

TOWARDS A THEORY OF TRANSNATIONAL JUDICIAL REVIEW IN EUROPEAN ADMINISTRATIVE LAW*

*Paolo Mazzotti***, *Mariolina Eliantonio****

Abstract

In the cases of *Berlioz* (2017) and *Donnellan* (2018), the European Court of Justice has required national judges, under certain conditions, to carry out the transnational judicial review of preparatory acts adopted, in mutual assistance procedures in the tax field, by authorities of EU Member States different from those in which the judiciary concerned is located. The present Article takes an Italian ruling on a case presenting a factual setting similar with *Donnellan* as a case study, and explores the limits and prospects of such doctrine of transnational judicial review under EU fundamental rights law (with a view, in particular but not exclusively, to the right to an effective judicial remedy). It thus strives to develop a general theory of transnational judicial review for EU administrative law.

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** J.D., University of Trento; LL.M. candidate, Graduate Institute of International and Development Studies, Geneva.

*** Professor of European and Comparative Administrative Law and Procedure, Maastricht University.

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1. Introduction and Methodological Remarks

Despite the unquestionable specificity of its substantive aspects (identifying, for instance, taxable facts and the relevant tax rates), tax law raises, in respect of its organisational and functional dimensions, a number of questions shared with general administrative law.¹ This is true, in particular, as regards the issues revolving around the judicial review of acts of tax authorities, where a confrontation of private (here: that of the taxpayer in preserving their property) and public (here: that of the government in maximising revenues) interests requires an appropriate balance to be struck – arguably, the main feature of administrative law as a discipline since its very emergence.² Viewed through this lens, the system of mutual assistance established by the EU for tax recovery

¹ The point has been strongly debated in recent years in the US jurisdiction, in particular following the Supreme Court's ruling in *Mayo Foundation for Medical Education & Research v United States* (2011) 562 US 44. Here, the Supreme Court maintained that the famous deference standard for judicial review of agencies' acts executing a federal statute, laid down in *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837, was, contrary to what had been deemed that far, also applicable to acts of the Treasury Department. For an introduction to the debate, see R. Murphy, *Pragmatic Administrative Law and Tax Exceptionalism*, 64 Duke L.J. Online 21 (2014-2015); for a defense of the peculiarity of the role occupied by tax law in the US legal system, see L. Zelenak, *Maybe Just a Little Bit Special, after All?*, 63 Duke L.J. 1897 (2014).

² This is not, however, an undisputed understanding of administrative law in turn: see the juxtaposition of "control" and "instrumentalist" theories of administrative law, and the application thereof to European administrative law, drawn by C. Harlow, *European Administrative Law and the Global Challenge*, European University Institute Working Paper RSC 98/23 (1998).

and assessment purposes³ does, indeed, share a number of features and challenges with EU administrative law. Just like therein, cooperation in fiscal matters brings together authorities coming from a number of different national jurisdictions, contributing through discrete, yet coordinated acts to the adoption of an administrative act (be it of assessment, or of enforcement of a claim) which impinges upon the legal entitlements of taxpayers. The cross-boundary pattern of cooperation thus carried out hence provides a striking example of what EU administrative law scholarship labels a “horizontal composite procedure”: administrative acts adopted by the authorities of an EU Member State (MS) are based on a preparatory act adopted by the authorities of a different MS.⁴ Such procedure(s) raise(s) serious questions on the judicial review side.

³ For a concise, yet comprehensive overview of the system, see S. Hemels, *Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims*, in P.J. Wattel, O. Marres & H. Vermeulen (eds.), *European Tax Law: Volume I – General Topics and Direct Taxation* (7th ed., 2018).

⁴ Horizontal composite procedures are to be contrasted with “vertical composite procedures”, which do similarly involve a cooperation between administrative authorities belonging to different jurisdictions; in such case, however, coordination occurs between the authorities of a MS, on the one hand, and those of the EU (e.g. the European Commission, or a European Agency), on the other hand. Both vertical and horizontal procedures are increasingly common techniques of implementation of EU (administrative) law, and amount to one of the most distinctive features thereof. Scholarly and judicial elaboration, however, seems to be significantly more developed on vertical composite procedures than it is on their horizontal counterparts. On these and other aspects, with a focus on the notion and the functional aspects of composite procedures, see G. Della Cananea, *The European Union’s Mixed Administrative Proceedings*, 68 *Law & Contemp. Probs.* 197 (2004); H.C.H. Hofmann, *Decision-Making in EU Administrative Law – The Problem of Composite Procedures*, 61 *Adm. L. Rev.* 199 (2009); H.C.H. Hofmann, G.C. Rowe & A.H. Türk, *Administrative Law and Policy of the European Union* (2011), 405-410; M. Eliantonio, *Judicial Review in an Integrated Administration: The Case of ‘Composite Procedures’*, 7 *Rev. Eur. Adm. L.* 65; B.G. Mattarella, *Procedimenti e atti amministrativi*, in M.P. Chiti (ed.), *Diritto amministrativo europeo* (2nd edn., 2018), 343-345; H.C.H. Hofmann, *Multi-Jurisdictional Composite Procedures: The Backbone to the EU’s Single Regulatory Space*, University of Luxembourg Law Working Paper No 003-2019 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399042> accessed 3rd February 2022.. Focussing more on the institutional and organisational implications of Europe’s “composite administration”, see C. Franchini, *Les notions d’administration indirecte et de coadministration*, in J.B. Auby, J. Dutheil de la Rochère & E. Chevalier (eds.), *Traité de droit administratif européen* (2nd edn., 2014); L. De Lucia, *Strumenti di cooperazione per l’esecuzione del diritto europeo*, in L. De Lucia, B. Marchetti (eds.), *L’amministrazione europea e le sue regole* (2015).

It is, indeed, frequently difficult to effectively safeguard the taxpayer's rights and interests, because of the entanglements between authorities and functionally tied administrative acts, spanning in a transnational dimension, through which fiscal cooperation unfolds. In recent years, tax law scholars have, in fact, started applying categories developed in the EU administrative law field to the EU system of administrative cooperation in fiscal matters,⁵ and it is likely that this fertile trend will (and should) continue. EU administrative law scholarship can provide EU tax law with powerful analytical grids to tackle what scholars in the latter field themselves forcefully point to as the most compelling question faced by their discipline as it stands now – the protection of taxpayers' (fundamental) rights and the filling of the gaps in judicial protection left by the transnational dimension of mutual assistance procedures.⁶

The European Court of Justice (ECJ) itself is gaining increasing awareness of the problem. In an earlier contribution,⁷ we analysed the landmark rulings of *Berlioz* (2017)⁸ and *Donnellan* (2018),⁹ in which the ECJ upheld what we labelled “transnational judicial review”. In those cases, the ECJ empowered (and actually required), under certain circumstances, national judges to review, in the context of proceedings initiated against acts adopted at the outcome of a horizontal composite procedure in the fiscal field, the legality of preparatory acts adopted by authorities belonging to the legal system of another MS. In both cases, transnational judicial review was deemed necessary to safeguard the right to an effective judicial remedy under Art. 47 of the Charter of Fundamental Rights

⁵ See, for instance, S. Dorigo, *Mutual Recognition versus Transnational Administration in Tax Law: Is Fiscal Sovereignty Still Alive?*, 13 Rev. Eur. Adm. L. 209 (2020). More comprehensively, but not always as lucidly, F. Saponaro, *L'attuazione amministrativa del tributo nel diritto dell'integrazione europea* (2017), in particular 186-208 and 331-371.

⁶ See I. De Troyer, *Administrative Cooperation and Recovery of Taxes*, in C.H.J.I. Panayi, W. Haslehner & E. Traversa (eds.), *Research Handbook on European Union Taxation Law* (2020), in particular 478-480 and 484-487; K. Perrou, *Fundamental Rights in EU Tax Law*, *Ibid.*, in particular 529-539; G. Kofler, *Europäischer Grundrechtsschutz im Steuerrecht*, in M. Lang (ed.), *Europäisches Steuerrecht* (2018), in particular 179-185.

⁷ P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union*, 5 Eur. Papers 41 (2020).

⁸ ECJ, Case C-682/15 – *Berlioz Investment Fund* (ECLI:EU:C:2017:373).

⁹ ECJ, Case C-34/17 – *Donnellan* (ECLI:EU:C:2018:282).

of the European Union (CFREU). In both cases, the benchmark against which to carry out such review were EU law norms regulating the transnational administrative cooperation process, from both a substantive (in *Berlioz*) and a procedural (in *Donnellan*) point of view. This legitimised a judicial review which could have otherwise been regarded as an intrusion into another MS' sovereign legal order: the judges of all MS are *juges de droit commun*, equally entitled to review the correct application of EU norms, irrespective of the fact that, *in casu*, they would be executed by the authorities of another MS (which would hence be acting *qua* part of the EU's integrated administration, and not of that State's sovereign executive power).¹⁰ We maintained that this strand of case law marks a much welcome development in EU law, filling the gaps in judicial protection which have thus far been left much too often in the context of administrative cooperation in fiscal matters; and, most importantly, that the fact that transnational judicial review was based on Art. 47 CFREU, a general provision, gives this case law the potential of being applied throughout the whole range of horizontal composite procedures deployed by EU administrative law.¹¹

The acceptance of transnational judicial review at the supranational level, however, does not, as such, have any impact on the actual practice of horizontal composite procedures. By definition, such procedures are carried out at the national level: they entail the adoption of administrative acts on the part of authorities of the MS, which must be challenged before the judiciary of the respective legal system. This means that, once the ECJ clarifies that EU law enables and requires national judges to review the legality of foreign preparatory acts, those judges must be actually ready to do so in the concrete cases before them, for taxpayers' right to an effective judicial remedy to be actually safeguarded. It goes without saying that this might not be the case, due to a number of reasons - ranging from the possible unawareness by national judges of the ECJ's jurisprudence, to a

¹⁰ On the notion of "integrated administration" see, in particular, H.C.H. Hofmann, A.H. Türk, *Conclusions: Europe's Integrated Administration*, in H.C.H. Hofmann, A.H. Türk (eds.), *EU Administrative Governance* (2006). For a detailed analysis of the institutional role of national authorities in such administration, see L. Saltari, *Amministrazioni nazionali in funzione comunitaria* (2007).

¹¹ See P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 49-55.

misapplication thereof. This, a crucial feature of EU law in most of its manifestations,¹² prompted us to ask ourselves whether competent national courts (correctly) apply the *Berlioz-Donnellan* jurisprudence, by carrying out the transnational judicial review of foreign preparatory acts in the context of mutual assistance procedures in the fiscal field. In this paper, we took the Italian courts as a case study to address that research question. We only examined tax rulings, despite our faith in the wider potential of the case law concerned, acknowledging that it might take time for such an innovative judicial stance to trickle into other policy areas.¹³ We thus researched into the main Italian case law databases (*DeJure*, *Leggi d'Italia*), including one specialised in tax law (*Sistema "il fisco"*), looking for express quotations of *Berlioz*, *Donnellan*, and *Kyrian* (another, earlier and seminal precedent, on which see below, Section 3.1, which we chose to include for the sake of completeness). We queried the databases by separately searching for both the rulings' names and the ECJ numbering of the cases.¹⁴ We hence found three rulings, handed down by the Court of Cassation between 2019 and 2020,¹⁵ one of which (Court Order No 2395/2019)

¹² As has been powerfully said in B. de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. Craig, G. De Búrca (eds.), *The Evolution of EU Law* (3rd edn, 2021), 211: "[T]he European Court indicated, quite rightly, that the crucial element for the effective application of the principles of primacy and direct effect is the attitude of national courts and authorities. It is not enough for the Court of Justice to proclaim that EU law rules should have direct effect and should prevail over national law: 'To put it bluntly, the ECJ can say whatever it wants, the real question is why anyone should heed it'. There is therefore a second dimension to the matter, which is decisive for determining whether the Court's doctrines have an impact on legal reality: the attitude of national courts and other institutions". Both the emphasis and the quotation are in the original, the latter coming from K.J. Alter, *The European Court's Political Power*, 19 West Eur. Pol. 459 (1996).

