

EU and International TAX COLLECTION NEWS

Vol. 9

2022-1

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This newsletter is available on the CIRCABC website managed by the European Commission.

It can be accessed via the Europa-Taxud website:

[Tax recovery \(europa.eu\)](https://europa.eu/europa-taxud/)

Reference recommendation: EU & *Int. Tax Coll. News*

PROGRAM OF THE CONFERENCE

On Monday 21 November 2022, the European Commission organises a conference dealing with the legal protection of tax debtors in the process of mutual tax recovery assistance between Member States of the EU. The conference aims at presenting and discussing important questions on how to respect tax debtors' rights in the phase of tax recovery and in cross-border tax recovery assistance cases.

- 08:45 – 09:30: Registration
- 09:30 – 09:40: Welcome (Elena Scoppio, Director Indirect taxation and Tax administration, European Commission)
- 09:40 – 09:50: Introduction (Prof. Dr. Luk Vandenberghe, Head of sector Tax collection and enforcement, European Commission, University of Antwerp)

First session: Recovery of contested claims – Precautionary measures – Judicial review – Ombud's intervention

- 09:50 – 10:15: Presentation: "Protecting tax debtors' rights: to be guaranteed at national level or EU level?" (Prof. Dr. Pasquale Pistone, Academic Chairman IBFD, WU University of Vienna and University of Salerno, and Dr. Ivan Lazarov, WU University of Vienna)
- 10:15 – 10:40: Presentation: "Contested claims: lessons from abroad" (Prof. Dr. Carika Fritz, University of the Witwatersrand)
- 10:40 – 11:05: Presentation: "Contested claims: ideas for an intra-EU approach" (Prof. Dr. Roman Seer, Ruhr University of Bochum)
- 11:05 – 11:30: Coffee break
- 11.30 – 13:00: Discussion, panel + plenary (Panel: speakers + J. Evgenia Papadopoulou, Court of appeal Thessaloniki; Prof. Dr. Caroline Vanderkerken, Court of Appeal Brussels, University of Hasselt; Prof. Dr. Isabelle Richelle, CFE, University of Liège)
- 13:00 – 14:30: Lunch break

Second session: Timing of requests – Interest and penalties – Third parties

- 14:30 – 14:55: Presentation "Interest issues" (Prof. Dr. Ilse De Troyer, University of Leuven)
- 14:55 – 15:20: Presentation: "Penalties issues" (Prof. Dr. Carlos Weffe, Central University of Venezuela)
- 15:20 – 15:45: Presentation: "Third parties" (Prof. Dr. Katerina Perrou, University of Athens)
- 15:45 – 16:10: Coffee break
- 16:10 – 17:15: Discussion panel + plenary (Panel: speakers + Prof. Dr. Caroline Vanderkerken, Court of Appeal Brussels, University of Hasselt; Prof. Dr. Isabelle Richelle, CFE, University of Liège; Prof. Dr. Roman Seer, Ruhr University of Bochum)
- 17:15 – 17:30: Conclusions and closing (European Commission)

PRESENTATIONS

L. Vandenberghe Introduction



Protecting the tax debtor in cross-border tax recovery assistance

Brussels, 21 November 2022

Why this conference ?

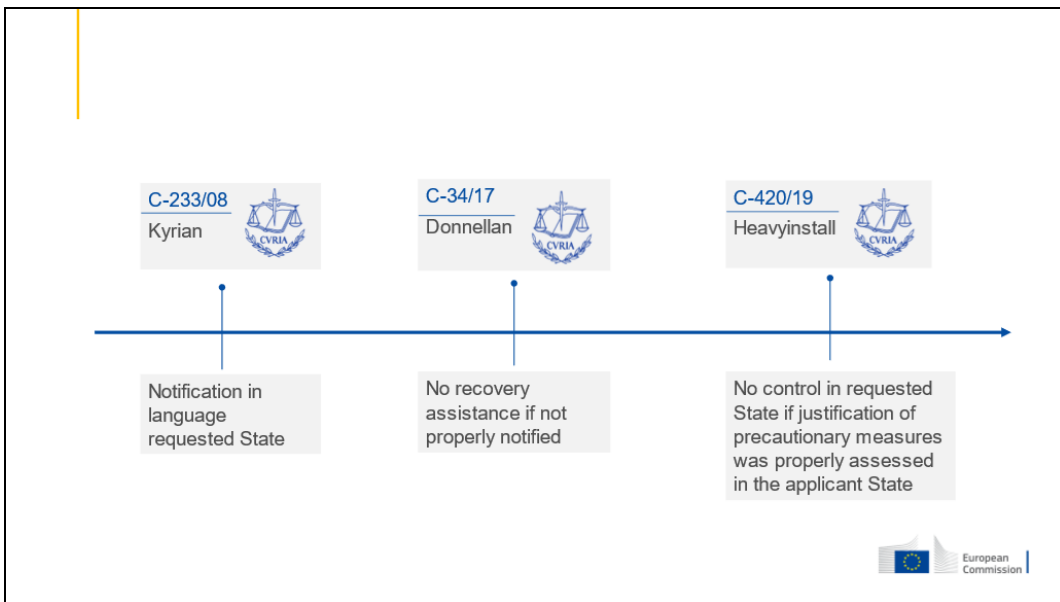
- 2010: adoption of the current EU Directive on mutual tax recovery assistance
Now: analysis of possibilities to improve and reinforce this framework

- Tax recovery assistance is not only a matter between tax authorities →
Tax recovery: about obligations and **rights of tax debtors**

↓
relevance confirmed by case law EUCJ



L. Vandenberghe
Introduction



Example: Donnellan (1)

- 16 Mr Donnellan, who is an Irish national, was recruited in 2002 as a driver of heavy goods vehicles by TLT International Ltd, a transport undertaking established under Irish law.
 - 17 In July 2002, Mr Donnellan, on the instructions of that undertaking, collected, from a trader established in Greece, 23 pallets of olive oil. The consignment note relating to those goods indicated that the consignee of those goods was an undertaking operating supermarkets in Ireland.
 - 18 On 26 July 2002, Mr Donnellan presented that consignment note to the customs office of the port of Patras (Greece). On that occasion, a customs agent, during an inspection of those goods, discovered, in addition to the olive oil, 171 800 packets of contraband cigarettes. Following that discovery, Mr Donnellan was arrested and the vehicle and its cargo were seized.
 - 19 On 29 July 2002, Mr Donnellan was found guilty at first instance of smuggling and issuing fictitious tax data. Those offences led to the sentencing of Mr Donnellan to prison sentences of three years and one year respectively. Mr Donnellan was imprisoned immediately.
 - 20 On 17 October 2002, Mr Donnellan was acquitted of both charges on appeal and was released immediately.
- ...



Example: Donnellan (2)

- ...
- 21 On 27 April 2009, the customs office of Patras issued a notice for the imposition on Mr Donnellan of an administrative penalty of EUR 1 097 505 on the basis that the cargo seized in July 2002 contained 171 800 packets of contraband cigarettes.
- 23 (...) On 15 July 2009, (...), that fine was published in the Official Journal of the Hellenic Republic.
- 24 On 14 November 2012, the Greek authorities sent to the Irish tax authorities a request for recovery, within the meaning of Article 10 of Directive 2010/24, relating to that fine of EUR 1 097 505, increased by interest of EUR 384 126.76 and costs or penalties of EUR 26 340.12.



L. Vandenberghe Introduction

Example: Donnellan (3)

56 In circumstances such as those established by the referring court in the case in the main proceedings, the person concerned is subject to the enforcement procedure relating to the request for recovery covered by Directive 2010/24, notwithstanding the fact that **the fine in question was not notified to him**. The person concerned is thus placed in a situation in which payment of the amount of that fine, together with the interest and costs referred to in Article 2(2)(c) of that directive and interest for late payment referred to in Article 13(3) thereof, is claimed from him by the requested authority even though, **due to a lack of sufficient knowledge of the content of and the reasoning for the decision imposing the fine on him, he was not in a position to contest that decision in the Member State of the applicant authority**

60 That is a fortiori so where, as in the present case, **the applicant authority itself indicated, in the request for recovery, and therefore at a point in time earlier than that at which the person concerned became aware of the existence of the claim in question, that it was no longer possible to bring administrative or judicial proceedings in the applicant Member State with a view to contesting that claim.** (...)



Example: Donnellan (4)

62 In the light of all of the foregoing considerations, the **answer to the question referred** is that Article 14(1) and (2) of Directive 2010/24 read in the light of Article 47 of the Charter, must be interpreted as **not precluding an authority of a Member State from refusing to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State, such as that at issue in the main proceedings, on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to that authority pursuant to that directive.**

Cf. referring Irish court: "enforcement of a fine which has not been notified to the person concerned is contrary to public policy."



What if it had been accepted that the claim could still be contested?

How to exercise the right of defence after 10 years ? (facts in 2002; recovery request in 2012) ? And **where to exercise the right of defence** ? (in applicant State / in requested State, on grounds of public policy?)
If contested, what should/could the requested authorities do in practice ?

Penalties of 1.000.000 € ... but in 2002, he was acquitted on appeal and released immediately?
So what about « ne bis in idem » ?

Should such an argument be raised before Greek courts ? Or could it be raised in Ireland, to stop the execution of the recovery request for reasons of public policy ?

Default interest of almost 400.000 € ... but is it proportionate to impose such an interest if the debt was never effectively notified to that person?

Should this argument be raised before Greek courts ? Or could it be raised in Ireland, to stop the execution of the recovery request for reasons of public policy ?

Smuggling of goods: liability of the driver confirmed by established case law EUCJ, but what about **liability of third parties** (e.g. the company that had just recruited him)?



