



ARTICLES

TRANSNATIONAL JUDICIAL REVIEW IN HORIZONTAL COMPOSITE PROCEDURES: *BERLIOZ, DONNELLAN,* AND THE CONSTITUTIONAL LAW OF THE UNION

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ABSTRACT: The policy area of cooperation between fiscal authorities of Member States of the EU has historically been characterised by advanced patterns of administrative integration which, coupled with the sensitivity of the subject-matter in terms of potential impingement on taxpayers' rights, have made all the more problematic the gaps in effective judicial protection generally to be found in composite procedures set up by EU administrative law. This *Article* analyses two recent rulings delivered by the Court of Justice where what might be labelled as transnational judicial review has for the first time been accepted by the Court: the possibility that, in so-called horizontal composite procedures, the judiciary of the State to which the authority adopting the final act of the procedure belongs review, along with such latter act, preparatory acts adopted in earlier stages of the procedure by authorities of a different Member State. It strives to read the rulings against the broader background of the judicial dialogue currently engaged into by the European Court of Human Rights and the Court of Justice on the principle of mutual trust, and it argues that the progressive solution reached by the Court of Justice in those cases can be applied across all areas of EU administrative law, pivoting on the right to an effective judicial remedy, but also on other general principles of EU constitutional law (and, in particular, the principles of autonomy and uniformity of EU law).

KEYWORDS: transnational judicial review – right to an effective judicial remedy – composite procedures – cooperation in fiscal matters – autonomy of EU law – uniformity of EU law.

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I. INTRODUCTION

As is now almost a commonplace to point out,¹ the evolution of the EU towards the creation of a “European administrative space” has given rise to a striking paradox. On the one hand, according to a convincing periodisation,² it led to the setting up, from the 1990s onwards, of an “integrated administration”,³ whereby administrative authorities from the EU and the Member States (hereinafter: MS) have come to act in a regime of ever growing, close co-operation, involving not only the joint execution of EU law, but also a continuous and informal exchange of information, ideas, and best practices. On the other hand, the judiciary meant to review the acts emanating therefrom has remained strongly fragmented. A strict adherence to the traditional doctrine of executive federalism, under which the judicial authority competent for reviewing administrative acts is, in procedures where integration takes the shape of a procedural link between EU and MS’ authorities (so-called “vertical composite procedures”),⁴ that of the system to which the final act of the proce-

¹ See, for instance, B. MARCHETTI, *Il sistema integrato di tutela*, in B. MARCHETTI, L. DE LUCIA (eds), *L'amministrazione europea e le sue regole*, Bologna: Società Editrice Il Mulino, 2015, p. 197 *et seq.* (in particular, pp. 197-200).

² Both the concept of “European administrative space” and the periodisation referred to have been developed in H.C.H. HOFMANN, *European Administration: Nature and Developments of a Legal and Political Space*, in G. DELLA CANANEA, C. HARLOW, P. LEINO (eds), *Research Handbook on EU Administrative Law*, Cheltenham – Northampton: Edward Elgar Publishing, 2017, p. 21 *et seq.* (in particular, pp. 23-28). According to Hofmann, the “European administrative space” amounts to “the phenomenon of the coordinated formation of policies and subsequent implementation of EU law which is marked by a high degree of close cooperation between MS’ administrations on various levels, EU institutions and bodies as well as private, semi-private and public standard-setting bodies” (*Ibid.*, p. 23). In the author’s account, such phenomenon, closely linked with “his” concept of “integrated administration” (see below, note 3), is the outcome of an evolution which, starting in the 60s with a “vertical” integration of the MS’ legal systems, opened the latter to rules on administrative action stemming from the Community, passed through a further stage of “horizontal” integration from the 70s onwards, where the mutual recognition obligation imposed on MS by the *Cassis de Dijon* jurisprudence (Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe Central Ag v. Bundesmonopolverwaltung für Branntwein*) opened each State’s legal systems to extra-territorial legal effects produced by other States’ authorities. The third stage – in fact, the emergence of the “integrated administration” – was, in such construction, (also) a response elaborated by the legal systems concerned to the hurdles posed by horizontal integration, in terms of risks of substantial deprivation of the protection offered by regulatory standards implicit therein.

³ The notion has, as is well known, first been powerfully developed in H.C.H. HOFMANN, A.H. TÜRK, *Conclusions: Europe’s Integrated Administration*, in H.C.H. HOFMANN, A.H. TÜRK (eds), *EU Administrative Governance*, Cheltenham – Northampton: Edward Elgar Publishing, 2006, p. 573 *et seq.* (in particular, pp. 580-591). In its most synthetic and effective expression, the concept was used to address “the idea that EU administrative governance takes place within a framework, where supranational and national bodies are linked together in the performance of the tasks entrusted to the European Union” (*Ibid.*, p. 583).

⁴ For this terminology, see, *inter alios*, H.C.H. HOFMANN, *Decisionmaking in EU Administrative Law – The Problem of Composite Procedures*, in *Administrative Law Review*, 2009, p. 199 *et seq.* (in particular, pp. 202-203).

dure belongs, has given rise to significant gaps in judicial protection, upon which most publications problematizing the issues of integrated administration have focused.⁵

On the contrary, scholars have not paid an equal attention to the similar concerns raised by so-called “horizontal composite procedures”,⁶ whereby the authorities being procedurally integrated are those belonging to different MS. Yet, the core conundrum of integrated administration is here to be found as well: the review performed by the judiciary of the legal system to which the “final” act belongs (let us call it judge in State A), vested with competence for hearing claims against such act (which, in turn, is most often the only reviewable one),⁷ is hindered by the lack of competence, as a matter of principle, to review the acts adopted in earlier stages of the procedure by authorities of another MS (we can call it State B). This allocation of competence and these limits on judicial review are, essentially and historically, concerned with considerations of sovereignty: since in these cases acts other than the final one are attributable to authorities of State B, sovereignly equal to State A, reviewing the act adopted by the former would amount to an unacceptable intrusion on its sovereignty. Hence, in most cases the “final” judiciary will refrain from reviewing earlier stages of the procedure, declining jurisdiction to do so.⁸ It can also be added that the opposite solution would entail significant practical hurdles, in terms of the judge of State A having to apply standards of legality set by the legal system of State B, which the judge does not most likely know, or does not even have access to.

Whether these assumptions are tenable in the context of the European administrative space will be assessed in this *Article*. What is important to underline here is that declining jurisdiction to assess the legality of preparatory acts adopted by administrative authorities of the “first” State in the procedure undermines the effectiveness of the judicial review carried out on the final act, because earlier acts contribute in determining, to a degree which varies depending on the features of the procedure at stake, the outcome of the procedure as a whole. The most obvious case is that of procedures where the “final” authority enjoys no discretion and merely formalises a decision the substantive content of which is determined elsewhere, but instances where another authority’s

⁵ See, *ex multis*, G. DELLA CANANEA, *The European Union’s Mixed Administrative Proceedings*, in *Law and Contemporary Problems*, 2004, p. 197 *et seq.* (in particular, pp. 201-203 and pp. 213-214); B.G. MATTARELLA, *Procedimenti e atti amministrativi*, in M.P. CHITI (ed.), *Diritto amministrativo europeo*, Milan: Giuffrè Editore, 2013, p. 327 *et seq.* (in particular, pp. 336-338); M. ELIANTONIO, *Judicial Review in an Integrated Administration: the Case of ‘Composite Procedures’*, in *Review of European Administrative Law*, 2014, p. 65 *et seq.* (in particular, pp. 96-102).

⁶ See H.C.H. HOFMANN, *Decisionmaking in EU Administrative Law*, *cit.*, pp. 202-203.

⁷ In many cases this outcome, far from being a mere conclusion of legal logic (even though one might argue that this would be the case, in that it is more rational to challenge the procedure once it is over, and the legal situation is clearly settled), is mandated by rules on reviewable acts adopted by national legal systems. See, to that effect, M. ELIANTONIO, *Judicial Review in an Integrated Administration*, *cit.*, pp. 82-83.

⁸ In the context of EU composite procedures, this is predicated to find a further, specific justification in the principle of mutual trust between MS (see *infra*, Section III).

impulse acts as a necessary trigger for the whole procedure are not less problematic. The non-reviewability of the earlier act entails, respectively, a risk that no redress is afforded against an arbitrary overstepping of the authority's discretion, and the possibility that an act is adopted without the conditions set forth by the European legislature for doing so having been fulfilled.

The present *Article* will try to assess whether, at the state of EU law, the traditional doctrine of non-reviewability of other States' acts in horizontal composite procedures can be overcome. It will do so by analyzing the case-study of administrative cooperation in fiscal matters, and, in particular the recent ruling delivered by the Court of Justice in the case of *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes* (hereinafter, *Berlioz*),⁹ where, in essence, the carrying out of this review was required of national judges (Section II). The argument deployed by the Court to this end will be assessed, and its interrelationship with other principles of EU constitutional law will be explored, in order to assess whether *Berlioz* could amount to an authority liable to be extended to horizontal composite procedures in general (Section III). The conclusion reached will then be tested against another recent case dealt with by the Court, *Donnellan*,¹⁰ to be used to explore what the currently prevailing attitude of the Court on the matter seems to be, as well as what prospective developments could be foreseen (Section IV). Some concluding remarks will finally be made (Section V).

II. THE CASE OF *BERLIOZ*: TOWARDS TRANSNATIONAL JUDICIAL REVIEW

Berlioz was a Luxembourgish joint stock company, which had established a French subsidiary which paid dividends to it. The French tax administration initiated proceedings in order to assess whether the relationship between the two companies complied with the requirements set forth by French tax laws for an exemption from withholding tax to be granted. It therefore addressed the Luxembourgish tax administration a request for exchange of information on *Berlioz*.

Such administration, being in principle bound by the request under Art. 5 of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC,¹¹ addressed *Berlioz* an order asking for certain information, which the company provided in whole, except for the names, addresses and capital detained by its shareholders. In *Berlioz's* opinion, the requirements

⁹ Court of Justice, judgment of 16 May 2017, case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*.

¹⁰ Court of Justice, judgment of 26 April 2018, case C-34/17, *Donnellan*.