¹³ In Italy, tax claims are indeed heard by a specialised judiciary in first instance (*Commissione Tributaria Provinciale*, District Tax Commission) and appeal (*Commissione Tributaria Regionale*, Regional Tax Commission) proceedings, whereas appeal rulings can be further challenged before the generalist Court of Cassation (*Corte di Cassazione*, the highest judicial instance). For an overview of the system, see G. Tinelli, *Istituzioni di diritto tributario* (5th edn, 2016), 507-664.

¹⁴ C-682/15, C-34/17, and C-233/08, respectively.

¹⁵ Court Order No 2395/2019, delivered on 29th January 2019; Court Order No 22652/2019, rendered on 11th September 2019; and Judgement No 13826/2020, handed down on 6th July 2020. Note that, as regards Court Order No. 22652/2019 and Judgement No. 13826/2020, the difference between "Court Order" (*ordinanza*) and "Judgement" (*sentenza*) is one of procedure, not substance, given

immediately appeared, however, to be of a somehow lesser importance to our research, and will not be further analysed in this contribution.¹⁶

The two retained rulings are, first, Court Order No 22652/2019 (in the following: *Intini*, after the name of the taxpayer involved). Here, the facts of the case were in line with a *Donnellan*-like scenario (see below, Sections 2 and 3). However, they also differed in a number of important respects, raising a number of novel, intriguing questions to which, in our submission, the Court of Cassation did not answer in an appropriate way. The second ruling is Judgement no 13826/2020, which on its part, mostly raised questions similar to those at stake in *Intini*. The Judgement, however, did not clearly explain the factual setting of the case. Rather, it adopted a somehow contradictory narrative, seriously hampering the possibility to carry out a rigorous analysis from the point of view of compliance with *Donnellan* and *Berlioz*.¹⁷

that both acts decide the case. Court Orders are adopted in a more expedited way, without a public hearing, when the claim appears *prima facie* to be inadmissible or ill-founded, whereas Judgements are adopted, pursuant to a proceeding with longer delays and comprising a public hearing, when there is no such immediate filter: see Arts. 375-376 of the Italian Code of Civil Procedure (also applying to tax proceedings pursuant to Art. 62.2 of Legislative Decree No. 546/1992). On the other hand, Court Orders are also adopted for incidental acts not deciding the claim: see Arts. 121 and 295 of the Italian Code of Civil Procedure. This includes the issuance of preliminary references to the ECJ, such as was, indeed, the case of Court Order No. 2396/2019 (see the following note).

¹⁶ Here, a preliminary reference to the ECJ was involved. The question was whether Italy should assist Greece in recovering an excise duty, claimed on the basis of Directive 92/12 (See Art. 20 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ L 76, 23.3.1992, pp. 1-13). Whereas the issue could be technically framed as potentially involving an instance of transnational judicial review based on EU substantive norms (since the Italian judiciary was asking whether it enjoyed jurisdiction to review the application, by the Greek authorities, of Directive 92/12's criteria for the determination of the State competent to levy the tax), it seemed to us that the facts of the case revolved more around issues of substantive tax law (the prevention of double taxation), than around questions of effective judicial protection – a point which also appears to have been acknowledged by the ECJ in the preliminary ruling recently delivered on the matter (ECJ, Case C-95/19 – *Silcompa*, ECLI:EU:C:2021:128): see, in particular, para. 75 of the judgement.

¹⁷ In fact, reading the judgement, it is not entirely clear what were the reasons for the claim brought by the taxpayer (an Italian resident in respect of whom Italian authorities adopted acts of enforcement, based on a request by Austria, which alleged the claimant to have smuggled clocks, hence evading the VAT and

Given the limited size of our sample, it is impossible to infer any meaningful conclusion on the application of the European case law in Italy. At the same time, the ruling in *Intini* provides stimulating food for thought to reflect on how transnational judicial review based on Art. 47 CFREU could further evolve. In this paper, while conscious of a number of methodological limitations of our study,¹⁸ we thus momentarily set aside our original empirical perspective (leaving it to future research). Rather, we take *Intini* as a case study to develop a conceptual, qualitative perspective on the

customs duties). On the one hand, the taxpayer seems to have challenged the Italian acts of enforcement because of the failure, on the part of the authorities involved, to notify to him the acts of assessment of the claim (paras. 1, 3) – a most serious defect, which would attract the case to the *Donnellan* constellation (see below, Section 2). On the other hand, reference is also confusingly made to the fact that the act of assessment was served on him only in German, which he could not understand (para. 2) – the same kind of problem which was at stake in *Intini*, so that our remarks made in Section 3 below would also be valid for the instant case. That such latter defect was the main reason underlying the claim seems more likely to be the case, considering that, further on, reference is also made to the fact that the *Donnellan* principles cannot apply to the case, since the taxpayer is reported, at any rate, to have challenged the Austrian act in the Austrian legal system; and this seems hardly compatible with a failure on the part of Austria to notify the act to the taxpayer (para. 4.4). Even after changing our perspective, as explained shortly below, we decided to focus on *Intini* only, since there the Court of Cassation engaged more clearly with the facts of the case, making it possible to appraise more extensively the problems dealt with. Further, one of the most interesting aspects of *Intini* is the fact that, unlike *Donnellan* (and *Berlioz*), the claim for which the requesting applicant State (also Austria) sought cross-border assistance did not involve any penalty element, which raises important questions concerning the scope of the *Donnellan* solution (see Section 3.2 below). In Judgement No 13826/2020, on the other hand, albeit that the point is not expressly clarified in the ruling, the fact that the taxpayer was charged with smuggling seems to point to the fact that a sanctioning element was also at stake in the Austrian claim. From the conceptual perspective developed throughout this paper, the Judgement thus appeared not to pose novel questions and hence to be less relevant, and will accordingly not be further examined in the following.

¹⁸ The collection of data we carried out may be problematic, since some judgements might have applied the ECJ's jurisprudence while failing to mention the cases (e.g. only referencing the relevant provisions, and generically quoting EU jurisprudence), hence being incapable of being detected pursuant to our methodology. Equally untraceable therewith are possible instances where the judge completely failed to apply the ECJ's jurisprudence in a case in which this would have been apposite. At more fundamental a level, empirical research in the field of Italian tax law is radically flawed by the fragmentary state of legal databases in the field, with first and second instance rulings being particularly hard to find.

topic. We thus counterfactually speculate how the general principles to be elicited from (in particular) *Donnellan* should have been applied by the Court of Cassation, and strive to provide a further contribution towards a *theory* of transnational judicial review in EU horizontal composite procedures.

With all this in mind, the present paper proceeds as follows. Section 2 outlines the system of cooperation between administrative authorities in the EU MS in the recovery of tax claims, and conceptualises it along the lines of the EU administrative law category of horizontal composite procedure. It highlights the gaps in the judicial protection of taxpayers thereby left, and outlines the solution developed by the ECJ, based on Art. 47 CFREU, in *Berlioz* and *Donnellan*. Section 3 builds upon those findings to analyse *Intini*, finding out that EU law, as it emerges from, in particular, *Donnellan*, was not properly applied by the Court of Cassation. This is done through a four-step analysis. Section 3.1 addresses the use of the ECJ's jurisprudence by the Court of Cassation as a reason to decline jurisdiction in *Intini*, and dismisses the analysis thus carried out as ill-founded. The following Sub-Sections speculate how more appropriate a use of *Donnellan* should have been done, deepening the conceptual analysis of Art. 47 CFREU. Section 3.2 thus investigates the *scope of application* of Art. 47 CFREU, to preliminarily assess whether *Donnellan* is actually capable of regulating a case such as *Intini*. Deeming the case at hand to be covered by Art. 47 CFREU, Section 3.3 delves into the *substance* of the provision. It thus finds out that the ECJ jurisprudence shows that Art. 47 CFREU has a linguistic dimension, bestowing upon the recipient of a transnationally notified fiscal document a right to have that document served in a language which they can understand (that which was indeed problematic in *Intini*). Section 3.4 thus turns to the conditions under which a violation of EU law in a horizontal composite procedure can be deemed to be so "exceptional" as to require transnational judicial review to be carried out. Section 4 concludes.

2. Administrative Cooperation between Fiscal Authorities in the EU: *Berlioz*, *Donnellan*, and the Right to an Effective Judicial Remedy in Horizontal Composite Procedures

Taxation forms an integral part of the common market project ever since its very inception. Arts. 95-99 of the Treaty of

Rome (the fundamental tenets of which are now reflected in Arts. 110-113 TFEU) envisaged a complex system of constraints placed upon the MS' fiscal sovereignty. This was meant to prevent the exercise thereof from being of prejudice to the establishment of the European common market, going so far as to enable the harmonisation of indirect taxation by a unanimous vote in the Council "in the interest of the common market" (Art. 99 of the Treaty of Rome). Whereas, in particular, such latter legal basis was successfully employed in the edification of the VAT system, European institutions soon realised that the common market could be hampered not only by differences in fiscal burdens resulting from non-harmonised *substantive* tax provisions, but also by procedural and organisational arrangements concerning the *administration* of taxation in the EU. The proliferation of cross-border transactions would result increasingly often in, *inter alia*, the very same indirect taxes which had been harmonised to have to be levied upon individuals and businesses established in a MS other than that in which the taxable fact had taken place. This would entail the risk of fraudulent deployments of the mobility enabled by the common market, with traders establishing themselves in a MS other than their own, while keeping on entertaining business with the State of provenance. Taxes claimed by the latter, based on the principle of territoriality, would then have been unenforceable in the State of establishment, and traders could curtail the costs stemming from taxation – hence gaining an unfair competitive advantage, while further causing revenue losses to the MS of origin. With a view to this, the Council adopted Directive 76/308/EEC,¹⁹ enabling for mutual assistance to be provided in the cross-border recovery of a number of tax claims forming part of fiscal schemes harmonised at the European level. The Directive underwent a number of successive modifications over time, which progressively expanded the range of duties which could benefit from mutual assistance. Administrative cooperation in the recovery of taxes is now governed by Directive 2010/24/EU,²⁰ which broadened the

¹⁹ Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ L 73, 19.3.1976, pp. 18-23).

²⁰ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ L 84, 31.3.2010, pp. 1-12). Prior to this, Directive 76/308 was modified by a number of

arrangements' scope to "all taxes and duties of any kind", including their accessories (e.g. interest) and, crucially, "administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested".²¹ Directive 2010/24 reiterates however, in their fundamentals, the schemes of mutual assistance dating back to Directive 76/308, which can be conceptualised resorting to the EU administrative law category of horizontal composite procedure.

Mutual assistance could (and can) be provided, essentially, in three respects. First, fiscal authorities can request their counterparts assistance in the *notification* of "all instruments and decisions (...) which relate to a claim and/or to its recovery".²² Art. 9 of Directive 2010/24, expressly stating what was implicit in Directive 76/308, also clarifies, on the one hand, that "[t]he requested authority shall ensure that notification in the requested Member State is effected in accordance with the national laws, regulations and administrative practices in force in the requested Member State",²³ and, on the other hand, that this "shall be without

instruments essentially meant, as recalled, to broaden the scope of the tax claims which could benefit from mutual assistance. The most significant broadening was carried out 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 (OJ L 175, 28.6.2001, pp. 17-20). The changes carried out over time were eventually consolidated in Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ L 150, 10.6.2008, pp. 28-38), governing mutual assistance in the short 2008-2010 interval, before being replaced by Directive 2010/24. For an account of the historical development of Directive 76/308, see F. Saponaro, *L'attuazione amministrativa del tributo nel diritto dell'integrazione europea*, cit. at 5, 170-173, as well as I. De Troyer, *Administrative Cooperation and Recovery of Taxes*, cit. at 6, 477. For an analysis of Directive 2010/24, highlighting the changes brought to the system established by Directive 76/308, see Ead., *Tax Recovery Assistance in the EU: Analysis of Directive 2010/24/EU*, 23 EC Tax Rev. 135 (2014), as well as F. Saponaro, *L'attuazione amministrativa del tributo nel diritto dell'integrazione europea*, cit. at 5, 318-330.

