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# Influence of International Mutual Assistance on EU Tax Law

Karoline Spies\*\*

*ECJ case law shows that the free movement of capital requires Member States to treat only those external capital movements equal to EU-internal capital movements which involve cooperative third countries. Based on this ECJ case law, Member States are trying to protect their tax revenues by making tax benefits in third-country situations conditional upon the entering into an agreement on mutual assistance by third countries. This article deals with the question whether and to which extent Member States are permitted to ask for agreements on exchange of information as well as on tax collection under EU law, and how these bilateral agreements need to be designed to qualify for equal treatment. In this respect, the potential impact of the new EU Mutual Assistance Directives, strengthening the efficiency of cooperation within the EU, is also taken into account.*

## I FRAMEWORK OF COOPERATION IN ECJ CASE LAW

The wording of the free movement of capital under Article 63 of the Treaty on the Functioning of the European Union (TFEU) seems to protect capital movements between Member States and between Member States and third countries on the same level.<sup>1</sup> The Court of Justice of the European Union (hereinafter 'ECJ' or 'the Court'), however, has basically developed two ways to limit the effect of the free movement of capital to third countries including EEA Member States:<sup>2</sup> First, by establishing an area of exclusivity, not parallelism, in applying the

fundamental freedoms;<sup>3</sup> and second and more relevant for this paper, by applying a less stringent justification and proportionality test than in intra-EU cases.<sup>4</sup> ECJ case law has shown that restrictive tax measures that are not justified by a valid reason in relation to other Member States may be permissible by reason of a 'different legal context'<sup>5</sup> in relation to third countries. This different legal context is characterized by the EU Mutual Assistance Directive on the exchange of information<sup>6</sup> and the EU Mutual Assistance Directive on the recovery of taxes<sup>7</sup> which are both only valid within the EU, but not in relation to third countries including the EEA Member States.<sup>8</sup> Based on this ECJ case law, certain Member States

## Notes

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<sup>1</sup> Art. 63(1) TFEU provides: "Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."

<sup>2</sup> See on the limited effect of the free movement of capital in third-country relationships, *inter alia*, HJI Panayi, *The Fundamental Freedoms and Third Countries: Recent Perspectives*, Eur. Taxn. 571 (2008); Wunderlich & Blaschke, *Die Gewährleistung der Kapitalverkehrsfreiheit in Bezug auf Drittstaaten: Neuere Entwicklungen in der Rechtsprechung des EuGH*, Internationales Steuerrecht 754 (2008); Cordewener, Kofler & Schindler, *Free Movement of Capital, Third Country Relationships and National Tax Law: An Emerging Issue before the ECJ*, EC Tax Rev. 260 (2009); Smit, *Freedom of Investment between EU and Non-EU Member States and its Impact on Corporate Income Tax Systems within the European Union*, vol. 2, 343 et seq. (Tilburg University 2011); Lang, *Kapitalverkehrsfreiheit, Steuerrecht und Drittstaaten*, Steuer und Wirtschaft 209 (2011); at an earlier stage already Stahl, *Free Movement of capital between Member States and third countries*, EC Tax Rev. 47 (2004); Schön, *Körperschaftsteuer, Internationales Steuerrecht, Doppelbesteuerung – FS Wassermeyer*, 489 (Gocke, Gosch & Lang eds., Beck 2005).

<sup>3</sup> See, *inter alia*, ECJ 3 October 2006, C-452/04, *Fidium Finanz*, para. 49; ECJ 10 May 2007, C-492/04, *Lasertex*, para. 25; ECJ 10 May 2007, C-102/05, *A and B*, para. 27; ECJ 6 November 2007, C-415/06, *Stahlwerk Ergste Westig*, para. 16. See on this issue, *inter alia*, Smit, *The relationship between the free movement of capital and the other EC Treaty freedoms in third country relationships in the field of direct taxation: a question of exclusivity, parallelism or causality?*, EC Tax Rev. 252 (2007); Lang, *Europäisches Steuerrecht – FS Rödler*, 521 (Lang & Weinzierl eds., Linde 2010); den Boer, *Freedom of Establishment versus Free Movement of Capital: Ongoing Confusion at the ECJ and in the National Courts?*, Eur. Taxn. 250 (2010); Hemels et al., *Freedom of Establishment or Free Movement of Capital: Is There an Order of Priority?*, EC Tax Rev. 19 (2010); Spies, *Die Kapitalverkehrsfreiheit und Kapitalbeteiligungen in der EuGH-Rechtsprechung*, Steuer und Wirtschaft International 350 (2011).

<sup>4</sup> See ECJ 18 December 2007, C-101/05, A.; ECJ 25 October 2007, C-540/07, *Commission v. Italy*.

<sup>5</sup> See ECJ 18 December 2007, C-101/05, A., para. 60.

<sup>6</sup> 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 and indirect taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992.

<sup>7</sup> 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 (Codified version).

are trying to protect their tax revenues by making tax benefits in third-country situations conditional upon entering into an agreement on mutual assistance by third countries. In a first part, this paper deals with the question whether and to which extent Member States are permitted to do so under EU law. The analysis is divided into the impact of international agreements on exchange of information on the one hand, and of international agreements on assistance in tax collection on the other hand. The EU Mutual Assistance Directives are replaced by new ones in 2012 (Directive 2010/24/EU on recovery of taxes)<sup>9</sup> and 2013 (Directive 2011/16/EU on exchange of information)<sup>10</sup> in order to strengthen efficiency of the proceedings within the EU.<sup>11</sup> Hence, in a second part it will be examined if the current standard developed by the ECJ will or should change under the scope of the new EU Mutual Assistance Directives.

## 2 EXCHANGE OF INFORMATION

### 2.1 Lack of Framework of Cooperation in Third-Country Situations

Many EU Member States limit certain tax benefits in cross-border settings to situations involving countries with which a mutual assistance agreement on exchange of information exists.<sup>12</sup> This development (partly) has its roots in ECJ case law on the effect of the free movement of capital in third-country situations.

In intra-EU settings, the objective of ensuring fiscal supervision has been denied by the ECJ several times as a justification for restrictive tax measures, since Member States could ask taxpayers for evidence<sup>13</sup> or make use of the Directive on exchange of information as a less

restrictive measure.<sup>14</sup> In relation to third countries, the landmark case for the relevance of exchange of information was the *A.* case.<sup>15</sup> In this case, the Court decided for the first time that capital movements vis-à-vis non-Member States may be given a more burdensome treatment if no agreement on mutual assistance is in place with the respective third country. The Court stated that this principle may hold true if the '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 authority of a third country'.<sup>16</sup> Based on this reasoning, the ECJ has repeatedly stated that the need to safeguard the effectiveness of fiscal supervision<sup>17</sup> or the need to fight against tax evasion<sup>18</sup> might be a valid justification in relation to third countries, although these overriding reasons may not save the same restrictive measures in intra-EU situations.

In the *ELISA* case, the ECJ held that EU taxpayers must have the possibility to produce evidence in order to benefit from a certain advantage even if there is no obligation to exchange information due to a limitation of the Directive, and therefore no possibility for the Member State to verify the data provided.<sup>19</sup> This judgment could lead one to the conclusion that in third-country cases, the taxpayer needs to be asked to provide evidence before denying a benefit in the case of lack of mutual assistance as well. However, the transposition of this approach to third-country settings has been explicitly denied by the Court in the *Rimbaud* case.<sup>20</sup> According to the Court, EU taxpayers need to have the possibility to produce evidence in order to prevent the limitation caused by the missing obligation for administrative assistance under Article 8 of the Directive applicable in the case at hand 'from acting to the

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<sup>8</sup> ECJ 5 May 2011, C-267/09, *Commission v. Portugal*, para. 55; ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, paras. 49 et seq.

<sup>9</sup> Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

<sup>10</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

<sup>11</sup> Preamble 3 et seq. Directive 2011/16/EU; Preamble 14 et seq. Directive 2010/24/EU.

<sup>12</sup> See e.g. in Austria: Sec. 10(1)(6) and Sec. 21(1)(1a) Austrian Corporate Income Tax Act (CITA) and Sec. 6(6)(b) Austrian Income Tax Act (ITA); in France e.g.: Art. 990D of the French General Tax Code (CGI) and a list of non-cooperative states or territories (NCSTs): being on the list leads to an increase in the tax burden on outbound payments to the listed countries; in Germany e.g.: Sec. 2(a) German Income Tax Act.

<sup>13</sup> ECJ 14 September 2006, C-386/04, *Stauffer*, para. 49; ECJ 8 July 1999, C-254/97, *Baxter*, paras. 18 et seq.; ECJ 10 March 2005, C-39/04, *Labouratoires Fournier*, para. 25; ECJ 27 January 2009, C-318/07, *Persche*, paras. 53 et seq.

