

Case C-420/19

Request for a preliminary ruling

Date lodged:

29 May 2019

Referring court:

Riigikohus (Estonia)

Date of the decision to refer:

29 May 2019

Applicant:

Maksu- ja Tolliamet

Person concerned:

Heavyinstall OÜ

RIIGIKOHUS (Supreme Court)

HALDUSKOLLEEGIUM (Administrative Chamber)

ORDER

... [not translated]

Date of order: 29 May 2019

... [not translated]

Case: Application by the Maksu- ja Tolliamet for approval of precautionary measures in relation to Heavyinstall OÜ

Parties: Applicant: Maksu- ja Tolliamet ... [not translated]

Person concerned: Heavyinstall OÜ ... [not translated]

... [not translated]

Basis for the proceedings before the Riigikohus: Appeal by the Maksu- ja Tolliamet

... [not translated]

ORDER

1. The Court of Justice of the European Union is requested to make a preliminary ruling on the following question:

Is Article 16 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures to be interpreted as meaning that the court of the Member State which has received the request for precautionary measures, when ruling on that request on the basis of national law (which is possible for the requested court under the first sentence of Article 16), is bound to the view taken by the court of the state of establishment of the applicant in relation to the necessity and possibility of the precautionary measure when a document containing that view has been submitted to the court (last sentence of Article 16[(1)](2), according to which this document shall not be subject to any recognition, supplementing or replacement in the requested Member State)?

... [not translated][stay of proceedings]

FACTS AND PROCEEDINGS

1. On 13 March 2018, the tax authority of the Republic of Finland made a request at the **Maksu- ja Tolliamet** (MTA) (Tax and Customs Board) for precautionary measures in relation to Heavyinstall OÜ, in order to ensure the fulfilment of the expected tax liability of Heavyinstall OÜ. The request was made on the basis of Article 16 (Request for precautionary measures) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

2. On 29 March 2018, the MTA asked the Tallinna Halduskohus (Tallinn Administrative Court), pursuant to Paragraph 51³(1) and Paragraph 136¹(1) of the maksukorralduse seadus (MKS) (fiscal code), to approve the entry of prohibitions of disposal in relation to the vehicles of Heavyinstall OÜ (two trailers each worth around EUR 7 500 and one HGV worth around EUR 9 500) and the attachment of the company's bank accounts in all Estonian credit institutions in the amount of EUR 297 304. [Or. 2]

2.1. It can be seen from the reasoning for the application that, following tax proceedings, the Finnish tax authority was imposing on Heavyinstall OÜ an additional tax liability expected to be EUR 320 000. The tax liability resulted from the fact that, even though Heavyinstall OÜ had a permanent establishment in

Finland, it had not declared or paid any taxes there. Even though X, a member of the board of Heavyinstall OÜ, had, by his own account, lived permanently in Tallinn since 2009 and run the company there, it could be established, on the basis of data from the MTA, banks, travel agencies and known cooperation partners, that X had actually spent most of that time in Finland, where he had also been occupied with running the company. In the summary of the tax audit, the Finnish tax authority had adopted the position that X's customary place of residence and centre of life was actually in Finland, where he had also performed the management functions of Heavyinstall OÜ. The overall economic activity of the company had also taken place in Finland. Accordingly, under Article 5(1) and (2) of the Convention between the Republic of Estonia and the Republic of Finland for the avoidance of double taxation of income and assets and the prevention of tax evasion (Double Taxation Convention), Heavyinstall OÜ had a permanent establishment in Finland, but the company had not paid any taxes there. The sole member of the board of Heavyinstall OÜ had made a false statement both in relation to the economic activity of the company and in relation to his residence. Such conduct showed the attitude of the representative of Heavyinstall OÜ to public-law obligations.

2.2. By ruling of the court of first instance of Keski-Pohjanmaa of 8 February 2018, which was enclosed with the request, the assets of Heavyinstall OÜ were attached on application of the Finnish tax authority in an amount securing the applicant's claim of EUR 320 022. In that ruling, it was found that there was the risk of Heavyinstall OÜ concealing, destroying or transferring its assets or acting in another way endangering the satisfaction of the tax authority's claim. Due to the conduct of the taxable person, it could be much more difficult or impossible to enforce the tax liability. The board member of the company had deliberately misled the tax authority in relation to a possible permanent establishment and the tax liability resulting therefrom. In consideration of the findings of the Finnish tax authority, it was obvious that, ever since 2010, it had been the objective of Heavyinstall OÜ to evade taxes, and the company's conduct in relation to tax had not improved despite the inspection conducted in the meantime and the determination of additional taxes. Heavyinstall OÜ could also have the same attitude to the tax liability to be determined as a result of the present proceedings, which meant that the taxes might not be paid at all. The company had not submitted an annual report for the financial year 2017 and, according to data from the traffic register of the Roads Office, the person concerned had sold the Renault Traffic belonging thereto on 21 March 2018. In addition, in its written statement of 13 March 2018, the Finnish tax authority informed the MTA that it had filed a complaint to the Finnish police, because Heavyinstall OÜ had possibly committed tax fraud.

