

Right to be paid interest on overpayment of taxes in breach of EU Law – Opinion Statement ECJ-TF 3/2023 on the ECJ decision of 8 June 2023 in Case C-322/22, *E. v Dyrektor Izby Administracji Skarbowej we Wrocławiu*

Prepared by the CFE ECJ Task Force

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This is an Opinion Statement prepared by the CFE ECJ Task Force¹ on CJEU's decision of 8 June 2023 in case C-322/22, *E. v Dyrektor Izby Administracji Skarbowej we Wrocławiu*², decided without an Opinion of the AG.³ At issue was the admissibility of a Polish domestic rule that limited the right to the payment of interest on overpayments of corporate income tax in breach of EU law to the period running the thirtieth day following the publication, in the Official Journal of the European Union, of a ruling of the Court of Justice finding that the collection of a certain tax is incompatible with EU law. The Court of Justice considered that such limitation was not admissible by reference to the principles of sincere cooperation, equivalence, and effectiveness in connection with the EU right of individuals to receive interest when receiving a refund of an amount paid in breach of EU law.

I. Background, Facts, and Issues

1. The appellant in the main proceedings is E., an investment fund with registered office in the United States of America. Regarding the tax years 2012 to 2014, E. received income sourced in Poland, and the payment of income was subject to withholding taxation, by the Polish paying agent, at a flat-tax rate. E. considered that such withholding had been levied in breach of EU law based on the CJEU's decision in *Emerging Markets* of 10 April 2014.⁴ The overpayment of tax amounted to PLN 489960.00.
2. On 28 December 2017, E. requested the refund of the overpayment of tax and respective interest, computed from the day of the collection of the overpayments until the day of the full refund.
3. According to the Polish tax code, if a paying agent settles the tax liability of the taxable person, and there is an overpayment in breach of a ruling of the Polish Constitutional Court or of the Court of Justice of the European Union, tax authorities shall reimburse such overpayment in a period of 30 days counted from the request.⁵ The taxable person would also be entitled to interest computed from the day of the overpayment until:
 - a. The moment of the reimbursement, in case the request for reimbursement is submitted within the 30th day from the date on which: i) the Polish Constitutional Court ruling entered into force, or; ii) the ruling of the CJEU is published in the Official Journal of the European Union (OJEU);
 - b. The 30th day in which: i) the Polish Constitutional Court ruling entered into force, or; ii) the ruling of the CJEU is published in the OJ EU; in case the request was submitted after those moments.⁶
4. Poland claims that this limitation is justified by the need to dissuade taxpayers from deferring the requests for reimbursement, deferral which would entitle them to higher amounts of interest.⁷
5. On 2 March 2018, the Polish tax authorities approved the refund of the overpayments of tax, which took place on 28 March 2018.

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² PL: ECJ, 8 June 2023, Case C-322/22, *E. v. Dyrektor Izby Administracji Skarbowej we Wrocławiu*, Case Law IBFD.

³ The Advocate General appointed for this case was T. Čapeta and the Court decided to proceed to judgment without an Opinion after hearing the Advocate General.

⁴ PL: ECJ, 10 April 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company v. Dyrektor Izby Skarbowej w Bydgoszczy*, Case Law IBFD.

⁵ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 10, citing Art. 75, § 1 of the tax code.

⁶ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 13, citing Art. 77, § 14 of the tax code.

⁷ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 44.