¹¹ "At the request of the requesting authority, the requested authority *shall* communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries" (emphasis added). See *infra* for the content of Art. 1, para. 1. Certain limitations on the obligation to provide information, as well as to carry out enquiries to obtain it where it is not immediately available, are to be found in Art. 17 of the Directive (which, nonetheless, is of no relevance here).

set forth in Art. 1, para. 1, of Directive 2011/16 for the exchange of information to be requested, namely that the information sought be “of foreseeable relevance” to the administration and enforcement of taxes covered by the Directive,¹² had not been fulfilled, so that the company could legitimately refuse to provide the Luxembourgish authority with such information.¹³

As a consequence, the Luxembourg tax authority imposed a fine upon Berlioz, which the company challenged before the Luxembourgish administrative judge. The ground for challenging the decision was the alleged ill-foundedness of the information order which the penalty aimed at enforcing: Berlioz argued that the French request, which amounted to a pre-condition for the information order to be issued, was ill-founded in turn,¹⁴ the information lacking foreseeable relevance. The court of first instance, while reducing the amount of the fine, refused to adjudicate on the issue of well-foundedness of the underlying order, and confirmed the existence of the penalty upon the company.¹⁵ Berlioz therefore claimed before the court of second instance an impairment of its right to an effective judicial remedy, as guaranteed by Art. 6, para. 1, of the European Convention for the Protection of Human Rights (ECHR), on the part of such refusal to adjudicate.¹⁶

The Luxembourgish *Cour administrative*, apparently on its own motion, speculated on the applicability of the analogous and broader provision of Art. 47 of the Charter of Fundamental Rights of the European Union (Charter), and referred to the Court of Justice a series of preliminary questions whereby it asked, in essence, whether, in the first place, the Charter applied at all to the controversy at issue. Were the Court to answer in the positive, the national court asked whether the Charter’s right to an effective remedy implied a power on the part of the national court to review, in the context of a claim brought against the decision imposing a penalty for the enforcement of an information order issued pursuant to an information request under Art. 5 of Directive 2011/16, both the information order and the information request upon which this was founded, and

¹² More precisely, Art. 1, para. 1, reads as follows: “This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2”.

¹³ *Berlioz*, cit., paras 21-24.

¹⁴ *Ibid.*, paras 25-26.

¹⁵ *Ibid.*, para. 27.

¹⁶ The resort to the ECHR, instead than to the Charter, can probably be explained by the fact that the falling of the controversy “within the scope of EU law” for the purposes of Arts 47 and 51 of the Charter was not so clear-cut, as, when the controversy involving *Berlioz* took place (2015), the controversial ruling in Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC], which allowed for such claims to be deemed as covered by the Charter, had only been rendered since a little time. Proof of this can be found in the fact that the Luxembourgish Court also referred a question on the applicability of the Charter (see *infra*).

to review the latter in the light of the aforementioned requirement of “foreseeable relevance” of the information sought. Lastly, the court asked whether, were such a power to be conferred upon it, the national court, taking account of the secrecy which Art. 16, para. 1, of the Directive attaches to the information request, should have access thereto in order to be able to carry out its review.¹⁷

The Court did not encounter many hurdles, recalling the doctrine developed in *Åkerberg Fransson*,¹⁸ in maintaining that the Charter was applicable in the case at stake.¹⁹ Nor did it find it difficult to uphold AG Wathelet’s conclusion that the right to an effective judicial remedy, as guaranteed by Art. 47 of the Charter, could subsequently be invoked.²⁰ Given that this right entails the power of the judge “to consider all the rel-

¹⁷ *Berlioz*, cit., paras 27-31.

¹⁸ *Åkerberg Fransson*, cit. This was the famous case where the Court developed the doctrine that measures of fiscal enforcement, such as criminal proceedings brought against tax evaders or punitive surcharges imposed upon the latter, would amount to measures of “implementation of Union law” for the purposes of Art. 51 the Charter, the provisions of which the MS would therefore be bound to comply with, in that they amounted to a way for States to abide by the obligation to set forth measures for the protection of the Union’s financial interests stemming from Art. 325 TFEU (*Åkerberg Fransson*, cit., paras 25-26). The Court also noted, in this respect, that, as long as a relationship of a means (the enforcement measure) to an end (the protection of the Union’s interests) could be found, it was immaterial whether the measure had been enacted with the purpose of complying with Art. 325, or not (*Åkerberg Fransson*, cit., para. 28). See, for a brief discussion of the possible systemic implications and limits of this doctrine, J.E. VAN DEN BRINK, W. DEN OUDEN, S. PRECHAL, R.J.G.M. WIDDERSHOVEN, *General Principles of Law*, in J.H. JANS, S. PRECHAL, R.J.G.M. WIDDERSHOVEN (eds.), *Europeanisation of Public Law*, Amsterdam: Europa Law Publishing, 2015, p. 115 *et seq.* (in particular, p. 152 *et seq.*).

¹⁹ *Berlioz*, cit., paras 32-42.

²⁰ The issue of what the limits of the right enshrined in Art. 47 of the Charter are, given that its wording requires that “rights and freedoms guaranteed by the law of the Union” be at stake, is indeed debated. This is particularly so in cases, such as *Berlioz*, where this condition is not satisfied; here, given that the main object of dispute was the well-foundedness of the penalty, which was not directly governed by EU law. The Court, in para. 49 of the judgment, simply maintained that “fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter”. On the other hand, and more persuasively, AG Wathelet opted, in his Opinion delivered on 10 January 2017, case C-682/15, *Berlioz Investment Fund SA v. Directeur de l’administration des Contributions directes*, paras 50-68, for construing Art. 47 in the light of its historical development as an unwritten general principle, essentially upholding the rule of law, and of the intention, on the part of the drafters of the Charter, to broaden the scope of protection when compared with Arts. 6 and 13 of the ECHR, thereby finding that “Article 47 of the Charter necessarily entails the right of access to justice, that is to say, the possibility for an individual to secure a rigorous judicial review of any act capable of *adversely affecting his interests.*” (para. 67 of the Opinion; emphasis added). The other option available to the Court would have been that of further drawing towards a generalisation of the principle underlying the finding made in the earlier case of Court of Justice, judgment of 5 November 2014, case C-166/13, *Mukarubega*. In this judgment the Court held that general principles, as they emerge from the case-law, are a different legal institution than fundamental rights enshrined in the Charter, even when there is apparent correspondence between the two, to the effect that the unwritten principle can be used to overcome restrictions placed by the drafter of the Charter upon the scope of the written provision. This would have meant, in the case at stake, to apply directly

evant issues”, the Court further inferred that “the national court hearing an action against the pecuniary administrative penalty imposed for failure to comply with an information order must be able to examine the legality of that information order”.²¹

Given the strict interrelation of such order (in this case, the Luxembourgish one) with the information request (the French one), though, the Court was soon faced with the question whether this review would entail also a power to review such underlying request, its emanation from a different MS notwithstanding. Finding that, in the context of the procedure under Directive 2011/16, “characterization of the requested information as being of ‘foreseeable relevance’ is a condition of the request relating to that information”,²² the Court held, in a potentially landmark decision, that the court of the requested State was to review this aspect of the information request’s legality, though limiting to satisfying itself that the information not be “manifestly devoid of any foreseeable relevance”.²³ As a corollary, the last question was answered in the sense that, where this is necessary for such review to be carried out, the national judge must be given access to the information request, its secrecy in principle notwithstanding.²⁴

III. TRANSNATIONAL JUDICIAL REVIEW AND THE CONSTITUTIONAL LAW OF THE UNION

The core of the judgment appears to be the Court of Justice’s recognition of the admissibility, and, indeed, of the mandatory character in the light of Art. 47 of the Charter, of what might be labelled as “transnational judicial review”: that is, of the carrying out, on the part of the judge of the legal system to which the final act of a composite procedure belongs, of judicial review over the preparatory acts issued by an administrative authority belonging to the legal system of a different MS.²⁵

the general principle alluded to by AG Wathelet, without unduly stretching the wording of Art. 47. See, in this respect, J.E. VAN DEN BRINK, W. DEN OUDEN, S. PRECHAL, R.J.G.M. WIDDERSHOVEN, *General Principles of Law*, cit., p. 141 *et seq.*

²¹ *Berlioz*, cit., paras 55-56.

²² *Ibid.*, para. 64.

²³ *Ibid.*, paras 82-86.

²⁴ *Ibid.*, paras 90-101.

²⁵ In this context, “preparatory act” must be understood in a broad sense, encompassing all those acts which, irrespective of their precise function in a composite procedure, are set forth in the applicable Union legislation as necessarily preceding the issuance of the “final act” – namely, the act which produces legal effects outside of the administration. The most obvious case is when the preparatory act is adopted as the basis for determining the discretionary content of a legally binding act (e.g., in the centralised procedure leading to the marketing authorisation of medicinal products pursuant to Arts 5-10 of Regulation (EC) 726/2004, the opinion issued by the European Medicines Agency is used as a basis by the Commission in adopting the decision as to whether or not to grant the marketing authorisation). In *Berlioz*, while not displaying any influence on the discretion of the Luxembourgish administration as regards the content of a legally binding act (that is, the information order), the French information request issued under Art. 5 of Directive 2011/16 is the necessary antecedent of the “administrative enquiry” carried out by the

Such a possibility has historically been deemed problematic, in the first place owing to considerations of sovereign equality between States, and in the second place owing to the practical difficulties it could have entailed.²⁶ In the particular context of the EU legal system, it has been ruled out in general under the principle of mutual trust informing the relationship between the MS. As the Court famously put it in the landmark Opinion 2/13,²⁷ this principle “requires [...] each of those States, save in *exceptional circumstances*, to consider all the *other Member States to be complying with EU law* and particularly with the fundamental rights recognised by EU law”.²⁸ As clarified by Judge Lenaerts,²⁹ more carefully elaborating in a personal capacity on a hint contained in Opinion 2/13 itself,³⁰ mutual trust is a fundamental principle of the Union’s constitutional law, which finds a basis in the principle of equality of the MS before the treaties,³¹ and a specific justification in the common set of values which all MS commit to abide by under Art. 2 TEU.³² Under this approach, mutual trust, while being of relevance first and foremost in the context of the area of freedom, security and justice (Arts 67-89 TFEU), in the context of which it was first developed, is to shed light on, and to be applied in, all policy areas of the EU.

While not expressly mentioning Opinion 2/13, the Court made reference to this problem in *Berlioz*, where it stated that, Directive 2011/16 being “founded on rules intended to create *confidence between Member States*”, the authorities of the MS requested to provide

Luxemburgish authority pursuant to Art. 6 of the Directive, and can therefore qualify as a “preparatory act” for the purposes of the present analysis.

²⁶ See *supra*, section I.

²⁷ Court of Justice, opinion 2/13 of 18 December 2014.

²⁸ *Ibid.*, para. 191 (emphasis added).

