European Union

*Karin Simader**

Withholding Taxes and the Effectiveness of Fiscal Supervision and Tax Collection

This article discusses some issues raised in IFA/EU Seminar G "The death of withholding taxes?" at the 63rd Congress of the International Fiscal Association, held in Vancouver, Canada on 2 September 2009. It focuses on the possible justification of withholding taxes based on the effectiveness of fiscal supervision and tax collection.

1. IFA/EU Seminar "The Death of Withholding Taxes?"[1]

At the 2009 IFA Congress in Vancouver, a special IFA/EU Seminar was held on the topic of withholding taxes. The panellists discussed whether or not EC law allows for the levying of withholding taxes and how Member States must draft their withholding regimes in order to comply with EC law. Special emphasis was also placed on third-country relationships and the extent to which these differ from intra-Community situations with regard to withholding taxes. As a result of various recent judgements of the European Court of Justice (ECJ), the subject of the seminar was very topical.[2] The following contribution, therefore, focuses on the question of whether or not withholding taxes that discriminate against non-residents may be justified by the effectiveness of fiscal supervision and the need to ensure the effective collection of taxes.

2. Withholding Taxes and the Fundamental Freedoms

Withholding taxes are part of the national tax systems of many Member States. In cross-border situations, in particular, withholding taxes are often levied to ensure the collection of taxes. If non-residents are taxed by way of a withholding, whilst residents are taxed by way of a tax assessment, cash flow disadvantages may arise. Withholding taxes are also typically withheld by the payment debtor, who is also liable for the tax payment in the event of non-compliance. In addition, withholding taxes are frequently levied at a flat rate and on a gross basis. If these characteristics of withholding taxes lead to an unfavourable treatment or a higher tax burden for non-residents than for residents, discrimination, which is prohibited by the fundamental freedoms, might arise. Due to the discriminatory effects of withholding taxes, the ECJ has considered the compatibility of withholding taxes with EC law in various cases in recent years.

In *Denkavit Internationaal* (C-170/05),[3] *Amurta* (C-379/05)[4] and *Aberdeen* (C-303/07),[5] the ECJ held that EC law prohibits the levying of withholding taxes. All three cases dealt with the taxation of dividends. According to the national provisions in question, economic double taxation was avoided for domestic dividends, but not for outbound dividends. Consequently, whilst outbound dividends were taxed by way of a withholding, no taxes were due on domestic dividends. This lead to discrimination, not only in terms of taxation by way of a withholding, but also with regard to the taxation itself.[6] Accordingly, the ECJ did not accept any justification for the discrimination in these cases.

The ECJ has reached a different conclusion in cases where both residents and non-residents were taxed, but a withholding tax was only levied on cross-border payments. In *Scorpio* (C-290/04)[7] and *Truck Center* (C-282/07),[8] the ECJ had to elaborate on the comparability between residents and non-residents and the justification for discrimination with regard to withholding taxes. In both cases, the ECJ found that the withholding tax did not infringe EC law because of the need to ensure the effective collection of taxes. In *Truck Center*, the ECJ held that residents and non-residents are not in a comparable situation based on three arguments. The first argument related to the position of Belgium as the residence or source state,[9] the second argument related

* **Research Associate, Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business). The author can be contacted at Karin.Simader@wu.ac.at.**

