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Public oral hearing in tax procedure – Austria and Sweden in comparison

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I. INTRODUCTION¹

On 19 March 2013 the Austrian Administrative Federal Court (*Bundesverwaltungsgerichtshof*) ruled that there is an absolute right to oral hearing in VAT cases.² The court based its decision upon the right to a fair trial in the Charter of Fundamental Rights of the European Union (CFR), that, unlike article 6 of the European Convention of Human Rights (ECHR), does not limit the right of a fair and public hearing to civil rights and obligations and criminal charges.³ Since it was made clear from the European Union Court of Justice (EUCJ) in the Åkerberg Fransson case that the VAT procedure is part of EU Law, the taxpayers should, according to the Austrian Federal Administrative Court, have a general right to an oral hearing in all VAT cases.

1. Thanks a lot to MMMag. Dr. Philipp Loser, Salzburg University, who has helped us with proof reading. The article is based upon a lecture that we held at *Österreichischer Steuerrechtstag* in Graz, Austria, 17 May 2014.

2. VwGH vom 19.03.2013, 2012/15/0021.

3. Article 6 ECHR and article 47 (2) of the CFR.

In Sweden the right to oral hearing is subject to governmental investigation. In SOU 2014:76 *Fortsatt utveckling av förvaltningsprocessen och specialisering för skattemål* (Continued development of the administrative procedure and specialization in tax cases), the provisions regarding oral hearing are proposed to be adjusted and the right to oral hearing partly changed. There is however no proposal of taking the CFR in consideration in VAT cases.

In this article we analyze the right to a public oral hearing in tax procedure out of a human rights perspective. First we discuss the right to a public oral hearing under the CFR. Thereafter, we deal briefly with the right to oral hearing in Austrian and Swedish tax procedure.⁴ Particularly, we answer the question whether the taxpayers in Sweden should have the same right to oral hearing in VAT cases, and also other EU tax law cases, as the Austrian Federal Administrative Court has granted the tax payers in Austria. The article ends with some concluding remarks.

2. ECHR'S REQUIREMENTS FOR THE PUBLIC HEARING

2.1 ARTICLE 6 ECHR AND ARTICLE 47 CFR AND THEIR RELATIONSHIP

2.1.1 ARTICLE 6 ECHR'S RANGE OF APPLICATION

Article 6 sec. 1 ECHR stipulates the following **procedural guarantees**:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The procedural guarantees stipulated in article 6 sec. 1 ECHR require in addition to the existence of a "tribunal"⁵ either "civil rights" claims of or

4. The right to oral hearing in tax procedure in Sweden has recently been analyzed by Kleist, David, Wejedal, Sebastian, *Tala är silver, tiga är guld, Om muntlig förhandling i förvaltningsmål särskilt i skattemål*, *Förvaltningsrättslig tidskrift* 2013 pp. 345–375.

5. Cf as well section 1/2.

“criminal charges” against a person.⁶ The ECHR’s limitation to civil rights establishes the inapplicability of its article 6 to tax proceedings as taxes usually do not constitute civil rights claims but rather form the core of public law.⁷ However, the distinction between a public and a civil law regime is sometimes difficult to draw.⁸

As far as Austria is concerned, article 6 ECHR is generally not applicable to tax proceedings⁹ governed by the Federal Fiscal Code (*Bundesabgabenordnung* [BAO])¹⁰ although different definitions of taxes by the ECtHR and the Austrian Federal Fiscal Code might give rise to interpretation problems.¹¹ In contrast, article 6 ECHR is applicable to criminal proceedings meaning that the procedural guarantees stipulated in article 6 ECHR do also apply to tax criminal proceedings as governed by the Austrian Fiscal Criminal Act (*Finanzstrafgesetz* [FinStrG]).¹² In Sweden the situation is similar. Article 6 ECHR is generally not applicable to tax proceedings, but only to tax criminal proceedings. Since the from a Swedish law point of view administrative sanction and often imposed *tax surcharge* (*skattetillägg*) is a criminal sanction under article 6 ECHR, many tax proceedings comprise elements of criminal proceedings.

6. Cf, instead of many, Grabenwarter/Pabel, *Europäische Menschenrechtskonvention*, fifth edition, (2012) § 24 Rz 4 ff.

7. E.g. ECtHR 12.7.2001 (GK), 44759/98, Ferrazzini/Italy Rz 29; ECtHR 9.12.1994, 19005/91, 19006/91, Schouten and Meldrum/Netherlands Rz 50.

8. Cf the categorization in Grabenwarter/Pabel, *Menschenrechtskonvention* § 24 Rz 8 ff: All cases impacting property and the guarantee of property (itself) constitute civil rights, furthermore disputes related to social security and civil service law, and also proceedings possibly affecting assets (e.g. ECtHR 27.10.1987, 10930/84, Bodén/SWE Rz 32). Precisely because of the last group demarcation problems might arise as far as taxes are concerned (e.g. Tanzer, *Rechtsschutz im Steuerrecht*, Gutachten zum 16. ÖJT IV/1, 2006 p. 81 ff.). However, the ECtHR has ruled that taxes do not constitute civil rights: e.g. ECtHR 9.12.1994, 19005/91, 19006/91, Schouten and Meldrum/Netherlands Rz 50; cf e.g. Grabenwarter, *Civil rights – neuere Entwicklungen*, in: Festschrift Ruppe 2007 p. 156.

9. For relevant national jurisdiction cf e.g. VwGH 22.3.2010, 2009/15/0116. For literature cf e.g. Fellner, *Verwaltungsgerichte erster Stufe in Abgabensachen und Finanzstrafsachen*, ÖJZ 1996 p. 370–371; Grabenwarter in Festschrift Ruppe p. 154; idem, *Menschenrechtskonvention und Abgabenrecht*, SWI 1993 p. 111.

10. *Bundesabgabenordnung*, Federal Gazette 1961/194, actually Federal Gazette I 2014/105.

11. According to Grabenwarter, SWI 1993 p. 113 with further references, the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms’ definition of taxes is broader than the national (Austrian) definition of the Fiscal Constitutional Law (*Finanz-Verfassungsgesetz* [F-VG]). It has to be borne in mind, though, that the BAO’s definition of taxes is more comprehensive than the F-VG’s definition. In contrast, the ECtHR’s definition of taxes is narrower: In the case of Stork/Deutschland (Rz 28), ECtHR 13.7.2006, 38033/02, the ECtHR ruled that a contribution payable for the construction of a road adjacent to the land of the applicants does not constitute a tax because it was imposed only on persons who had a personal interest in and took advantage of the road construction. However, according to Austrian law, this contribution would constitute a tax as even contributions for specific purposes are included in the national definition of taxes (eg Ruppe, § 5 F-VG, in: Korinek/Holoubek (Hrsg), *Bundesverfassungsrecht* Rz 13 [2000]).

12. *Finanzstrafgesetz*, Federal Gazette 1958/129, actually Federal Gazette I 2014/105.

2.1.2 ARTICLE 47 CFR'S RANGE OF APPLICATION

As far as the law of the European Union is concerned, the protection of fundamental rights rests on three key pillars: First, on the Charter of Fundamental Rights of the European Union (CFR), having the same legal value as the European Union treaties, hence constituting EU primary law (article 6 sec. 1 TEU); secondly, on the EU's accession to the European Convention on Human Rights (ECHR) [article 6 sec. 2 TEU]; and thirdly, on the recognition of the fundamental rights enshrined in the ECHR as general principles of the Union's law resulting from the constitutional traditions common to the Member States (article 6 sec. 3 TEU).