²⁹ K. LENAERTS, *La Vie Après l’Avis: Exploring the Principle of Mutual (yet not Blind) Trust*, in *Common Market Law Review*, 2017, p. 805 *et seq.*

³⁰ See Opinion 2/13, *cit.*, para. 168: “This legal structure [the constitutional system of the EU, including its institutional structure and the principles of primacy and direct effect of EU law] is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, asset of common values on which the EU is founded, as stated in Article 2 TEU. *That premise implies and justifies the existence of mutual trust* between the Member States that those values will be recognized and, therefore *that the law of the EU that implements them will be respected*” (emphasis added). This reasoning has been recently reasserted by the Court of Justice, quoting Opinion 2/13, in another seminal case such as Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea* [GC], para. 34. It is interesting to notice that, in both cases, Judge Lenaerts sat in the Court, in the former as vice-president, and in the latter as president.

³¹ As it is to be found in Art. 4, para. 2, TFEU, which, in the relevant part, reads: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”

³² K. LENAERTS, *La Vie Après l’Avis*, *cit.*, pp. 807-812. Art. 2 TEU, in turn, reads: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

information “must, *in principle*, trust the requesting authority and *assume that the request for information [...] is necessary* for the purposes of its investigation”.³³ The traditional inference from this finding would have been to deny the national court’s jurisdiction to carry out an autonomous review in this respect. Yet, the Court of Justice allowed the *Cour administrative* to review the French decision, essentially referring to Art. 47 of the Charter. What follows is an analysis of the reasoning behind this choice, coupled with a discussion of whether other principles of EU constitutional law might bolster it, in order to inquire into whether the Court’s conclusion is liable to be generalised to other horizontal composite procedures, beyond Directive 2011/16.

III.1. THE RIGHT TO AN EFFECTIVE JUDICIAL REMEDY

That, as noted above, the right to an effective judicial remedy implies that the national judge be able to assess “all relevant issues” to decide on the legality of a contested measure is by no means a novelty of this judgment.³⁴ Still, so far, the Court of Justice had been reluctant to allow a review of those “relevant issues” amounting to administrative acts emanating from other MS on two main grounds. One of these was the second of what Judge Lenaerts has named “the two negative obligations placed on the MS by the principle of mutual trust”:³⁵ in the words of Opinion 2/13, Member States, “save in exceptional cases, may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”,³⁶ and this conclusion seems to be valid, *a fortiori*, for cases where the application of EU law does not entail an impingement on fundamental rights. Further, the Court has repeatedly stated, albeit in a somehow simplistic manner, that preparatory measures in horizontal composite procedures are, in general, to be reviewed by the judges of the legal system they emanate from, as the authorities “best placed to judge the legality of the measure according to [their] national law”.³⁷

The reason why the Court decided to depart from its traditional stance should be viewed precisely in the light of the “exceptional cases” quoted in the aforementioned excerpt of Opinion 2/13. One bare year before the judgment in *Berlioz*, the European Court of Human Rights delivered a judgment in *Avotiņš v. Latvia*,³⁸ where it held, in the

³³ *Berlioz*, cit., para. 77 (emphasis added).

³⁴ The precedent most often quoted in this respect is Court of Justice, judgment of 4 June 2013, case C-300/11, *ZZ*, where, at para. 59, the Court held that the review of the legality of the decision at stake in the main proceedings (a refusal to grant entry into the territory of the UK based on national security grounds) should cover “all the grounds and the related evidence on the basis of which the decision was taken”.

³⁵ K. LENAERTS, *La Vie Après l’Avis*, cit., p. 813.

³⁶ Opinion 2/13, cit., para. 193.

³⁷ See, though in a different context which, nonetheless, involves fiscal cooperation issues, and is thereby of interest, Court of Justice, judgment of 14 January 2010, case C-233/08, *Kyrian*, para. 40. The case will be addressed in more detail *infra*, section IV.

³⁸ European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia*.

context of the limits of the so-called “*Bosphorus* presumption”,³⁹ that “if a serious and substantiated complaint is raised before [the judge of a MS of the EU] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, [that judge] cannot refrain from examining that complaint on the sole ground that [it is] applying EU law”.⁴⁰ In *Avotiņš*, the EU law being complained of was precisely the system of mutual recognition of judgments envisaged by the so-called “Brussels I Regulation”, one of the most prominent examples of the principle of mutual trust, explicitly quoted by Opinion 2/13 itself.⁴¹

Many scholars have seen in *Avotiņš v. Latvia* a reaction on the part of the European Court against Opinion 2/13, and a call upon the placement of limitations on the principle of mutual trust, when it could interfere with the enjoyment of fundamental rights.⁴² In the contribution published in a personal capacity already referred to above, Judge Lenaerts argued that the acceptable exceptions to the principle of mutual trust under Opinion 2/13 should be read precisely in the light of *Avotiņš*.⁴³ That is, in his account, the “exceptional circumstances” mentioned in Opinion 2/13, allowing MS to deviate from the obligation to refrain from double-checking other MS’ compliance with EU law, should be deemed to prevail when, as requested by the European Court of Human rights in *Avotiņš*, “substantial grounds” are found for believing, in individual cases, that an application of such principle would entail a “real risk” of breaching fundamental rights. This appears to be precisely what the Court of Justice did, shortly after the publication of Judge Lenaerts’ article, in *Berlioz*, and it is arguably by no means an accident that Judge Lenaerts himself sat in the Grand Chamber in his capacity of president of the Court.⁴⁴ Though not explicitly quoted, *Avotiņš v. Latvia* indeed seems to permeate the AG’s and the Court’s reasoning in *Berlioz*.⁴⁵

³⁹ Reference is made here to the well-known doctrine, developed in European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, under which the European Court would refrain, as a rule, from examining claims brought against State Parties to the ECHR for conduct amounting to a mere implementation, lacking any degree of discretion, of obligations stemming from membership in an international organisation, such as the EU, offering a system of protection of human rights comparable, from both the substantive and the procedural point of view, with that under the ECHR.

⁴⁰ *Avotiņš v. Latvia*, cit., para. 116.

⁴¹ Opinion 2/13, cit., para. 192, where the Court underlined the importance of the principle of mutual trust “particularly with regard to the area of freedom, security and justice”.

⁴² See P. GRAGL, *An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights’ Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case*, in *European Constitutional Law Review*, 2017, p. 551 *et seq.*

⁴³ K. LENAERTS, *La Vie Après l’Avis*, cit., pp. 828-837.

⁴⁴ The issue of the *Common Market Law Review* containing Judge Lenaerts’ article was published in April 2017, whereas the judgment in *Berlioz* was delivered in May 2017. Overall, it seems to be fair to assume that Judge Lenaerts played a key role in the theoretical justification and judicial operation of the

AG Wathelet grounded his finding that the Luxemburgish court should be able to review the French information request on a reading of Art. 47 of the Charter, pursuant to Art. 52, para. 3, thereof,⁴⁶ in the light of the European Court of Human Rights' case-law. As involving a penalty, the main proceedings amounted to "the determination of a criminal charge", thereby triggering the applicability of Art. 6, para. 1, of the ECHR and requiring that an "independent and impartial tribunal" could review the legality of the decision imposing that penalty.⁴⁷ Given that Berlioz was submitting "substantial grounds" that such aspect of Art. 6 had been violated, in that the Luxembourgish court of first instance had refused to review the legality of the information order on which the penalty depended (that is, the fulfilment of the condition of "foreseeable relevance" of the information sought by the French tax authorities, on which the information order further depended), if the case had ended up to Strasbourg it could have led, under *Avotiņš*, to the first rebuttal ever of the *Bosphorus* presumption. That the AG's Opinion was of the outmost relevance to the Court's reasoning is, in turn, shown by the fact that the conclusion on the obligation on the part of the Luxembourgish court to review the legality of the information order is grounded on a recall of the AG's analysis,⁴⁸ and that the limits on the subsequent review of the information request are the same as those advocated by AG Wathelet.⁴⁹

The implications of this finding might extend well beyond the limited scope of Directive 2011/16, as Art. 47 of the Charter and the principle of mutual trust are institutions of a general application in the context of EU (administrative) law. The reasoning deployed in *Berlioz* is thus capable of being generalised, first and foremost, to all cases where a national measure, qualifying as "criminal" in the aforementioned sense, of enforcement of a decision reached at the outcome of a horizontal composite procedure is

principle of mutual trust in the "modern" version which seems to be emerging in the recent case law of the Court of Justice referred to in this paper.

⁴⁵ That *Avotiņš v. Latvia* is of general concern to the EU institutions can be inferred not only from the circumstances referred to *sub* note 44, but also from the submissions issued by the Commission to the Court of Justice in the later, and in many respects analogous, case of *Donnellan* (see *infra*, Section IV).

⁴⁶ "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

⁴⁷ Opinion of AG Wathelet, *Berlioz*, cit., paras 73-80. The qualification of the penalty at stake as "criminal" for the purposes of Art. 6 of the ECHR is, in turn, grounded on the jurisprudence first developed in European Court of Human Rights, judgment of 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, *Engel and others v. the Netherlands* [GC], where it was held that also measures qualifying as "administrative" under national law (such as the penalty imposed on Berlioz) can be deemed "criminal" for the purposes of Art. 6, taking into account, in particular, the nature of the offence for which they are applied and the nature and severity of the penalty itself.

⁴⁸ *Berlioz*, cit., para. 56.

⁴⁹ *Berlioz*, cit., paras 79-85. Space precludes here an in-depth analysis of this aspect of the judgment, as this paper is focused on the admissibility of transnational judicial review as a matter of principle.

challenged before a national court: in all such cases, Art. 47 of the Charter and Art. 6 of the ECHR would be breached, in the same way as they would have been in *Berlioz*, if the national judge refused to examine the legality of the decision underlying the enforcement measure. The reach of *Berlioz* might be even broader, though. As pointed out above,⁵⁰ in the Court's reasoning, Art. 47 of the Charter is, unlike Art. 6, para. 1, of the ECHR, applicable "in all situations governed by EU law", irrespective of whether a "civil right or obligation" or a "criminal charge" is at stake.⁵¹ Therefore, *Berlioz's* reasoning can be used to find a right to bring a claim against *any* alleged violation of EU law committed in the context of a horizontal composite procedure, without having to wait, as in *Berlioz*, that an enforcement measure is enacted, for the case to involve a "criminal charge" and thereby to trigger the narrower protection offered under the ECHR.

