EU and International
TAX COLLECTION NEWS
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Contents

EU activities

35 Tax Collection Platform – Fiscalis Conference Tallinn

35 Public consultation on the functioning of mutual assistance between the EU Member States for the recovery of taxes

Reports

36 Public /private cooperation for the recovery of taxes in Ireland, Belgium and the United Kingdom

Lucy Mulqueen

Michael Roekaerts

Matthew Nicolas

39 EU: the national organisation for the execution of tax recovery assistance requests

Jean-Michel Moriceau

44 Joint Council of Europe – OECD Convention on mutual assistance in tax matters – Taxes for which recovery assistance is provided

Martijn Veltrop

Opinion

56 International assistance in tax collection: facilitating the use of precautionary measures

Luk Vandenberghe

Case law

65 EU – Court of Justice, 14 April 2016, C-522/14, Sparkasse Allgäu (Germany)

Guarantees for tax collection – Obligation for credit institutions to notify the tax authorities of deceased customers' assets in view of collection of inheritance tax – Application to branches established in another EU Member State

69 EU – Court of Justice, 13 July 2016, C-18/15, Brisal and KBC Finance Ireland (Portugal)

Guarantees for tax collection – Obligation to apply a withholding tax to the interest paid to non-resident financial institutions – No corresponding obligation if the recipient is a resident company – can be justified to ensure effective tax collection – Application only in so far as necessary – restriction of the deduction of directly related business expenses not necessary to ensure the effective collection of income tax

76 Germany – Administrative Court Berlin, 27 August 2014

Deterrent measures – Freedom to travel – Withdrawal of a passport – Justified because of substantial tax arrears, the easily possible relocation of the applicant's residence to a foreign country and his inconsistent information concerning his domicile

78 Netherlands – District Court Netherlands North (Groningen), 31 March 2015

Guarantees for tax collection – Deferred payment of disputed tax debts of a foreign company – Condition to lodge a security for the full amount – No threat to the continuity of the company in the residence State

81 Germany – Federal Tax Court, 24 February 2015

International recovery assistance – (1) Administrative penalties for late filing and late payment of a tax covered by the EU legislation on tax recovery assistance – (2) Distribution of competences not allowing the requested authority to review the substantive correctness of the claim and the enforceability of the instrument permitting enforcement – Notification of tax claims - Direct notification by the applicant authority – Language of the notification – Effectiveness to be assessed under the legislation of the applicant State, without review by the requested authority

This newsletter is available on the CIRCABC website managed by the European Commission.
It can be found under the category "Tax Collection" (with free access).
EUROPA > European Commission > CIRCABC > Taxation & Customs Union > Tax Collection (public group)
Direct access via this link: https://circabc.europa.eu/w/browse/96117957-aa29-4714-8bca-c45c9ba719a9

It can also be accessed via the Europa-Taxud website:
http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/tax_recovery/index_en.htm

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

ACTIVITIES

EU - Tax Collection Platform (FPG 33) Fiscalis Conference Tallinn 24-25 May 2015

On 24-25 May 2016, the EU Fiscalis project group "Tax Collection Platform" held a conference in Tallinn (Estonia).

This conference allowed the project group to share and discuss with all EU Member States the following topics:

- cooperation with the private sector for the recovery of tax claims;
- organisation of recovery at national level in the execution of mutual recovery assistance;
- retracing missing debtors;
- direct notification in other Member States and notification on behalf of other Member States.

This newsletter contains the public version of some reports prepared for the first two topics of this conference (i.e. on cooperation with the private sector for the recovery of tax claims and on the organisation of the authorities dealing with the execution of mutual recovery assistance requests).

Participants Fiscalis conference Tallinn (24-25 May 2016)

EU – Public consultation on the functioning of mutual assistance between EU Member States for the recovery of taxes

On 30 November 2016, the European Commission has launched a public consultation on the functioning of mutual tax recovery assistance between the Member States. This is part of the Commission's on-going evaluation of the use of Directive 2010/24/EU, which is the EU legal basis for mutual tax recovery assistance between the EU Member States.

The purpose of this consultation is:

- to gather views from stakeholders other than tax administrations about their experience of the current rules concerning mutual assistance for the recovery of claims across the borders;
- to bring new insights for the on-going evaluation and reporting exercise about the efficiency of the Directive 2010/24/EU;
- to provide information with regard to the need for further improvement of the legal, administrative or technical framework.

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

This public consultation will be closed on 8 March 2017.

For further information, please see: *https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations/public-consultation-functioning-mutual-assistance-between-eu-member-states-recovery-taxes_en*

Public/private co-operation for the recovery of taxes

Ireland - Outsourcing debt collection

Report by: Lucy. Mulqueen

This is a summary report of an Irish presentation at the EU Fiscalis workshop in Tallinn in May 2016, dealing with the outsourcing of tax debt collection.

INTRODUCTION

Revenue is the Irish tax and customs administration charged with the collection and recovery of a wide range of taxes and duties.

Revenue takes enforcement action where necessary to recover a tax debt, including interest, where a taxpayer or business fails to engage in a satisfactory manner in regard to the debt. Revenue has a number of enforcement options available to effect recovery of a debt including the use of external debt collection agents, namely Sheriffs and contracted Solicitors.

Revenue uses the services of 16 Sheriffs to assist in its debt recovery operations and 6 solicitor firms to assist it in debt recovery through the Courts. Sheriffs dealt with 30,927 Revenue referrals in 2014 and collected €149 million approximately of outstanding tax debt on behalf of the Exchequer. The total amount collected as a result of Solicitor enforcement in 2014 was €43 million from 5,164 referrals.

Sheriff and Solicitor Referrals in 2014

Referrals Period 1-1-14 to 31-12-14	No of referrals/ warrants issued	Value of Referrals /Warrants	Amount Collected
Sheriff	**30,927**	**€284 million**	**€149 million**
Solicitor	**5,164**	**€144 million**	**€43 million**

All Revenue debt collection caseworkers operate to strict guidelines in deploying debt collection/enforcement powers against defaulting taxpayers and the activities of both the Solicitor and Sheriff are monitored at individual case level to ensure proper procedures are followed in every instance. Sheriff enforcement is pursued where the defaulter has seizable goods or assets, as it is a swift and cost effective method of enforcement.

A Memorandum of Understanding is in place with all Sheriffs to ensure consistency and quality of operations. Sheriffs also have in place a Code of Practice which sets out taxpayers' rights of complaint in relation to any actions of a Sheriff.

Each solicitor firm has a formal contract with Revenue and is allocated a geographical area of the country in which to carry out debt recovery operations.

SHERIFFS

Sheriffs are appointed officers of the Court, holding office under Section 12 of the Court Officers Act, 1945 and are independent of Revenue. Their debt collection activities are generally covered by the Enforcement of Court Orders Act, 1926, (as amended). The execution of Revenue referrals (Certificates/warrants) is specifically provided for in Section 960L of the Taxes Consolidated Act 1997 (as amended).

Appointment of a Sheriff is made by the Irish Government under Section 12(3) (a) of the Court Officers Act, 1945. Appointment is made following an open recruitment competition which is conducted by the National Public Appointments Service (PAS).

APPOINTMENT OF A SHERIFF

To be appointed as a Sheriff under the provisions of section 12(5) of the Court Officers Act 1945 a person must be:

- A barrister who has practiced for no less than five years; or
- A solicitor who has practiced for not less than five years; or
- Have acted for not less than five years as managing clerk or principal assistant to an under-sheriff (deputy) or sheriff.

WARRANTS/CERTIFICATES

A warrant, which is issued electronically by the Revenue Collector-General is a legal document conferring authority on the Sheriff to collect outstanding amounts of tax and interest and/or to seize goods to the value of the outstanding debt.

Under the Court Officers Act, 1945, the Sheriff is empowered to seize only within his/her Bailiwick and cannot seize outside of it. A Bailiwick is the jurisdiction/geographical location the Sheriff can operate within.

A warrant is valid for 12 months from the date of issue but must be actioned within 3 months of receipt. Where the Sheriff fails to collect any of the liability within 3 months, the certificate must be returned to Revenue's Collector-General's office.

The Sheriff also has the authority to negotiate an arrangement with the taxpayer to facilitate the

payment of outstanding taxes. . Any such phased payment arrangement must be for the shortest possible period and in any event not exceeding 2 years.

SHERIFF COMMISSION

Sheriffs are paid for enforcement work on a commission basis and are entitled to collect fees and expenses in relation to collection of payment and/or seizure of goods. Sheriffs will usually deduct their fees first from any payment made and then allocate to tax followed by interest. The current fee structure came into effect on 1 November 2005 and is set out in a Statutory Instrument - *SI 644/2005 -Sheriff Fees and Expenses Order 2005*

The main fee items are as follows:

- Lodgement Fee €19
- Poundage, 5% for the first €5,000 and 2.5% of the balance
- Travel expenses of €32 for the execution of an order
- €40 payable on execution of an order
- Any necessary expenses incurred in relation to seizure and sale of goods

SOLICITORS

Revenue uses the services of six solicitor firms under contract to assist it in debt recovery through the Courts. The six firms who are selected through a competitive tendering process operate on the basis of six year contracts. The current contract is effective from 2014 to 2020.

APPOINTMENT OF SOLICITORS

Tenders are invited from practising solicitors for the provision of legal and related services in the collection of certain Revenue debt. Invitation to Tender is published every five years.

SOLICITOR OPERATIONS

Solicitor work on behalf of Revenue involves debt collection proceedings in the District, Circuit and High Courts for the recovery of tax and interest due. In all cases, instructions to the solicitor will be for the recovery of a specified amount together with interest accrued. The amount will arise either from a declaration of liability in a return made by the customer or from an estimate of liability (which is final and conclusive and therefore payable) in accordance with the Tax Acts.

Solicitors are supplied electronically with details of the taxes and interest to be collected and with any other information held by Revenue, which may be of assistance in progressing collection. There is a liaison arrangement in place with case managers to ensure that the solicitor is correctly informed and instructed throughout the working of the case.

Solicitors are expected to notify the taxpayer of the intention to institute legal proceedings. The solicitor are empowered to deal with representations made by the taxpayer as a result of this notification or at other stages of the process, including the agreement of deferred payment arrangements and the acceptance of outstanding tax returns in addition to payment.

Solicitors commence legal proceedings and conduct them to the point of obtaining and registering judgment where appropriate. This includes the preparation of affidavits for signature by appropriate Revenue officials, service of summonses and other legal notices.

Following the obtaining/registering judgment, solicitors report to Revenue's Collector-General, on all cases in which full recovery has not been achieved. This report includes an assessment of the likelihood of recovery if alternative measures are adopted.

REMUNERATION STRUCTURE FOR SOLICITOR

The major portion of the remuneration of a contracted solicitor is in the form of commission expressed as a percentage of amounts collected. Where possible the legal costs are recovered from the taxpayer.

DECISION ON REFERRAL TO SHERIFF OR SOLICITOR

A decision on whether to refer a tax debt to a Sheriff or one of the contracted firms of solicitors will be influenced by a range of factors including the individual case circumstances, the success of previous enforcement actions that might have been taken in respect of the same customer or business, the quantum of the debt and whether the defaulter might have seizable assets.

SUMMARY

The Sheriff is Revenue's preferred external enforcement option because it can be quickly activated in comparison to the Courts' process and because it is the more cost effective for the Exchequer, in that all fees/costs are levied on the defaulting taxpayer.

Belgium – public/private cooperation for tax recovery

Report by: Michael Roekaerts

This is a summary report of the Belgian contribution to the EU Fiscalis workshop in Tallinn in May 2016, dealing with the outsourcing of tax debt collection.

1. Use of bailiffs in the recovery process

The bailiffs in Belgium are sworn officers who may legally deliver exploits and execute enforcement measures. They play an important role in debt recovery. However, there is no outsourcing of the debt recovery process. If the services of a bailiff are needed, he will receive a standing order from the tax collector. However, at any moment in the procedure the tax collector can recall this order and decide to use other debt collection methods (i.e. simplified garnishment order, payment plan, etc.). The tax collector remains master of the case.

2. Role of notaries in selling immovable properties

In Belgium, all notaries who draw up a deed concerning the alienation or mortgage of a property, ship or vessel, are obliged to notify the tax collector of the jurisdiction in which the owner or usufructuary of the property has his residence or principal establishment and, in case of real estate, the tax collector of the jurisdiction in which that property is situated, about this deed.

If the interest of the Treasury so require the competent tax collector will, within a period of twelve working days following the notice and by registered mail, notify the notary of the outstanding debts for which a legal mortgage of the treasury can be taken on the goods that are the subject of the deed.

When the notarial deed is executed the abovementioned notice by the tax collector serves as garnishment in the hands of the notary on the sums and values he holds under him, pursuant to the deed, for the account or benefit of the debtor and as opposition to the price in those cases where the notary is obliged to partition these sums and values.

Without prejudice to the rights of third parties the notary is obliged, when such deed is executed, to verse to the tax collector(s) not later than the eighth working day following the execution the sums and values he holds under him, pursuant to the deed, for the account or benefit of the debtor, to the extent of the amount of taxes and accessories which were notified and insofar as these taxes and accessories form a certain and established debt.

United Kingdom – public/private cooperation for tax recovery

Report by: Matthew Nicolas

This is a summary report of a UK presentation at the EU Fiscalis workshop in Tallinn in May 2016, dealing with the outsourcing of tax debt collection.

In the UK, there is a political willingness to cooperate (more) with the private sector for tax collection. At present, HM Revenue & Customs is using the private sector for about 3 % of its tax claims. The ambition is to collect privately £ 2 to 2.5 billion per year. All claims attributed to the private sector are low value claims.

The use of the private sector is considered to have several benefits:

- enhanced recoveries: the purpose of the cooperation with the private sector is not to reduce jobs for civil servants. This cooperation expands the capacity to collect tax debts, at the moment when this capacity is needed, for debts that otherwise may not be collected (given the low money debts).
- innovation: the private sector can be more innovative to collect the debts.
- flexibility: contracts with the private sector are flexible. The tax authorities can pass on more debt or refrain from doing so. This helps to avoid or solve problems of being under- or overstaffed.
- responsiveness: HM Revenue & Customs does not need to manage individual contracts with the debt collection agencies.

There are also some challenges:

- contract negotiations with the private debt collection agencies: this is a difficult and complex process.
- information technology: a lot of new IT-infrastructure had to be built for the contacts with the private sector (interfaces between government and the private business which is offering government departments a single route to use the private sector to recover debt, and between this private business and private debt collection agencies.

The future ?

So far, the private sector has not been used for international debt recovery, nor for other services (auctioneer services; tracing debtors). Cooperation in such a field could be useful.

EU - The national organisation for the execution of tax recovery assistance requests

Report by: Jean-Michel Moriceau

This is a summary report of EU Member States' replies to a questionnaire about the national organisation for the execution of requests for mutual recovery assistance. This topic was presented at the EU Fiscalis workshop in Tallinn in May 2016. The purpose of this topic was to exchange views on best practices in the Member States, and to make every Member State think about its own organisation.

Preliminary observation

It appears that this organisation is different from one Member State to another. This is in line with the national organisation of the tax collection and recovery of the Member States' own taxes, which is also different from one Member State to another, as it is influenced by their history, their size and population, their administrative culture and practices.

1) OVERALL ORGANIZATION OF TAX COLLECTION AND RECOVERY IN YOUR STATE

1-1 In a few words, could you describe the overall organisation of the collection and recovery relating to national or local taxes and duties? (centralized organisation or not, public accountants, banking network, private partnership, etc.)

In almost all Member States tax collection and recovery are managed by a state body or a public administration. The organisation is generally decentralized with regional/local offices, but it is centralized in a few smaller Member States (Estonia, Cyprus, Latvia, Malta).

In Italy, voluntary collection is managed by a banking network; recovery of national and local taxes and duties is done by a public enterprise.

Several Member States (Bulgaria, Ireland, France, Croatia, Hungary, Romania, Slovenia, Slovakia...) have set up a specialized directorate or office competent for large companies or high wealth individuals.

Customs and excise duties are generally collected by another structure/administration, except in some Member States (Denmark, Ireland, Estonia, Hungary, Latvia, Romania, Slovenia...). Non fiscal claims (such as police fines, claims from the municipalities, alimony, social security contributions) are sometimes collected or recovered by the same administration (to some extent in Belgium, Denmark, Ireland, Romania).

Some national particularities:

– Denmark: strict separation between the collection and the recovery phase; the recovery of all public claims is handled by the recovery unit under the Tax Authorities.

– The Netherlands: differentiation of taxpayers into a number of segments, which gives a better insight (Small mass process, Medium/small businesses, Private taxpayers (individuals), Large businesses taxpayers).

- Finland: recovery by the public and independent Enforcement Entity.

- Sweden: the recovery of public and private claims is executed by the Enforcement Authority.

2) ORGANIZATION OF THE MUTUAL ASSISTANCE IN THE MEMBER STATES: THE CENTRAL LIAISON OFFICE (CLO)

2-1 Regarding the mutual assistance for recovery, where is situated the CLO Recovery in your overall administrative structure?

In most Member States the CLO is situated in the central administration (headquarters of the ministry of finance, revenue agency, revenue department, General directorate of tax administration).

The CLO Recovery is sometimes included in a specialized structure, different or separated from the central administration: for example, in Belgium (embedded in the Special Recovery Centre), in Denmark (in a Recovery Unit), Ireland (in one of the 16 divisions of Revenue), in France (in a specialized Directorate which deals only with recovery of special public claims), in Poland (a separate unit of one of the 16 Tax Chambers).