1. The seminar was chaired by Prof. Michael Lang (WU, Vienna University of Economics and Business, Austria). Participants included Prof. Ana Paula Dourado (University of Lisbon, Portugal), Marek Herm (Raidla Lejins & Norcous, Tallinn, Estonia), Hal Hicks (Skadden, Arps, Slate, Meagher & Flom LLP, Washington DC, United States), Uwe Ihli (European Commission), Prof. Eric Kemmeren (University of Tilburg, the Netherlands) and Karin Simader (panel secretary, Austria).
2. The ECJ decided several cases on withholding taxes in 2008 and 2009: Case C-540/07, *Commission v. Italy* (19 November 2009); Case C-303/07, *Aberdeen* (18 June 2009); Case C-521/07, *Commission v. Netherlands* (11 June 2009); and Case C-282/07, *Truck Center* (22 December 2008). Several infringement procedures regarding withholding taxes were also pending at the time of writing this article: Case C-284/09, *Commission v. Germany*; Case C-487/08, *Commission v. Spain*; and Case C-105/08, *Commission v. Portugal*.
3. Case C-170/05, *Denkavit Internationaal* (14 December 2006).
4. Case C-379/05, *Amurta* (8 November 2007).
5. Case C-303/07, *Aberdeen* (18 June 2009).
6. See also Garabedian and Malherbe, "Cross-Border Dividend Taxation: Testing the Belgian Rules against the ECJ Case law (or Testing the ECJ Case Law against the Belgian Rules)", in Hinnekens and Hinnekens (eds.), *A Vision of Taxes within and outside European Borders. Festschrift in Honor of Prof. Dr. Frans Vanistendael* (Alphen aan den Rijn: Kluwer Law International, 2008), p. 406 and Zimmer, "Withholding Taxes in the EU and the EEA", *Tax Notes International* (2008), p. 668 et seq.
7. Case C-290/04, *Scorpio* (3 October 2006).
8. Case C-282/07, *Truck Center* (22 December 2008).
9. C-282/07, *Truck Center*, Para. 42. For a critique of the case see Lang, "Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions", *EC Tax Review* (2009), p. 100; Englisch, "*Truck Center*. Withholding tax on intercompany interest derived by non-resident companies compatible with freedom of establishment. ECJ", *Highlights & Insights* 2 (2009), p. 49; and de Broe and Bammens, "Belgian Withholding Tax on Inter-

to the difference in the taxes charged[10] and the third argument for finding that residents and non-residents were not comparable was based on the difference in their situation with regard to the recovery of taxes.[11] A slightly different result was achieved in *Scorpio*, although the substantial outcome was the same. The ECJ recognized the comparability of residents and non-residents and, therefore, found that, due to a difference in treatment, there was discrimination under the freedom to provide services.[12] In the next step, however, the ECJ accepted the justification of the need to ensure the effective collection of taxes. As a result, the withholding tax was regarded as compatible with EC law.[13]

3. The Relevance of Mutual Assistance in ECJ Case Law

The effectiveness of fiscal supervision and the need to ensure the effective collection of taxes have been advanced as justifications for discrimination in numerous ECJ cases.[14] Member States have tried to justify unfavourable treatment of non-residents on the basis that the possibilities for legal action are limited in other Member States. This is due to the restricted sovereignty of the Member States, which is limited to their territory. The justification of the effectiveness of fiscal supervision has its roots in non-tax cases.[15] Following its judgement in *Bachmann* (C-204/90),[16] the ECJ accepted this justification on several occasions in direct tax cases.[17] Despite its acceptance on the merits, however, the ECJ has repeatedly held that the effectiveness of fiscal supervision cannot be accepted as a justification when the Mutual Assistance Directive[18] applies:

> Under Directive 77/799, the competent authorities of a Member State may always request the competent authorities of another Member State to provide them with all the information enabling them to ascertain, in relation to the legislation which they have to apply, the correct amount of revenue tax payable by a taxpayer having his residence in that other Member State.[19]

In addition to mutual administrative assistance, the participation of the taxpayer was another argument presented by the ECJ to deny the justification of the effectiveness of fiscal supervision. In *Commission v. Denmark* (C-150/04),[20] the ECJ did not accept the less favourable treatment of non-resident taxpayers, which Denmark tried to justify on the basis of the requested Member State's possibility to deny mutual assistance under the Mutual Assistance Directive:

> The fact that Article 8(1) of the Directive imposes no obligation on the tax authorities of Member States to collaborate where the conditions laid down in that provision are met cannot justify the lack of deductibility or exemption of contributions paid to pension schemes. There is nothing to prevent the ... tax authorities from demanding from the person involved such proof as they consider necessary and, where appropriate, from refusing to allow deduction or exemption where such proof is not forthcoming (see, to that effect, *Bachmann*, paragraphs 18 and 20, and Case 300/90 *Commission* v *Belgium*, paragraphs 11 and 13).[21]

In addition, even in cases where the Mutual Assistance Directive did not apply, the ECJ did not accept this as a justification for discrimination. In *Geurts and Vogten* (C-464/05),[22] an inheritance tax case, the ECJ concluded the following:

> Further, as for the Belgian Government's argument regarding the need to maintain the effectiveness of fiscal supervision on account of the fact that 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 (OJ 1977 L 336, p. 15) does not apply to inheritance tax, it suffices to point out that that difficulty cannot justify the categorical refusal to grant the tax benefits in question since the tax authorities could request the taxpayers concerned to provide themselves the evidence which the authorities consider necessary to be fully satisfied that those benefits are granted only where the jobs in question fulfil the criteria set out under national law (see, to that effect, Case C-451/05 *Elisa* [2007] ECR I-0000, paragraph 98).[23]