L. Vandenberghe
Introduction

Program of this conference 21 -11-2022

**Recovery of contested claims –
Precautionary measures – Judicial review
– Ombud’s intervention**

- 09:50 – 10:15: Presentation: **“Protecting tax debtors’ rights: to be guaranteed at national level or EU level?”** (P. Pistone)
- 10:15 – 10:40: Presentation: **“Contested claims: lessons from abroad”** (C. Fritz)
- 10:40 – 11:05: Presentation: **“Contested claims: ideas for an intra-EU approach”** (R. Seer)
- 11:05 – 11:30: **Coffee break**
- 11.30 – 13:00: Discussion (panel: speakers + E. Papadopoulou; C. Vanderkerken; I. Richelle)
- 13:00 – 14:30: **Lunch break**

**Interest and penalties – Third parties –
Timing of requests**

- 14:30 – 14:55: Presentation **“Interest issues”** (I. De Troyer)
- 14:55 – 15:20: Presentation: **“Penalties issues”** (C. Weffe)
- 15:20 – 15:45: Presentation: **“Third parties”** (K. Perrou)
- **15.45 – 16.10: Coffee break**
- 16.10 – 17.15: Discussion (panel: speakers + C. Vanderkerken; R. Seer; I. Richelle)
- 17.15 – 17.30: Closing



Launching of a stakeholder consultation



Conference
“Protection of tax debtor rights”



Exploratory consultation
questionnaire



Expectations with regard to this conference

- Raising awareness, launching the debate, searching for suggestions...
- No final conclusions/decisions !
- Participants with a different background, different interests,
- But common concerns:
 - Protection of the tax debtor + protection of the general interest
 - Effective protection of respective rights and interests, in practice, taking account of the fact that situations may be very different.



L. Vandenberghe
Introduction

What will follow ?

- Tuesday 22.11.22: 2nd day for further discussion with tax authorities.
- Exploratory consultation (contributions to be submitted before end Jan. 2023)



Thank you



P. Pistone, I. Lazarov

Protecting tax debtors' rights: to be guaranteed at national level or EU level?




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Protecting Tax Debtors' Rights: To be Guaranteed at National Level or EU Level?

Prof. Dr. Pasquale Pistone
Dr. Ivan Lazarov

Visit us at www.ibfd.org



Outline and research questions

The three dimensions of fundamental rights protection:

- ▶ Under **the TRD** and its Implementing Regulation.
- ▶ Under the **requesting** Member State's domestic tax law, establishing the initial claim.
- ▶ Need for a **common minimum standard** of protection.


Issues :

1. How can conforming interpretation inform the construction of certain provisions of the TRD framework?
2. Are there instances where the domestic framework is outside the scope of EU law but a recourse to mutual recognition is sought?
3. Is there a need for a common minimum standard in such instances?

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Protecting tax debtors' rights: to be guaranteed at national level or EU level?




TRD in light of the Charter

- ▶ Member States 'implementing' EU law for the purposes of Art. 51 of the Charter
 - ▶ Plea for a strict standard of review of secondary legislation in light of fundamental rights (beyond *Digital Rights Ireland*).
- ▶ Rights of third parties against enforcement (Art. 3(2)(c) IR)
 - ▶ Protection standard under the law of the requested MS.
- ▶ Notification of measures devoid of purpose (e.g. paying the debt)
 - ▶ Greater role of the taxpayer.
- ▶ Deemed notifications
 - ▶ Link to the right of fair trial under Art. 47 of the Charter.

Conforming interpretation as a way of guaranteeing respect of fundamental rights

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Domestic procedure and scope of EU law (1)

Is the domestic tax procedure in the requesting Member State within the scope of EU law?

Two main points of view possible:

- ▶ **Yes:** If a Member State requests tax assistance, then 'retroactively' also its domestic procedure leading to the claim must be regarded 'within the scope of EU law'.
 - ▶ Gaining access to the MRD is preconditioned by meeting the EU standard of fundamental rights protection.

= Insofar as a decision to request enforcement abroad is adopted, the whole question gains EU significance.
- ▶ However, timing problem: at the moment of establishing the claim, the procedure was seen as purely domestic.
 - ▶ Only limited review possible in the requested MS

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Protecting tax debtors' rights: to be guaranteed at national level or EU level?



Domestic procedure and scope of EU law (2)

- ▶ **If within the scope of EU law, the general principles and Charter apply in the requesting Member State**
- ▶ **EU law provides for a comprehensive and complete system of fundamental rights protection that is:**
 - ▶ At least equivalent to the ECHR (*Bosphorus* presumption) .
 - ▶ Sufficient from the perspective of domestic constitutional courts (*Solange*).
- ▶ **No need for any secondary law intervention but merely application of the general principles**

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Domestic procedure and scope of EU law (3)

- ▶ **[Our view] Not within the scope**, unless underlying secondary law applies (e.g. VAT, WHT) or there is discrimination (FF relevant)
 - ▶ Competences and conferral – the Charter should not expand the scope of EU law .
 - ▶ *Åkerberg Fransson* – broad but not that broad: (i) VAT, excise duties, ATAD – ‘In’; (ii) PIT, CIT– ‘Out’.
 - ▶ The procedures for establishing an executable tax claim (administrative/judicial act) ≠ procedure for collecting the claim.
 - ▶ Different organs responsible, subject matter, grounds for review.
 - ▶ Case law of the CJEU (e.g. *Donnellan*) looks at the domestic public policy of the requested MS as a ground for non-execution.

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Protecting tax debtors' rights: to be guaranteed at national level or EU level?



Domestic procedure and scope of EU law (4)

- ▶ **If outside the scope, the general principles and the Charter do not apply in the requesting Member State.**
 - ▶ The ECHR also does not apply to the general tax procedure.
- ▶ **No remedy available if the domestic standard of fundamental rights protection in the requesting Member State is not adequate.**
 - ▶ [Not entirely true]: *Donnellan* – in exceptional circumstances the requested Member State may hit the emergency brake.
 - ▶ Also *Donnellan* unavailable if the requesting and the requested Member State have deficient standards.
- ▶ **Undermines mutual trust as nothing but 'blind' trust guarantees the domestic standard in the requesting Member State**

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Need for a common minimum standard (1)

- ▶ **Need for secondary legislation introducing a common minimum standard of fundamental rights protection in the context of tax procedures**
 - ▶ Would strengthen mutual trust and recognition making the system more efficient.
 - ▶ Legal basis: combined Art. 113 -115.
 - ▶ Similar problems already arose in the context of criminal law and EAW – solved precisely by means of harmonization .
- ▶ **Supplements the broad upcoming Recommendation on taxpayers' rights**
 - ▶ Two track approach: soft -law for broad best practices, hard -law for minimum standards.
- ▶ **Even if all Member States were to currently meet the standards, this guarantees against rollbacks in case of future Rule of Law concerns in some MS**

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Protecting tax debtors' rights: to be guaranteed at national level or EU level?



Need for a common minimum standard (2)

- ▶ **Examples of potential issues:**
 - ▶ Deployment of AI, illegal obtaining of tax information by authorities, deemed notification rules, good administration and fair trial.

- ▶ **Potential substantive scope of secondary law:**
 - ▶ Explainability of technology.
 - ▶ Timely and actual communication to the taxpayer of measures.
 - ▶ Right to be heard during audits and transparency of conditions for being selected for audit.
 - ▶ Right of review and judicial appeal.
 - ▶ Minimum rules on subsistence.

C. Fritz

Contested claims: lessons from abroad



Prof Carika Fritz
Brussels, 21 November 2022

CONTESTED CLAIMS: LESSONS FROM ABROAD

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG  **100** 1922 2022 

CONFLICTING INTERESTS

<p>Right to effective remedy</p> <ul style="list-style-type: none">• Rule of Law – access to courts• Prospect of success	<p>Efficient and effective tax collection</p> <ul style="list-style-type: none">• Public interest
--	---

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG  **100** 1922 2022 

Carika Fritz



Contested claims: lessons from abroad

APPROACHES TO CONTESTED CLAIMS

The diagram illustrates a continuum between two approaches to contested claims. On the left is 'Taxpayer rights', represented by a red sphere with a grid pattern. On the right is 'Effective collection', represented by a green sphere with a grid pattern. A double-headed arrow labeled 'Continuum' connects the two spheres. The background is a light blue gradient.

Taxpayer rights Effective collection

← Continuum →

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NEW ZEALAND

Suspension until dispute finalised

Exception:
-Significant risk

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Carika Fritz

Contested claims: lessons from abroad

CANADA

90 days suspension impartial forum

Exception

- Withholding tax
- Large corporation – 50%
- Judge – jeopardy if collection delayed

The Tax Court of Canada - penalty



AUSTRALIA

Discretion to defer

When:

- Genuine dispute
- Risk assessment – 50/50



Carika Fritz

Contested claims: lessons from abroad

SOUTH AFRICA

Payment obligation not suspended

Suspend on request:

- jeopardy to recover
- compliance history
- prima facie fraud
- irreparable hardship vs prejudice
- adequate security tendered



Paying disputed tax as pre-requisite to contest

- **General - unconstitutional**
 - Spain – violate right to effective legal remedy
 - Italy – principle of equality
- **Partial payment**
 - Uganda – boxing match with one hand tied
 - Argentina – not proportional
- **Indirect pre-requisite**
 - Nigeria Tax Appeal Tribunal



Carika Fritz

Contested claims: lessons from abroad

Lessons to learn?

Rule-exception-approach – rational balance

Jurisdiction specific



R. Seer,

Default interest in the event of late payment of taxes

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RUB

EC Workshop, Brussels – Protecting the Tax Debtor in Mutual Recovery Assistance 21.11.2022

