European Union/Poland

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Right To Be Paid Interest on Overpayment of Taxes in Breach of EU Law – Opinion Statement ECJ-TF 3/2023 on the CJEU Decision of 8 June 2023 in *E. v. Dyrektor Izby Administracji Skarbowej we Wrocławiu* (Case C-322/22)

In this CFE Opinion Statement, submitted to the EU Institutions on 4 October 2023, the CFE ECJ Task Force comments on the CJEU's decision of 8 June 2023 in *E. v Dyrektor Izby Administracji Skarbowej we Wrocławiu* (Case C-322/22), which addressed a Polish domestic rule limiting the right to the interest on overpayments of corporate income tax in breach of EU law, to the period running from the 30th day following the publication, in the Official Journal of the European Union, of a ruling of the Court of Justice finding that the collection of the tax was incompatible with EU law.

1. Introduction

This is an Opinion Statement, prepared by the CFE ECJ Task Force, on the CJEU's decision of 8 June 2023 in *E. v. Dyrektor Izby Administracji Skarbowej we Wrocławiu* (Case C-322/22),[1] which was decided without an Opinion of the Advocate General.[2] At issue was the validity of a Polish domestic rule that limited the right to the payment of interest on overpayments of corporate income tax in breach of EU law, to the period running from the 30th day following publication, in the Official Journal of the European Union, of a ruling of the Court of Justice finding that the collection of the tax was incompatible with EU law. The Court of Justice considered that such a limitation was not permissible by reference to the principles of sincere cooperation, equivalence and effectiveness in connection with the EU right of individuals to be paid interest when receiving a refund of an amount paid in breach of EU law.

2. Background, Facts and Issues

The appellant in the main proceedings was E., an investment fund with a registered office in the United States. Regarding the 2012 to 2014 tax years, E. received income sourced in Poland and the payment of income was subject to withholding taxation, by the Polish paying agent, at a flat rate. E. considered that such a withholding was levied in breach of EU law based on the Court of Justice of the European Union's (CJEU) decision in *Emerging Markets* (Case C-190/12) of 10 April 2014.[3] The overpayment of tax amounted to PLN 48,996.

On 28 December 2017, E. requested a refund of the overpayment of tax and respective interest, computed from the day of the collection of the overpayments until the day of the full refund.

According to the Polish Tax Code,[4] if a paying agent settles the tax liability of a taxable person and there is an overpayment in breach of a ruling of the Polish Constitutional Court or of the CJEU, the tax authorities shall reimburse such overpayment within a period of 30 days from the

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1. PL: ECJ, 8 June 2023, Case C-322/22, *E. v. Dyrektor Izby Administracji Skarbowej we Wrocławiu*, Case Law IBFD.
2. The Advocate General appointed to this case was T. Ćapeta and the Court decided to proceed to judgment without an Opinion after hearing the Advocate General.
3. PL: ECJ, 10 Apr. 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company v. Dyrektor Izby Skarbowej w Bydgoszczy*, Case Law IBFD.
4. PL: Tax Code of 29 Aug. 1997 [*Ordynacjapodatkowa*] [hereinafter Tax Code].

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date of the request.[5] The taxable person is also entitled to interest computed from the day of the overpayment until:

- The moment of the reimbursement, in the event that the request for reimbursement is submitted by the 30th day from the date on which: (i) the Polish Constitutional Court ruling entered into force; or (ii) the ruling of the CJEU is published in the Official Journal of the European Union (OJEU).
- The 30th day from the date: (i) the Polish Constitutional Court ruling entered into force; or (ii) the CJEU decision is published in the OJEU, in the event that the request was submitted after those points in time.[6]

Poland claims that this limitation is justified by the need to dissuade taxpayers from deferring requests for reimbursement, thus entitling them to higher amounts of interest.[7]

On 2 March 2018, the Polish tax authorities approved the refund for overpayments of tax and it was paid out on 28 March 2018.