A different CLO is generally competent for customs and excise duties.

In Austria the CLO Recovery is located in the Tax Fraud Investigation Unit and is merged with the VAT CLO and the CLO Direct Taxes (the Tax Fraud Investigation Unit is below the Ministry of Finance).

2-2 Is it a part of a larger CLO covering all forms of exchange of information or is it a separate entity?

In 23 Member States the CLO Recovery is a separate entity.

In 5 Member States (Italy, Lithuania, The Netherlands, Austria, Hungary), the CLO is considered as a part of a larger CLO covering other forms of assistance in the field of exchange of information:

- mutual assistance in the field of VAT (Regulation 904/2010) and direct taxes (Directive 2011/16), even social security contributions in The Netherlands ; or

- in Hungary, tax recovery, excise and customs (only for notification).

Generally the CLO Customs and excise duties is a different CLO located in another department or administration.

Several Member States emphasized the good cooperation of the CLO Recovery with the other CLOs (Belgium, Finland).

2-3 Is the CLO Recovery solely competent for mutual assistance in the field of recovery?

In almost all the MS the CLO recovery is solely competent for mutual assistance in the field of recovery.

2-4 Is the CLO only competent for the recovery of taxes and duties, or also for other types of claims (social security, traffic fines...) ?

In 21 Member States the CLO is only competent for taxes and duties, whereas it covers other types of claims in 7 Member States : Bulgaria (all types of claims without social security claims; certificates regarding traffic fines), Denmark (all claims), Latvia (taxes, duties, customs except real estate, social security contributions), The Netherlands (all tax claims including social security contributions and benefits), Romania (also on social security matters), Sweden (all claims), United Kingdom (all claims including social security claims, local taxes and devolved taxes).

2-5 For the MS having regions with some form of fiscal autonomy, how do these regions deal with mutual assistance in the field of recovery? How are local (ie municipal) taxes dealt with?

There is no real difference with regard to mutual assistance and the role of the CLO according to the administrative level. Generally all processes in the context of international mutual administrative assistance in recovery proceedings are coordinated by the liaison offices; this also applies to regional and local taxes falling within the scope of Directive 2010/24/EU.

3) TREATMENT OF THE REQUESTS COMING FROM OTHER STATES

3-1 Could you describe by a schematic plan the way followed by a request coming from abroad? (see below 3-5)

3-2 What administrative units / working units are involved in processing incoming requests? (see below 3-5)

3-3 What detailed tasks are these administrative units / working units responsible for? (see below 3-5)

3-4 Are they specialized units in mutual assistance, or usual offices territorially competent according to the debtors' address ? (see below 3-5)

3-5 If all or a part of incoming requests are dispatched over the tax collection offices: according to which criteria?

→ Answers to questions from 3-1 to 3-5:

In almost all Member States the incoming request is checked by the CLO: examination of the request for admissibility, acknowledgement of receipt, registration, translation if needed, request of additional information from the applicant authority if needed, reply to the applicant authority, transfer of money recovered from the debtor, statistics...

Then it is possible to distinguish **two main models of organization**. *The main advantages and main disadvantages of these two models are examined below 5-1.*

Firstly the dominant model based on the common territorial organization

Admissible requests (for information, notification, precautionary measures and recovery) are forwarded by the CLO, directly or through an intermediate authority, to the territorially competent authority (local, regional, other), generally according to the debtor´s address. The foreign claims are basically treated as any other domestic claim, but generally without granting any preference (privilege) accorded to similar national claims.

However in a few Member States (Bulgaria, Italy, Luxembourg, The Netherlands, Austria, Poland, Portugal), requests for information are directly handled by the CLO when the information required is available in databases (address for example). In Croatia requests for information and for notification are directly handled in the CLO, and the other requests are sent to the territorial competent authority mainly according to the debtor's address.

Secondly the minority model with a specialized/integrated unit dealing with recovery measures and operating at a national level

In a few Member States (such as Ireland, Estonia, France, Finland, United Kingdom), a specific mutual assistance unit operating as CLO or LO is also responsible for processing all the requests for recovery, information and notification. It deals directly with the recovery process, however to various degrees. Generally this unit handles all international recovery requests (receiving and sending requests).

Some particularities and differences as suggested above ("various degrees"):

- In Estonia some of the recovery actions are carried out by the tax authority.

- In Ireland requests for notification are dealt with by regional offices.

- In Finland all the concrete EU assistance cases within the Finnish Tax Administration are dealt with by the specialized unit, but recovery measures are dealt with by the relevant district enforcement office.

- In United Kingdom, if the payment is not received after some contacts, the specialized team will establish

the most appropriate recovery method and will then send the case to the relevant enforcement team to take the next action and monitor outcomes.

- In France, the process of international recovery has been concentrated for many years within one specialist department, the Directorate for special claims of the Treasury. This specialized directorate centralises all gathered information, all requests from abroad in the field of recovery (notification, information, recovery or precautionary measures) and all financial flows between the various countries. As far as tax collection in France is concerned, this directorate proceeds with the recovery and can take enforcement measures against the tax debtors or third persons that are liable for the collection of the tax debt. For customs duties the organization is similar: a specialized directorate deals with the requests.

3-6 If the incoming requests are treated by one specialized office, how does it work with the recovery of national claims? How to deal with the risk of competition between the different offices?

According to most of the answers, there is no competition in place, because incoming requests are treated as national claims. In some Member States (Denmark, Estonia), all the claims (domestic and from abroad) are entered into the same system and recovered in order of due dates, starting from the oldest. In Malta the Law Courts decide the ranking of the creditors.

3-7 Is your organization different according to the types of incoming requests: recovery, notification and information?

In almost all the Member States no difference is made according to the type of incoming request.

By way of exception, in a few Member States (Bulgaria, Italy, Luxembourg, the Netherlands, Austria, Poland, Portugal) requests for information are directly handled by the CLO when the information required is available in databases (address for example), while the other requests (recovery, precautionary measures, notification) are dealt with by another body or authority (generally the competent local office).

In Croatia requests for information and notification are directly handled in the CLO. In Ireland requests for notification are sent to Regional Offices for hand delivery while all other requests are dealt with by the Mutual Assistance team.

3-8 Is it different for the requests coming from other countries which are not Member States?

In 21 Member States the process is the same for third countries as with EU-Member State requests (a difference however exists in Germany in the field of customs duties).

In 5 Member States the process is different (Croatia, Cyprus, Hungary, Malta, Portugal): requests are handled by another department/body/office.

Lastly 2 other Member States are not concerned because they do not receive such requests from third countries (Bulgaria, Ireland).

4) MEANS AND RIGHTS FOR THE MUTUAL ASSISTANCE

4-1 Do you know how many people work for assistance recovery (worked full-time equivalent) in your country?

4 Member States did not provide any number, while several Member States indicated it is not possible to estimate the full time equivalent of employees dealing with recovery requests as it is a part of their overall work for recovery. Needless to say that, within the territorial model, several/many field workers or regional/local officers contribute for a part of their work to recovery assistance.

The number of persons (full-time equivalent) working for recovery assistance in the CLO or at the central level (both for incoming and outgoing requests) generally varies according to the size or the administrative organization of each Member State, ranging from one or two (Estonia, Croatia, Latvia) to about fifteen (Denmark, Luxembourg, France). Among 24 replies, 12 Member States employ between 3 and 7 full-time equivalent workers in the CLO or at the central level, while 5 other Member States use between 8 and 12 persons.

4-2 Which are the means available in the units in charge of mutual assistance: databases, etc...?

The units in charge of recovery within the framework of mutual assistance generally use the same databases and tools as they use for collecting and recovering national claims.

These tools are different according to the MS. Here are the main ones: internal tax information system, national register of population, business or company register, real estate register, land register, databases of employers, wages and pensions payments, bank account holders, motor vehicles register (less commonly, boats, ships or aircraft register), social insurance or social benefits, insolvencies register...

Units in charge of recovery can also request some information from other public institutions and private or financial institutions under legal rules.

4-3 What rights do the offices have when carrying out certain enforcement measures?

The offices in charge of recovery have the same rights and powers as when carrying out enforcement measures to collect and recover national debts. The same policy and procedures are applied as for national claims.

In principle, no exceptions are made. But in case of mutual assistance, several Member States (Belgium, France, Italy, Luxembourg, the Netherlands) indicate that they do not grant other Member States' claims

preferences accorded to similar national claims (as permitted under Directive 2010/24, Art. 13-1, third paragraph).

4-4- Are there any national limits that restrict certain enforcement measures? (e.g. minimum amount)

In most Member States, there are minimum amounts when it comes to enforcement which can vary according to the enforcement action being taken. Some of these minimum amounts are legislative and some are administrative.

A few Member States indicate there is no legal limit (Czech Republic, Malta, the Netherlands, Sweden).

In any event, the principles of proportionality and efficiency or the cost benefit analysis are taken into consideration in many Member States before adopting any enforcement measure. Some practical thresholds are applied as for national claims in order to concentrate available resources on higher claims. In some Member States, no enforcement measures are taken if the expenses are disproportionate with the expected income.

Generally the national rules for taking enforcement action protect the debtor against seizure (e.g. seizure-exemption limits, a minimum income must remain to the debtor, some specific properties are excluded from enforcement measures).

4-5 In which way do the recovery offices make use of information obtained under other directives (Dir. 2011/16, VAT refund, MOSS scheme)?

Except for VAT refunds, most Member States indicated there is no real organized use of this information, despite no legal problem. So progress is necessary to determine the best way how to use data received from other Member States.

A few Member States observed that some of this information is added in their databases, disclosed or provided for tax recovery purposes, so that any official can check in order to decide if it is useful to send a request for recovery abroad (especially Belgium, Greece, Spain, the Netherlands, Austria, Slovenia, Slovakia).

4-6 What way of communication is used between the different offices / units?

All Member States use mostly e-mail and phone, sometimes through a secured network system (the Netherlands). In Portugal a communication model based on a web platform is under preparation.

5) OVERALL APPRECIATION

5-1 According to you, which are the main advantages or disadvantages of your organization?

Member States with the territorial model (see above 3-5)

Main advantages:

- all claims (domestic and foreign claims) relating to the same debtor are equally treated by a single territorial office;

- direct and rapid communication between CLO and recovery/enforcement authorities;

- optimal combination of centralization (CLO keeps an overview of mutual assistance and can assist territorial offices) and decentralization (the territorial offices that deal with the requests are closer to the debtor than a central office and, consequently, can deal with the requests in a more efficient way).

Main disadvantage: this decentralized organisation can lead to a difference in treatment or in speed of treatment depending on each competent local tax office**.**

MS with a specialized/integrated unit dealing with recovery

Main advantages:

- no communication problem that might occur if there were separate units dealing with the requests;

- easier to track the progress of cases and to make sure all cases are worked correctly.

- greater potential to save on back-office and administrative costs;

- compact, efficient, fast, know how centralized.

One Member State had earlier experience from a decentralized system, which was much more work and time consuming.

Main disadvantage:

- a MS thinks that an integrated structure can be such a large bureaucratic structure that effective governance and true integration and knowledge sharing become difficult.

- risk of difference in the treatment of national claims and foreign claims (but in principle, incoming requests are treated as national claims: see above point 3-6).

5-2 Have you changed your organisation in the last years? Do you think it will change next?

In some Member States there were changes in the overall structure of the organisation (merger of tax administrations, concentration of regional/local offices...), but that didn't affect the work process of the recovery department or of the mutual assistance in recovery that much.

However some major changes have affected mutual assistance in a few Member States: in Belgium, the CLO Recovery was integrated in the Special Recovery Centre, which deals with specific types of recovery in many fields (mutual assistance, payment evasion, organised fiscal fraud such as shell companies or carousel fraud); also in Belgium the VAT and direct tax offices were merged into "Recovery teams natural persons" and "Recovery teams legal entities"; In Poland

the task of mutual assistance for recovery of tax claims was taken over from the Ministry of Finance by a Tax Chamber in Poznań (CLO was established).

5-3 How long does it take to process a request from its receipt by the CLO till the first enforcement measure is taken?

Processing time varies from case to case depending on a number of factors (workload, cases, units), ranging from a few days to one or two months, or sometimes more (three or four months).

It seems that the process in the Member States with an integrated unit is faster, but other Member States act quickly.

A few Member States pointed out that the foreign debts were treated in the same way as the domestic tax debts, regarding the period for taking the first enforcement measures.

5-4 What do you think about the processing time of requests coming from abroad?

Several Member States pointed out that the foreign claims are treated in the same way as national claims. So the processing time for requests coming from abroad is almost the same as for national debts and is supposed to be reasonable or acceptable.

However, the processing time is highly dependent on the quality / consistency of the information and data set out in the request by the applicant authority.

Moreover, it takes more time when the requests become more complex, when notification problems arise or in case of dispute.

5-5 And about the requests you send to other countries?

In principle cooperation can be evaluated positively. However the processing time in the receiving countries varies: it depends on the countries. Some answer quickly; others take more time.

It also varies from case to case. In some cases it can take longer than the applicant Member State anticipates it might or should. And the applicant Member State is not always sure or aware of the level of accuracy and effort before involved in answering to its requests.

Joint Council of Europe – OECD Convention on mutual assistance in tax matters – Taxes for which recovery assistance is provided

Report by: Martijn Veltrop

The Council of Europe-OECD Convention on Mutual Administrative Assistance in Tax Matters provides *inter alia* for assistance in tax recovery and service of documents. The States ratifying this Convention however have a large freedom to decide for which taxes they want to provide recovery assistance. They can exclude this form of assistance or limit it to specific types of taxes.

This report presents an overview of the current status of ratifications of the Council of Europe – OECD Convention, indicating the taxes for which recovery assistance is granted on the basis of this Convention.

The Joint Council of Europe – OECD Convention of 25 January 1988 on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 Protocol, provides for international administrative cooperation, including assistance in tax recovery (Arts. 11-16) and service of documents (Art. 17).

Article 2 of this Convention determines the taxes falling within its scope.

Article 2 – Taxes covered

1 This Convention shall apply:

a to the following taxes:
i taxes on income or profits;
ii taxes on capital gains which are imposed separately from the tax on income or profits;
iii taxes on net wealth;
imposed on behalf of a Party; and

b to the following taxes:
i taxes on income, profits, capital gains or net wealth which are imposed on behalf of political subdivisions or local authorities of a Party;
ii compulsory social security contributions payable to general government or to social security institutions established under public law, and
iii taxes in other categories, except customs duties, imposed on behalf of a Party, namely:
A estate, inheritance or gift taxes,
B taxes on immovable property,
C general consumption taxes, such as value-added or sales taxes,
D specific taxes on goods and services such as excise taxes,
E taxes on the use or ownership of motor vehicles,
F taxes on the use or ownership of movable property other than motor vehicles,
G any other taxes.
iv taxes in categories referred to in sub-paragraph iii above which are imposed on behalf of political subdivisions or local authorities of a Party.

2 The existing taxes to which the Convention shall apply are listed in Annex A in the categories referred to in paragraph 1.

3 The Parties shall notify the Secretary General of the Council of Europe or the Secretary General of OECD (hereinafter referred to as the "Depositaries") of any change to be made to Annex A as a result of a modification of the list mentioned in paragraph 2. Such change shall take effect on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Depositary.

4 The Convention shall also apply, as from their adoption, to any identical or substantially similar taxes which are imposed in a Contracting State after the entry into force of the Convention in respect of that Party in addition to or in place of the existing taxes listed in Annex A and, in that event, the Party concerned shall notify one of the Depositaries of the adoption of the tax in question.

However, the States ratifying this Convention may make a reservation not to provide assistance for specific tax categories, in accordance with Article 30 of this Convention:

Article 30 – Reservations

1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval or at any later date, declare that it reserves the right:
a not to provide any form of assistance in relation to the taxes of other Parties in any of the categories listed in sub-paragraph b of paragraph 1 of Article 2, provided that it has not included any domestic tax in that category under Annex A of the Convention;
b not to provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes or only for taxes in one or more of the categories listed in paragraph 1 of Article 2;

c not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of that State or, where a reservation has previously been made under sub-paragraph a or b above, at the date of withdrawal of such a reservation in relation to taxes in the category in question;

(…)

3 After the entry into force of the Convention in respect of a Party, that Party may make one or more of the reservations listed in paragraph 1 which it did not make at the time of ratification, acceptance or approval. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositaries.

4 Any Party which has made a reservation under paragraphs 1 and 3 may wholly or partly withdraw it by means of a notification addressed to one of the Depositaries. The withdrawal shall take effect on the date of receipt of such notification by the Depositary in question.

5 A Party which has made a reservation in respect of a provision of this Convention may not require the application of that provision by any other Party; it may, however, if its reservation is partial, require the application of that provision insofar as it has itself accepted it.

The first table below presents an overview of the reservations made in accordance with Article 30(1)(a) and (b) of the Convention.

The second table below presents an overview of the reservations made in accordance with Article 30(1)(c) of the Convention.

These overviews are based on the information which is available on the website of the Council of Europe; see the following link providing an updated list of reservations and declarations: http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/127/declarations.

Note: the information available on this website distinguishes between the following situations:
- situations where no reservation has been made;
- situations where States "reserved the right not to provide assistance";
- situations where States declared that they "do not" or "will not" provide recovery assistance.

The above distinction has also been maintained in the tables below. It should however be observed that, in practice, a reservation of the "right not to provide assistance" may be considered by the country concerned as an absolute refusal to provide recovery assistance.