<sup>14</sup> ECJ 28 January 1992, C-204/90, *Bachmann*, para. 18; ECJ 15 May 1997, C-250/95, *Futura Participations*, para. 41; ECJ 14 September 2006, C-386/04, *Stauffer*, para. 50; ECJ 29 March 2007, C-347/04, *Reue Zentralfinanz*, para. 56; ECJ 16 October 2008, C-527/06, *Renneberg*, para. 78; ECJ 27 January 2009, C-318/07, *Persche*, para. 61. For a comprehensive systematic analysis of the references to the Directive on exchange of information in ECJ case law see Hemels, Eur. Taxn 583 (2009).

<sup>15</sup> ECJ 18 December 2007, C-101/05, *A.*

<sup>16</sup> ECJ 18 December 2007, C-101/05, *A.*, para. 63.

<sup>17</sup> ECJ 18 December 2007, C-101/05, *A.*, paras. 54 et seq.; ECJ 28 October 2010, C-72/09, *Etablissements Rimbaud*, paras. 33 et seq.

<sup>18</sup> ECJ 25 October 2007, C-540/07, *Commission v. Italy*, paras. 68 et seq.; ECJ 28 October 2010, C-72/09, *Etablissements Rimbaud*, paras. 33 et seq.

<sup>19</sup> ECJ 11 October 2007, C-451/05, *ELISA*, paras. 90 et seq. See also ECJ 25 October 2007, C-464/05, *Geurts and Vogten*, para. 28. See on this issue with further references Hemels, Eur. Taxn. 584 et seq. (2009).

<sup>20</sup> ECJ 28 October 2010, C-72/09, *Etablissements Rimbaud*. In the *Rimbaud* case, the same restrictive French tax provision as in the *ELISA* case was under dispute, however, in relation to a resident of Liechtenstein, an EEA Member State. See on both cases Gutmann, *ECJ – Recent Developments in Direct Taxation 2010*, 91 et seq. (Lang et al. eds., Linde 2011); as well as Gutmann, *ECJ – Recent Developments in Direct Taxation 2009*, 47 et seq. (Lang et al. eds., Linde 2010).

detriment of the taxpayer'.<sup>21</sup> With regard to non-Member States, however, the possibility of providing evidence has to be denied due to 'the fact...that the **regulatory framework is quite different**',<sup>22</sup> because of the lack of a general system for the exchange of information comparable to the Directive.<sup>23</sup> Taxpayers resident in third countries without a bilateral agreement on the exchange of information with the respective Member State are thus, as opposed to EU residents, not permitted to provide proof as a less restrictive measure.<sup>24</sup>

The importance of mutual assistance in ECJ case law becomes even more obvious if one takes a look at the *Commission v. Portugal* case on tax exemption provisions exclusively applicable to resident pension funds.<sup>25</sup> Portugal argued that the conditions that resident pension funds must fulfil in order to avail themselves of the corporation tax exemption are intended to ensure the maintenance of the Portuguese pension system, by subjecting those funds to particularly strict requirements as concerns management, operation, capitalization and financial responsibility. The supervision of those requirements may only be possible insofar as those funds reside in Portugal. Advocate General Mengozzi argued that in the case at hand, the provisions of the Directive on exchange of information 'seem hardly to be of any use',<sup>26</sup> since the requested conditions do not concern the tax position of the pension funds, but their economic activity. The Directive on exchange of information only allowing the exchange of tax information might thus not be the right legal basis to obtain the information needed by the Portuguese authorities to ensure compliance with the strict Portuguese administrative provisions.<sup>27</sup> The ECJ, however, did not even mention this obstacle, but concluded with regard to EU funds that the measure goes beyond what is necessary, since Member States may ask the pension fund for evidence and rely on both EU Directives

on mutual assistance as a less restrictive measure.<sup>28</sup> With regard to EEA funds, the Court came to the same result, since 'the law at issue does not make the benefit of the exemption from corporation tax **subject to a bilateral assistance agreement** between the Portuguese Republic and the EEA Member States which enables cooperation and assistance **equivalent** to that put in place between the EU Member States'.<sup>29</sup> The Court, thus, seems to simply stress the need for a framework of cooperation without analysing whether the Directive and the bilateral agreement are actually needed and relevant to attain the objective of the national provision.<sup>30</sup>

This ECJ case law confirms that the lack of a general framework of cooperation serves as the ultimate justification ground for restrictive tax measures in third-country settings. Member States are, thus, in general not allowed to treat capital movements in relation to third countries more burdensome than in internal situations, but have to grant the same tax benefits at least to those situations which involve third countries that have already agreed on an exchange of information.

## 2.2 Comparability of International Agreements to the EU Directive

For some time, it was disputed in academic writing whether entering into international agreements on mutual assistance could place third countries in an equal position with Member States at all.<sup>31</sup> The ECJ's reasoning in the *Commission v. Portugal* case on pension funds, however, confirms that bilateral agreements are seen by the Court as equal to the EU Directive on exchange of information, since the Court explicitly refers to the possibility of signing bilateral agreements.<sup>32</sup> Even though the *Commission v. the Netherlands* case pointed in the opposite

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<sup>21</sup> ECJ 28 October 2010, C-72/09, *Etablissements Rimbaud*, para. 49. See critically on this reasoning Gutmann in Lang et al., *ECJ – Recent Developments in Direct Taxation 2010*, 96 et seq. (2011).

<sup>22</sup> ECJ 28 October 2010, C-72/09, *Etablissements Rimbaud*, para. 46.

<sup>23</sup> ECJ 28 October 2010, C-72/09, *Etablissements Rimbaud*, para. 50.

<sup>24</sup> Critically, *inter alia*, Helmes, Eur. Taxn. 585 et seq. (2009); Gutmann *ECJ – Recent Developments in Direct Taxation 2010*, 96 et seq. (Lang et al. eds., 2011); HJI Panayi, Eur. Taxn. 581 et seq. (2008); Marschner & Stefaner, *Die Zulässigkeit von Einschränkungen der Kapitalverkehrsfreiheit gegenüber Drittstaaten aufgrund fehlender Amts- und Vollstreckungshilfe*, Steuer und Wirtschaft International 375 (2009).

<sup>25</sup> ECJ 27 October 2011, C-493/09, *Commission v. Portugal*. See on this case and Portugals' legal response Nogueira, *The Feared Austerity Budget Enters into Force*, Eur. Taxn. 128 et seq. (2012).

<sup>26</sup> Opinion of AG Mengozzi 25 May 2011, C-493/09, *Commission v. Portugal*, para. 60. Translation by the author.

<sup>27</sup> Opinion of AG Mengozzi 25 May 2011, C-493/09, *Commission v. Portugal*, para. 61.

<sup>28</sup> ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, paras. 45 et seq.

<sup>29</sup> ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, para. 50.

<sup>30</sup> See critically Smit, *The Haribo & Österreichische Salinen Cases: To What Extent Is the ECJ Willing To Remove International Double Taxation Caused by Member States?*, Eur. Taxn. 280 et seq. (2011); Smit, *Freedom of Investment*, vol. 2, 591 et seq. (2011).

<sup>31</sup> See Lang, *Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions*, EC Tax Rev. 111 (2009); Daurer & Simader, *The EU's External Dimension in Direct Tax Matters*, 185, 200 et seq. (Heidenbauer & Stürzlinger eds., Linde 2010); Lang, *Steuer und Wirtschaft* 222 (2011).

<sup>32</sup> See in this regard also ECJ 12 September 2006, C-196/04, *Cadbury Schweppes*, para. 71 ('...such as...'); ECJ 10 February 2011, C-436/08 and C-437/08, *Haribo und Österreichische Salinen*, para. 132: The Court stated that a general refusal of a tax benefit to portfolio dividends from third countries which is granted in purely national situations violates EU law, since "the national legislation does not provide that any exemption of portfolio dividends received from a company established in a non-member



direction,<sup>33</sup> the lack of a possibility to enforce the rights laid down in international agreements like double taxation conventions (DTCs), as opposed to those in the EU Directive, does not seem to interfere with the comparability.<sup>34</sup>

In this respect, it is worth analysing how bilateral agreements with third countries have to be designed to qualify for equal treatment under EU law. In the *Commission v. Portugal* case on pension funds, the ECJ clarified that bilateral assistance agreements shall enable cooperation and assistance 'equivalent to that put in place between the EU Member States'.<sup>35</sup> In another infringement proceeding against Portugal, the ECJ gave further insights into the relevant scope of bilateral agreements.<sup>36</sup> According to Portuguese law, certain non-residents were obliged to appoint a fiscal representative resident within Portugal. The Commission was of the opinion that this requirement infringes the free movement of capital in the TFEU as well as under the EEA Agreement, since some bilateral mutual agreements between Portugal and the EEA Member States were in place.<sup>37</sup> However, according to the ECJ the restriction on EEA funds was justified by the need to ensure the effectiveness of fiscal supervision and the prevention of tax avoidance, since 'the Commission failed to establish that those [bilateral] agreements actually included sufficient mechanisms for the exchange of information to verify and monitor the returns'.<sup>38</sup> This statement shows that a case-by-case analysis is needed to verify whether certain information may be obtained under a bilateral agreement and, thus, requires an examination of the scope of the bilateral agreement by the national courts.