The CFR's relevant provision concerning public hearings is article 47, especially sec. 2 first sentence. According to this provision, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Article 47 sec. 2 first sentence CFR adopts the procedural guarantees set out by article 6 sec. 1 ECHR.¹³ Article 52 sec. 3 CFR states that the meaning and scope of the rights contained in the CFR correspond to the rights guaranteed by the ECHR.¹⁴ In addition, the explanation on article 47 CFR explicitly states that article 47 sec. 2 corresponds to article 6 sec. 1 ECHR.¹⁵ Moreover, the explanation on article 47 CFR affirms that in Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations,¹⁶ thereby stressing the main difference between the procedural guarantees stipulated by article 47 sec. 2 CFR and article 6 sec. 1 ECHR, respectively: The ECHR's limitation to civil rights or criminal charges does not apply to the CFR.¹⁷ The procedural guarantees set out by article 47 CFR are hence applicable to tax proceedings governed by the national fiscal codes. Therefore, as a preliminary conclusion it has to be noted that the CFR and its procedural guarantees

13. E.g. N. Raschauer/Sander/Schlögl in Holoubek/Lienbacher, GRC-Kommentar (2014) Art 47 Rz 38.

14. E.g. N. Raschauer/Sander/Schlögl in Holoubek/Lienbacher, GRC-Kommentar Art 47 Rz 38.

15. Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, Official Journal C 2007/303, 30. For the CFR's historical development cf e.g. N. Raschauer/Sander/Schlögl in Holoubek/Lienbacher, GRC-Kommentar Art 47 Rz 4.

16. "In 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" (Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, Official Journal C 2007/303, 30).

17. E.g. N. Raschauer/Sander/Schlögl in Holoubek/Lienbacher, GRC-Kommentar Art 47 Rz 38; Blanke in Calliess/Ruffert (Hrsg), EUV/AEUV, fourth edition, (2011) GRCh Art 47 Rz 10: "for all forms of procedures and for all forms of courts – independent of the assertion of the rights enshrined in Union law."

are of great importance for tax proceedings because they exceed article 6 ECHR's range of application.

However, article 47 sec. 2 CFR's procedural guarantees apply only when they are implementing Union law (article 51 CFR).¹⁸ As vast areas of national (Austrian and Swedish) tax law are not shaped by Union law, the CFR does not entail requirements for the national protection of fundamental procedural rights in that respect. Therefore, it is crucial to understand the meaning of "when implementing Union law". The CJEU has ruled that the fundamental rights guaranteed by the CFR are to be respected whenever a national measure falls within the scope of EU law.

In this regard, the case Åkerberg Fransson is of fundamental importance:¹⁹ In a Swedish tax proceeding concerning the VAT harmonized by Union law²⁰ the tax sanctions imposed on Mr Åkerberg Fransson as well as the criminal procedure initiated against him fall within the scope of the CFR, the CJEU ruled. The mere imposition of – tax law or criminal law – sanctions was sufficient for the CJEU, even though the sanctions are only partially related to the VAT harmonized by Union law. The CJEU considered irrelevant the fact that the national Swedish measures governing the tax criminal proceeding were not a result of the transposition of Union law into national legislation.

To begin with, all the secondary law measures issued in the process of transposition of directives adopted by the Council of the European Union – eg. VAT²¹ – or measures based on regulations – eg. customs law²² – fall within the scope of Union law.

According to the CJEU's decision in the case Åkerberg Fransson, the Austrian Administrative Court considers the tax amnesty procedure laid down by article 236 BAO in Austria as subject to article 47 CFR provided that the tax amnesty procedure is related to a tax shaped by Union law such as the VAT. In case of taxes harmonized by Union law the CFR

18. Cf. as well Jarass, GRCh, second edition, Art 47 Rz 2, arguing a limitation on the basis of the German version of article 47 sec. 1 CFR ("rights and freedoms guaranteed by the law of the Union" – "durch das Recht der Union garantierte Rechte oder Freiheiten") as sec. 2 – in the German version of the CFR – supposedly relates to the fundamental Union rights mentioned in article 47 sec. 1 CFR ("ihre Sache" in the German version). However, this argumentation is, in the English version, not in the exact same manner convincing as in the German version.

19. C-617/10, Åkerberg Fransson, especially Rz 21.

20. See especially Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal L 2006/347, 1.

21. For Austria cf. e.g. VwGH 19.3.2013, 2012/15/0021 and 23.1.2013, 2010/15/0196; for Sweden, see NJA 2013 p. 502.

22. For Austria cf. e.g. VwGH 29.8.2013, 2011/16/0245 (customs law) and VwGH 21.12.2012, 2012/03/0038 (in general).

is applicable to (eg amnesty or liability) procedures connected with the assessment of these taxes.²³ In Sweden the Åkerberg Fransson case has mainly had impact on double proceedings in cases of criminal law. The Supreme Court has for example stated that there is no prohibition of trying accounting fraud and tax fraud relating to the same transactions in different proceedings.²⁴

What remains questionable is whether the freedoms of the TFEU entail the applicability of the fundamental procedural rights contained in the CFR within their range of application. This question shall not be treated exhaustively here.²⁵ However, it shall be mentioned that the Austrian literature has deduced from cases adjudged by the CJEU that the CFR is applicable within the freedoms' range of application.²⁶ According to some authors,²⁷ even a potential restriction of the freedoms is sufficient, implying that a cross-border issue is sufficient to warrant the application of the CFR.²⁸ In their view the principles of non-discrimination (article 18 TFEU) and free movement of people (article 21 TFEU) entail a vast range of application of the CFR.²⁹ This applies all the more so if the freedom of capital (article 63 TFEU) even extending to relations with third states is concerned.³⁰

23. Cf in this context the Federal Administrative Court's relevant jurisdiction in connection with tax amnesty related to the VAT (article 236 BAO), e.g. VwGH 19.3.2013, 2012/15/0021; cf moreover Ellinger/Sutter/Urtz, BAO, third edition, § 274 Anm 13 (as of 1.9.2014).

24. NJA 2013 p. 502.

25. The CJEU defined the range of application of Union law in case C-457/09, *Claude Charry*, negatively: "The dispute in the main proceedings, between a Belgian national and the Belgian State concerning taxation of activities carried out within the territory of that Member State, is not connected in any way with any of the situations contemplated by the provisions of the EC Treaty on the free movement of persons, of services, or of capital. Moreover, that dispute does not concern the application of national measures by which that Member State implements EU law" (C-457/09, *Claude Charry* Rz 25). In case C-60/00, *Mary Carpenter*, the CJEU ruled that – because of the free movement of services – a person's Member State of origin must not refuse the right to reside in the Member State (of origin) to this person's spouse (= *Mary Carpenter*) – even if the spouse is a national of a third country – in case the person provides services to recipients established in other Member States. Hence, in case C-60/00, *Mary Carpenter*, even the spouse of the person availing herself of the free movement of services benefitted from it.