1. Reservations made based on Article 30(1)(a) and (b) of the Convention (situation end December 2016)

	No reservation
	"reserves the right not to provide assistance"
	"does not provide recovery assistance for this/these tax(es)"

Categories of taxes, as listed in Article 2 ► **Country ▼**	**1 a i**	**1 a ii**	**1 a iii**	**1 b i**	**1 b ii**	**1 b iii A**	**1 b iii B**	**1 b iii C**	**1 b iii D**	**1 b iii E**	**1 b iii F**	**1 b iii G**	**1 b iv A**	**1 b iv B**	**1 b iv C**	**1 b iv D**	**1 b iv E**	**1 b iv F**	**1 b iv G**
Albania																			
Andorra																			
Argentina																			
Australia																			
Austria																			
Azerbaijan																			
Barbados																			
Belgium																			
Belize																			
Brazil																			
Bulgaria																			
Cameroon																			
Canada																			
Chile																			
China																			
Colombia																			
Costa Rica																			
Croatia																			
Cyprus																			
Czech Republic																			
Denmark																			
Estonia																			
Finland																			
France																			
Georgia																			
Germany																			

Categories of taxes, as listed in Article 2 ► / Country ▼	1 a i	1 a ii	1 a iii	1 b i	1 b ii	1 b iii A	1 b iii B	1 b iii C	1 b iii D	1 b iii E	1 b iii F	1 b iii G	1 b iv A	1 b iv B	1 b iv C	1 b iv D	1 b iv E	1 b iv F	1 b iv G
Ghana																			
Greece																			
Hungary																			
Iceland																			
India																			
Indonesia																			
Ireland																			
Israel																			
Italy																			
Japan																			
Kazakhstan																			
Korea																			
Latvia																			
Liechtenstein																			
Lithuania																			
Luxembourg																			
Malaysia																			
Malta																			
Marshall Islands																			
Mauritius																			
Mexico																			
Moldova																			
Monaco																			
Nauru																			
The Netherlands:																			
European part																			
Aruba																			
Curacao																			
Sint Maarten																			
New Zealand																			
Nigeria																			
Niue																			

Categories of taxes, as listed in Article 2 ► / Country ▼	1 a i	1 a ii	1 a iii	1 b i	1 b ii	1 b iii A	1 b iii B	1 b iii C	1 b iii D	1 b iii E	1 b iii F	1 b iii G	1 b iv A	1 b iv B	1 b iv C	1 b iv D	1 b iv E	1 b iv F	1 b iv G
Norway																			
Pakistan																			
Poland																			
Portugal																			
Romania																			
Russia																			
Saint Christopher and Nevis																			
Saint Lucia																			
Saint Vincent and the Grenadines																			
Samoa																			
San Marino																			
Saudi Arabia																			
Senegal																			
Seychelles																			
Singapore																			
Slovakia																			
Slovenia																			
South Africa																			
Spain																			
Sweden																			
Switzerland																			
Tunisia																			
Turkey																			
Uganda																			
Ukraine																			
United Kingdom:																			
Great Britain																			
Montserrat																			
Turks and Caicos Islands																			
Cayman Islands																			

Categories of taxes, as listed in Article 2 ► **Country ▼**	**1 a i**	**1 a ii**	**1 a iii**	**1 b i**	**1 b ii**	**1 b iii A**	**1 b iii B**	**1 b iii C**	**1 b iii D**	**1 b iii E**	**1 b iii F**	**1 b iii G**	**1 b iv A**	**1 b iv B**	**1 b iv C**	**1 b iv D**	**1 b iv E**	**1 b iv F**	**1 b iv G**
Anguilla																			
Gibraltar																			
Isle of Man																			
British Virgin Islands																			
Bermuda																			
Jersey																			
Guernsey																			
United States of America																			
Uruguay																			

2. Reservations made based on Article 30(1)(c) of the Convention (situation end December 2016)

Country	Article 30(1)(c)
Albania	
Andorra	Andorra will not provide assistance in respect of any tax claim which was in existence at the date of entry into force of the Convention in respect of the Principality of Andorra. Andorra will not provide assistance in respect of any tax claim which was in existence at the date of withdrawal of a reservation made under Article 30, paragraphs 1.a or 1.b, of the convention.
Argentina	
Australia	
Austria	Austria reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of the Republic of Austria.
Azerbaijan	
Barbados	Barbados reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Barbados, or, if the tax claim is in relation to taxes which are listed in the reservation made under Article 30, paragraph 1.a or b of the Convention, at the date of withdrawal of such a reservation by Barbados.
Belgium	Belgium reserves the right not to provide assistance in respect of any tax claim: - which is in existence at the date of entry into force of the Convention in respect of Belgium; - which was the subject of a reservation by Belgium based on Article 30, § 1.a of the Convention and was already in existence at the date of withdrawal by Belgium of such a reservation.
Belize	
Brazil	
Bulgaria	
Cameroon	
Canada	
Chile	
China	
Colombia	
Costa Rica	Costa Rica reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of that State or, where a reservation has previously been made under sub-paragraph a or b above, at the date of withdrawal of such a reservation in relation to taxes in the category in question.

Croatia	Croatia reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of the Republic of Croatia, or, if the tax claim is in relation to taxes which are listed in the reservation made under Article 30, paragraph 1. a or b of the Convention, at the date of withdrawal of such a reservation by the Republic of Croatia.
Cyprus	
Czech Republic	
Denmark	
Estonia	
Finland	
France	
Georgia	
Germany	
Ghana	
Greece	
Hungary	Hungary reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Hungary.
Iceland	
India	
Indonesia	
Ireland	
Israel	
Italy	Italy reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Italy or included in the reservation made under sub paragraphs a and b above and existing at the date of withdrawal of such a reservation by Italy.
Japan	
Kazakhstan	Kazakhstan reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect to the republic of Kazakhstan or at the date of withdrawal of such a reservation by the Republic of Kazakhstan in accordance with Article 30, paragraph 1. a or b, of the Convention.
Korea	
Latvia	Latvia reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of the Republic of Latvia or, where a reservation has been made under sub-paragraph a or b, till the date of withdrawal of such a reservation in relation to taxes in the category in question.

Liechtenstein	
Lithuania	
Luxembourg	Luxembourg does not provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of the Grand-Duchy of Luxembourg.
Malaysia	
Malta	Malta reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Malta and, due to the reservations in relation to paragraphs 1.a and 1.b of Article 30 of the Convention, to any existing tax claim at the date of withdrawal of such a reservation by Malta.
Marshall Islands	The Marshall Islands reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of the Republic of the Marshall Islands.
Mauritius	
Mexico	
Moldova	
Monaco	Monaco does not provide assistance in respect of tax claims which are in existence at the date of entry into force of the Convention in respect of the Principality or at the date of withdrawal of a reservation, made under sub-paragraph a or b, in relation to taxes in the category in question.
Nauru	
The Netherlands: *European part* *Aruba* *Curacao* *Sint Maarten*	
New Zealand	
Nigeria	
Niue	
Norway	
Pakistan	Pakistan reserves the right not to provide assistance in respect of any tax claim which is in existence at the date of entry into force of the Convention in respect of Pakistan.
Poland	
Portugal	
Romania	

Russia	
Saint Christopher and Nevis	Saint Kitts and Nevis shall not provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Saint Kitts and Nevis or, if the tax claim is in relation to taxes that are listed in the reservation made under Article 30, paragraph 1.a or b, of the Convention, at the date of withdrawal of such reservation by Saint Kitts and Nevis.
Saint Lucia	Saint Lucia reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Saint Lucia or, if the tax claim is in relation to taxes which are listed in the reservation made under Article 30, paragraph 1.a or b of the Convention, at the date of withdrawal of such a reservation by Saint Lucia.
Saint Vincent and the Grenadines	Saint Vincent and the Grenadines reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Saint Vincent and the Grenadines, or, if the tax claim is in relation to taxes which are listed in the reservation made under Article 30, paragraph 1.a or b of the Convention, at the date of withdrawal of such a reservation by Saint Vincent and the Grenadines.
Samoa	Samoa reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of that State.
San Marino	San Marino does not provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention for the Republic of San Marino.
Saudi Arabia	
Senegal	
Seychelles	Seychelles reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Seychelles or, where a reservation has previously been made under sub-paragraph a or b of Article 30, at the date of withdrawal of such a reservation in relation to taxes in the category in question.
Singapore	Singapore reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Singapore or, where a reservation has previously been made under sub-paragraph a or b of paragraph 1 of Article 30, at the date of withdrawal of such a reservation in relation to taxes in the category in question.
Slovakia	The Slovak Republic reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of the Slovak Republic.
Slovenia	Slovenia reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Slovenia or, if the tax claim is in relation to taxes, which are included in the reservation made under Article 30, paragraphs 1.a or 1.b, at the date of withdrawal of such a reservation by the Republic of Slovenia.
South Africa	

Spain	
Sweden	
Switzerland	Switzerland does not provide assistance in respect of tax claims which are in existence at the date of entry into force of the Convention in respect of Switzerland; in case of withdrawal of a reservation as defined in numbers 1 and 2, Switzerland does not provide any administrative assistance in respect to tax claims existing at the date of withdrawal of such a reservation in relation to taxes of the mentioned category.
Tunisia	
Turkey	Turkey reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of Turkey or, if the tax claim is in relation to taxes, which are included in the reservation made under Article 30, paragraph 1.a, at the date of withdrawal of such a reservation by the Republic of Turkey.
Uganda	
Ukraine	Ukraine reserves the right not to provide the assistance concerning any tax debts existing on the date of entry into force of the Convention for Ukraine.
United Kingdom: *Great Britain* *Montserrat* *Turks and Caicos Islands* *Cayman Islands* *Anguilla*	
Gibraltar	Gibraltar will not provide assistance in respect of any tax claim, which is in existence at the date of withdrawal of a reservation made under Article 30, paragraph 1(a) or (b), of the Convention, in relation to taxes of the category in question.
Isle of Man	The Isle of Man will not provide assistance in respect of any tax claim, which is in existence at the date of withdrawal of a reservation made under Article 30, paragraph 1(a) or (b), in relation to taxes of the category in question.
British Virgin Islands	The British Virgin Islands will not provide assistance in respect of any tax claims, which is in existence at the date of entry into force of the Convention in the British Virgin Islands or, where a reservation has previously been made under Article 30, paragraphs 1(a) or 1(b), at the date of withdrawal of such a reservation in relation to taxes in the category in question.
Bermuda	Bermuda will not provide any form of assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention for Bermuda or, where a reservation has been made, at the date of withdrawal of such a reservation in relation to taxes in the category in question.

Jersey	Jersey will not provide any form of assistance in respect of any tax claim which is in existence at the date of withdrawal of a reservation made under Article 30, paragraph 1(a) or (b), of the Convention, in relation to taxes of the category in question.
Guernsey	Guernsey will not provide assistance in respect of any tax claim, which is in existence at the date of withdrawal of a reservation made under Article 30, paragraph 1(a) or (b), of the Convention, in relation to taxes of the category in question.
United States of America	
Uruguay	Uruguay reserves the right not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of that State or, where a reservation has previously been made under sub-paragraph a or b of paragraph 1 of Article 30, at the date of withdrawal of such a reservation in relation to taxes in the category in question.

OPINION

International assistance in tax collection: facilitating the use of precautionary measures

Luk Vandenberghe[1]

Agreements on international assistance for the collection of taxes mainly focus on recovery measures. The same can be said about the EU Directive 2010/24/EU on tax recovery assistance. However, fraudulent debtors often try to avoid enforcement measures by contesting the claims or by hiding or disposing of their assets. More attention should thus be paid to the use of measures of conservancy – in the EU legislation described as "precautionary measures" – in order to secure the future recovery if debtors contest their debt or to prevent fraudsters from making themselves insolvent. This article focuses on some issues relating to the use of measures of conservancy.

Contents

This article first explains why precautionary measures are important to fight against tax fraudsters, and how the European Commission recently took an important initiative to facilitate the follow-up of intra-EU requests for such precautionary measures (point 1).

Further, it is explained that the current legal situation concerning international requests for precautionary measures creates a considerable complexity, as the conditions for applying precautionary measures are tested in the applicant and the requested State (point 2).

In order to reduce this complexity, it is suggested to introduce a uniform instrument facilitating the use of measures of conservancy in the requested State. Such a uniform instrument could further increase the efficiency of these precautionary measures in a cross-border context, while at the same time respecting the right of defence of the debtor concerned (point 3).

Finally, attention is also paid to the question to which extent contested claims could/should not only be the subject of precautionary measures, but also of recovery measures (point 4).

1. Introduction

1. In general, recovery of tax claims is the end phase of a long process: the tax debt first needs to be assessed – on the initiative of the tax debtor himself or by the tax authorities – and a time period for voluntary payment must be granted. Moreover, debtors may also contest the tax claim. Such contestations usually have the legal effect that recovery measures are suspended during the contestation. In the meantime, fraudulent tax debtors may already take arrangements to make themselves officially insolvent, possibly by dislocating their assets to other (Member) States, (ab)using the free movement of goods, persons and capital. In this way, they can frustrate the recovery plans of the tax authorities and prevent the execution of the tax claims. So at the moment when the tax authorities can start recovery measures, it may appear that there is nothing left to recover.

In order to counter such fraudulent behaviour, tax authorities normally dispose of the possibility to take precautionary measures, guaranteeing the future recovery. The authorities concerned may also send an international request to take such measures in other States.

However, the national legislations regarding such precautionary measures are quite diverse, and the conditions and modalities are different from one State to another. This leads to complications when a tax authority sends a request for precautionary measures to another State, as each authority has to respect its own (national) rules concerning the use of such measures.

2. At a Fiscalis conference on tax enforcement, held in Lisbon in October 2015, tax authorities of the EU Member States confirmed that in order to facilitate the execution of such international requests for precautionary measures, the applicant authorities should provide sufficient details about the circumstances and reasons of these requests. This information is indeed important for the requested authority, in order to determine an appropriate follow-up, to obtain the necessary authorisations (in so far as required for specific measures of conservancy) and to justify these measures in case of contestation by the tax debtor or any other person affected by such measures.

3. The recommendation made at the above Fiscalis conference was followed by the European Commission, in its VAT Action Plan of April 2016. On 7 April 2016, the European Commission presented a Communication to the European Parliament, the Council and the European Economic and Social Committee (document COM(2016) 148) on how to

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The opinion expressed in this article is the personal opinion of the author. It does not necessarily correspond to the opinion of the European Commission.

improve the fight against VAT fraud. In an accompanying document, the Commission presented 20 measures to tackle the VAT gap, which the Commission intended to pursue together with the Member States and other interested parties.[2] In this document, the Commission *inter alia* announced its intention to facilitate the cross-border use of precautionary measures safeguarding the recovery of VAT claims. This action point clearly confirmed the need to ensure that such measures of conservancy can really contribute to the efficient and effective collection of taxes in a cross-border context.

4. In the course of 2016, the EU Tax Recovery Expert Group has taken up the work to elaborate a standard for substantiating such requests for precautionary measures. These new forms have been made available for use by the competent authorities of the EU Member States at the end of 2016. It can be expected that they will indeed facilitate the follow-up of these requests between EU Member States.

5. However, it is still useful to consider further improvements of the current assistance arrangements. This article sheds some light on possible ways forward with regard to international requests for precautionary measures.

2. Current situation: a dual legislation approach leading to a double justification need

6. The existing arrangements with regard to international assistance for measures of conservancy present a duality, which results from the fact that the possibility to take such measures must be assessed in relation to the laws of both the applicant and requested State. This approach is linked to the traditionally applied principle of reciprocity of international assistance in tax collection.

Article 16(1), first subparagraph of Directive 2010/24 explicitly confirms that precautionary measures should only be requested *"in so far as such measures are also possible, in a similar situation, under the national law and administrative practices of the applicant State"*. This principle is also confirmed in Article 27(4) of the OECD Model Convention, which states: *"When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. (...)".* The applicant State should indeed not send a request for measures of conservancy in circumstances where such measures would not be allowed in the applicant State itself.

When executing a request for precautionary measures, the requested authority has to make use of the procedures available under the laws, regulations or administrative provisions of the requested State (Article 17, referring to Article 13(1), first subparagraph, of the EU Directive). This principle is also confirmed in Article 27(4) of the OECD Model Convention, which states: *"(...) That other [the requested] State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the firstmentioned State [the requesting State] or is owed by a person who has a right to prevent its collection."* The Commentary on the above provision of the OECD Model Convention clarifies that in making such a request the requesting State should indicate in each case what stage in the process of assessment or collection has been reached; *"the requested State will then have to consider whether in such a case its own laws and administrative practice permit it to take measures of conservancy"*.[3]

The wording of Article 12 of the OECD-Council of Europe Convention is not so clear on this point. It only states that: *"At the request of the applicant State, the requested State shall, with a view to the recovery of an amount of tax, take measures of conservancy even if the claim is contested or is not yet the subject of an instrument permitting enforcement."* Here as well, the explanatory notes confirm that:

- a request for measures of conservancy cannot be made before the applicant State itself can take such measures;[4]
- on the basis of the information provided by the applicant State, the requested State will have to consider whether in such a case its laws and administrative practice permit it to take measures of conservancy.[5]

7. The requested authority can only proceed with such measures of conservancy in accordance with the national law and administrative practices of the requested State, which may imply the need for an administrative or judicial authorization or – in case of a contestation – an administrative or judicial confirmation of such measures in the requested Member State. Therefore, the request for measures of conservancy or the accompanying documents should clarify the nature, the sincerity and the urgency of the request, in order to allow the administrative authority or the judge concerned in the requested State to evaluate whether such measures should be authorized

2 http://ec.europa.eu/taxation_customs/taxation/vat/action_plan/index_en.htm#urgent.