In most cases, a double taxation convention (DTC) or a Tax Information Exchange Agreement (TIEA) including an

extended exchange of information clause allowing the exchange of information not only for carrying out of the provisions of the treaty but also for the assessment under national law will be necessary to meet the requirements of an 'equivalent' and 'sufficient' bilateral mechanism. Considering the reasoning of the ECJ, a limited clause on exchange of information in a DTC permitting the exchange of information for carrying out of the provisions of the treaty only might be insufficient to escape discrimination,<sup>39</sup> since, even though this bilateral mechanism could be viewed as 'sufficient' to verify certain conditions in a given case,<sup>40</sup> the limited clause is not 'equivalent' to the standard of cooperation within the EU.<sup>41</sup>

## 2.3 Evaluation

ECJ case law shows that the missing obligation to provide information by third countries seems to serve as the ultimate justification for a more burdensome treatment of capital movements in third-country situations. Member States are, therefore, as a general rule permitted to make tax benefits in third-country settings conditional upon the signing of an international agreement on exchange of information by the respective third country. In this respect Member States are, in addition, still free to choose which tax benefits in third-country settings are conditional upon the entering in an agreement on mutual assistance and which tax benefits in third-country settings are granted without such condition. This can be inferred from the *Haribo* case where the ECJ held that the proportionality of the condition of existing mutual assistance for the exemption of portfolio dividends is 'not called into question simply because a Member State does not impose such a requirement for the exemption of dividends

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State...is conditional upon the existence of an agreement for mutual assistance between the Member State and the relevant non-member State." See on this judgment, *inter alia*, Smit, Eur. Taxn. 275 (2011).

<sup>33</sup> ECJ 11 June 2009, C-521/07, *Commission v. the Netherlands*, para. 47. See Simader, *Withholding Taxes and the Effectiveness of Fiscal Supervision and Tax Collection*, Bull. Intl. Taxn. 118 (2010). Due to the wording 'even if' used by the Court, the reasoning does in my opinion not explicitly answer the question whether the lack of a possibility to enforce the rights laid down in a DTC, as opposed to those under the EU Directive, is capable of saving a restrictive tax measure. On the contrary, the wording 'even if' could be interpreted as indicating that the Court simply avoided giving a final answer on this issue, since the provision would – on other grounds – still be incompatible with EU law. The *Commission v. the Netherlands* case, therefore, should in my opinion not be seen as decisive on this matter.

<sup>34</sup> See on this issue Lang, *Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions*, EC Tax Rev. 111 (2009); Daurer & Simader, *The EU's External Dimension in Direct Tax Matters*, 200 et seq. (Heidenbauer & Stürzlinger eds., Linde 2010); Simader, *Die Rs Haribo und Österreichische Salinen: Neues zur Bedeutung der Amtshilfe mit Drittstaaten?*, Steuer und Wirtschaft International 244 (2011).

<sup>35</sup> ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, para. 50.

<sup>36</sup> ECJ 5 May 2011, C-267/09, *Commission v. Portugal*.

<sup>37</sup> See ECJ 5 May 2011, C-267/09, *Commission v. Portugal*, para. 15. Concerning the existing agreements between Portugal and the EEA Member States: Portugal and Iceland have signed a DTC including an extended clause on exchange of information (in force since 2002) which should be sufficient for exchanging the relevant information in the case at hand; Portugal and Norway have also concluded a DTC including an extended clause on the exchange of information in 2011, but this agreement is not yet in force; Portugal and Liechtenstein have not yet signed a DTC or TIEA.

<sup>38</sup> ECJ 5 May 2011, C-267/09, *Commission v. Portugal*, paras. 56 et seq.

<sup>39</sup> Critically also Nijkeuter, *Exchange of Information and the Free Movement of Capital between Member States and Third Countries*, EC Tax Rev. 240 (2011).

<sup>40</sup> According to a limited clause, e.g. information on residence or on withholding tax on passive income may be requested by the other contracting State. See Nijkeuter, EC Tax Rev. 237 (2011); see also examples for information relevant for carrying out the provisions of the treaty itself OECD MC Commentary art. 26 para. 7; Engelschalk, *Doppelbesteuerungsabkommen - Kommentar*, art. 26 paras. 48 et seq. (5th ed., Vogel & Lehner eds., 2008).

<sup>41</sup> See Schilcher, *Introduction to European Tax Law on Direct Taxation*, mno 622 (2d ed., Lang et al. eds., Linde 2010). On the same lines Pistone, *The EU's External Dimension in Direct Tax Matters*, 17, 38 et seq. (Heidenbauer & Stürzlinger eds., Linde 2010), who is of the opinion that no Member State may invoke the justification of ensuring effective fiscal supervision if a bilateral agreement in line with the current OECD standard with the third country is in place. In addition, Pistone is of the opinion that the effectiveness of the exchange of information under a treaty in practice should also be taken into account.

from holdings of 10% or more of the capital of the company making the distribution'.<sup>42</sup> Hence, EU law permits Member States to treat foreign portfolio investments and foreign direct investments related to third countries differently. The ECJ, thus, seems to back away from examining the inherent logic of a national tax system<sup>43</sup> and thereby strengthens the tax sovereignty of the Member States.<sup>44</sup>

This ECJ case law, however, also implies that third countries are in principle in a position to escape discrimination in the tax law systems of the Member States by their own means: If a third country agrees on an equivalent and sufficient exchange of information with a Member State, this Member State is no longer allowed to treat capital movements in relation to the respective third country more burdensome. In this way, international agreements on mutual assistance between Member States and third countries may have an impact on the tax law systems within the EU.

One has to keep in mind, however, that if such a sufficient and equivalent bilateral agreement on exchange of information with a third country exists, Member States are nevertheless allowed to ask the taxpayer for evidence before using the proceedings under the bilateral agreement.<sup>45</sup> According to established case law, Member States are not forced to make use of the proceedings under the Directive or under bilateral agreements when the taxpayer does not provide any evidence.<sup>46</sup> The burden of proof lies as a rule in the hands of the taxpayer.<sup>47</sup> The Directive and the bilateral agreements seem only to serve the goal of verifying data already provided by the taxpayer.

### 3 TAX COLLECTION

#### 3.1 Home State

Recently, the ECJ has held that in examining the relevant 'legal framework' the EU Mutual Assistance Directive on

the recovery of taxes may also be taken into account.<sup>48</sup> The question to be analysed in this paper is whether Member States are permitted to make certain tax benefits relating to capital movements in certain third-country situations, in addition to existing bilateral agreements on exchange of information, conditional upon the existence of a mutual agreement on assistance with regard to tax enforcement as well. In this regard, it might make sense to distinguish between home and host-State scenarios, since the risk of non-enforcement of taxes and the validity of the corresponding justification ground of ensuring efficient tax collection may be influenced by the fact whether the taxpayer is a resident or a non-resident. In general, in the case of non-resident taxpayers efficient tax collection seems to be more difficult to achieve than in the case of resident taxpayers, since due to the states' territorial limits in the case of foreign taxpayers the assistance of foreign authorities may be needed.

If we take a look at the need for enforcement assistance in home-State scenarios, the Court's ruling in the *Haribo* case may give guidance. This case involved the taxation of inbound dividends under the Austrian Corporate Income Tax Act (CITA): While portfolio dividends distributed by resident companies in the hands of resident shareholders were tax exempt without any further conditions, portfolio dividends distributed by companies resident in EEA countries were only tax exempt if a comprehensive agreement on mutual assistance with regard to exchange of information as well as recovery of taxes with the respective EEA countries was in place.<sup>49</sup> According to the ECJ, however, 'only the existence of an agreement for mutual assistance with regard to administrative matters proves necessary for the purpose of attaining the objectives of the legislation in question'.<sup>50</sup> The requirement of an undertaking in mutual assistance with regard to enforcement in order to benefit from a tax relief on inbound dividends is in conflict with EU law, since the possibility put forward by Austria of residents 'moving

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<sup>42</sup> See ECJ 10 February 2011, C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, para. 71. Contra Opinion of AG Kokott 11 November 2010, C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, points 99 et seq. and 130 et seq.