6. Regarding the payment of interest due on the overpayment of tax:
 - a. First, on 24 April 2018, the request was fully refused;
 - b. Then, on 6 August 2018, it was partially accepted by the regional director of the tax authorities; in that decision:
 - i. Regarding the tax years 2012 and 2013, the payment of interest was accepted counting from the date of the overpayment of tax until 10 July 2014 (which was the 30th day after the publication on the OJEU of the decision in C-190/12, *Emerging Markets*)⁸;
 - ii. Regarding the tax year 2014, interest was fully refused (as the tax had been collected after the 30th day following the publication of the decision);⁹
7. The applicant appealed to the Regional Administrative Court of Wrocław (which was rejected) and then to the Supreme Administrative Court. This Court distinguished three cases of reimbursement requests:
 - a. Those submitted before the 30th day of the publication of the CJEU decision: interest would run from the moment of the collection until the effective reimbursement;
 - b. Those submitted after the 30th day after the publication but regarding overpayments taking place until that date: interest would run from the moment of the collection until that 30th day; the referring court clarified that even if the situation had not been foreseen in the law, Polish courts would compute interest in these terms, “on the basis similar to those laid down” in the tax code.
 - c. Those submitted after the 30th day after the publication and regarding overpayments also taking place after that 30th day: interest would not be due.¹⁰
8. The Supreme Administrative Court noted that the formula for computing interest was identical regardless of whether the overpayment arose as a result of a ruling of the Polish Constitutional Court or the CJEU.¹¹ It also noted that, according to domestic law, in cases of withholding taxes (as the sub judice situation), the paying agent was required to inform the taxpayer of the amount of tax collected until the 7th day of the month following the collection.
9. The Supreme Administrative Court questioned whether the formula used for computing interest: i) allowed that “the damage caused by the collection of tax not due is made good”, and; ii) was compliant with the EU principle of sincere cooperation.¹²
10. Accordingly, it decided to stay the proceedings and refer the following question to the CJEU:

“Do the principles of effectiveness, sincere cooperation and equivalence expressed in Article 4(3) [TEU], or any other relevant principle laid down in EU law, preclude a provision of national law such as Article 78 § 5(1) and (2) of [the Tax Code], which provides that interest on overpaid tax which is collected by a paying agent in a manner not consistent with EU law is not due to the taxable person for the period after the expiry of 30 days from the date of publication in the Official Journal [of the European Union] of the judgment of the Court of Justice ... declaring that the collection of the tax is incompatible with EU law, where the request for a declaration of that overpayment was submitted by the taxable person after that time limit and the provisions of national law relating to the collection of the tax continue to be incompatible with EU law despite [the judgment in *Emerging Markets*]?”¹³

⁸ See supra n.4.

⁹ According to the Court, the director’s decision was based on the consideration that the taxable person “may oppose the levying of the overpayment by relying on the ruling of the Court”. *E. v. Dyrektor Izby Administracji Skarbowej*, see supra n. 2, § 45.

¹⁰ *E. v. Dyrektor Izby Administracji Skarbowej*, see supra n. 2, § 22-25.

¹¹ *E. v. Dyrektor Izby Administracji Skarbowej*, see supra n. 2, §27.

¹² *E. v. Dyrektor Izby Administracji Skarbowej*, see supra n. 2, § 26.

¹³ *E. v. Dyrektor Izby Administracji Skarbowej*, see supra n. 2, §28.

II. The Judgment of the CJEU

11. The CJEU concluded that the Polish domestic legislation at issue, insofar as limited the computation of interest to the 30th day after the publication on the OJ EU of the Court's ruling leading to the conclusion that there was an overpayment of tax, constitutes a breach of the principle of effectiveness, in conjunction with the principle of sincere cooperation.
12. The reasoning of the Court was structured on the following segments: i) characterization of the principle of sincere cooperation with its dimensions of equivalence and effectiveness; ii) characterization of the right to the payment of interest regarding amounts paid in breach of EU law; iii) assessment of the compatibility of the Polish domestic rules with the principle in its subdimension of effectiveness, and the right referred in i) and ii).
13. The Court starts by characterizing the principle of sincere cooperation, held as the legal basis by the referring Court:

“According to settled case-law, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of an infringement of EU law and to lay down detailed procedural rules, in respect of actions for safeguarding rights which individuals derive from EU law, which are no less favourable than those governing similar domestic actions (principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness).”¹⁴
14. Nullifying adverse consequences requires recognising “the right, under EU law, to obtain from the Member State concerned not only a refund of the sum of money levied though not due but also the payment of interest intended to compensate for the unavailability of the sum”.¹⁵
15. The Court proceeded with the characterization of this right to the payment of interest:
 - a. It is an expression of “a general principle of recovery of sums paid but not due”,¹⁶
 - b. It is based and justified on the fact that a national authority imposed a payment in breach of EU law,¹⁷ being it primary law, secondary law or a general principle of EU law;¹⁸
 - c. It emerges out of any breach of EU law; it can be invoked, inter alia, when the payment is imposed on the basis of: i) incorrect interpretation of EU law; ii) incorrect application of that law;¹⁹
 - d. Aims at compensating “for the unavailability of the sum of money which the person concerned has been wrongly deprived”,²⁰
 - e. Concerns a (self-standing) right which applies even without detailed rules for the exercise of such right;²¹ such rules may be laid down by EU law or by domestic law;²² in the absence of EU rules, it is up to domestic law; in any case, those rules must comply with the principles of equivalence and effectiveness;²³ effectiveness requires the computation of interest “from the date on which the person paid the sum of money in question to the date on which that sum is refunded to that person”;²⁴

¹⁴ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 30.

¹⁵ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 31.

¹⁶ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 32.

¹⁷ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 33.

¹⁸ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 34.

¹⁹ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 37.

²⁰ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 38.

²¹ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 37.

²² E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 38.

²³ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 39.

²⁴ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 40 and 41 in which the Court explains that the formula for the computation of interest is required for and “effective exercise of the rights”.

16. Assessing the Polish provision against the background of this right to interest, the Court considered that:
 - a. The computation of the interest on the amounts of tax paid in breach of EU law was regulated under Polish domestic law;
 - b. In case of requests submitted after the 30th day following the publication of the relevant ruling of the CJEU in the OJEU, limited or excluded the interest (i.e., limited it until that date, not allowing computation to take into account the moment of the effective reimbursement);²⁵ such condition limited the right to interest;
 - c. The right to interest is not absolute, and domestic law could, namely, require the person “to act with reasonable diligence in order to avoid loss or damage or to limit the extent thereof”;²⁶
 - d. In any case, domestic law would need to comply with the principle of effectiveness.
17. Hereinafter, the Court focuses on effectiveness, distinguishing, in its assessment, the cases in which the payment of interest was limited from those in which it was fully refused.
18. In what concerns the first (limitation of the computation of interest due to the submission of the reimbursement request after the 30th day of the publication of the CJEU ruling on the OJEU), the Court considered that:
 - a. Regarding the person involved in the dispute, the timely filing of a request for a refund could be *prima facie* regarded as diligence “which may reasonably be required”;²⁷ however, even such person “may still not be reasonably expected” to submit the request within the 30 days, namely when concluding that the domestic tax breaches EU law requires additional verifications that the “Court asks the national court to carry out”, which may also comprise verifications to be performed, at the request of the referring Court, by tax authorities;²⁸
 - b. Regarding any other person, it could not be regarded as admissible since this person: i) would “not likely be informed” of the publication in such a short time frame; ii) could have not been aware “without having been negligent” that the tax imposed was in breach of EU law “until some time after the expiry of that 30-day time limit”;²⁹
19. Regarding the second (full exclusion of interest for requests made after the 30-day period), it was considered inadmissible. The Court notes that, even after that period, the person could still not be in a position to prevent the payment of a tax in breach of EU law, namely: i) and again, if the conclusion that the tax infringes EU law does not result immediately from the CJEU ruling but from further verifications (by the national court or, subsequently, by national tax authorities)³⁰; ii) if the tax is collected through withholding by a third party, particularly when such person does not inform the taxable person until the expiry of the 30-day limit;³¹
20. The Court concluded that the principle of effectiveness, in conjunction with the principle of sincere cooperation, had to be interpreted as “precluding” domestic legislation that had the effect of excluding the computation of interest or limiting its computation until the 30th day after the publication of the Court ruling from which the finding that the tax at issue was contrary to EU law.

²⁵ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 43-45.

²⁶ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 47 citing UK: ECJ, 8 Mar. 2001, Case C-397/98, Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v. Commissioners of Inland Revenue and HM Attorney General, Case Law IBFD, para. 102.

²⁷ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 49.

²⁸ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 51.

²⁹ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 49.

³⁰ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 53.

³¹ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 54.