This latter aspect is, further, strictly intertwined with the overcoming of the Court's second stance recalled above – namely, that transnational judicial review ought not to be carried out, given that the judges of the MS in which the preparatory act is adopted are the ones best placed to assess the legality of that act itself in the light of "their" national law. As is apparent from the case at stake, the very fact that a procedural link between authorities from different MS exists implies that, to a certain extent, an EU norm is applied in the procedure. In the case of *Berlioz*, this was the conditioning of France's power to request Luxembourg for information on the requirement that the information sought be "of foreseeable relevance", and the assessment of whether such condition was fulfilled was the ambit of the information request's legality which the Court of Justice urged the *Cour administrative* to review. Thus the Court implicitly recognised, as some scholars had already hinted at,⁵² that there appears to be no reason why, in principle, the judges of a MS

⁵⁰ See note 20.

⁵¹ These are, indeed, the conditions under which Art. 6, para. 1, of the ECHR is applicable. The concept of "civil right or obligation" is particularly controversial, and appears not to have been fleshed out with precise contours by the European Court of Human Rights, which rather seems to approach on a somehow casuistic basis the most controversial, and most interesting for the purposes of the present research, case where the provision could be invoked – i.e., the bringing of claims against alleged violations of public law provisions. Nonetheless, a wide range of administrative law situations has been accepted by the Court to fall under the notion of "civil right and obligation", to the effect that the ECHR's provision itself would be liable to be applied in many other cases of horizontal composite procedures. See, in this respect, C. OVEY, B. RAINEY, E. WICKS, *The Right to a Fair Trial*, in F.G. JACOBS, C. OVEY, R.C.A. WHITE (eds), *The European Convention on Human Rights*, Oxford: Oxford University Press, 2017, p. 274 *et seq.* (in particular, pp. 278-284).

⁵² See H.C.H. HOFMANN, A. TÜRK, *Legal Challenges in EU Administrative Law by the Move to an Integrated Administration*, in H.C.H. HOFMANN, A. TÜRK (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Cheltenham – Northampton: Edward Elgar Publishing, 2009, p. 355 *et seq.* (in particular, pp. 375-376). The argument was advanced in the context of vertical composite procedures and with regard to the jurisdiction of EU Courts to review preparatory acts issued by national administrative authorities, but it applies *a fortiori* in horizontal procedures, given that the strongest argument for excluding such a "top-down" review, namely the limits placed on EU Courts' jurisdiction in the light of the principles of conferral (Arts 263-281 only envisage EU acts as possible object of review in the context of the various actions liable to

should not be allowed to review the compliance of the administrative authorities of another MS with EU law, to which both MS are bound, and, as recalled by Judge Lenaerts in the passage quoted above, in respect of which both MS are equal. On the contrary, the admissibility of transnational judicial review in this context is in line, from the political point of view, with the argument that, in the context of the EU and of its “shared sovereignty”, the executive authorities of each MS are accountable not only before “their own” people, but also before those of other MS, to the effect that the “old” doctrine of sovereign equality as a factor preventing such review⁵³ loses much of its appeal.⁵⁴ From the legal point of view, this fits well with the notion of “national judges as [Union] courts of general jurisdiction”,⁵⁵ whereby national courts are considered as the ordinary fora where Union law should find judicial enforcement and redress against any breach thereof – an aspect which also leads us to the broader horizon of EU constitutional law.

III.2. OTHER PRINCIPLES OF CONSTITUTIONAL LAW OF THE UNION

Brito Bastos⁵⁶ has noticed that, in the context of “bottom-up” vertical composite procedures, where the final act is adopted by EU authorities on the basis of preparatory acts issued by national authorities, a number of fundamental principles of the EU constitutional order clash with each other as regards the question of whether the Court of Justice should be able to review the legality of the acts issued in the national steps of the procedure. On the one hand, one would conclude in the affirmative, in order to grant an effective judicial protection and the upholding of the “objective aspect of the rule of law” – namely, the need for executive authorities’ activity to be guided by the norms laid down by democratically legitimised rule-makers.⁵⁷ On the other hand, opening to such a possibility would risk to overstep the limits placed on the jurisdiction of the CJEU, as this is not competent to review acts emanating from national authorities.⁵⁸ Similarly, this would risk to hinder the principles of autonomy of EU law, given that the lawfulness of EU acts would be assessed in the light of norms of national law,⁵⁹ and of uniformity thereof, as the validity of such acts would depend on whether different national authorities executing the same EU law provisions comply with the respective national laws or not.⁶⁰

be triggered before the judiciary of the Union) and of subsidiarity, does not apply in this form of composite administrative cooperation (also see, in this latter respect, *infra*, section III.2).

⁵³ See note 8 and corresponding text in the main body.

⁵⁴ See S. CASSESE, *La Democrazia e i Suoi Limiti*, Milan: Arnoldo Mondadori Editore, 2017, p. 86.

⁵⁵ This is the formula first deployed in Court of First Instance, judgment of 10 July 1990, case T-51/89, *Tetra Pak Rausing SA v. Commission*, para. 42.

⁵⁶ F. BRITO BASTOS, *Derivative Illegality in European Composite Administrative Procedures*, in *Common Market Law Review*, 2018, p. 101 *et seq.*

⁵⁷ *Ibid.*, p. 102 and pp. 112-113.

⁵⁸ *Ibid.*, p. 111. Also see note 53.

⁵⁹ *Ibid.*, p. 111.

⁶⁰ *Ibid.*, p. 112.

The point made here is that, when it comes to horizontal composite procedures, one would find no such conflict between equally overarching principles, capable of preventing the judge of the “final” MS from reviewing the acts adopted by the authorities of the MS involved in the earlier stages of the procedure. As far as the reasons for allowing a broadened (i.e. transnational) judicial review are concerned, the situation is indeed comparable with the one prevailing in the context of vertical, “bottom-up” procedures. It is *Berlioz* itself which shows how ineffective the judicial protection afforded to the citizens would be, were violations of EU law committed at the stage of preparatory acts not to be open to judicial scrutiny in the context of a review carried out on the final act of the procedure: in fact, *Berlioz* would have been subjected to a fine imposed on it for non-compliance with an order, the legislative requirements for the issuance of which were lacking, with no judge vested with the power to redress such breach of the applicable legal provisions. Moreover, the “objective aspect of the rule of law” identified by Brito Bastos definitely seems worthy of being safeguarded in the context of horizontal composite procedures as well, the administrative authorities involved being bound to execute the will of the EU democratically legitimised legislature, just as much as they do when they co-operate with EU authorities.

Yet, no further comparison is to be drawn. Quite the contrary, one could even argue that those very same principles which, in the context of vertical, “bottom-up” procedures, prevent EU final acts from being affected by derivative illegality on account of breaches of the applicable provisions committed in the national stages of the procedure, not only do not place a similar brake on judges from the “final” legal system involved in a horizontal procedure, but do even require them to perform the transnational judicial review sketched above. On the one hand, the principle of strict separation between EU and national courts does not have a corresponding tenet as to the relationship between MS, save for the principle of mutual trust, which has been held liable to be set aside by *Berlioz*, and for that of sovereign equality which, though, does not match with the reality of the EU’s shared sovereignty and “horizontal accountability”.⁶¹ On the other hand, the uniformity of EU law would benefit from the possibility to carry out transnational judicial review: given that most often preparatory acts are not reviewable independently of the final decision,⁶² were it not possible to scrutinise them on the part of the national court competent on the basis of the final act of the procedure, a serious risk of leaving the interpretation of the norms on which they are based at the discretion of the national administrative authority adopting them would arise.⁶³ Therefore, the argument which one could develop to restrict judicial protection in the context of “bot-

⁶¹ This is the term deployed by Cassese in the work quoted *sub* note 54.

⁶² See note 7.

⁶³ This would have indeed been the case if the Court had reached a different conclusion in *Berlioz*, as the concept of “foreseeable relevance” of the information sought would have been left at the discretion of the interpretive autonomy of the French fiscal administration.

tom-up” vertical composite procedures cannot be simply transposed to the same effect in horizontal procedures: indeed, it could lead to the opposite finding.

IV. THE CASE OF *DONNELLAN*: ONE STEP FORWARD?

IV.1. DIRECTIVE 2010/24 AND THE CASE OF *DONNELLAN*

One bare year after *Berlioz*, the Court of Justice was confronted with another case involving cooperation in fiscal matters, the hurdles posed by which make it an interesting yardstick to measure the extent to which *Berlioz* might be deemed to embody a new sensitivity of the Court towards the problems surrounding gaps in judicial protection in horizontal composite procedures. *Donnellan*⁶⁴ involved the different, yet in many respects analogous system for cross-border collection of taxes set up by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.⁶⁵ Under this Directive, a number of arrangements are made available to European fiscal authorities, with the purpose of allowing for “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”⁶⁶ to be provided. As made clear by Art. 1 of the Directive, such assistance is to be provided in cases where the recovery of one of the claims encompassed by the scope of the Directive arisen in State A is to be effected in State B, e.g. because the taxpayer has their assets or their residence in such latter State.

The most important, and strictly interrelated with each other, devices in such system of mutual assistance are the arrangements for assistance in the notification of documents relating to a claim and in respect of recovery of the claim itself. Under the former, the authority of the State in which the claim has arisen (“the applicant authority”) can ask for the authority of the State in which the notification is to take place (“the requested authority”) to notify to the addressee of a claim all documents emanating from the applicant MS, when the applicant authority is unable to notify them directly or could do so only encountering disproportionate difficulties.⁶⁷ However, assistance regarding recovery of the claim can be provided where an enforceable instrument permitting the recovery of one of the claims covered by the Directive in the applicant MS is available, and such recovery needs to be effected in the requested MS. In such a case, and as long as such instrument and the underlying claim are not contested in the applicant MS and all available procedures

⁶⁴ *Donnellan*, cit.

⁶⁵ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. For an early overview of the system set up therein, see B. TERRA, P. WATTEL, *European Tax Law*, Deventer: Kluwer, 2012, p. 845 *et seq.*

⁶⁶ Directive 2010/24/EU, Recital 1.