<sup>43</sup> Contra ECJ 11 June 2009, C-521/07, *Commission v. the Netherlands*, para. 47. See Simader, *Steuer und Wirtschaft International* 246 (2011). Smit, *Eur. Taxn.* 281 et seq. (2011), seems to misinterpret the ECJ's reasoning. On the same lines as the ECJ Kühbacher, *Ausländische Portfoliodividenden: Nachweisprobleme stehen der Anrechnungsmethode nicht entgegen*, *Steuer und Wirtschaft International* 79 (2011).

<sup>44</sup> See the critical Austrian literature on the *Haribo* case, *inter alia*, Kofler & Prechtl Aigner, *Die Beteiligungsertragsbefreiung nach Haribo und Salinen*, *Zeitschrift für Gesellschaftsrecht (GES)* 188 (2011); Marschner, *Süßes und Saures zur Besteuerung von Portfoliodividenden*, *UFS Journal* 114 (2011); Prechtl-Aigner, *Rs. Haribo und Salinen AG: EuGH gibt nationalem Gesetzgeber weiten Gestaltungsspielraum*, *Steuer und Wirtschafts Kartei* S 391 (2011).

<sup>45</sup> See ECJ 10 February 2011, C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, paras. 102 et seq.

<sup>46</sup> See ECJ 10 February 2011, C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, para. 102. For intra-EU cases see ECJ 27 September 2007, C-184/05, *Twob*, para. 32; ECJ 27 January 2009, C-318/07, *Persche*, para. 65. On the same lines, *inter alia*, Zorn, *Urteil des EuGH in den Rs Haribo und Salinen AG zu § 10 KStG*, *Recht der Wirtschaft* 172 (2011).

<sup>47</sup> See Nijkeuter, *EC Tax Rev.* 233 et seq. (2011). Critically, *inter alia*, Opinion of AG Mengozzi 14 October 2008, C-318/07, *Persche*, point 110; Englisch, *ECJ – Recent Developments in Direct Taxation* 2008, 167 et seq. (Lang et al. eds., Linde 2008).

<sup>48</sup> ECJ 5 May 2011, C-267/09, *Commission v. Portugal*, para. 55; ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, paras. 49 et seq.; ECJ 29 November 2011, C-371/10, *National Grid Indus*, para. 74.

<sup>49</sup> See Sec. 10(1)(6) Austrian CITA before the amendments made by the law modifying tax law 2011 ('AbgÄG 2011'). These requirements were only fulfilled in relation to Norway, but not in relation to Iceland and Liechtenstein, since only the DTC between Austria and Norway contains a comprehensive clause on the exchange of information as well as on recovery of taxes. See also ECJ 10 February 2011, C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, para. 4.

<sup>50</sup> ECJ 10 February 2011, C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, para. 73.

away is too remote a possibility to be capable of justifying making the prevention of economic double taxation of portfolio dividends from a non-Member State . . . consistently dependent on an agreement for enforcement assistance'.<sup>51</sup> Hence, the Court found it disproportionate to ask for an agreement on enforcement assistance, when this agreement is needed in very exceptional cases only. This result is reasonable, since the tax assessment of dividends in the hands of resident companies, as a rule, does not require enforcement assistance by the residence State of the company distributing the dividends.<sup>52</sup>

Based on this reasoning, however, the result could differ if one thinks of situations where a Member State acts as host for third-country residents. In situations involving non-residents undertaking business within a Member State, enforcement assistance might be necessary not only in very exceptional cases, but in more frequent situations. The ECJ's reasoning in the *Haribo* case might, therefore, point in the direction that in host-State scenarios there is more leeway for Member States to set the requirement of an existing agreement on enforcement assistance for certain benefits than in home-State scenarios.

### 3.2 Host State

Measures which could be taken by the Member State acting as a host State to ensure effective tax collection of

non-residents are, in particular, withholding taxes on passive income<sup>53</sup> or on income from temporal business activities,<sup>54</sup> and the obligation to appoint a fiscal representative or to provide guarantees.<sup>55</sup> In addition, in exit-tax cases the justification of the need to ensure effective tax collection may be relevant as well.<sup>56</sup> The above measures are mainly characterized by different proceedings in tax collection for residents and non-residents, and in certain cases a corresponding difference in the tax burden.<sup>57</sup> These differences may cause additional costs<sup>58</sup> in cross-border situations which might lead to a restriction of the fundamental freedoms.<sup>59</sup>

Until now, the ECJ has mainly had to deal with the relevance of mutual assistance in tax collection in intra-EU cases. In the *Scorpio* case, in which the Directive on tax collection was not yet applicable,<sup>60</sup> the Court came to the conclusion that withholding taxes on non-residents are 'a legitimate and appropriate means' to ensure effective tax collection and, thus, are in line with EU law.<sup>61</sup> In the *Truck Center* case, where the Directive was not applicable as well,<sup>62</sup> the Court came to a comparable outcome by a different reasoning.<sup>63</sup> In academic writing, it has been argued that in cases where the Directive on tax collection is applicable, the withholding tax should violate EU law, since the possibility to ask other Member States for enforcement assistance would be a less restrictive measure.<sup>64</sup> This view may be seen as having been

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<sup>51</sup> ECJ 10 February 2011, C-436/08 and C-437/08, *Haribo and Österreichische Salinen*, para. 74.

<sup>52</sup> On the same lines, *inter alia*, Kofler & Prechtl Zeitschrift für Gesellschaftsrecht (GES) 188 (2011); Zorn, *Recht der Wirtschaft* 173 (2011); prior to the *Haribo* judgment, *inter alia*, Marschner & Stefaner, *Steuer und Wirtschaft International* 384 (2009).

<sup>53</sup> In particular dividends, interest or royalties.

<sup>54</sup> E.g. the performance of artists.

<sup>55</sup> See e.g. ECJ 5 May 2011, C-267/09, *Commission v. Portugal*. See examples of unilateral measures also De Troyer, *A European Perspective on Tax Recovery in Cross-Border Situations*, EC Tax Rev. 214 et seq. (2009).

<sup>56</sup> Although exit tax cases are not typical host-State scenarios, these situations may raise similar issues, since after emigration the taxpayer becomes a non-resident. Therefore, exit taxes are also dealt with in this section.

<sup>57</sup> This is especially true for withholding tax cases, since withholding taxes are often levied at a flat rate, while residents might be subject to progressive tax rates. See e.g. ECJ 9 November 2006, C-520/04, *Turpeinen*.

<sup>58</sup> For example in the case of withholding taxes the additional costs for non-residents could be divided into those from the perspective of the taxpayer and those from perspective of the debtor or receiver of the services. From the taxpayer's perspective withholding taxes are often levied on the gross instead of the net income and are paid earlier than taxes levied on assessment. From the perspective of the debtor or the receiver of services the debtor's duty to withhold taxes and to pay them to the tax authorities as well as the liability resulting from non-compliance with that duty has to be considered. See in detail Zimmer, *Withholding Taxes in the EU and the EEA*, Tax Notes Intl. 668 et seq. (2008); see on the restrictive effects of withholding taxes on dividends also Garabedian & Malherbe, *A Vision of Taxes within and outside European Borders - Commemorative Publication in Honor of Prof. Dr. Frans Vanistendael*, 404 et seq. (Hinneken & Hinneken eds., 2008).

<sup>59</sup> It is, however, disputed whether the method of withholding tax as means to ensure the effective collection of taxes as such constitutes a restriction to the fundamental freedoms at all. According to Smit, it can be inferred from the *Truck Center* and the *Commission v. Spain* cases (ECJ 22 December 2008, C-282/07, *Truck Center*; ECJ 3 June 2010, C-487/08, *Commission v. Spain*, para. 54) that the method of a withholding tax, at least from the taxpayer's perspective, does not constitute a restriction and, thus, no justification would be necessary (Smit, *Freedom of Investment*, vol. 1 at 271, 295 and vol. 2 at 598; see in this regard also Hohenwarter & Koppensteiner, *Quellensteuern – Der Steuerabzug bei Zahlungen an ausländische Empfänger*, 108 (Lang et al. eds., Linde 108). However, this view could be questioned, since in the *Truck Center* case the EU Directive on tax collection was not yet applicable and, in addition, it was not certain that the legislation at hand led to any disadvantage for the income recipient at all (see ECJ 22 December 2008, C-282/07, *Truck Center*, para. 49). See also Simader, *Bull. Intl. Taxn.* 117 et seq. (2010); Lang, *Zum Seminar G: Verbiendet das Gemeinschaftsrecht die Erhebung von Quellensteuern?*, *Internationales Steuerrecht* 739 (2009).

<sup>60</sup> ECJ 3 October 2006, C-290/04, *Scorpio*, para. 36.

<sup>61</sup> ECJ 3 October 2006, C-290/04, *Scorpio*, para. 36.