3 Commentary on Article 27, point 21.

4 Explanatory Notes, point 125.

5 Explanatory Notes, point 126.

in the territory of the requested State, or to justify these measures if they are disputed by the person concerned.[6] This means that the applicant authorities have to provide information on the conditions and circumstances relating to the situations for which a request for measures of conservancy is made, in order to facilitate the work and the burden of proof for the requested authorities.[7]

These essential conditions for precautionary measures relate first of all to the question whether the claims, allegations or presumptions of the tax authorities in the applicant State *prima facie* justify measures of conservancy (the *'fumus boni iuris'* test). Moreover, a review of the urgency and necessity (the *'periculum in mora'* test) should also be possible. The evaluation of these conditions helps the authority or judge concerned to assess the proportionality of the precautionary measure(s) at stake.

8. If the measures of conservancy taken by the requested authority would be contested before an administrative or judicial body in the requested State, it could be expected that this body would not have a different appreciation of the facts and circumstances that were considered to justify such measures in the applicant State or which were considered to justify the request for such measures by the applicant State. However, in the absence of a uniform instrument permitting measures of conservancy in the requested State, the competent administrative or judicial body in that requested State would probably make its own evaluation of the facts and circumstances of the case, in order to examine whether the measures of conservancy taken or to be taken by the requested authority are justified on the basis of the law and the administrative practice of that requested State.[8] In this regard, the competent body may also pay special attention to the different circumstances under which measures of conservancy can be taken in the applicant and requested State; e.g. according to Belgian VAT law, a specific precautionary measure (consisting in the preventive attachment of refundable VAT credits where either there are serious grounds for presumption of tax evasion or there is a VAT debt claimed by the tax authority, that debt being contested by the taxable person) is possible on the basis of a purely administrative decision, without any *ex ante* control by a judicial body. The administrative document drawn up for permitting this measure of conservancy could be attached to a request for measures of conservancy in another requested State, where a judge may be invited to evaluate – *ex ante* or *ex post* – whether (another) measure of conservancy is justified in that State.

9. Could it be argued that the fulfilment of the conditions for taking measures of conservancy should be examined by the administrative or judicial authorities of the applicant State rather than by the competent authorities of the requested State?

This argument could certainly be raised in relation to the condition concerning the *'fumus boni iuris'* test: do the allegations or presumptions of the tax authorities in the applicant State *prima facie* justify measures of conservancy? Is the claim sufficiently certain – despite the fact that it is being contested – to justify such measures? It is clear that the authorities of the applicant State are best placed to evaluate the fulfilment of this condition, in so far as they can understand all the factual elements invoked and as they know best the tax legislation which is at stake. In this regard, it should also be noted that Article 17 of Directive 2010/24, which lays down the rules governing the request for precautionary measures, simply refers to Article 14 (relating to requests for recovery), which *"shall apply mutatis mutandis"*. Paragraph 1 of this Article 14 provides that disputes concerning the claim shall be brought before the competent authority of the applicant Member State. It could thus be argued that the authorities of the applicant Member State also have to evaluate whether the degree of certainty of a claim is sufficient to justify precautionary measures, in particular if the fulfilment of that condition is contested.

It indeed occurs that judges in a requested Member State consider that the fulfilment of that condition should anyhow be contested in the applicant Member State. In so far as Article 17 of the EU Directive refers back to Article 14, debtors may then be tempted to invoke that this reference also applies with regard to the consequences of this contestation in the applicant Member State. As Article 14(4) provides that the enforcement procedure in the requested Member State has to be suspended as soon as the requested authority is informed about the contestation of the claim in the applicant Member State, debtors may argue that the *'mutatis mutandis'* referral in Article 17 also implies that the precautionary measures in the requested Member State have to be suspended as soon as the *'prima facie'* validity of the claim is contested in the applicant Member State. Such an immediate

6 It is true that Article 16 of the current Directive no longer explicitly requires that a request for precautionary measures should be a 'reasoned request' as provided for under Article 13 of the former Directive 2008/55/EC (J. LAO, 'The Council Directive concerning Mutual Assistance for the Recovery of Taxes', in O. GÜNTHER and N. TÜCHLER (eds.), 'Exchange of Information for Tax Purposes', Linde, Vienna, 2013, (303), 316). However, it remains important to explain and to justify such a request (See I. DE TROYER, 'Tax Recovery Assistance in the EU: Execution of Requests for Recovery and/or Precautionary Measures in Other EU Member States', *EC Tax Review* 2014/4, (207), 209).

7 Cf. OECD Model Tax Convention on Income and on Capital, Commentary on Article 27 concerning the assistance in the collection of taxes, point 21.

8 Cf. OECD Model Tax Convention on Income and on Capital, Commentary on Article 27 concerning the assistance in the collection of taxes, point 20: *'The conditions required for the taking of measures of conservancy may vary from one State to another …'*.

suspension would completely undermine the effect and the purpose of these measures of conservancy. Accordingly, it would be appropriate to interpret the *'mutatis mutandis'* referral in such a way that the possible suspension of the precautionary measure(s) depends on the provisional assessment made by the administrative or judicial body that is requested, following the contestation, to decide on the fulfilment of this condition.

With regard to the other condition, relating to the urgency and necessity (the *'periculum in mora'* test): this is also a matter that should (primarily[9]) be evaluated in the applicant Member State, since the request for precautionary measures is based on the situation and the unwillingness of the debtor to pay his tax debts in the applicant Member State.

However, the referral in Article 17 to Article 14 of the EU Directive also relates to the second paragraph of Article 14, which provides that *"diputes concerning the enforcement – 'mutatis mutandis' precautionary measures – taken in the requested Member State by a competent authority of the requested Member State shall be brought before the competent body of that Member State in accordance with its laws and regulations"*. Under these circumstances, it is not surprising that judges in the requested Member State also examine – at least to some extent – whether the claim at stake presents a sufficient *'fumus boni iuris'* and/or whether any *'periculum in mora'* justifies the use of the measures of conservancy taken by the tax authorities of the requested Member State.

10. The above analysis makes it clear that the simple referral in Article 17 of Directive 2010/24, in order to apply 'mutatis mutandis' the rules relating to the dispute of recovery measures, leads to complexity and ambiguity. It would thus be useful to have a more detailed and precise description of the rules applying to (contestations of) precautionary measures in the requested State.

3. A uniform instrument facilitating the use of measures of conservancy in the requested State?

3.1. Control of the fulfilment of the conditions in the applicant State

11. This complexity of the existing arrangements – and the administrative burden involved – could be avoided by the introduction of a specific uniform instrument permitting precautionary measures in the requested State, in order to secure the future recovery where a claim or the instrument permitting enforcement in the applicant State is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the applicant State.

This uniform instrument permitting measures of conservancy should ideally be submitted to a specific authorization procedure in the applicant State, whereby an administrative or (preferably) a judicial authority would evaluate the need to take such measures and thus sufficiently safeguard the legitimate interests of the debtor. This would provide a guarantee, for both the debtor and the requested authority, that the justification of these measures of conservancy has been carefully checked in the applicant State. The existence of this uniform instrument permitting measures of conservancy could then discharge the authorities (including supervisory administrative bodies or judges) of the requested State from checking again the justification of such measures of conservancy in the requested State. The requested tax authority could then immediately proceed with measures of conservancy, on the basis of this uniform instrument permitting such measures in the requested State.

The use of such a uniform instrument permitting measures of conservancy should not necessarily be made obligatory, but it would facilitate the follow-up of requests of Member States who avail themselves of this possibility.

12. At EU level, the introduction of a specific uniform instrument permitting precautionary measures was proposed by the European Commission in 2009,[10] but this proposal was not accepted at the time when Directive 2010/24/EU was finally adopted. At that time, the Council only adopted the innovative use of a uniform instrument permitting enforcement in the requested Member State, and preferred to gain some experience with the use of that other uniform instrument, before considering a similar instrument for precautionary measures.

Under the current EU assistance arrangements, the fulfilment of the conditions for the use of precautionary measures in the applicant Member State may be demonstrated by a document drawn up for permitting precautionary measures in the applicant Member State and relating to the claim for which mutual assistance is requested (Article 16(1), 2nd subparagraph of the Directive) or by other documents issued in the applicant Member State (Article 16(2) of the Directive). If the requested authority requires an administrative or judicial authorization for precautionary measures in that requested Member State, the administrative or judicial body authorizing or revising the measure of

9 Cf. infra, with regard to the question of the proportionality of the precautionary measures taken in the requested State.

10 For situations where there was no uniform instrument permitting enforcement, permitting recovery measures but also precautionary measures in the requested State, in accordance with Article 12(1), 2nd subparagraph, of Directive 2010/24/EU.

conservancy in the requested State may take account of the documents submitted by the applicant State, but there is no "uniform" instrument permitting precautionary measures in the requested State.[11]

3.2. Guaranteeing the right of defence in the applicant State

13. The debtor must of course be able to exercise his right of defence against the precautionary measures. Even if the debtor would not be allowed to intervene in the preliminary authorization proceedings – as this could undermine the 'surprise' effect that is generally sought when measures of conservancy are initiated – he should be able to contest the measures of conservancy once they are taken by any authority. Measures of conservancy applied to secure the (future) recovery of tax claims should indeed always respect the proportionality principle, and the EU Court of Justice explicitly confirmed that the availability of an effective judicial review is necessary both in the proceedings on the substance of the case and in those before the judge hearing proceedings about measures of conservancy.[12] This effective judicial review relates in particular to the urgency and necessity of the measures of conservancy. The debtor may indeed have (convincing or less convincing) arguments to contest the justification of the precautionary measures, and he must be able to submit these arguments to the judge.

14. As far as the contestation of such a uniform instrument permitting measures of conservancy is concerned, the dispute arrangements could be similar to the dispute arrangements concerning the uniform instrument permitting enforcement already applied within the EU (see Article 14(1) of Directive 2010/24). This would imply that the contestation of the conditions for the use of measures of conservancy could only be contested in the applicant State issuing the uniform instrument permitting measures of conservancy, and there should be no second assessment of this justification in the requested State. An evaluation of the fulfilment of the essential conditions for applying measures of conservancy can indeed best be done in the State where the (presumed/contested) claim originates from. As already mentioned, these essential conditions relate to the question whether the allegations or presumptions or the contested claim of the tax authorities in the applicant State *prima facie* justify measures of conservancy (the *'fumus boni iuris'* test). The administrative and judicial authorities of the applicant State are indeed in the best position to assess – in case of precautionary measures: on a provisional basis – the validity of a tax claim which is due in that country. Moreover, a review of the urgency and necessity (the *'periculum in mora'* test) should also be possible in that State.

15. The fact that the conditions for applying measures of conservancy could only be contested in the applicant State should not be considered as problematic. There is no need for the requested State to intervene in such an evaluation. As already observed, the same approach has already been adopted within the EU with regard to the uniform instrument permitting enforcement measures in the requested State (Article 14 of Directive 2010/24/EU).

A similar approach can also be found in the area of judicial cooperation in the EU. In 2002, the Council adopted Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.[13] For a large number of offences, Article 2(2) of this Framework Decision provides that, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, these offences give rise to surrender pursuant to a European arrest warrant, without verification of the double criminality of the act. The requested Member States have to execute any such a European arrest warrant in accordance with the provisions of this Framework Decision, on the basis of the principle of mutual recognition (Article 1(2) of this Framework Decision). A Belgian association submitted that the Belgian law, transposing Article 2(2) of this Framework Decision into Belgian domestic law, infringed the principle of equality and non-discrimination. This association held that there was no objective and reasonable justification for the derogation from the requirement of double criminality. The EU Court of Justice however decided that *"in so far as it dispenses with verification of double criminality in respect of the offences listed therein, Article 2(2) of the Framework Decision is not invalid inasmuch as it does not breach Article 6(2) EU or, more*

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11 Some authors consider that the documents drawn up in the applicant Member State for permitting precautionary measures in that State are the sole basis for the precautionary measures in the requested Member State (see M. VASCEGA and S. VAN THIEL, 'Council adopts New Directive on Mutual Assistance in Recovery of Tax and Similar Claims', European Taxation, 2010, (231), 236; J. LAO, 'The Council Directive concerning Mutual Assistance for the Recovery of Taxes', in O. GÜNTHER and N. TÜCHLER (eds.), 'Exchange of Information for Tax Purposes', Linde, Vienna, 2013, (303), 316). However, the above opinion is not fully in line with the text and the meaning of the Directive (see in more detail: I. DE TROYER, *'Tax Recovery Assistance in the EU: Execution of Requests for Recovery and/or Precautionary Measures in Other EU Member States'*, EC Tax Review 2014/4, (207), 209).

12 EUCJ 18 December 1997, C-286/94, C-340/95, C-401/95, C-47/96, Garage Molenheide and Others, para. 55.

13 Council Framework Decision of 13 June 2002, OJ 2002 L 190, p. 1.

specifically, the principle of legality of criminal offences and penalties and the principle of equality and non-discrimination".[14] Under this provision, the requested Member State cannot refuse the surrender as soon as the person committed an offence which qualifies for a European arrest warrant under the legislation of the Member State issuing this arrest warrant.

16. The fact that the justification of the measures of conservancy with regard to the (presumed/contested) tax claim could only be contested before the competent bodies of the applicant State, should not be considered as an unacceptable limitation of the debtor's contestation rights, even though contesting this in another State may not always be easy. The debtor would indeed have to respect the contestation rules and conditions applying in the applicant State, and this State could require him to raise his arguments in the official language of that State. Within the EU, this contestation regime already applies under the current tax recovery assistance Directive (see Articles 14(1) and 17 of Directive 2010/24, relating to respectively disputes in recovery proceedings and in cases of precautionary measures). On this last point, reference can also be made to a recent judgment of the EU Court of Justice in a situation concerning criminal prosecutions, where the standard of the protection of the defendant's rights is even stricter. Suspected or accused persons who do not understand the language of the criminal proceedings against them, have a right to translation of essential documents (Article 3 of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings).[15] However, the EU Court of Justice confirmed that this does not prohibit a Member State from imposing a language condition for the objection lodged by the defendant himself, even though the person concerned does not have a command of that language. [16]

[14] EUCJ, 3 May 2007, C-303/05, Advocaten voor de Wereld, para. 60.

[15] This is in line with Article 6(2), subparagraph 3a) of the European Convention for the Protection of Human Rights, which provides that everyone charged with a criminal offence has the right to be informed 'in a language which he understands' of the nature and cause of the accusation against him.

[16] EUCJ, 15 October 2015, C-216/14, Gavril Covaci, para. 51: *"Articles 1 to 3 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings must be interpreted as not precluding national legislation such as that at issue in the main proceedings which, in criminal proceedings, does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings, provided that the competent authorities do not consider, in accordance with Article 3(3) of that directive, that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document."*.

3.3. A limited judicial review in the requested State

17. Even if the conditions for applying measures of conservancy could only be contested in the applicant State, the defendant should nevertheless still have the possibility to contest one aspect in the requested State: the specific precautionary measures taken in the requested State will depend on the legal possibilities in that State, and the debtor may argue that the specific measure taken in his regard should be substituted by another measure of conservancy or that its effect should be reduced. In its *Molenheide* judgement, the EU Court of Justice confirmed that such a proportionality control also belongs to the judicial review that can be requested by the debtor in case of measures of conservancy: [17]

> *"Third, the applicants observe that it is impossible for the taxable person to request a court to adopt in place of the retention a different protective measure which is sufficient to protect the interests of the Treasury but is less onerous for the taxable person, such as, for example, provision of a bond or a bank guarantee. Such a possibility is open only to the tax authority and is entirely a matter for its discretion.*
>
> *It must be pointed out that such impossibility, if proved, would also exceed the bounds of what is necessary to guarantee recovery of any sums due, in that the substitution in question might mitigate the adverse effect on the right of deduction and the grant of such a measure should be amenable to review by a court."*

It is obvious that the courts of the requested State are in a better position than the courts of the applicant State to evaluate the needs and possibilities for substituting measures of conservancy allowed under the national legislation of the requested State, or for limiting the use or effects of such measures, in accordance with the proportionality requirement.

4. Recovery of contested claims?

4.1. Possibilities depending on the legal instrument

18. In the introduction it was mentioned that measures of conservancy could be useful to guarantee the collection of disputed claims. The question can also be raised whether (the possibility of) a contestation of the tax claim should prevent the tax authorities from requesting/taking recovery actions, or whether it should lead to a suspension of recovery measures that were already started.

[17] EUCJ, 18 December 1997, C-286/94, C-340/95, C-401/95, C-47/96, Garage Molenheide and Others, paras. 58-59.

19. On this point, Directive 2010/24 is very clear. Article 14(4) states that recovery measures should be suspended, as far as the contested part of the claim is concerned, as soon as the requested authority is informed about the contestation lodged in the applicant State. However, the applicant authority may request to continue the recovery measures *"in accordance with the third subparagraph of Article 14(4)".* According to this third subparagraph, the applicant authority may *"in accordance with the laws, regulations and administrative practices in force in the applicant Member State, ask the requested authority to recover a contested claim or the contested part of a claim, in so far as the relevant laws, regulations and administrative practices in force in the requested Member State allow such action."* This provision was introduced in 2001, in order to allow Member States to remedy situations of clear abuse of appeal rights by debtors who only contested claims to avoid recovery.[18] It is to be understood in such a way that (1°) the applicant authority can only request another Member State to continue the recovery of a contested claim if recovery would also be possible, in the same circumstances, in the applicant Member State itself, and (2°) the requested authority can only execute the request to continue the recovery of a contested claim if the tax authorities of the requested Member State would have the same competence with regard to their own contested claims. The EU Directive is thus based on a clear parallel between the competences of the applicant Member State and the competences of the requested Member State. From the point of view of the applicant Member State, this approach is based on the idea that a Member State should not ask another Member State to do more than what would be allowed in the applicant Member State itself. From the point of view of the requested Member State, the request will be executed as if the claim concerned was a claim of the requested Member State, which implies that the requested authority shall make use of the powers and procedures under the laws, regulations or administrative provisions of the requested Member State applying to the same or, in the absence of the same, a similar tax or duty (in accordance with Article 13(1) of Directive 2010/24).