26. E.g. Müller, *Verfassungsgerichtsbarkeit und Europäische Grundrechtecharta* "Bereicherung oder Funktionsverlust?" – Thesen zur Frage, ÖJZ 2012 p. 162; Holoubek, *Europäischer und nationaler Grundrechtsschutz*, in *Festschrift Rill* 2010 p. 252; Zorn, *Überlegungen zu unionsrechtlichen Grundrechten*, ÖSiZ 2013 p. 342.

27. Explicitly Zorn, ÖSiZ 2013 p. 343 fn 16; cf as well the examples in Holoubek in *Festschrift Rill* 252, who includes tourists in the passive freedom to provide services (with reference to C-348/96 *Calfa*; C-274/96 *Bickel* and *Franz*).

28. For the related discussion and the CJEU's most recent – though not further differentiated – jurisdiction concerning the applicability and its possible limitations and consequences cf as well Wollenschläger, *Anwendbarkeit der EU-Grundrechte im Rahmen einer Beschränkung von Grundfreiheiten*, EuZW 2014 p. 577.

29. E.g. Holoubek in *Festschrift Rill* p. 257–258; Zorn, ÖSiZ 2013 p. 343.

30. For the freedom of capital cf C-457/09, *Claude Charry* Rz 25.

2.2 REQUIREMENT OF JUDICIAL PROCEDURE: "BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL PREVIOUSLY ESTABLISHED BY LAW"

2.2.1 THE ECHR AND THE CFR

Article 6 sec. 1 ECHR requires a decision by an independent and impartial tribunal previously established by law. Article 47 sec. 2 first sentence CFR adopts article 6 sec. 1 ECHR's procedural guarantees. Hence, only *tribunals* – either a tribunal of the European Union or of one of the Member States – are subject to the requirements of article 6 ECHR and article 47 CFR. The specifications of the term *tribunal* shall not be thoroughly discussed in this article, though;³¹ only examples for tribunals in Austria as well as in Sweden shall be given.

2.2.2 COURTS AND ORDINARY STAGES OF APPEAL IN AUSTRIA

In Austria tax authorities issue a tax decree to begin with. In the case of an appeal, an administrative court renders a decision – the Federal Tax Court (*Bundesfinanzgericht*) as far as federal taxes are concerned and one of seven local administrative courts (*Landesverwaltungsgericht*) as far as state or community taxes are concerned. It has to be noted that in case of an appeal against a tax decree to an administrative court the tax authority is obliged to issue a preliminary decision (*Beschwerdevorentscheidung*). Only in special cases – article 262 BAO – there is no obligation to issue such a preliminary decision. Only after the tax authority's preliminary decision the administrative court is definitively competent to render a decision. The administrative courts are truly courts in terms of national Austrian law. Moreover, they qualify as a tribunal in the sense of article 6 ECHR and article 47 CFR³² whereas the Austrian tax authorities do not constitute tribunals, meaning that in proceedings leading up to tax authorities' decisions public hearings are not necessary from a fundamental rights point of view.

As court of second and last instance serves the Federal Administrative Court (*Verwaltungsgerichtshof*) – a supreme court. The Federal Administrative Court, too, is truly a court in terms of national Austrian law.

31. For the requirement of a "tribunal" established by law cf e.g. Jarass, GRCh, second edition, Art 47 Rz 17 ff; Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 2.4 Rz 27 ff.

32. Cf e.g. VwGH 29.8.2013, 2011/16/02.45 (concerning the *Unabhängiger Finanzsenat*, a precursor to the *Bundesfinanzgericht*, which did – unlike the *Bundesfinanzgericht* – not qualify as court in terms of national Austrian Law; all the more, the *Bundesfinanzgericht* (Federal Tax court) qualifies as a tribunal.

Moreover, it qualifies as a tribunal in the sense of article 6 ECHR and article 47 CFR.³³

2.2.3 COURTS AND ORDINARY STAGES OF APPEAL IN SWEDEN

In Sweden the tax administration (*Skatteverket*) issues a tax decision to begin with. In the case of an appeal, the tax administration reconsiders its decision. If there is still a dispute after the reconsideration, the case is passed on to the administrative court of first instance (*förvaltningsrätten*). The judgments from the administrative court of first instance are appealed to the administrative court of appeal (*kammarrätten*). There is no requirement of leave to appeal to the administrative courts of appeal. As court of third and last instance serves the Supreme Administrative Court (*Högsta förvaltningsdomstolen*) which is a supreme court. In general a leave to appeal by the Supreme Administrative Court is necessary for a trial of the case. Only preliminary rulings from the Board of Advanced Rulings (*Skatterättsnämnden*) can be appealed directly to the Supreme Administrative Court without a leave to appeal. All the administrative courts qualify as tribunals in the sense of article 6 ECHR and article 47 CFR.³⁴

2.3 RIGHT TO AND PURPOSE OF AN ORAL PUBLIC HEARING

According to article 6 sec. 1 ECHR, in the determination of his or her civil rights, everyone is entitled to a public hearing. The same holds true for article 47 sec. 2 first sentence CFR: "Everyone is entitled to a [...] public hearing [...]." As taxes usually do not constitute civil rights,³⁵ only article 47 sec. 2 first sentence CFR is able to serve as a basis for the claim for a public hearing, requiring the applicability of Union law in the first place. Art 6 ECHR and article 47 sec. 2, respectively, imply that, first, an *oral* hearing has to take place (this follows from the term *hearing*³⁶) and that, second, this oral hearing has to be conducted *publicly*

33. Cf e.g. ECtHR 26.4.1995, 16922/90, Fischer/Austria Rz 30 ff; ECtHR 5.9.2002, 42057/98, Spiel/Austria; VwGH 12.7.2012, 2010/06/0234.

34. Cf e.g. ECtHR 26.4.1995, 16922/90, Fischer/Austria Rz 30 ff; ECtHR 5.9.2002, 42057/98, Spiel/Austria; VwGH 12.7.2012, 2010/06/0234.

35. Cf section I/1.1.

36. Cf especially Jarass, GRCh, second edition, Art 47 Rz 39, arguing the principle of an oral hearing on the basis of the German term "verhandelt" (and the English term *hearing* as well as the French term *entendu*). For the term *hearing* cf as well section II/1.

(this follows from the term *public hearing*) meaning that attendance to the hearing is not limited to the litigants.³⁷ As the terms *public* and *hearing* are distinct and clearly separated terms in their own right, the public is not an indispensable requirement for an oral hearing and may be excluded altogether under certain circumstances.

The purpose of the hearing stipulated by article 6 sec. 1 ECHR and article 47 sec. 2 CFR is to allow the litigants to submit their view, thereby ensuring their right to be heard. This follows from the right to fair trial contained in article 6 sec. 1 ECHR and article 47 sec. 2 CFR³⁸ and from the principle of effective legal protection entailing the right to adversarial proceedings.³⁹ The question remains whether legal aspects, too, have to be discussed in the oral hearing, meaning that the court needs to inform the litigants about the legal viewpoint it intends to adopt in the matter.⁴⁰ What seems to be clear is that legal aspects *may* be discussed – along with the facts of the case – in the oral hearing, which will generally prove useful. According to the ECtHR's jurisdiction,⁴¹ an oral hearing *solely* destined for the discussion of legal aspects does not need to be conducted.⁴² Hence, the right to adversarial proceedings needs to be seen against the background of a complicated fact finding process.