²¹ Directive 2010/24, Art. 2.

²² Directive 76/308, Art. 5.1. Art. 8.1 of Directive 2010/24 now more generally refers to "all *documents*, (...) which emanate from the applicant Member State and which relate to a claim as referred to in Article 2 or to its recovery" (emphasis added).

²³ Directive 2010/24, Art. 9.1.

prejudice to any other form of notification made by a competent authority of the applicant Member State in accordance with the rules in force in that Member State".²⁴ Such latter form of cross-border notification turned out to be problematic both in *Donnellan* and in *Intini*, and will accordingly be returned to below. Second, and key to the Directives' system, assistance may be requested in respect of the *recovery* of the taxes due themselves. This form of cooperation, which intrudes more significantly on the traditional tax law principle of non-cooperation with foreign authorities in the enforcement of claims,²⁵ is subject to a two-fold condition. First, the claim and/or the instrument permitting its enforcement must not be contested in the legal system of origin.²⁶ Second, the applicant MS must have unsuccessfully attempted to recover the claim domestically, although Directive 2010/24 now allows for some margins of exception in this regard.²⁷ When such conditions are fulfilled, the applicant MS is to send the requested one a copy of the instrument permitting enforcement of the claim (which, after Directive 2010/24, is "uniform", i.e. drafted according to a common template whose minimum formal requirements are harmonised at the EU level).²⁸ Directive 2010/24 now expressly stipulates that such instrument shall "constitute the sole basis for the recovery measures taken in the requested Member State", that it "shall not be subject to any act of recognition, supplementing or replacement in that Member State",²⁹ and that the claim "shall be treated as if it was a claim of the requested Member State".³⁰ Finally, completing

²⁴ Directive 2010/24, Art. 9.2. See, as to the significance of the amendment in this respect, F. Saponaro, *L'attuazione amministrativa del tributo nel diritto dell'integrazione europea*, cit. at 5, 324.

²⁵ Also known in common law systems, especially as regards judicial enforcement, as the "revenue rule". For a detailed analysis of the history of the doctrine, see B. Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 *Duke J. Comp. & Int'l L.* 79 (2006), in particular 83-94.

²⁶ See Art. 7.2(a) of Directive 76/308 and Art. 11.1 of Directive 2010/24. The latter provision, however, now explicitly allows for the cross-border recovery of claims which are only partially contested, in respect of the part which is not, as well as for the recovery of a claim which is contested *in toto*, insofar as the law of the requested MS allows for such a possibility. This latter possibility is subject, however, to an obligation to refund the tax illegitimately levied in the event the challenge brought by the taxpayer were eventually upheld (see Art. 14.4).

²⁷ See Art. 7.2(b) of Directive 76/308 and Art. 11.2 of Directive 2010/24.

²⁸ See Directive 2010/24, Art. 12.

²⁹ *Ibid.*

³⁰ Directive 2010/24, Art. 13.1.

the system, requests for assistance can also be made concerning the adoption of *precautionary measures*, to which most of the requirements governing recovery cooperation also apply.³¹

All three arrangements can be conceptualised as horizontal composite procedures. The act adopted by the requested authority (be it one of notification, or of enforcement, or a precautionary measure) is based on one or more acts adopted by the applicant authority which can hence be qualified as “preparatory”. In instances of notification this boils down to the request for assistance in notifying the documents. In cases of recovery and precautionary measures, however, this also more obviously involves attributing relevance in the legal system of the requested authority, pursuant to an EU norm to this effect, to acts of tax assessment and/or instruments permitting the enforcement of the claim emanating from the applicant MS’ legal system. This raises the problem of derivative illegality: Are violations of the norms governing the preparatory stages of the procedure liable to affect the legality of the final act? From the point of view of (transnational) judicial review, the question is: Can the judiciary of the requested MS review the legality of the final act, in the light of violations which took place in the applicant MS’ legal system, during the adoption of the preparatory acts by the authorities belonging to such latter system?

This heated issue was expressly dealt with by the EU legislature. The Directives adopted a conservative solution, which seriously diminished the possibility for an effective judicial remedy to be granted to taxpayers. Ever since Directive 76/308, the judges of the *applicant* MS are to hear challenges brought against “the claim and/or the instrument permitting its enforcement”,³² to which Directive 2010/24 appropriately added disputes concerning the newly-introduced uniform instrument permitting enforcement, and (crucially for our purposes) those “concerning the validity of a notification made by a competent authority of the applicant Member State”.³³ Judges in the *requested* MS, on the other hand, are competent to hear disputes concerning “the enforcement measures” taken in that MS,³⁴ which Directive 2010/24, codifying the ECJ’s *Kyrian* jurisprudence, also clarified to encompass disputes

³¹ See Directive 76/308, Art. 13, and Directive 2010/24, Arts. 16 and 17.

³² Directive 76/308, Art. 12.1.

³³ Directive 2010/24, Art. 14.1.

³⁴ Directive 76/308, Art. 12.3.

“concerning the validity of a notification made by a competent authority of the requested Member State”.³⁵

As a consequence, judges in the applicant MS are given with exclusive jurisdiction to hear challenges brought against acts of the authorities forming part of the legal system of the applicant MS itself. The same then goes for the requested MS, whose judges are given with exclusive jurisdiction on the acts of the authorities located therein. Transnational judicial review thus appears to be explicitly barred. This can, however, be problematic, as the facts in *Donnellan* show.³⁶ There, an Irish taxpayer was subject in Ireland, on request from Greece, to measures of enforcement of an administrative penalty imposed on him by the Greek customs administration. Mr Donnellan was, however, only made aware of the existence of the penalty many years after its adoption, when the Irish acts of enforcement were put in place, since Greece had failed to notify to him the relevant decision. As a consequence of such failure, when Mr Donnellan became aware of the penalty, the limitation period laid down in Greek law for challenges to be brought against the act imposing the penalty had already elapsed. The apportionment of jurisdiction enshrined in Directive 2010/24 did, however, also prevent Mr Donnellan from challenging in Ireland both the decision (which was, technically speaking, the “claim” concerned, upon which only judges in the applicant MS enjoy jurisdiction) and, crucially, its enforcement, based on the defective notification process (which, having been carried out by the applicant authority, pertained to the jurisdiction of the judiciary belonging to the same legal system as the latter). The Irish judge did thus apparently have no other choice than enforcing the sanction, despite the most obvious breach of the right to an effective judicial remedy which this would have entailed. In a landmark preliminary ruling, however, the ECJ acknowledged that the Directive’s apportionment of jurisdiction could not, when read in the light of Art. 47 CFREU, “reasonably be invoked against [Mr Donnellan]”,³⁷ since it would have deprived the applicant of any possibility to challenge the penalty and its enforcement in both fora. The Irish

³⁵ Directive 2010/24, Art. 14.2. On the germination of the provision from *Kyrian* (addressed in Section 3.1 below), see P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 59-61.

³⁶ The following only sums up the main facts and findings of the case. For more detailed analysis, see *Ibid.*, 55-68.

³⁷ *Donnellan*, cit. at 9, para 59.

judge would thus be empowered to review the legality of the notification process (not) carried out by Greece also in the context of the challenge brought against the Irish acts of enforcement. Such (non-)notification was, however, also bound to be deemed incompatible with Art. 47 CFREU itself, which was construed to require “that the addressee of a document actually receives the document in question but also that he is able to know and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able effectively to assert his rights in the Member State of transmission”³⁸ – a standard most obviously not complied with, in a case where the addressee of the document was not even made aware of the existence of foreign measures against him. The Irish judge could thus legitimately refuse to enforce the Greek penalty against Mr Donnellan.

It is important to notice that, in *Donnellan*, Art. 47 CFREU thus played a dual role: on the one hand, it provided a legal basis for transnational judicial review, grounding the ECJ’s stance that the notification process carried out by Greece was, despite the Directive’s unambiguous wording to the contrary,³⁹ censorable also before the Irish judge (we might call this the *cause of action* aspect of Art. 47 CFREU). On the other hand, it provided the legal standard against which to carry out such judicial review itself, instructing that judge to assess whether the conditions under which notification was (not) effected could be held to enable Mr Donnellan to effectively safeguard his rights and interests (we will refer to this as the *benchmark* aspect of Art. 47 CFREU).⁴⁰ This radical outcome complements the earlier finding in *Berlioz*, where a preparatory act adopted under the twin Directive 2011/16⁴¹ was also accepted to be prone to transnational judicial review in the context of a challenge brought against the final act of the tax assessment cooperation

³⁸ *Ibid.*, para. 58.

³⁹ This appears to be conceptually problematic, since in such a case the most appropriate remedy would rather be expected to be a declaration that the Directive’s norms are null and void, pursuant to a preliminary ruling (not on the *interpretation*, but) on the *validity* of the act. See P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 63-64.

⁴⁰ Although the ECJ unpersuasively attempted to conceptualise this point in a different way. See *Ibid.*, 64-68.

⁴¹ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011).

procedure: whereas Directive 2011/16 does *not* contain an explicit apportionment of jurisdiction barring transnational judicial review, so that the solution reached was perhaps less problematic, *Berlioz* amounted to the first time where transnational judicial review was accepted by the ECJ, also drawing on Art. 47 CFREU *qua* cause of action. Further, it shows that such judicial review can also be relied upon to censor a misapplication of *substantive* EU norms governing the procedure laid down in secondary law acts (hence providing the benchmark which, in *Donnellan*, is provided by Art. 47 CFREU itself).⁴² Taken together, *Berlioz* and *Donnellan* show that Art. 47 CFREU, in its cause of action aspect, can be used to carry out transnational judicial review whenever, without such review, individuals would be deprived of any judicial remedy against alleged violations of EU norms in the preparatory stages of horizontal composite procedures, be those norms substantive or procedural (and, in such latter case, be they a secondary law provision, or Art. 47 CFREU in its benchmark aspect). This innovative solution, arguably stemming from judicial dialogue between the ECJ and the European Court of Human Rights (ECtHR) (see below, Section 3.2), opens most interesting horizons for the future of EU administrative law. As recalled in Section 1 above, its actual working in practice depends, however, on the capability of national judges to comply with the ECJ's *dicta*. This does not appear to have been the case in *Intini*, as the following Section will try to detail.