III. Comments

III.1 Introduction

21. Direct taxation remains a non-harmonised area. Consequently, Member States are free to adopt domestic tax rules insofar as they comply with EU law, which is not easy to ascertain, as the frequent referrals to the CJEU (and the scholarly discussions around those referrals) evidence.
22. Levying direct taxes in breach of EU law may be the result of several circumstances, namely: i) the fact that the Member State considered, at the adoption, that the tax was compliant with EU law (namely following the interpretation of EU law by the CJEU); ii) the fact that the Member State has not properly reacted after a CJEU ruling considering that its domestic law was not compliant with EU law;³² iii) lack of (timely) implementation of secondary law; iv) misinterpretation and misapplication (by negligence or fault) by national authorities of domestic law which, in its terms, is compliant with EU law.
23. In all cases, and despite acknowledging different levels of accountability of the Member States, the taxpayer is unlawfully deprived of a certain amount of money.
24. The case at hand can be seen as a reinforcement of the protection of taxpayers' rights in what concerns the rights to interest rights in what concerns the rights to interest in direct taxation.³³
25. Our comments will deal with the following issues: i) the legal foundation of the right to interest; ii) the nature and limitations of that right; iii) valid public interest limitations of that right; iv) the aim of that right; v) interest rate and inflation; vi) the need for action at the EU level. It will end with a shared reflection on the so-called follow-up cases and on the action that could be taken at the EU level to limit their negative impact.

III.2 Legal foundation of the right to interest

26. *E. v. Dyrektor Izby Administracji Skarbowej* recognises explicitly, for the first time in direct taxation, an unwritten right of the taxpayer: "the right, under EU Law to obtain from the Member State concerned (...) the payment of interest intended to compensate for the unavailability" of sums imposed as taxes in breach of EU law,³⁴ based on the principle of effectiveness as derived from the (written) principle of sincere cooperation.
27. Even if direct taxes are enacted by domestic law, the right to interest regarding taxes levied in breach of EU law emerges as an EU law right, being an expression of the general principle of recovery of sums paid but not due.³⁵ The Court dissociates the right to collect (direct) taxes from the duty to pay interest regarding (direct) taxes imposed in breach of EU law: whereas the first remains in the realm of Member States' sovereignty in tax matters, the second is construed as the reflex of the obligation assumed by Member States of complying with EU law.

³² In this case, this is recognised by the Court in the following statement: "as the European Commission notes in its written observations, it is not inconceivable that a tax may continue to be levied, in breach of EU law, after the delivery of such a ruling and its publication in the *Official Journal of the European Union*." See *E. v. Dyrektor Izby Administracji Skarbowej*, see supra n. 2, § 52 in fine.

³³ One should note that this is mentioned in the case law of the Court since, at least, the sixties. In *Humblet*, the Court had already explicitly mentioned that "if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a member state is contrary to Community law, that member state is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued". See BE: ECJ, 16 Dec. 1960, Case 6/60, *Jean-E. Humblet v. Belgian State*, Case Law IBFD, section I.

³⁴ *E. v. Dyrektor Izby Administracji Skarbowej*, see supra n. 2, § 31.

³⁵ *E. v. Dyrektor Izby Administracji Skarbowej*, see supra n. 2, § 32.

III.3 Limitations of and real nature of the right

28. The Court characterises the taxpayer's position as an EU “right”.
29. However, from a procedural perspective, such a statement is counterbalanced with the acknowledgement that such a right is “subject to the national rules of procedure”, with the limitations derived from the principles of equivalence and effectiveness.³⁶ Therefore, and despite being grounded on EU law, it is up to the Member States to lay down the rules for its exercise (i.e. the procedural rules), subject solely to equivalence and effectiveness.
30. Moreover, and from a substantive or content perspective, Member States remain in a position of further limiting the right, namely: i) requiring the taxpayer to act with reasonable diligence;³⁷ ii) limiting the relevant period for the computation regarding those that would likely be informed that the collection of the tax was in breach of EU law.³⁸ These two limitations that surface in the Court’s decision appear to be two corollaries of a much more fundamental understanding, as upheld by the Advocate General Ćapeta in *Gräfendorfer*,³⁹ that “rights which arise under EU law, including the right to payment of interest, may, under certain conditions be limited either by EU law itself or by national law (...)” insofar as two conditions are met: “first, the measure limiting the EU right has to be justified by a public interest objective acceptable under EU law and, second, that measure has to be proportionate to that objective.”⁴⁰ Therefore, in addition to determining the rules for exercising the right, the Member States remain entitled to configure its content insofar as a valid public interest is pursued in a proportionate way.
31. Accordingly, with these procedural and substantive limitations, this right should not (yet) be seen as an all-or-nothing fashion norm but as the projection of the written principle of sincere cooperation, insofar as it requires Member States to “nullify the unlawful consequences of an infringement of EU law and to lay down detailed procedural rules, in respect of actions for safeguarding rights which individuals derive from EU law.”⁴¹