3. The **Tallinna Halduskohus** (Tallinn Administrative Court) refused the application **by order of 3 April 2018.**

3.1. In its opinion, the condition cited in Paragraph 136¹(1) MKS is not met, according to which, for the application of precautionary measures, there would

have to be reason to suspect that, following the establishment of a monetary claim or liability resulting from tax legislation, the enforcement thereof could prove to be much more difficult or impossible due to the conduct of the taxable person. The performance of precautionary measures restricted the right of a person to freely dispose of its property and to conduct business activities to a considerable extent, which meant that such precautionary measures should not be taken lightly. The suspicion that the enforcement of the tax liability could prove to be much more difficult or impossible due to the conduct of the person concerned could not be justified solely with the amount of tax owed. Heavyinstall OÜ's annual report for the financial year 2016 revealed that it was an active, profitable company with respectable sales. It was admittedly plausible that, in continuing with the traditional economic activity, the company might not be able to pay the total amount of tax expected to be demanded thereof. However, it was not to be excluded that, regardless of the additional tax liability, the trader would want to continue with his economic activity and settle the tax debt using the mechanisms provided for in Finnish law. **[Or. 3]**

3.2. It could not be seen from the documents that Heavyinstall OÜ had hidden information from the tax authority. The difference in opinion between the person concerned and the Finnish tax authority was more legal in nature. The fact that, in the opinion of the Finnish tax authority, Heavyinstall OÜ had not declared its tax liabilities in Finland did not as such justify the conclusion that it would prevent the fulfilment of the tax liability as soon as this had been established. It could not be seen from either the application or the enclosed documents that the company's economic situation had significantly changed. It could not be concluded solely from the fact that the person concerned had sold a vehicle that it had made that transaction with the intention of circumventing any future tax liability.

3.3. The attachment of a trader's current accounts was particularly restrictive. Therefore, under Paragraph 136¹ MKS, there should be a very important reason for attaching a trader's bank account before the tax liability has been established, which was not, however, apparent in the present case. On the basis of Heavyinstall OÜ's annual report, it was plausible that the attachment of the bank accounts could bring about the end of the company's activity or at least the need to transform the company's activity in such a way as to entail costs and activities which were to be regarded as irreversible or as consequences that were difficult to overcome.

4. MTA lodged an **appeal** at the Ringkonnakohus.

5. By **order of 8 May 2018**, the **Ringkonnakohus Tallinn** did not allow the appeal and did not amend the operative part of the order of the Administrative Court, but supplemented the reasoning for the order of the Administrative Court with its own reasoning. The Ringkonnakohus also did not allow the MTA's application for a request for a preliminary ruling to be submitted to the Court of Justice of the European Union. ... [not translated].

5.1. An analysis of the tax law of the European Union had revealed that, in situations in which requests for precautionary measures were made without an instrument permitting enforcement of the claim having been issued in the applicant State, according to the currently valid Directive 2010/24/EU the so-called dual system was applicable. The duality consisted in that both the applicant and the requested Member States were entitled to assess the merit of the application of precautionary measures under the national laws. Pursuant to Article 16 of Directive 2010/24/EU, the Member State that had received a request for precautionary measures had to take precautionary measures according to the procedures provided for in the law of that Member State and to assess whether, under the relevant circumstances, the adoption of such measures was in accordance with its law and its administrative practices. In the opinion of the Ringkonnakohus, it is clearly apparent from the above that, in the scope of international mutual assistance, the performance of precautionary measures in a situation in which there was no instrument permitting enforcement differed significantly from the international recovery of tax claims which were already established and that, when ruling on the request for precautionary measures under Article 16 of the Directive, the requested Member State also had to assess the merit and proportionality of the measures under national law and the national administrative practices. Even though the Member State requested to carry out precautionary measures should not recognise, supplement or replace the original document which approved precautionary measures in the applicant Member State (in the present case the ruling of the Finnish court; second and third sentences of Article 16(1) of the Directive), the authority or the court of the requested Member State was not obliged by that document to carry out the requested precautionary measures in its own territory if the adoption of those measures was not in accordance with its law and administrative practices and was not proportional.