3. The Case of *Intini*: Transnational Judicial Review in Action

Intini involved the provision, on the part of the Italian tax authority, of assistance to the Austrian revenue service in the recovery of VAT (plus interest) due by Mr Intini, an Italian taxpayer, on importation into Austria of some jewelry from third countries. The Austrian authority had directly notified to Mr Intini acts of assessment of the duty, and had subsequently adopted an

⁴² In this case, the requirement, stipulated in Art. 1 of Directive 2011/16, that the information sought under the Directive's cooperation scheme be "foreseeably relevant to the administration and enforcement" of the domestic tax law of the applicant MS. The following does not address *Berlioz* in detail: to this end, reference can be made, again, to P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 44-55.

instrument permitting enforcement of the claim. Pursuant to an Austrian request for recovery assistance, the Italian authority initiated the recovery procedure. It thus notified to Mr Intini a document, called *cartella di pagamento*, inviting him to pay the sum due within 60 days, after the expiry of which term the claim would be enforced. Mr Intini unsuccessfully brought a complex challenge against the *cartella di pagamento* before the Milan District Tax Commission, by which, in essence, he aimed at having the Austrian tax claim declared as substantively non-existing; at reprehending the process of notification of the *cartella di pagamento* undergone by the Italian authority pursuant to Italian law; and, what is most relevant for our purposes, at remedying the fact that he had been served with the Austrian act of assessment, upon which the Austrian instrument permitting enforcement (and, therefore, the *cartella di pagamento*) was premised, only in German.⁴³ Upon lodging a successful appeal with the Lombardy Regional Tax Commission,⁴⁴ Mr Intini was relieved from paying the contested

⁴³ *Intini*, preliminary remarks. In this respect, the ruling is complex because under Italian tax law, pursuant to Art. 19 of Legislative Decree No. 546/1992, claims in the fiscal field can only be brought against certain enumerated acts, and the unlawfulness of acts other than those mentioned in the provision can only be redressed by means of derivative illegality of the former: see, also for the broader conceptual implications of the system, F. Batistoni Ferrara, *Gli atti impugnabili nel processo tributario*, 67 *Diritto e pratica tributaria* 1109 (1996). The Court of Cassation, however, tends to interpret broadly the enumerated acts: see G. Frasoni, *Spunti ricostruttivi in tema di atti impugnabili nel processo tributario*, 22 *Rivista di diritto tributario* 979 (2012). Mr Intini brought his claim against the *cartella di pagamento*, a document which, as stated above, is to be notified, pursuant to Art. 25 of Decree of the President of the Republic No. 602/1973, to the taxpayer in order to make them aware of the existence of an instrument permitting the enforcement of a tax claim. However, from the perspective of the taxpayer, the *cartella di pagamento* tends to subsume the instrument permitting enforcement, taking into account that enforcement itself cannot take place before the *cartella di pagamento* has been notified (Art. 50, Decree No. 602/1973) and that the limitation period for the taxpayer to challenge the instrument permitting enforcement starts elapsing, in turn, only when the *cartella di pagamento* is served on them (Art. 19, Legislative Decree No. 546/1992): see M. Basilavecchia, *Il ruolo e la cartella di pagamento: profili evolutivi della riscossione dei tributi*, 78 *Diritto e pratica tributaria* 127 (2007). Strictly speaking, however, the grounds for Mr Intini's claims concerned only in part the *cartella di pagamento* (to the extent that they pivoted on the process of notification thereof). Rather, they were largely devoted to seeking redress for alleged violations of his rights brought about by the Austrian acts of the procedure (that is, the act of assessment and its notification), that which caused the problems which are of interest here to arise.

⁴⁴ *Intini*, preliminary remarks. On Regional Tax Commissions, see note 13 above.

VAT, and the Italian authority challenged the Commission's ruling before the Court of Cassation. Mr Intini was eventually unsuccessful: the Court of Cassation upheld the lawfulness of the notification process put in place by the Italian authority under the national law,⁴⁵ and declared not to have jurisdiction to hear the claims concerning the non-existence of the Austrian claim and the notification in German of the relevant documents on the part of the Austrian authority.⁴⁶ The latter aspect is most relevant from the angle chosen in the present paper. Given that, in the Court of Cassation's view, any irregularity in the notification of the acts of assessment underlying the Austrian instrument permitting enforcement was to be conceptualised as affecting the existence of such latter instrument, Mr Intini's third claim was deemed to be one regarding that instrument. The Court of Cassation thus held that "Italian jurisdiction must be declined [in respect of those amongst Mr Intini's claims] which involve questions revolving around the existence of the foreign tax claim and the foreign instrument permitting enforcement, and not the Italian enforcement procedure, as it is the competent authority of the State asserting the tax claim which has jurisdiction to hear those claims".⁴⁷ The Court reached this conclusion by allegedly applying Directive 76/308 (applicable *ratione temporis* over Directive 2010/24): it was of the view that the rule demanding jurisdiction to be declined could be inferred from the principle of correspondence between the law regulating the acts to be challenged and the judiciary given with competence to hear those challenges implicit in the Directive (see Section 2 above), and allegedly stated by the ECJ in *Kyrian*.⁴⁸ Indeed, the Court of Cassation excerpted from such latter judgment the *obiter* that an allocation of jurisdiction which was such as to exclude the Italian jurisdiction in the instant case "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, pursuant to Articles 5 and 6 of Directive 76/308, the provisions which its national law lays down for corresponding

⁴⁵ *Intini*, paras. 4-7.

⁴⁶ *Intini*, para. 2.

⁴⁷ *Ibid.*; Authors' translation.

⁴⁸ ECJ, Case C-233/08 - *Kyrian* (ECLI:EU:C:2010:11).

measures, that authority being the best placed to judge the legality of the measure according to its national law".⁴⁹

Setting aside the claim on the existence of the tax claim in the narrow sense, which was indeed purely a matter of Austrian tax law, Mr Intini was, however, essentially striving to engage in the kind of transnational judicial review of alleged procedural defects sketched out in *Donnellan*. In EU administrative law terms, the Austrian instrument permitting enforcement of the claim was a preparatory act for the Italian acts of enforcement of the said claim (the final act of the horizontal composite procedure, which the Italian judge no doubt had jurisdiction to review, also pursuant to Directive 76/308's allocation criteria). Mr Intini was arguing that, since the Austrian act of assessment upon which the instrument permitting enforcement was premised in turn had been notified to him in German, a language he could not understand, the whole transnational recovery procedure was to be deemed invalid, as he had not been placed in such a position as to be able to assert his rights *vis-à-vis* the Austrian authority. Otherwise put, implying that the Italian judge was given jurisdiction to do so (based on Art. 47 CFREU's cause of action aspect), Mr Intini was searching for redress to what he deemed to amount to a violation of Art. 47 CFREU's benchmark aspect, *not*, as the Court of Cassation implied referencing *Kyrian*, of the Austrian tax law governing notification. There are most certainly aspects of the transnational notification process at stake in *Intini* which are exclusively governed by the law of the applicant MS,⁵⁰ and it is inapposite for the judiciary of the requested MS to review the application of those provisions by the notifying authority. This does not, however, exhaust what notification is all about. A *Donnellan*-like assessment of whether that process as a whole complies with the minimum standard laid down by Art. 47 CFREU, which is an EU law provision, can be carried out by a *juge de droit commun* situated in the requested State, without engendering any practical or conceptual problem in a system of shared sovereignty such as the EU's. A closer scrutiny of *Intini* is therefore apposite, in order to more carefully assess the merits of the Court of Cassation's interpretive strategy from the

⁴⁹ *Ibid.*, para. 40.

⁵⁰ This might be the case, for instance, of the identification of the competent authority within that State's legal system, or the detailed content of the instrument permitting the enforcement of the claim besides the minimum standard of the Directive's uniform template.

perspective of the correct application of the ECJ's case law on effective judicial review in EU horizontal composite procedures.

3.1 The Apportionment of Jurisdiction on Claims Concerning the Transnational Notification of Fiscal Documents, between Kyrian and Donnellan

The Court of Cassation's simplistic reliance upon *Kyrian* hides, in fact, the complexity of the issues dealt with in these cases. At first glance, *Kyrian* regarded a factual setting similar to that of *Intini*. The German customs authority had availed itself of the assistance of the Czech authority to notify to Mr Kyrian, a Czech taxpayer, an assessment act imposing the payment of excise duties. Assistance was also requested to carry out the subsequent steps in the recovery procedure, including the notification of the instrument permitting the enforcement of the claim.⁵¹ Similarly with the case of *Intini*, the assessment notice was served on Mr Kyrian in German. This led Mr Kyrian to claim that "he was unable to take the appropriate legal steps to defend his rights", to the effect that the German claim, so Mr Kyrian submitted, was unenforceable in the Czech Republic.⁵² Upon challenging the Czech enforcement acts, Mr Kyrian had to confront the Czech authority's defence that "neither it nor the Czech administrative courts ha[d] jurisdiction to review the tax assessment notice",⁵³ and a preliminary ruling was requested to the ECJ to provide clarification on the allocation of jurisdiction under Directive 76/308. The ECJ concluded in the sense of the excerpt quoted above, on the principled correspondence between applicable law and competent judiciary.⁵⁴ However, in a key facet of the ruling completely overlooked by the Court of Cassation in *Intini*, it also held that, in exceptional cases, the enforcement of the recovery request could be denied, if needed to safeguard the requested State's public policy.⁵⁵ It further maintained that, in any event, the notification carried out by the Czech authorities was to be considered an "enforcement measure" of the requested authority for the purposes of the jurisdiction's

⁵¹ See Opinion of Advocate General Mazák in Case C-233/08 – *Kyrian* (ECLI:EU:C:2009:552), paras. 5-7.

⁵² *Ibid.*, para. 9.

⁵³ *Ibid.*, para. 10.

⁵⁴ See note 49 above and surrounding text.

⁵⁵ *Kyrian*, cit. at 48, para. 42.

apportionment.⁵⁶ As a consequence, the Czech judge was competent to hear Mr Kyrian's claims on, *inter alia*, the language of the documents which, though emanating from Germany, had been notified to him by the Czech authority.

As recalled above,⁵⁷ the approach deployed in *Kyrian* was consolidated in Directive 2010/24, which explicitly bestowed jurisdiction to hear claims concerning notification processes in cross-border cases upon the judge belonging to the same legal system as the notifying authority. That approach was, however, radically questioned in *Donnellan*. In fact, in such latter case, and like in *Intini* (but unlike *Kyrian*), it was the applicant authority (in *Donnellan*: Greece; in *Intini*: Austria), not the requested one (in *Donnellan*: Ireland; in *Intini*: Italy) which (should have) carried out the notification in the territory of the requested State; as a consequence, applying the *Kyrian* jurisprudence and/or Directive 2010/24, the judge belonging to the same legal system as the applicant authority (respectively, Greek or Austrian) should have enjoyed jurisdiction to hear the claims concerning the notification process. However, as recalled in Section 2 above, in *Donnellan* the ECJ accepted that the judge of the requested MS could be given with jurisdiction, based on Art. 47 CFREU *qua* cause of action, to review whether such notification complied with Art. 47 CFREU *qua* benchmark. In other words, *Kyrian* seems hardly relevant to *Intini*: it concerned a factual setting where it was the requested authority which notified all the relevant documents (which was not the case in *Intini*), and the principles it laid down to govern the allocation of jurisdiction have been, despite Directive 2010/24's codification, essentially overruled by *Donnellan*. It is therefore at least dubious to invoke it to ground a regressive ruling, which basically upholds the cross-border enforcement of a tax claim which the taxpayer was not able to challenge owing to language barriers.

At a closer scrutiny, the main force behind the Court of Cassation's use of *Kyrian* actually seems to be that Court's willingness not to depart from its well-established jurisprudence. In fact, the Court of Cassation mainly quotes *Kyrian* to provide further authority in support of the leading precedent in the Italian legal system to decide jurisdictional issues in fiscal mutual

⁵⁶ *Ibid.*, para. 47.