Contested Claims: ideas for an intra- EU approach

Prof. Dr. Roman Seer

Chair of Tax Law - Institute of Tax Law and Tax Procedure Law



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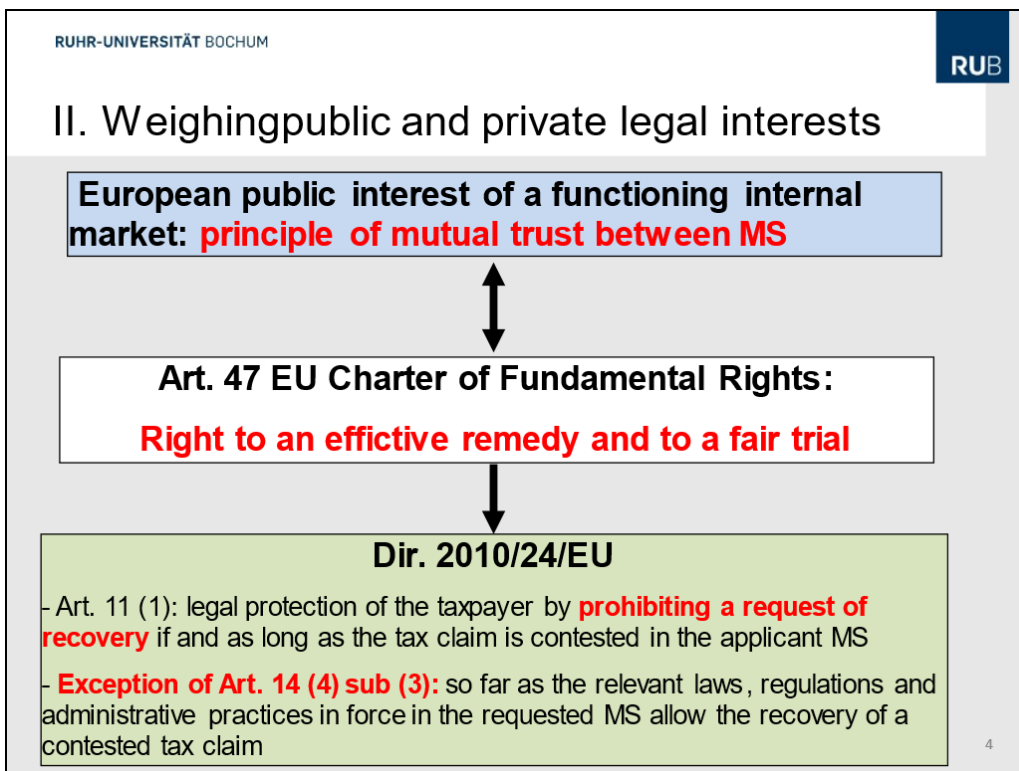
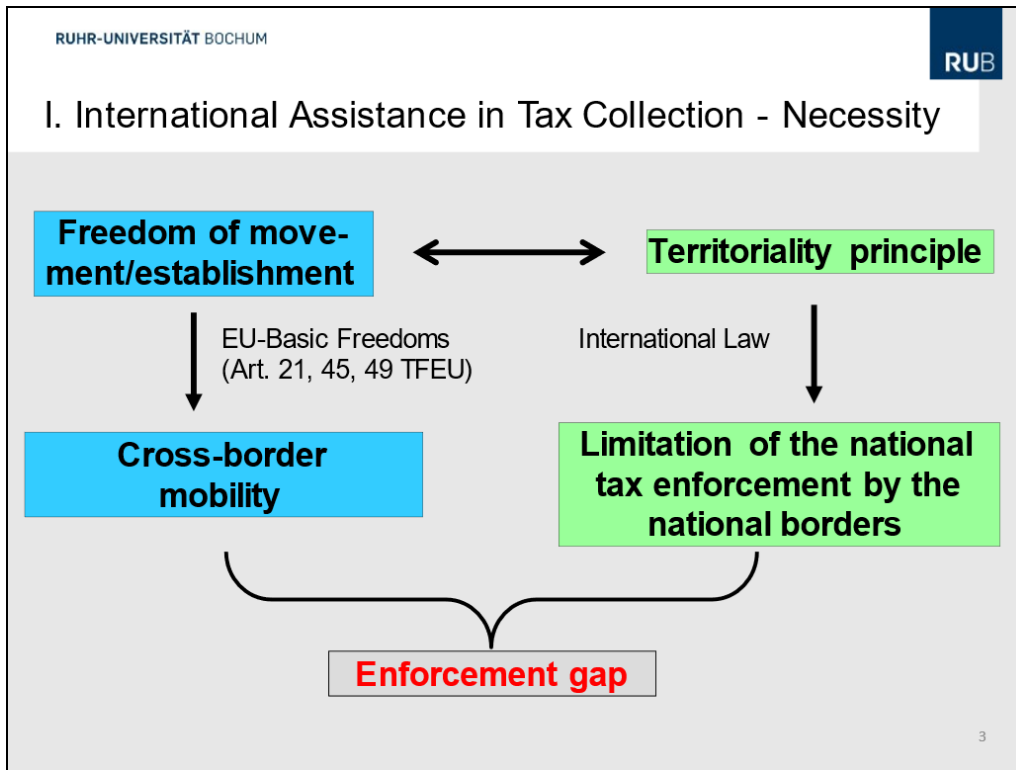
Outline

- I. International assistance in tax collection - necessity
- II. Weighing public and private legal interests
- III. Notion of Dir. 2010/24/EU
- IV. Distinction of instruments of mutual assistance
- V. Lack of legal protection
- VI. Request of precautionary measures
- VII. Legal protection regarding precautionary measures
- VIII. Relevance of the probability of success of the legal remedy

2

R. Seer,

Default interest in the event of late payment of taxes



R. Seer,

Default interest in the event of late payment of taxes

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III. Notion of Dir. 2010/24/EU

- **uniform instrument permitting enforcement: no difference between foreign and domestic administrative acts**
- **Enforcement of a foreign tax claim under the same law and with the same means as the enforcement of a domestic tax claim**
- **splitted legal protection of the debtor:**
 - **against the tax claim itself**: in the **applicant MS**
 - **against the enforcement measures**: in the **requested MS**

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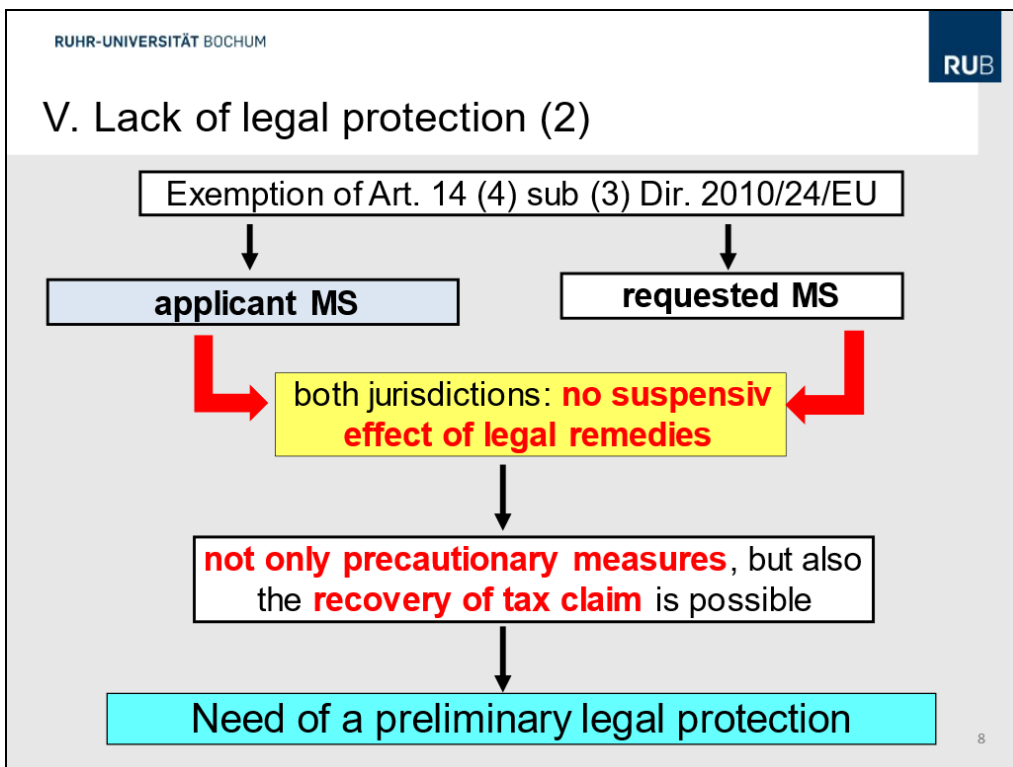
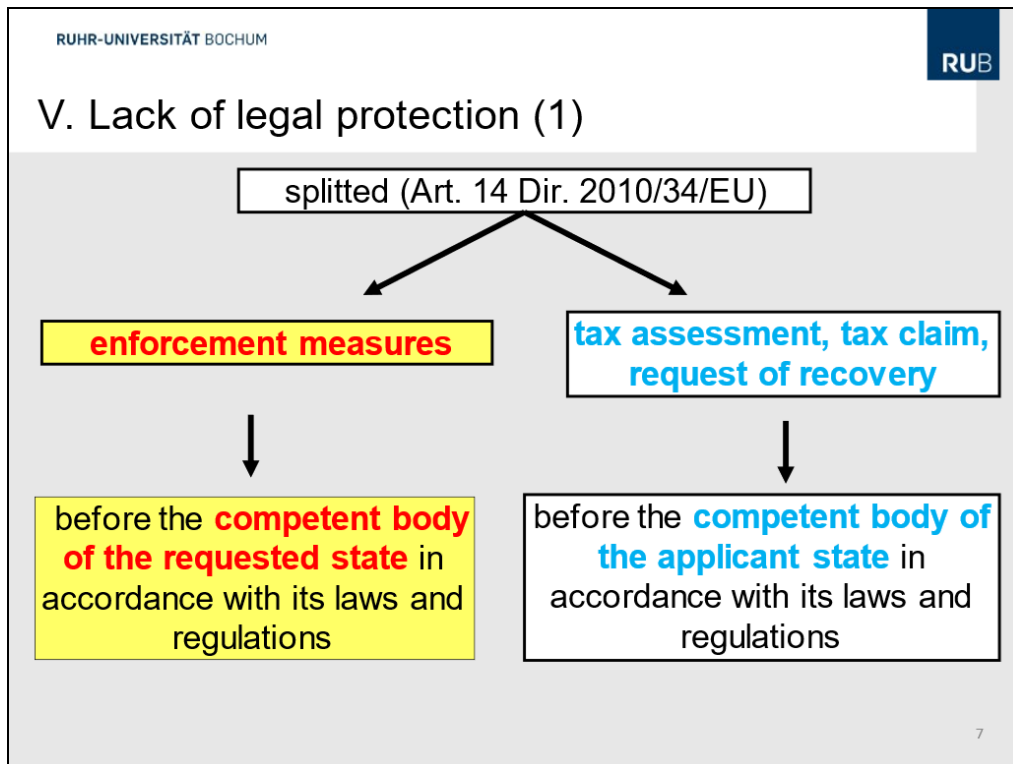
IV. Distinction of instruments of mutual assistance