The public nature of the oral hearing constitutes an aspect of its own. Its purpose is to protect the procedural guarantees laid down by article 6 sec. 1 ECHR and article 47 sec. 2 CFR, that is the protection of the right to fair trial, through public control of the jurisdiction.⁴³

37. Cf e.g. Blanke in Calliess/Ruffert, EUV/AEUV, fourth edition, GRCh Art 47 p. 16; Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 73.

38. For the right to a fair trial cf, instead of many, e.g. Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 60.

39. For the necessity of adversarial proceedings under the aspect of fair trial cf e.g. Jarass, GRCh Art 47 Rz 31.

40. Gunacker-Slawitsch, Der Grundsatz des Parteigehörs im Lichte des Art 47 der Grundrechte-Charta, in Festschrift Tanzer (2014) p. 341 (p. 350 ff.) argues the courts obligation to inform the litigants about the legal viewpoint it intends to adopt in the matter (with reference to T-284/12, Oro Clean Chemie AG Rz 26 with further references and T-16/02, Audi AG Rz 75).

41. Cf the following section I/4.1.

42. In addition to Gunacker-Slawitsch in Festschrift Tanzer p. 350 ff. (see the preceding footnote) it has to be noted that in case T-284/12, Oro Clean Chemie AG, and in case T-16/02, Audi AG, the EGC points out that the right to be heard "covers all the factual and legal evidence" but not the "final position which the administration intends to adopt". Therefore, it is doubtful whether the EGC's jurisdiction allows for a mandatory discussion of legal aspects in the oral hearing, meaning that the court is bound to inform the litigants about its legal viewpoint.

43. Cf e.g. ECtHR 5.9.2002, 42057/98, Speil/Austria: "This requirement protects litigants against the administration of justice in secret, with no public scrutiny".

2.4 ARTICLE 6 ECHR'S AND ARTICLE 47 CFR'S DETAILED REQUIREMENTS FOR THE ORAL HEARING

2.4.1 UNDER WHICH CIRCUMSTANCES DOES A REQUESTED ORAL HEARING NOT NEED TO BE CONDUCTED?

The right to an oral hearing derivable from article 6 sec. 1 ECHR in case of civil rights and from article 47 sec. 2 CFR when implementing Union law is not an absolute one. According to the ECtHR's jurisdiction, there are certain limitations in this respect. For example, an oral hearing does not need to be conducted in case of extraordinary circumstances⁴⁴ justifying an exception from the right to an oral hearing.⁴⁵

Extraordinary circumstances constitute – *inter alia* –

- **exclusively legal issues**, albeit the jurisdiction has failed to establish whether an oral hearing generally does not need to be conducted under extraordinary circumstances or whether it can only be passed up when dealing with legal questions of particular complexity,⁴⁶ or
- **highly technical issues**, for example social security issues^{47, 48}

The reason for these limitations lies in their cost effectiveness and usefulness, that is, in their judicial economy.⁴⁹ Exclusively legal issues usually arise from procedural decisions concerning the legal standing, the adherence to statutory periods, the competence of a court and so forth.⁵⁰

44. E.g. ECtHR's decisions dating from 10.5.2007, 7401/04, Hofbauer/Austria 2, Rz 26, and from 3.5.2007, 17912/05 Bösch/Austria, Rz 26; cf as well VwGH 20.9.2012, 2007/07/0149 and VwGH 21.12.2012, 2012/03/0038.

45. E.g. ECtHR 13.3.2012, 13556/07, Efferl/Austria with further references.

46. Decisions giving weight to the first opinion include eg ECtHR 22.2.1996, 17358/90, Bulut/Austria Rz 41 ("involving only questions of law") and 3.10.2002, 61595/00, Cetinkaya/Austria ("the complaints raised in the appeal concerned questions of law only"); decisions giving weight to the second opinion include eg ECtHR 5.9.2002, 42057/98, Speil/Austria ("questions of law of no particular complexity"); for the second opinion cf as well Bumberger, Der Verwaltungsgerichtshof und die 'europäischen Gerichtshöfe' EGMR und EUGH, in *Festschrift Klecatsky* (2010) p. 105 (p. 114) with reference to Speil/Austria.

47. E.g. Peukert in Frowein/Peukert, Europäische Menschenrechtskonvention – EMRK-Kommentar, third edition, (2009) Art 6 p. 191; ECtHR 24.6.1993, 14518/89, Schuler-Zraggen/CH; cf as well Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 90.

48. E.g. Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 90 with further references; ECtHR 5.9.2002, 42057/98, Speil/Austria; ECtHR 8.2.2005, 55853/00, Miller/SWE Rz 29; 10.5.2007, 7401/04, Hofbauer/Austria 2, Rz 27, and 3.5.2007, 17912/05 Bösch/Austria, Rz 27; cf as well ECtHR 24.6.1993, 14518/89, Schuler-Zraggen/CH, and ECtHR 2.9.2004, 68087/01, Hofbauer/Austria.

49. E.g. ECtHR 24.6.1993, 14518/89, Schuler-Zraggen/CH ("demands of efficiency and economy"); cf as well ECtHR 5.9.2002, 42057/98, Speil/Austria.

50. Even these decisions might lead to questions of credibility – for example, as far as the adherence to statutory periods is concerned –, making an oral hearing necessary. On the other hand, procedural decisions may raise difficult factual questions – for example, questions related to the legal capacity of a litigant.

Only in cases where also facts need to be established (*quaestiones mixtae*), an oral hearing – which is above all supposed to ensure the right to be heard – makes any sense. Yet, even in cases where facts need to be established an oral hearing is dispensable if – in the language of the jurisdiction – *technical questions* are involved *to a high degree*, meaning for example that an expert opinion – and not the litigant's credibility (in which case an oral hearing would be indispensable) – needs to be discussed.

2.4.2 RIGHT TO AN ORAL HEARING AT EVERY INSTANCE

As article 6 sec. 1 ECHR and article 47 sec. 2 do not require a *tribunal* to decide in every instance,⁵¹ it becomes clear that a right to appeal cannot be derived from article 6 sec. 1 ECHR and article 47 sec. 2 first sentence, respectively.⁵² From this it follows that limits to a court's cognizable authority are admissible from a fundamental rights' viewpoint.

If already at first instance a tribunal in the sense of article 6 sec. 1 ECHR and article 47 sec. 2 first sentence CFR renders a decision, even the first instance procedure has to correspond to the fundamental rights requirements. Hence, an oral hearing has to be conducted – with the exception of the above-mentioned cases of extraordinary circumstances.⁵³ As far as the court of higher instance is concerned, the requirement of an oral hearing is applied less strictly, though.⁵⁴ If the court of appeal's cognizable authority does not cover all factual and legal evidence – in case of full cognizable authority another oral hearing is considered mandatory⁵⁵ –, an oral hearing does not need to be conducted in the following cases:

The court of appeal only deals with legal, not factual evidence.⁵⁶

In case the court of appeal also deals with factual evidence an oral hearing is indispensable – with the exception of extraordinary circumstances, meaning for example cases involving technical questions to a high

51. For the whole cf. Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 93 ff.; Lienbacher, Der Verwaltungsrechtsschutz in Österreich und die europäische Dimension, in: Bußjäger/Gamper/Ranacher/Sonntag (Hrsg.), Die neuen Landesverwaltungsgerichte, 2013 p. 44 ff.

52. Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 57.

53. Cf. the preceding section I/4.1.

54. Cf. e.g. ECtHR 8.2.2005, 55853/00, Miller/SWE Rz 30.

55. E.g. Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 94.

56. E.g. Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 94 with further references; ECtHR 22.2.1984, 8209/78, Suttet/CH Rz 30, ECtHR 29.10.1991, 12631/87, Fejde/SWE Rz 34; ECtHR 22.2.1996, 17358/90, Bulut/Austria Rz 41 f., regarding a nullity appeal to the Austrian Supreme Court of Justice (the court of first instance conducted an oral hearing).

degree.⁵⁷ Moreover, an oral hearing does not need to be conducted if facts are clear because of sufficient proof or because of the written submissions.⁵⁸ However, if questions of credibility or guilt and innocence are addressed, an oral hearing has to be conducted.⁵⁹

If at first instance an oral hearing was not conducted – for example, because the court of first instance unlawfully refrained from conducting it –, according to the ECtHR's jurisdiction, an oral hearing has to be conducted by a tribunal in the sense of article 6 sec. 1 ECHR and article 47 sec. 2 first sentence CFR, respectively, when it comes to the appeal procedure. In other words: At least once during the whole legal procedure – either at first instance or in the appeal procedure – an oral hearing has to be conducted before a tribunal.⁶⁰ If the court of appeal does not lack full cognizable authority, the defect of the first instance proceedings – no oral hearing – can then be remedied.⁶¹ However, the above-mentioned extraordinary circumstances – exclusively legal issues and issues involving technical questions to a high degree – apply at any rate.⁶² If exclusively legal issues – which usually arise from procedural decisions – are to be dealt with, there is no need for an oral hearing either at first instance or in the appeal procedure.

In conclusion, if a litigant has a right to request an oral hearing but has refused to exercise this right, there is no need for a remedy. Instead it is treated as a tacit waiver of the right to an oral hearing.⁶³

2.4.3 WAIVER OF THE RIGHT TO AN ORAL HEARING AND REQUEST

According to prevailing opinion, the ECtHR's⁶⁴ and subsequent national jurisdiction,⁶⁵ article 6 sec. 1 ECHR's and article 47 CFR's procedural guarantees can be waived. A – tacit – waiver will be assumed when

57. Cf section I/4.1 above.

58. E.g. Peukert in Frowein/Peukert, EMRK-Kommentar Art 6 Rz 195; Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 95.

59. Cf e.g. zB Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 95; Lienbacher in Bußjäger/Gamper/Ranacher/Sonntag p. 45 ff.

60. Cf as well the Federal Administrative Court's decisions, e.g. in VwGH 24.1.2013, 2011/16/0161 or 29.6.2012, 2012/02/0067: "By conducting a public oral hearing before the authority held accountable – the authority constituting a tribunal in the sense of the ECHR –, article 6 ECHR's requirements were fulfilled."

61. Cf e.g. Peukert in Frowein/Peukert, EMRK-Kommentar Art 6 Rz 194.

62. Cf once again section I/4.1.

63. Cf the immediately following section.

64. E.g. ECtHR 24.6.1993, 14518/89, Schuler-Zgraggen/CH; ECtHR 5.9.2002, 42057/98, Speil/Austria.

65. For Austria e.g. VwGH 29.10.1997, 95/09/0299; VwGH 13.12.2011, 2011/05/0122 (with reference to ECtHR 14.10.2010, 65631/01, Kugler/Austria).

there is no explicit request for a public hearing.⁶⁶ This applies in all cases where an oral hearing – aside from a party's request – is not required compulsorily by national law⁶⁷ (for example, article 274 BAO⁶⁸ or article 39 *Verwaltungsgerichtsgesetz*⁶⁹ (VwGG⁷⁰)). Yet, limitations to possible waivers – and therefore uncertainty in connection with their scope – result from the fact that even in case of waiver the court has to examine *ex officio* whether conducting an oral hearing is in the public interest.⁷¹ For example, the principle that proceedings should be of a reasonable duration may call for an oral hearing because of the concentrating effect of an adversary proceeding.⁷²

3. SPECIFIC ISSUES REGARDING THE RIGHT TO ORAL HEARING IN AUSTRIAN TAX PROCEDURE

3.1 RIGHT TO AN ORAL HEARING IN EVERY INSTANCE?

As already mentioned,⁷³ in Austria tax authorities issue a tax decree against which an appeal is admissible. An administrative court – either the Federal Tax Court (*Bundesfinanzgericht*) or one of seven local administrative courts (*Landesverwaltungsgericht*) – renders a decision on this appeal.⁷⁴

As court of second and last instance serves the Federal Administrative Court (*Verwaltungsgerichtshof*), which is a supreme court.

In first instance procedure before the administrative court, an oral hearing has – *inter alia* – to be conducted upon the appellant's explicit

66. E.g. Peukert in Frowein/Peukert, EMRK-Kommentar Art 6 Rz 191; Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 91, each with further references; ECtHR 28.5.1997, 16717/90, Pauer/Austria Rz 60 (referring to the fact that the plaintiff, Mr Pauer, is professor of public law and hence familiar with the proceedings before the Constitutional Court of Austria); ECtHR 3.10.2002, 61595/00, Cetinkaya/Austria (regarding a litigant represented by an attorney at law).

67. E.g. Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 91.

68. For the possibilities of an oral hearing *ex officio* cf section II/2.3.

69. According to article 39 sec. 1 subsec. 2 VwGG, discretion can be exercised in the proceedings before the senate insofar as "the co-chair or the chairman considers necessary to conduct the hearing" or the "senate decides" on conducting it; cf sec. II/3.1.

70. Federal Gazette BGBl 1985/10, actually BGBl I 2013/122.

71. E.g. Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 92; ECtHR 24.6.1993, 14518/89, Schuler-Zgraggen/CH; ECtHR 3.10.2002, 61595/00, Cetinkaya/Austria.

72. Cf Grabenwarter/Pabel, Menschenrechtskonvention, fifth edition, § 24 Rz 92.

73. Cf sec. 2.2.2.

74. However, the tax authority having issued the decree is usually obliged to issue a preliminary decision on the appeal (*Beschwerdevorentscheidung*); cf again sec. 2.2.2.

request⁷⁵ (cf article 274 sec. 1 no. 1 lit. and lit. b BAO). Moreover, an oral hearing has to be conducted – in case a single judge is competent to render a decision – upon the judge's demand; or – in case a senate is competent to decide – upon the chairman's or the co-chairman's⁷⁶ demand or upon the senate's decision⁷⁷ (article 274 sec. 1 no. 2 and sec. 2 BAO).

In second (and last) instance procedure before the Federal Administrative court, an oral hearing has to be conducted upon a litigant's request. As in second instance procedure a senate is invariably competent to render a decision, an oral hearing has also to be conducted upon the chairman's or the co-chairman's⁷⁸ demand or upon the senate's decision⁷⁹ (article 39 sec. 1 no. 2 VwGG).