⁶⁷ *Ibid.*, Art. 8.

for the recovery to be carried out in the applicant MS have been undergone,⁶⁸ fiscal authorities in the applicant MS can request to the authorities of the requested MS to proceed with the recovery themselves.⁶⁹ In doing so, they are to submit a “uniform instrument permitting enforcement in the requested MS”, the content of which is standardised by the Directive itself, and which is directly and *per se* enforceable in the requested MS, without being subject to any act of recognition, supplementing or replacement.⁷⁰ The expeditious and proficient processing of the recovery request is ensured by an obligation placed on the requested authority to treat the claim “as if it was a claim of the requested MS”.⁷¹ As a matter of principle, the requested authority is bound to comply with any request of assistance, of notification as well as of recovery, provided the respective conditions briefly outlined above are fulfilled.⁷²

Given the complexity of the resulting system and the involvement of substantive tax claims on its part, which is obviously liable to give rise to an exceptional load of litigation initiated by taxpayers contesting the duty levied on them, the EU legislature introduced a provision for the apportionment of competence to hear judicial claims brought against the various acts through which the assistance arrangements are to unfold. Therefore, pursuant to Art. 14, the judiciary of the MS to which the applicant authority belongs is vested with jurisdiction as regards disputes concerning *a*) the substantive tax claim, *b*) the validity of the initial instrument permitting enforcement in the applicant State, *c*) the uniform instrument permitting enforcement in the requested State and *d*) the validity of a notification made by a competent authority of the applicant State. Conversely, judges in the requested MS can hear pleas challenging *a*) the measures of enforcement taken in such State pursuant to the request for assistance, as well as *b*) a notification made by a competent authority of the requested MS itself. Such allocation of jurisdiction is conceived by the legislature in rather strict terms, and appears to rest on the assumption that judges in each of the MS concerned are those best placed to assess the lawfulness of claims originating in “their own” legal system, also taking into account the only limited harmonisation of national provisions prevailing in the fiscal field. In this connection, no exception from such allocation of jurisdiction is provided for in Art. 14.

It was precisely this rigid division of judicial competences which was questioned in *Donnellan*. The case concerned the imposition, on the part of the Greek authorities in April 2009, of an administrative penalty over Mr. Donnellan, an Irish citizen, in relation with his alleged involvement in a case of cigarettes smuggling and issuance of fictitious

⁶⁸ *Ibid.*, Art. 11, para. 2, of which also lays down some limited exceptions for the need for all available recovery procedures to have been undergone in the applicant MS.

⁶⁹ *Ibid.*, Art. 10.

⁷⁰ *Ibid.*, Art. 12.

⁷¹ *Ibid.*, Art. 13.

⁷² A number of exceptions to the obligation for the requested authority to provide the requested assistance are spelled out by Art. 18 of Directive 2010/24/EU.

tax data. The contested facts, though, had taken place in July 2002, and Mr. Donnellan had been acquitted of all charges on appeal as early as in October that same year.⁷³ What was more, Mr. Donnellan was not made aware of the existence of the fine any earlier than in November 2012, when he was reached by an order, issued by the Irish fiscal administration, reclaiming the payment of the fine pursuant to the request for recovery assistance issued, under Art. 10 of Directive 2010/24, by the Greek authorities, the claim amounting to an administrative penalty connected with a tax claim and thereby falling within the scope of application of the Directive pursuant to Art. 2 thereof. By the time he was reached by such communication, to which a uniform instrument permitting enforcement in Ireland was attached, Mr. Donnellan had been barred from challenging the decision before Greek courts, the relevant limitation period having already elapsed.⁷⁴ In the ensuing litigation which Mr. Donnellan brought before the Irish judge, seeking relief from the enforceability of the order, it emerged that the Greek embassy had addressed a letter to him in June 2009, “inviting him to make contact with the embassy’s services”, without any further specification; still, such letter was never received by Mr. Donnellan, and the Greek authorities had satisfied themselves with publishing the fine on the *Official Journal of the Hellenic Republic*.⁷⁵ Moreover, the very same communication issued in November 2012 by the Irish authorities only referred to the claim as “multiple duties for illegal cigarette trading”, and Mr. Donnellan was not made aware of the grounds underlying the decision until December 2015, when the last of a series of letters elaborating on the matter was delivered to him.⁷⁶

The Irish judge was willing to grant relief to Mr. Donnellan, on account of both the failure on the part of the authorities involved to properly notify to him the instruments relevant to his possibilities of defence, and of the earlier acquittal in respect of the contested facts, fearing that allowing for the decision to be enforced in such circumstances would have contravened Irish public policy. Still, it found the path to so doing barred by Art. 14 of Directive 2010/24: such a refusal to enforce the order would have entailed an assessment of the legality “of a notification made by a competent authority in the applicant MS” (as regards the lack of notification) and of “the initial instrument permitting enforcement in the applicant MS” (as regards the *ne bis in idem* aspect of the dispute) – both appraisals which Art. 14 of the Directive, as seen above, attributes to the remit of the jurisdiction of the judges in the applicant MS. The Irish judge therefore decided to stay the proceedings, issuing a preliminary reference to the Court of Justice whereby it

⁷³ *Donnellan*, cit., paras 16-21. Still, the possible (likely?) problems to be found as regards compliance with the principle of *ne bis in idem*, enshrined in Art. 50 of the Charter, is not touched upon by the ruling.

⁷⁴ *Ibid.*, para. 34.

⁷⁵ *Ibid.*, paras 22-30.

⁷⁶ *Donnellan*, cit., para. 35.

asked, in essence, whether such an impossibility to refuse the enforcement of the decision was compatible with Art. 47 of the Charter.⁷⁷

The Court began its reasoning by apparently ruling out the possibility for transnational judicial review to be carried out in the context of a request for recovery assistance. It recalled Opinion 2/13 and the principle of mutual trust to which the relationship between fiscal authorities under Directive 2010/24 must be informed,⁷⁸ and held that, in view of the explicit wording of Art. 14, the Irish judge was barred from reviewing the legality of the conduct engaged into by the Greek authorities.⁷⁹ However, it went on to find that, pursuant to the ruling delivered in *Kyrian*,⁸⁰ “the requested authority may, exceptionally, decide not to grant its assistance to the applicant authority, [...] *inter alia* if it is shown that such enforcement is liable to be contrary to the public policy of [the requested MS]”.⁸¹ Thus, explicitly conceiving such a refusal of assistance as an exception to the principle of mutual trust, thereby mandating for a narrow construction, it struggled to identify under which circumstances such an option would be available to the requested authority.

Essentially restating the view articulated by the AG in his Opinion, it found that one of the conditions laid down in Directive 2010/24 for the assistance request to be issued, namely that the claim not be contested in the applicant MS, could not be deemed to be fulfilled in a case such as that of Mr. Donnellan: as being informed of the existence of a claim is a necessary precondition for such claim to be open to judicial contestation, a claim which could not be contested on the grounds that the taxpayer was not made aware of its very existence could not be deemed as fulfilling such non-contestation requirement.⁸² Such a conclusion was reached stressing the importance of Art. 47 of the Charter, the standard of effectiveness of which could not be deemed to have been complied with in circumstances such as those at stake.⁸³ Preventing possible allegations

⁷⁷ *Ibid.*, paras 36-38.

⁷⁸ *Ibid.*, paras 40-41. It is interesting to notice here that, by contrast, in *Berlioz* no express reference to Opinion 2/13 as such had been made. This might signal an increasing willingness of the Court to progressively broaden the scope of the principle beyond the area of freedom, security and justice to which it was primarily tied by Opinion 2/13 (and, possibly, in the direction suggested in K. LENAERTS, *La Vie Après l'Avis*, cit., extensively referred to above, section III). See, underlining this aspect of the judgment, F. PÉRALDI-LENEUF, *Confiance Mutuelle en Matière de Recouvrement de Créance, in Europe, in Europe – Actualité du Droit de l'Union Européenne*, 2018, pp. 18-19.

⁷⁹ *Donnellan*, cit., paras 44-46.

⁸⁰ Court of Justice, judgment of 14 January 2010, case C-233/08, *Kyrian*. This was the immediate antecedent to *Donnellan*, delivered construing Directive 76/308/EEC which was, in turn, the immediate antecedent to Directive 2010/24 and contained, in particular, a provision analogous to Art. 14 of such latter Directive, as restricting the jurisdiction of the judge in the requested MS to “enforcement measures taken in the Member State in which the requested authority is situated”. See *infra* for further detail.

⁸¹ *Donnellan*, cit., para. 47, quoting *Kyrian*, cit., para. 42.

⁸² *Donnellan*, cit., para. 57.

⁸³ Art. 47 is quoted in both para. 55 and para. 58. Curiously enough, though, while in the conclusion the Court focuses on the fact that Mr. Donnellan was not informed at all of the existence of the fine, so

in the opposite on the part of Greece from being made, the Court held that such finding was not open to contestation on the grounds that Mr. Donnellan had still been notified the uniform instrument permitting enforcement, given that the function of such instrument is to provide the requested authority with a legal title to enforce the recovery, and not to place the taxpayer in a position as to assert their rights.⁸⁴

Not unlike in *Berlioz*, then, the Court was faced with a case where the conditions set forth by an EU norm for an act to be issued in the context of a horizontal administrative proceeding were not fulfilled; unlike in *Berlioz*, however, it was confronted with a legislative norm explicitly stating that a plea aiming at having such violation reviewed by a court, as one relating to the uniform instrument permitting enforcement, ought to be brought before a judge in the applicant MS. The dilemma was solved in favour of effective judicial protection: contrary to the view taken at the outset of the ruling, the Court posited that, reading Art. 14 of Directive 2010/24 in the light of Art. 47 of the Charter, the restrictive allocation of jurisdiction enshrined in the former provision “[could not] reasonably be invoked against [Mr. Donnellan]”,⁸⁵ to the effect that the Irish judge could not be considered as being prevented from refusing to enforce the Greek request for recovery on the grounds which Mr. Donnellan was complaining about.

IV.2. ASSESSMENT

The case of *Donnellan* went largely unnoticed,⁸⁶ most likely because it was perceived by commentators as a mere restatement of the principles which could already be inferred from the way more annotated case of *Kyrian*, briefly mentioned above. *Kyrian* was delivered in the context of proceedings brought by a Czech taxpayer against an instrument permitting enforcement in the Czech Republic, issued pursuant to a request for assistance in the recovery of a claim made to the Czech authorities by the German fiscal administration under 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. This measure lays down a system broadly comparable to the refined one set up by Directive 2010/24, including, for the present purposes, as regards the system for assistance in the

that he was prevented from challenging the decision before a Greek judge, as implied by the allocation of jurisdiction enshrined in Art. 14 of the Directive (para. 57), on the reasoning in those paragraphs it stresses, rather, the fact that he was not made aware of the facts and reasoning underlying the decision itself. This is probably due to the fact that, as pointed at in para. 60, the Greek Government claimed in its submissions before the Court, contrary to what had initially been maintained, that Donnellan was not barred from bringing a claim in a Greek court by Greek procedural law. Still, the reasoning appears somehow ambiguous, both in content and in structure.

⁸⁴ *Donnellan*, cit., para. 53.

⁸⁵ *Ibid.*, para. 59.