The same reasoning was applied by the ECJ in *A* (C-101/05),[24] where the Court concluded that the non-applicability of the Mutual Assistance Directive to third countries did not justify treating third-country residents unfavourably. Specifically, the ECJ held that:

> even if it proves difficult to verify the information provided by the taxpayer ... there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (see, to that effect, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 20; Case C-150/04 *Commission* v *Denmark* [2007] ECR I-

est Payments to Non-resident Companies Does Not Violate EC Law: A Critical Look at the ECJ's Judgment in Truck Center", *EC Tax Review* (2009), p. 135.

10. C-282/07, *Truck Center*, Para. 43, For a critique, see Lang, supra note 9, p. 100 and Englisch, supra note 9, p. 49.
11. C-282/07, *Truck Center*, Para. 47. The same reasoning was applied by Advocate-General Léger in Advocate-General's Opinion, C-290/04, *Scorpio* (16 May 2006), Para. 47.
12. C-290/04, *Scorpio*, Para. 34.
13. Id., Para. 35.
14. See, for example, Case C-204/90, *Bachmann* (28 January 1992); Case C-1/93, *Halliburton* (12 April 1994); Case C-279/93, *Schumacker* (14 February 1995); Case C-80/94, *Wielockx* (11 August 1995); Case C-250/95, *Futura Participations* (15 May 1997); Case C-136/00, *Danner* (3 October 2002); Case C-470/04, *N* (7 September 2006); Case C-196/04, *Cadbury Schweppes* (12 September 2006); Case C-386/04, *Stauffer* (14 September 2006); C-290/04, *Scorpio*; Case C-520/04, *Turpeinen* (9 November 2006); Case C-347/04, *Rewe Zentralfinanz eG* (29 March 2007); Case C-464/05, *Geurts and Vogten* (25 October 2007); and Case C-318/07, *Persche* (27 January 2009).
15. Case 120/78, *Rewe Zentral AG* (20 February 1979).
16. Case C-204/90, *Bachmann* (28 January 1992).
17. C-204/90, *Bachmann*. See further C-250/95, *Futura Participations*; Case C-254/97, *Baxter* (8 July 1999); and Case C-39/04, *Laboratoires Fournier* (10 March 2005).
18. 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.
19. C-250/95, *Futura Participations*, Para. 41. See also C-386/04, *Stauffer*, Para. 50; C-347/04, *ReweZentralfinanz eG*, Para. 56; Case C-451/05, *ELISA* (11 October 2007), Para. 92; Case C-527/06, *Renneberg* (16 October 2008), Para. 78; and C-318/07, *Persche*, Para. 61.
20. Case C-150/04, *Commission v. Denmark* (30 January 2007).
21. C-150/04, *Commission v. Denmark*, Para. 54. See also Case C-55/98, *Bent Vestergaard* (28 October 1999), Paras. 25-26; C-204/90, *Bachmann*, Para. 20; C-136/00, *Danner*, Para. 52; Case C-422/01, *Skandia* (26 June 2003), Para. 43; C-39/04, *Laboratoires Fournier*, Para. 25; and C-347/04, *Rewe Zentralfinanz eG*, Para. 57.
22. Case C-464/05, *Geurts and Vogten* (25 October 2007).
23. C-464/05, *Geurts and Vogten*, Para. 28. See also Case C-360/06, *Bauer* (2 October 2008), Para. 41.
24. Case C-101/05, *A* (18 December 2007).

> 1163, paragraph 54; and Case C-451/05 *ELISA* [2007] ECR I-0000, paragraphs 94 and 95).[25]

To summarize, the justification of the effectiveness of fiscal supervision was not accepted in cases where the tax authorities could rely on the mutual assistance of another Member State or the relevant information could be requested from the taxpayer. With regard to the exchange of information, the taxpayer will often want to provide the relevant information to the tax authorities. As far as withholding taxes are concerned, however, there is not only a need for the exchange of information, but also for assistance in the recovery of taxes. Of course, with regard to the collection of taxes, the taxpayer cannot be counted on to cooperate. Accordingly, the argument that the taxpayer can provide information when the Mutual Assistance Directive does not apply does not pertain to the problem of tax collection. Consequently, it is reasonable for the ECJ to accept the justification of the effective collection of taxes with regard to discrimination relating to withholding taxes where mutual assistance in the recovery of taxes is not available. It is unclear from the ECJ case law on withholding taxes, however, if discrimination can be justified where instruments for administrative assistance are applicable and whether or not there is a difference between EC law and international law provisions.