Regarding the payment of interest due on the overpayment of tax:
- first, on 24 April 2018, the request was denied in full;
- then, on 6 August 2018, it was partially accepted by the regional director of the tax authorities. In that decision:
  - regarding the 2012 and 2013 tax years, the payment of interest was accepted counting from the date of the overpayment of tax until 10 July 2014 (which was the 30th day after the publication in the OJEU of the decision in *Emerging Markets* (Case C-190/12); and
  - regarding the 2014 tax year, interest was refused entirely, as the tax was collected after the 30th day following the publication of the decision.[8]

The applicant appealed to the Regional Administrative Court of Wrocław (which rejected the appeal) and then to the Supreme Administrative Court. This Court distinguished three cases of reimbursement requests:
- those submitted before the 30th day of publication of the CJEU decision: interest would run from the moment of collection until the effective reimbursement;
- those submitted after the 30th day after publication but regarding overpayments made prior to that date: interest would run from the moment of collection until that 30th day; the referring court clarified that even if the situation had not been foreseen under the law, Polish courts would compute interest on these terms, "on a basis similar to those laid down" in the Tax Code; and
- those submitted after the 30th day after publication and regarding overpayments made after that 30th day: interest would not be payable.[9]

The Supreme Administrative Court noted that the formula for computing interest was identical regardless of whether the overpayment arose as a result of a ruling of the Polish Constitutional Court or the CJEU.[10] It also noted that, according to domestic law, in respect of withholding taxes (as the *sub judice* situation), the paying agent was required to inform the taxpayer of the amount of tax collected by the 7th day of the month following collection.

The Supreme Administrative Court questioned whether the formula used for computing interest: (i) allowed for "the damage caused by the collection of tax not due" to be made good, and (ii) was compliant with the EU principle of sincere cooperation.[11]

Accordingly, it decided to stay the proceedings and refer the following question to the CJEU:[12]

> Do the principles of effectiveness, sincere cooperation and equivalence expressed in Article 4(3) [TEU], or any other relevant principle laid down in EU law, preclude a provision of national law such as Article 78 § 5(1) and (2) of [the Tax Code], which provides that interest on overpaid tax which is collected by a paying agent in a manner not consistent with EU law is not due to the taxable person for the period after the expiry of 30 days from the date of publication in the Official Journal [of the European Union] of the judgment of the Court of Justice … declaring that the collection of the tax is incompatible with EU law, where the request for a declaration of that overpayment was submitted by the taxable person after that time limit and the provisions of national law relating to the collection of the tax continue to be incompatible with EU law despite.

3. The CJEU's Decision

The CJEU concluded that the Polish domestic legislation at issue, insofar as it limited the computation of interest to the 30th day after the publication in the OJEU of the Court's ruling leading to the conclusion that there was an overpayment of tax, constitutes a breach of the principle of effectiveness, in conjunction with the principle of sincere cooperation.

The reasoning of the Court was structured based on the following segments: (i) characterization of the principle of sincere cooperation, with its dimensions of equivalence and effectiveness; (ii) characterization of the right to the payment of interest regarding amounts paid in breach of EU law; (iii) assessment of the compatibility of the Polish domestic rules with EU law.

The Court started by characterizing the principle of sincere cooperation, which was held to be the legal basis by the referring Court:[13]

> According to settled case-law, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of an infringe-

5. *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 10, citing art. 75(1) Tax Code.
6. Id., para. 13, citing art. 77(14) Tax Code.
7. Id., para. 44.
8. According to the Court, the director's decision was based on the consideration that the taxable person "may oppose the levying of the overpayment by relying on the ruling of the Court". *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 45.
9. Id., paras. 22-25.
10. Id., para. 27.
11. Id., para. 26.
12. Id., para. 28.
13. Id., para. 30.

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ment of EU law and to lay down detailed procedural rules, in respect of actions for safeguarding rights which individuals derive from EU law, which are no less favourable than those governing similar domestic actions (principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness).

