Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 14 January 2020 [1]

Case C-19/19

État belge
v
Pantochim SA, in liquidation

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, Belgium))

(Reference for a preliminary ruling — Directive 76/308/EEC Mutual assistance for the recovery of claims — Directive 2008/55/EC — Articles 6 and 10 — Directive 2010/24/EU — Article 13(1) — Set-off of tax claim recovered on behalf of requesting Member State against tax debt of requested Member State — Status of recovered claim — Interpretation of term 'privilege')

I. Introduction

1. This reference for a preliminary ruling concerns the interpretation of Article 6(2) and Article 10 of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund (EAGGF), and of the agricultural levies and customs duties [2] together with the second paragraph of Article 6, and Article 10 of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures. [3]

2. The reference has been made in proceedings between the État belge (Belgian State) and Pantochim SA, in liquidation . In essence, the questions posed relate to whether a tax claim held by Pantochim in respect of the Belgian State can be set off against a value added tax (VAT) claim of the German State against the same company. The German State had requested assistance from the Belgian State on the basis of Directive 76/308, as transposed under Belgian law, in order to recover the debt in question.

3. I propose to return presently to the facts of this case, but it is first necessary to set out the relevant legal materials.

1 Original language: English.

2 OJ 1976 L 73, p. 18.

3 OJ 2008 L 150, p. 28.

II. Legal framework

A. EU law

1. Directive 76/308

4. Article 6 of Directive 76/308 in its original version provides:

'1. At the request of the applicant authority, the requested authority shall, in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State in which the requested authority is situated, recover claims which are the subject of an instrument permitting their enforcement.

2. For this purpose any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the requested authority is situated, …'

5. Article 10 of Directive 76/308 in its original version provides:

'The claims to be recovered shall not be given preferential treatment in the Member State in which the requested authority is situated.'

2. Directive 2008/55

6. Recital 1 of Directive 2008/55 provides:

'Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures has been substantially amended several times. In the interests of clarity and rationality the said Directive should be codified.'

7. Article 6 of Directive 2008/55 provides:

'At the request of the applicant authority, the requested authority shall, in accordance with the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State in which the requested authority is situated, recover claims which are the subject of an instrument permitting their enforcement.

For this purpose any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the requested authority is situated, …'

8. Article 10 of Directive 2008/55 provides:

'Notwithstanding the second paragraph of Article 6, the claims to be recovered shall not necessarily benefit from the privileges accorded to similar claims arising in the Member State in which the requested authority is situated.'

3. Directive 2010/24/EU

9. Directive 2008/55 was repealed with effect from 1 January 2012 by Article 29 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. [4]

10. Article 10(1) of Directive 2010/24 provides:

'At the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the applicant Member State.'

11. Article 13(1) of Directive 2010/24 provides:

'For the purpose of the recovery in the requested Member State, any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State, except where otherwise provided for in this Directive. The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State applying to claims concerning the same or, in the absence of the same, a similar tax or duty, except where otherwise provided for in this Directive.

…

The requested Member State shall not be obliged to grant other Member States' claims preferences accorded to similar claims arising in that Member State, except where otherwise agreed between the Member States concerned or provided in the law of the requested Member State. A Member State which grants preferences to another Member State's claims may not refuse to grant the same preferences to the same or similar claims of other Member States on the same conditions.

…'

12. Article 13(5) of Directive 2010/24 provides:

'Without prejudice to Article 20(1), the requested authority shall remit to the applicant authority the amounts recovered with respect to the claim and the interest referred to in paragraphs 3 and 4 of this Article.'

B. Belgian law

13. Article 12 of the loi du 20 juillet 1979 concernant l'assistance mutuelle en matière de recouvrement des créances relatives à certaines cotisations, droits, taxes et autres mesures (Law of 20 July 1979 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures) (*Moniteur belge* of 30 August 1979, p. 9457 'the Law of 20 July 1979') provides:

'The requested Belgian authority shall proceed with recoveries requested by the applicant foreign authority as if they were claims arising within the Kingdom [of Belgium].'

14. Article 15 of that law states:

'The claims to be recovered shall not benefit from any privilege.'

4 OJ 2010 L 84, p. 1.

15. Article 334 de la loi-programme du 27 décembre 2004 (*Moniteur belge* of 31 December 2004, p. 87006, 'the Programme-Law of 27 December 2004') in the version applicable up to 7 January 2009 provides:

'Any sum to be repaid or paid to a debtor on the basis of legal provisions on income taxes, taxes treated as equivalent thereto, value added tax, … may be assigned without formalities by the competent official to the payment … of income taxes, taxes treated as equivalent thereto, value added tax, … where the latter are not or are no longer contested.

The preceding paragraph shall continue to apply in the event of seizure, assignment, transfer or where there are concurrent claims or insolvency proceedings.'