<div style="border: 1px solid black; background-color: #e0ffe0; padding: 5px; margin-bottom: 10px;">Request for pre-cautionary measures</div> <div style="font-size: 2em;">↓</div> <div style="border: 1px solid black; background-color: #e0ffe0; padding: 5px; margin-bottom: 10px;">Protection of the tax claim of the applicant state</div> <div style="font-size: 2em;">↓</div> <div style="border: 1px solid black; background-color: #e0ffe0; padding: 5px;">Tax assessment act or tax claim are in dispute</div>	<div style="border: 1px solid black; background-color: #ffe0e0; padding: 5px; margin-bottom: 10px;">Request for the recovery of claim</div> <div style="font-size: 2em;">↓</div> <div style="border: 1px solid black; background-color: #ffe0e0; padding: 5px; margin-bottom: 10px;">Execution of the recovery (realization of the tax claim)</div> <div style="font-size: 2em;">↓</div> <div style="border: 1px solid black; background-color: #ffe0e0; padding: 5px;">Tax assessment act is final-valid</div>
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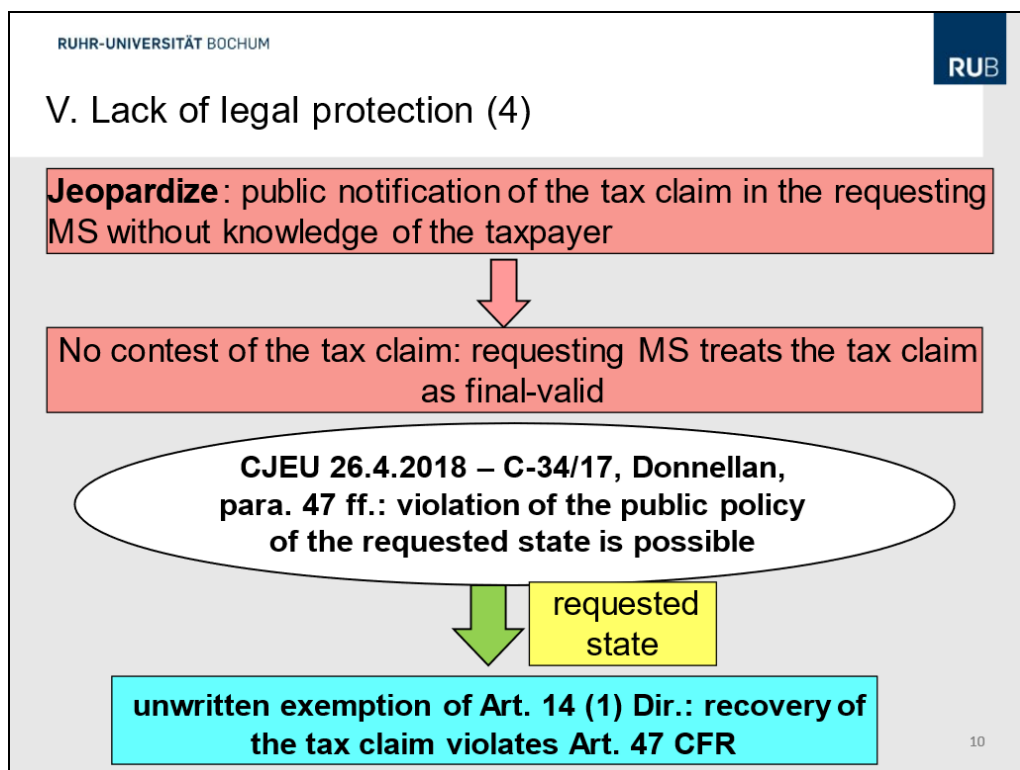
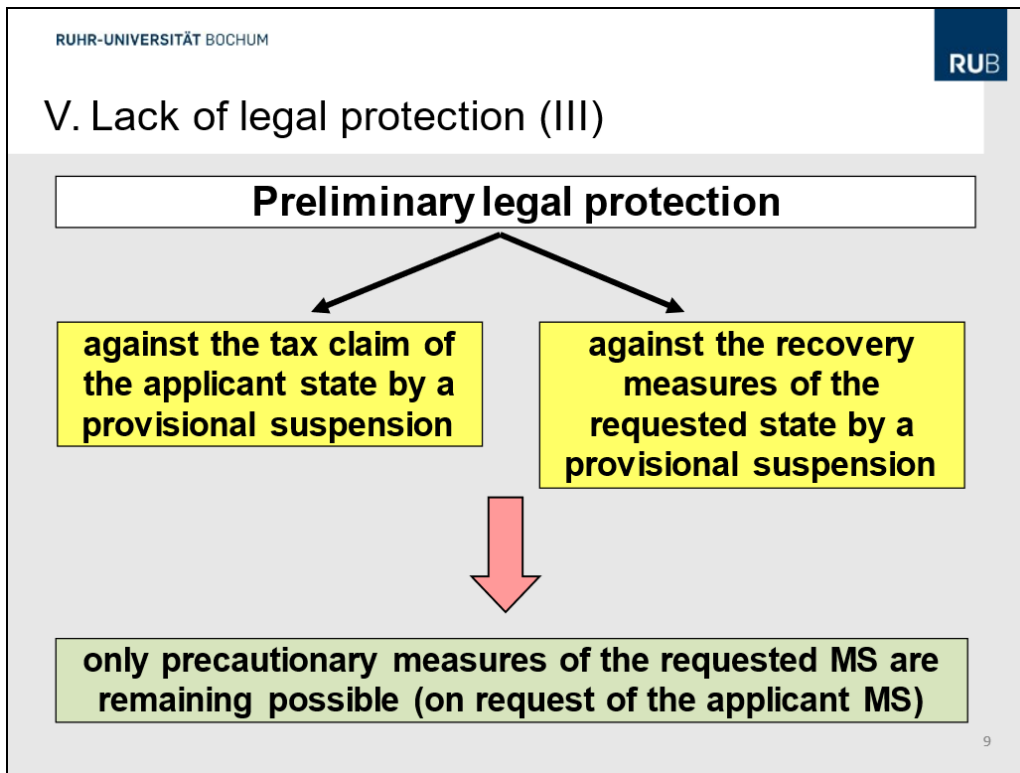
R. Seer,

Default interest in the event of late payment of taxes



R. Seer,

Default interest in the event of late payment of taxes



R. Seer,

Default interest in the event of late payment of taxes

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VI. Request of precautionary measures

Examples of precautionary measures to ensure tax recovery

- Security deposits
- Security pledges
- Seizure of goods and tangible assets
- Attachment of bank accounts
- Registration of mortgages
- Guarantees of banks and other persons

Art. 16 Dir. 2010/24/EU

- Art. 16 (1) sub (1): ... in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant MS.

- Art. 16 (1) sub (2): Document drawn up for permitting precautionary measures in the applicant MS (relating to the tax claim), if any, shall be attached to the request of precautionary measures in the requested MS

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VII. Legal protection regarding precautionary measures (1)

CJEU 20.1.2021 – C-420/19, Heavyinstall, para. 28 ff.

requesting MS

↓

legal protection against the request of precautionary measures

requested MS

↓

legal protection against the way of application of precautionary measures

Lack of legal protection:

- taxpayer will probably **not be informed** about the request before precautionary measures will be applied
- **proportionality** of the specific measure can only be tested by verifying the individual action of the tax authority in the **requested MS**

12

R. Seer,

Default interest in the event of late payment of taxes

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VII. Legal protection regarding precautionary measures (2)

CJEU 20.1.2021 – C-420/19, Heavyinstall, para. 46 f.

- the courts of the **requested MS are**, in principle, **bound by the assessment made by the authorities of the applicant MS** of compliance with the conditions of application of precautionary measures.
- in the decided case: the specific reasons and circumstances for the request have been documented by an attached seizure of a court of the applicant MS (added to a formula Annex III to Regulation No. 1189/2011).

- **Need for legal protection** :

- principle of “mutual trust” **does not mean “blind trust”**; therefore the applicant MS has to substantiate its request by using Annex III formula and giving a justification for demanding precautionary measures (but this must not be a court decision)
- in the **light of Art. 47 CFR** the taxpayer must have the right of judicial proof of the proportionality of the specific precautionary measure used by the requested MS

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VII. Legal protection regarding precautionary measures (3)

Need for minimum standards of legal protection under Art. 47 CFR:

- **applicant MS** can only decide *whether* precautionary measures can be taken from its national law perspective → **in so far: forum of testing the request (examination even ex post)**
- **requested MS** has to decide *how and which* certain precautionary measures will be taken from its national law perspective → **in so far forum of the place of precautionary measures**
- beyond Art. 18 Dir. 2010/24/EU the **requested MS** has to examine if **in line with its national public policy** the request ask for precautionary measures which **comply with the national law of the requested MS**.
- In due to the pending dispute in the applicant state the strength of precautionary measures is **limited by its function** only to ensure and not to execute the recovery of the tax claim.

14

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Default interest in the event of late payment of taxes

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VIII. Relevance of the success of the legal remedy

- If the success of the legal remedy against the tax claim in the **applicant MS** is **more like than the failure**, the enforcement of the tax claim **should be suspended**, in favour of the taxpayer.
- in this case the **requested MS may only take precautionary measures**, notwithstanding Art. 14 (4) sub (3) Dir. 2010/24/EU.
- the applicant MS has to **inform the requested MS** about the process status of the dispute and the prospects of success which are both factors for the proportionality test of specific precautionary measures.

15

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16

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Default interest in the event of late payment of taxes

Default interest in the event of late payment of taxes

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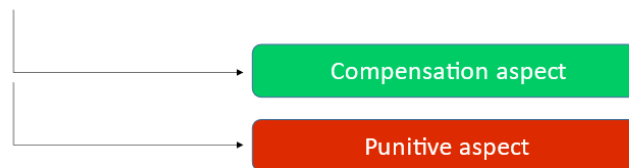
Brussels, 21 November 2022

KU LEUVEN

1

Introductory remarks

- Default interest: due if a tax is not paid on its due date.



- This presentation summarises some of the opinions expressed in the corresponding article to be published in the World Tax Journal(expected 2023-1).

2

Applicable rules

National legislation
EU: except for customs duties

Conditions Rates Periods

Compensation aspect

+

Punitive aspect

But supra-national standards:

Proportionality requirement

Art. 1 First Protocol ECHR

Art. 17 EU Charter fundamental rights

Art. 49 EU Charter fundamental rights

for criminal offences

EUCJ: general principle for all sanctions

3

I. De Troyer,**Default interest in the event of late payment of taxes****How to ensure proportionality ?****□ Current rules**

- Generally no distinction between compensation and punitive aspect when interest is charged. Tax authorities do not (always) know in advance why a tax remains unpaid.
- This is normally handled as follows:
 - Tax authorities (should) have the power to waive all or part of the default interest.
 - Tax debtor can (should be able to) request a reduction or remission of default interest from the courts (→ competent to evaluate the proportionality).