⁸⁶ The case information webpage on the CJEU's website (available at curia.europa.eu) only mentioned three scholarly articles addressing the case. The authors of this contribution were not able to identify, by means of an autonomous research, any further academic reference to the ruling.

notification of documents and in the recovery of claims, and the ensuing apportionment of jurisdiction.⁸⁷ Mr. Kyrian complained about not being allowed to fully understand the scope of the claim after having been notified the instrument permitting enforcement by the Czech authorities, on two accounts. Firstly, because of the fact that the identification of the debtor contained therein was unclear, it being possible to understand it as referring to Mr. Kyrian himself, as well as to his father and his son. Secondly, because the documents emanating from Germany which had been served on him by the Czech authorities, had not been translated from German, and could therefore not be understood by him. It was in this context that the Court first developed the principle that while, pursuant to the allocation of jurisdiction between the MS involved, it was not possible for the judges of the requested MS to assess the legality of the underlying claim *per se*, such judges could still refuse enforceability of the order in their domestic legal system, when such an enforcement would be liable to breach such State's public policy.⁸⁸ For such a refusal to be made, though, the judge in the requested MS would still need to be given jurisdiction, and one which would not be excluded under the provisions then in force. Given that such provisions envisaged the jurisdiction of judges in the requested MS only as regarded "enforcement measures" taken in the requested MS,⁸⁹ the Court construed such concept in an extensive manner, so as to encompass "notification to the addressee by the requested authority of all instruments and decisions which emanate" from the applicant MS,⁹⁰ as being

⁸⁷ 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, as amended by Council Directive 2001/44/EC of 15 June 2001 amending 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, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties.

⁸⁸ *Kyrian*, cit., paras 42-43. The conclusion, eminently dictated by considerations of substantive justice, was reached reasoning on the equation, highlighted above in the context of Directive 2010/24, between the (now, uniform) instrument permitting enforcement upon request of the applicant MS, on the one hand, and national instruments permitting enforcement in the requested MS, on the other hand. In more detail, the Court held that "it is hard to imagine that [a national instrument permitting the enforcement of the claim] would be enforced [by the requested MS] if that enforcement were liable to be contrary to the public policy of that State" (*ibid.*, para. 43). That is, interestingly, the Court resorted to an indent which was inserted by the legislature with the primary purpose of ensuring that the authority in the requested MS would diligently and expeditiously process the request issued by the applicant authority, in order to strengthen taxpayers' rights in a system lacking strong safeguarding provisions in this respect. However, in doing so, it accepted the risk that the effectiveness and speed of the collection be jeopardised, contrary to the apparent assumptions of the legislature (the focus on the effectiveness of the recovery proceeding can also be seen in the "whereas" part of Directive 76/308), reminding of the equally ranking importance of safeguarding the position of taxpayers.

⁸⁹ See Directive 76/308, Art. 12, para. 3. On the other hand, judges in the applicant MS were then vested with jurisdiction to adjudicate disputes concerning either the substantive tax claim or the instrument permitting enforcement in the applicant MS (Directive 76/308, Art. 12, para. 1).

⁹⁰ *Kyrian*, cit., para. 46.

“the first stage of the enforcement” – a solution which, as shown above, was subsequently codified in Art. 14, para. 2, of Directive 2010/24.⁹¹

Yet, *Donnellan* differs from *Kyrian* in some important respects, and what is argued here is that it signals a further advancement in the Court’s openness to admitting the carrying out of transnational judicial review in the context of horizontal composite procedures. First and foremost, in *Donnellan* it was the applicant (Greek) authority which (purportedly) notified the documents relating to the claim to the taxpayer, without availing itself of the possibility to ask for the assistance of the requested (Irish) authority envisaged in Art. 8 of Directive 2010/24. Admittedly, this was the decisive flaw in the proceeding initiated against Mr. Donnellan: the first document reaching him was the uniform instrument permitting enforcement in Ireland, which, as recalled above, was deemed insufficient by the Court to fulfill the requirements of Art. 47 of the Charter. In *Kyrian*, on the opposite, the whole notification process was undertaken by the requested (Czech) authority. This core factual difference is conducive to wholly different decisory outcomes.

Hence, whereas in *Kyrian* the Court could interpret the concept of “enforcement measures” taken by the requested (Czech) authority so as to encompass notifications performed by such authority in compliance with its own national law without contravening the overall logic underlying the allocation of jurisdiction in the Directives concerned,⁹² and without encountering any positive legal provision preventing it from doing so, none of the above conditions prevailed in *Donnellan*. Quite the contrary, refusing to enforce the uniform instrument permitting enforcement in Ireland implied directly reviewing the notification carried out by the Greek authorities pursuant to Greek law, that which was explicitly ruled out by Art. 14, para. 1, of Directive 2010/24. The Court was thus forced to simply state that the norm “cannot reasonably be invoked” against Mr. Donnellan – quite awkward a conclusion, which hints at the fact that, had the preliminary reference been one of validity rather than one of interpretation, the Court could have been forced to declare the provision null and void, at least insofar as it was to be applied in exceptional circumstances such as those at stake. Moreover, the right to an effective judicial remedy is nowhere quoted in *Kyrian*.⁹³ The conclusion reached there only drew on a self-sufficient construction of the concept of “enforcement measures” in the context of Directive 76/308, and even when it came to assessing the limits of the review to be carried out on the notifica-

⁹¹ See, as regards the ensuing “outdating” of this aspect of *Kyrian*, I. DE TROYER, *The Tax Debtor’s Right of Defence in Case of Cross-Border Collection of Taxes*, in *EC Tax Review*, 2019, p. 18 *et seq.* (in particular, pp. 22-23).

⁹² Which the Court itself explained in the following terms in *Kyrian*, *cit.*, para. 40: “[The Directive’s allocation of jurisdiction] results from the fact that the claim and the instrument permitting 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 [...] the provisions which its national law lays down for corresponding measures, that authority being the best placed to judge the legality of the measure according to its national law”.

⁹³ A point also made in F. PÉRALDI-LENEUF, *Confiance Mutuelle*, *cit.*

tion from the perspective of the flaws highlighted by Mr. Kyrian, reference was only made to a self-standing function of the notification “to make it possible for the addressee to understand the subject-matter and the cause of the notified measure and to assert [their] rights”.⁹⁴ On the contrary, as shown above, the decisive factor leading the Court to conclude for the setting aside of the secondary law norm in *Donnellan* is Art. 47 of the Charter – that which, in turn, was the only way for such an outcome to be tenable, given that the wording of Art. 14 was directly conflicting with the solution the Irish court was attempting to be given leeway for.⁹⁵

These factual and legal differences, coupled with the fact, underlined above, that this time the Court decided to read the case in terms of mutual trust and exceptions thereto, places *Donnellan* in the strand of jurisprudence opened by *Berlioz*, in terms of (gradual and cautious) opening on the part of the Court to the concept of transnational judicial review. First and foremost, *Donnellan* goes one step further than *Kyrian*, and could, in the future, be liable to amount on its own to a further authoritative precedent for advocates of transnational judicial review as an integral part of the Union’s system of judicial protection. Whereas *Kyrian* was structurally not able to exit the limited remit of Directive 76/308, in that it was wholly based on the cluster of legal concepts contained therein, *Donnellan* relies on an overarching norm of a general application, Art. 47 of the Charter, meant to apply across the whole of the EU legal system and, at the very least, to foster similar, extensive constructions of relevant, sectoral norms. The analysis sketched above in Section III can therefore be recalled: there seems to be no reason why the same conclusion should not be reached in the context of any other horizontal composite procedure, in the light of both the general scope of Art. 47 and the other principles of constitutional law of the Union liable to be of relevance here.⁹⁶

⁹⁴ *Kyrian*, cit., para. 58.

⁹⁵ *En passant*, it might also be noticed that, unlike in *Berlioz*, the Court in *Donnellan* completely overlooked the question of whether Art. 47 of the Charter was applicable, even though the situation in the two cases was, in this respect, profoundly similar (as in *Berlioz*, apparently no “right and freedom guaranteed by the law of the Union”, but rather, at best, a mere question of whether a substantive, de-subjectivised Union norm governing administrative action had been complied with, was at stake). The Court seemed simply to rely on the assumption that Art. 47 was applicable, hastily mentioning, referring to *ZZ*, cit., that “a decision adversely affecting [the applicant’s] interests” was involved (*Donnellan*, cit., para. 55). Interestingly, still, AG Tanchev mentioned in his Opinion delivered on 8 March 2018, case C-34/17, *Eamonn Donnellann v. The Revenue Commissioners*, para. 60, that, the situation being “governed by EU law”, Art. 47 was applicable *sic et simpliciter*, and expressly quoted *Berlioz* itself (which, as recalled above, precisely concluded for such a correspondence between EU law in the abstract and the right to an effective judicial remedy) to ground such statement.

⁹⁶ Indeed, also in this case the principle of autonomy of EU law is fostered by the possibility for the Irish judge to apply relevant EU norms (the conditions placed on the request for assistance in the recovery of claims – but, that this is what was really at stake in *Donnellan* is objectionable: see *infra*, as well as Art. 47 itself) irrespective of any influence possibly displayed by Greek law; and so is the principle of uniformity, given that the review carried out by the Irish judge, with its openness to the issuance of prelimi-

Still, *Donnellan* also goes one step further *Berlioz* itself. Whereas *Berlioz* essentially implied a direct application of Art. 47 of the Charter on the part of the Court, allowed by the legal vacuum left by the legislature in Directive 2011/16 as regards issues of jurisdiction, *Donnellan* signals the willingness of the Court even to set aside secondary law norms taking an explicit stance *against* transnational judicial review. This amounts, in effect, to directly applying Art. 47, an operation which is conceptually not as straightforward, since Art. 47 of the Charter, *qua lex generalis*, should in principle give way to Art. 14 of the Directive, *qua lex specialis*. Furthermore, as a general matter, conflicts of such kind are to be addressed by means of a hierarchical approach, resulting in a declaration of invalidity of the secondary norm, rather than by a mere non-application thereof. Under this line of reasoning, one would therefore conclude that the Irish court should have issued a reference of validity, aiming at having the conflict between the two provisions settled through a declaration of Art. 14 of the Directive null and void *in parte qua*. Given that it opted not to do so, the Court nonetheless reached a functionally equivalent solution by means of the preliminary question of interpretation procedure. It thus seems that, relying on *Donnellan*, judges across the Union will be able to review foreign acts in horizontal composite procedures, directly applying Art. 47, even in cases where they would explicitly be barred from doing so by norms of secondary law, and without being compelled, pursuant to the *Foto-Frost* jurisprudence,⁹⁷ to ask a preliminary question on the validity of those restrictive norms.