III.4 Prosecution of a valid public interest

32. A careful reading of the Court’s decision makes it evident that this is not an absolute right, and its content is subject to limitations, namely those (mentioned in the previous section) derived from a proportionate prosecution of a valid public interest by Member States.
33. The Court’s decision is not entirely clear on whether the goals pursued by the Member State with the scrutinized legislation (“avoid taxable persons from deferring their requests for refunds of overpayments in order to benefit from more sizeable amounts of interest”) should be considered as valid public interest. In any case, it appears to subject such a goal to a proportionality analysis, which could be understood as an implicit recognition.⁴²
34. In this testing, the Court appears to give relevance to the *concrete* knowledge-position of the taxpayer, i.e. whether the taxpayer was in a position to know if the tax imposed was in breach of EU Law at the moment of the collection. The Court “assumes” that “the filing of a request for a refund within the 30 days (...) may be regarded as a diligence that may reasonably be required of the taxable person who has taken part in the

³⁶ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 47.

³⁷ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 47.

³⁸ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 49.

³⁹ DE: Opinion of Advocate General Ćapeta, 13 Jan. 2022, Case C-415/20, *Gräfendorfer Geflügel- und Tiefkühlfeinkost Produktions GmbH v. Hauptzollamt Hamburg*, Case Law IBFD.

⁴⁰ Opinion of Advocate General in *Gräfendorfer*, see supra n. 39. § 91 and 92.

⁴¹ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 39.

⁴² On the contrary, one could argue that the Court was just, for the sake of precaution, testing the logicity of the reasons put forward by the Member State. However, it would remain to be explained the reasons for such testing, as it would not bear any relationship with the issues under discussion in this case.

dispute”.⁴³ Moreover, it considers that it cannot be requested from other taxpayers as they “without having been negligent, [could] not become aware that the tax to which he or she has been subject was in breach of EU law”.⁴⁴

35. The Court’s references to cases in which further verifications by domestic courts (and by tax authorities) are needed appear to strengthen the argument that the taxpayer’s knowledge-position is relevant. And this would be aligned with the cited decision in *Metallgesellschaft*,⁴⁵ and the requirement impending on the person making the request to “act with reasonable diligence in order to avoid loss or damage or to limit the extent thereof”,⁴⁶ which, in this case, would be the extension of the period of deprivation of the sums (which the taxpayer is in a position of controlling as of the moment that he or she knows that the tax is in breach of EU law by submitting the reimbursement request) and the corresponding computation of interest.
36. It later refers to instances in which further verifications are needed, which again appears to give relevance to the concrete knowledge of the taxpayer.
37. One should start by noting that the settled case law on this right to interest was developed in the framework of actions for the annulment of acts, procedures in which the Court’s ruling was needed to affirm the existence of a breach. This is not the case in all proceedings, namely of preliminary rulings (as the case at hand, in *Emerging Markets*⁴⁷) in which the Court is required to interpret EU law and not to annul a certain act. In preliminary rulings, the Court leaves to the referring domestic Court (as an ordinary EU court) the task of determining whether domestic law infringes EU law. In all these cases, the date for the publication of the ruling appears to be irrelevant for ascertaining whether the taxpayer would be in a position of understanding that the imposed tax infringed EU law.
38. However, from a policy perspective, the following points should be considered.
39. First, according to the principle of sincere cooperation, the initiative to pay the interest to compensate the taxes levied in breach of EU law should be primarily a task for the Member States and, more concretely, for the Tax Administration. Not for the taxpayer. This is certainly the case when Member states have sufficient knowledge that allows them to act “with reasonable diligence in order to avoid loss or damage or to limit the extent thereof”.⁴⁸
40. Second, Member States are in a position to: i) avoid payment of interest by not enacting direct taxes levied in breach of EU law, and/or by repealing those taxes (or provisions of those taxes) that are considered as a breach of EU law by the relevant Court’s decisions; ii) to limit payment of interest by limiting the statute of limitation for claiming reimbursement of unduly paid taxes, insofar as respecting equivalence and effectiveness.
41. Third, the Member State should never be in a position to: i) on the one hand, adopt a tax in breach of EU law (and of keeping it in force, even after a ruling of the CJEU allowing the conclusion that it was in breach of EU law), and; ii) on the other hand of limiting the right to interest to which that tax was imposed on the basis that the taxpayer should have known that the tax was incompatible with EU law. In short, the State should not be allowed to continue imposing unlawful taxes (even long after the relevant CJEU ruling) while completely denying any right to interest.
42. Fourth, if the tax administration does not take the initiative to pay the interest or does not have the knowledge to do so, the taxpayer should have the right to claim the interest within a reasonable period of time. In that context, the Court refers to the concrete knowledge of the taxpayer as a starting point, but it