5.2. In the present case, not all of the conditions under Paragraph 136¹ MKS for the performance of enforcement action were met in relation to the person concerned. In relation to the present request, the Court was not convinced that the fulfilment of the tax liabilities possibly to be imposed on Heavyinstall OÜ could prove to be more difficult or impossible due to the latter's conduct. Although the Finnish tax authority had found that the board member of the person concerned had spent most of the year in Finland, the conclusion drawn did not undoubtedly reveal that the conduct of the person concerned suggested the intention to commit tax fraud or that its conduct was not trustworthy ... [not translated]. The adoption of precautionary measures in relation to Heavyinstall OÜ would also be in breach of the principle of proportionality. **[Or. 4]** The Finnish tax authority wanted to impose an additional tax liability on the person concerned in a situation in which the person concerned had fulfilled comparable tax liabilities in the same assessment period in the Republic of Estonia. The tax audit summary drawn up by the Finnish tax authority had revealed that the person concerned had paid taxes to the Republic of Estonia in the assessment period in question (around EUR 131 000), but it was not apparent from the summary that the Finnish tax authority had deducted that amount from the planned tax claim. The measures requested of the MTA to secure the Finnish tax authority's claim expected to be

EUR 320 022 largely consisted in the attachment of the current assets in the company's bank accounts (in the amount of EUR 297 304.74). In view of the objective of fulfilling the expected tax liability, the attachment of the bank accounts would be a measure that would excessively restrict the rights of the person concerned. An attachment of the current assets would undoubtedly hinder the further business activity of the company. In a situation in which the expected tax claim of the Finnish tax authority was essentially already secured to a significant extent with the amount paid by the person concerned to the Republic of Estonia and there was no direct evidence that the company's assets would not be sufficient for fulfilling the remaining tax liability or those assets were very probably concealed, the actual cessation of the business activity of the person concerned through the attachment of the bank accounts would not be justified. In a situation in which the Court had no data in relation to the company's current economic situation (the period for filing the annual reports for the financial year 2017 had not expired) and, according to the profit-and-loss account submitted to the Commercial Register in 2016, the person concerned had made a net profit for the financial year of EUR 173 376, the Court had no basis for the view that the company was acting in bad faith with the aim of preventing the fulfilment of possible future tax liabilities.

ARGUMENTS OF THE PARTIES

6. The MTA lodged an appeal at the Riigikohus, in which it requests that the order of the Ringkonnakohus be annulled and a new order be issued, with which its application for precautionary measures to be carried out in relation to Heavyinstall OÜ is allowed.

6.1. In the present case, the general principle of European Union law, the principle of effectiveness, was decisive. According to the case-law of the Court of Justice, the Member States should not render impossible or excessively difficult the assertion of claims under European Union law through procedural rules provided for in their national legal systems (see, inter alia, C-542/08, *Barth*, paragraph 17). The approach that the Estonian court should re-examine the package of evidence submitted by Finland, which the Finnish court had already assessed, removed the meaning and purpose of the content of Article 16(1), according to which the document submitted by the applicant Member State should not be subject to recognition, supplementing or replacement. Through a disregard for the principle of effectiveness, this approach also made it excessively difficult to fulfil the request in the requested Member State, as the Estonian court had to assess for a second time the facts which had already been established in the applicant Member State.

6.2. The MTA does not agree with the Ringkonnakohus that there was no justification for complying with the request to carry out precautionary measures in relation to Heavyinstall OÜ. It had explained both in its application for approval and in its appeal to the Ringkonnakohus that the unreliable and bad-faith conduct

of the person was clearly apparent from the false statement made to the Finnish tax authority by X, the company's board member, in 2013, on the basis of which the Finnish tax authority had drawn an incorrect conclusion and therefore refrained from rectifying the company's tax liability. The Riigikohus had also agreed that a false statement meant that the enforcement of a tax claim in the future could prove to be much more difficult or could be rendered impossible ... [not translated]. The Finnish tax authority had filed a complaint regarding a financial crime with the police. Circumstances indicative of tax fraud also gave cause for reasonable suspicion. As the Court had found that the requested measures were disproportionate in consideration of the circumstances set out above, the possibility of partial compliance with the request should also have been examined. The Court could have deducted the sum paid by the company in Estonia from the amount set out in the request or only allowed the entry of a prohibition of disposal in relation to the company's vehicle. [Or. 5]

6.3. The Finnish tax authority informed the MTA that the District Court (Keski-Pohjanmaan käräjäoikeus) had made a final ruling on the precautionary measures on 21 June 2018. The ruling had the same content as the preliminary ruling made on 8 February 2018.