16. The first paragraph of Article 334 of the Programme-Law of 27 December 2004 as modified by Article 194 de la loi-programme du 22 décembre 2008 (*Moniteur belge* of 29 December 2008, p.68649, 'the Programme-Law of 22 December 2008') and prior to its modification by the loi du 25 décembre 2016 (the Law of 25 December 2016), as applicable to the facts from 8 January 2009 provides:

'Any sum to be repaid or paid to a person,… in the course of applying tax laws which fall within the competence of Service public fédéral Finances [(Federal Public Service for Finance)] or for which the collection and recovery is insured by that Federal public service … may be assigned without formalities and at the discretion of the competent official, to the payment of sums owed by that person pursuant to the tax laws concerned or to the settlement of tax or non-tax claims the collection and recovery of which are ensured by the [Federal Public Service for Finance] … That application is limited to the uncontested amount of the debt in respect of that person.

The preceding indent shall continue to apply in the event of seizure, assignment, transfer or where there are concurrent claims or insolvency proceedings.'

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

17. Pantochim is a public limited company which was placed in liquidation on 26 June 2001 by a judgment of the tribunal de commerce de Charleroi (Charleroi Commercial Court, Belgium). In the course of that liquidation, Pantochim paid in full the preferential VAT debt held by the Belgian State.

18. The Belgian State also declared in the course of the liquidation proceedings a debt of EUR 634 275.50 for VAT plus interest held by the German State. This particular VAT debt ('the German VAT debt') was admitted as an unsecured debt. It would appear from the request for a preliminary ruling that the German State requested assistance on the basis of Directive 76/308, as transposed under Belgian law, in order to recover the VAT debt in question.

19. The issue which now concerns us arises because Pantochim has a significant tax claim against the Belgian State. When the Belgian State indicated that it intended to set off its tax debt to Pantochim against the German VAT debt on the basis of Article 334 of the Programme-Law of 27 December 2004, the liquidators of Pantochim responded by instituting proceedings against the Belgian State. The tribunal de première instance du Hainaut, division Mons) (Court of First Instance, Hainaut, Mons Division, Belgium) decided that the Belgian State was not authorised to set off the debts in question. On appeal, the Cour d'appel de Mons (Court of Appeal, Mons, Belgium) by judgment of 27 June 2016 upheld that decision and ordered the Belgian State to pay the sum of EUR 502 991.47 plus interest to Pantochim.

20. The Belgian State then brought an appeal on a point of law before the Cour de cassation (Court of Cassation, Belgium). That State considered that the Cour d'appel de Mons (Court of Appeal, Mons) had infringed, inter alia, Article 6(2) of Directive 76/308 in preventing it from recovering the debt of the German State as if it were its own. In addition, the Belgian State does not consider that the set-off of debts in accordance with Article 334 of the Programme-Law of 27 December 2004 is a 'privilege' in accordance with Article 10 of Directive 76/308.

21. That court highlighted a number of findings of the Cour d'appel de Mons (Court of Appeal, Mons) which are contested by the Belgian State.

22. First, the Cour d'appel de Mons (Court of Appeal, Mons) considered that 'Article 334 [of the Programme-Law] does not expressly exclude the provisions of the Civil Code relating to set-off', which require 'the existence of two mutual debts … which must exist between the same persons acting in the same capacity'. The Cour d'appel de Mons (Court of Appeal, Mons) stated that, 'even if the German State's claim may be recovered as the Belgian State's own claim, it remains a claim of the German State', with the result that 'statutory set-off is not possible since there are no mutual debts between the same persons, the Belgian State seeking to offset its debt towards [the company Pantochim] with the debt [of the company Pantochim] towards the German State'. That court further indicated that, 'even if tax set-off were to be regarded as set-off *sui generis*', Article 334 of the Programme-Law still 'does not extend the benefit of set-off to claims other than those of the Belgian State'.

23. Second, the Cour d'appel de Mons (Court of Appeal, Mons) considered that the provisions of the directives do not change any of the foregoing because, although 'they admittedly provide that claims for which assistance is requested are to be recovered as a claim of the requested State and in the same way', the fact remains that 'the claims to be recovered are to benefit from the privileges accorded to similar claims arising in the Member State in which the requested authority is situated only if the legislation of that State or an agreement between the requesting State and the requested State so provides'. The Cour d'appel de Mons (Court of Appeal, Mons) added that, 'failing any definition in the directive, the term "privilege" must be understood in its usual meaning of advantage or prerogative'.

24. In those circumstances the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the provision according to which the claim in respect of which a request for recovery has been made "shall be treated as a claim of the Member State in which the requested authority is situated", as provided for in [the second paragraph of] Article 6 of [Directive 2008/55] which replaces Article 6(2) of [Directive 76/308], be understood as meaning that the claim of the requesting State is to be treated as being a claim of the requested State, with the result that the claim of the requesting State acquires the status of a claim of the requested State?

(2) Must the term "privilege" referred to in Article 10 of Directive [2008/55], and, before codification, in Article 10 of Directive [76/308], be understood as the preferential right attached to the claim which confers on it a right of priority over other claims in the event of concurrent claims, or as any mechanism which results, in the event of concurrent claims, in the preferential payment of the claim?