4. Mutual Assistance and Withholding Taxes

In *Scorpio*, the ECJ explicitly accepted that the effective collection of taxes serves as a justification for the withholding tax, as:

> at the material time, in 1993, no Community directive or any other instrument referred to in the case-file governed mutual administrative assistance concerning the recovery of tax debts between the Kingdom of the Netherlands and the Federal Republic of Germany.[26]

This leads to the question of whether or not the outcome would have been different if the Directive on Mutual Assistance in the Recovery of Tax Claims[27] or a tax treaty with a provision on mutual assistance for the recovery of tax claims had applied.[28]

In *Turpeinen* (C-520/04),[29] which was decided only one month after *Scorpio*, the ECJ held that the taxation of non-residents by way of a flat withholding tax rate, while residents were taxed by way of assessment at progressive rates, violated EC law. Both the Mutual Assistance Directive and the Directive on Mutual Assistance in the Recovery of Tax Claims applied. Consequently, the ECJ held that "the tax regime at issue in the main proceedings goes beyond what is necessary in order to guarantee effective tax collection".[30]

The outcome was different in *Truck Center*. Here, the ECJ decided that the withholding tax did not infringe EC law, although an instrument governing mutual assistance was available to the Member States involved. As in *Scorpio*, the Directive on Mutual Assistance in the Recovery of Tax Claims was not applicable. However, the Member States involved – Belgium and Luxembourg – had concluded a treaty on mutual assistance in the recovery of tax claims.[31] Advocate-General Kokott concluded in her Opinion that despite the possibility of mutual assistance, taxation by way of assessment is not necessarily less restrictive than taxation by withholding.[32] The ECJ did not even refer to the treaty in its judgement. As noted in 2., the ECJ concluded that residents and non-residents are not in a comparable situation, because of – among other arguments – the differences in the recovery of tax claims.[33] Accordingly, the availability of mutual assistance did not hinder the ECJ from finding that withholding taxes are compatible with EC law.

Considering *Truck Center*, it is questionable whether or not the ECJ has become more reluctant to find that withholding taxes are not compatible with EC law. The outcome in *Truck Center* was, however, probably due to the particular circumstances involved in the case. Accordingly, the judgement should not be regarded as a precedent for other withholding tax cases.[34] In particular, the ECJ did not consider residents and non-residents as comparable. This was not the finding in any of the other cases on withholding taxes. The difference between residents and non-residents concerning the recovery of tax claims was only one of three reasons the ECJ relied on in negating the comparability. Consequently, it cannot be concluded from the decision in *Truck Center* that the need to ensure effective tax collection can serve as a justification for withholding taxes in

25. Id., Para. 58.
26. C-290/04, *Scorpio*, Para. 36.
27. Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties.
28. See also Zimmer, supra note 6, p. 669; Garabedian and Malherbe, supra note 6, p. 407; Molenaar and Grams, "*Scorpio* and the Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union", *European Taxation* 2 (2007), p. 66. The German Supreme Court considered, however, that the withholding tax would still be compatible with EC law under the application of the Directive for Mutual Assistance in the Recovery of Tax Claims. See *BFH*, 29 November 2007, I B 181/07.
29. Case C-520/04, *Turpeinen* (9 November 2006).
30. Id., Para. 35.
31. Convention of 5 September 1952 between the Kingdom of Belgium, the Grand-Duchy of Luxembourg and the Kingdom of the Netherlands on reciprocal assistance for the recovery of tax debts, *moniteur belge*, 6 July 1956 and 23 December 1956.
32. Case C-282/07, Advocate-General's Opinion, *Truck Center* (18 September 2008), Para. 45. The Advocate-General included the administrative burden of the tax authority in the proportionality test. She assumed that it is higher with regard to an assessment than if taxes are levied at withholding. For a critique, see Wathelet and de Broe, "Belgium: The *Eckelkamp*, *Les Vergersdu Vieux Tauves*, *Cobelfret*, *KBC*, *Beleggen Risicokapitaal Beheer*, *Truck Center*, *Damseaux*, *Commission v. Belgium* and *Simeti Engineering* Cases", in Lang, Pistone, Schuch and Staringer (eds.), *ECJ – Recent Developments in Direct Taxation 2008* (Vienna: Linde, 2008), p. 49; de Broe, "Are we Heading towards an Internal Market without Dividend Withholding Tax but with Interest and Royalty Withholding Tax? Some Observations on Advocate-General's Kokott Opinion in *Truck Center*", *EC Tax Review* (2009), p. 3; and Lang, supra note 9, p. 111. Advocate-General Kokott appears to come to the conclusion that the *effective* collection of taxes is not necessarily achieved through administrative assistance.
33. The mere need for mutual assistance makes residents and non-residents not comparable. See de Broe and Bammens, supra note 9, p. 135.
34. See also Englisch, supra note 9, p. 50.