... [not translated] [gathering of evidence — hearing of the parties]

RELEVANT LEGAL PROVISIONS

10. Article 16 ('Request for precautionary measures') of Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures specifies:

'(1) At the request of the applicant authority, the requested authority shall take precautionary measures, if allowed by its national law and in accordance with its administrative practices, to ensure recovery where a claim or the instrument permitting enforcement in the applicant Member State is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the applicant Member State, in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant Member State.'

The document drawn up for permitting precautionary measures in the applicant Member State and relating to the claim for which mutual assistance is requested, if any, shall be attached to the request for precautionary measures in the requested Member State. This document shall not be subject to any act of recognition, supplementing or replacement in the requested Member State.'

11. Maksukorralduse seadus (MKS, Fiscal Code)

Paragraph 51¹ MKS 'International assistance'

‘(1) The Maksu- ja Tolliamet shall provide international assistance to the competent authorities of the States which belong to the European Union or with which Estonia has a valid international agreement with corresponding content (hereinafter: competent authority of the foreign State).

...

(3) International assistance shall be requested and provided on the basis of the international agreement and according to the procedure and to the extent regulated in the law of Estonia and that of the European Union.

(4) The competence of the authority providing assistance and the rights and obligations of the parties shall be established with national legislation.

...’

Paragraph 51³ MKS ‘Recovery by way of international assistance’

‘(1) The Maksu- ja Tolliamet shall provide international assistance for the recovery of taxes imposed by the State making a request for recovery or information or a request for precautionary measures, or by one of its regional authorities or another administrative unit, from a taxable person with residence or registered office in Estonia or possessing assets in Estonia.

... [Or. 6]

(3) On the basis of a request for precautionary measures made by the competent authority of the foreign State, the Maksu- ja Tolliamet shall be authorised to take enforcement action in accordance with the procedure regulated in Paragraph 136¹ of the present law.

Paragraph 130 MKS ‘Enforcement action by the tax authority’

‘(1) If the taxable person has not met the financial obligation within the period set in the administrative act of the tax authority or in a ruling cited in Paragraph 128(4) No 2 or 3, the tax authority shall begin to recover the debt by way of compulsory enforcement. The tax authority shall have the right:

1. to request the entry of a note on a prohibition of disposal in the land register or another register of assets without the consent of the party concerned;
2. to request the creation of a mortgage in respect of real estate, a ship entered in the ship register or an aircraft entered in the register of civil aviation according to the provisions of the property law regarding the regulation of forced mortgages;
3. to carry out the enforcement in terms of financial rights pursuant to the provisions of the present law and the legislation regulating the enforcement procedure;

4. to attach other property rights in respect of which no enforcement within the meaning of No 3 of this paragraph is possible, and to request the entry of a note on a prohibition of disposal with regard to those rights in the corresponding register on those rights;

5. to issue the order to block securities or a securities account in accordance with the provisions of the securities register law. ...'

Paragraph 136¹ MKS 'Precautionary measures before establishment of the monetary claim or liability'

'(1) If, upon inspection of the correct payment of taxes, there is reason to suspect that, following the establishment of the monetary claim or liability arising from tax legislation, the enforceability thereof may prove to be much more difficult or impossible due to the conduct of the taxable person, the head of the tax authority or an officer authorised thereby may ask the Administrative Court to grant approval for an enforcement measure provided for in Paragraph 130(1) of the present law.

(1¹) If an enforcement measure regulated in Paragraph 130(1) of the present law is not possible in the case or would very probably not be successful, the head of the tax authority or an officer authorised thereby may ask the Administrative Court to allow the bailiff to take the following enforcement measures:

1. To attach the assets of the taxable person or the recipient of the notice of liability which are in the possession of the taxable person, the recipient of the notice of liability or a third person;

2. To prohibit a third person from transferring assets to the taxable person or the recipient of the notice of liability or fulfilling other commitments therefor, which may also involve the obligation to transfer assets to the bailiff or money to an account provided for that purpose.

(1²) In the case cited in subparagraph 1¹ No 1 of the present paragraph, the court may, on the basis of an application by the tax authority, the taxable person or the recipient of the notice of liability, order that the attached assets be sold and the proceeds from that sale be paid into an account provided for that purpose, if the object may significantly diminish in value or retaining the object would cause excessive costs.

(1³) The application cited in subparagraphs 1 and 1¹ of the present paragraph shall be made to the Administrative Court in whose district the taxable person or the recipient of the notice of liability has his residence or registered office. If the residence or registered office of the taxable person or the recipient of the notice of liability is not known or is not in Estonia, the application shall be made to the Administrative Court in whose district the assets in question are located.