⁴³ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 49.

⁴⁴ Idem, ibidem.

⁴⁵ *Metallgesellschaft*, see supra n. 26.

⁴⁶ *Metallgesellschaft*, see supra n. 26, § 102 as cited in E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 47.

⁴⁷ See supra n. 4.

⁴⁸ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 47.

also requires that the taxpayer is not negligent. Therefore, the rules to be adopted should take this into account. In any case, a 30-day period after the publication of a Court ruling does not meet these standards.⁴⁹

43. Fifth, any system to be developed should not convert EU law's primacy and direct effect from citizens' entitlements into citizen's burdens.

III.5 Aim of the right to interest

44. According to the Court, this right to interest aims to "compensate for the unavailability of the sum of money of which the person concerned has been wrongly deprived"⁵⁰ or to "adequate compensation for the loss sustained".⁵¹ It focuses solely on the passive side of the tax relationship and on the negative impact caused to the taxpayer by the temporary unavailability of the sums.
45. The right appears to be aimed at a *restitutio ad integrum*, i.e., restoring taxpayers to the economic position they would be in had they not been affected by the unlawful tax.⁵²
46. Within such a framework, any considerations regarding the liability of the Member State or its national authorities are excluded. Unlike in actions for damages,⁵³ the reasons for the unlawful collection or the intensity of eventual negligence or fault are made irrelevant.⁵⁴
47. The Court rejects linking the right to interest to the unjust enrichment of the Member State,⁵⁵ making the exercise of the right independent from the provision of evidence regarding the enrichment of the Member State or the evidence of the impoverishment by the taxpayer.⁵⁶ The exercise of the right is solely linked to the unavailability of the sums for a certain period.

III.6 Interest rate and inflation

48. The Court has neither been asked nor made any reference related to the setting (by the Member States) of the interest rate or its relationship with the inflation rate. It is, in any case, an interesting issue worth further consideration.
49. The Court grounds the legitimacy of the right to interest on a "loss sustained"⁵⁷ by the taxpayer for the temporary unavailability of the amounts paid as taxes. Insofar as such legitimacy is not made dependent on proof of damages or of any other factors, the "loss" to which the Court refers appears to be closely linked with inflation.⁵⁸
50. The same conclusion may be withdrawn from the fact that the Court requires the computation of the interest by consideration to the period in which the sums were temporarily deprived (i.e. from the collection until reimbursement), and not by consideration to an eventual damage or impoverishment.

⁴⁹ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, 49.

⁵⁰ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, §38, repeated partly in § 31.

⁵¹ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 40.

⁵² In the same vein, Opinion of Advocate General in Gräfendorfer, see supra n. 39, § 56.