When placed into context, this latter aspect shows how the Court of Justice is, silently, applying the principles stated by the European Court of Human Rights in *Avotiņš*. Whereas the Court carefully avoids mentioning it explicitly, this emerges quite clearly from *Berlioz*, and is all the more evident in *Donnellan*. The Court had no real need to read the whole case through the lenses of mutual trust and of exceptions thereto, as it could have simply looked at the allocation of jurisdiction in the framework of the specific legislation at stake, also taking into account that mutual trust is a principle referring, first and foremost, to the area of freedom, security and justice. Yet, in the very same moment it decided to do so, it opened its reasoning to scrutiny from the perspective of *Avotiņš*. The outcome eventually reached is, in turn, in line with *Avotiņš*' requirement for the national courts not to "refrain from examining [a serious and substantiated complaint that a Convention right has been manifestly deficient] on the sole ground" that

nary references to the Court of Justice, prevents uneven interpretations of those norms from being given by fiscal authorities throughout the Union, without the possibility to bring about homogeneity in courts.

⁹⁷ Court of Justice, judgment of 22 October 1987, case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*. Reportedly, the Court of Justice found in this case that "The national courts have no jurisdiction themselves to declare that measures taken by Community institutions are invalid", to the effect that, where they so deem, they have no alternative but to issue a validity preliminary reference.

EU law is being applied.⁹⁸ Indeed, Mr. Donnellan's claim that his right to an effective judicial remedy was being impaired was rather "serious and substantiated", given the exceptional circumstances of his case, and given that Art. 14 of the Directive was essentially preventing him from having access to any form of judicial redress. The question addressed to the Court of Justice by the Irish judge, in turn, sought to clarify whether that norm was to be applied mechanically, the risk of a breach of Mr. Donnellan's right to effective judicial protection notwithstanding. The Court then accepted that Art. 14 could be disregarded in circumstances such as those at stake; however, as hinted at above, in the internal logic of the EU system of remedies such disregard could be predicated not to be acceptable, as, in cases of breach of a primary law provision, secondary law norms should rather be declared null and void. It is, therefore, arguably to meet the European Court of Human Rights' concerns that the Court of Justice allowed for the non-application of rather explicit a norm: again, as in *Berlioz*, had it not allowed the Irish judge to do so, it would have been confronted with the risk of Mr. Donnellan's case being brought before the European Court, leading to the conclusion that the applicant's rights had been breached because of the application of EU law and rebutting the *Bosphorus* presumption. Cherry on top, it was the Commission itself in its submissions which, as emerges from the Opinion of AG Tanchev, urged on the Court to allow the Irish judge to refuse enforcement of the uniform instrument, precisely on the grounds of the need for *Avotiņš v. Latvia* to be complied with, strengthening the impression that such an apparently strange decision can be explained in terms of judicial dialogue between the Court of Justice and the European Court of Human Rights.⁹⁹

One further remark can be made. Once it reaches the conclusion that the Irish judge's jurisdiction can be affirmed, the Court takes an ambiguous stance as regards the *object* of the review to be carried out exercising that jurisdiction. As recalled above, the Court takes the view that enforcement can be refused because the request could not be made, since the condition that the claim not be contested in the applicant MS, was not fulfilled. This

⁹⁸ See note 40 and corresponding text in the main body. The analysis carried out above, at note 47 and corresponding text in the main body, as regards the applicability of Art. 6 of the ECHR in the case at stake can also be recalled here, since in *Donnellan* as well an administrative penalty, qualifying as a "criminal charge" for the purposes of Art. 6, is at stake.

⁹⁹ See Opinion of AG Tanchev, *Donnellan*, cit., paras 45-46: "The Commission takes the view that [*Avotiņš*] resolves the dilemma in the main proceedings. Applying principles established in *Avotiņš v. Latvia* [...] it follows that, normally, the requested Member State is precluded from reviewing the validity or enforceability of the instrument, where the plaintiff has not exhausted legal remedies. However, in exceptional cases, where the court of the requested State is satisfied beyond any reasonable doubt that no effective judicial remedy is available to the interested person in the applicant Member State, then the division of roles set out in Article 14 of Directive 2010/24 should not apply. Consequently, the courts of the requested Member State may exceptionally review whether the enforcement of the instrument is liable, in particular, to lead to a manifest breach of the fundamental right to an effective judicial remedy under Article 47 [...] and a flagrant denial of justice and, in such case, refuse to execute the request for recovery of the claim".

was, in essence, the view taken by AG Tanchev in his Opinion,¹⁰⁰ which admittedly tried to resolve the case by making exclusive reference to the system set up by Directive 2010/24 and to the *Kyrian* jurisprudence, arguably in an attempt to dilute the overt clash between Art. 47 of the Charter and Art. 14 of the Directive.¹⁰¹ In other words, the flaw identified by the AG and the Court is of a *substantive* nature, and hereby comparable with *Berlioz*: the preparatory act (the request for assistance in the recovery) was adopted *ultra vires*, as the conditions laid down by the legislature for the administrative authority to issue it (that the claim not be contested in the “home” legal system) were not fulfilled, and hence the final act (the uniform instrument permitting enforcement in Ireland or, *rectius*, its enforceability) is affected by derivative illegality.¹⁰² Therefore, even if the Court does not elaborate on the point, under this line of reasoning, in terms of the allocation of jurisdiction pursuant to Art. 14 of the Directive the claim involved a “dispute concerning the uniform instrument permitting enforcement in the requested MS”.

Yet, this analysis can be questioned. As recalled above, AG Tanchev’s line of reasoning essentially aimed at reconciling Art. 14 of the Directive with Art. 47 of the Charter. Accordingly, he focused not so much on the uniform instrument of enforcement (that which would have entailed an acknowledgement of the unambiguous wording of the provision, attributing the dispute to the jurisdiction of Greek judges), but, rather, on “the letter of demand” sent by the Irish authorities to Mr. Donnellan, to which such instrument was attached. The latter, in AG Tanchev’s view, “amounted to an enforcement measure within the meaning of Art. 14(2) of Directive 2010/24, and one that was issued by the requested authority under conditions that were not in compliance with the right to effective judicial protection”.¹⁰³ The Irish judge’s jurisdiction could thus be established without any need to set Art. 14 aside, as under that provision such judge is competent to hear claims involving “enforcement measures taken in the requested Member State”, and enforcement of the measure could thus be refused resorting to the *Kyrian* jurisprudence.

As shown above, however, the Court is way more open to recognise the conflict between Art. 14 of the Directive and Art. 47 of the Charter (that which the AG only admitted subsidiarily),¹⁰⁴ and it can thus be questioned whether there is any real need to resort to

¹⁰⁰ *Ibid.*, paras 63-71.

¹⁰¹ *Ibid.*, para. 69: “If [...] the first step of notification does not take place until after the issue of a uniform instrument permitting enforcement [...], enforcement of the claim can be challenged, pursuant to the *Kyrian* case, before the courts of the requested State [...]”.

¹⁰² See note 82 and corresponding text in the main body.

¹⁰³ Opinion of AG Tanchev, *Donnellan*, cit., para. 89.

¹⁰⁴ See *ibid.*, para. 89, the second limb of which reads: “*In the alternative*, the competence of the bodies of requested Member States [*sic*; this is clearly a typo, and the AG actually refers to applicant MS] under Article 14(1) of Directive 2010/24 with respect to disputes concerning enforcement instruments is to be read subject to compliance with the sequence of request for information, notification and enforcement that is established by Directive 2010/24, *the text of Article 14(1) and recital 12 notwithstanding*. *In its*

AG Tanchev's analysis. That this reasoning is artificial is shown by the outcome of the ruling: the Irish judge will be able to refuse to enforce the claim "on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to [the requested authority]",¹⁰⁵ and it will do so by setting Art. 14 of the Directive aside. In other words, the Court is actually concerned with an eminently *procedural* issue: as highlighted above, what the Court reprimands is that Mr. Donnellan was not "able to know and understand effectively and completely the meaning and scope of the action brought against him",¹⁰⁶ to the effect that Art. 47 of the Charter effectively works not only as an argument to establish the Irish judge's jurisdiction, but, indeed, also as the benchmark against which to assess the legality of the whole of the composite procedure. In the wording of Art. 14 of the Directive, what is to be set aside is not, in fact, as artificially maintained, the allocation on the Greek judiciary of the competence to hear "disputes concerning the uniform instrument permitting enforcement in the requested Member State", but, rather, that to judge on "the validity of a notification made by a competent authority of the applicant Member State". Once the Court decided to recognise and tackle the conflict between such apportionment and Art. 47 of the Charter, it would have been desirable, for the sake of clarity, that an argument explicitly developed to conceal such conflict not be resorted to.

Elucidating this point, *Donnellan* can therefore be usefully contrasted to *Berlioz* to show the different shapes which transnational judicial review can take. On the one hand, in *Berlioz*, we have a genuinely *substantive* review of the preparatory act on the part of the judge of the MS to which the authority adopting the final act belongs: the Luxembourgish court reprimands the French authority for having issued a request for information in a case where the conditions laid down by the Union's legislature for doing so were not fulfilled, the information sought lacking foreseeable relevance. On the other hand, in *Donnellan*, we have a *procedural* review of the preliminary act, disguised as a substantive one: the Irish court reviews whether the notification undertaken by the Greek administration complies with a procedural standard meant to secure the effective possibility for Mr. Donnellan to assert his rights and interests, conveyed in the substantive provisions governing the power for the administrations involved to levy taxes and impose penalties on him.

What is interesting is that, unlike in *Berlioz*, where action undertaken by the Luxembourgish authority could be reviewed in the light of a relatively precise substantive secondary law norm, such procedural standard is not contained in a provision precisely detailing the procedure to be followed, as Directive 2010/24 does not provide, as such, for a

absence, it is for the competent bodies of the requested Member States to review compliance of the enforcement process with Article 47 of the Charter" (emphasis added).

¹⁰⁵ *Donnellan*, cit., para. 62.