4

How to ensure proportionality ?**□ Suggested approach**

- Legislation should distinguish between compensation and punitive aspect, in order to set rules, at least for standard situations, to guarantee that proportionality can be ensured more easily. (punitive → penalties)
- Proportionality is a right, not a favour depending on the discretion of tax authorities;
- Proportionality should not only be obtained after lengthy court proceedings.

5

How to ensure proportionality ? → Relevance of the time aspect**□ Evolution of interest rates should be taken into account**

- Proportionality implies that national interest rates are regularly checked and possibly adjusted, taking account of normal market interest rate developments.

e.g. Belgium: default interest rate for VAT debts has not been changed since 1 October 1986 (0,8 % per month = 9,6 % per year).

6

I. De Troyer,

Default interest in the event of late payment of taxes

How to ensure proportionality ? → Relevance of the time aspect

☐ Tax dispute may be pending for a long time

- Administrative or judicial decision may take a long time.
- Tax debtor chooses not to pay the disputed tax yet (and arguments are not unreasonable).
- Interest charged should not be higher than needed to compensate the financial advantage resulting from the late payment.

7

How to ensure proportionality ? → Relevance of the time aspect

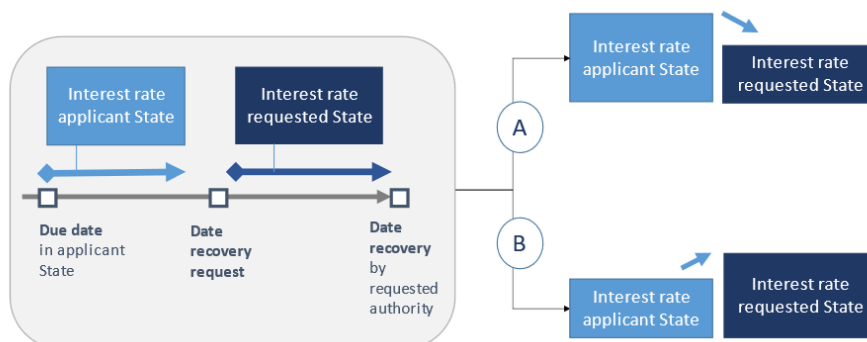
☐ (very) long period for tax investigations and for tax recovery

- E.g. tax authorities retrospectively charge and recover VAT

→ is it reasonable to require the taxpayer to pay default interest on the VAT recovered for all those years, irrespective of the specific circumstances of the previous incorrect assessment ?

8

Interest issues in case of cross-border recovery of taxes



I. De Troyer,

Default interest in the event of late payment of taxes

Interest issues in case of cross-border recovery of taxes

- Debtor will normally not oppose
- Debtor may contest in the applicant State (proportionality)
- Debtor cannot contest this rate in the requested State
(Bundesfinanzhof 30.7.2020, EUITCN 2021, 79)

Interest issues in case of cross-border recovery of taxes

- Debtor will normally not oppose
- Justified ?

Interest issues in case of cross-border recovery of taxes

- Debtor will normally not oppose
- Justified ?
- Simple approach
- But simplicity should not prevail over tax debtor interests and diminish the legal protection of the tax debtor
- Tax debtor can still pay the amount due in the applicant State, with the lower interest rate of that State.
- Important to inform debtor in the requested State about the interest rate in the applicant State (e.g. in uniform notification form).

I. De Troyer,

Default interest in the event of late payment of taxes

Interest issues in case of cross-border recovery of taxes

❑ « Ne bis in idem »

- Punitive effect may be reinforced if for instance
 - applicant State applies interest + penalties
 - requested State applies interest with a punitive character

Compensation aspect (green box)
Punitive aspect (red box)

Due date in applicant State recovery request recovery by requested authority

Interest (green box) Penalties (red box) Interest (red box)

Proportionality ?

See also next presentation on « penalties »

Interest issues in case of cross -border recovery of taxes

❑ Starting point for charging default interest in case of fictitious notifications

Example: CJEU, C-34/17, Donnellan

2002: Facts:
- Discovery of contraband cigarettes
- Truck driver was first arrested, then released.

2009: Greek claim
Fine: 1.097.505 €
+ interest 384.126 €

2012: recovery request to Ireland

Publication in the Official Journal of Greece ↔ Person concerned was an Irish citizen, living in Ireland

If tax assessment by the authorities is needed to create the tax debt, and if the debtor did not (have to) know that (more) tax was due, then default interest should not be charged as long as the debtor is not properly informed.

Interest issues in case of international double taxation

❑ Current rules

International double taxation (income taxes) → detailed procedure for consultation between tax authorities of the States concerned ...

... but what about the interest if it is concluded that the tax was paid in the wrong State ?

Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the EU

- No specific EU arrangements
- National law applies

Double tax conventions based on Art. 25 of the OECD Model Tax Convention

- No international arrangements
- OECD commentary: « the States should adopt a flexible approach...»

I. De Troyer,**Default interest in the event of late payment of taxes****Interest issues in case of international double taxation**

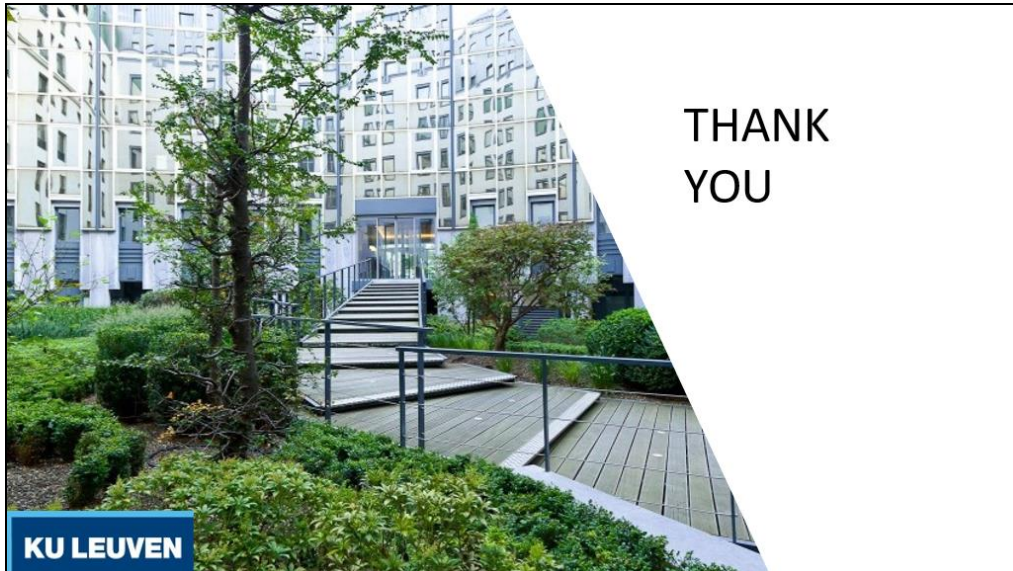
□ Suggested approach

Compensation aspect

- The State confronted with the late payment may charge compensatory interest to compensate for the loss suffered as a result of the late payment.
- If that interest \leq overpayment interest paid by the State where the tax was initially paid
→ no problem.
- Insofar as that interest exceeds the overpayment interest:
 - taxpayer should not be punished;
 - this is a liability of the State that wrongly levied the tax!


Punitive aspect

- Other State should not charge punitive interest, if the tax is paid there as soon as the double taxation dispute is finished (and reimbursed by the other State)




R. Attard and C. Weffe

Towards a taxpayers' rights compliant cross-border recovery of tax sanctions



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Towards a taxpayers' rights compliant cross-border recovery of tax sanctions

Authors: Robert Attard & Carlos E. Weffe
Presentation: Carlos E. Weffe (IBFD / Central University of Venezuela)

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Agenda


- ▶ Research questions and possible answers
- ▶ The (problematic) material scope: tax penalties in the context of the TRD
- ▶ A substantive approach: deterrence under minimum human rights standards
- ▶ Taxpayers' rights: minimum standards of enforcement of tax penalties under EU law
- ▶ Concluding remarks

2


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Research questions



Should the crossborder enforcement of tax sanctions under Council Directive 2010/24/EU (hereinafter, "TRD") be fully automatic, based solely on mutual trust among Member States and the need for swift and effective revenue collection?



Should compliance with minimum standards of protection of human rights set forth in the CFREU, the ECHR and stemming from the constitutional tradition common to the member states (Art. 6 TEU) be verified *in limine* to grant cross-border enforcement of tax sanctions under the TRD?

- Due process
- Proportionality
- *Non bis in idem*
- Other (e.g., individual nature of penalties)

3

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Possible answers

Yes

- Protection of taxpayers' *fundamental* rights
- General principles of EU Law

No

- Mutual trust
- Efficient tax collection
- Legal certainty

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Agenda

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Sanctions and the TRD, a two-dimensional approach

Formalistic approach

- Pecuniary penalties imposed by tax authorities
- Confirmed by (tax) administrative or judicial review bodies
- **NO**: criminal pecuniary penalties (i) based on public prosecution and (ii) imposed by (tax) criminal courts


Functionalist approach (Engel)

- The legal classification of the offence under national law
- The very nature of the offence
- The severity of the penalty that the person concerned risks incurring

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Agenda

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- ▶ Concluding remarks

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The *Engel* criteria, applicable throughout EU Law


- The *Engel* criteria, applicable throughout EU Law**

 - Sanctions (under TRD): amounts unilaterally imposed by the State for the purpose of deterring unlawful conduct, *finally* imposed after *due process* of law and respecting minimum standards of *proportionality*.
- Consequences**

 - ECtHR protection *granted*. [art. 6 ECHR].
- Potential problems**

 - Precautionary measures and presumption of innocence. *Heavyinstall*? (ECJ, C-420/19, 20.1.2021) (de Troyer, Maisto)
 - Surcharges as penalties. *Vegotex*? (ECtHR, App. 49812/09, 3.11.2022)

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Towards a taxpayers' rights compliant cross-border recovery of tax sanctions

Mutual trust, cornerstone of the EU integration

Mutual trust allows a prima facie presumption of conformity of the applicant State's acts subject to cross-border collection.

Efficient cross-border tax collection puts resident and non-resident taxpayers on an equal footing, favouring the establishment of the internal market under conditions comparable to those of domestic markets.