⁵³ See IT: ECJ, 19 Nov. 1991, Case C-6/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic, Case Law IBFD and the subsequent case law on the matter, determining strict conditions for compensating damages.

⁵⁴ E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 35-38.

⁵⁵ As it relied upon in other cases regarding reimbursement of amounts requested in breach of EU law, such as Judgment of 16 December 2008, Masdar (UK) / Commission (C-47/07 P, ECR 2008 p. I-9761) ECLI:EU:C:2008:726, Judgment of 27 September 2012, Zuckerfabrik Jülich and others (C-113/10, C-147/10 and C-234/10, Publié au Recueil numérique) ECLI:EU:C:2012:591 and Judgment of 9 July 2020, Czech Republic / Commission (C-575/18 P) ECLI:EU:C:2020:530.

⁵⁶ In the same vein, Opinion of Advocate General in Gräfendorfer, see supra n. 39, § 64-66.

⁵⁷ Expression used in E. v. Dyrektor Izby Administracji Skarbowej, see supra n. 2, § 40.

⁵⁸ In addition to other factors, such as the lost opportunity costs. In any case, inflation appears to be an objective loss falling within the scope of the losses requiring compensation.

51. In indirect taxation, the Court has already acknowledged that, in addition to equivalence and effectiveness, Member States have also to comply with the “principle of fiscal neutrality”⁵⁹ requiring “that the procedure for paying interest must be established in a way that the economic burden of the amounts of tax unlawfully retained may be offset”.⁶⁰
52. In its *Sole-Mizo Zrt* judgment decided in 2020, the Court concluded that effectiveness and fiscal neutrality prevented a Member State from setting the applicable interest rate by reference to the State’s Central base interest rate (which is only available to credit institutions) in case of a taxpayer that is not a credit institution.
53. The CJEU does not provide further guidance regarding the calculation of rate and, specifically on how this needs to be set to avoid “that [it] is lower than that which a taxable person who is not a credit institution would have to pay to borrow a sum equal to (...) the amount (...) retained in breach of EU law”.⁶¹ [In practice, it might be necessary to set a general interest rate, because setting an individual interest rate in each individual case may be too burdensome for all interested parties involved. Prima facie, national law could provide such a general rule which should sufficiently consider this standard of the CJEU].
54. However, the Court clearly suggested in para. 49 of this judgment that the national legislation should provide for “the application of interest to compensate the taxable person for the monetary erosion caused by the passage of time (...) up until the actual payment of that interest”.
55. The CJEU appears to make a direct link between the interest rate and 'monetary erosion', which seems to be a synonym for the term 'inflation'. Inflation should be considered: interest that runs for a given reporting period, without the application of interest to compensate a taxable person for the monetary erosion (inflation) caused by the passage of time following that reporting period up until the actual payment of that interest, is not allowed under EU law. Prima facie, also in this context, it seems to be practical to include in national law a general rule to set an interest rate which considers inflation as meant by the CJEU.
56. This is even more relevant in the current context, where inflation rates have significantly increased, and some Member States still set the interest rates for unlawfully paid taxes as a (non-revised) set percentage rate.
57. In any case, Member States are not allowed, according to the principle of effectiveness, to deprive a right of its meaningful effect by setting the compensatory interest at a rate which would render the compensation insignificant.

III.7 The need for action at the EU level

58. Given the known limitations of the Court’s rulings, effectiveness of the right to claim reimbursement of unduly paid taxes and interest may require action at the EU level. This would strengthen the effective protection of EU taxpayers and, more generally, of those benefiting from EU law.
59. As regards the issues mentioned in the previous section, this instrument could set the interest rate or define its maximum and minimum thresholds, which could or could not be linked to an index reflecting inflation. Inspiration for such a system could also be drawn from the rules regarding the computation of interest in the recovery of State Aid.⁶²

37. ⁵⁹ HU: ECJ, 23 Apr. 2020, Case C-13/18, *Sole-Mizo Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, Case Law IBFD, para. 37.

⁶⁰ See *Sole-Mizo Zrt.*, supra n. 59, para. 44.

⁶¹ See *Sole-Mizo Zrt.*, supra n. 59, para.