¹⁰⁶ *Ibid.*, para. 58, quoting case law rendered in the domain of the area of freedom, security and justice and, in particular, concerning the service and notification of judicial documents. See note 86, as regards the lack of clarity to be found in the ruling in this respect.

unitary composite procedure whereby transnational notification of relevant documents is necessarily tied to recovery of the claim. This is so, because requests for assistance in notification and requests for assistance in the recovery can be sent independently of one another (and, indeed, *Donnellan* entailed precisely a request for assistance in the recovery not preceded by any request for assistance in notification, and the Court did not show any concern with this hiatus as such).¹⁰⁷ What is at stake is the minimum and abstract standard provided for by Art. 47 of the Charter. The review carried out by the Irish court is therefore not different, in nature, from the one which could be performed by the European Court of Human Rights, or by the Court of Justice itself, in a classical constitutional-like adjudication – and this could sound rather shocking in terms of sovereign equality between MS. One might be tempted to conclude that intrusions on the sovereignty of State A on the part of judges in State B can be accepted in a case such as *Berlioz*, or assuming that an administrative procedure minutely regulated by an EU norm is regulated in each and every step, so that violations thereof can be pointed out in a rather uncontroversial manner, but that allowing B to review A's action in the light of such a value-laden and sensitive benchmark as a human rights norm is all too much.

However, constitutionally upheaving as it may seem from a traditional, sovereignty-focused perspective, the outcome in *Donnellan* does indeed seem to be the natural corollary of the system of shared sovereignty prevailing in the EU. In the case of substantive flaws the judge in State A is entitled to review the preparatory act issued by the authority in State B, in that the respective legal systems are integrated by the provision laying down the conditions under which each authority is entitled or required to act in the context of the composite procedure, and the judge in A is required to apply the

¹⁰⁷ AG Tanchev took, in his Opinion, *Donnellan*, cit. (paras 63-71), a different view, claiming that the Directive “set[s] out a sequence providing for assistance by way of exchange of information, then notification, then recovery” (para. 65), and grounded his reading of the substantive flawedness of the uniform instrument permitting enforcement precisely on such sequence. Still, that the various forms of cross-border assistance in the recovery of claims are conceived of by the legislature as independent of each another is apparent from Recital 7 of the Directive, and it is AG Tanchev himself who admits (para. 68) that “the Greek authorities were not obliged to seek the assistance of the Irish authorities [...] to notify the 2009 Assessment act”, in that they retained the possibility to do so under Art. 8, para. 2, of the Directive. That notification of the documents necessary for the taxpayer to fully understand the scope of the claim they are confronted with must precede notification of the uniform instrument permitting enforcement seems, indeed, to be only a consequence of Art. 47 itself, in the light of the Court's finding that the standardised information to be included in the uniform instrument of enforcement is not such as to place its addressee in such a position as to grasp the issue and to raise a defence against it (see note 84 and corresponding text in the main body). In this respect, I. DE TROYER, *The Tax Debtor's Right of Defence*, cit., pp. 21-23, points out that a contemporary issuance of the uniform instrument permitting enforcement in the requested MS and of a document satisfying the requirement that the taxpayer be put in such a position as to be able to assert their rights (be it the uniform notification form envisaged in Art. 8 of the Directive or the initial instrument permitting enforcement in the applicant MS) should, in principle, suffice to bring the procedure in line with the requirements of Art. 47 of the Charter.

norm as much as the authority in B is required to execute it. If this can be accepted without many hurdles, as it has been accepted in the comments to *Berlioz*, the same should in principle be concluded in a hypothetical case, where a detailed procedural provision laid down in secondary law is breached. This is not, however, different in essence from the case of *Donnellan* where such a detailed provision is lacking, but integration between legal systems and authorities is to be found nonetheless – though in the *prima facie* awkward form of a constitutional-like norm such as Art. 47 of the Charter. The equal commitment of Greece and Ireland to administratively execute EU law, therefore, opens to the possibility for the Irish judge to directly review the activity of the Greek authority in the light of the right to an effective judicial remedy, which is, itself, part of the cluster of norms governing the composite procedure.

V. CONCLUDING REMARKS

The case of *Berlioz* might well be the first step on the path towards a fuller and more effective judicial protection, in an area where this has so far been inadequate and defective. The reasoning deployed by the Court shows that, while waiting for more effective solutions to be introduced, with a view to granting full protection also against violations of the national law of the authorities competent for earlier steps of the procedure,¹⁰⁸ it is possible to interpret the current state of EU law, pivoting on the right to an effective judicial remedy, so as to afford redress, at least, against the most egregious violations of the EU norms laying down the conditions under which administrative authorities are to act in the execution of EU law.¹⁰⁹

¹⁰⁸ The proposal in H.C.H. HOFMANN, *Decisionmaking in EU Administrative Law*, cit., pp. 213-214, of envisaging a form of “preliminary rulings from courts of other Member States when necessary to review final decisions established with the input of other Member State agencies under composite procedures”, is the most well-known of such possible solutions.

¹⁰⁹ As anticipated at note 49 and surrounding text, as regards the scope of the review the Court of Justice is actually still somehow cautious, reflecting the finding in Opinion 2/13 that limitations on mutual trust could be tolerated, in principle, “in exceptional circumstances” only. Indeed, the test to be used in scrutinizing the information request is one of inquiring into whether it is “manifestly devoid of any foreseeable relevance” (*Berlioz*, cit., para. 86): an extremely high threshold, the strictness of which is, moreover, further underlined by the finding that, as a matter of principle, the standard for carrying out this assessment should be based on the minimum information which, pursuant to Art. 20, para. 2, Directive 2011/16, the requesting authority must indicate to the requested authority (the identity of the person under fiscal investigation and of any person believed to be in possession of the requested information, as well as the tax purpose for which such investigation is being effected) (*Berlioz*, cit., para. 86). This restrictive approach is, nonetheless, relaxed by the acknowledgement that, on the one hand, the requested authority can, in processing the information request, ask the requesting authority for additional information (*ibid.*, para. 81), and, on the other hand, that, where the minimum information standard referred to above proves not to be sufficient for the lawfulness of the information request to be scrutinised, that the reviewing court can ask the requested authority for such additional information, where it has been provided to the latter (*ibid.*, para. 92).

As this contribution has tried to show, nothing seems to preclude a generalisation of this finding to other horizontal procedures, and accepting the possibility to carry out transnational judicial review in such procedures would also be consistent with other principles of the EU constitutional order, such as those of uniformity and autonomy. The ultimate purpose to be served is the upholding of the rule of law, including its “objective” aspect, which the EU solemnly commits to in the Preamble of the TEU and in Art. 2 of the same Treaty. The most effective way to ensure that the rule of law is respected, in a context where most national legal systems do not allow for preparatory acts to be autonomously challenged before court,¹¹⁰ is precisely that of enabling transnational judicial review in the context of claims brought before the final act. This solution, moreover, finds a powerful conceptual justification in the notion that all judges in all MS are to be regarded as “EU courts of general jurisdiction”, or as *juges de droit commun*. If each and every national court is to be regarded as equally called upon in applying EU law, there seems to be no reason for administrative acts meant to execute such law not to be reviewed in the light of the applicable norms for the mere reason that they emanate from authorities of another MS.

The case of *Donnellan*, on its part, may be thought of as a signal that the Court of Justice is increasingly aware of the gaps in judicial protection ensuing from strictly sticking to the traditional stance on transnational judicial review in horizontal composite procedures, and that it is ready to elaborate on the foundations laid down in *Berlioz* to tackle them. Unlike in *Berlioz*, in *Donnellan* the Court explicitly stretches the principle of mutual trust, as a legal concept, beyond its remit “proper”, that of the area of freedom, security and justice, so as to encompass cooperation in fiscal matters. In doing so it paves the way for even more solid an application of the principles enshrined in *Avotiņš*, which, though keeping on being nowhere mentioned in the ruling as such, amount to the necessary background against which to read the strand of case law which is gradually emerging on these issues, as made evident by the explicit reference to the case made by the Commission in its submissions in *Donnellan*. The ruling can therefore also be viewed as another say in the ongoing judicial dialogue between the Court of Justice and the European Court of Human Rights. While explicitly tying transnational judicial review to mutual trust inevitably dooms it to be an exceptional remedy, just as exceptional are acceptable derogations to mutual trust as developed in Opinion 2/13, it also gives it the potential to become a cross-cutting concept. Indeed, if mutual trust informs the relationship between MS across sectoral policy areas, from the area of freedom, security and justice to cooperation in fiscal matters, so does transnational judicial review, as the corollary to mutual trust itself mandated for by Art. 47 of the Charter. *Donnellan* also indicates that, in the Court’s opinion, the right to an effective judicial remedy can, in fact, be directly applied so as to allow for transnational judicial review to be performed, even where a secondary law norm explicitly excludes

¹¹⁰ See note 7.

such possibility. Albeit not perfectly in line with prevailing attitudes on the system of remedies before the Court, under which in cases of such overt a conflict references of validity should in principle be resorted to, this approach attributes even more potential on the expanding scope of transnational judicial review.

Taken together, *Berlioz* and *Donnellan* also powerfully exemplify that, just like in national administrative law systems, violations of EU law occurring in horizontal composite procedures, requiring redress to be afforded in the shape of transnational judicial review, can be of both a substantive and a procedural nature. In the first case, authorities in the earlier stages of the procedure exercise an executive power without the conditions for doing so laid down in the applicable EU legal act being fulfilled. This is what the French authority did in *Berlioz*, asking the Luxembourgish authority for an information lacking foreseeable relevance. When procedural violations are concerned, it is the procedure meant to place the subjects impinged on by the exercise of administrative power in such a position as to be able to assert the rights they enjoy under substantive law which is disregarded. *Donnellan* shows that this can be the case even where there is no underlying EU substantive norm, and, even more interestingly, where EU law does not regulate the procedure in detail. Mr. Donnellan was not properly given the information needed for an administrative decision affecting his interests to be challenged before court, and this was enough for the course of action undertaken by the authorities involved to fall short of the standard required by Art. 47 of the Charter. The right to an effective judicial remedy is therefore capable of providing a yardstick to directly measure the procedural legality of horizontal composite procedures, while at the same time being the main legal basis upon which transnational judicial review can find its way in the EU legal system.

The policy area of cooperation in fiscal matters is thus working as a powerful laboratory for developments in the case law of the Court of Justice which could be of relevance way beyond its scope, and involve a rethinking of conventional assumptions in EU constitutional law and EU administrative law as a whole. One cannot but welcome the increasing awareness on the part of the Court of the gaps in judicial protection which have this far been left in the field of horizontal composite procedures, and praise the path taken to fill them. If, as Judge Lenaerts argues, the mutual commitment to the protection of fundamental rights and to respect for the rule of law is what justifies the very existence of the principle of mutual trust between the MS, the time has come to draw the necessary consequences thereof, and to allow the judiciary to fully perform its protective function. *Berlioz* and *Donnellan* leave room for doing so. It is now up to the Court not to let down the hopes it has engendered.