every case, even where instruments for mutual assistance apply.

Another aspect of *Truck Center* is that the ECJ did not consider the mutual assistance treaty between the Member States. This might lead to the conclusion that bilateral or multilateral treaties are not as relevant to the ECJ as EC Directives. The difference in their relevance, in determining whether or not there has been an infringement of EC law, might stem from the fact that the instruments have a different scope – which has to be assessed on a case-by-case basis – or from the differences in their enforceability. The EC Directives are interpreted by the ECJ and their transposition into the national laws of the Member States is monitored by the Commission. Bilateral or multilateral treaties do not enjoy the same level of enforceability.[35] This difference could be very important in cases involving third countries and the free movement of capital, due to the non-application of the Directives on mutual assistance in third-country relationships. The same is also true for cases involving the freedoms of the European Economic Area (EEA) and the EEA Member States (the 27 EU Member States, plus Iceland, Liechtenstein and Norway). Although residents of these states enjoy the same freedoms granted under the EC Treaty, the EC Directives on mutual assistance do not apply.

5. The Third-Country Perspective

Due to the non-application of the Directives on mutual assistance to third countries, it is indisputable that there may be differences between intra-Community cases and third-country cases. Of course, there is an obvious lack of mutual assistance with third countries when there is no tax treaty or similar convention in place, or the tax treaty does not contain a provision on mutual assistance. The exchange of information and mutual assistance in the recovery of taxes may also have a narrower scope under a tax treaty than what is available under the Directives on mutual assistance. Under some tax treaties, only information that is necessary for the application of the treaty can be exchanged. When, however, tax treaties contain articles on the exchange of information and assistance in the collection of taxes in line with Arts. 26 and 27 of the OECD Model Tax Convention (the "OECD Model"), the scope of mutual administrative assistance comes close to that under the Directives on mutual assistance. Accordingly, the question is whether or not the ECJ differentiates between mutual assistance under tax treaties and mutual assistance under Community legislation and, if so, whether or not the difference in relevance is based on a different scope in a particular case or on other factors – for example, the general difference in the enforceability of the instruments.

The ECJ's judgement in *A* does not imply that the ECJ considers Community legislation more relevant than bi- or multilateral treaties on mutual assistance. The ECJ admitted that there is a difference between intra-Community situations and situations where a third country is involved, as they:

> take place in a different legal context ... . It follows that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, in particular, because that third country is not *under any contractual obligation* to provide information, it proves impossible to obtain such information from that country (emphasis added).[36]

The ECJ recognized the importance of mutual assistance. It did not, however, differentiate between *the contractual obligations* and also referred to the Mutual Assistance Directive and the exchange of information under Art. 26 of the OECD Model in one breath.[37] This indifferent referral suggests that the ECJ did not attach a greater value to Community legislation than to instruments of international law.

In the recent infringement procedure against the Netherlands, *Commission v. the Netherlands* (C-521/07),[38] the ECJ had to assess the withholding taxes levied on outbound dividends to third countries and the importance of mutual assistance instruments. The Netherlands tax authorities tried to justify the unfavourable treatment of outbound dividends to Iceland and Norway on the basis of the lack of exchange of information under EC law.[39] As in *Denkavit Internationaal*, *Amurta* and *Aberdeen*, domestic dividends – as well as dividends paid to other Member States – were tax exempt. Accordingly, a justification based on the need to ensure the effective collection of taxes could not be relied on. The Netherlands tax authorities explained, however, that the tax exemption for domestic and intra-Community dividends is subject to certain conditions, which cannot be monitored for companies resident in third countries.[40] This is due to the fact that the Mutual Assistance Directive does not apply to third countries. In addition, contrary to the Mutual Assistance Directive, the fulfilment of obligations under a tax treaty cannot be enforced.[41] Accordingly, there is no guarantee that the relevant information will be exchanged under a tax treaty.