Nullifying adverse consequences requires recognizing "the right, under EU law, to obtain from the Member State concerned not only a refund of the sum of money levied though not due but also the payment of interest intended to compensate for the unavailability of the sum".[14]

The Court proceeded to characterize this right to the payment of interest:

- it is an expression of "a general principle of recovery of sums paid but not due";[15]
- it is based and justified on the fact that a national authority imposed a payment in breach of EU law,[16] whether primary law, secondary law or a general principle of EU law;[17]
- it emerges out of any breach of EU law; it can be invoked, inter alia, when the payment is imposed on the basis of: (i) an incorrect interpretation of EU law; or (ii) an incorrect application of that law;[18]
- it aims at compensating "for the unavailability of the sum of money which the person concerned has been wrongly deprived";[19]
- it concerns a (self-standing) right that applies even without detailed rules for the exercise of such a right;[20] such rules may be laid down by EU law or by domestic law;[21] in the absence of EU rules, it is up to domestic law; in any event, those rules must comply with the principles of equivalence and effectiveness;[22] and
- its effectiveness requires the computation of interest "from the date on which the person paid the sum of money in question to the date on which that sum is refunded to that person".[23]

Assessing the Polish provision against the background of this right to interest, the Court considered that:

- The computation of the interest on the amounts of tax paid in breach of EU law was regulated under Polish domestic law.
- In the event of requests submitted after the 30th day following the publication of the relevant ruling of the CJEU in the OJEU, the provision limited or excluded the interest (i.e. the provision limited the interest to that date, not allowing computation to take into account the moment of effective reimbursement);[24] such a condition limited the right to interest.
- The right to interest is not absolute and domestic law could, namely, require the person "to act with reasonable diligence in order to avoid loss or damage or to limit the extent thereof".[25]
- In any event, domestic law would need to comply with the principle of effectiveness.

Subsequently, the Court focused on effectiveness, distinguishing, in its assessment, cases in which the payment of interest was limited from those in which it was fully refused.

On the former (limitation of the computation of interest due to the submission of the reimbursement request after the 30th day of publication of the CJEU ruling in the OJEU), the Court considered that:

- Regarding the person involved in the dispute, the timely filing of a request for a refund could be prima facie regarded as diligence "which may reasonably be required";[26] however, even such person "may still not be reasonably expected" to submit the request within the 30 days. Namely, when concluding that the domestic tax breaches EU law, additional verifications are required that the "Court asks the national court to carry out", which may also comprise verifications to be performed, at the request of the referring Court, by the tax authorities.[27]
- Regarding any other person, it could not be regarded as admissible since this person: (i) would "not likely be informed" of the publication in such a short time frame; (ii) might not have been aware "without having been negligent" that the tax imposed was in breach of EU law "until some time after the expiry of that 30-day time limit".[28]

As to the second (full exclusion of interest for requests made after the 30-day period), the Court also found this to be inadmissible. The Court noted that, even after that period, the person could still not be in a position to prevent the payment of tax in breach of EU law, namely: (i) because, again, the conclusion that the tax infringes EU law does not result immediately from the CJEU ruling but from further verifications (by the national court or, subsequently, the national tax authorities);[29] (ii) if the tax is collected by way of a withholding by a third party, particularly when such a person does not inform the taxable person until the expiry of the 30-day limit.[30]

The Court concluded that the principle of effectiveness, in conjunction with the principle of sincere cooperation, had

14. Id., para. 31.
15. Id., para. 32.
16. Id., para. 33.
17. Id., para. 34.
18. Id., para. 37.
19. Id., para. 38.
20. Id., para. 37.
21. Id., para. 38.
22. Id., para. 39.
23. Id., paras. 40 and 41 in which the Court explains that the formula for the computation of interest is required for an "effective exercise of the rights".
24. *Dyrektor Izby Administracji Skarbowej* (C-322/22), paras. 43-45.
25. Id., para. 47 citing UK: ECJ, 8 Mar. 2001, Case C-397/98, *Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v. Commissioners of Inland Revenue and HM Attorney General*, para. 102, Case Law IBFD.
26. *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 49.
27. Id., para. 51.
28. Id., para. 49.
29. Id., para. 53.
30. Id., para. 54.