20. The EU approach corresponds to the general rule in other international assistance arrangements.[19] However, the OECD-Council of Europe Convention and the OECD Model Tax Convention appear to admit derogations from this principle.

In this regard, Article 11(2) of the OECD-Council of Europe Convention provides that assistance in tax collection should only be provided for tax claims which form the subject of an instrument permitting their enforcement in the applicant State and, *"unless otherwise agreed between the Parties concerned"*, which are not contested. This provision thus confirms that contracting States may derogate from the normal condition that recovery assistance can only be requested for claims which are not contested.[20] The explanatory report to this Convention explains that such a possibility should make cooperation easier with certain States in which the taxpayers have extensive rights of appeal and ensure that such appeals, which tend to lengthen the procedure, do not prevent recovery of claims.

According to point 16 of the OECD's Commentary on Article 27 of its Model Tax Convention on Income and on Capital, States may wish to have collection assistance (i.e. recovery measures) *"where a revenue claim may be collected in the requesting State notwithstanding the existence of appeal rights even though the requested State's own law prevents collection in that case"*. If a claim can be recovered in the applicant State, even though it is or can still be contested, the requested State may accept to provide recovery assistance for this claim, even though the requested State could not collect and recover its own claims which are or could still be contested.[21]

The above commentaries on these OECD instruments confirm that the acceptance of a request for assistance in tax collection with regard to contested claims, despite the fact that the requested State could not enforce its own contested claims, would require a clear legal basis.[22]

21. Accepting such an obligation to recover a contested claim, irrespective of the possibility to recover the own contested claims, constitutes a clear derogation from the traditional *'dual legislation'* or *'mirror'* approach which implies that the requested

18 See doc. COM(1998) 364, p. 8, nr. 3.1.2.

19 The Nordic agreement on assistance in tax matters goes further as recovery has to be provided if the claim is enforceable in the applicant State. If the law of that applicant State permits recovery of a contested claim, there is no condition of acceptance of the recovery request by the requested State (Art. 14(1) of the Nordic agreement); see M. BERGLUND, *Cross-border Enforcement of Claims in the EU*, Kluwer, Alphen aan den Rijn 2014, 203.

20 Point 113 of the Explanatory Report to this Convention.

21 The OECD Commentary suggests to use the following wording for such an agreement: *'When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State that met the conditions allowing that other State to make a request under this paragraph.'*

22 Cf. A.P. DOURADO and K. ZEMBALA, Article 27, in E. REIMER and A. RUST (eds.) , *Klaus Vogel on Double Taxation Conventions*, Kluwer, Alphen aan den Rijn, 2015, p. 1966, nr. 74.

State can only provide recovery assistance for contested claims if recovery would also be allowed under its own rules, with regard to its own contested claims.

So far, it seems that such special provisions only appear in a few double taxation conventions (and in the Nordic agreement[23]). Most States still consider that it would go too far to provide recovery assistance for contested claims of another State, while recovery of their own contested claims is – or may be – not permitted in their territory.

22. It may be argued that EU Member States would not be allowed to grant recovery assistance for contested claims of other Member States, if they do not have the competence to recover internal claims that are contested, given the general obligation, enshrined in the Treaty on the functioning of the EU, to apply a non-discriminatory treatment to citizens and companies established in another EU Member State. However, this argument could be countered by the defence that the two above situations are different. If the requested Member State would not have the competence to recover its own claims, that rule would also (have to) apply to taxes owed to that requested Member State by residents of other Member States (which would mean that there is no discrimination issue at that level). In so far as the applicant Member State can take recovery measures for its contested claims, a request for recovery which is executed by the requested State, only leads to a geographical extension of the possibility to take recovery measures for these claims of the applicant Member State.

4.2. Respecting the rights of the debtors

23. Anyhow, any arguments in favour of facilitating tax recovery of contested claims should not make us forget the relevance of the fundamental need to protect the rights of the tax debtors.

On this point, it is interesting to note that the Council of Europe also cooperated in writing the OECD-Council of Europe Convention of 1988 and thus apparently accepted the principle that contracting Parties could agree to provide assistance in the collection of contested claims, despite the provision of Article 1 of the First Protocol to the European Convention for the protection of Human Rights. According to this provision:

> *"every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

The correct application of this provision requires balancing human rights issues against conflicting public interests, taking into account the proportionality principle. This means that the deprivation of property must be proportionate to the exception laid down in the second paragraph of this Article.[24]

24. In a judgement of 25 July 2013, the European Court of Human Rights (ECHR) had to decide whether recovery measures can be taken with regard to a contested claim.[25] This case related to a Swedish citizen who had asked his tax inspector to grant respite for the main part of a tax debt. The tax inspector agreed, but due to a lack of communication between the tax inspector and the tax collector, and a lack of diligence of the latter, this respite was not taken into account and the house of the tax debtor was sold at an auction. The tax debtor was evicted from his own house. In this specific case, the ECHR considered that the person concerned was effectively deprived of his property right since the enforcement took place despite the respite granted, due to a lack of communication within the tax administration. The Court however also confirmed that a contestation should not automatically prevent the enforcement of the contested tax claim:

> *"(…) the Court notes that tax debts to the State are enforceable following the Tax Authority's decision on final tax even if there has been a request for reconsideration or an appeal to the administrative courts. Likewise, enforcement measures are not automatically suspended when a debtor appeals against such measures.* W*hile such mechanisms must be considered acceptable and falling within the State's wide margin of appreciation under the second paragraph of Article 1 of Protocol No. 1, the Court considers that it is necessary that they are accompanied by procedural safeguards to ensure that individuals are not put in a position where*

23 See footnote 19.

24 G. MAISTO, *"The Impact of the European Convention on Human Rights on Tax Procedures and Sanctions with Special Reference to Tax Treaties and the EU Arbitration Convention"*, in G. KOFLER, M.POIARES MADURO and P. PISTONE (eds.), *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 384; B. PEETERS, "*The protection of the Right to Property in Article 1 of the First Protocol to the European Human Rights Convention Limiting the Fiscal Power of States*", in *A Vision of Taxes within and outside European Borders*, L. and P. HINNEKENS (eds.), Kluwer, Alphen aan den Rijn 2008, (679), 686.

25 EctHR 25 July 2013, No 27183/04, Rousk v. Sweden.

their appeals are effectively circumscribed and they are unable to protect correctly their interests.

The Court observes that such safeguards exist under Swedish law, inter alia, through the possibility to request the Tax Authority to grant respite from the payment of taxes. If such a request has been granted, no enforcement measures may be taken for the amount covered by the respite. Moreover, a debtor may request the Enforcement Authority to grant deferment of payment or a stay on the enforcement measure." [26]

25. In my view, the basic rule should rather be that recovery of contested claims is generally not in accordance with the States' obligation to respect the taxpayers' property, and recovery of contested claims should rather be conceived as the exception to that general rule.[27] This exception should only be permitted in situations where the contestation is abusive or otherwise unjustified, for example if it is clear that the arguments of the tax debtor are not serious and that his contestation merely seeks to delay the recovery process.[28] This concern is also expressed in Article 14(4), subparagraph 3, of EU Directive 2010/24, which requires that any request to recover contested claims should be reasoned.

Apart from these specific situations, contested tax claims should only be the subject of measures of conservancy, as also referred to in the generally applicable rules of Article 12 of the OECD-Council of Europe Convention and Article 27(4) of the OECD Model Convention.[29] Such measures of conservancy better respect the proportionality principle, insofar as they guarantee the recovery of a contested tax claim, while not having a definitive and possibly irreversible effect on the property of the person concerned. In this regard, it should be underlined that Article 1 of the first Protocol allows tax authorities to "*secure the payment of taxes".* If effective measures of conservancy can be taken, then the payment of the tax is sufficiently "secured". The approach here suggested is more in line with the best practice to give a stronger protection of taxdebtors' rights in all cases associated with stronger powers enjoyed by tax authorities.[30]

26. The same care should be exercised with regard to provisional assessments. Measures of conservancy can normally be requested *"even if the claim is not yet the subject of an instrument permitting enforcement"* (Article 12 of the OECD – Council of Europe Convention; Article 16(1), first subparagraph of Directive 2010/24). Here as well, precautionary measures – and requests to other States for taking such precautionary measures – should not be applied without respect for the right of defence of the tax debtor.[31]

5. Conclusions

The use of precautionary measures is important to guarantee the collection of taxes, particularly in the fight against fraudsters arranging their own insolvency. The efficiency of such measures of conservancy in cross-border situations can be improved.

Within the EU, the recent action to develop and standardise the explanations of requests for precautionary measures is an important step to facilitate the execution of such requests in the requested Member States.

The development of a uniform instrument permitting precautionary measures in the requested Member State would be a further useful step in this process.

At the same time, it is necessary to protect the legitimate interests of the tax debtors and to guarantee their right of defence against the use of such measures. This right should be respected, particularly in situations of recovery of contested claims and in situaties where precautionary measures are taken with regard to provisional tax assessments.

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26 Point 117 of this judgement.

27 In a particular case, it was confirmed that this provision of the first Protocol is not violated if tax authorities seize goods to secure the payment of outstanding tax liabilities. The case related to Swedish citizens who requested for permission to remove currency from Sweden. The tax authorities however refused this permission, since the persons concerned had outstanding tax liabilities. The authorities seized their bank accounts and a pension. Their application to the ECHR was declared inadmissible. The decision rejecting their application did not make it clear whether the tax claims were still contested, nor whether the seizure was applied as a measure of conservancy or as a definitieve recovery measure (EcomHR 6 may 1985, No. 120653/83, S. v. Sweden).

28 Cf. I. DE TROYER, *De invordering van belastingen in grensoverschrijdende situaties*, Intersentia, Antwerpen – Oxford, 2009, 371.

29 The use of such measures of conservancy can be requested "even" if the claim is contested or is not yet the subject of an instrument permitting enforcement (Article 12 of the OECD-Council of Europe Convention and Article 27(4) of the OECD Model Convention).

30 See P. BAKER and P. PISTONE, "*General report*", in "*The practical protection of taxpayers' fundamental rights*, IFA congress, 2015, p. 57.

31 On this point, the Explanatory Report to the OECD-Council of Europe Convention (point 115) should be disapproved insofar as it seems to allow countries to ask for recovery of provisional assessments (even though this explanatory report does not recommend such requests: *'It is clear therefore that States should exercise care in asking for assistance in the recovery of tax charged under provisional assessments. In such circumstances, it might be more appropriate to ask for measures of conservancy.'*).

CASE LAW

EU

Court of Justice

Sparkasse Allgäu/Finanzamt Kempten

14 April 2016

C-522/14

Guarantees for tax collection – Obligation for credit institutions to notify the tax authorities of deceased customers' assets in view of collection of inheritance tax – Application to branches established in another EU Member State

Summary

German legislation required credit institutions to notify the tax authorities of deceased customers' assets for purposes related to the collection of inheritance tax. This legislation also applied to branches established in other Member States, such as Ausria. In Austria, banking secrecy prohibited, in principle, the disclosure of such information.

The EU Court of Justice decided that, under EU law as it applied at the time of the facts in the main proceedings, and in the absence of any harmonising measure in relation to the exchange of information for the requirements of fiscal supervision, Member States were free to impose on national credit institutions an obligation concerning their branches operating abroad, such as that at issue in the main proceedings, with the objective of ensuring the effectiveness of fiscal supervision, on condition that the transactions carried out in those branches were not treated in a manner that was discriminatory in comparison with transactions carried out by their national branches.

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in proceedings between Sparkasse Allgäu and Finanzamt Kempten (Kempten tax office) concerning the refusal of that credit institution to disclose to the Kempten tax office information relating to the accounts held with its dependent branch established in Austria by persons who, at the time of their death, had their place of residence for tax purposes in Germany.

Legal context

EU law

Directive 2006/48/EC

3 Article 23 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ 2006 L 177, p. 1), reads as follows:

> *'The Member States shall provide that the activities listed in Annex I may be carried on within their territories, in accordance with Articles 25, 26(1) to (3), 28(1) and (2) and 29 to 37 either by the establishment of a branch or by way of the provision of services, by any credit institution authorised and supervised by the competent authorities of another Member State, provided that such activities are covered by the authorisation.'*

4 The activities referred to in Annex I to Directive 2006/48 include 'acceptance of deposits and other repayable funds'.

5 Article 31 of that directive states:

> *'Articles 29 and 30 shall not affect the power of host Member States to take appropriate measures to prevent or to punish irregularities committed within their territories which are contrary to the legal rules they have adopted in the interests of the general good. This shall include the possibility of preventing offending credit institutions from initiating further transactions within their territories.'*

Directive 2011/16/EU

6 Article 8(3a) of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive 2014/107/EU of 9 December 2014 (OJ 2014 L 359, p. 1), ('Directive 2011/16') provides:

> *'Each Member State shall take the necessary measures to require its Reporting Financial Institutions to perform the reporting and due diligence rules included in Annexes I and II and to ensure effective implementation of, and compliance with, such rules in accordance with Section IX of Annex I.*
>
> *Pursuant to the applicable reporting and due diligence rules contained in Annexes I and II, the competent authority of each Member State shall, by automatic exchange, communicate within the deadline laid down in point (b) of paragraph 6 to the competent authority of any other Member State, the following information regarding taxable periods as from 1 January 2016 concerning a Reportable Account:*

(a) the name, address, [tax identification number(s) (TIN)] and date and place of birth (in the case of an individual) of each Reportable Person that is an Account Holder of the account and, in the case of any Entity that is an Account Holder and that, after application of due diligence rules consistent with the Annexes, is identified as having one or more Controlling Persons that is a Reportable Person, the name, address, and TIN(s) of the Entity and the name, address, TIN(s) and date and place of birth of each Reportable Person;

(b) the account number (or functional equivalent in the absence of an account number);

(c) the name and identifying number (if any) of the Reporting Financial Institution;

(d) the account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account;

…'

7 Pursuant to point D(1) of section VIII of Annex I to Directive 2011/16, the term 'Reportable Account' means, inter alia, a financial account that is maintained by a reporting financial institution of a Member State and is held by one or more reportable persons, provided that it has been identified as such pursuant to the due diligence procedures described in Sections II through VII of that annex.

German law

8 Under Paragraph 33(1) of the Law on Inheritance Tax and Gift Tax (Erbschaftsteuer- und Schenkungsteuergesetz; 'the ErbStG'), any person who engages by way of business in the custody or management of third-party assets is required to notify, in writing, the tax office responsible for the administration of inheritance tax of those assets in his custody and those claims directed against him which, at the time of the death of the owner of those assets, formed part of the latter's estate.

Austrian law

9 Under Paragraph 9(1) and (7) of the Law on Banking (Bankwesengesetz; 'the BWG'), branches of credit institutions which have their head office in other Member States may pursue activities within the territory of the Republic of Austria but are required to comply with a number of provisions of Austrian law, including those set out in Paragraph 38 of the BWG.

10 Paragraph 38 of the BWG is worded as follows:

'1. Credit institutions, their members, officers, employees and persons otherwise acting on behalf of credit institutions shall not disclose or exploit secrets which are entrusted or made accessible to them solely by reason of their business relations with customers … (banking secrecy)…

2. There shall be no obligation to maintain banking secrecy:

…

(5) where the customer gives express written consent to disclosure of the secret;

…'

11 Paragraph 101 of the BWG provides for criminal penalties in the event of a breach of banking secrecy.

The dispute in the main proceedings and the question referred for a preliminary ruling

12 Sparkasse Allgäu is a credit institution within the meaning of Directive 2006/48 which operates pursuant to an authorisation issued by the German authorities. It operates, inter alia, a dependent branch in Austria.

13 On 25 September 2008 the Kempten tax office asked Sparkasse Allgäu to supply it with the information referred to in Paragraph 33 of the ErbStG, for the period from 1 January 2001, in relation to clients of its branch established in Austria who were resident in Germany at the time of their death.

14 Sparkasse Allgäu lodged an appeal against that decision, but the appeal was dismissed, as was the subsequent action brought by Sparkasse Allgäu before the court of first instance. In those circumstances, the appellant in the main proceedings appealed on a point of law ('Revision') to the Bundesfinanzhof (Federal Finance Court).

15 The referring court expresses uncertainty as to whether Paragraph 33(1) of the ErbStG restricts the freedom of establishment even though the notification obligation laid down in that provision applies in the same way to all German credit institutions. According to the referring court, that requirement has the result that German credit institutions may be deterred from exercising, by means of a branch office, commercial operations in Austria. However, the referring court is also unsure (i) whether a restriction on the freedom of establishment may also arise from the combined effect of the legislation of the Member State in which the credit institution's head office is situated, namely the Federal Republic of Germany, and the legislation of the Member State in which the branch is situated, namely the Republic of Austria, and (ii) to which Member State such a restriction must be attributed.