⁵⁷ See note 35 above.

assistance procedures, Judgement No 760/2006.⁵⁸ This ruling was delivered on the interpretation of the 1938 Convention on mutual assistance in the fiscal field between Italy and Germany, which, similarly with the EU Directives, envisaged the possibility for the tax authorities of one State to request assistance in the recovery of taxes in the territory of the counterpart.⁵⁹ The Italian authority had enforced a German claim pursuant to the said Convention, and the taxpayer concerned had alleged, on the one hand, that the Italian provisions on the notification of the enforcement acts had not been complied with, and, on the other hand, that the relevant limitation period set forth by German tax law had elapsed.⁶⁰ The Court of Cassation accepted that the Italian judge enjoyed jurisdiction on the former aspect, but denied it in respect of the latter, based on a principle of correspondence between acts (and the law regulating them) and competent judiciary. What is more for present purposes, although it reached such conclusion through an interpretation of the 1938 Convention, the Court of Cassation expressly stated that the resulting apportionment of jurisdiction could also apply to the system established pursuant to the EU Directives, holding them to embody, as a matter of positive law, the criterion which it was interpretatively eliciting from the 1938 Convention. In a sense, therefore, the quotation of Judgement No 760/2006 in *Intini* is an interpretive twist. Judgement No 760/2006 used Directive 76/308, interpreted superficially and in isolation from the broader system of EU law, to read into the 1938 Convention a rigid allocation of jurisdiction, excluding any form of transnational judicial review from the purview of the tools available to the Italian judge. In a perverse form of path dependence, however, it soon became a leading precedent which the Court of Cassation could resort to, also when applying EU law, to claim that a *jurisprudence constante* existed, under which transnational judicial review in fiscal assistance procedures was barred *a priori*. This tautological reference to the national case law, however, turns ultimately out to

⁵⁸ Court of Cassation, Judgement No 760/2006 of 17 January 2006. For early comment on the ruling, see M. Poggioli, *Le controversie giudiziali generate dalla riscossione in Italia di crediti tributari formati all'estero ed il riparto di giurisdizione affermato dalle SS.UU. della Corte di Cassazione*, 17 *Rivista di diritto tributario* 119 (2007). The ruling is quoted, just before referencing *Kyrian*, in *Intini*, para 2.

⁵⁹ *Convenzione sull'assistenza amministrativa e giudiziaria in materia tributaria, stipulata in Roma, fra l'Italia e la Germania, il 9 giugno 1938*, executed in the Italian legal system by Royal Decree No 1676/1938 of 9 September 1938.

⁶⁰ Judgement No 760/2006, cit. at 58, preliminary remarks.

be a way to immunise the Italian legal system from the developments occurred in the meanwhile in this area of the law at the EU level. Judgement No 760/2006 was, in fact, handed down in 2006 – before *Kyrian* (2010), way before *Donnellan* (2018), and, in general, when the realisation, by scholars and practitioners, of the perilous implications for taxpayers’ rights of cross-border cooperation between tax authorities was far ahead. Even if this approach were to be legitimately applied under a non-EU scheme of assistance, such as that of the 1938 Convention (and there are serious indices that, without being properly qualified, it would be in breach of Italian constitutional law as well),⁶¹ it can no longer prevail when the authorities involved act under the EU Directives, which *Berlioz* and *Donnellan* have caused to rebalance in a manner which is more sensitive to taxpayers’ rights under Art. 47 CFREU.

3.2 The Applicability of the *Donnellan* Jurisprudence: On the Scope of Application of Art. 47 CFREU

Setting aside *Kyrian*’s outdated solution, the Court of Cassation should have thus acknowledged that *Donnellan* arguably required the establishment of Italian jurisdiction, based on Art. 47 CFREU’s cause of action aspect. We use “arguably” because a conservative reading of the ruling could raise some doubts as to whether *Donnellan*’s liberal solution can be extended to a case such as *Intini*. This is not only on account of the merits of the cases, with the ECJ’s insistence that *Donnellan*’s circumstances were “exceptional”.⁶² We will return to this point in Section 3.4 below. For now, it must be noted that more radical questions, surrounding the very same *scope* of transnational judicial review based on Art. 47 CFREU *qua* cause of action, are also raised by *Intini*’s factual setting. In this respect, we have submitted in our earlier contribution that a key factor determining the ECJ’s unusual outcome in *Donnellan* (as well as, earlier, in *Berlioz*) was its willingness to bring forward the dialogue with the ECtHR, and, in particular, to prevent the *Bosphorus* presumption, viewed in the light of *Avotiņš v. Latvia*, from being rebutted.⁶³ Had the ECJ not

⁶¹ See M. Poggioli, *Le controversie giudiziali*, cit. at 58, 129-142.

⁶² *Donnellan*, cit. at 9, para. 61.

⁶³ See P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 49-51 and 63-64. The *Bosphorus* presumption is the well-known doctrine, developed in ECtHR, *Bosphorus Hava Tollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Judgement of 30 Jun 2005, application No

allowed the Irish judge in *Donnellan* to review the legality of the notification procedure carried out by the Greek authority, Mr Donnellan would have had a rather easy case to claim, before the ECtHR, that his right to a fair trial under Art. 6 of the European Convention on Human Rights (ECHR) had been breached by the Irish judge. Given that, however, this would have amounted to “a serious and substantiated complaint” (since it was undisputed that Mr Donnellan could not bring claims in either Ireland and Greece, and that he had not been served in due time with the relevant documents) that “the protection of [Art. 6 ECHR] ha[d] been manifestly deficient” (since a key aspect of Art. 6 ECHR, the right of access to court, had been completely denied by the radical unavailability of any judicial remedy, and that, on the Greek side, this was due to the failure to notify to him the decision to be challenged),⁶⁴ Ireland could not have shielded itself behind the sole fact that it was applying EU law. Had Art. 6 ECHR been found to have been breached, however, a disrupting acknowledgment by the ECtHR that the application of EU law was the root cause of the violation would have ensued. In our view, such need to accommodate the system set up by the EU Directives’ allocation of jurisdiction, on the one hand, and the precepts of ECHR law, on the other hand, was to a large extent responsible for *Donnellan*’s apparently erratic conclusion.

With this in mind, one could draw a crucial distinction between *Donnellan* and *Intini*. As recalled in Section 2 above, in

45036/98, under which the ECtHR would refrain, as a rule, from hearing 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. This is conditional, however, on the fact that such organisation offers a system of protection of human rights comparable, from both the substantive and the procedural point of view, with that under the ECHR. Under such conditions, the ECtHR would presume that the State conduct complained of would comply with ECHR law. It would not waive, however, the possibility to carry out an assessment of the merits of the individual case, with a view to ascertaining whether the protection of fundamental rights was “manifestly deficient”, so that the presumption should be rebutted. In ECtHR, *Avotiņš v. Latvia*, Judgment of 23 May 2016, Application No 17502/07, the ECtHR came close for the first time to a rebuttal of such presumption, while also introducing an obligation, under certain conditions, for national judges themselves to assess whether the conditions for rebuttal applied (see text surrounding the following note).

⁶⁴ “Serious and substantiated complaint of manifest deficiency” is, indeed, the formula deployed *Ibid.*, para. 116.

Donnellan, the claim for the recovery of which Greece had requested Ireland's assistance was an *administrative penalty* imposed on Mr Donnellan for smuggling.⁶⁵ Art. 6 ECHR was therefore applicable, since, pursuant to the so-called "*Engel criteria*",⁶⁶ the challenge brought against the enforcement of the claim qualified as one aiming at "the determination of a criminal charge".⁶⁷ In *Intini*, on the other hand, Austria had requested Italy's assistance to recover a VAT sum *as such* (plus interest), without a penalty element being involved at all. Given that Art. 6 ECHR can apply to proceedings aiming at "the determination" of either "a criminal charge" or of "*civil rights and obligations*", the applicability of the provision to the instant case, if at all, would have to hinge upon such second limb. This is problematic. In the case of *Ferrazzini v. Italy* (2001),⁶⁸ the

⁶⁵ *Donnellan*, cit. at 9, paras. 16-24.

⁶⁶ Reference is made here to the famous criteria laid down in ECtHR, *Engel and others v. The Netherlands*, Judgment of 8 June 1976, Application No 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para. 82, under which, with a view to determining whether a given penalty imposed by a State party to the ECHR possesses a "criminal" nature for the purposes of triggering the Convention's procedural (Art. 6) and substantive (Art. 7) guarantees, the ECtHR would take into account, besides the national law's qualification thereof, "the nature of the offence" and "the degree of severity of the penalty". For an overview of the case law which further clarified the meaning and scope of the *Engel* jurisprudence (e.g., and importantly, specifying that the "nature of the offence" and the "severity of the penalty" criteria, recalled above, are alternative, and not cumulative), see B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn., 2017), 275-277. The first case where tax penalties (coming as surcharges) were deemed to qualify as "criminal" was ECtHR, *Bendenoun v. France*, Judgment of 24 February 1994, Application No 12547/86. Some uncertainty arose, however, as to whether that judgement amounted to an application of the *Engel* criteria, or rather laid down a different test applying in fiscal matters only, because of the failure by the ECtHR to reference *Engel* and of the partially different analysis carried out in this case (see *Ibid.*, para. 47). The ECtHR, however, reviewed its case law in what is now regarded as the leading precedent in the field (ECtHR, *Jussila v. Finland*, Judgment of 23 November 2006, Application No 73053/01), clarifying that *Bendenoun v. France* was not intended to depart from *Engel v. The Netherlands*, and that also the field of tax penalties is governed by such general jurisprudence (*Jussila v. Finland*, paras. 29-36). From then on, the ECtHR has accepted that a strikingly wide array of tax penalties qualify as "criminal" for the purposes of Art. 6 ECHR: see R. Attard, *The Classification of Tax Disputes, Human Rights Implications*, in G. Kofler, M. Poiaras Maduro & P. Pistone (eds.), *Human Rights and Taxation in Europe and the World* (2011).

⁶⁷ See, *mutatis mutandis*, P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 51.

⁶⁸ ECtHR, *Ferrazzini v. Italy*, Judgment of 12 July 2001, Application No 44759/98.

ECtHR famously posited that “tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant”.⁶⁹ As a consequence, “rights and obligations” arising in the fiscal field could not, in and of themselves, be considered as having a “civil” character. Art. 6 ECHR would hence be inapplicable in tax cases other than those falling under the criminal prong of the provision. To be sure, the roots of the principle can actually be traced back to the very early years of application of the ECHR.⁷⁰ The significance of *Ferrazzini v. Italy* lies primarily in the fact that here, when asked to review its jurisprudence pursuant to the “Convention as living instrument” doctrine,⁷¹ the ECtHR confirmed its earlier approach, and kept on excluding tax trials from the scope of the procedural guarantees under Art. 6 ECHR in its “civil” component. *Ferrazzini v. Italy* was harshly criticised by tax law scholars,⁷² but still holds as good law. The significant curtailing of taxpayers’ procedural rights arising from this broad exclusion might, to a certain extent, be practically downscaled: the ECtHR has, indeed, acknowledged that, if penalties qualifying as “criminal” are imposed, when challenges are brought in a single trial against both the penalty and the properly fiscal aspects of the dispute, Art. 6 ECHR applies.⁷³ In *Intini*, however, there not being any penalty whatsoever in place, not even this path was available. Henceforth, had the case been considered under ECHR law, Art. 6 ECHR would most likely have been found to be inapplicable. If, therefore, we accept that the need to preserve a good relationship with the ECtHR laid the foundations for *Donnellan’s* (and, earlier, *Berlioz’*) acceptance of transnational judicial review, we might be

⁶⁹ *Ibid.*, para. 29.

⁷⁰ For a detailed overview of the early case law, see P. Baker, *Taxation and the European Convention on Human Rights*, 40 *Eur. Tax’n* 298 (2000), 306-312.

⁷¹ On which see B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, cit. at 66, 76-80.

⁷² See, for instance, P. Baker, *Should Article 6 ECHR (Civil) Apply to Tax Proceedings?*, 29 *Intertax* 205 (2001), in particular 207-211, and *Id.*, *The Decision in Ferrazzini: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters*, 29 *Intertax* 360 (2001). Less based on ECHR law proper, but pivoting on general jurisprudence arguments, see A. Perrone, *Art. 6 della CEDU, diritti fondamentali e processo tributario: una riflessione teorica*, 23 *Rivista di diritto tributario* 919 (2013), in particular 945-978.

⁷³ See ECtHR, *Georgiou v. The United Kingdom*, Judgment of 16 May 2000 (admissibility decision), Application No 40042/98, para 1.

led to conclude that *Intini's* circumstances lack a crucial condition for that judicial review to apply.