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to be interpreted as "precluding" domestic legislation that had the effect of excluding the computation of interest or limiting its computation up to the 30th day following the publication of the Court ruling that found the tax at issue to be contrary to EU law.

4. Comments

4.1. Introduction

Direct taxation remains a non-harmonized area. Consequently, Member States are free to adopt domestic tax rules insofar as they comply with EU law, which is not easy to ascertain, as the frequent referrals to the CJEU (and the scholarly discussions around those referrals) evidence.

Levying direct taxes in breach of EU law may be the result of several circumstances, namely: (i) the fact that the Member State considered, upon its adoption, that the tax was compliant with EU law (namely following the CJEU's interpretation of EU law); (ii) the fact that the Member State did not immediately react to a CJEU decision finding that its domestic law was not compliant with EU law;[31] (iii) a lack of (timely) implementation of secondary law; (iv) misinterpretation and misapplication (by negligence or fault) by national authorities of domestic law that, in its view, is compliant with EU law.

In all cases, and despite acknowledging different levels of accountability of the Member States, the taxpayer is unlawfully deprived of a certain amount of money.

The case at hand can be seen as reinforcing the protection of taxpayers' rights in the sense of a right to interest in the area of direct taxation.[32]

The CFE ECJ Task Force's comments will deal with the following issues: (i) the legal foundation of the right to interest; (ii) the nature and limitations of that right; (iii) valid public interest limitations of that right; (iv) the aim of that right; (v) interest rate and inflation; and (vi) the need for action at the EU level. It will end with a shared reflection on follow-up cases and on action that could be taken at the EU level to limit the negative impact of these cases.

4.2. Legal foundation of the right to interest

E. v. Dyrektor Izby Administracji Skarbowej recognizes explicitly, for the first time in direct taxation, an unwritten right of the taxpayer: "the right, under EU Law to obtain from the Member State concerned … the payment of interest intended to compensate for the unavailability" of sums imposed as taxes in breach of EU law,[33] based on the principle of effectiveness as derived from the (written) principle of sincere cooperation.

Even though direct taxes are enacted by domestic law, the right to interest regarding taxes levied in breach of EU law emerges as an EU law right, being an expression of the general principle of recovery of sums paid but not due.[34] The Court distinguished the right to collect (direct) taxes from the duty to pay interest regarding (direct) taxes imposed in breach of EU law: whereas the first remains within the realm of Member States' sovereignty in tax matters, the second is construed as a reflection of the obligation assumed by Member States to comply with EU law.

4.3. Limitations of and real nature of the right

The Court characterizes the taxpayer's position as an EU "right". However, from a procedural perspective, such a statement is counterbalanced by an acknowledgement that such a right is "subject to the national rules of procedure" and the limitations derived from the principles of equivalence and effectiveness.[35] Therefore, and despite being grounded in EU law, it is up to the Member States to lay down the rules for the exercise of the right (i.e. the procedural rules), subject solely to the principles of equivalence and effectiveness.

Moreover, and from a substantive or content perspective, Member States remain in a position to further limit the right, namely by: (i) requiring the taxpayer to act with reasonable diligence;[36] and (ii) limiting the relevant period for the computation regarding those that would likely be informed that the collection of the tax was in breach of EU law.[37] These two limitations that surface in the Court's decision appear to be two corollaries of a much more fundamental understanding, as upheld by Advocate General Ćapeta in *Gräfendorfer* (Case C-415/20),[38] that "rights which arise under EU law, including the right to payment of interest, may, under certain conditions be limited either by EU law itself or by national law" insofar as two conditions are met: "first, the measure limiting the EU right has to be justified by a public interest objective acceptable under EU law and, second, that measure has to be proportionate to that objective".[39] Therefore, in addition to determining the rules for exercising the right, the Member States remain entitled to configure its content insofar as a valid public interest is pursued in a proportionate way.