<sup>62</sup> See Opinion of AG Kokott 21 December 2011, C-498/10, X, point 42.

<sup>63</sup> ECJ 22 December 2008, C-282/07, *Truck Center*, paras. 41 et seq. The mere need for mutual assistance seems to render residents and non-residents non-comparable and therefore a different treatment was permitted. See Opinion of AG Kokott 21 December 2011, C-498/10, X, points 18 et seq.

<sup>64</sup> See Simader, *Internationale Amtshilfe in Steuersachen*, 326 (Lang et al. eds., Linde 2011); Garabedian & Malherbe, *A Vision of Taxes within and outside European Borders - Commemorative Publication in Honor of Prof. Dr. Frans Vanistendael*, 407 (Hinneken & Hinneken eds., 2008); see on this possibility also Daurer & Simader, *The EU's External Dimension in Direct Tax Matters*, 204 (Heidenbauer & Stürzlinger eds., Linde 2010); Supporting ECJ 9 November 2006, C-433/04, *Commission v. Belgium*.



confirmed in the *Turpeinen* judgment where the ECJ referred to both Directives on mutual assistance.<sup>65</sup> In contrast, Advocate General Kokott is of the opinion that even if the former Directive 2008/55/EC on tax collection is applicable to a certain case, levying withholding tax on non-residents is in line with EU law, since it is well-known that the mutual assistance procedure under this Directive has been not very efficient in practice so far.<sup>66</sup> If one follows this approach, international agreements on tax collection would not play any role in examining the justification of effective tax collection either, since the procedure under international agreements seems to be even less effective due to the lack of enforcement possibilities.<sup>67</sup>

However, in addition to the *Turpeinen* case,<sup>68</sup> the ECJ has also already confirmed in the exit-taxes cases *N.* and *National Grid Indus* that the Directive on tax collection has to be taken into account in examining the justification of ensuring effective tax collection. These judgments show that the Member States cannot justify a restrictive tax measure related to the time of tax payment, in this case the immediate payment of exit tax on hidden reserves at the time of migration, by the need to ensure effective tax collection, since the Member States may rely on the Directive as a less restrictive measure.<sup>69</sup> According to the *Van Hilten* case, the mere change of the State of residence without movement of capital, however, does not seem to be protected under the free movement of capital.<sup>70</sup> Therefore, the principles of these exit-tax cases may not be extended to comparable migrations to third countries.<sup>71</sup> However, if one follows the approach taken by the Netherlands Supreme Court, exit-tax cases of companies could also be covered by the free movement of capital<sup>72</sup> and, thus, the relevance of bilateral agreements on tax

enforcement might come into play in the case of migration to third countries.

Even though the *N.* and *National Grid Indus* cases both take into account the former Directive on tax collection, the judgments differ when it comes to the details of the determination of the least restrictive measure to attain the objective of effective tax collection. Whereas in the *N.* case, the ECJ was of the clear opinion that the obligation to provide guarantees by the taxpayer, in the case at hand the pledge of shares,<sup>73</sup> goes beyond what is necessary and, thus, violates EU law,<sup>74</sup> the *National Grid Indus* case seems to support the view that the Member States are permitted to ask for the provision of guarantees even if an obligation to enforcement assistant by the new residence State under the Directive exists. In the *National Grid Indus* case the ECJ held: 'However, account should also be taken of the risk of non-recovery of the tax, which increases with the passage of time. That risk may be taken into account by the Member State in question, in its national legislation applicable to deferred payments of tax debts, by measures such as the provision of a bank guarantee.'<sup>75</sup>

As the relevance of the justification of ensuring effective tax collection and the corresponding Directive is not fully clear for intra-EU cases so far, this issue is even more unsettled when it comes to third-country settings. Regarding tax enforcement in third-country situations, the judgment in the infringement proceeding against Portugal on pension funds could also give an indication to the relevance of bilateral agreements on tax collection and their relation to guarantees. As already mentioned, Portugal argued that levying withholding tax on passive income to foreign pension funds whereas domestic funds are exempt is justified by the need for efficient fiscal

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<sup>65</sup> ECJ 9 November 2006, C-520/04, *Turpeinen*, paras. 35 et seq.

<sup>66</sup> Opinion of AG Kokott 21 December 2011, C-498/10, X, points 52 et seq. Under the old Directive on tax collection, only 5% of the amounts asked to be recovered by a Member State had actually been collected (See Report of the Commission, COM(2009) 451 final, point 2.4).

<sup>67</sup> See on the aspect of enforcement, *inter alia*, Lang, EC Tax Rev. 111 (2009); see for further references in footnote 34. Also the *Truck Center* case could be interpreted correspondingly, since the Court ignored the multilateral agreement on assistance in tax collection in place between Belgium, Luxembourg and the Netherlands altogether (ECJ 22 December 2008, C-282/07, *Truck Center*). See also Daurer & Simader, *The EU's External Dimension in Direct Tax Matters*, 205 et seq. (Heidenbauer & Stürzlinger eds., Linde 2010); Hohenwarter & Koppensteiner, *Quellensteuern*, 108 (Lang et al. eds., Linde 2010).

<sup>68</sup> ECJ 9 November 2006, C-520/04, *Turpeinen*, paras. 35 et seq.

<sup>69</sup> ECJ 29 November 2011, C-371/10, *National Grid Indus*, para. 78; ECJ 7 September 2006, C-470/04, *N.*, para. 53.

<sup>70</sup> ECJ 23 February 2006, C-513/03, *Van Hilten*, para. 49. See on this issue Bron, *Das van Hilten-Urteil des EuGH und die (Un-)Anwendbarkeit der Wegzugsbesteuerung im Verhältnis zu Drittstaaten*, Internationales Steuerrecht 296 (2006); Lang, Lüdicke & Reich, *Beteiligungen im Privatvermögen: Die Besteuerung des Wegzugs aus Österreich und Deutschland in die Schweiz (Teil II)*, Internationales Steuerrecht 709 (2008).

<sup>71</sup> Except for migrations to EEA Member States (Iceland, Liechtenstein, Norway), since the EEA Agreement extends the scope of all fundamental freedoms to EEA Member States.

<sup>72</sup> On 13 January 2012, the Netherlands Supreme Court (*Hoge Raad der Nederlanden*) gave its decision in case No. 08/05322 on the compatibility of the exit tax on capital gains on portfolio shares with the free movement of capital of Arts. 56 and 57 EC Treaty (now Art. 63 TFEU). The Court held that the exit tax was justified based on the standstill clause of Art. 57(1) EC Treaty (now Art. 64(1) TFEU), which provides that provisions which existed on 31 December 1993 remain applicable.

<sup>73</sup> ECJ 7 September 2006, C-470/04, *N.*, para. 13.

<sup>74</sup> ECJ 7 September 2006, C-470/04, *N.*, paras. 51 et seq. See also ECJ 11 March 2004, C-9/02, *Hughes de Lasteyrie du Saillant*, paras. 47 et seq.

<sup>75</sup> ECJ 29 November 2011, C-371/10, *National Grid Indus*, para. 74.

supervision. Only pension funds meeting the stringent requirements for managing, organization and liability under Portuguese law should benefit from the exemption. These conditions could only be met and verified in the case of resident pension funds.<sup>76</sup> Concerning EEA funds, the Court concluded that the tax measure at hand was disproportionate, since the provision ‘does not make the benefit of the exemption from corporation tax **subject to a bilateral assistance agreement** between the Portuguese Republic and the EEA Member States which **enables cooperation and assistance** equivalent to that put in place between the EU Member States’.<sup>77</sup> However, the Court continued: ‘On the other hand, ..., measures less restrictive of the free movement of capital than those in the law at issue could be envisaged to ensure the recovery of tax debts, such as the obligation to provide, a priori, the necessary **financial guarantees** for the payment of those debts.’<sup>78</sup>

The Court thus seems to come to the conclusion that the restrictive measure is disproportional in relation to EEA funds based on two grounds: ‘on the one hand’ the measure is not conditional upon an existing bilateral agreement on exchange of information as well as tax enforcement, and ‘on the other hand’ the Member State may also ask for provision of guarantees. From this reasoning, it is difficult to infer which of these two less restrictive measures is the least restrictive one or if they are both at the same level. What makes it even more difficult to examine the relevance of the Court's statement in this as well as in other judgments is the fact that the restriction found could not only be based on a disadvantage caused by the method of withholding, but also the taxation itself.<sup>79</sup> It is thus unclear whether the Court's reasoning would have been the same if only the method of tax collection had been different.<sup>80</sup> Nevertheless, in light of this judgment it at least seems that it could be permissible for the Member States to make certain benefits for third-country residents conditional upon an existing bilateral agreement on mutual assistance with regard to tax enforcement.