The Commission did not recognize a difference between the instruments:

> On that point, the Commission insists ... that the bilateral conventions concerned are legally binding for those States. Even if it were more difficult to obtain compliance with obligations of international law than compliance, within the Community framework, with obligations arising under Community law, that does not mean that those conventions are irrelevant.[42]

It is remarkable, however, that the ECJ, in contrast to its judgement in *A*, appeared to confirm that there is a difference between Community legislation and international law:

35. See Lang, supra note 9, p. 111.
36. C-101/05, *A*, Paras. 60 and 63.
37. C-101/05, *A*, Para. 54. See also C-290/04, *Scorpio*, Para. 36.
38. Case C-521/07, *Commission v. the Netherlands* (11 June 2009).
39. Id., Para. 28.
40. Id., Para. 27 et seq.
41. Id., Para. 28.
42. Id., Para. 30.

> It should, however, be noted that, even if such a difference in the system of legal obligations of the States in question in the tax area, in comparison with those of the Member States of the Community, is capable of justifying the Kingdom of the Netherlands in making the benefit of exemption from deduction at source of the tax on dividends subject, for Icelandic and Norwegian companies, to proof that those companies do in fact fulfil the conditions laid down by Netherlands legislation, it does not justify that legislation in making the benefit of that exemption subject to the holding of a higher stake in the capital of the distributing company.[43]

Accordingly, even if the justification was not accepted in *Commission v. Netherlands*, the ECJ obviously applied a different reasoning with regard to the effectiveness of fiscal supervision and tax collection.

In its very recent judgement in *Commission v. Italy* (C-540/07),[44] however, the ECJ appears to have returned to the reasoning applied in *A*:

> In this case, it should first be noted that the framework of cooperation between the competent authorities of the Member States established by Directive 77/799 does not exist between the latter and the competent authorities of a non-member State *when* the latter has not entered into any undertaking of mutual assistance (emphasis added).[45]

Therefore, *if* a third country *has entered* into an undertaking of mutual assistance (for example a tax treaty), the framework of cooperation is the same as between Member States. In its judgement, the ECJ concluded that there is no instrument of mutual assistance that applies between Italy and the EEA Member States. As a consequence, the discrimination that was caused by the levying of withholding taxes can be justified by an overriding reason in the public interest, namely the fight against tax evasion.

6. Conclusions

The ECJ case law on withholding taxes seems to be constantly evolving. There are many issues that need to be clarified, in particular with regard to the justification for withholding taxes based on the effective collection of taxes. Since *Scorpio*, there has been speculation regarding whether or not withholding taxes are still admissible following the implementation of the EC Directive on Mutual Assistance in the Recovery of Tax Claims. Most scholars tend to answer the question in the negative. The German Supreme Court (*Bundesfinanzhof*, BFH), however, gives an affirmative answer. Accordingly, the ECJ should be given the opportunity to finally resolve this question.

It is also not clear how the phrase "effective collection of taxes" should be understood. In particular, it is questionable what importance is given to the term "effective". Advocate-General Kokott's Opinion in *Truck Center* implies that she considers the collection of taxes through administrative assistance ineffective and, therefore, favours withholding tax. If this is also the position of the ECJ (which can be assumed from the judgement following Advocate-General Kokott's Opinion), the usefulness of the Directives regarding mutual assistance may be questioned.

A completely open issue is the relevance of international law provisions on mutual assistance – for example, the exchange of information and mutual assistance in the recovery of taxes under tax treaties. By not taking into consideration the multilateral treaty in *Truck Center*, the ECJ appears to attach no importance to international law provisions. Accordingly, such provisions may not prevent the application of withholding taxes.

This final issue is obviously of great importance for third countries. Most ECJ case law on the legality of withholding taxes – with the exception of the infringement procedure against the Netherlands – addresses intra-Community situations. In relation to third countries, other standards of comparability and justifications might apply. It is, therefore, not clear whether or not the ECJ will find withholding taxes compatible with the free movement of capital with regard to third countries.

43. Id., Para. 47.
44. Case C-540/07, *Commission v. Italy* (19 November 2009).
45. Id., Para. 70.