The point made here, however, is that this is not decisive. In fact, the conceptual *a priori* for the reception of *Avotiņš v. Latvia* in the EU legal order effected with *Donnellan* and *Berlioz* is Opinion 2/13, rendered by the ECJ on the EU's accession to the ECHR.⁷⁴ The Opinion introduced a constitutional discourse on the principle of mutual trust meant to exclude, as a rule, transnational judicial review on the implementation of EU law.⁷⁵ It was, possibly, as a reaction to this that the ECtHR prevented, in *Avotiņš v. Latvia*, EU MS from successfully invoking the need to implement EU law as a justification for shortcomings in the protection of ECHR rights.⁷⁶ At the same time, however, the Opinion itself already introduced a principled room for exception to mutual trust on fundamental rights grounds, which was actually applied in *Donnellan* (and, earlier, in *Berlioz*).⁷⁷ More precisely, and crucially, in the Opinion we read that MS may, “in exceptional cases”, derogate from the principle of mutual trust, double-checking “whether [another MS] has actually, in a specific case, observed the fundamental rights

⁷⁴ ECJ, Opinion 2/13 – *Adhésion de l'Union à la CEDH* (ECLI:EU:C:2014:2454). See the reference to the Opinion made in *Donnellan*, cit. at 9, para. 40.

⁷⁵ That which was, ultimately, allegedly instrumental in preserving the principle of autonomy of EU law, the overarching preoccupation of the ECJ throughout the Opinion: see B.H. Pirker and S. Reitemeyer, *Between Discursive and Exclusive Autonomy: Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law*, 17 Cambridge Y.B. Eur. Legal Stud. 168 (2015). The principle of mutual trust, in turn, is a principle requiring MS, “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” (Opinion 2/13, cit. at 74, para. 191). Despite lacking a clear treaty foundation, such principle, which was mainstreamed in the 1990s in connection with the deepening of integration in judicial matters, was constitutionalised in Opinion 2/13, grounding it on the commitment by all MS to the set of shared values of Art. 2 TEU: see *Ibid.*, para. 168, and, in the literature, K. Lenaerts, *La Vie après l'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust*, 54 Common Mkt. L. Rev. 805 (2017). Comprehensively on the principle, its roots, and its normative content, see C. Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne : Un principe essentiel à l'épreuve d'une crise de valeurs* (2020).

⁷⁶ 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*, 13 Eur. Const. L. Rev. 551 (2017), in particular 560-566.

⁷⁷ See P. Mazzotti, M. Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures*, cit. at 7, 48-53 and 68-70.

guaranteed by the EU".⁷⁸ This is a major turning point in our inquiry. *Berlioz* and *Donnellan* might have well availed themselves of the room for exceptions to mutual trust left by Opinion 2/13 in order to accommodate *Avotiņš v. Latvia*'s precepts. This acted, however, as the "political" determinant for the ECJ's willingness to accept transnational judicial review. As a matter of law, neither Opinion 2/13, nor *Donnellan*, nor *Berlioz* quote ECHR law as such: what transnational judicial review may exceptionally aim at checking is compliance with EU fundamental rights law. Since, as is well known, the ECHR provides the CFREU with "a floor, not a ceiling",⁷⁹ provided ECHR rights are safeguarded in any event, EU fundamental rights might provide a higher degree of protection, both in scope and content. Coming to *Berlioz* and *Donnellan*, this means that, when the ECJ said that transnational judicial review was to be carried out "in the light of Article 47 of the Charter",⁸⁰ it was laying down a basis for a doctrine of such review which, while motivated by the dialogue with the ECtHR, ends up having a way broader scope than would suffice to have *Avotiņš v. Latvia* complied with. In fact, one of the major features of Art. 47 CFREU, which corresponds with Art. 6 ECHR as regards its substantive content, is its exceptionally broader scope of application.⁸¹ Indeed, provided

⁷⁸ Opinion 2/13, cit. at 74, para. 192. Emphasis added.

⁷⁹ This is the image most frequently deployed to account for the model of protection emerging, in particular, from Arts. 52(3) and 53 CFREU. Under the former provision, "[i]n so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], 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"; pursuant to the latter, "[n]othing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions".

⁸⁰ *Donnellan*, cit. at 9, para. 62.

⁸¹ As authoritatively stated in the relevant Explanation, to be found in the Explanations relating to the Charter of Fundamental Rights (OJ C 303, 14.12.2007): "[i]n Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. (...) Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union". Although this excerpt regards one aspect of Art. 47 CFREU in particular (i.e. the right to a fair hearing), the same goes for all of the components of the provision - including, for our purposes, the right of access to court. For commentary in this respect, see P. Aalto and others, *Article 47 - Right to an*

that the MS concerned can be regarded as acting “within the scope of EU law”, so that, under Art. 51 CFREU, the Charter is applicable in the first place, Art. 47 CFREU extends its guarantees not only to controversies aiming at “the determination of civil rights and obligations, or of any criminal charge”. Under Art. 47 CFREU, the relevant test is, rather, whether the proceeding aims at safeguarding a “right [or] freedom guaranteed by the law of the Union” whatsoever.

To start with, there is no doubt that, in fiscal cooperation cases, the Charter is applicable pursuant to Art. 51 CFREU’s requirements: MS resorting to mutual assistance arrangements are “acting within the scope of EU law”, to the extent that the authorities involved act pursuant to a procedure laid down in EU secondary law.⁸² Everything thus boils down to ascertaining

Effective Remedy and to a Fair Trial, in S. Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (2014) paras. 47.44-47.46.

⁸² Indeed, in the early years of the CFREU, some uncertainty famously arose as to the exact scope of application of the rights guaranteed by the CFREU to action undertaken by the MS. Art. 51 CFREU, titled “Field of application”, states that “[t]he provisions of [the] Charter are addressed [...] to the Member States only when they are *implementing* Union law” (emphasis added). The pertinent Explanation, however, states that “it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they act in the scope of Union law*” (emphasis added), and engenders some confusion: pre-Charter, the ECJ reportedly stated that the fundamental rights guaranteed as general principles of Union law were binding upon the MS in situations of “implementation” of EU law, such as those of the instant case (see ECJ, Case C-5/88 - *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, ECLI:EU:C:1989:321), but also in the event MS adopted measures derogating from the four freedoms, since also in this case action at the State level would be taken “within the scope of EU law” (ECJ, Case C-260/89 - *ERT*, ECLI:EU:C:1991:254). In the aftermath of the entry into force of the Charter, commentators speculated whether Art. 51 CFREU’s wording meant that only *Wachauf*-like situations would be governed by the Charter, or whether a reading thereof in the light of the Explanations justified the conclusion that the ECJ’s case law was to be confirmed *in toto*, so that *ERT*-like instances would be covered as well (see, for instance, A.P. Van der Mei, *The Scope of Application of the EU Charter of Fundamental Rights: ERT Implementation*, 22 Maastricht J. Eur. & Comp. L. 432 (2015), 433-436). The issue was eventually solved in ECJ, Case C-390/12 - *Pfleger and Others* (ECLI:EU:C:2014:281), confirming that *ERT*-like situations were also covered by Art. 51 CFREU, and that the relevant test was therefore the traditional “acting within the scope of EU law” one. Such test was then famously given an extremely broad reading in ECJ, Case C-617/10 - *Åkerberg Fransson* (ECLI:EU:C:2013:280), which went so far as to state that “[t]he applicability of

whether in such cases a “right [or] freedom guaranteed by the law of the Union” for the purposes of Art. 47 CFREU is at stake. Although the precise meaning of the expression is unclear, the tendency of the ECJ seems to be that of actually conflating the analysis thereof with the question whether MS are acting within the scope of EU law for the general purposes of Art. 51 CFREU.⁸³ From this perspective, the requirement that the protection of a right or freedom guaranteed by EU law be at stake would thus amount to nothing more than a requirement that an EU law provision be applied in the dispute, one way or another. Again, this would patently be the case in the event of a horizontal composite procedure, such as that pursuant to which a tax claim is enforced in the territory of a MS other than that to which the duty is owed by the authorities of the former State. This only happens because EU norms so provide, regulating a case which would otherwise have to be decided by reference to the national law concerned only – most likely, in the sense that, pursuant to the revenue rule, the foreign claim would be unenforceable.⁸⁴

Therefore, assuming that here a violation of Mr Intini’s right to an effective judicial remedy under Art. 47 CFREU might well take place, it would be of no bearing, for the purpose of triggering *Donnellan*’s transnational judicial review, that the same would not go for Art. 6 ECHR, despite the fact that *Donnellan* was arguably intended to safeguard Art. 6 ECHR itself. The transformative and autonomous character of the discourse generated into EU law by ECHR law’s input makes it possible to accept an exception to the principle of mutual trust, to safeguard the broader right under Art. 47 CFREU, even when the ECHR counterpart would not be applicable. In *Donnellan*, therefore, the ECJ paved the way for

European Union law entails applicability of the fundamental rights guaranteed by the Charter” (para 21). For an analysis of the point in the specific field of tax law, see G. Kofler, *Europäischer Grundrechtsschutz im Steuerrecht*, cit. at 6, 146-177. Note, incidentally, that Kofler concludes that, in the case of the Directives on mutual assistance, the applicability of the Charter does not derive from the “implementation” of EU law *stricto sensu* (but the difference is merely descriptive): contrast 146-154 and 159-172. For systemic reflections on the scope of application of the Charter, also pointing out the limits of any rigid categorisation along the lines of the *Wachauf/ERT* dichotomy, see M. Dougan, *Judicial Review of Member State Action under the General Principles and the Charter: Defining the “Scope of Union Law”*, 52 *Common Mkt. L. Rev.* 1201 (2015).

⁸³ See P. Aalto and others, *Article 47*, cit. at 81, para 47.01.

⁸⁴ See note 25 above and surrounding text.

transnational judicial review to be carried out, whenever this would be necessary to redress a breach of EU law in its broadest sense – including, in a scenario such as *Donnellan* and *Intini*, of Art. 47 CFREU in its benchmark aspect.

3.3 The Language of Fiscal Documents in Transnational Notification Processes: On the Substance of Art. 47 CFREU

A question is thus begged: Is the right to an effective judicial remedy under Art. 47 CFREU actually breached, if a taxpayer is notified with an act of assessment drafted in a language which the taxpayer does not understand? The point is debated ever since *Kyrian*. Here, the ECJ indeed concluded that the taxpayer had the right to receive the relevant documents in one of the official languages of the MS of residence, with a view to ensuring the understandability of their content. It did so, however, pivoting not on Art. 47 CFREU, but rather on a self-standing interpretation of Directive 76/308. It found the understandability of the documents by the recipient to be an implicit requirement of any act of notification, viewed in the light of its purpose of “mak[ing] it possible for the addressee to understand the subject-matter and the cause of the notified measure and to assert his rights”.⁸⁵ Scholarly comments on *Kyrian* were quick to notice that there was no such need to ground that requirement on a self-enclosed interpretation of the Directive, and that more satisfactory a result could have been reached by focusing, to the same effect, on what is now Art. 47 CFREU.⁸⁶ Interestingly, however, the ruling referenced by the ECJ in *Kyrian* to support its interpretation on the function of notification does actually reason in terms of the right to an effective judicial remedy.

Weiss und Partner (2008)⁸⁷ concerned the interpretation of Art. 8(1) of Regulation (EC) No 1348/2000, which enables the

⁸⁵ See *Kyrian*, cit. at 48, para. 58.

⁸⁶ See E. Lege, ‘Zustellung des Vollstreckungstitels in einer Sprache, die der Empfänger nicht versteht – Anmerkung zum Urteil des EuGH vom 14.1.2010 – Rs. C-233/08 (*Kyrian*)’, 7 *Zeitschrift für das Privatrecht der Europäischen Union* 193 (2010), 195-196. Also see, *mutatis mutandis*, F. Péraldi-Leneuf, *Confiance mutuelle en matière de recouvrement de créance* (2018) 6 *Europe – Actualité du droit de l’Union Européenne*.