16 It was in those circumstances that the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the freedom of establishment (Article 49 TFEU, formerly Article 43 EC) preclude a provision in a Member State under which a credit institution established in its national territory must, on the death of a domestic testator, also notify the tax office responsible for the administration of inheritance tax in the national territory of those of the testator's assets which are held or managed in a dependent branch of the credit institution in another Member State, where there is no similar notification obligation in the other Member State and credit institutions in that State are subject to banking secrecy any breach of which constitutes a criminal offence?'

The question referred for a preliminary ruling

17 By its question, the referring court essentially asks whether Article 49 TFEU must be interpreted as precluding legislation of a Member State which requires credit institutions having their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and the credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence.

18 As a preliminary point, it should be noted that Article 49 TFEU requires the elimination of restrictions on freedom of establishment. According to this provision, freedom of establishment for nationals of one Member State in the territory of another Member State includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State of establishment. The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State (see, inter alia, judgments in *Commission* v *France*, 270/83, EU:C:1986:37, paragraph 13; *Royal Bank of Scotland*, C-311/97, EU:C:1999:216, paragraph 22; and *CLT-UFA*, C-253/03, EU:C:2006:129, paragraph 13).

19 Under the second paragraph of Article 54 TFEU, legal persons governed by public law, save for those which are non-profit-making, also constitute companies or firms to which Article 49 TFEU applies. According to the information provided by the referring court, Sparkasse Allgäu is a legal person governed by public law to which Article 49 TFEU is applicable.

20 It is settled case-law that, even though, according to their wording, the provisions of the FEU Treaty on freedom of establishment are aimed at ensuring the benefit of national treatment in the host Member State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated in accordance with its legislation (judgment in *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 33 and the case-law cited).

21 Further, it should also be borne in mind that, under Paragraph 33(1) of the ErbStG, any person who engages by way of business in the custody or management of third-party assets is required to notify, in writing, the tax office responsible for the administration of inheritance tax of those assets in his custody and those claims directed against him which, at the time of the death of the owner of those assets, formed part of the latter's estate.

22 That provision is drafted in general terms and does not make any distinction on the basis of the location in which the custody or management of the third-party assets to which it relates takes place. Consequently, the appellant in the main proceedings, which is a legal person established under German law and has its head office in Germany, is subject to the obligations arising from that provision not only with respect to the accounts held by its various agencies and branches established in Germany, but also with respect to accounts opened at its dependent branch established in Austria.

23 The referring court raises the question of whether the activity of a German credit institution which has opened a branch in Austria is impeded by reason of both the requirement to transmit information set out in Paragraph 33(1) of the ErbStG and the requirement to respect banking secrecy in Austria laid down by Paragraph 38(2) and Paragraph 101 of the BWG. In that regard, the referring court observes that, in order to comply with those two requirements, a credit institution in the position of the appellant in the main proceedings is obliged, under Paragraph 38(2)(5) of the BWG, to seek its clients' consent to the possible transmission of information concerning them to the German authorities. The requirement of such consent might, in its view, lead potential clients of the Austrian branch of such a credit institution to have recourse to Austrian banks or Austrian subsidiaries of German banks inasmuch as neither of these are subject to a similar obligation to divulge information.

24 While it is not inconceivable that Paragraph 33(1) of the ErbStG might deter credit institutions established in Germany from opening branches in Austria, inasmuch as compliance with that obligation would place them at a disadvantage simply because they would then be subject to an obligation which is not imposed on credit institutions established in Austria, it nevertheless cannot be concluded that the existence of that obligation is liable to be classified as a restriction on freedom of establishment for the purposes of Article 49 TFEU.

25 In the light of the information supplied by the referring court, it must be held that, in circumstances such as those at issue in the main proceedings, the adverse consequences which might arise from an obligation such as that laid down in Paragraph 33(1) of the ErbStG result from the exercise in parallel by two Member States of their powers (i) in regard to regulating the obligations of banks and other credit institutions towards their clients with regard to maintaining banking secrecy and (ii) of fiscal supervision (see, to that effect, judgments in *Kerckhaert and Morres*, C-513/04, EU:C:2006:713, paragraph 20; *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraph 43; and *CIBA*, C-96/08, EU:C:2010:185, paragraph 25).

26 More specifically, under German law, compliance with banking secrecy cannot take precedence over the need to ensure that fiscal supervision is effective, for which reason Paragraph 33(1) of the ErbStG imposes, in the circumstances which it covers, an obligation to forward information to the tax authorities without the consent of the account holder concerned. By contrast, Austrian law, under Paragraph 38 of the BWG, has made the opposite choice, namely that banking secrecy must, in principle, be maintained in all regards, including with regard to the tax authorities.

27 It is true that a bilateral agreement concluded between the two Member States concerned, as well as measures taken at EU level, such as the mandatory automatic exchange of information provided for in Article 8(3a) of Directive 2011/16, ensure administrative cooperation in the field of taxation and therefore, in circumstances such as those in the main proceedings, make it easier for the German tax authorities to obtain the information concerned by the measure at issue in the main proceedings.

28 The referring court observes, however, that, even though there is an agreement providing for the exchange of information relating to tax matters, which was concluded between the Federal Republic of Germany and the Republic of Austria and entered into force on 1 March 2012, that agreement applies only to tax years or assessment periods beginning on or after 1 January 2011, and therefore does not apply to the request sent by the Kempten tax office to Sparkasse Allgäu. Likewise, Directive 2011/16 was adopted only after the facts which gave rise to the action in the main proceedings.

29 It must therefore be held that, under EU law as it applied at the time of the facts in the main proceedings, and in the absence of any harmonising measure in relation to the exchange of information for the requirements of fiscal supervision, Member States were free to impose on national credit institutions an obligation concerning their branches operating abroad, such as that at issue in the main proceedings, with the objective of ensuring the effectiveness of fiscal supervision, on condition that the transactions carried out in those branches are not treated in a manner that is discriminatory in comparison with transactions carried out by their national branches (see, to that effect, judgment in *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraphs 51 and 53, and order in *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C-439/07 and C-499/07, EU:C:2009:339, paragraph 80).

30 As has already been noted in paragraph 22 above, Paragraph 33(1) of the ErbStG applies, according to its wording, to credit institutions which have their head office in Germany, with regard to transactions carried out both in Germany and in other Member States.

31 The mere fact that a notification obligation, such as that at issue in the main proceedings, is not prescribed by Austrian law cannot lead to the conclusion that the Federal Republic of Germany is precluded from imposing such an obligation. It follows from the Court's case-law that freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules and, in particular, a notification obligation such as that at issue in the main proceedings on the basis of those in another Member State in order to ensure, in all circumstances, that any disparities arising from national rules are removed (see, to that effect, judgments in *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraph 51, and *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 62).

32 In view of all of the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as not precluding legislation of a Member State which requires credit institutions having their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence.

On those grounds, the Court (Third Chamber) hereby rules:

Article 49 TFEU must be interpreted as not precluding legislation of a Member State which requires credit institutions having their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence

EU

Court of Justice

Brisal and KBC Finance Ireland

13 July 2016

C-18/15

Guarantees for tax collection – Obligation to apply a withholding tax to the interest paid to non-resident financial institutions – No corresponding obligation if the recipient is a resident company – Can be justified to ensure effective tax collection – Application only in so far as necessary – Restriction of the deduction of directly related business expenses not necessary to ensure the effective collection of income tax

Summary

Article Article 49 EC must be interpreted as not precluding national legislation under which a procedure for withholding tax at source is applied to the income of non-resident financial institutions in the Member State in which the services are provided, whereas the income received by financial institutions resident in that Member State is not subject to such withholding tax, provided that the application to the non-resident financial institutions of the withholding tax is justified by an overriding reason in the general interest and does not go beyond what is necessary to attain the objective pursued (points 21-22)

Article 49 EC however precludes national legislation which, as a general rule, taxes non-resident financial institutions on the interest income received within the Member State concerned, without giving them the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions.

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU.

2 The request has been made in proceedings between, on the one hand, Brisal – Auto Estradas do Litoral SA ('Brisal'), established in Portugal, and KBC Finance Ireland ('KBC'), a bank established in Ireland, and, on the other, the Fazenda Pública (State Treasury, Portugal), concerning the calculation of corporation tax ('IRC') on interest received by KBC and the collection of that tax at source.

Legal context

Portuguese Law

3 Under Article 4(2) of the Código do Imposto sobre o Rendimento das Pessoas Colectivas (Corporation Tax Code), approved by Decreto-Lei No 442-B/88 (Decree-Law No 442-B/88) of 30 November 1988 (*Diário da República* I, Series I-A, No 277, of 30 November 1988), as amended by Decreto-Lei No 211/2005 (Decree-Law No 211/2005) of 7 December 2005 (*Diário da República* I, Series I-A, No 234 of 7 December 2005) ('the CIRC'), legal persons and other entities which have neither their headquarters nor their place of actual management in Portuguese territory are subject to IRC only in respect of income obtained in that territory. Under Article 4(3)(c) of the CIRC, such income includes interest paid by debtors who are resident, or who have their headquarters or place of actual management, in Portuguese territory, or the payment of which is attributable to a permanent establishment in that State.

4 In the absence of a convention for the avoidance of double taxation, under Article 80(2)(c) of the CIRC such income is taxed, as a rule, at a rate of 20%, and the taxable amount is made up of the gross income received in Portugal. IRC is, in accordance with Article 88(1)(c), Article 88(3)(b) and Article 88(5) of the CIRC, levied by way of definitive retention at source.

5 Income from interest received by resident financial institutions is, by virtue of Article 80(1) of the CIRC, taxed at 25%. However, the taxable amount is made up only of the net amount of the interest received. Furthermore, in accordance with Article 90(1)(a) of the CIRC, IRC, in respect of those financial institutions, is not levied by retention at source.

The double taxation convention between the Portuguese Republic and Ireland

6 Article 11 of the Convenção entre a República Portuguesa e a Irlanda para Evitar a Dupla Tributação e Prevenir a Evasão Fiscal em Matéria de Impostos sobre o Rendimento (Convention between Ireland and the Portuguese Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income), concluded in Dublin on 1 June 1993 (*Diário da República* I, Series I-A, No 144, of 24 June 1994, p. 3310), provides:

> *'1 — Interest received in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
>
> *2 — However, such interest may also be taxed in the Contracting State in which it arises, and in accordance with the laws of that State, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 15 percent of the gross amount of such interest.*

The competent authorities of the Contracting States shall, by mutual agreement, settle the mode of application of this limitation.

…'

The facts in the main proceedings and the questions referred for a preliminary ruling

7 On 30 September 2004, Brisal entered into an external financing agreement, known as *Loan, Bond and Guarantee Facilities,* in the amount of EUR 262 726 055, designed to guarantee the performance of all the activities covered by a concession contract previously concluded with the Portuguese State. That external financing agreement was concluded with a syndicate of banks, some of which were resident solely in Portuguese territory.

8 On 29 March 2005, that syndicate was extended to other financial institutions, including KBC, by means of a transfer of contract.

9 As regards the part of the contract relating to KBC, Brisal withheld at source, and paid to the Portuguese State, the sum of EUR 59 386 by way of IRC. That amount was calculated on the basis of interest accrued in favour of KBC between September 2005 and September 2007 and totalling EUR 350 806.07.

10 On 28 September 2007, Brisal and KBC brought an administrative appeal before the relevant tax authority in which they sought a review of that taxation on the ground that it contravened Article 56 TFEU.

11 Following the dismissal of that administrative appeal, Brisal and KBC brought an application before the Tribunal Administrativo e Fiscal de Sintra (Sintra Administrative and Tax Court, Portugal), which was also unsuccessful. That court took the view that it was clear from the judgment of 22 December 2008 in *Truck Center* (C-282/07, EU:C:2008:762) that the fact that national legislation makes provision for treating resident companies and non-resident companies differently with regard to the obligation to withhold income tax at source does not, in itself, constitute an infringement of the principle of freedom to provide services, since those two categories of companies are not in an objectively comparable situation. That court also added that the Court of Justice had already dismissed an action for failure to fulfil obligations brought by the European Commission against the Portuguese Republic, an action which was based on the same grounds as those relied on by Brisal and KBC in the dispute in the main proceedings.

12 In support of the appeal brought before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), Brisal and KBC claim that the interest received in Portugal by non-resident financial institutions is subject to a withholding tax at a definitive rate of 20%, or at a lower rate if there is an agreement to avoid double taxation — a rate that is applied to gross income — whereas interest received by resident financial institutions, which is not subject to withholding tax, is taxed on its net value at the rate of 25%. Non-resident financial institutions are therefore subject to a heavier tax burden than are resident financial institutions, something which, they submit, is contrary to the freedom to provide services and to the free movement of capital, provided for, respectively, in Articles 56 and 63 TFEU.

13 The Supremo Tribunal Administrativo (Supreme Administrative Court) states that the dispute in the main proceedings concerns the freedom to provide services and that the restrictive effects on the free movement of capital and the freedom of payments are merely the direct and natural consequence of possible restrictions on the freedom to provide services. It is therefore, in its view, appropriate only to examine whether Article 80(2)(c) of the CIRC is compatible with Article 56 TFEU, as interpreted by the Court, in particular in its judgments of 12 June 2003 in *Gerritse* (C-234/01, EU:C:2003:340), 3 October 2006 in *FKP Scorpio Konzertproduktionen* (C-290/04, EU:C:2006:630), and 15 February 2007 in *Centro Equestre da Lezíria Grande* (C-345/04, EU:C:2007:96).

14 In the opinion of that court, it is necessary to refer, not to the judgment of 22 December 2008 in *Truck Center* (C-282/07, EU:C:2008:762), in order to resolve the present case, but rather to the judgment of 12 June 2003 in *Gerritse* (C-234/01, EU:C:2003:340). However, although the rationale of that latter judgment may be regarded as having similarities with the rationale at issue in the case in the main proceedings here, the Court has not, in the view of the referring court, given an express ruling on the taxation of cross-border interest payments involving financial institutions.

15 The question therefore remains open, in the view of the referring court, as to whether resident financial institutions and non-resident financial institutions are in a comparable situation, and whether the taxation in question must take into account, for both, the costs of financing loans granted or the expenses directly related to the economic activity carried out, and, if so, as to what is the difference which can lead to the conclusion that non-resident institutions are actually in a less favourable situation compared with resident institutions. That issue, in its opinion, was also not dealt with in the judgment of 17 June 2010 in *Commission* v *Portugal* (C-105/08, EU:C:2010:345).

16 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 56 TFEU preclude national tax legislation under which financial institutions not

resident in Portuguese territory are subject to tax on interest income received in that territory, withheld at source at the definitive rate of 20% (or at a lower rate if there is an agreement to avoid double taxation), a tax applied to gross income with no possibility of deducting business expenses directly related to the financial activity carried out, whereas the interest received by resident financial institutions is incorporated in the total taxable income, with deduction of any expenses related to the activity pursued when determining the profit for the purposes of [IRC], so that the basic rate of 25% is applied to the net interest income?

(2) Does the same hold good even if the tax base of resident financial institutions, after deduction of the financing costs related to the interest income, or of expenses directly related, economically, to such income, is or may be subject to a higher tax than is deducted at source from the gross income of non-resident institutions?

(3) For this purpose, can the financing costs associated with the loans granted, or the expenses directly related, economically, to the interest income received, be proved by the data provided by the Euribor (Euro Interbank Offered Rate) and by the Libor (London Interbank Offered Rate), which represent the average interest rates charged on interbank financing used by banks to carry out their activity?'

Consideration of the questions referred for a preliminary ruling

17 It must be stated at the outset that, given that the facts at issue in the main proceedings took place before 1 December 2009, that is to say, before the entry into force of the FEU Treaty, the interpretation sought by the referring court must be regarded as concerning Article 49 EC, and not Article 56 TFEU.

18 By its questions, which it is appropriate to consider together, the referring court asks, in essence, first, whether Article 49 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings, which taxes non-resident financial institutions by means of withholding tax on income from interest received inside the country with no possibility of deducting business expenses, whereas resident financial institutions are not subject to such withhol ding tax and may deduct business expenses directly related to the financial activity pursued, and secondly, how those expenses should be determined.

19 In order to answer those questions, it is necessary, first of all, to examine whether Article 49 EC precludes national legislation under which withholding tax is applied to the income of non-resident financial institutions, whereas the income received by resident financial institutions is not subject to such tax. Next, it is necessary to determine whether the fact that non-residents, unlike residents, cannot deduct business expenses directly related to the financial activity in question constitutes a restriction for the purposes of that provision, and, if so, whether such a restriction can be justified. Finally, it is necessary to determine whether average interest rates such as those referred to in the request for a preliminary ruling can be regarded as constituting business expenses directly related to the financial activity in question.

20 As regards the first of those issues, it is clear from the request for a preliminary ruling that the referring court itself takes the view that the difference in treatment at issue in the main proceedings does not stem so much from the application of two different taxation methods as from the refusal to allow non-resident financial institutions the opportunity to deduct business expenses, whereas resident financial institutions do have that opportunity. Moreover, the file submitted to the Court does not contain any other information relating to that first aspect of the order for reference.

21 In those circumstances**,** suffice it to recall, as the Advocate General stated in point 22 of her Opinion, that it is clear from the case-law of the Court that the application of withholding tax, as a method of taxation, to non-resident service providers, when resident service providers are not subject to such tax, whilst constituting a restriction on the freedom to provide services, may be justified by overriding reasons in the general interest, such as the need to ensure the effective collection of tax (see, to that effect, judgments of 3 October 2006 in *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 35, and 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 39).