Automatic recognition of intra-EU foreign tax assessments enhances legal certainty

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Towards a taxpayers' rights compliant enforcement of taxes under the TRD

Abolition of controls in the requested State under EU law is inseparably subject to the observance and respect of EU minimum human rights standards in the issuing of the instruments allowing tax enforcement (ECJ, *WinnenWetten*, Case No. C-409/06, 8.10.2010)

Kofler & Pistone: the protection of the revenue interest must be reconciled with ensuring compliance with the law in the activity of tax authorities at all levels.

Public policy (*ordre public*) exception: enough for adequate protection? (De Troyer)

Requires modification of Art. 12(1) TRD to:

- * Grant jurisdiction to the requested State to examine *in limine* the conformity of the enforcement order with these minimum standards
- * Provide taxpayers with standing to oppose enforcement measures before the requested State on these grounds

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Possible situations & solutions

Non bis in idem

- Sanctions in both states for the same facts.
- Suspend the procedure and request a MAP in accordance with the TRD (art. 14.4).
- Interest imposed by the applicant State: compensation for damages arising from the delay in paying the tax due.

Proportionality

- Penalties *grossly disproportionate* or *contrary to public policy* of the requested state (see ECJ, Case No. C-34/17, *Donnellan*).
- Collection of (dis)proportionate penalties would cause "serious economic or social difficulties in the requested Member State, and provided that the laws, regulations and administrative practices in force in that Member State allow such an exception in relation to national claims" (Art. 18.1 TRD).


Due process

- Protection of fundamental principles of EU law (Art. 6 TEU, in accordance with Art. 47 CFREU and Art. 6 ECHR).
- No need to recourse to public policy. (See ECJ, Case No. C-34/17, *Donnellan* and ECJ, Case No. 233/08, *Kyrian*)
- De Troyer: Impossibility of implementing the foreign act on the basis of the law of the forum (Art. 13 (1) TRD).

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Relevant case law

- C-420/19, Heavyinstall: precautionary measures**
 - Yes, requested state able to suspend, due *presumption of innocence* (de Troyer, Maisto).
 - No, *mutual trust* (Judgment, paras. 446).
- C-95/19, Silcompa: non bis in idem**
 - Yes, requested state able to deny assistance, based on double jeopardy (Judgment, paras. 78-79).
 - Yes, requested state able to deny assistance, based *ordre public* (Judgment, para. 76).
- C-34/17, Donnellan: right to be informed, defence**
 - Minimum procedural requisites for admissibility (Judgment, para. 60).
- C-233/08 – Kyrian: right to be informed, defence**
 - Yes, minimum procedural requisites for admissibility (Judgment, para. 57).
 - Notification in language of the required state (Judgment, paras. 62).


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Concluding remarks

- 
 TRD may be viewed as a tool to enforce criminal law through civil processes creating dangerous scenarios.
- 
 Cross-border enforcement of tax sanctions must *not* be fully automatic in all cases. Mutual trust and swift collection of taxes must be balanced with the protection of taxpayers' fundamental rights.
- 
 Proposal: modify the TRD to allow the requested State to verify *in limine* that the claim meets minimum human rights requirements, either *ex officio* or by taxpayer's request. (Winner Wetten, Silcompa, Donnellan, Kyrian)
- 
 Not precluding the same treatment for other penalty -related fundamental rights (e.g., individual nature of penalties).

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P. Baker, P. Pistone, K. Perrou

Third Party Liability for the Collection of Taxes

Brussels, 21 November 2022

Third Party Liability for the Collection of Taxes

Authors: Philip Baker, Pasquale Pistone & Katerina Perrou

Presentation: Katerina Perrou

Third Party Liability for the Collection of Taxes

➤ Agenda

1. Measures establishing liability of third parties
 - Third party **replacing** taxpayer liability
 - Third party **jointly and severally** liable for the payment of taxes
2. Third party liability and the **right to property**
3. Withholding-tax obligation and **prohibition of forced labour**
4. Withholding-tax obligation and **non-discrimination**
5. Concluding remarks

Measures establishing liability of third parties

A. Third party replacing the taxpayer

1. Withholding agents

- Collection at source – simplification
- Enhances effectiveness of tax collection [‘Stealth’ collection]?
- BUT: creates additional obligations to the WHT agents

2. VAT economic operators

- They are not third parties, but “taxpayers” for VAT purposes
- The correct functioning of the right to deduct input VAT justifies the involvement of the supplier and the liability to tax of the economic operators, rather than of the consumers themselves

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Third Party Liability for the Collection of Taxes**Measures establishing liability of third parties**

B. Third party jointly and severally liable with the taxpayer

1. Subsidiary liability

- Similar to security
- e.g. Managers of companies
- Operates only at the collection phase
- Objective liability

2. Purchaser's liability

- Prevention of fraudulent alienations
- Protects the interests of the state as creditor
- Objective liability

Third party liability and the right to property

- **Article P1-1 ECHR:** Any interference with the right to property should strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights; scope of review includes collection measures
- = **Article 17 of the EU Charter;** BUT, possibly, stricter scrutiny within the EU?

Third party liability and the right to property

- **Article P1-1 ECHR:** joint and several liability of third parties for the payment of tax debts → a collection measure
- **ECtHR (1995) Gasus Dossier:** Gasus Dossier had sold to a Dutch company a concrete mixer with reservation of title; the tax authorities seized the concrete mixer in the hands of the Dutch company that was a tax debtor
 - **Retention title** was meant as security; not equal to other forms of ownership; no protection granted under P1-1 ECHR
 - In the EU: May the **good faith** of the third party change this outcome?

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Third Party Liability for the Collection of Taxes

Third party liability and the right to property

➤ Art. 17 EU Charter – CJEU:

- *confiscation*, following a person's conviction for aggravated smuggling, of *property used to commit* that infringement *which belongs to a third-party*
- *third party* acting in *good faith* (did not know and could not have known that his or her property was used to commit an offence)
- is a *disproportionate and intolerable interference* impairing the very substance of the right to property

Third party liability and the right to property

➤ The case of company directors' liability

- Is objective (i.e. "automatic") liability tolerated, as a "proportionate measure" or subjective elements should be taken into account when assessing the third party's liability for the tax debts of another taxpayer?
- *ECTHR Bulves (VAT case)*: a third party not involved in VAT fraud cannot suffer consequences by the lack of compliance with VAT reporting of the other party of the transaction

Third party liability and the right to property

➤ Our view: under both Art. P1-1 ECHR and Art. 17 EU Charter

- *Strict* joint and several liability of a third party *cannot be justified* by the need to secure a more effective protection of the interest to collect taxes,
- *On the contrary*: CJEU, 13 October 2022, *MC, C-1/21*:
 - a *manager* or member of an executive body who, *in bad faith*, makes payments in kind or in cash from the assets of a legal entity which is a tax debtor constituting a hidden distribution of profits or dividends, or transfers assets of the debtor free of charge or at prices significantly lower than market prices, with the result that *the assets of the debtor are reduced* and therefore *taxes or statutory social security contributions are not paid* shall be *liable for the debt up to the amount* of the payments made or the amount of the reduction in the assets, *plus interest* → *proportionate rule*

9

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Third Party Liability for the Collection of Taxes

Third party liability and the right to property

- Remedies available to the third party: under Art. P1-1 ECHR
- Third parties (not being the taxpayer) only have a joint liability for the payment of the tax → they have access to legal remedies that provide only for *limited review of the tax collection measures*
- Country practice (Greece, Supreme Administrative Court): *third parties* with joint and several liability (e.g. company directors) *may challenge* the validity of the enforcement measures initiated against them AND the *validity of the tax assessment itself, without any restriction*

Third party liability and the right to property

- Withholding agents' right to property: *provision of services* to the State *without proper remuneration* ?
- ECtHR, *Four Companies v Austria (1976)*: "even assuming that losses of property or income suffered by the applicant companies in connection with their above obligations can be regarded as deprivations of possessions, they are covered by the exception of P1-1."

Third party liability and the right to property

- Withholding agents' obligations under the *EU fundamental freedoms*
- AG Szpunar, Opinion in *C-83/21, Airbnb Ireland and Airbnb Payments UK Ltd* : the *obligation to withhold tax* constitutes a *much greater burden* than a mere obligation to provide information, not least because of the *financial liability* to which it gives rise, not only *towards the State* of taxation but also *towards the customers* of the online platform.
- Obstacle to freedom to provide services, BUT: *Justified (effective collection of tax, simplification, legal certainty)*

12

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Third Party Liability for the Collection of Taxes

Third party liability and the right to property

- Arguably, the obligation to provide certain services to the State and to other private parties, amounts to *a de facto expropriation*
- **Trend** → the *burden* of collection of taxes is *increasingly transferred* from States to private parties; overall *increase* in the *compliance* and *reporting* obligations (e.g. DAC 6); **needs monitoring**
- **Problem:** when the third party liability operates as a way of *indemnifying the State* of the potentially *missed collection of tax*, the *third party* is directly exposed to a *deprivation of his property*

Withholding tax and prohibition of forced labour

- **Article 4 ECHR:** Arguably, the lack of remuneration or reimbursement of expenses could amount to forced labour (*individuals* and *legal entities*)
- Exception under Article 4§3(d) ECHR: any work or service which forms part of *normal civic obligations* cannot be included in the scope of forced or compulsory labour
- **“Civic”** obligation, yes (taxation); but what about **“normal”**?
- ECtHR case law so far (1995) considers burden as “normal”

Withholding tax and prohibition of forced labour

- But what is **“normal”** today? What should we take into account?
- **only tax obligations** or **all “civic” obligations** on private persons in relation to collection of taxes, duties, social security contributions, other reporting obligations, etc?
- only in **one country** or in **multiple jurisdictions**?
- **technological progress** lifts or increases the burden (costs involved)?
- **The need to protect the collective interest cannot be open-ended**

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Third Party Liability for the Collection of Taxes

Withholding tax and non-discrimination

- The burden is not equal among the persons affected → discrimination against those that have to bear the extra burden?
- **All employers** have the same obligation → no discrimination
- **Employers** and **employees** are **not in comparable** situations
- BUT: are **individual employers** and **corporate employers** comparable?
- **Questionable:** reasonableness of WHT obligation in **cross-border cases**, if applied in a discriminatory manner creating indirect repercussions on the WHT agents

Conclusions

- Third party liability: **useful tool** but **proportionality** is required; **this means:**
 - **No open-ended** exposure of third parties
 - **No liability** of third parties, **unless** such third parties are **directly involved** in a scheme or have a precise awareness of such scheme and opted to ignore it
 - **No “outsourcing”** of part of the tax procedure to third parties **without** an actual reimbursement or remuneration for their intervention
- These concerns may be addressed through the development of mutual assistance between tax authorities within the EU

Third Party Liability for the Collection of Taxes

THANK YOU!