Accordingly, with these procedural and substantive limitations, this right should not (yet) be seen as an all-or-nothing fashion norm but as a manifestation of the written principle of sincere cooperation, insofar as it requires

31. In this case, this is recognized by the Court in the following statement: "as the European Commission notes in its written observations, it is not inconceivable that a tax may continue to be levied, in breach of EU law, after the delivery of such a ruling and its publication in the *Official Journal of the European Union*". *See Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 52 in fine.
32. One should note that this has been mentioned in the case law of the Court since, at least, the 1960s. In *Humblet*, the Court had already explicitly mentioned that "if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a member state is contrary to Community law, that member state is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued". *See* BE: ECJ, 16 Dec. 1960, Case 6/60, *Jean-E. Humblet v. Belgian State*, sec. I, Case Law IBFD.
33. *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 31.
34. Id., para. 32.
35. Id., para. 47.
36. Id., para. 47.
37. Id., para. 49.
38. DE: Opinion of Advocate General Ćapeta, 13 Jan. 2022, Case C-415/20, *Gräfendorfer Geflügel- und Tiefkühlfeinkost Produktions GmbH v. Hauptzollamt Hamburg*, Case Law IBFD.
39. AG Opinion in *Gräfendorfer* (C-415/20), paras. 91 and 92.

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Member States to "nullify the unlawful consequences of an infringement of EU law and to lay down detailed procedural rules, in respect of actions for safeguarding rights which individuals derive from EU law".[40]

4.4. Pursuit of a valid public interest

A careful reading of the Court's decision makes it evident that the right is not an absolute right; its content is subject to limitations, namely those (mentioned in the previous section) derived from a proportionate pursuit of a valid public interest by Member States.

The Court's decision is not entirely clear on whether the goals pursued by the Member State with regard to the scrutinized legislation ("avoid taxable persons from deferring their requests for refunds of overpayments in order to benefit from more sizeable amounts of interest") should be considered as pursuing a valid public interest. In any event, it appears to subject such a goal to a proportionality analysis, which could be understood as an implicit recognition.[41]

In this testing, the Court appears to consider the *concrete* knowledge position of the taxpayer relevant, i.e. whether the taxpayer was in a position to know whether or not the tax imposed was in breach of EU law at the moment of collection. The Court "assumes" that "the filing of a request for a refund within the 30 days … may be regarded as a diligence that may reasonably be required of the taxable person who has taken part in the dispute".[42] Moreover, it considers that the diligence cannot be requested from other taxpayers, as they "without having been negligent, [could] not become aware that the tax to which he or she has been subject was in breach of EU law".[43]

The Court's reference to cases in which further verification by domestic courts (and by tax authorities) is needed appears to strengthen the argument that the taxpayer's knowledge position is relevant. And this would be aligned with the cited decision in *Metallgesellschaft* (C-397/98)[44] and the requirement imposed on the person making the request to "act with reasonable diligence in order to avoid loss or damage or to limit the extent thereof",[45] which, in this case, would be the extension of the period of deprivation of the sums (which the taxpayer is in a position to control as of the moment that they know that the tax is in breach of EU law, by submitting the reimbursement request) and the corresponding computation of interest.

It later refers to instances in which further verification is needed, which again appears to grant relevance to the concrete knowledge of the taxpayer.

One should start by noting that the settled case law on this right to interest was developed within the framework of actions for the annulment of acts. In those actions, the Court's ruling was needed to affirm the existence of a breach. This is not the case in all proceedings, namely preliminary rulings (as in the case at hand, in *Emerging Markets*) in which the Court is required to interpret EU law and not to annul a certain act. In preliminary rulings, the Court leaves it to the referring domestic court (as an ordinary EU court) to determine whether or not domestic law infringes EU law. In all these cases, the date for the publication of the ruling appears to be irrelevant in ascertaining whether the taxpayer would be in a position to understand that the tax imposed infringed EU law.