(3) Must the option available to the tax authority to carry out, under the conditions laid down by Article 334 of the Programme-Law of 27 December 2004, a set-off where there are concurrent claims be regarded as a privilege within the meaning of Article 10 of the abovementioned directives?'

IV. Procedure before the Court

25. Written observations were submitted by Pantochim, the Belgian and Spanish Governments and the European Commission. The Court decided to proceed to judgment without an oral hearing.

V. Analysis

A. Preliminary remarks

26. In its questions referred to the Court for a preliminary ruling, the Cour de cassation (Court of Cassation) cites certain provisions of Directive 76/308 and Directive 2008/55. No reference is made to Directive 2010/24. Before examining the questions referred, I consider that it is first necessary to determine which directive is applicable *ratione temporis*. This is important because there are certain differences in the wording of Article 6(2) of Directive 76/308, the second paragraph of Article 6 of Directive 2008/55 and Article 10(1) of Directive 2010/24 and the first subparagraph of Article 13(1) of Directive 2010/24, although they are, of course, equivalent in scope. This cannot, however, be said of Article 10 of Directive 76/308,[5] Article 10 of Directive 2008/55 and the third subparagraph of Article 13(1) of Directive 2010/24.[6]

27. In paragraph 20 of the judgment of 1 July 2004, *Tsapalos and Diamantakis* (C-361/02 and C-362/02, EU:C:2004:401), the Court held that since Directive 76/308 governs only the recognition and enforcement of certain categories of claims which arise in another Member State, without setting out rules relating to their accrual or their scope, the provisions of that directive must be considered as constituting simply procedural rules. In my view, this statement of the Court also applies in respect of Directive 2008/55 and Directive 2010/24.

28. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas by contrast substantive rules are usually interpreted as not applying to situations existing before their entry into force.[7]

29. Article 29 of Directive 2010/24 provides that Directive 2008/55 is repealed with effect from 1 January 2012 and that references to the repealed Directive 2008/55 shall be construed as references to Directive 2010/24.[8] No transitional arrangements are provided for in Directive 2010/24.

30. I therefore consider that it is Directive 2010/24 rather than Directive 76/308 or Directive 2008/55 which applies to the proceedings that are currently pending before the referring court.

5 In its original version.

6 The Court had already stated in paragraph 72 of the judgment of 29 April 2004, *Commission v Council* (C-338/01, EU:C:2004:253) that 'so far as concerns Article 10 of Directive 76/308, which provided that instruments for recovery were not to be given preferential treatment in the Member State in which the requested authority was situated, the amended version of that article resulting from [Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308 (OJ 2001 L 175, p. 17)] provides that such claims will not necessarily benefit from the privileges accorded to similar claims arising in the Member State in which the requested authority is situated. Such an *amendment constitutes a substantial change in the treatment of the claims covered by Directive 76/308* inasmuch as it is equivalent to a reversal of the principle hitherto applicable that such claims could not benefit from preferential treatment in the Member State to which the request was addressed'. Emphasis added.

7 Judgment of 1 July 2004, *Tsapalos and Diamantakis* (C-361/02 and C-362/02, EU:C:2004:401, paragraph 19). In paragraph 42 of its observations, the Commission states that given that the request for a preliminary ruling does not indicate the date of the request for recovery made by the German State, it is not possible to establish which of the three directives is applicable in the main proceedings. Pantochim and the Belgian and Spanish Governments refer to both Directive 76/308 and Directive 2008/55.

8 Directive 76/308 was repealed by Article 25 of Directive 2008/55 with effect from 30 June 2008. See Article 26 of Directive 2008/55.

B. First question

31. By its first question, the referring court asks, in essence, whether the first subparagraph of Article 13(1) of Directive 2010/24 — which provides that 'any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State' — must be interpreted as meaning that the claim of the requesting Member State (in these proceedings, Germany) acquires the status of a claim of the requested Member State (in these proceedings, Belgium).

32. It is settled case-law that Directive 76/308 established common rules on mutual assistance in order to ensure the recovery of claims relating to certain levies, duties and taxes.[9] That statement also applies in respect of Directive 2010/24.[10] Indeed, Directive 2010/24 seeks to extend the scope of Directive 76/308, as codified by Directive 2008/55, to claims which were not previously covered by the latter directives in order to better safeguard the financial interests of the Member States and the neutrality of the internal market and to make mutual assistance more efficient and effective. In sum, therefore, given the growing number of assistance requests, Directive 2010/24 generally seeks to facilitate and to promote such mutual assistance.[11]

33. Article 1 of Directive 2010/24 states that that directive lays down the rules under which the Member States are *to provide assistance* for the recovery in a Member State of any claims referenced in Article 2 which arise in another Member State. Article 2(1)(a) of Directive 2010/24 provides the request for assistance may be made in relation, inter alia, to the recovery of *all taxes and duties of any kind* levied by or on behalf of a Member State or on behalf of the Union.[12] In accordance with Article 10(1) of Directive 2010/24 a requested authority in a Member State shall, upon the request of the applicant authority in another Member State, recover claims which are the subject of an instrument permitting enforcement in the applicant Member State.