If an oral hearing is conducted at first instance, as a general rule, an oral hearing will not be conducted at second instance: In this case, the Federal Administrative Court is entitled to refrain from conducting an oral hearing (cf article 39 sec. 2 no. 6 VwGG), which is what it does as a general rule, acting in compliance with the requirements of article 6 sec. 1 ECHR and article 47 sec. 2 first sentence CFR (the mentioned provision of article 39 sec. 2 no. 6 VwGG expressly refers to the requirements of article 6 sec. 1 ECHR and article 47 sec. 2 first sentence CFR).

As already mentioned,⁸⁰ at least once during the whole legal procedure – either at first instance or at second instance – an oral hearing has to be conducted before a tribunal, which means that either before the administrative court or before the Federal Administrative court an oral hearing has to be conducted. Hence, an oral hearing at first instance entitles the Federal Administrative court to refrain from it according to article 39 sec. 2 no. 6 VwGG. Though the Federal Administrative court's cognizable authority does (upon certain requirements) cover all factual and legal evidence – meaning that in case of full cognizable authority another oral hearing is considered mandatory –,⁸¹ an oral hearing before the Federal Administrative court does not need to be conducted since the court does, as a general rule, only deal with legal, not factual evidence.

75. Such request shall, as a general rule, be in written form.

76. The co-chairman performs the function of reporting the case to the senate.

77. Such decision takes, as a general rule, place upon request of a judge who is neither the chairman nor the co-chairman of the senate.

78. The co-chairman performs the function of reporting the case to the senate.

79. Such decision takes, as a general rule, place upon request of a judge who is neither the chairman nor the co-chairman of the senate.

80. Cf sec. 2.4.2 for details.

81. Cf sec. 2.4.2 again.

In case an oral hearing was not conducted at first instance although the appellant had requested it, the administrative court commits a procedural error. If such error is properly claimed in the appeal and thereby brought before the Federal Administrative court, the administrative court's decision will be annulled as a result of this procedural error (see for details sec. 3.3). However, the Federal Administrative court will see no need to make up for the oral hearing: As the Federal Administrative court does – when annulling the administrative court's decision – not deal with factual evidence, an oral hearing is, as a general rule, not considered to be mandatory, entitling the Federal Administrative court to refrain from it (cf article 39 sec. 2 n^o. 3 VwGG).

In case the appellant had not requested an oral hearing in his appeal to the administrative court, a tacit waiver is assumed due to the lack of an explicit request (in compliance with article 6 sec. 1 ECHR and article 47 sec. 2 first sentence CFR).⁸² Such tacit waiver entitles the administrative court – as a general rule – to refrain from an oral hearing, giving the Federal Administrative court no right to reverse or annul the decision of the first instance. As a result, an oral hearing can be – lawfully – passed up during the whole legal procedure.

3.2 EXPLICIT REQUEST OF AN ORAL HEARING AS AN EXCESSIVE REQUIREMENT

As mentioned above,⁸³ in first instance procedure before the administrative court, an oral hearing has to be conducted upon the appellant's explicit request⁸⁴ (cf article 274 sec. 1 no. 1 lit. a and lit. b BAO). If the appellant does not request an oral hearing – whereby such request has, as a general rule, to be in written form –, the appellant is considered to have waived his right to an oral hearing. Such – tacit – waiver of the right to an oral hearing forming a part of the appellant's procedural guarantees is, however, in compliance with the requirements of article 6 sec. 1 ECHR and article 47 sec. 2 first sentence CFR.⁸⁵

The Austrian Federal Administrative court's jurisdiction, however, applies a stricter standard for a tacit waiver of an oral hearing than the ECtHR, the appellant should not be represented by a professional representative (in first instance tax procedure, the appellant may either repre-

82. Cf sec. 2.4.3 for details.

83. Cf sec. 3.1.

84. Such request shall, as a general rule, be in written form.

85. Cf sec. 2.4.3 for details.

sent himself/herself or choose to be represented before the administrative court by either (i) an attorney at law, (ii) or a registered tax adviser or a certified public accountant, (iii) or a notary public). In case an appellant is not represented by a professional representative, the omission to request an oral hearing cannot – due to the Austrian Federal Administrative court's jurisdiction – be considered as a tacit waiver of the right to an oral hearing, if the appellant was not formally instructed about his right to request such hearing (provided that, in addition, the appellant did not already know about his right, a formal instruction thus becoming unnecessary).⁸⁶ Hence, the administrative court is, even when an oral hearing was not explicitly requested, obliged to conduct an oral hearing (this obligation, however, is not effective in case (i) an exception from the right to an oral hearing applies, i.e. the court deals exclusively with legal or highly technical issues, (ii) or the appellant explicitly waives his right to an oral hearing after having been formally instructed about this right).⁸⁷

3.3 NON-CONDUCTING AN ORAL HEARING AS ABSOLUTE PROCEDURAL ERROR

As already mentioned above, in first instance procedure before the administrative court, an oral hearing has to be conducted upon the appellant's explicit request (cf article 274 sec. 1 no. 1 lit. a and lit. b BAO). In case the appellant is not represented by a professional representative, an oral hearing has to be conducted even without such explicit request provided that the appellant has not been formally instructed about his right to request such oral hearing (such formal instruction is, however, unnecessary if the appellant is already informed about his right).⁸⁸

If the administrative court at first instance does not comply with the above-mentioned obligation to conduct an oral hearing, a procedural error occurs, which leads to the annulment of the administrative court's decision provided that the procedural errors is properly claimed in the appeal and thereby brought before the Federal Administrative court (at second and last instance). Such procedural error, however, only leads to the annulment of the administrative court's decision, if the error is considered to be "substantial" (a "substantial" error is also called an "abso-

86. E.g. VwGH 12.8.2010, 2008/10/0315; VwGH 30.01.2014, 2012/10/0193; e.g. also VwGH 26.4.2010, 2004/10/0024 and VwGH 23.1.2013, 2010/15/0196.

87. Cf sec. 2.4.1.

88. Cf sec. 3.2.

lute” error; cf article 42 sec. 2 no. 3 lit. c VwGG). The omission of an oral hearing is considered to be a “substantial” procedural error if the administrative court would have rendered a different decision after having conducted the – unlawfully omitted – oral hearing.⁸⁹ The mentioned requirement derivable from article 42 sec. 2 no. 3 lit. c VwGG practically means that the appellant has to argue in the appeal to the Federal Administrative court which facts and circumstances he would have reported in the oral hearing, provided that these facts and circumstances would have potentially influenced the administrative court’s decision.

However, the Federal Administrative court’s jurisdiction states that – referring to the ECtHR’s jurisdiction⁹⁰ – such procedural error does not need to be “substantial” (such error is called an “absolute” error), which practically means that the appellant does not have to argue in his appeal the effect of the omitted oral hearing on the administrative court’s decision (which further means that the appellant is not required to argue in his appeal what facts and circumstances he would have reported in the oral hearing).⁹¹ The omission of an oral hearing is, however, only to be considered an “absolute” error (which is not required to be “substantial”) within the range of article 47 sec. 2 first sentence CFR.⁹²

The conclusions the Federal Administrative court draws from the ECtHR’s jurisdiction are far-reaching as the omission of an oral hearing always qualifies as a procedural error, leading to the annulment of the administrative court’s decision even if it did not influence it. The Federal Administrative court’s jurisdiction has therefore been criticized in Austrian literature; it is, however, very beneficial for the appellant (and his professional representative).⁹³

89. E.g. VwGH 29.7.2010, 2006/15/0215; VwGH 4.3.2009, 2006/15/0175 (the appellant did not argue which facts and circumstances he would have reported in the oral hearing); see also VwGH 19.3.2013, 2012/15/0021.