### 3.3 Evaluation

ECJ case law on the relevance of mutual assistance in tax collection is much less developed than the case law on the relevance of exchange of information. In the light of the proportionality principle the requirement of an enforcement agreement seems, in contrast to the exchange of information, only reasonable in host-State scenarios. The more recent ECJ case law confirms that Member States could be permitted to make certain benefits for third-country taxpayers subject to an existing agreement on enforcement assistance with the residence State. This approach, however, would exclude many third countries from certain benefits, since the inclusion of a provision corresponding to Article 27 OECD Model Convention (OECD MC) in existing bilateral tax treaties is so far not widespread.<sup>81</sup>

In light of the goal of ensuring effective tax collection the condition of a bilateral agreement on enforcement assistance seems to be reasonable for two types of benefits for non-residents in particular: First, in cases where the benefit in question concerns the time of tax payment: for instance, the deferral of payment in exit-tax cases<sup>82</sup> or the possibility to apply for an assessment proceeding instead of an immediate withholding tax.<sup>83</sup> In these cases, the desired benefit corresponds to the need for enforcement assistance. However, one has to keep in mind that the assessment proceeding is not in all cases more advantageous than the means of withholding, since many States ask for advance tax payments in their assessment proceedings which could place residents in an equal (or even worse) position to non-residents.<sup>84</sup> Therefore, a case-by-case analysis of the relevant national provisions for residents and non-residents will be required to establish whether the withholding tax results in a restriction or not. Second, the requirement of an existing agreement on tax enforcement could also be reasonable in situations where a tax benefit is subject to certain stringent liability requirements the taxpayer has to satisfy, namely in sensible

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<sup>76</sup> ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, paras. 21–22 and 43–44.

<sup>77</sup> ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, paras. 48 et seq.

<sup>78</sup> ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, para. 50.

<sup>79</sup> See on this issue also Simader, *Bulletin for International Taxation* 115 (2010); Zimmer, *Tax Notes International* 668 et seq. (2008).

<sup>80</sup> This could also hold true for the *Turpeinen* case (ECJ 9 November 2006, C-520/04, *Turpeinen*), since in this case non-residents were taxed by withholding at a flat rate and residents were taxed by assessment at progressive tax rates.

<sup>81</sup> This is due to the fact that Art. 27 OECD MC was only introduced in the Model in 2003.

<sup>82</sup> It is, however, questionable, whether exit-tax cases are covered by the free movement of capital at all. Nevertheless, this issue is at least relevant for exit taxes under the freedom of establishment in the EEA Agreement. For example, under Sec. 6(6)(b) Austrian Income Tax Act (ITA) in the case of transfer of assets to an EEA Member State a deferral of payment of exit tax on hidden reserves in the assets transferred abroad is conditional upon an existing comprehensive agreement on exchange of information as well as tax collection with the relevant Member State. See also Mayr, § 10 KStG: *Portfolioidividenden aus Drittstaaten ebenfalls befreit*, *Recht der Wirtschaft* 503 (2011).

<sup>83</sup> One has to keep in mind that it is, however, disputed and so far unsettled whether the method of withholding tax as means to ensure the effective collection of taxes constitutes a restriction to the fundamental freedoms at all. See footnote 59.

<sup>84</sup> E.g. this seemed to be the situation in the *Truck Center* case (see ECJ 22 December 2008, C-282/07, *Truck Center*, para. 49).

areas carrying out tasks for the public benefit as well.<sup>85</sup> With regard to such benefits, one could argue that non-residents may only guarantee to meet the same liability standards if an agreement on enforcement assistance is in place.

Making other benefits for non-residents with regard to the amount of tax, such as tax exemptions or lower tax rates, dependent upon an existing agreement on enforcement assistance, however, should in general not be able to be justified by the need for effective tax collection. In the case of granting such benefits, tax authorities will as a rule not have any need to ask foreign authorities for assistance in tax collection.<sup>86</sup> Only under exceptional circumstances, where it proves later on that the necessary conditions have actually not been fulfilled, a tax amount may possibly have to be re-collected.<sup>87</sup> Moreover, a general presumption of abuse for non-residents is not in line with the principle of proportionality and, thus, violates EU law.<sup>88</sup> Therefore, in light of the ECJ's reasoning in the *Haribo* case it seems disproportionate to make such benefits consistently dependent on an existing enforcement agreement, since this agreement is needed in very exceptional cases only. Hence, taking into account the principles of the proportionality test developed by the Court, the room for the condition of an existing agreement on enforcement assistance in third-country situations under the scope of the free movement of capital seems to be limited to rather certain specific benefits.

## 4 CHANGE UNDER THE SCOPE OF THE NEW EU DIRECTIVES?

### 4.1 Higher Standard of Cooperation than in International Agreements?

So far, the ECJ has only had to deal with cases under the 'old' EU Directives on mutual assistance. One may wonder

whether the relevant framework to compare may change for situations where the new Directives apply.<sup>89</sup> If we follow the Opinion of Advocate General Kokott and some other scholars,<sup>90</sup> the efficiency of mutual assistance in practice could also be relevant in applying the discrimination test of the fundamental freedoms. It is, thus, worth analysing whether the new EU Directives may lead to a significant change in the scope and/or effectiveness of the exchange of information and tax collection within the EU compared to that in international agreements following the OECD standard.<sup>91</sup>

#### 4.1.1 The New Directive on Exchange of Information

The new Directive 2011/16/EU on exchange of information includes several features that may increase the effectiveness of the exchange of information between the Member States. Since the ECJ refers the Member States to the possibility to ask each other for information instead of denying a benefit, the new provisions with regard to exchange of information upon request could in particular be relevant from a fundamental freedom perspective. In this regard, the new Directive sets a time limit of six months for the requested State to provide the information asked for, and additional different time limits to keep the requesting authority up-to-date on any problems that have occurred.<sup>92</sup> These provisions should lead to a swifter exchange of information within the EU compared to the proceedings under agreements with third countries.<sup>93</sup>

Furthermore, it seems that also the minimum conditions to be fulfilled for a valid request for information so as to exclude 'fishing expeditions' may be less far-reaching in certain situations than the OECD standard following the Tax Information Exchange Agreement Model Convention (TIEA MC).<sup>94</sup> Under the provisions of the new Directive and in line with the TIEA

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<sup>85</sup> An example of such a measure might be found in the *Commission v. Portugal* case on pension funds (ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, paras. 21–22 and 43–44).

<sup>86</sup> See e.g. Sec. 21(1)(1a) Austrian CITA which makes the refunding of withholding tax on portfolio dividends to non-residents, *inter alia*, conditional upon an existing comprehensive agreement with regard to exchange of information as well as tax collection with the relevant EEA countries (third countries are discriminatory excluded from this provision). It seems questionable under which circumstances enforcement assistance could be really helpful for the Austrian tax authorities in granting a tax exemption by refunding withholding tax. Critically also Kofler & Marschner, *Die Quellensteuerrückzahlung bei grenzüberschreitenden Portfoliodividenden nach § 21 Abs 1 Z 1a KStG*, GES 296 (2011).

<sup>87</sup> See along the same lines with regard to Sec. 21(1)(1a) Austrian CITA also Kofler & Marschner, GeS 296 (2011).

<sup>88</sup> See ECJ 21 November 2006, C-196/04, *Cadbury Schweppes*, paras. 51 and 55. See as well European Commission, MEMO/07/558 of 10 December 2007.

<sup>89</sup> The Directive 2011/16/EU has to be implemented into national law by 1 January 2013. The Directive 2010/24/EU should already have been implemented by the Member States with the beginning of the year 2012.

<sup>90</sup> Opinion of AG Kokott 21 December 2011, C-498/10, X, paras. 52 et seq. See supporting the relevance of efficiency also Pistone, *The EU's External Dimension in Direct Tax Matters*, 37 et seq. (Heidenbauer & Stürzlinger eds., Linde, 2010); Lang, *ECJ case law on cross-border dividend taxation – recent developments*, EC Tax Rev. 76 et seq. (2008).

<sup>91</sup> For a comparison (based on the proposals to the EU Directives) see also e.g. Caram, *Enhancing International Cooperation among Tax Authorities in the Assessment and the Recovery of Taxes: The proposals for New European Directives*, Intertax 630 (2009).

<sup>92</sup> Art. 7 Directive 2011/16/EU. The old Directive only stipulated in Art. 5 that the information must be forwarded 'as swiftly as possible'. Supporting this obligation for a quicker exchange Gabert, *Council Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation*, Eur. Taxn. 345 (2011).

<sup>93</sup> The current OECD MC and TIEA MC do not include any comparable provisions on time limits.

<sup>94</sup> Compare Art. 20(2) Directive 2011/16/EU and Art. 5(5) TIEA MC.