34. In paragraph 48 of the judgment of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282), the Court stated that, 'in accordance with Article 13(1) of Directive 2010/24, the claim in respect of which a request for recovery has been made is to be treated as if it were a claim of the requested Member State, that latter Member State being thus required to make use of the powers and procedures provided for under the laws, regulations or administrative provisions applying to claims concerning identical or similar taxes or duties in its legal system'.[13]

35. It is, nevertheless, important to stress the limits of these comments in the judgment of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282). It is clear from the terms of that judgment that the Court was here referring to the *procedural obligations* of the requested State. I consider, therefore, that while the first subparagraph of Article 13(1) of Directive 2010/24 requires that the claims of a requesting

9 Judgment of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 44 and the case-law cited).

10 According to the first recital to Directive 2010/24, 'mutual assistance between the Member States for the recovery of each others' claims and those of the Union with respect to certain taxes and other measures contributes to the proper functioning of the internal market. It ensures fiscal neutrality and has allowed Member States to remove discriminatory protective measures in cross-border transactions designed to prevent fraud and budgetary losses'. See also judgment of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282, paragraph 42).

11 See to that effect, judgment of 14 March 2019, *Metirato* (C-695/17, EU:C:2019:209, paragraph 29). See also recital 4 to Directive 2010/24 which provides that 'to better safeguard the financial interests of the Member States and the neutrality of the internal market, it is necessary to extend the scope of mutual assistance for recovery to claims relating to taxes and duties not yet covered by mutual assistance for recovery, whilst in order to cope with the increase in assistance requests and to deliver better results, it is necessary to make assistance more efficient and effective and to facilitate it in practice. In order to fulfil these objectives, important adaptations are necessary, whereby a mere modification of the existing Directive 2008/55/EC would not be sufficient. The latter should therefore be repealed and replaced by a new legal instrument which builds on the achievements of Directive 2008/55/EC but provides for clearer and more precise rules where necessary'.

12 It must be noted that Council Directive 79/1071/EEC of 6 December 1979 amending Directive 76/308 (OJ 1979 L 331, p. 10) broadened the scope of Directive 76/308 by extending it to claims relating to VAT.

13 See also, by analogy, with respect to Directive 76/308, judgment of 14 January 2010, *Kyrian* (C-233/08, EU:C:2010:11, paragraph 43).

Member State should be deemed from a *procedural perspective* to be equivalent[14] to those of the requested Member State, there are nonetheless limits to the scope of this particular deeming provision. Specifically, that claim does not acquire, from a *substantive perspective*, the status of a claim which might be made by the requested Member State.

36. This is clear from the language and context of Article 13(1) itself. Thus, for example, the third subparagraph of Article 13(1) of Directive 2010/24 states that 'the requested Member State shall *not be obliged* to grant other Member States' claims preferences accorded to similar claims arising in that Member State, *except* where otherwise agreed between the Member States concerned or provided in the law of the requested Member State'.[15] This in itself is sufficient to demonstrate that the claims of the requested Member State are treated as quite distinct and separate from those of the requesting Member State. In its own way it also shows the limits of the deeming provision provided for in the first subparagraph of Article 13(1) of Directive 2010/24 because if the claim of the requesting State was indeed to be treated as substantively identical for this purpose to that of a claim on the part of the requested State, the third subparagraph of that directive would have been quite otiose and unnecessary.

37. In my view, therefore, the effect of Directive 2010/24 is that the requested Member State acts as a form of agent on behalf of the requesting Member State for the purposes of enforcing the latter's claim.[16] In the absence, however, of any specific assignment of the claim to the requested Member State — and there is no suggestion that such has occurred in the present case — the claim remains that of the requesting Member State.[17]

38. Indeed, it must be recalled that in accordance with Article 1 of Directive 2010/24, the role of the requested Member State is to *assist* the requesting Member State in recovering *the latter's* claim. I thus agree with the submission of the Spanish Government[18] that the claim of the requesting Member State cannot be assimilated to that of the requested Member State and that the claim of the requesting Member State does not acquire the status of a claim of the requested Member State.[19]

14 The scope for the requested Member State to refuse to grant assistance to the requesting Member State is very limited. See, judgment of 26 April 2018, *Donnellan* (C-34/17, EU:C:2018:282, paragraphs 49 to 51).

15 Emphasis added.

16 The requested Member State must, in principle, seek payment of its costs in connection with a request for recovery from the debtor in question rather than from the requesting Member State. Pursuant to Article 20(1) of Directive 2010/24, '… the requested authority shall seek to recover from the person concerned and retain the costs linked to the recovery that it incurred, in accordance with the laws and regulations of the requested Member State'.

17 In its judgment of 14 March 2019, *Metirato* (C-695/17, EU:C:2019:209, paragraphs 33 and 34), the Court noted that Article 14 of Directive 2010/24 provides for a division of powers between the courts of the applicant Member State and the courts of the requested Member State. Thus, disputes concerning the claim must be brought before the courts of the applicant Member State while the enforcement measures taken in the requested Member State must be brought before the courts of the latter Member State. According to the Court, that division of powers results from the fact that the claim and the instrument permitting its enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, whilst, for enforcement measures in the Member State in which the requested authority is situated, the latter applies according to its national law. This division of power is, in my view, indicative of the fact that Directive 2010/24 contains procedural rules rather than substantive rules governing, inter alia, the status or title to a claim.