22 Therefore, Article 49 EC must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which a procedure for withholding tax at source is applied to the income of non-resident financial institutions in the Member State in which the services are provided, whereas the income received by financial institutions resident in that Member State is not subject to such withholding tax, provided that the application to the non-resident financial institutions of the withholding tax is justified by an overriding reason in the general interest and does not go beyond what is necessary to attain the objective pursued.

23 As regards the second aspect of the request for a preliminary ruling, it must be recalled that the Court has already held, in relation to the deduction of business expenses which have a direct connection to the activity pursued, that resident providers and non-resident providers are in a comparable situation (see, to that effect, judgments of 12 June 2003 in *Gerritse*, C-234/01, EU:C:2003:340, paragraph 27; 6 July 2006 in *Conijn*, C-346/04, EU:C:2006:445, paragraph 20; and 15 February 2007 in *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 23).

24 The Court concluded that Article 49 EC precludes national tax legislation which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses (judgments of 12 June 2003 in *Gerritse*, C-234/01, EU:C:2003:340, paragraphs 29 and 55; 3 October 2006 in *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 42; and 15 February 2007 in *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 23).

25 In the present case, in view of the argument, relied on in particular by the Portuguese Government, that the provision of services by financial institutions should, in the light of the principle of the freedom to provide services referred to in Article 49 EC, as a matter of principle, be treated differently from the provision of services in other areas of activity, given that it would be impossible to establish any characteristic link between costs incurred and interest income received, the referring court is unsure whether the case-law cited in the preceding paragraph can be applied to the case in the main proceedings.

26 In that regard, it must be pointed out that the Court has not established any distinction between the different categories of services. In addition, Article 49 EC, read in conjunction with Article 50 EC, refers, without distinction, to all the categories of services listed in the latter provision. Only Article 51(2) EC provides that the liberalisation of banking services connected with movements of capital is to be effected in step with the liberalisation of the movement of capital. The provisions of the EC Treaty on the free movement of capital do not contain anything to support the argument that banking services should be treated differently from other services due to the fact that it is impossible to establish any characteristic link between costs incurred and interest income received.

27 Consequently, the services provided by financial institutions cannot, in the light of the principle of the freedom to provide services referred to in Article 49 EC, as a matter of principle, be treated differently from the provision of services in other areas of activity.

28 It follows that national legislation, such as that at issue in the main proceedings, under which non-resident financial institutions are taxed on the interest income received within the Member State concerned, without giving them the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions, constitutes a restriction on the freedom to provide services which is prohibited, as a rule, by Article 49 EC.

29 However, in accordance with settled case-law of the Court, a restriction on the freedom to provide services may be permitted if it is justified by overriding reasons in the public interest. Even if that were so, the application of that restriction would still have to be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (judgment of 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 36).

30 It is appropriate therefore to determine whether a restriction such as that at issue in the main proceedings can be validly justified by the reasons relied on in the present case.

31 In that regard, first, it is clear from the order for reference that the justification put forward before the national court is derived from the fact that a more favourable tax rate is applied to non-resident financial institutions than the one which is applied to resident financial institutions.

32 However, the Court has repeatedly held that unfavourable tax treatment contrary to a fundamental freedom cannot be regarded as compatible with EU law because of the potential existence of other advantages (see, to that effect, judgments of 1 July 2010 in *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 41, and 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 31).

33 It follows that a restriction on the freedom to provide services, such as that at issue in the main proceedings, cannot be justified by the fact that non-resident financial institutions are subject to a tax rate which is lower than the rate for resident financial institutions.

34 Secondly, in the proceedings before the Court, the Portuguese Republic argued that the legislation at issue in the main proceedings is justified by the need to preserve a balanced allocation of taxation powers between the Member States, by the desire to prevent the double taxation of the business expenses at issue and by the need to ensure the effective collection of tax.

35 As regards, first, the balanced allocation of taxation powers between Member States, it should be borne in mind that the Court has, admittedly, accepted that the preservation of the balanced allocation of taxation powers between Member States constitutes a legitimate objective and that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, with a view to eliminating double taxation (judgment of 21 May 2015 in *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 42).

36 However, it is also clear from the case-law of the Court that, where Member States make use of that freedom and determine the connecting factors for the allocation of fiscal jurisdiction in bilateral conventions for the avoidance of double taxation, they are required to respect the principle of equal treatment and the freedoms of movement guaranteed by primary EU law

(see, to that effect, judgment of 19 November 2015 in *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 37).

37 As the Advocate General has stated in points 59 to 62 of her Opinion, there is in the present case nothing which can explain in what way the allocation of taxation powers require that non-resident financial institutions, with regard to the deduction of business expenses directly related to their taxable income in that Member State, must be treated less favourably than resident financial institutions.

38 Secondly, as regards the desire to prevent double deduction of business expenses, which may be linked to the fight against tax evasion, suffice it to state that, by merely relying on, without further clarification, the potential risk that the expenses in question may be deducted a second time in the State of residence of the service provider, without establishing how that risk was not prevented by the implementation of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), in force at the time of the facts at issue in the main proceedings, the Portuguese Republic does not make it possible for the Court to assess the scope of that argument (see, to that effect, judgment of 24 February 2015 in *Grünewald*, C-559/13, EU:C:2015:109, paragraph 52).

39 Thirdly, as regards the need to ensure the effective collection of tax, it must be recalled that, although the Court has held that such an objective constitutes an overriding reason of public interest, capable of justifying a restriction on the freedom to provide services (see, inter alia, judgments of 3 October 2006 in *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraphs 35 and 36, and 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 39), that restriction must still be applied in such a way as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (judgment of 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 36).

40 With regard to a restriction such as that at issue in the main proceedings, it is important to note that such a restriction is not necessary to ensure the effective collection of IRC.

41 As the Advocate General stated in points 70 to 72 of her Opinion, it must first be pointed out that the argument advanced by the Portuguese Republic, to the effect that giving taxpayers with limited liability the opportunity to deduct business expenses directly related to the services provided in the territory of that Member State would give rise to an administrative burden for the national tax authorities, also applies, *mutatis mutandis*, in the case of taxpayers with unlimited liability.

42 Next, the additional administrative burden which may fall on the recipient of the service, where the latter must enter into the accounts the business expenses which the service provider seeks to deduct, exists only in a system which provides that that deduction must be made before withholding tax is applied and may therefore be avoided in the case where the service provider is authorised to claim its right to deduction directly from the authorities once IRC has been levied. In such a case, the right to deduct will take the form of a reimbursement of a fraction of the tax withheld at source.

43 Finally, it is for the service provider to decide whether it is appropriate to invest resources in drawing up and translating documents intended to demonstrate the genuineness and the actual amount of the business expenses which it seeks to deduct.

44 With regard to the third aspect of the request for a preliminary ruling, that is to say, how to determine the business expenses directly related to interest income arising from a financial loan agreement such as that at issue in the main proceedings, it must be recalled that the Court has held that a Member State which grants residents the opportunity to deduct such expenses may not, in principle, preclude the deduction of those same expenses for non-residents (judgment of 15 February 2007 in *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 23).

45 It follows that, as regards the account to be taken of those expenses, non-residents must, in principle, be treated in the same way as residents and must be able to deduct the same expenses as those which residents are allowed to deduct.

46 Furthermore, it is clear from the case-law of the Court that business expenses directly related to the income received in the Member State in which the activity is pursued must be understood as expenses occasioned by the activity in question, and therefore necessary for pursuing that activity (see, to that effect, judgment of 24 February 2015 in *Grünewald*, C-559/13, EU:C:2015:109, paragraph 30 and the case-law cited).

47 With regard to the service at issue in the main proceedings, that is to say, the granting of a loan, it must be noted that the performance of that service necessarily gives rise to business expenses such as, for example, travel and accommodation expenses, and legal or tax advice, for which it is relatively easy both to establish the direct link with the loan in question and to prove the actual amount involved. Since taxpayers with limited liability must be able to enjoy the same treatment as taxpayers with unlimited liability, they must be granted, as regards those expenses, the same opportunities to make deductions, whilst being subject to the same requirements as regards, in particular, the burden of proof.

48 It is important to add that the pursuit of that activity also occasions financing costs which must, in

principle, be regarded as necessary to the pursuit of that activity, but in respect of which it may prove more difficult to establish a direct link with a given loan or the actual amount involved. The same is true, as the Advocate General stated in point 39 of her Opinion, as regards the fraction of the general expenses of the financial institution which may be regarded as necessary for the granting of a particular loan.

49 Nevertheless, the mere fact that that evidence is more difficult to provide cannot authorise a Member State to deny categorically to non-residents, as taxpayers with limited liability, a deduction which it grants to residents, as taxpayers with unlimited liability, given that it cannot *a priori* be ruled out that a non-resident is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the business expenses in respect of which deduction is sought (see, by analogy, judgments of 27 January 2009 in *Persche*, C-318/07, EU:C:2009:33, paragraph 53, and 26 May 2016 in *Kohll and Kohll-Schlesser*, C-300/15, EU:C:2016:361, paragraph 55).

50 Nothing prevents the tax authorities concerned from requiring a non-resident to provide such proof as they may consider necessary in order to determine whether the conditions for deducting expenses provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested (see, by analogy, judgments of 27 January 2009 in *Persche*, C-318/07, EU:C:2009:33, paragraph 54, and 26 May 2016 in *Kohll and Kohll-Schlesser*, C-300/15, EU:C:2016:361, paragraph 56).

51 In that context, it must be noted that the Portuguese Government did not provide any indication of the reasons which might prevent the national tax authorities from taking into account evidence provided by non-resident financial institutions.

52 It is for the referring court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the main proceedings, first, which of the expenses claimed by KBC may be regarded as business expenses directly related to the financial activity in question for the purposes of national legislation, and secondly, what is the fraction of the general expenses which may be regarded as directly related to that activity (see, by analogy, judgment of 15 February 2007 in *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 26).

53 In that regard, it is appropriate to add that, unless national legislation authorises resident financial institutions to use, in the calculation of the financing costs incurred, interest rates such as those mentioned by the referring court in its third question for a preliminary ruling, that court cannot take those rates into account in a situation such as that at issue in the main proceedings.

54 Those rates constitute only average rates charged in the context of interbank financing and do not correspond to the financing costs actually incurred. Furthermore, as is apparent from the file submitted to the Court, the loan at issue in the main proceedings was not financed exclusively by funds borrowed from KBC's parent company and other banks, but was also financed through funds deposited by KBC's clients.

55 Therefore, in light of all the foregoing considerations, the answer to the questions referred for a preliminary ruling is that:

– Article 49 EC does not preclude national legislation under which a procedure for withholding tax at source is applied to the income of financial institutions that are not resident in the Member State in which the services are provided, whereas the income received by financial institutions that are resident in that Member State is not subject to such withholding tax, provided that the application of the withholding tax to the non-resident financial institutions is justified by an overriding reason in the general interest and does not go beyond what is necessary to attain the objective pursued;

– Article 49 EC precludes national legislation, such as that at issue in the main proceedings, which, as a general rule, taxes non-resident financial institutions on the interest income received within the Member State concerned without giving them the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions;

– it is for the national court to assess, on the basis of its national law, which business expenses may be regarded as being directly related to the activity in question.

On those grounds, the Court (Fifth Chamber), hereby rules:

Article 49 EC does not preclude national legislation under which a procedure for withholding tax at source is applied to the income of financial institutions that are not resident in the Member State in which the services are provided, whereas the income received by financial institutions that are resident in that Member State is not subject to such withholding tax, provided that the application of the withholding tax to the non-resident financial institutions is justified by an overriding reason in the general interest and does not go beyond what is necessary to attain the objective pursued.

Article 49 EC precludes national legislation, such as that at issue in the main proceedings, which, as a general rule, taxes non-resident financial institutions on the interest income received within the Member State concerned without giving them the opportunity

to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions.

It is for the national court to assess, on the basis of its national law, which business expenses may be regarded as being directly related to the activity in question.

Germany

Administrative Court (Verwaltungsgericht) Berlin

X.

27 August 2014

Case number: VG 23 L 410.14

Deterrent measures – Freedom to travel – Withdrawal of a passport – Justified because of substantial tax arrears, the easily possible relocation of the applicant's residence to a foreign country and his inconsistent information concerning his domicile

Summary

The withdrawal of a passport is justified in a situation where it can be assumed that the tax debtor will escape from his substantial tax debts by moving abroad, taking into account the easily possible relocation of his residence to a foreign country and his inconsistent information concerning his domicile.

Summary of the considerations and the decision of the judgement

In 2009 the applicant was convicted of tax evasion in 17 cases, of attempted tax evasion in two cases and of complicity in tax evasion in 22 cases. He was convicted by the Court (Landgericht) of Mannheim to three years' imprisonment. Five months after the suspension of the remaining custodial sentence in 2010 the applicant deregistered for the Netherlands and started to establish a business advertising with the take-over of points registered because of traffic offences within Germany's Federal Motor Vehicle And Transport Authority in Flensburg. Therefore, the applicant feigns a third – in fact non existing – person for the real driver, who accuses itself untruthfully for this traffic offence and in that way takes over the aforementioned points. Since December 2011 the applicant held a passport of the Federal Republic of Germany. In March 2013 the Tax Office in Mannheim received an e-mail reporting the applicant's business as well as the fact that he realizes an average profit of € 500,-- per case; on the assumption of 500 cases per year, the applicant was estimated to reach earnings of about € 250.000 per year.

Due to this criminal report Mannheim Tax Office asked the State Office for Residents' and Regulatory Affairs to issue a withdrawal of the applicant's passport as well as the immediate seizure. The Tax Office justified this application by presenting all the applicant's unpaid tax debts and arguing, that the applicant – also holding a Swiss bank-account – escaped from his tax obligations. In April 2014 the above mentioned State Office issued the withdrawal of the passport and also limited the validity of the applicant's ID card by revoking the normally corresponding right to leave the country. The immediate seizure was issued; the State Office for Residents' and Regulatory Affairs stated the measures as appropriate and necessary to urge the applicant to pay his tax debts. Because of the fact that an official residence in Germany was unknown, the administrative decision was notified by public notification; furthermore the police was asked to publish it within the secured border-crossing records.

When the applicant entered Germany coming from Thailand he was forwarded the decision of the State Office for Residents' and Regulatory Affairs, and his passport was seized. He appealed against that measure arguing he wouldn't have sufficient resources to pay his debt, furthermore an enforced stay in Germany would not lead to a realization of the public claims as it wouldn't increase the existing assets. The State Office rejected the applicant's appeal, so he filed a suit at the administrative court (Verwaltungs-gericht) of Berlin. Again he emphasized to have no motif for leaving the country as he would possess no assets; so, the causal relation between a real or intentional stay abroad and tax payment obligations would not exist. The only motif for his stay in Thailand would be the low living expenses.

The administrative court of Berlin considered the public interest in an execution of the decision concerning tax obligations outweighed the applicant's interest to be spared from execution for the time being. The legal basis for withdrawing a passport was Section 8 of the Passport Act (Passgesetz). According to this provision, a passport can be withdrawn if facts become known that would justify the refusal to issue a passport. Due to Section 7 par. 1 nr. 4 of the Passport Act, the administration has to refuse from issuing a passport if certain facts justify the assumption, that the applicant for a passport will escape himself from his tax paying obligations. The administrative court of Berlin regarded these conditions as fulfilled:

1) Withdrawal of a passport requires, from an objective view, that substantial tax arrears result from enforceable tax assessments not being manifestly unlawful; final or even legally binding assessments are not necessary. It was clear that the applicant had substantial tax arrears. The court also considered the applicant's argument of a writing-off of tax collection on an earlier occasion due to Section 261 of the Tax Code (Abgabenordnung) as unsuccessful. This provision entitles tax administration to write off

claims arising from the tax debtor-creditor relationship where it is clear that collection will not lead to the desired result or where the costs of collection are not in proportion to the amount. But writing off tax debts does not constitute a subjective right of the debtor on a temporary or total dispense of enforcement measures. It follows from the internal character of this writing-off that enforcement can be resumed until the tax claim's prescription. After all, the applicant's assertion of being sufficiently poor was considered to be implausible due to the fact that he owned three Swiss bank accounts receiving incoming payments.

2) As far as Section 7 par. 1 nr. 4 of the Passport Act requires - from an subjective view – an intention on tax evasion, the administrative court considered this as "*easily to affirm*". For this conclusion not only the intention of the applicant not to return to Germany in the foreseeable future is relevant. Rather, a causal relation between tax obligations and the envisaged further residence abroad must be given in a way that facts justify the assumption that the tax debtor would escape himself from his obligations respectively intends to aggravate or prevent the tax administration's access to his assets. According to settled case law, even a substantial amount of tax arrears indicates an intention on tax evasion, whereby a substantial amount of tax arrears would already be given at about 60.000 Euro (while the applicant's outstanding tax debts amounted to approximately 532.000 Euro). The court also observed that another indication would be the easily possible relocation of the applicant's residence to a foreign country together with his inconsistent information concerning his abode. By the establishment of numerous national and international (fictional) domiciles the applicant could be characterized as a highly mobile person who was easily able to adapt and cover up his domicile situationally. The applicant's argument, a movement of domiciles would have been necessary to uncover new revenue opportunities respectively to benefit from low living expenses was qualified as a purely self-serving assertion by the court. Not least, the fact that the applicant runned his business of taking over Flensburg-points under a false name was considered to matter in that context by the court as such dishonest conduct would facilitate to escape from tax obligations.