However, from a policy perspective, the following points should be considered. First, according to the principle of sincere cooperation, the initiative to pay the interest to compensate for taxes levied in breach of EU law should primarily be taken by the Member States and, more concretely, the tax administration, not the taxpayer. This is certainly the case when Member states have sufficient knowledge that allows them to act "with reasonable diligence in order to avoid loss or damage or to limit the extent thereof".[46]

Second, Member States are in a position to: (i) avoid payment of interest by not enacting direct taxes in breach of EU law, and/or by repealing those taxes (or provisions of those taxes) that are considered in breach of EU law by the relevant Court decisions; and (ii) to limit payment of interest by limiting the statute of limitations for claiming reimbursement of unduly paid taxes, provided the principles of equivalence and effectiveness are protected.

Third, the Member State should never be in a position to: (i) on the one hand, adopt a tax in breach of EU law (and keep it in force even after a ruling of the CJEU determining that it is in breach of EU law); and (ii) on the other hand, limit the right to interest on the basis that the taxpayer should have known that the tax was incompatible with EU law. In short, the state should not be allowed to continue imposing unlawful taxes (long after the relevant CJEU decision) while completely denying any right to interest.

Fourth, if the tax administration does not take the initiative to pay the interest or does not have the knowledge to do so, the taxpayer should have the right to claim the interest within a reasonable period of time. In that context, the Court refers to the concrete knowledge of the taxpayer as a starting point, but it also requires that the taxpayer not be negligent. Therefore, the rules to be adopted should take this into account. In any event, a 30-day period after the publication of a Court ruling does not meet these standards.[47]

Fifth, any system to be developed should not convert the primacy of EU law and direct effect from an entitlement to a burden on citizens.

40. *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 39.
41. On the contrary, one could argue that the Court was just, for the sake of precaution, testing the logic of the reasons put forward by the Member State. However, an explanation for the reasons for such testing is needed, as it would not bear any relationship with the issues under discussion in this case.
42. *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 49.
43. Id.
44. *Metallgesellschaft* (C-397/98).
45. Id., para. 102 as cited in *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 47.
46. *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 47.
47. Id., para. 49.

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4.5. Aim of the right to interest

According to the Court, this right to interest is aimed at compensating "for the unavailability of the sum of money of which the person concerned has been wrongly deprived"[48] or to provide "adequate compensation for the loss sustained".[49] It focuses solely on the passive side of the tax relationship and on the negative impact on the taxpayer due to the temporary unavailability of the sums.

The right appears to be aimed at a *restitutio ad integrum*, i.e. restoring taxpayers to the economic position they would have been in had they not been affected by the unlawful tax.[50]

Within such a framework, any considerations regarding the liability of the Member State or its national authorities are excluded. Unlike in actions for damages,[51] the reasons for the unlawful collection or the extent of negligence or fault are rendered irrelevant.[52]

The Court rejects linking the right to interest to the unjust enrichment of the Member State,[53] making the exercise of the right independent from the provision of evidence regarding the enrichment of the Member State or evidence of the impoverishment of the taxpayer.[54] The exercise of the right is solely linked to the lack of availability of the sums for a certain period.

4.6. Interest rate and inflation

The Court has neither been asked nor made any reference to the setting (by the Member States) of the interest rate or its relationship with the rate of inflation. This is, in any event, an interesting issue worth further consideration.

The Court grounds the legitimacy of the right to interest on a "loss sustained"[55] by the taxpayer due to the temporary lack of availability of the amounts paid as taxes. Insofar as such legitimacy is not made dependent on proof of damages or of any other factors, the "loss" to which the Court refers appears to be closely linked with inflation.[56]

The same conclusion may stem from the fact that the Court requires that interest be computed considering the period in which the sums were temporarily unavailable (i.e. from the date of collection until reimbursement) and not considering the ultimate damage or impoverishment.

In relation to indirect taxation, the Court has already acknowledged that, in addition to the principles of equivalence and effectiveness, Members States also have to comply with the "principle of fiscal neutrality",[57] which requires "that the procedure for paying interest must be established in a way that the economic burden of the amounts of tax unlawfully retained may be offset".[58]

In its *Sole-Mizo Zrt* (Case C-13/18) decision, decided in 2020, the Court concluded that effectiveness and fiscal neutrality prevented a Member State from setting the applicable interest rate by reference to the State's central base interest rate (which is only available to credit institutions) in respect of a taxpayer that is not a credit institution.