18 See paragraph 27 of its observations.

19 Pantochim considers that the requested Member State acts on behalf of the requesting Member State. See page 8 of its observations. The Belgian Government states in paragraphs 18 and 21 of its observations that the claim of the requesting Member State acquires the status of a claim of the requested Member State and that the claim of the requesting Member State is fully assimilated to that of the requested Member State.

39. In that regard, the Court has recently stated in paragraph 40 of the judgment of 14 March 2019, *Metirato* (C-695/17, EU:C:2019:209) that 'in the absence of any determination, by Directive 2010/24 of the details rules for conserving the amounts recovered by the requested Member State before their transfer to the applicant Member State, that falls within the competence of the Member States, *provided that the obligation to transfer the amounts recovered and the applicable interest … are observed*'.[20]

40. In the light of the above, I consider that the first subparagraph of Article 13(1) of Directive 2010/24 which provides that 'any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State' must be interpreted simply as meaning that the latter Member State is required to make use of the powers and procedures provided for under the laws, regulations or administrative provisions applying to claims concerning identical or similar taxes or duties in its legal system. It is clear from a reading of both the first and third subparagraph of Article 13(1) of Directive 2010/24 that the claim of the requesting Member State does not, however, acquire for this purpose the status of a substantive claim of the requested Member State.

C. Second question

41. By its second question, the referring court asks, in essence, the Court to determine whether the term 'privilege' in Article 10 of Directive 76/308 and Article 10 of Directive 2008/55 must be interpreted as referring to a preferential right attached to a claim which confers on it a right of priority in the event of concurrent claims or as any mechanism which results, in the event of concurrent claims, in the preferential payment of the claim.

42. As I indicated in point 30 of this Opinion, I consider that it is Directive 2010/24 rather than Directive 76/308 or Directive 2008/55 which applies to the proceedings which are currently pending before the referring court. The referring court therefore seeks an interpretation of the third subparagraph of Article 13(1) of Directive 2010/24. In that regard, it queries whether the term 'privilege' must be understood as the preferential right attached to the claim which confers on it a right of priority over other claims in the event of concurrent claims, or as any mechanism which results, in the event of concurrent claims, in the preferential payment of the claim. Despite the formal language of this question, the referring court has not, in my view, indicated how under its legal system there is any practical difference between these two alternatives.

43. I will therefore examine this question somewhat in the abstract, focusing on the language used by the directive itself.

20 Emphasis added. See Article 13(5) of Directive 2010/24. I would note that while the Court in its judgment of 14 March 2019, *Metirato* (C-695/17, EU:C:2019:209) largely followed the Opinion of Advocate General Bobek in *Metirato* (EU:C:2018:944), it did not use the terms 'full assimilation of claims' used in the Advocate General's Opinion to refer to the principle laid down in the first subparagraph of Article 13(1) of Directive 2010/24 which requires that claims for which a request for recovery has been made must be treated as if they were claims of the requested Member State.

44. It must be noted that the English-language version of the third subparagraph of Article 13(1) of Directive 2010/24 makes no reference to the term 'privilege'.[21] Rather it states that the requested Member State is not obliged to grant other Member States' claims *preferences*[22] accorded to similar claims arising in that Member State, except where otherwise agreed between the Member States concerned or provided in the law of the requested Member State.[23]

45. It is settled case-law that the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation, which must take into account the context of that provision and the purpose of the legislation in question.[24] Moreover, in the absence of any definition of the term 'preferences' (and/or 'privilèges in the French language version[25]) in Directive 2010/24, the meaning and scope of that term must be determined by considering the general context[26] in which it is used and its usual meaning in everyday language.[27]

46. The term 'preferences', which only appears in recital 14 and the third subparagraph of Article 13(1) of Directive 2010/24, is not defined by that directive and no reference is made to the law of the Member States for the purposes of defining that term. Recital 14 of Directive 2010/24 states, in essence, that the use by the requested Member State of its powers under its national laws applying to claims concerning the same or similar taxes or duties 'should not, as a general rule, apply with regard to the preferences accorded to claims arising in the requested Member State. However, it should be made possible to extend preferences to claims of other Member States based on an agreement between the Member States concerned'.[28]

47. Article 13 of Directive 2010/24 is entitled 'Execution of the request for recovery'. The first subparagraph of Article 13(1) of Directive 2010/24 provides, in essence, that the requested authority must make use of the *powers and procedures* provided under the laws, regulations or administrative provisions of that Member State in order to recover claims subject to a recovery request. Any such claims must be treated for this purpose as a claim of the requested Member State, except where otherwise provided for in that directive.

