT and that the date up to which interest was payable was the date on which they authorised repayment of the amount on which interest was payable. I consider that the fact that no mention is made, at paragraph 27 of that judgment, of the date from which interest should be calculated among the conditions to be laid down by the internal legal order of each Member State is particularly revealing. That, in my opinion, amounts to the Court's implicit approval of the period for which interest was payable under English law and to upholding the subjective right to a level of interest which represents an adequate indemnity for the loss occasioned through the undue payment of the tax.

29. In my opinion, the right to interest representing an adequate indemnity for the loss occasioned through the undue payment of tax contrary to European Union law ranks equally,¹⁸ in consequence of the *Littlewoods Retail and Others* judgment, with the right to repayment of the tax and is therefore a subjective right derived from the legal order of the European Union.¹⁹ In my opinion, that subjective right necessarily entails the payment of interest from the date of payment of the tax. It is obvious that it is from that date, and not from any other subsequent date, that the taxpayer suffers a loss arising from the unavailability of the sums in question.

30. In addition, it is common knowledge that taxpayers who fail to pay tax must in principle, save in exceptional circumstances, pay to the relevant Treasury of the Member States any unpaid tax, interest on such tax from the date when it fell due and penalties for delay and/or fines.²⁰

31. Alternatively, if the application by the applicant in the main proceedings is classified as an action for compensation for damage caused by an infringement of European Union law by the Member State, the question would be whether, in circumstances such as those of the main proceedings, the infringement of Article 110 TFEU by a Member State confers on taxpayers a right to damages of an amount equal not only to the tax charged contrary to European Union law, but also to the statutory interest accruing on the tax since the date of payment.

32. The Court has held that the principle whereby a State must be liable 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 Treaty.²¹ It follows from the judgment in *Brasserie du Pêcheur and Factortame*²² that reparation for loss or damage caused to individuals as a result of breaches of European Union law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights. With regard to loss in particular, in *Metallgesellschaft and Others* the Court held that full compensation for the loss and damage sustained cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value, and that the award of interest is an essential component of compensation for the purposes of restoring real equality of treatment.²³ In addition, in *Manfredi and Others*,²⁴ the Court held that it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*), plus interest.

33. In circumstances such as those of the main proceedings, an award of interest from the date of payment of the tax in question seems to me essential for adequate reparation for the loss caused by the infringement of Article 110 TFEU as it was from that date that the taxpayer suffered loss due to the unavailability of the sums in question.

18 — At point 30 of her Opinion in *Littlewoods Retail and Others*, Advocate General Trstenjak declared that ‘the taxable person therefore has a right to reimbursement of the charge and a right to payment of interest. Those rights enjoyed by the taxable person are based on the provisions of EU law prohibiting the taxes levied’.

19 — See point 21 above. On this point it should be noted that, in *Littlewoods and Others*, the Court made no reference to the ancillary nature of the question of interest.

20 — Penalties for delay and fines in the tax field are means of coercion used by the Member States in the public interest in order to ensure the (punctual) payment of tax payable by taxpayers.

21 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35, and Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20.

22 — Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029, paragraph 82.

23 — See paragraph 94.

24 — Joined Cases C-295/04 to C-298/04 [2006] ECR I-6619, paragraph 100.

34. In the light of what is said in points 22 to 33 above, I think it is unnecessary to examine whether the limitation imposed by Romanian law on the damages that could be recovered by the applicant is compatible with the principles of effectiveness and proportionality, and the right to property laid down in Article 6 TEU read in conjunction with Article 17 of the Charter.

VI – Conclusion

35. Therefore I propose that the Court's reply to the question referred by the Tribunalul Sibiu (Romania) should be as follows:

European Union law must be interpreted as meaning that, where a Member State levies a tax incompatible with European Union law – in the present case, Article 110 TFEU – that State must repay the amount of the tax and pay interest on that amount from the date of the payment by the taxpayer.