I. Richelle

Comments on tax debtor rights and tax recovery

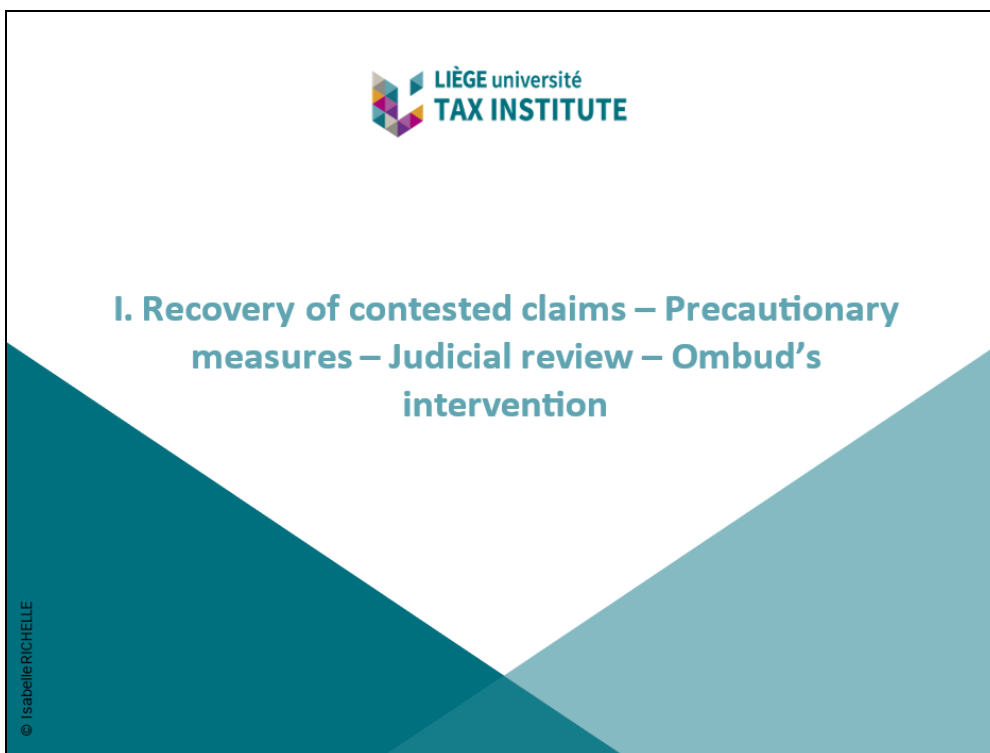


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*PROTECTING THE TAX DEBTOR IN
CROSS-BORDER TAX RECOVERY
ASSISTANCE*

Prof. Dr. Isabelle RICHELLE
Co-Chair Tax Institute
HEC-Management School
University of Liège (Belgium)

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TAX INSTITUTE

**I. Recovery of contested claims – Precautionary
measures – Judicial review – Ombud’s
intervention**

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Comments on tax debtor rights and tax recovery

1. Some datas' concerning implementation of the Directive in Belgium



► Implementation of the 2010/24 Directive in Belgium:

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Total requests within EUdemandes	3.133	4.656	5.658	5.079	6.393	6.635	6.663	7.996	6.386	7.444
Total request outside EU	79	148	224	174	160	219	201	358	352	375

- In 2021,
 - > 1984 requests for recovery by Belgium (about 78mios € / recovered: about 7,5mios)
 - > 747 requests for recovery from other MS to Belgium (about 78mios €/recovered: about 10mios)

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2. Taxpayers' rights



- Request for recovery:
 - Donellan: possibility for the requested authority to refuse the execution of a request for recovery on the ground that the decision [imposing a penalty] was not properly notified
 - CJEU:
 - > No examination of the legality of the claim in the requested State
 - > Principle of mutual trust
 - > EXCEPT in "exceptional circumstances": "prejudice to public policy" of the requested State
 - > This is the case if the tax claim was not notified to the taxpayer by the requesting State before the procedure

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Comments on tax debtor rights and tax recovery



2. Taxpayers' rights

► Request for recovery:

- HeavyInstall: request for precautionary measure
 - › CJEU: requested MS « bound by the assessment of the factual and legal compliance with the conditions laid down for the application of those measures made by the authorities of the applicant MS, in particular where that assessment is contained in the document... attached to that request »

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2. Taxpayers' rights

- Court of Appeal, Brussels, 25 Febr. 2014

France	Belgium
<ul style="list-style-type: none"> - SCI C and D - C married to H - Assessment of an income tax on C (taxation of rental income accrued by the SCI) - 2011: administrative claim: rejected - 2013: tribunal: rejected - 2013: appeal → pending 	<p>Real estate</p> <ul style="list-style-type: none"> - 2012: France requests Belgium for precautionary measures - 2012: letter to taxpayers: <ul style="list-style-type: none"> => mortgage on H real estate => attachment on bank accounts

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Comments on tax debtor rights and tax recovery

2. Taxpayers' rights

- Court of Appeal, Brussels, 25 Febr. 2014



► Application of Belgian procedural rules

- In the absence of a prior autorisation by a judgment,
- Tax authorities must prove they have an official document justifying the tax debt and that there are risks that the tax could not be recovered, that the taxpayer could organize in that sense (« celerity » condition).
- In the case at hand, no « celerity »
- ➔ appeal dismissed

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2. Taxpayers' rights

- Tribunal Bruges, 30 Sept. 2015

- Court of Appeal, Gent, 13 Nov. 2018



► Request from Austria :

- Tribunal: "it appears from the evidence submitted that the taxpayer, by means of three letters sent by registered post, contested the collection of the VAT in question with the Austrian authorities. The fact that the foreign tax authorities are of the opinion that the collection of VAT in this context is justified does not in itself establish that the claim is certain and liquid. There is no indication that the debt is no longer disputed".
- Court of Appeal:
 - › The Austrian authorities have formally confirmed that the tax is certain and final and can no longer be contested.
 - › The recovery assistance procedure was correctly followed.
 - › The uniform instrument... complies with the express obligation to state reasons and the obligation to publicise, since all the information needed to comply with it is mentioned in the uniform instrument.
 - › No violation of the principles of good administration or of the duty to state reasons.
 - › No evidence that the rights of defence or the due process rights of the tax debtor have been violated".
- ➔ In line with HeavyInstall

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Comments on tax debtor rights and tax recovery



2. Taxpayers' rights

► Comments

- Directive: « uniform instrument »
- → based on « mutual trust »
- → « mutual trust » applies between MS
- → what about the relation between MS and taxpayer?
 - › Place of taxpayers' rights?
 - › Force of the «uniform instrument» is not absolute (Donnellan)
 - › National law might mitigate the force of the «uniform instrument»

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2. Taxpayers' rights

► Other questions:

- What if the MS sends recovery requests to several other MS?
 - › Infringement to “mutual trust”?
 - › What should the requested State do?
 - HeavyInstall: “uniform instrument” to be implemented...
- What about the procedural costs?
 - › Art 20.3: obligation for applicant State to indemnify the requested State “when action held to be unfounded”
 - › Why not for the taxpayer?
 - › Note: §3 → implicitly, possibility to challenge the “uniform instrument”
- Could the taxpayer ask for compensation for damages?

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Comments on tax debtor rights and tax recovery



II. Timing of requests – Interest and penalties – Third parties

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3. Interest

- ▶ Art. 13.3: Requested State charging interest:
 - Rate:
 - › Of the requested State
 - Mandatory application of its tax law – no possibility to refer to the requesting rate
 - Rationale of the rule?
 - › Art. 12.1, al. 3, a) : uniform instrument must mention « the amount of the claim and its different components such as principal, interest accrued, etc. »
 - › Art. 13.1: foreign claim “ treated as if it was a claim of the requested Member State”
 - › Thus, interest in the requesting State ceases to accrue
 - › Art. 13.5: requested State shall remit “ the amounts recovered with respect to the claim and the interest referred to in paragraphs 3 and 4 of this Article”.
 - ➔ principal, interest attached to the claim and interest accrued in the requested State

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I. Richelle

Comments on tax debtor rights and tax recovery

3. Interest



▶ Art. 13.3:

- Requested State charging interest:
 - › Information of the taxpayer
 - If it pays in the applicant State, interest of that State for the whole?
 - Information should be provided
 - » Which information?
 - » Who has to inform?
 - » “principles of good administration” are sufficient?
 - » → room for technical rule

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Exploratory consultation on protecting tax debtors in mutual tax recovery assistance between EU Member States

When to submit your contribution

Before the end of January 2023

How to submit your contribution

All your responses will be taken into account, even if you have not replied to all questions.

Contact details

responsible service	Directorate-General for Taxation and Customs Union, Unit TAXUD/C4 - Tax administration and fight against tax fraud
e-mail	Taxud-C4-recovery@ec.europa.eu
postal address	European Commission Directorate-General for Taxation and Customs Union Unit TAXUD/C4 Spastraat – Rue de Spa 3, Office SPA3 05/091 B-1049 Brussels Belgium

Transparency Register

In the interest of transparency, organisations have been invited to provide the public with relevant information about themselves by registering in the Transparency Register and subscribing to its Code of Conduct. If the organisation contributing to this exploratory questionnaire is not registered, its submission is published separately from the registered organisations.

Personal data and privacy statement

The European Union is committed to protecting your personal data and to respecting your privacy. When carrying out exploratory consultations we adhere to the policy on 'protection of individuals with regard to the processing of personal data by the Community institutions', based on Regulation (EU) 2018/1725 on processing of personal data by the EU institutions.

QUESTIONNAIRE

1. [Introduction](#)

Context of the exploratory consultation

Everyone is expected to pay his/her share of taxes. If taxes remain unpaid, tax authorities take recovery actions to collect the taxes. The competence of the tax authorities is however limited to their national territory. They cannot take recovery actions in other countries, although tax debtors may have moved to another country or may dispose of assets in other countries. Therefore, the EU has adopted legislation which allows the EU Member States to provide mutual assistance to each other, for the recovery of their taxes and other levies.

The European Commission is currently undertaking an analysis of the possibilities to adapt the tax recovery assistance framework to the increasing need for such cross-border assistance.