21 The French-language version of the third subparagraph of Article 13(1) of Directive 2010/24 refers to both 'préférences' and 'privilèges'. The third subparagraph of Article 13(1) of Directive 2010/24 of the Spanish, Czech, Danish, German, Estonian, Italian, Latvian, Lithuanian, Hungarian, Maltese, Dutch, Polish, Portuguese, Romanian, Slovak, Slovenian and Swedish, language versions use the same or almost equivalent term throughout. That term corresponds to 'preferences', 'privileges', 'priority (right)' or 'prerogatives'.

22 I consider that the term 'preferences' in the third subparagraph of Article 13(1) of Directive 2010/24 is in fact a synonym of the term 'preferential treatment' in Article 10 of Directive 76/308 and the term 'privileges' in Article 10 of Directive 2008/55. It must be stressed however that the articles themselves are quite different in scope and their content evolved over time. See Article 1(9) of the Commission's Proposal for a European Parliament and Council Directive amending Council Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund (EAGGF), and of agricultural levies and customs duties and in respect of value added tax and certain excise duties (98/C 269/06), COM(1998) 364 final, which refers to 'preferences' rather than 'privileges'. The text finally adopted, namely, Directive 2001/44 refers to 'privileges'.

23 Pantochim (page 10 of its observations), the Spanish Government (paragraph 31 of its observations) and the Cour d'appel de Mons (Court of Appeal, Mons) consider that 'privilege' refers to an advantage or prerogative. The Belgian Government claims that the term 'privilege' must be understood as the preferential right attached to a claim which confers a right of priority over other claims in the event of concurrent claims (paragraph 40 of its observations). The Commission considers that it must be understood as priority payment rights attached to a claim (paragraph 32 of its observations).

24 Judgment of 16 November 2017, *Kozuba Premium Selection* (C-308/16, EU:C:2017:869, paragraph 38 and the case-law cited).

25 I would emphasise again that I consider that these terms are synonymous.

26 The Commission's proposal which resulted in the adoption of Directive 2010/24 did not refer to preferences but to privileges. See recital 13 and Article 22(2) of Proposal for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (COM/2009/0028 final) ('the Proposal for Directive 2010/24'). That provision of the proposal provides in effect that when executing a request for assistance with regard to a claim falling within the scope of the directive, the requested authority shall make use of not only the powers but also the privileges accorded to claims arising in the requested Member State. It is unclear from the legislative history of Directive 2010/24 why the term 'privilege' was altered to 'preference' in the different language versions and what was the objective, if any, of that alteration.

27 Judgment of 4 May 2006, *Massachusetts Institute of Technology* (C-431/04, EU:C:2006:291, paragraph 17 and the case-law cited).

28 See by contrast Article 22(2) of the Proposal for Directive 2010/24.

48. In my view, the third subparagraph of Article 13(1) of Directive 2010/24 is not drafted in the form of an exception or derogation to the first subparagraph thereof: it refers rather to something distinct from the powers and procedures applying to the execution of a request for recovery. In the light of the general context and wording of that provision, I consider that it extends, in certain circumstances, *additional* rights or benefits granted in respect of the execution of the requested Member State's claims to the claims of the requesting Member State, over and above the powers and procedures referred to in the first subparagraph of Article 13(1) of Directive 2010/24. As I have already pointed out, all of this reinforces the conclusion in respect of the first question that the claim of the requesting State is not to be treated from a *substantive perspective* as if it were a claim brought by the requested State because, to repeat, all of this would be unnecessary if the claim were to enjoy this substantive status.

49. Given the broad and unqualified manner in which the term 'preferences' appears in the third subparagraph of Article 13(1) of Directive 2010/24, I consider that that term refers to any mechanism which, in the event of concurrent claims, results in the preferential payment of the claims of the requested Member State. This would include — but is not limited to — preferential or priority rights granted to the claims of the requested Member State in respect of the order or ranking of their payment having regard to that Member State's insolvency system.[29] Accordingly, the requested Member State *may* — but it is not *required* to — grant such preferential or priority rights in respect of the claims of the requesting Member States in the manner envisaged by the third subparagraph of Article 13(1) of Directive 2010/24.[30]

D. Third question

50. By this question, the referring court seeks to ascertain whether the possibility to set off claims in the event of concurrent claims under the conditions laid down by a provision of national law such as Article 334 of the Programme-Law of 27 December 2004 or Article 194 of the Programme-Law of 22 December 2008 must be regarded as a preference in accordance with the third subparagraph of Article 13(1) of Directive 2010/24.

51. As the Commission observed in its written submissions, the general power to set off reciprocal or mutual claims is part of the powers and procedures available under national law for the recovery of claims. This power of set-off thus applies not only in respect of the claims of the requested Member State (in this case, the Belgian State) but also in respect of the claims of other creditors where reciprocal or mutual claims exist.[31] I consider, therefore, that the power to set off reciprocal or

29 In that regard, I would note that the application of Directive 2010/24 is not limited to cases whether the debtor of the requesting Member State is insolvent. The scope of Directive 2010/24 extends to all claims laid down in Article 2 thereof subject, inter alia, to a number of limits to the requested authority's obligations laid down in Article 18 of that directive.