The CJEU does not provide further guidance regarding the calculation of the rate and, specifically, on how this needs to be set to avoid a situation in which "[it] is lower than that which a taxable person who is not a credit institution would have to pay to borrow a sum equal to … the amount … retained in breach of EU law".[59] (In practice, it might be necessary to set a general interest rate because setting an individual interest rate in each individual case may be too burdensome for the parties involved. Prima facie, national law could provide such a general rule, which should sufficiently consider this CJEU standard.)

The Court, however, clearly suggested, in paragraph 49 of this decision, that the national legislation should provide for "the application of interest to compensate the taxable person for the monetary erosion caused by the passage of time … up until the actual payment of that interest".

The CJEU appears to make a direct link between the interest rate and "monetary erosion", which seems to be a synonym for the term "inflation". Inflation should be considered: interest that runs for a given reporting period, without the computation and inclusion of interest to compensate a taxable person for monetary erosion (inflation) caused by the passage of time following that reporting period up until the actual payment of that interest, is not allowed under EU law. Prima facie, also in this context, it seems practical to include, in national law, a general rule to set an interest rate that considers inflation, as meant by the CJEU.

This is even more relevant in the current context, where some Member States still set interest rates for unlawfully paid taxes according to a (non-revised) set rate even though inflation rates have significantly increased.

In any event, Member States are not allowed, according to the principle of effectiveness, to deprive a right of its meaningful effect by setting the compensatory interest at a rate that would render the compensation insignificant.

48. Id., para. 38, repeated partly in para. 31.
49. Id., para. 40.
50. In the same vein, AG Opinion in *Gräfendorfer* (C-415/20), para. 56.
51. *See* IT: CJEU, 19 Nov. 1991, Case C-6/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, Case Law IBFD and subsequent case law on the matter, determining strict conditions for compensating damages.
52. *Dyrektor Izby Administracji Skarbowej* (C-322/22), paras. 35-38.
53. As it relied upon in other cases regarding reimbursement of amounts requested in breach of EU law, such as UK: ECJ, 16 Dec. 2008, *Masdar (UK) v. Commission* (Case C-47/07 P), ECR 2008 p. I-9761, ECLI:EU:C:2008:726 and DE, UK, FR: ECJ, 27 Sept. 2012, *Zuckerfabrik Jülich and others* (Joined Cases C-113/10, C-147/10 and C-234/10, Publié au Recueil numérique), ECLI:EU:C:2012:591 and CZ: ECJ, 9 July 2020, *Czech Republic v. Commission* (C-575/18 P), ECLI:EU:C:2020:530.
54. In the same vein, AG Opinion in *Gräfendorfer* (C-415/20), paras. 64-66.
55. Expression used in *Dyrektor Izby Administracji Skarbowej* (C-322/22), para. 40.
56. In addition to other factors, such as the lost opportunity costs. In any event, inflation appears to be an objective loss falling within the scope of the losses requiring compensation.
57. HU: ECJ, 23 Apr. 2020, Case C-13/18, *Sole-Mizo Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, para. 37, Case Law IBFD.
58. *See Sole-Mizo Zrt* (C-13/18), para. 44.
59. Id., para. 49.

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4.7. The need for action at the EU level

Given the known limitations of the Court's decisions, the effectiveness of the right to claim reimbursement of unduly paid taxes and interest may require action at the EU level. This would strengthen the effective protection of EU taxpayers and, more generally, those benefiting from EU law.

As regards the issues mentioned in section 4.6., this instrument could set the interest rate or define its maximum and minimum thresholds, which might or might not be linked to an index reflecting inflation. Inspiration for such a system could also be drawn from the rules regarding the computation of interest in recovering State aid.[60]

The Commission could first adopt a Recommendation or a Communication, making Member States aware of the existence of such rights and of the need, in accordance with the principle of sincere cooperation, to adjust domestic law, laying down detailed and effective domestic procedural rules.