⁶² See Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 82, 25.3.2008, p. 1–64, Commission notice on the method for setting the reference and discount rates, OJ C 273, 9.9.1997, Commission notice on technical adaptations to the method for setting the reference and discount rates (Text with EEA relevance), OJ C 241, 26.8.1999, the Communication from the Commission on the revision of the method for

60. The Commission could first adopt a Recommendation or a Communication, making Member States aware of the existence of such rights and of the need, in accordance with the principle of sincere cooperation, to adjust domestic law, laying down detailed and effective domestic procedural rules.
61. The Commission could also start a comprehensive review of Member States' domestic legislation in this matter, alerting them to possible instances of infringement and starting infringement procedures regarding Member States failing to act adequately.⁶³
62. Finally, and given the acknowledgement that the right of reimbursement of unduly paid taxes and its corresponding right to interest is derived from EU law, the Commission could consider enacting a directive, laying down the adequate normative framework for implementing such rights, creating a level playing field within the internal market.

III.8 Follow-up cases

63. *E. v. Dyrektor Izby Administracji Skarbowej* is another follow-up case, i.e. a case in which the Court was again confronted with a domestic tax which continues to be levied based on normative provisions previously considered a breach of EU law by the CJEU.⁶⁴ The Court has already had the opportunity to clarify that a Member State infringes EU law by maintaining in force domestic law considered incompatible with EU law and that such incompatibility "can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended".⁶⁵
64. The inconveniences of inaction (or deficient action) of Member States following CJEU rulings for taxpayers, tax authorities, and the judiciary (comprising both domestic courts and the CJEU) are well known.
65. Cases such as the one at hand urge reflection on whether the EU institutions could start taking a different approach. This is particularly true in the case of the European Commission, which, as "guardian of the Treaties", is responsible for ensuring that EU law is timely interpreted and applied. This includes extracting adequate conclusions from CJEU's rulings. Several actions could be considered.
66. First, the EU Commission could engage in constructive dialogue with the Member States, actively asking whether they consider legislative action necessary to ensure full compliance with EU law in the aftermath of a Court case considering certain tax provisions as inadmissible.
67. Second, the EU Commission could lead the efforts in assessing whether further action (by that Member State or by any other Member State) is required to ensure compliance with EU law. This could be ensured with the following initiatives:
 - a. Public consultations, inviting all stakeholders to provide input on the amendments needed;
 - b. By public tenders, commissioning studies to expert organisations on the amendments needed;
 - c. By asking the EU tax observatory, financed by the European Commission, to include such assessments in their activities.
68. Third, the Commission could consider, as a priority, the assessment of domestic tax systems whenever the same provision or the same point of law is referred for the second time to the CJEU.

setting the reference and discount rates, OJ C 14, 19.1.2008, p. 6–9, Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004. See also the EU Commission.

⁶³ According to Art. 258 et seq. of the TFEU.

⁶⁴ At least in what concerns the withholding tax levied in 2014.

⁶⁵ LU: ECJ, 26 Oct. 1995, Case C-151/94, *Commission of the European Communities v. Grand Duchy of Luxembourg*, Case Law IBFD, § 18.

IV. The Statement

69. The CFE ECJ Task Force welcomes the decision of the Court as it reinforces the taxpayers' right to interest on refunds in cases where a tax is imposed in breach of EU law.
70. The CFE ECJ Task Force acknowledges that the Court has limited competence to ensure the enforcement of EU law at this level. Therefore, additional action seems to be necessary to establish a common normative framework for the reimbursement of unduly paid taxes and its corresponding right to interest. Currently, there is a margin of discretion in the regulation by the Member States (in what concerns both the exercise of the rights and their content), which may lead to unwanted asymmetries in the levels of protection of the same EU rights in the different Member States. Such diversity is not welcomed in view of strengthening the internal market.
71. The CFE ECJ Task Force would welcome actions by EU institutions (and particularly by the EU Commission) towards ensuring effective protection of such rights. Such actions would not only be adequate but also needed and could include soft law (such as a Communication regarding the implementation of such rights in accordance with the case law) and/or hard law (namely, a directive laying down the adequate normative framework for the implementation of such rights).