30 The third subparagraph of Article 13(1) of Directive 2010/24 also provides that a Member State which grants preferences to another Member State's claims may not refuse to grant the same preferences to the same or similar claims of other Member States on the same conditions. Thus where preferences are granted to the claims of another Member State by the requested Member State, they must be granted on an equal basis to the claims of all other Member States. Given that such preferences may operate to the disadvantage of other creditors, I consider that such preferences should be conferred by law in a transparent manner in order to put other creditors on notice thereof.

31 The rules on set-off under Belgian law must of course be established by the referring court.

mutual claims falls, in principle, under the first subparagraph of Article 13(1) of Directive 2010/24.[32] Thus, for example, if Pantochim and the German State have reciprocal or mutual claims they could, in principle — provided that this and all the other conditions required under Belgian law are met — be set off against each other.

52. The request for a preliminary ruling does not, perhaps, make it sufficiently clear whether Article 334 of the Programme-Law of 27 December 2004 or Article 194 of the Programme-Law of 22 December 2008 derogates from the general rules on set-off laid down in the Belgian Civil Code. Subject to verification by the national court, these general rules would seem to require the existence of reciprocal or mutual claims between the same persons acting in the same capacity. It is thus unclear whether the claims of the requested Member State (in this case the Belgian State) which fall within the scope of Article 2 of Directive 2010/24 are treated differently to the claims of other creditors so far as the application of the set-off rules are concerned.

53. Indeed, in the request for a preliminary ruling, the referring court cited extracts from the judgment of the Cour d'appel de Mons (Court of Appeal, Mons) of 27 June 2016 which found that neither the Programme-Law of 27 December 2004 nor the Programme-Law of 22 December 2008 derogates from the general rules on set-off laid down in the Belgian Civil Code which, as I have already noted, require reciprocal claims between the same persons. Moreover, according to the Cour d'appel de Mons (Court of Appeal, Mons), even if the claim of the German State could be recovered as a debt of the Belgian State, it remains a debt of the German State and, in the absence of reciprocal debts, a set-off cannot be performed.

54. In its request for a preliminary ruling, the referring court also cited certain arguments of the Belgian State in the appeal proceedings before it. In that regard, the referring court stated that the Belgian State claimed that the Programme-Law of 27 December 2004 and the Programme-Law of 22 December 2008 provide for a *sui generis* system of set-off which does not require reciprocity between the debts and claims in fiscal matters. The Belgian State claimed that a set-off is thus authorised in respect of such claims subject to a request for recovery pursuant to Directive 2010/24.

55. In its written observations submitted to this Court, the Belgian Government contends that the third question is inadmissible as the referring court has not explained the rules on set-off under the Belgian Civil Code and has not explained the mechanism of set-off laid down in the Programme-Law of 27 December 2004 and the Programme-Law of 22 December 2008.

56. Not without some hesitation I find myself obliged to agree with this submission. In the absence of any real explanation in the request for a preliminary ruling or indeed from the file before the Court as to how that allegedly *sui generis* mechanism operates and whether and, if so, to what extent it differs from the general rules on set-off laid down in the Belgian Civil Code, I find myself unable to assess in any meaningful fashion whether that mechanism falls within the terms 'powers and procedures' under the first subparagraph of Article 13(1) of Directive 2010/24 or, instead, constitutes a preference for the purposes of the third subparagraph thereof.

32 See, to that effect, the submission of the Commission in paragraph 50 of its observations. Moreover, although not applicable *ratione temporis* to the liquidation of Pantochim, Article 6 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) is entitled 'Set-off', paragraph 1 of which provides that 'the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim'. Article 43 of that regulation entitled 'Applicability in time', provides that 'the provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done'. Regulation No 1346/2000 entered in force on 31 May 2002. See Article 47 thereof. Regulation No 1346/2000 was repealed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (*OJ 2015 L 141, p. 19). See also Article 9(1) of Regulation 2015/848 with respect to set-off which is very similar to Article 6(1) of Regulation No 1346/2000*. Pursuant to Article 84(1) of Regulation 2015/848, the provisions of that 'regulation shall apply only to insolvency proceedings opened after 26 June 2017. Acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed'.

57. The Belgian Government claims, in the alternative to its submission on inadmissibility, that the *sui generis* mechanism merely simplifies the recovery procedure and should thus not be considered a privilege (preference).

58. If the Court were to consider that the third question is admissible and if, as the Belgian Government claims, the mechanism in question merely simplifies the recovery procedure and does not grant preferential or priority rights in respect of the order or ranking of the payment of its claims or otherwise prefers the Belgian State qua creditor then,[33] in my view, that mechanism falls within the powers and procedures referred to in the first subparagraph of Article 13(1) of Directive 2010/24.

59. All of this is to say that it would be open to a Member State to provide in its national debt collection rules for a general power of set-off in respect of all debts and to dispense with the mutuality requirement, irrespective of the identity of the creditor. *If* that were indeed the effect of the Programme-Law of 27 December 2004 and the Programme-Law of 22 December 2008 — a matter which is entirely for the national courts to assess and to determine — then this enhanced power of set-off would have to be regarded as part of the ordinary 'powers and procedures' provided for by national law in respect of insolvency in the manner envisaged by the first subparagraph of Article 13(1) of Directive 2010/24.