The Commission could also undertake a comprehensive review of Member States' domestic legislation in this matter, alerting them to possible instances of infringement and starting infringement procedures against Member States that fail to take appropriate action.[61]

Finally, and given the acknowledgement that the right of reimbursement of unduly paid taxes and its corresponding right to interest are derived from EU law, the Commission could consider enacting a directive laying down an adequate normative framework for implementing such rights, which would create a level playing field within the internal market.

4.8. Follow-up cases

E. v. Dyrektor Izby Administracji Skarbowej is another follow-up case, i.e. a case in which the Court was again confronted with a domestic tax that continues to be levied based on normative provisions previously considered in breach of EU law by the CJEU.[62] The Court has already had the opportunity to clarify that a Member State infringes EU law by maintaining in force domestic law considered incompatible with EU law and that such incompatibility "can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended".[63]

The inconvenience of inaction (or deficient action) of Member States following CJEU rulings for taxpayers, tax authorities, and the judiciary (comprising both domestic courts and the CJEU) are well known.

Cases such as the one at hand urge reflection on whether the EU institutions could start taking a different approach. This is particularly true in respect of the European Commission, which, as "guardian of the Treaties", is responsible for ensuring that EU law is interpreted and applied in a timely manner. This includes extracting adequate conclusions from CJEU rulings. Several actions could be considered.

First, the EU Commission could engage in constructive dialogue with the Member States, actively asking whether they consider legislative action necessary to ensure full compliance with EU law in the aftermath of a Court case considering certain tax provisions to be inadmissible.

Second, the EU Commission could lead the efforts in assessing whether further action (by that Member State or by any other Member State) is required to ensure compliance with EU law. This could be ensured through the following initiatives:

- public consultations, inviting all stakeholders to provide input on the amendments needed;
- public tenders, commissioning studies by expert organizations on the amendments needed; and
- by asking the EU tax observatory, financed by the European Commission, to include such assessments in their activities.

Third, the Commission could consider, as a priority, the assessment of domestic tax systems whenever the same provision or the same point of law is referred, for the second time, to the CJEU.

5. The Statement

The CFE ECJ Task Force welcomes the decision of the Court, as it reinforces the taxpayers' right to interest on refunds in cases where a tax is imposed in breach of EU law.

The CFE ECJ Task Force acknowledges that the Court has limited competence to ensure the enforcement of EU law at this level. Therefore, additional action seems to be necessary to establish a common normative framework for the reimbursement of unduly paid taxes and the corresponding right to interest. Currently, there is a margin of discretion in regulation by the Member States (regarding both the exercise of the rights and their content), which may lead to unwanted asymmetries in the levels of protection of the same EU rights in the different Member States. Such diversity is not welcomed in view of the aim to strengthen the internal market.

60. *See* Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 82 (25 Mar. 2008), pp. 1-64; Commission notice on the method for setting the reference and discount rates, OJ C 273 (9 Sept. 1997); Commission notice on technical adaptations to the method for setting the reference and discount rates (Text with EEA relevance), OJ C 241 (26 Aug. 1999); Communication from the Commission on the revision of the method for setting the reference and discount rates, OJ C 14 (19 Jan. 2008), pp. 6-9; Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140 (30 Apr. 2004).

61. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), art. 258 et seq., Primary Sources IBFD [hereinafter TFEU].

62. At least in respect of the withholding tax levied in 2014.

63. LU: ECJ, 26 Oct. 1995, Case C-151/94, *Commission of the European Communities v. Grand Duchy of Luxembourg*, para. 18, Case Law IBFD.

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The CFE ECJ Task Force would welcome actions by EU institutions (and particularly by the EU Commission) towards ensuring effective protection of such rights. Such actions would not only be adequate but also needed and could include soft law (such as a Communication regarding the implementation of such rights in accordance with the case law) and/or hard law (namely, a directive laying down an adequate normative framework for the implementation of such rights).

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