MC, in order to demonstrate the foreseeable relevance of the information requested, the identity of the person under examination or investigation as well as the tax purpose for which the information is sought has to be provided by the requesting authority. The name and address of any person believed to be in possession of the requested information as well as any other element that may facilitate the collection of information may only be provided by the requesting authority 'to the extent known and in line with international developments'.<sup>95</sup> This is not a major difference with the standard in the TIEA MC.<sup>96</sup> However, the nature and the form of the information sought and the specific grounds for believing that the information is held by the requested Member State, which is mandatory information under the TIEA MC,<sup>97</sup> are not mentioned in the new Directive.<sup>98</sup> Moreover, the TIEA MC also calls for a statement by the requesting State that the request is in conformity with the law and administrative practices of the applicant State, and a statement that the applicant party has pursued all means available under national law,<sup>99</sup> which is also not explicitly mentioned by the Directive.<sup>100</sup> Hence, in certain cases it may be easier to make a valid request under the new Directive than under a bilateral agreement which follows the TIEA MC. However, apart from TIEAs many DTCs do not include a list of information which has to be provided by the requesting State or include lists in additional protocols to Article 26 which differ from the one contained in Article 5 TIEA MC.<sup>101</sup> Therefore, in most situations a case-by-case analysis will be needed to determine whether the requirements for a valid request are more or less far-reaching under a specific bilateral agreement or under the Directive. Nevertheless, compared to the TIEA MC – which has recently been gaining more relevance, in particular for tax havens, due to the pressure

by the OECD – it seems to be easier to produce a valid request under the Directive than under a TIEA.

Moreover, the new Directive on exchange of information will force the Member States to exchange information automatically for specific listed income beginning on 1 January 2015.<sup>102</sup> This new feature, however, seems to be less relevant for the discrimination test under the fundamental freedoms, since the ECJ has so far mainly referred to exchange of information upon request in its case law on third-country situations.<sup>103</sup> Therefore, provisions for automatic exchange should not be taken into account in analysing the relevant legal framework.<sup>104</sup> As the requirement of a bilateral agreement seems to serve the goal of verifying data already provided by the taxpayer only (see on this issue section 2.3), international instruments which solely provide for exchange of information or other assistance upon request seem to satisfy the Member States' need for ensuring effectiveness of fiscal supervision. If, however, one takes the ECJ's reasoning in the *Commission v. Portugal* case literally – that the framework of cooperation in relation to third countries should be 'equivalent to that put in place between the EU Member States'<sup>105</sup> –, the provisions on automatic exchange included in the new Directive may also play a role.<sup>106</sup> According to this view, any bilateral agreement without provisions on automatic exchange comparable to the new EU Directive would no longer qualify under the scope of the new Directive in the future.

#### 4.1.2 The New Directive on Tax Collection

The new Directive 2010/24/EU on tax collection may also lead to more efficient and swift assistance.<sup>107</sup> Compared to the old Directive, the substantive scope is generally extended to all taxes and duties of any kind,

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- <sup>95</sup> One, however, has to wonder how these wording, in particular in line with international developments', should be interpreted and what the meaning and the consequence of this provision should be. The developments on the OECD level, in particular in Art. 26 OECD MC, the TIEA MC and the corresponding commentaries could be of relevance here. This approach, however, would lead to a dynamic interpretation depending on the future decisions in a non-EU body which could be criticized from a democracy and policy point of view.
- <sup>96</sup> Art. 5(5)(d) TIEA MC also provides that the name and address of any person believed to be in possession of the requested information shall only be provided 'to the extent known'. There is, however, no reference to other relevant information included in the TIEA MC.
- <sup>97</sup> See Art. 5(5)(b) and (d) TIEA MC.
- <sup>98</sup> See also Vascega & Van Thiel, *Assessment of Taxes in Cross-Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation*, EC Tax Rev. 152 (2011).
- <sup>99</sup> Art. 5(5)(f) and (g) TIEA MC.
- <sup>100</sup> However, this requirement could be indirectly derived from Art. 17(1) and (3) Directive 2011/16/EU.
- <sup>101</sup> See Aumayr, *Internationale Amtsbilfe in Steuersachen* (Lang et al. eds., Linde 2010). Also, the list established by the OECD Fiscal Committee which serves as a non-exhaustive illustration for states wishing to integrate some definition of a valid request in their treaty (See OECD Committee on Fiscal Affairs, *Manual on the implementation of exchange of information provisions for tax purposes*, 2006, 9 et seq.) does not correspond to the list contained in the TIEA MC.
- <sup>102</sup> Art. 8 Directive 2011/16/EU. See on this issue Vascega & Van Thiel, EC Tax Rev. 153 (2011).
- <sup>103</sup> See ECJ 18 December 2007, C-101/05, A, paras. 63 and 67; ECJ 23 April 2008, C-201/05, *Test Claimants in the CFC and Dividend Group Litigation*, paras. 95 et seq.
- <sup>104</sup> See also Smit, *Freedom of Investment*, vol. 2, 594 et seq. (2011). Contra and also taking into account automatic disclosure provisions O'Brien, *Taxation and the Third Country Dimension of Free Movement of Capital in EU Law*, Brit. Tax Rev. 664 (2008).
- <sup>105</sup> ECJ 27 October 2011, C-493/09, *Commission v. Portugal*, para. 50.
- <sup>106</sup> See along these lines also O'Brien, Brit. Tax Rev. 664 (2008).
- <sup>107</sup> See COM(2009) 28 final; Preamble 14 et seq. Directive 2010/24/EU; Opinion of AG Kokott 21 December 2011, C-498/10, X, points 52 et seq.



administrative penalties, fees for certificates as well as interest and costs relating to tax claims.<sup>108</sup> Moreover, the preconditions to be fulfilled by the requesting State for a valid request for enforcement assistance have been limited: Asking for enforcement assistance is also permitted without actually commencing domestic procedures when there are no assets in the requesting Member State or when using domestic procedures would lead to disproportionate difficulties.<sup>109</sup> Under Article 27 OECD MC, a request in this regard is only valid if the requesting State has pursued all reasonable measures of collection available under its laws or administrative practice.<sup>110</sup> The wording and the more detailed criteria under the new Directive seems to make it easier to produce a valid request for enforcement assistance under the Directive than under the OECD MC. What will also speed up the assistance procedure is the newly established 'uniform instrument'.<sup>111</sup> This uniform instrument abolishes the need for additional acts of recognition, supplements or replacement. With this new instrument many problematic issues and disputes that have so far occurred in practice under the scope of the old Directive will therefore be eliminated.<sup>112</sup> A model for the uniform instrument and other additional details clarifying the assistance procedure are included in the implementing regulation adopted by the Commission.<sup>113</sup> Moreover, the new Directive on tax collection also explicitly allows officials of the applying State to be present in administrative offices and to participate in administrative enquiries in the requested State.<sup>114</sup> The OECD MC as well as its Commentary lacks such detailed rules on the procedure of enforcement assistance.

When it comes to organization and communication aspects, both new Directives go into more detail than the old ones and the corresponding OECD MC provisions:<sup>115</sup>

The new Directives will force the Member States to use standard forms and electronic means of communication,<sup>116</sup> and regulate the use of languages<sup>117</sup> and the organization of the responsible authorities more precisely.<sup>118</sup>

All these new provisions may, in particular, speed up the process of exchanging information and tax collection across borders and may, thus, lead to more effectiveness in mutual assistance within the EU in the future,<sup>119</sup> even in a more extensive way than under the current OECD standard.<sup>120</sup> The new Directives, therefore, could strengthen the relevance of mutual assistance and their effect on the fundamental freedoms, both within the EU and in relation to third countries.<sup>121</sup> Member States might be even less permitted to rely on the justification grounds of ensuring fiscal supervision and efficient tax collection to save restrictive tax measures in relation to other Member States, since the new Directives should provide for an efficient framework of cooperation between the Member States. In light of this new standard of cooperation within the EU, there seems to be the possibility that the ECJ may apply a higher standard in examining the legal framework of cooperation in third-country situations under the scope of the new Directives as well. One could even think the Court could make use of these developments – if only for political reasons – to refuse the general comparability between the EU Directives and bilateral agreements on mutual assistance in the future. It remains to be seen whether and how the Court will deal with this issue in its upcoming case law.

## 4.2 Relevance of Article 24(1) Directive 2011/16/EU

In looking at the new Directive on exchange of information, it is also important to mention Article 24(1).

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<sup>108</sup> Art. 2 Directive 2010/24/EU. A small number of specific items not covered are listed separately in Art. 2(3).