60. On the other hand, it may be noted that the Commission contends that the mechanism in question would appear to grant a preferential right of payment to the Belgian State which derogates from the ordinary rules on set-off, and, as such, it should therefore be considered to constitute a privilege (preference) for the purposes of the third subparagraph of Article 13(1) of Directive 2010/34.[34] While it is regrettable that the matter should have to be dealt with on the basis of a pure hypothesis, if the effect of the Programme-Law of 27 December 2004 and the Programme-Law of 22 December 2008 was to confer a preferential or enhanced right of set-off in favour of the Belgian State which was not enjoyed by other creditors by dispensing with the mutuality of debt requirement, then in my view this would constitute a 'preference' within the meaning of the third subparagraph of Article 13(1) of Directive 2010/24.

61. Of course, even if this were so, this *in itself* would change nothing because it must be recalled that the third subparagraph of Article 13(1) of Directive 2010/24 *also* provides that the requested Member States do not have to grant such preferential rights in respect of similar claims of the requesting Member State unless it has been specifically agreed otherwise by the Member States in question or such preferential rights in respect of the claims of the requesting Member State are provided in the law of the requested Member State.

62. Subject to verification by the referring court, it would appear from the file before the Court and in particular from Article 15 of the Law of 20 July 1979,[35] that under the Belgian legal system the claims of a requesting Member State *do not* in fact benefit from any such preference or privilege.[36]

33 A situation which must be verified by the referring court.

34 The Commission considers that it is for the referring Court to assess whether the set-off mechanism in question constitutes a preference. See paragraph 47 of the Commission's observations.

35 See also Article 20(1) of the Loi transposant la Directive 2010/24/UE du Conseil du 16 mars 2010 concernant l'assistance mutuelle en matière de recouvrement des créances relatives aux taxes, impôts, droits et autres mesures du 9 janvier 2012 (Law transposing Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures of 9 January 2012) which also provides, subject to verification by the referring court, that foreign claims for which assistance is requested shall *not* enjoy any privilege.

36 The Belgian Government also stated in paragraph 51 of its observations before the Court that the claims of a requesting Member State *do not* benefit from any 'privilege'.

63. Moreover, in the absence of any wording to that effect, the third subparagraph, in a similar manner to the first subparagraph, of Article 13(1) of Directive 2010/24 does not alter the status or result in the transfer of the requesting Member State's claim to the requested Member State. It follows therefore, that such preferences cannot result in the claim of the requesting Member State acquiring the status of a claim of the requested Member State. I also consider, for the purposes of clarity, that in the light of the objective of Directive 2010/24, which is to ensure, inter alia, that the requested Member State assists the requesting Member State in the recovery of the latter's claims, the grant of preferences under the third subparagraph of Article 13(1) of Directive 2010/24 must operate for the benefit, rather than to the detriment, of the requesting Member State.

VI. Conclusion

64. Having regard to the foregoing considerations, I would propose that the questions referred by the Cour de cassation (Court of Cassation, Belgium) be answered as follows:

The first subparagraph of Article 13(1) 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 which provides that 'any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State' must be interpreted as meaning that the latter Member State is required to make use of the powers and procedures provided for under the laws, regulations or administrative provisions applying to claims concerning identical or similar taxes or duties in its legal system. The first and third subparagraphs of Article 13(1) of Directive 2010/24 must be interpreted as meaning that the claim of the requesting Member State does not, however, acquire the status of a substantive claim of the requested Member State.

The term 'preferences' in the third subparagraph of Article 13(1) of Directive 2010/24, refers to any mechanism which, in the event of concurrent claims, results in the preferential payment of the claim of the requested Member State. This would include, but is not limited to, preferential or priority rights granted to the claims of the requested Member State in respect of the order or ranking of their payment having regard to that Member State's insolvency system. The requested Member State may — but it is not required to — grant such preferential or priority rights in respect of the claims of the requesting Member States.

The general power to set off reciprocal or mutual claims under national law is part of the powers and procedures available under national law for the recovery not only of the claims of the requested Member State but also for the claims of other creditors where reciprocal or mutual claims exist and falls, in principle, under the first subparagraph of Article 13(1) of Directive 2010/24.

A mechanism which merely simplifies the recovery procedure and does not grant preferential or priority rights in respect of the order or ranking of the payment of the claims of the requested Member State falls within the powers and procedures referred to in the first subparagraph of Article 13(1) of Directive 2010/24.

The third subparagraph of Article 13(1) of Directive 2010/24 does not alter the status or result in the transfer of the requesting Member State's claim to the requested Member State. In the light of the objective of Directive 2010/24, which is to ensure, inter alia, that the requested Member State assists the requesting Member State in the recovery of the latter's claims, the grant of preferences under the third subparagraph of Article 13(1) of Directive 2010/24 must operate for the benefit, rather than to the detriment, of the requesting Member State.