Objectives of the exploratory consultation

As observed in the latest report of the European Commission on the use of the tax recovery assistance Directive,¹ the analysis of ways to improve the recovery assistance framework should also pay particular attention to the respect of tax debtors' rights (see point 33).

This exploratory consultation seeks the opinion of persons confronted with such recovery assistance procedures and other stakeholders on how the tax debtor can be adequately protected.

Target groups

All stakeholders – citizens, companies, organisations, institutions, public authorities, academic researchers – are invited to provide their views on this matter.

Important notices

- Contributions received are intended for publication "as submitted" and this respondent by respondent and question by question. Below, you have the possibility to indicate whether you agree to the publication of your individual responses under your name or anonymously.
- The questionnaire contains open and closed questions. In case of the latter, please give reasons for the choice you prefer. You can also reply by uploading a document (a position paper) in which you clearly indicate the number(s) of the question(s) to which you reply.
- The questions are not exhaustive. Any other issues relating to the necessary protection of the tax debtor during cross-border tax recovery can be raised in uploaded documents, but it should be clearly indicated that your comments relate to other issues than the questions mentioned in the questionnaire.

[2. About you](#)

Note: fields marked with * are mandatory.

2.1. You are welcome to answer the questionnaire in any of the official languages of the EU. Please let us know in which language you are replying: ...

*** 2.2. You are replying:**

○ as an individual in your personal capacity:

* 2.2.1. First name: ...

* 2.2.2. Last name: ...

2.2.3. e-mail address (*this information is only for administrative purposes and will not be published*): ...

* 2.2.4. Country of residence:

○ in your professional capacity or on behalf of an organisation

* 2.2.1. Respondent's first name: ...

* 2.2.2. Respondent's last name: ...

¹ Report COM(2020)813 of 18 December 2020 from the European Commission to the European Parliament and the council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

2.2.3. Respondent's professional e-mail address (*this information is only for administrative purposes and will not be published*): ...

* 2.2.4. Name of the organisation: ...

* 2.2.5. Postal address of the organisation: ...

* 2.2.6. Type of organisation:

- ✓ Private enterprise
 - more than 250 employees (large enterprise)
 - between 50 and 250 employees (medium-sized enterprise)
 - between 10 and 49 employees (small enterprise)
 - less than 10 employees (micro enterprise)
 - self-employed (micro enterprise)
- ✓ Trade, business or professional association
- ✓ Consultancy or law firm
- ✓ Non-governmental organisation, platform or network
- ✓ Judge
- ✓ Research and academia
- ✓ Regional or local authority (public or mixed)
- ✓ National public authority
- ✓ International organisation
- ✓ Other (please specify your interest in this matter): ...

* 2.2.7. Is your organisation included in the Transparency Register?

If your organisation is not registered, we invite you to register in the Transparency Register, although it is not compulsory to be registered to reply to this exploratory consultation.

- Yes
- No
- Not applicable

* 2.2.8. Country of organisation's headquarters:

* **2.3. Your contribution,**

○ **can be published with your personal information**

("I consent the publication of all information in my contribution in whole or in part including my name or my organisation's name, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication.")

○ **can be published provided that you remain anonymous**

("I consent to the publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that it is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication.")

3. Questions

A. Contested claims in recovery assistance

1. Use of precautionary measures

Most of Member States' tax recovery authorities may take precautionary measures (measures of conservancy) to guarantee the recovery of claims that are contested or claims that are not yet the subject of an instrument permitting enforcement. Precautionary measures can also be requested in cross-border tax recovery assistance (Art. 16 and Art. 14(4), subpara. 2, of Directive 2010/24/EU).

In the *Heavyinstall* case (C-420/19), the Court of Justice of the European Union (EUCJ) has decided that the courts of the requested Member State are bound by the assessment of the factual and legal compliance, which the authorities of the applicant Member State have conducted with respect to the conditions for precautionary measures.

The above-mentioned judgement related to a situation where the conditions for taking precautionary measures had been assessed by a court in the applicant Member State. It is not totally clear whether or not the EUCJ would confirm that the tax authorities and courts of the requested State are bound by the applicant tax authority's assessment of the conditions of precautionary measures to the same degree as by assessments of the applicant Member State's courts.

Moreover, under the current Directive, a request for precautionary measures is not necessarily accompanied by a document presenting an assessment of the justification for precautionary measures by the applicant Member State's authorities. However, the EUCJ in its *Heavyinstall* judgement seemed to consider such document relevant.

Further, the debtor is generally not informed before precautionary measures are taken. Hence the need to ensure that debtors can exercise their right to an effective remedy as soon as precautionary measures are launched. However, even if the authorities (administration and courts) of the applicant Member State have done their best to properly assess the conditions for precautionary measures, they may be unaware of or unable to verify specific circumstances in the requested Member State that could have an impact on this assessment.

Question 1: How to ensure that the tax debtors are sufficiently protected when taking precautionary measures, notably concerning their proportionality?

Question 2: In particular, what competence/task should be given to the competent bodies in the applicant and/or requested Member States to ensure an appropriate assessment of the conditions for precautionary measures?

Question 3: Should there be common minimum standards or limits for precautionary measures that could be established in an EU Directive? If yes, which common standards or limits? If not, why?

Question 4: In your view, does the EU Charter of Fundamental Rights, notably its Article 47, already provide for sufficient common minimum standards or limits for precautionary measures?

2. Recovery of contested claims

An applicant Member State may wish to recover a contested claim, if possible under its domestic law, instead of asking for precautionary measures. Under the current EU legislation, a request for recovery of a contested claim can only be executed by the requested Member State if the requested Member State has the power to recover its own contested claims (see Art. 14(4), third subparagraph, of Directive 2010/24).

Question 5: Would it be appropriate to provide for an obligation or possibility for the requested Member State to execute requests for recovery of contested claims, irrespective of whether the requested Member State can recover its own contested claims?

3. Mediation and judicial review

Disputes concerning the validity of tax claims may go on for many years. Maintaining the effect of recovery or precautionary measures during many years may lay an extra burden on the tax debtor concerned.

Disputes about those recovery or precautionary measures are usually not brought before the judges that decide on the dispute concerning the tax claim itself. In situations of international recovery assistance, legal remedies against the enforcement measures in the requested State have to be brought before the courts of the requested State, while the claim itself can only be contested before the courts of the applicant State (see Art. 14 of Directive 2010/24 for the EU).

No other form of dispute resolution is currently provided. While ombudspersons or other mediation bodies may play an important role in the tax recovery within a Member State, for instance to agree on temporary arrangements for pending tax disputes at administrative level, they are normally not involved in cases of cross-border recovery assistance.

Question 6: Could mediation bodies or ombudspersons play a useful role in disputes about international tax recovery cases? If yes, how? If not, why?

Question 7: Should lengthy court proceedings concerning the tax claim have an influence on enforcement measures, insofar as a delay in court proceedings is not caused by the tax debtor's behaviour? Should this be subject to judicial control in the applicant and/or requested Member State?

Question 8: Do third persons that are confronted with recovery actions, e.g. debtors of the tax debtor, need special legal protection?

B. Timing of requests for recovery

1. Interest and penalties

Requests for recovery assistance may include amounts of interest, calculated on the principal amount of the claim, and also administrative penalties (Art. 2(2)(a) and (c) of Directive 2010/24). Art. 11 of Directive 2010/24 provides that the applicant authority cannot immediately send a request for recovery, when a claim has been established. Normally, the claim must be final and domestic recovery measures must be exhausted before a request for assistance can be sent.

By the time a request for assistance is sent out, default interest and administrative penalties in the applicant Member State may have accumulated considerably.

Further, the interest until the date before the request is sent, is calculated in accordance with the laws of the applicant Member State, whereas the interest from the date, on which the recovery request is received, is charged in accordance with the laws of the requested Member State (Art. 13(3) and (4) of Directive 2010/24). These rules make the calculation of the interest easy for tax authorities, but they do not take account of the considerable differences in national interest rates, ranging from 0 % per year in Austria to 24 % per year in Estonia.

Question 9: The use of a different interest rate in the requested Member State may have as a consequence that the applicant Member State receives more or less than the amount of interest due in accordance with its own law. What is your view on the interest rate that should be applied in case of recovery in the requested Member State? Could it be considered to have a harmonised interest rate?

Question 10: Which law should decide on how to impute partial payments (e.g. whether they are first assigned to the principal debt or to the interest)? Should the tax debtor be able to determine a specific order of imputation (e.g. assign partial payments to the claims with the highest interest rates)?

Question 11: Should the charging of interest be different in cases where a tax claim is based on a fictitious notification, as in the *Donnellan* case (C-34/17)? Should for example the charging of interest start later or be based on a reduced interest rate?

Question 12: Should there be any limit(s) on the accrual of interest to ensure proportionality? In particular, is the full duration of the dispute concerning the tax claim always to be taken into account for the calculation of interest?

Question 13: Under what circumstances is it proportionate and in line with the fundamental right of 'ne bis in idem' that the requested State charges interest on penalties imposed by the applicant State for non-payment?

Question 14: how to ensure that interest and penalties respect the proportionality requirement (as required by the Court of Justice). Is this a role for the legislature or for the courts?

Question 15: Should recovery from persons other than the actual tax debtor, who are held jointly and severally liable, also encompass administrative penalties due by the actual tax debtor?

Question 16: Should legal successors of a tax debtor, e.g. heirs, be liable for administrative penalties linked to the tax concerned?

2. Periods of limitation

Art. 19 of Directive 2010/24 contains several complementary rules with regard to the suspension, interruption or prolongation of the limitation period. This multitude of rules can be explained by the fact that at the moment of adoption of the Directive, the EU legislature wanted to take account of the then existing diversity in Member States' domestic law.

It may be considered to simplify and harmonise the existing rules concerning limitation periods, e.g. by providing that an on-going period of limitation is interrupted/suspended by a request for assistance and by any dispute concerning the claim itself (in the applicant State) or the enforcement measures taken by the requested State; following this interruption/suspension, a new/continued period of limitation would start.

Question 17: In view of finding a good balance between the needs of Member States' budgets and the fight against fraud, on the one hand, and the benefits of legal certainty, on the other hand, how long should limitation periods be?

Question 18: Should actions to interrupt/suspend the period of limitation, taken in relation to only one of several persons being jointly and severally liable for a tax debt, have the same effect towards all those persons?