90. The Federal Administrative court’s jurisdiction refers, for example, to ECtHR 28.5.1997, 16717/90, *Pauger/Austria*; see also the subsequent footnote.

91. Sutter, *AnwBl* 2013, p. 248 Anm 3.

92. Basically VwGH 23.1.2013, 2010/15/0196 (referring to ECtHR 28.5.1997, 16717/90, *Pauger/Austria*); e.g. VwGH 19.3.2013, 2012/15/0021; see also VwGH 12.8.2010, 2008/10/0315; VwGH 26.1.2012, 2009/07/0039 and VwGH 30.01.2014, 2012/10/0193. For Austrian literature, cf e.g. Bumberger in *Festschrift Klecatsky* p. 117.

93. E.g. Sutter/Urtz, *Die mündliche Verhandlung im Beschwerdeverfahren vor den Verwaltungsgerichten nach der BAO sowie im Verfahren vor dem VwGH – Verfahrensrecht und grundrechtliche Anforderungen*, in *Festschrift Ritz* (2015).

4. SPECIFIC ISSUES REGARDING THE RIGHT TO ORAL HEARING IN SWEDISH TAX PROCEDURE

4.1 THE MAIN RULE IS A WRITTEN PROCEDURE

The Swedish tax procedure is governed by two different legal acts, the Administrative Procedure Act (APA), 1971: 291, *förvaltningsprocesslagen*, and the Tax Procedure Act (TPA), 2011:1244, *skatteförfarandelagen*. The general provisions on oral hearing are to be found in the APA, whereas the special provisions regarding certain categories of tax cases are found in the TPA.

The main rule is a written procedure.⁹⁴ The general idea behind a written procedure in administrative law cases is that the procedure should be easy, quick and cheap. The individuals and companies should be able to carry out their cases themselves without a legal representative. In complicated tax cases this is of course only a notion, but looking at the relatively low compensation for a legal representative that the taxpayers get when the tax administration loses a tax case, the idea that there should in general be no need for a legal representative is clear.

The written procedure is not necessarily quicker than an oral procedure when it comes to clarifying complicated facts. In such situations an oral hearing could be helpful. The written procedure can also be problematic in simple cases, where the court is required to guide the taxpayer because of the imbalance in strength between the taxpayer and the tax administration (Sw: *officialprincipen*, Ger: *Manduktionspflicht*). In many such cases it could be easier for the judges to understand what the taxpayers do not understand, and give the taxpayer the right guidance, in an oral rather than in a written procedure.⁹⁵

The written procedure is most likely cheaper for the public than the oral procedure would be. Assumed that an organized oral procedure in the majority of cases requires the taxpayer to have a legal representative, and that the written procedure does not, the written procedure should be cheaper also for the taxpayers. A written procedure also saves the taxpayer from travelling costs caused by the requirement of presence in court.

Even though a written procedure can be motivated by being easy, quick and cheap, many dimensions of communication get lost in a writ-

94. Sec. 9 (1) APA. See Gov. bill prop. 1971:30 p. 531.

95. Sec. 8 APA.

ten communication. This is especially the case in written communication by ordinary mail, where the possibilities of follow up questions are much more limited than in oral communication. Therefore, an oral hearing can in many cases be fruitful and contribute to a more efficient procedure.

4.2 ORAL HEARING

In some cases an oral hearing is mandatory in Swedish tax procedure law. This applies in cases of tax surcharge, personal responsibility for taxes and fees as well as provision of security for tax debts.⁹⁶ The tax surcharge is a criminal charge, so a denial of an oral hearing would be contrary to article 6 (1) ECHR. The personal responsibility for taxes and fees and the provision of security for tax debts are radical measures which requires a high level of legal certainty in the procedure.

In ordinary tax cases an oral hearing is not compulsory. Under sec. 9 (II) APA an oral hearing *may* be held when it benefits the case and it would lead to a quick ending of the case.⁹⁷ This applies for all instances, also the Supreme Administrative Court. An oral hearing under sec. 9 (II) APA could be beneficial to the case in order to enable interrogations with witnesses, parties or experts as well as to clarify the matters of dispute. The oral hearing under sec. 9 (II) APA could be initiated *ex officio*. This happens however very rarely.⁹⁸

When an oral hearing is initiated by the taxpayer sec. 9 (III) applies. Under this provision an oral hearing must be held in the administrative court of first instance and the administrative court of appeal when it is requested, an oral hearing is not unnecessary and special reasons do not speak against an oral hearing.⁹⁹ When deciding if an oral hearing is unnecessary, the court should primarily take into consideration the investigation of the facts of the case, but can also consider other circumstances, such as how important the case is for the taxpayer and if the taxpayer

96. Chapter 46 sec. 12, chapter 59 sec. 18 and chapter 67 sec. 37 TPA.

97. In SOU 2014:74 (p. 33) this provision is proposed to be compulsory, meaning that the courts are obliged to hold an oral hearing when it benefits the case. The requirement *it would lead to a quick ending of the case* is proposed to be replaced by a provision regarding oral preparation (*munlig förberedelse*).

98. See SOU 2014:74 p. 330.

99. In the governmental investigation SOU 2014:74 (p. 33) this requirement is proposed to be sharpened to if an oral hearing is not clearly unnecessary (*uppenbart obehövligt*). This however only applies in the Administrative court of first instance, see Cedermark, Pia, Kristiansson, Hanna, Förbättrad hantering av skattemål i de allmänna förvaltningsdomstolarna - en rättssäkerhetsfråga, Skattenytt 2015 p. 133.

could get a better understanding for the coming judgment if an oral hearing is held.¹⁰⁰ Special reasons could speak against an oral hearing in trivial cases and if the costs of arranging an oral hearing are not in proportion to the value of dispute.¹⁰¹ Surprisingly in tax cases an oral hearing is more common in the second than in the first instance.¹⁰²

A decision regarding oral hearing cannot be appealed separately. This means that an appeal regarding not having held an oral hearing should be rejected.¹⁰³

A general right of oral hearing could be found in the Swedish constitution, *regeringsformen* (1974:152) RF. Under chap. 2 sec. 11 RF procedures before the courts should be public.¹⁰⁴ According to the preparatory works this provision should not only be applied on civil and criminal cases as under the ECHR, but also to other categories of cases, such as those regarding migration and taxes. In practice, this provision is however not applied very often since Sweden does not have a constitutional court.

4.3 THE INFLUENCE OF THE ECHR AND THE CFR ON THE SWEDISH TAX PROCEDURE – NOW AND IN THE FUTURE

As appears from above, there is no absolute right to oral hearing in tax cases in Sweden, except for the cases of tax surcharge, personal responsibility for taxes and fees and the provision of security for tax debts. The current provisions in the APA are not based on ECHR or the CFR, but are rather old purely domestic rules from the beginning of the 1970s.