⁸⁷ ECJ, Case C-14/07 – *Weiss und Partner* (ECLI:EU:C:2008:264). For a detailed, yet concise account of the ruling from the civil procedural point of view, see the case note (written by P. Orejudo Prieto de los Mozos) in S. Alvarez Gonzalez, *Jurisprudencia Española y Comunitaria de Derecho Internacional Privado – Sección III:*

recipient of a judicial document in civil or commercial matters to refuse the transnational service thereof, if the document is not drafted in the official language of the MS addressed or a language of the MS of transmission which the recipient otherwise understands.⁸⁸ The question was how far the right of refusal could go, as far as documents to be notified in the initial phase of a proceeding were concerned: in the main proceeding, the documents relating to an action for damages for defective design on the basis of an architect's contract had been served on the defendant, an English company, to file an application with the German courts. However, only the contract had been translated into English, whereas the annexes thereto (including, for instance, technical reports on the project) had been notified in their original German version.⁸⁹ The ECJ concluded that the right of refusal only extends to "the document or documents which must be served on the defendant in due time in order *to enable him to assert his rights*", and highlighting that it does not cover "documents which have a purely evidential function and are not necessary for the purpose of *understanding the subject-matter of the claim and the cause of action*".⁹⁰ What is more, however, the ECJ opened its analysis by recalling that the objectives of the Regulation concerned (namely, "to improve and expedite the transmission of documents")⁹¹ "cannot be attained by undermining in any way the rights of the defence", which "derive from the right to a fair hearing guaranteed by Article 6 [ECHR and] constitute a fundamental right forming part of the general principles of law whose observance the Court ensures".⁹² It

Jurisprudencia, Parte B (Derecho Judicial Internacional y Derecho Civil Internacional), 60 *Revista Española de Derecho Internacional* 215, (2008) 229-232.

⁸⁸ See Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ L 160, 30.6.2000, pp. 37-52), Art. 8(1).

⁸⁹ *Weiss und Partner*, cit. at 87, paras. 19-31.

⁹⁰ *Ibid.*, para. 73. Emphasis added.

⁹¹ *Ibid.*, para. 46.

⁹² *Ibid.*, para. 47. Note that the judgment predates the entry into force of the Lisbon Treaty and, hence, the acquisition of fully binding legal force on the part of the Charter. The ECJ thus makes reference not to Art. 47 CFREU, but to the corresponding general principle of EU law guaranteed by Art. 6.3 TEU, consolidating into positive treaty law the ECJ's case law dating back to Case C-29/69 - *Stauder v. Stadt Ulm* (ECLI:EU:C:1969:57) and Case C-11/70 - *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECLI:EU:C:1970:114). On these aspects, see G. De Búrca, *The*

accordingly drew the distinction recalled above, between refusable documents and those which are not, precisely based on the need to reach a compromise between those conflicting needs.⁹³ In other words, contrary to what the ECJ maintained in *Kyrian, Weiss und Partner* did not ground its protective interpretation of language requirements in Regulation 1348/2000 on the purpose of notification, objectively viewed. It rather referred to a dichotomy between such objective purpose, on the one hand, and the subjective (fundamental) right granted by what is now Art. 47 CFREU, on the other hand. The latter acted antagonistically to the former, and implied the tearing down of language barriers to effectively safeguard the concerned person's rights before court. The effectiveness and expeditiousness of the cross-border notification of judicial documents (and so, by analogy, of fiscal acts) would benefit if the notifier were enabled to avoid the costly and time-consuming process of translation; the right to an effective judicial remedy, however, does not allow such a solution, at least insofar as the documents which are "necessary for the purpose of understanding the subject-matter of the claim and the cause of action" are concerned. *Weiss und Partner* hence confirms that the full and prompt linguistic understandability of documents which are crucial for a suit at law is a key component of Art. 47 CFREU, even in cases not qualifying as "criminal" (such as, in fact, Mr Intini's), in respect of which the point is made explicit by Art. 6(3)(a) ECHR.⁹⁴

This allows one to imbue with meaning the statement in a leading precedent on Art. 47 CFREU, ZZ (2013),⁹⁵ that, pursuant to that right, "the person concerned must be able to *ascertain the reasons upon which the decision taken in relation to him is based*, (...) so as to make it possible for him to *defend his rights in the best possible conditions and to decide*, with full knowledge of the relevant facts, *whether there is any point in his applying to the court with*

Evolution of EU Human Rights Law, in P. Craig, G. De Búrca (eds.), *The Evolution of EU Law*, cit. at 12, in particular 486-492.

⁹³ *Weiss und Partner*, cit. at 87, paras. 50-72.

⁹⁴ Art. 6(3)(a) ECHR, in fact, reads: "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him (...)"

⁹⁵ ECJ, Case C-300/11 – ZZ (ECLI:EU:C:2013:363). For commentary, see N. de Boer, *Secret Evidence and Due Process Rights under EU Law*: ZZ, 51 *Common Mkt. L. Rev.* 1235 (2014).

jurisdiction".⁹⁶ An individual is not only prevented from effectively appraising whether there is any point in applying to a court when the document is not notified to them at all, as happened in *Donnellan* (which quotes *ZZ* to this effect).⁹⁷ This is also the case where the information, whilst formally notified, cannot be given any real meaning by the recipient, because they cannot understand the language in which that decision is drafted. If, therefore, Art. 47 CFREU as interpreted in *ZZ* and *Weiss und Partner* is considered in its benchmark aspect, the relevant provisions in the EU Directives should be understood in the sense that fiscal documents in mutual assistance procedures should be notified in a language which is understandable to the recipient. The ECJ, indeed, reached such conclusion, already in *Kyrian*, drawing on arguments which, as *Weiss und Partner* shows, would actually tend to limit such aspect of Art. 47 CFREU.⁹⁸ It thus seems hard not to see an *a fortiori* argument to this end in the right to an effective judicial remedy. However, once it is acknowledged that notification in a language which is not understandable to the recipient is of prejudice to a crucial aspect of Art. 47 CFREU, it should be assessed whether this would qualify as an "exceptional circumstance" under (Opinion 2/13 and) *Donnellan* – that is, for present purposes, as an instance where transnational judicial review would be allowed, despite the allocation of jurisdiction to the contrary laid down in the EU mutual assistance Directives. We submit that the answer should be in the affirmative.

3.4 The (Exceptional) Conditions of Transnational Judicial Review and the Case of Fundamental Rights

As hinted at in Section 3.2 above, transnational judicial review under *Berlioz* and *Donnellan* was placed by the ECJ in a broader constitutional context. In fact, transnational judicial review was construed as an exception to the principle of mutual trust between the EU MS, needed to safeguard the right to an effective judicial remedy under Art. 47 CFREU. In those cases, mutual trust would have implied a complete denial of that right, since the taxpayers concerned would have been deprived of any opportunity to have an alleged breach of EU law redressed: in *Berlioz*, the

⁹⁶ *ZZ*, cit. at 95, para. 53; emphasis added. For a similar statement in *Donnellan*, see the excerpt quoted in the text surrounding note 38 above.

⁹⁷ See *Donnellan*, cit. at 9, para. 55.

⁹⁸ See note 85 above and surrounding text.

request for information-sharing was an act confined to the relationship between the MS involved, of which the addressee of the order was not aware, and which it could therefore not separately challenge.; in *Donnellan*, the Greek limitation period had elapsed without Mr Donnellan having been put in the position of asserting his rights. The judges of a MS could thus exceptionally double-check compliance with EU law by the authorities of another MS. The criterion to operationalise Opinion 2/13's "exceptional cases" clause which seems to emerge from *Berlioz* and *Donnellan* is thereby a test of whether, without transnational judicial review, the taxpayer would not have any opportunity to bring a suit at law against a decision adversely affecting their interests. In our view, this would not, however, be a completely accurate account of the stakes in the cases involved. This is *also* true, but, we submit, there is more than this to transnational judicial review. The question to be asked is: *Why* should transnational judicial review be allowed when there would be no other opportunity to have one's case heard by a judge? If one bears in mind that, pursuant to Opinion 2/13, exceptions to mutual trust (such as transnational judicial review is) are to be allowed in order to ensure that "the fundamental rights guaranteed by the EU [be] observed",⁹⁹ the answer becomes more apparent: because access to court is a substantive aspect of the right to an effective judicial remedy under Art. 47 CFREU. From this perspective, the dichotomy between Art. 47 CFREU *qua* cause of action and Art. 47 CFREU *qua* benchmark, which we have deployed this far for explanatory purposes, tends to dissolve: establishing a judge's transnational jurisdiction (hence giving effect to the cause of action) is a way not to have the particular aspect of the benchmark provided by the right of access to court breached. Consider *Donnellan*: the case can be framed as follows.¹⁰⁰ Since Greece acted under Directive 2010/24 to notify the penalty notice across the border, Art. 51 CFREU rendered Art. 47 CFREU applicable. Mr Donnellan thus had the right under Art. 47 CFREU

⁹⁹ Opinion 2/13, cit. at 74, para. 192.

¹⁰⁰ This appears to be the most apposite conceptualisation of the construction implied by the ECJ in its ruling, which however is influenced by the particular setting of the case (with Mr Donnellan demanding the enforcement of the claim to be refused based precisely on the defective notification process, and with the Directive's provisions barring the Irish judge's jurisdiction to do so). In our submission, the case could however be more accurately framed in a different way: see below, text surrounding note 110.

(via ZZ) to have the documents duly served, in order to assess whether there was any point in bringing a claim against the penalty order before a court of law. Such right does also, however, amount to a “right or freedom guaranteed by the Union” in respect of which Mr Donnellan enjoyed (also under Art. 47 CFREU) a right of access to court, to seek to have alleged breaches thereof redressed. The apportionment of jurisdiction under the mutual assistance Directives stood in the way of that access to court, since it reserved jurisdiction upon the issue to the Greek judge. Mr Donnellan was, however, prevented from challenging the claim before that judge, because the very same procedural defect complained of had caused the relevant limitation period to elapse, without Mr Donnellan even being aware of the penalty. The Directive’s allocation of jurisdiction accordingly had to be discarded: otherwise, the very essence of the right of access to court would have been rendered nugatory. The implications of this construction are, however, even broader. Under the current interpretation by the ECJ, EU administrative law provisions placing substantive or procedural conditions upon preparatory acts in horizontal composite procedures also qualify as attributing “a right or freedom guaranteed by the law of the Union” for the purposes of Art. 47 CFREU.¹⁰¹ The right of access to court must be granted in respect of that right/freedom, whether the latter can in turn be subsumed into a fundamental right or not. If, therefore, in a given case there were no other way to have a violation of those provisions redressed, than to enable the judge reviewing the final act to check in their light the legality of the preparatory acts of the procedure (most remarkably, because preparatory acts were not separately challengeable in the legal system of provenance), transnational judicial review would also have to be carried out.¹⁰² Art. 47 CFREU would then provide again

¹⁰¹ See note 83 above and surrounding text.

¹⁰² It might be objected that this solution is somehow artificial, since it might also be the legal systems in whose context the preparatory acts are adopted to be placed under an obligation to enable the separate challengeability of those acts, despite any provision to the contrary in the national law. In principle, preparatory acts are not, indeed, separately challengeable in many a national system of EU MS: see M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the CJEU’s Case Law in Italy, Germany and England* (2008), 35-37 (for the Italian legal system) and 42-48 (for the German legal system); R. Chapus, *Droit du contentieux administratif* (12th edn., 2006), 587-595 (for the French legal system). That such rules should not be applied and the legal system of the preparatory act should make the latter applicable might be opined, in particular, following the

a cause of action, with the relevant “right and freedom guaranteed by EU law” serving as the benchmark for transnational judicial review.