The administrative court of Berlin confirmed the administrative decision in this case, as the interests of Germany on the fulfilment of tax obligations were weighed up against the freedom to travel by giving precedence to the former. It also confirmed the interest in an immediate enforcement of the passport-withdrawal due to the "*enormous importance of tax liability*".

Netherlands

District Court Netherlands North (Groningen)

X. located in Portugal v. Tax authorities, tax office Groningen

31 March 2015

Case number: LEE 15/925
ECLI:NL:RBNNE:2015:1496

Guarantees for tax collection – Deferred payment of disputed tax debts of a foreign company – Condition to lodge a security for the full amount – No threat to the continuity of the company in the residence State

Summary

A Portuguese company with business activities in the Netherlands contested its tax debts in the Netherlands and requested to defer the payment of these contested claims. The deferral was refused by the tax authorities, since he did not lodge a security to the full amount of the contested claims. The tax debtor subsequently asked the tax court to suspend collection and recovery measures in general.

The interim relief judge considers that he is only competent to adopt the provisional measure sought by the debtor if the tax notices are clearly erroneous or unjustified. Moreover, the judge first has to assess whether the debtor has an urgent interest in the adoption of the interim measure. In the judge's view, this is not the case. As long as the claims are disputed, the Netherlands' tax authorities cannot request Portugal to provide recovery assistance. The company does not show that its continuity in Portugal is threatened. As the company fails to demonstrate any urgency, its request is dismissed.

Judgment of the interim relief judge on the application for an interim injunction in the case between
X, located in Portugal, the applicant,
and
the tax authorities, office Groningen, the defendant

Procedure

On 28 February 2014 the defendant issued the applicant for the years 2009, 2010 and 2011 notices of payroll taxes in the amount of respectively EUR 1.776.606, EUR 1.858.744 and EUR 1.309.258. At the same time as these notices, the defendant also charged interest on arrears, for respectively EUR 198.313, EUR 161.013 and EUR 78.228. In addition, the defendant has imposed penalties of respectively EUR 888.303, EUR 929.372 and EUR 654.629.
The applicant objected to all these amounts.
By letter of 11 March 2015, the applicant asked the interim relief judge to issue an interim injunction.
The hearing took place on 19 March 2015. The applicant was represented by its agents. The respondent was represented by his authorised representative, assisted by [...].

Considerations

1. The judgment of the court hearing the application for interim measures has a provisional character and is not binding on the Court of First Instance which will decide on the contestation itself.

2. The applicant asked the interim relief judge to suspend the legal effects produced by the contested notices and decisions imposing the taxes, interest and fines (hereinafter together referred to as "the notices") as long as the outcome of the contestation was not definitively established.

3. The applicant is located in [location] in Portugal and has offices at [address] at [place]. In the years 2009 to 2011, the applicant carried out construction projects in the Netherlands. The applicant was responsible for withholding payroll taxes in respect of the work carried out in the Netherlands by its own employees.

4. Officers of the tax authorities (office Rotterdam) have made an audit in connection with a construction project, on the construction project site at [...], relating to the acceptability of the payroll tax declarations for the years 2009, 2010 and 2011. The contested notices of additional assessment are the result of this audit.

5. On 14 March 2014, the applicant requested a deferral of payment of the adjustment notices. On the same day, the Director of the applicant made a declaration of inability to pay these notices.

6. On 9 April 2014, the applicant lodged a complaint against the notices. This complaint was rejected by the defendant.

7. The tax collector of the Tax Department in Rotterdam by letter of 16 May 2014 informed the applicant that he was prepared to defer payment of the notices. This postponement was however subject to the condition that the applicant lodged a security for the full amount of the notices, and this security had to be easily made, monitored and sold. Since the discussions between the tax collector and the

applicant demonstrated that this security could not be provided, the tax collector, by decision of 28 July 2014, rejected the request for deferment of payment.

8. The applicant lodged an administrative appeal against the decision of the tax collector refusing to defer payment. The Director of the Tax Department rejected this appeal on 17 November 2014.

9. On 24 February 2015, the tax collector served the documents to start recovery measures. The costs related to this service amounted to EUR 34.419.

Competence of the Court hearing the application for interim measures

10. The applicant submits in its pleadings that the application for an interim injunction is directed against the legal effect of the notices. The applicant considers that the Court has jurisdiction to examine this request. The defendant contends that the court hearing the application for interim measures is not entitled to rule on an application for an interim injunction in respect of decisions refusing a payment deferral. (…)

11. The Court shares the defendant's view that it is not competent to rule on an application for a provisional measure on tax authorities' decisions relating to payment deferrals. However, the present application for interim measures is not expressly directed against a decision of the tax collector or the director refusing the deferment of payment of the tax. As the applicant has pointed out, the request for an interim injunction is directed solely against the effects of the recovery notices.

12. The interim relief judge considers that the applicant has objected to the notices and that the defendant is examining this objection. Once the defendant's decision on this objection is taken, the applicant will have the possibility to appeal to the tax court. Therefore, the Court has jurisdiction to rule on the application for an interim measure on the notices of additional assessment.

(…)

14. The interim relief judge recognises that the applicant's request for a suspension of the effects of the adjustment notices implies a request for deferral of payment of these adjustment notices. Although this would actually be a recovery issue, the interim relief judge takes the view that it has the possibility in principle to adopt the provisional measure sought. This can, however, only if the Court finds that the notices are clearly erroneous or unjustified (see the ruling of 12 March 2003 by the Court of The Hague, 02/4900, ECLI:NL:GHSGR:2003:AV4371). This review could, also in view of the fact that the case is still in the objection phase, only be marginal.

Urgency?

15. Before the Court hearing the application for interim measures proceeds with the marginal review of the legality of the notices of additional assessment, it must first be assessed whether the applicant has an urgency in the adoption of the interim measures requested by this applicant. Such an urgency is not obvious in the case of a financial dispute, as in the present case. Adopting a provisional measure may however be considered if the financial interest would result in acute financial problems or if the continuity of the company was threatened.

16. The applicant submits that there is an urgency. In its view, the threat of recovery makes it impossible for the company to carry out further projects in the Netherlands. The applicant runs the risk that its property in the Netherlands is seized. This impedes the applicant in its business in the Netherlands, according to the applicant. In addition, the applicant claims that there is urgency, given the increasing costs of recovery which, according to the applicant, cannot be addressed in proceedings before the civil courts.

17. The interim relief judge considers, in line with the observations of the applicant, that as long as the notices are still disputed, no recovery of these notices is possible in Portugal, on the basis of Directive 2010/24/EU on mutual assistance for the recovery of claims relating to taxes, duties and other measuresl. Thus, the continuity of the applicant's company in the short term in Portugal is not threatened. To that extent, there is no urgency.

18. As was discussed at the hearing, the tax collector in the Netherlands may have the possibility to take immediate measures in order to recover the tax, even if these notices are not yet definitively established. At the hearing, the agent for the tax collector stated that in principle he will not make use of this possibility, if damage would be caused to the applicant. However, the tax collector's representative at the hearing could not confirm that no recovery action will be taken if the company would start new business activity in the Netherlands. On this basis, the court hearing the application for interim measures, decides that there is a risk that recovery measures are taken in the Netherlands, for example in the form of seizures of the company's properties in this country. However, even if it can be assumed that this will refrain the applicant from starting new projects in the Netherlands, the applicant has not shown that this mere fact constitutes a direct threat to the continuity of the applicant company established in Portugal. For example, it has not even alleged or demonstrated that the (re) launching of entrepreneurial activity in the Netherlands is of crucial importance for the company as a whole. Therefore, it has not been shown that the continuity of the applicant's undertaking in Portugal is under threat and there is no urgency.

19. In the opinion of the judge hearing applications for interim relief, it is not apparent why the growing recovery costs constitute an acute financial emergency or a direct threat to the continuity of the applicant's company. The Court hearing the application for interim measures observes that the applicant has the opportunity to use legal remedies against the prosecution costs charged by the tax collector, on the basis of Article 7 of the law on tax recovery costs.

20. The foregoing observations lead to the conclusion that the applicant has failed to show that it has an urgent interest in the provisional measure sought by it. The court hearing the application for interim measures therefore dismisses the application.

Decision

The court rejects the application for an interim injunction.

Germany

Federal Tax Court (Bundesfinanzhof)

X. v. German tax authorities

24 February 2015 – VII R 1/14

Case number: LEE 15/925

International recovery assistance – (1) Administrative penalties for late filing and late payment of a tax covered by the EU legislation on tax recovery assistance – (2) Distribution of competences not allowing the requested authority to review the substantive correctness of the claim and the enforceability of the instrument permitting enforcement –
Notification of tax claims – Direct notification by the applicant authority – Language of the notification - Effectiveness to be assessed under the legislation of the applicant State, without review by the requested authority

Summary

The Czech tax authorities imposed administrative penalities for late filing and late payment of a tax in the Czech Republic. These penalties were due by a person in Germany. The notification of the Czech claim was done directly by the Czech authorities, in their own language.

The German Court rejected the arguments invoked by this German debtor. The Court held:

(1) that the recovery assistance, established in accordance with the EU Directive, also applies to penalties for late filing or late payment of taxes;

(2) that it was not for the German tax authorities nor for the German Tax Court to examine the correctness of the claim and the enforceability of the instrument permitting enforcement;

(3) that the effectiveness of the direct notification by the Czech authorities could, in principle, only be reviewed by the Czech authorities, in accordance with Czech laws..

The appeal by the applicant against the judgment of Saxony Tax Court of 27 November 2013 is rejected as unfounded.

[1] Reasons: I. The plaintiff and appellant (hereinafter 'the applicant') appeals to the deicison of the Tax Court, which dismissed his application and stated that the enforcement of a request for recovery from the Czech Republic is (only) inadmissible as long as the applicant authority does not submit the original or a certified copy of the enforcable title.

[2] It was only in 2004 that the applicant, who was employed in the Czech Republic, filed a tax return in respect of the year 2000 to the Czech tax authorities and paid the tax due. On 21 December 2007 the Czech tax office decided to issue a payment order imposing a tax fine. This decision was sent to the applicant in the Czech language on 2 January 2008. It was sent by post, by registered letter with acknowledgement of receipt, to his address in Germany. The applicant lodged an objection against this "payment order concerning the tax fine from 21. December 2007", claiming that he had no knowledge of the Czech language. He argued that measures against him were unlawful on the ground that he had no knowledge of the content of the letter of the Czech tax authorities, so that he was unable to defend himself.

[3] In January 2009, the German tax authorities informed him that the Ministry of Finance of the Czech Republic had requested the German tax authorities to provide recovery assistance with regard to this debt.

[4] The German tax authorities, by enforcement notice of 30 January 2009, requested the applicant to pay the debt of EUR [...] for which the assistance request was sent. The applicant's repeated submissions against the enforcement or the writ of execution, at the level of the German tax authorities and the Czech authorities, were unsuccessful. Finally, the Czech Ministry of Finance asked again for continuation of recovery of the claim. The claim was considered to be legally binding and the outstanding fine for the delay in payment of income tax for 2000 in the sum of CZK [...] was not paid yet.

(...)

[6] By letter of 12 February 2010, the Tax Office rejected the applicant's request to refrain from the recovery until all decisions of the Czech authorities were translated into German. The Tax Office attached to its decision a statement from the Czech tax authorities - in German – which referred to the binding effect of the refusal decision and the end of the procedure, given the fact that the applicant did not timely undertake any action to remedy to his declaration failure.
[7] the Tax Office dismissed the appeal against the decision of the Tax Office to reject the application for protection against the enforcement.

[8] An action was brought against that decision, asking the Tax Court to declare that the recovery of the claim from the decision of 21 December 2007, on the basis of the Czech Republic's request for recovery of 10 November 2008, was inadmissible. This action was

only successful in so far as, in the absence of an official or certified copy of the enforcement order of the requesting authority, the recovery was declared inadmissible because of violation of § 4 subparagraph 1 sentence 1 No 1 of the Law on recovery assistance within the European Community, until the requesting authority submitted the instrument permitting enforcement in a lawful form. The Tax Court dismissed the remainder of the action. (…).

[9] In support of his appeal, the applicant complains that the recovery was not fully declared inadmissible by the Tax Court. He also relies on the fact that:
— the service of a 'decision' which was done in the Czech language, without attaching a translation in the official language of the location of the requested authority, was invalid, so that an essential enforcement condition – the effective service of the enforceable title – was lacking;
— the enforcement was inadmissible on the ground that the claim for which enforcement was sought was time-barred and, consequently, extinguished (in accordance with § 257 in conjunction with § 232 of the German Tax Code);
— the enforcement of a fine was not possible on the basis of the recovery assistance rules of the European Community;
— an agreement on a final settlement of the tax case had been reached with the Czech tax authorities, which at least in the sense of a pactum de non petendo could also be invoked against the enforcement;
— the requesting authority had made false declarations in its request for recovery assistance.

[10] The applicant requests the Court to set aside the judgment of the Tax Court and declare that the enforcement of the recovery request of the Czech Republic of 10 November 2008 is inadmissible.

[11] The Tax Office requests to dismiss the appeal.

[12] It shares the Tax Court's view and also explains that the enforcement order is now available in its original version.

[13] II. The appeal is unfounded. The judgment of the tax court is in line with the federal law (§ 118 subparagraph 1 sentence 1 of the decision of the Tax Court).

[14] 1. Contrary to the view taken by the applicant, the Tax Court's reasoning that enforcement of the request for recovery of the Czech Republic of 10 November 2008 is inadmissible until the instrument of the requesting authority is available in a lawfully admitted form, is not open to criticism. (…)

[15] In relation to the determination of the illegality of the recovery that can be expected on the basis of the recovery request enforcement, the Federal Tax Court considers that there is no reason to contest the decision of the Tax Court, which declares that the recovery is inadmissible because of the non-fulfilment of the procedural requirement set out in § 4 subparagraph 1 sentence 1 No 1 of the Law on recovery assistance within the European Community – because of the lack of an official of certified copy of the payment order of 21 December 2007 – and which adds that this only applies until this defect has been rectified. It is not clear how to understand the state of uncertainty, which is invoked by the applicant. The applicant overlooks the fact that, in the absence of recovery measures so far, there is not yet any interference with his legal position which may and should have been declared inadmissible. However, as this defect is remedied by the submission of the payment order in the form required by the law, there is no legitimate interest in a completely new request for recovery.

[16] 2. In addition, the objections raised by the applicant against the decision of the Tax Court cannot be upheld.

[17] (a) The Tax Court has held, in an unobjectionable way, that the Czech tax authorities requested enforcement of a claim for which mutual recovery assistance can be granted under the Law on recovery assistance within the European Community. It has been rightly pointed out that this law applies to all claims relating to – inter alia – income taxes, in particular also to penalties for late filing or late payment, as confirmed by the case law of the Federal Tax Court (judgment of the Federal Tax Court (Bundesfinanzhof) of 21 July 2009, VII R 52/08, BFHE 226, 102, BStBl II 2010, 51).

[18] The Federal Tax Court also agrees with the assessment of the Tax Court that the claim does not relate to a penalty of a criminal nature, not covered by the Law on recovery assistance within the European Community, even if the request for recovery and the Czech payment order use the term 'financial penalty" (literal translation into German). According to the findings of the Tax Court this concerns an accessory claim assessed by the administrative authority dependent on the delay in payment of the principal debt. With regard to the statement of reasons, reference is further made to the convincing arguments of the Tax Court.

[19] (b) The other objections raised by the applicant against the Tax Court decision cannot be accepted neither.

[20] The Federal Tax Court follows the opinion of the Tax Court, that:
- the alleged ineffective notification of the payment order to the applicant (because of the lack of translation into German),
- the contestation of this payment order by the applicant,
- the supposed agreement with the Czech tax authorities on a longer payment period, and

- the prescription of the claim,
should not, in principle, be examined by the German tax authorities, nor by the German Tax Court, due to the provisions on allocation of competences, laid down in Art. 12 para. 1 to 3 of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties (Official Journal of the European Communities No L 73/18) and Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (Official Journal of the European Union No L 150/28). According to the case-law of the Federal Tax Court and of the Court of Justice of the European Union (judgment of 3 November 2010 VII R 21/10, BFHE 231, 500, BStBl II 2011, 401; ECJ judgment of 14 January 2010 in Case C 233/08, Kyrian [2010] ECR I 177), the distribution of competences does not, in principle, allow the requested authority – in this case the German tax authorities – to review the substantive correctness of the claim and the enforceability of the instrument permitting enforcement.

[21] The responsibility for checking the effectiveness and regularity of the announcement or notification of the enforcement order also resides with the authority which has made the announcement or notification. If the authority which requests recovery assistance did not ask for notification assistance under the Directive, but – as in this case – sent the enforcement order by postal means, by registered letter with acknowledgment of delivery, in principle, that authority has to review this annoucement or notification in accordance with its national laws (as now confirmed by Art. 14, par. 1 and 2 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ N° L 84/1), which entered into force on 1 January 2012, implemented by the national law).

[22] The present case is not an exceptional case in which the execution of the recovery request in Germany would lead to an interference with public policy. With regard to the arguments based on the case-law of the European Court of Justice (in the Kyrian case [2010] ECR I-177), there is no need to further address the applicant's arguments, given the reasoning of the Tax Court. Although the appeal relies on the above ECJ ruling to support its argument that the payment order had to be notified in German, the applicant has in no way examined the relevant arguments of the Tax Court, that the present case is different from that of the ECJ, as – unlike in the European Court of Justice case – the Czech authorities carried out a direct service to the applicant, the effectiveness of which has to be assessed under Czech law, and that, therefore, review by the requested authority is not possible.