The CFR applies on fields of law implementing Union law. As expressed in the Treaty of the European Union, the provisions of the CFR shall not extend in any way the competences of the Union as defined in the Treaties.¹⁰⁵ Under the CFR the provisions of the Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.¹⁰⁶ Since the CJEU in the Åkerberg Fransson case has already stated that the CFR applies on VAT procedure, it is,

100. Gov. bill prop. 1971:30 p. 537.

101. Gov. bill prop. 1971:30 p. 537.

102. See SOU 2014:74 p. 323–324.

103. RÅ 1988 not. 202.

104. SFS 2010:1408.

105. Article 6 (II) of the Treaty of the European Union (OJ 2010 C 83).

106. Article 51 (I) of the CFR.

in our opinion, obvious that not only the *ne bis in idem* provision of the Charter applies,¹⁰⁷ but all rights granted by the CFR.

The right of an oral hearing applies in procedures where both facts and legal issues are tried. This is not the case in all supreme administrative courts around Europe, but it does apply for the Swedish Supreme Administrative Court. In special cases, even new facts that have not previously in lower instances been put forward can be taken in consideration by the Supreme Administrative Court.¹⁰⁸ As we understand it this cannot mean anything else than that the CFR provides the taxpayers with an almost absolute right of oral hearing in VAT cases, just like the Austrian Federal Court has stated in its ruling from 19 March 2013, and also in the Swedish Supreme Administrative Court. Only in cases of extraordinary circumstances, meaning for example cases involving technical questions to a high degree, and if facts are clear because of sufficient proof or because of the written submissions, the Swedish Supreme Administrative Court should deny a request of oral hearing.

The extensive right to an oral hearing is however not limited to VAT cases. It applies also to other harmonized fields of law. In tax law, such an absolute right of oral hearing applies to the Merger Directive,¹⁰⁹ the Parent-Subsidiary Directive¹¹⁰ and the Interest- and Royalty Directive¹¹¹. It has been brought forward by the District Court of Gothenburg that the CFR should apply when a taxpayer carries out cross-border trade, since the taxpayer in such a case exercises its rights of free movement.¹¹² When the tax procedure regards the cross-border trade of such a taxpayer, we would not exclude that there would be an absolute right to oral hearing in such a case.¹¹³

It should be considered whether other procedural rights, such as the right of oral hearing, should be extended to non-harmonized fields of

107. Article 50 of the CFR.

108. Sec. 37 APA.

109. Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States OJ L 310, 25.11.2009, pp. 34–46.

110. Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States OJ L 225, 20/08/1990 p. 6–9, amended by Directive 2003/123/EC.

111. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States OJ L 157, 26/06/2003 pp. 49–54.

112. Göteborgs tingsrätt den 25 januari 2011, slutligt beslut i mål nr B 2682-09.

113. See also Gulliksson, Magnus, Kristofferson, Eleonor, Betydelsen av *ne bis in idem*-principen inom EU-rätten för skattebröret och skatterätt, Svensk Skattetidning 2011 pp. 223–224.

income tax law, which are not subject to EU law. In the case NJA 2013 page 502 the Swedish Supreme Court elaborates in detail about if it should allow double proceedings in cases not implementing Union law, such as most income tax law cases. The question in that case was if the *ne bis in idem*-prohibition should be applied regarding tax crime and tax surcharge. The Swedish Supreme Court states in paragraph 58:

”Genom att rättighetsstadgans förbud mot dubbla förfaranden och straff omfattar mervärdesskatten, har det samlade svenska systemet med skatteillägg och skattebrott i väsentliga delar redan urholkats. Effekterna av att det underkänns också i fråga om andra skatter och avgifter blir därmed mindre ingripande. Att i rättspraxis upprätthålla bara vissa delar av ett system som är tänkt att vara sammanhängande skulle vidare leda till en svårförklarlig ordning och en i vissa fall svårtillämpad skillnad i reaktion på likartade regelöverträdelser.”

The Swedish Supreme Court states that case law upholding only parts of a system which is intended to be coherent would result in an order that would be difficult to explain and in some cases difficult to apply. This statement could be put forward in order to provoke an extension of the almost absolute right to oral hearing also to fields of tax law not implementing EU law.

In our opinion, however, it should be considered that the above mentioned case deals with the *ne bis in idem*-prohibition, and that the Swedish Supreme Court as a consequence of the Åkerberg Fransson case was just about to change its own very recent case law. Therefore, the court had to motivate clearly why it changed its case law also in the field of income tax law when the Åkerberg Fransson case only dealt with VAT and the CFR. There was however an underlying good reason to change the case law also in income tax law in this case, since double proceedings regarding sanctions in income tax law were not allowed under article 6 of the ECHR. The statement should therefore, in our opinion, not automatically be transferred to the right of oral hearing, since nothing in Union law, international law or domestic law provides for an absolute right of oral hearing in cases not implementing Union law. In the case of oral hearing, it would probably be more adequate to uphold the difference between tax law implementing and not implementing Union law. Where an actual case deals with both kinds of tax law there are no provisions in domestic Swedish tax procedural law hindering that the oral hearing also includes the issues regarding tax law that do not implement EU law.

Our conclusion is therefore that there is an extensive right to oral hearing in all instances in VAT cases, cases on the fields of the Merger Direc-

tive, the Parent Subsidiary Directive and the Interest- and Royalties Directive, and possibly also when the taxpayers in their business exercise the right of free movement under the TFEU.¹¹⁴ Since there are not too many such cases before the Swedish Supreme Administrative Court each year and the right to oral hearing in the lower instances is already rather extensive, our conclusions are maybe of greater importance for the Swedish legislator, when reforming the tax procedure. The right to oral hearing may only in exceptional cases be restricted in cases where the Member States are implementing Union law. In our opinion, when reforming the Swedish provisions of the right of oral hearing, it would be desirable that the Swedish provisions live up to the requirements in the CFR without having to apply the very general provision in the Swedish constitution (chap. 2 sec. 11 RF).

6. CONCLUDING REMARKS

As stated above, the CFR provides for a wide-reaching right of oral hearing in VAT procedure, and also in other areas of tax law implementing Union law. The Austrian but not the Swedish Supreme Administrative Court has in its case law provided for such a right. In Austria the main issue basically is whether the right has to be granted in all cases when the taxpayer requires it, or if the taxpayer has to argue for that an oral hearing would actually contribute to the investigation of the case. It is interesting to see that the Austrian Federal Administrative court in certain events applies a stricter standard than the ECtHR does in his jurisdiction.

An upcoming question is whether there are more procedural rights in the CFR that should be granted for the cases dealing with tax law implementing EU law. In the case VwGH 2014/16/0052 of 27 May 2014 of the Austrian Federal Administrative Court it was tried whether the right of a good administration in article 41 CFR applied in a case regarding excise duties. Unfortunately, the tax in the case, a kind of tax on restaurant supplies of alcoholic beverages, was deemed not to be an EU harmonized alcohol tax. Hence, the CFR did not apply at all. It would have been interesting if the court would have tried whether and to what extent

¹¹⁴ OJ 2012 C 326/47.

the rights provided for in article 41 of the CFR should be applied also by national authorities in tax matters.¹¹⁵

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115. See Bull, Thomas, Medborgare, makt och muntlighet, in: *Muntlighet vid domstol i Norden: en rättsvetenskaplig, rättspsykologisk och rättsetnologisk studie av presentationsformernas betydelse i förfarandet vid domstol i Norden*, Bylander, Eric & Lindblom, Per Henrik [ed.], Uppsala, Iustus Förlag 2005 p. 316.