When compliance with EU fundamental rights is concerned, this point can, however, also be brought one step forward. The very same logic underlying such solution would also dictate that, when the foreign preparatory act impinges upon a fundamental right guaranteed by EU law other than the right to an effective judicial remedy,¹⁰³ the national judge reviewing the final act of the procedure should be entitled to review it, *irrespective of whether that act could have been separately challenged in the system of provenance*. If the need to safeguard fundamental rights is, pursuant to Opinion 2/13, the ultimate reason to derogate from mutual trust, also rights other than Art. 47 CFREU deserve access to the enhanced and exceptional protection provided by transnational judicial review, when necessary. Residuality to challenges in the foreign system is a requirement which makes sense from the perspective of Art. 47 CFREU (which can be effectively safeguarded even without transnational judicial review, if a suit at law can be initiated abroad), but is of no bearing on the question whether a given

rationale behind the ECJ’s decision (which however, strictly speaking, only regards vertical composite procedures, on which see note 4) in Case C-97/91 – *Oleificio Borrelli v. Commission* (ECLI:EU:C:1992:491). Whereas one argument in favour of this might be found in the fact that “stopping” the composite procedure at the preparatory stage is more in line with the principle of legal certainty, it cannot, however, be ignored that such a solution goes to the detriment of the effectiveness of the individual’s judicial remedy. It potentially entails a costly and time-consuming multiplication of judicial claims against the acts of one and the same procedure, spanning throughout a number of different national legal systems. Further, it requires both the individual and the national judge to be ready to, respectively, initiate and decide a suit at law contrary to what the national law to be applied envisages (for reflections on the sharp drawbacks for rightholders of such a kind of litigation in even more “publicised” a policy area such as the common market, see J. Pelkmans, *Mutual Recognition in Goods. On Promises and Disillusions*, 14 J. of Eur. Pub. Pol’y 699 (2007).

¹⁰³ This might be the case, for instance, in cases of fiscal information exchange such as *Berlioz*, where the unlawful gathering of information which is not foreseeably relevant to tax assessment procedures (see note 42 above) might clash with the rights to respect for private and family life and to the protection of personal data under, respectively, Arts. 7 and 8 CFREU. The rights forming part of the right to a good administration granted under Art. 41 CFREU might also have a particular and cross-cutting significance from this perspective (think, for instance, of a preparatory act not stating any reasons whatsoever for its adoption).

decision violates a fundamental right *as such* (i.e., irrespective of the effective judicial protection thereof under Art. 47 CFREU). At the same time, Opinion 2/13 makes clear that such derogation should only be applied “in exceptional cases”, since mutual trust is a fundamental principle of EU law, just as much as the protection of fundamental rights.¹⁰⁴ A criterion to draw a distinction between transnationally reviewable acts and those which are not should thus be developed. In our submission, *Avotiņš v. Latvia*’s concept of a “serious and substantiated claim that protection has been manifestly deficient” might provide a useful starting point. This embodies a persuasive rationale that a claimant would be expected to meet a high evidentiary burden, i.e. to make a “serious” and “substantiated” case, before a fundamental principle of EU law such as mutual trust can be derogated from. At the same time, the “manifest deficiency” limb of the formula can be given, in EU law, a more precise meaning, helping in further circumscribing the scope of transnational judicial review. In *Donnellan*, a core aspect of Art. 47 CFREU had been violated – ZZ’s need for the addressee of a decision to be placed in the position of deciding whether to bring a judicial claim against it or not.¹⁰⁵ We suggest that this was also the case in *Intini*, interpreting ZZ, in the light of *Weiss und Partner*, to embody also a criterion of linguistic understandability.¹⁰⁶ Just as in cases of access to court in the narrow sense, what is at stake here is one of the aspects which form the hard core of Art. 47 CFREU. Relevance to this circumstance can be attributed, as a matter of positive law, drawing on Art. 52(1) CFREU’s requirement that any limitation on EU fundamental rights “respect the essence of those rights and freedoms”.¹⁰⁷ Where this is not the case, the limiting

¹⁰⁴ See Opinion 2/13, cit. at 74, para. 191.

¹⁰⁵ See note 96 above and surrounding text.

¹⁰⁶ See text surrounding note 98 above.

¹⁰⁷ This is, however, an under-theorised provision, to which scholars and the ECJ seem to have started paying systematic attention just recently: for an excellent (and critical) overview, see T. Tridimas and G. Gentile, *The Essence of Rights: An Unreliable Boundary?*, 20 *Germ. L. J.* 794, in particular 802-812. Interestingly, the conceptualisation of the “essence” of a Charter right which seems to be most advanced is the one regarding Art. 47 CFREU itself (whose essence is commonly held to comprise, for instance, the right of access to a court given with jurisdiction to review all the relevant issues of law and fact). In the literature, see S.K. Gutman, *The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?*, 20 *Germ. L. J.* 884 (2019). In the case law, see ECJ, Case C-245/19 – *État*

measure is unacceptable under EU law. In horizontal composite procedures, an easy and effective way to redress the violation thus carried out would be to refuse to enforce, or to declare null and void as the case may be, the final act adopted on the basis of a preparatory act violating the essence of a fundamental right. In our submission, the jurisdiction to do so could be established, as recalled above, by providing serious and substantiated evidence that such a violation has taken place – conceiving, as in *Donnellan*, the fundamental right at stake as both the cause of action and the benchmark for judicial analysis of the case. Further, given that the right of access to court would not be involved in the doctrinal construction of the case’s cause of action, it would not be necessary to show, as the current *Berlioz-Donnellan* approach based on the right to an effective judicial remedy requires, that challenges against the preparatory act in the legal system of provenance would be barred.

We concede that this latter interpretation of the Opinion 2/13-backed *Berlioz/Donnellan* jurisprudence might be held to go too far. Allowing national judges to review foreign preparatory acts in the light of EU fundamental rights even where those acts might have been challenged in the “original” legal system might lead to a proliferation of instances of transnational judicial review. While sensible from a constitutional point of view in the EU’s system of shared sovereignty, this might cause legitimacy concerns in many a circle.¹⁰⁸ The first solution, allowing for a transnational fundamental rights scrutiny based on Art. 47 CFREU whenever preparatory acts would not be amenable to separate challenge, would however amount to no more than a generalisation of *Donnellan*’s logic to EU fundamental rights law as a whole. Just like secondary norms explicitly devoted to regulating the horizontal composite procedure (which *Berlioz* already makes censorable), fundamental rights are norms which are binding upon the MS involved, since national authorities are acting “within the scope of EU law”.¹⁰⁹ The correct application of such norms might then be reviewed by the judges belonging to the legal system of the final

Luxembourgeois (Droit de recours contre une demand d’information en matière fiscal) (ECLI:EU:C:2020:795), para. 66.

¹⁰⁸ See e.g. Filipe Brito Bastos, *Luxembourg v. B: How Far Should Jurisdictional Limits Be Eroded in the Name of Effective Judicial Protection?*, 41 *EU Law Live – Weekend Edition* 10 (2020).

¹⁰⁹ See note 82 above and surrounding text.

act, *qua juges de droit commun*, and in respect of which a judicial remedy must be granted, *qua* “rights granted by the law of the Union” under Art. 47 CFREU. If, therefore, the most liberal solution were to be deemed excessively innovative, we should however acknowledge that a fundamental rights-based transnational judicial review, when no other judicial remedy would otherwise be available, would still be compelled in any event by the current logic of EU law.

Closing the circle, we submit that in *Intini* the Court of Cassation should indeed have accepted Italian jurisdiction, and declared the Austrian instrument to be unenforceable. Based on our second solution, this would be most obvious. Enforcing a claim in breach of the linguistic aspect of Art. 47 CFREU would violate the essence of the provision, viewed under *ZZ* and *Weiss und Partner's* understandability angle. If, however, the first, access-to-court-centric interpretation we advance is adhered to, transnational judicial review appears also apposite. From the case's narrative, it appears that Mr Intini did not challenge before the Austrian judge the act of assessment upon receiving it, but it seems fair to assume that he would have had the opportunity to do so. One might thus be tempted to conclude that transnational judicial review should not be allowed, since another opportunity to redress the violation of Art. 47 CFREU's language rights existed, and Mr Intini decided not to avail himself thereof. Mr Intini can however hardly be blamed for not challenging abroad an act which he was not in the position to understand – or in respect of which, in *ZZ's* parlance, he was unable “to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court”.¹¹⁰ Viewed from the perspective of Art. 47 CFREU, Mr Intini was in the same position as Mr Donnellan: his right to apply to an Austrian court was rendered merely illusory on account of defects in the process of notification attributable to the Austrian authority. The point is that, in this context, it is artificial to conceive procedural rights such as those governing notification as independent “rights and freedoms guaranteed by the law of the Union”, in respect of which access to court must be granted (with the residuality to challenges in the legal system of provenance which this entails from the perspective of transnational judicial review, “exceptionally” conceived). Those rights are a corollary of, and a precondition for,

¹¹⁰ See text surrounding note 96 above.

the right of access to court, which is *already* breached when the former are violated. Stakeholders cannot be required to bring in the legal system of origin a judicial claim against preparatory acts, aiming at censoring procedural defects which prevent them from bringing a judicial claim whatsoever. In such instances, the only way for those rights to be effectively safeguarded is to accept jurisdiction to review in their light the eventual act of the composite procedure, irrespective of any further consideration (as the ECJ in fact did in *Donnellan*).

4. Concluding Remarks

All in all, one cannot but be disappointed at the superficiality with which, as shown in Section 3.1, the Court of Cassation approached such a complex case as *Intini*. That case and similar cases involve many an aspect which is far from crystal-clear, and would require more careful judicial analysis to be correctly solved. One might agree or disagree with the interpretation of the current state of EU law advanced above; but, for sure, one would also be legitimately entitled to a deeper consideration of the profiles highlighted here at the highest judicial level of a MS' legal system. *Intini* also enabled us, however, to engage at length with the conceptual framework of transnational judicial review in EU horizontal composite procedures. We thus found that, based on *Berlioz* and *Donnellan*, both substantive and procedural defects affecting preparatory acts in those procedures are, in principle, liable to be transnationally reviewed (see Section 2 above). The fact that this solution was based on Art. 47 CFREU enables it to be broadened to all horizontal composite procedures, irrespective of the constraints which Art. 6 ECHR places upon it when viewed from Strasbourg (Section 3.2 above). As far as violations of Art. 47 CFREU are concerned, extant ECJ jurisprudence shows that cross-border recipients of administrative decisions have a right to receive them in a language which they are in a position to understand, with a view to ensuring that the decision's content can be understood, and appropriate steps against it can be taken to safeguard one's rights and interests (Section 3.3 above). Art. 47 CFREU is, however, just one amongst many fundamental rights guaranteed by EU law. *Berlioz* and *Donnellan*'s logic compels national judges to safeguard all those rights in horizontal composite procedures. Foreign preparatory acts impinging upon them must thus be amenable to

transnational judicial review, possibly even in instances where such acts could have been separately challenged in the legal system of origin. The baseline is, however, that violations of fundamental rights, as well as of provisions of secondary law applicable to the procedure, must be redressed in the context of challenges brought against the final act of the procedure, when the preparatory act could not be separately challenged in the legal system of origin; and this includes cases in which a challenge which would have been possible in the abstract, was prevented in the concrete because of procedural flaws amounting, in themselves, to a violation of Art. 47 CFREU (Section 3.4 above).

Transnational judicial review can thus be carried out against three benchmarks: *substantive* norms of secondary law specifically regulating the procedure; *procedural* norms of secondary law also specifically devoted thereto; and *fundamental rights*, both substantive and procedural, irrespective of whether norms of secondary law specifically meant to give effect thereto are also explicitly laid down. We believe the time to be ripe for Europe's integrated administration to be subject to a unitary jurisdiction of *juges de droit commun*, capable of ensuring that the horizontal composite procedures through which that administration operates do not result in the rule of law being systematically circumvented. Only by so doing, the ambitious commitment in Art. 2 TEU to a "Union founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights" will be able to be fully respected in practice.