<sup>109</sup> Art. 11(2) Directive 2010/24/EU. See also Vascega & Van Thiel, *Council Adopts New Directive on Mutual Assistance in Recovery of Tax and Similar Claims*, Eur. Taxn. 236 (2011); Bal, *Extraterritorial Enforcement of Tax Claims*, Bull. Intl. Taxn. 601 (2011).

<sup>110</sup> Art. 27(8)(c) OECD MC. See also Engelschalk in *Doppelbesteuerungsabkommen-Kommentar*, art. 27 para. 95 (5th ed., Vogel & Lehner eds., 2008).

<sup>111</sup> Art. 12 Directive 2010/24/EU.

<sup>112</sup> See Bal, Bull. Intl. Taxn. 601 (2011); Baker et al., *International Assistance in the Collection of Taxes*, Bull. Intl. Taxn. 285 (2011).

<sup>113</sup> See Commission implementing regulation No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 302/16 of 19 November 2011.

<sup>114</sup> Art. 7 Directive 2010/24/EU. There is no comparable provision in Art. 27 OECD MC.

<sup>115</sup> See Bal, Bull. Intl. Taxn. 602 (2011).

<sup>116</sup> Art. 21 Directive 2010/24/EU; Arts. 20-21 Directive 2011/16/EU. See on these issues Gabert, Eur. Taxn. 345 et seq. (2011). The uniform instrument and other documents have to be submitted via the Common Communications Network (CNN), a platform developed by the Union for all transmissions by electronic means between competent authorities in the area of customs and taxation.

<sup>117</sup> Art. 22 Directive 2010/24/EU; Art. 21(4) Directive 2010/24/EU. The TIEA MC only includes a brief provision in Art. 11.

<sup>118</sup> Art. 4 Directive 2010/24/EU; Art. 4 Directive 2010/24/EU.

<sup>119</sup> See Gabert, Eur. Taxn. 344 et seq. (2011); Vascega & Van Thiel, Eur. Taxn. 236 et seq. (2011).

<sup>120</sup> See in this regard also, Bal, Bull. Intl. Taxn. 602 (2011); Smit, *Freedom of Investment*, vol. 2, 204 et seq. (2011).

<sup>121</sup> See in this respect, taking into account the efficiency of mutual assistance in the discrimination test: Opinion of AG Kokott 21 December 2011, C-498/10, X, points 52 et seq. See in support of the relevance of efficiency also Pistone, *The EU's External Dimension in Direct Tax Matters*, 37 et seq. (Heidenbauer & Stürzlinger eds., Linde, 2010);



This provision provides for new exchange possibilities concerning information received from third countries:

Where the competent authority of a Member State receives from a third country information that is foreseeably relevant to the administration and enforcement of the domestic laws of that Member State concerning the taxes referred to in Article 2, that authority **may**, in so far as this is allowed pursuant to an agreement with that third country, provide that information to the competent authorities of Member States for which that information **might be useful and to any requesting authorities**.

In academic writing, it has been argued that this provision might render the justification ground of ensuring effective fiscal supervision more or less invalid, since Member States would need to ask each other if information can be obtained from third countries.<sup>122</sup> This could mean that if at least one Member State had agreed on a sufficient exchange of information clause with the respective third country, this would render the justification ground ineffective, since all other Member States would have to ask this single Member State to initiate an exchange of the relevant information under its bilateral agreement with the third country.

This view, however, can be questioned by a number of reasons: First, Article 24 only provides that '[w]here the competent authority of a Member State receives from a third country information...that authority **may**...provide that information to the competent authority of [other] Member States.' This wording could mean that only if the Member State has already obtained information, this specific information could be subject to an exchange within the EU based on Article 24. However, if the Member State has not yet obtained the relevant information from the third country, it would not be forced to initiate a separate information exchange proceeding with the third country. Second, the broad interpretation taken by some authors seems to be limited by the wording of Article 26 OECD MC and Article 24(1) Directive 2011/16/EU itself either. According to Article 26 OECD MC, only the exchange of information 'foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political

subdivisions or local authorities', is permitted. This condition is also reflected in Article 24(1).<sup>123</sup> Hence, asking the other contracting State (a non-Member State) for information relevant for the assessment of taxes imposed by another Member State, which is not a contracting State to the DTC at hand, does not seem to be covered by Article 26 OECD MC. Third, according to the prevailing opinion passing on information received from a contracting State to another country not party to the DTC is not permitted under Article 26 OECD MC or under the TIEA MC, unless explicitly stipulated otherwise,<sup>124</sup> or express written consent is given by the requested contracting State that supplied the information.<sup>125</sup> Fourth, from a policy point of view it seems rather unfair to burden a single Member State with the task and the corresponding costs of carrying out assistance proceedings with the third country under an existing bilateral agreement on behalf of all other Member States.

Taking into account these arguments, the area of application of Article 24 of the new Directive on exchange of information seems to be rather small: Article 24 may only be of relevance in cases where a Member State has already obtained the relevant information from the third country under its DTC or TIEA with the third country for its own tax purposes prior to the receipt of the request of the other Member State under Article 24. In addition, it is required that the DTC or TIEA between the Member State and the third country permits forwarding of information to non-contracting States. Under consideration of these arguments, it is rather more likely that the justification of ensuring effective fiscal supervision will be relevant in most third-country cases in the future as well.

## 5 CONCLUSION

ECJ case law shows that the free movement of capital requires Member States to treat only those external capital movements equal to EU-internal capital movements which involve cooperative third countries. Hence, third countries may be in a position to escape discrimination within the tax law systems of Member States by signing bilateral agreements on mutual assistance. However, there are certain conditions to be met.

The first precondition, which is not dealt with in this paper, is that the scope of the free movement of capital under Article 63 TFEU is fulfilled, since only this fundamental freedom applies to third-country

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<sup>122</sup> See Nijkeuter, EC Tax Rev. 241 (2011); Smit, *Freedom of Investment*, vol. 1, 188 and vol. 2, 596 et seq.

<sup>123</sup> See the wording of Art 24 Directive 2010/24/EU:...' information that is foreseeably relevant to the administration and enforcement of the domestic laws of **that** Member State...'

<sup>124</sup> See OECD MC Commentary Art. 26 para. 12.2; OECD Committee on Fiscal Affairs, *Manual on the implementation of exchange of information provisions for tax purposes*, 19 et seq. (2006).

<sup>125</sup> See TIEA MC Commentary para. 97; OECD Committee on Fiscal Affairs, *Manual on the implementation of exchange of information provisions for tax purposes*, 19 et seq. (2006).

situations.<sup>126</sup> This first precondition is typically met if the provision and the case at hand deal with portfolio investments or real estate. The second precondition is that the grandfathering clause under Article 64(1) TFEU does not apply, meaning that the restrictive tax measure was introduced after 31 December 1993 or does not address direct investments or other categories of capital movement listed in Article 64(1) TFEU. For purposes of this paper, the most important conditions, however, are that the bilateral agreement on mutual assistance between the respective Member State and the third country is 'equivalent' to the legal framework of cooperation within the EU, and that the mechanism in the bilateral agreement is 'sufficient' to verify the specific conditions needed. This requires a case-by-case analysis by the national authorities of the scope of the bilateral provisions. It seems that in most host and home-State scenarios a DTC including an extended clause on exchange of information permitting the exchange of information not only for carrying out of the provisions of the treaty but also for the assessment under national law will be necessary to meet these requirements. If a Member State

acts as a host State for third-country residents, the condition of a bilateral agreement on tax enforcement could also be permitted under EU law in certain cases, in particular for benefits extending the period for tax payment or requiring certain stringent liability standards. However, the ECJ has so far not clarified whether Member States are allowed to ask for guarantees in addition to or instead of this condition.<sup>127</sup>

International agreements on mutual assistance between Member States and third countries may, therefore, have an impact on the tax law systems and the tax revenues within the EU. From a policy point of view, there is the risk that based on this ECJ case law Member States will be less motivated to conclude bilateral agreements on mutual assistance with third countries in the future, since this could result in losses in their tax revenue.<sup>128</sup> Finally, it remains to be seen whether the standard and the interpretation of the relevance of international agreements in ECJ case law will be influenced by the new EU Directives strengthening the efficiency of cooperation within the EU.

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<sup>126</sup> See on this issue Spies, *Kapitalverkehrsfreiheit und Kapitalbeteiligungen in der EuGH-Rechtsprechung*, *Steuer und Wirtschaft International* 350 (2011); Smit, *Freedom of Investment*, vol. 2, 461 et seq.; see also further references in footnote 3.

<sup>127</sup> This may be further clarified in the ECJ's decision in the pending *X*. case (C-498/10).

<sup>128</sup> See on this consequence of ECJ case law and potential solutions Lang, *The Legal and Political Context of ECJ Case Law on Mutual Assistance*, *Eur. Taxn.* 199 et seq. (2012).