(1⁴) In order to recover the enforcement costs in connection with the measures cited in subparagraph 1¹ Nos 1 and 2 of the present paragraph, the tax authority shall issue an order establishing the period for the payment thereof and pointing out that, if the enforcement costs are not paid within that period, the non-settled liability will be enforced under Paragraphs 128-132 of the present law.

(2) The application to the Administrative Court shall indicate:

1. A reason why the recovery of the possible tax liability will be much more difficult or impossible; [**Or. 7**]

2. The estimated amount of the possible monetary claim or liability;

3. Indications of the security upon provision of which the tax authority shall end the enforcement measure;

4. One or more of the enforcement measures cited in Paragraph 130(1) of the present law or in the enforcement regulation and reasoning why the tax authority considers the chosen measure to be necessary.

(3) If the circumstance which caused the performance of the enforcement measure has ceased to exist or if the taxable person has provided a security to ensure the payment of the possible monetary claim or liability, the tax authority shall end the enforcement measure within two working days at the latest.

(4) The tax authority and the person whose rights are affected by the order may lodge an appeal against the order with which the request cited in subparagraphs 1-1² of the present paragraph or the application cited therein was or was not allowed. An appeal may be lodged against the order of the Ringkonnakohus regarding the appeal.

POSITION OF THE CHAMBER

12. In dispute in the present case is the question of whether the courts were right not to allow the MTA's application of 29 March 2018 for the granting of approval for prohibitions of disposal to be entered in relation to Heavyinstall OÜ's assets and for its assets to be attached. Decisive for the resolution of the case is the clarification of the question of whether the national courts, when ruling on the application for precautionary measures made by the MTA by way of mutual assistance, may assess the evidence themselves, including the ruling on the application of precautionary measures of the Finnish court, and may decide according to their own conviction whether the conditions for applying the measures are met, or whether the courts must proceed on the basis of the legal assessment made by the Finnish court in its ruling in relation to the facts.

13. The courts decided that the conditions of Paragraph 136¹(1) MKS were not met in the case of the MTA's application. Conveying the view taken by the

Finnish tax authority, the MTA is also of the opinion that the Estonian courts had incorrectly started to examine whether the request was in accordance with the national laws as, under the last sentence of Article 16(1) of Directive 2010/24/EU, the document of another Member State should not be reassessed.

14. Under national law, Paragraph 51³(3) and Paragraph 136¹ MKS concern the ruling on a request for precautionary measures by way of mutual assistance. Those provisions do not yield any differences for the ruling on a request by way of mutual assistance and an application which is necessary for securing the MTA's own procedure. Accordingly, when implementing the Directive, the Estonian legislature was of the opinion that the last sentence of Article 16(1) of Directive 2010/24/EU provides no basis for the approval granted by the Finnish court for carrying out precautionary measures being transferred to the Estonian territory. The Chamber also prefers the interpretation of Article 16(1) of the Directive according to which the ruling of the Finnish court on the performance of precautionary measures is just one item of evidence to be considered when examining the condition of Paragraph 136¹ MKS and the approval of the enforcement measures. That is confirmed by the first sentence of Article 16(1), according to which the requested authority shall take precautionary measures, if the request is allowed by its national law and in accordance with its administrative practices.

15. In the view of the Chamber, the interpretation by the tax authority (which also conveys the position of the Finnish tax authority), that under the last sentence of Article 16(1) of the Directive, a departure from the assessment of the facts established in the court ruling attached to the request was not admissible and Estonia had made a mistake when implementing the Directive, is however not excluded. In the recovery procedure, a uniform instrument was used as a basis for the compulsory enforcement and there was no examination of its correspondence with the laws at national level. When applying precautionary measures, it was also appropriate to refer to the principles of mutual trust and cooperation and the principle of effectiveness, and to proceed on the basis of the position of the court of the applicant Member State that had already assessed the need to apply precautionary measures. Therefore, the Chamber does not agree with the view taken by the Ringkonnakohus that an *acte clair* situation applied.

16. There is no case-law of the Court of Justice of the European Union in relation to the interpretation of Article 16 of Directive 2010/24/EU. It is also not apparent that requests for a preliminary ruling have been submitted in relation thereto. **[Or. 8]**

17. On the basis of the foregoing considerations, and since there is no case-law of the Court of Justice of the European Union on these matters, the Chamber considers it necessary to request a preliminary ruling from the Court of Justice of the European Union. ... [not translated][stay of proceedings]

... [not translated]