

The Legal and Political Context of ECJ Case Law on Mutual Assistance

This article traces the changing political environment behind the development of European Court of Justice case law on the role of mutual assistance in the review of justifications and proportionality with respect to the fundamental freedoms.

1. The Change in Direction of ECJ Case Law

The development of ECJ case law on the role of mutual assistance in relation to the freedoms vividly shows that court decisions must be understood within the context of – occasionally changing – political environments. In older case law, references to mutual assistance were made mainly in the context of depriving Member States of the possibility of justifying discriminatory cross-border rules: tax authorities are able to employ only limited investigative measures in regard to fact patterns occurring abroad. The lack of fiscal control in respect of cross-border constellations allowed states to create discriminatory rules, however, only if the tax authorities were unable to make use of the mutual assistance provided for under EU law.¹ Due to the almost unlimited possibilities for Member State governments to request mutual assistance from each other in the field of taxation, this sealed the fate of most national rules that discriminated against taxpayers domiciled in other Member States or against income or assets

from other Member States. The ECJ did not accept the objection that mutual assistance is, in fact, often executed very slowly in the European Union.² In this manner, the Court encouraged Member States to make effective use of the existing mutual assistance options: since Member States were not able to uphold discrimination on the basis of the factual difficulties they encountered, they were better advised to focus directly on turning mutual assistance provisions into an effective instrument.

More recently, the ECJ has been increasingly emphasizing that taxpayers may also be required to contribute, to a greater extent, to the clarification of cross-border fact patterns.³ The tax authorities do not need to rely primarily on mutual assistance options.⁴ In the view of the ECJ, the competent authorities are not in any way prevented from demanding evidence from taxpayers that the authorities deem necessary for assessing the taxes and duties concerned and, where necessary, from denying the requested equal treatment where such evidence is not provided. The pressure on Member States to make more effective use of the existing mutual assistance instruments within the European Union and to further expand them has thus diminished. At the same time, this development correlates with the Court's trend to pay greater attention to arguments submitted by governments when reviewing freedoms, to permit additional grounds of justification and to occasionally reduce the threshold when reviewing proportionality.⁵

For constellations involving third countries, the ECJ has, moreover, developed a separate direction of case law that makes even more concessions to the governments of Member States.⁶ In its decision in *A* (Case C-101/05),

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1. BE: ECJ, 28 Jan. 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State*, para. 18, ECJ Case Law IBFD; NL: ECJ, 12 Apr. 1994, Case C-1/93, *Halliburton Services BV v. Staatssecretaris van Financiën*, para. 21 et seq., ECJ Case Law IBFD; DE: ECJ, 14 Feb. 1995, Case C-279/93, *Finanzamt Köln-Alstadt v. Roland Schumacker*, para. 44 et seq., ECJ Case Law IBFD; NL: ECJ, 11 Aug. 1995, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen*, para. 26, ECJ Case Law IBFD; LU: ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*, para. 41, ECJ Case Law IBFD; DE: ECJ, 14 Sept. 2006, Case C-386/04, *Centro de Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, para. 50, ECJ Case Law IBFD; FI: ECJ, 9 Nov. 2006, Case C-520/04, *Pirkko Marjatta Turpeinen*, para. 36 et seq., ECJ Case Law IBFD; BE: ECJ, 22 Mar. 2007, Case C-383/05, *Raffaele Talotta v. Kingdom of Belgium*, para. 36 et seq., ECJ Case Law IBFD; NL: ECJ, 29 Mar. 2007, Case 120/78, *Rewe Zentralfinanz eG v. Finanzamt Köln-Mitte*, para. 56, ECJ Case Law IBFD; FR: ECJ, 11 Oct. 2007, Case C-451/05, *Européenne et Luxembourgeoise d'investissements SA v. Directeur Général des Impôts, Direction des services généraux et de l'informatique and Ministère public*, para. 92, ECJ Case Law IBFD; NL: ECJ, 16 Oct. 2008, Case C-527/06, *R.H.H. Renneberg v. Staatssecretaris van Financiën*, para. 78, ECJ Case Law IBFD; and DE: ECJ, 27 Jan. 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, para. 61, ECJ Case Law IBFD.

2. *Schumacker* (C-279/93), para. 43; FR: 4 Mar. 2004, Case C-334/02, *Commission v. France*, para. 29 and *Stauffer* (C-386/04), para. 48.

3. FR: ECJ, 8 July 1999, Case C-254/97, *Société Baxter, B. Braun Médical SA, Société Fresenius France and Laboratoires Bristol-Myers-Squibb SA v. Premier Ministre, Ministère du Travail et des Affaires sociales, Ministère de l'Économie et des Finances and Ministère de l'Agriculture, de la Pêche et de l'Alimentation*, para. 18 et seq.; FR: ECJ, 10 Mar. 2005, Case C-39/04, *Laboratoires Fournier SA v. Direction des vérifications nationales et internationales*, para. 25, ECJ Case Law IBFD; *Stauffer* (C-386/04), para. 49; *ELISA* (C-451/05), para. 95; FR: ECJ, 27 Nov. 2008, Case C-418/07, *Société Papillon v. Ministère du budget, des comptes publics et de la fonction publique*, para. 56 et seq., ECJ Case Law IBFD; *Persche* (C-318/07), para. 60 et seq.; AT: ECJ, 10 Feb. 2011, Case C-436/08 and C-437/08, *Haribo Lakritzen Hans Riegel BetriebsmbH and Österreichische Salinen AG v. Finanzamt Linz*, para. 100 et seq., ECJ Case Law IBFD. For details on the participation duties of taxpayers in ECJ case law, see M. Schilcher, *Grenzen der Mitwirkungspflichten im Lichte des Gemeinschaftsrechts* p. 155 et seq. (Linde 2010).

4. *Persche* (C-318/07), para. 65.

5. See M. Lang, 2005 – *Eine Wende in der steuerlichen Rechtsprechung des EuGH zu den Grundfreiheiten?*, in *Steuerrecht im Rechtsstaat* p. 297 et seq. (R. Mellingerhoff, W. Schön & H.-U. Viskorf eds., Dr. Otto Schmidt 2011).

6. For details, see M. Lang, *Kapitalverkehrsfreiheit, Steuerrecht und Drittstaaten*, p. 209 et seq. StuW 3 (2011).

where the fact pattern involved Switzerland, the ECJ expressly established a different threshold:⁷

However, that case-law, which relates to restrictions on the exercise of freedom of movement within the Community, cannot be transposed in its entirety to movements of capital between Member States and third countries, since such movements take place in a different legal context from that of the cases which gave rise to the judgments referred to in the two preceding paragraphs.

It was decisive for the ECJ that:

[...] relations between the Member States take place against a common legal background, characterised by the existence of Community legislation, such as Directive 77/799, which laid down reciprocal obligations of mutual assistance. Even if, in the fields governed by that directive, the obligation to provide assistance is not unlimited, the fact remains that that directive established a framework for cooperation between the competent authorities of the Member States which does not exist between those authorities and the competent authorities of a third country where the latter has given no undertaking of mutual assistance. [...] 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.

The *A* decision shows that the ECJ is significantly stricter with respect to taxpayers in third-country constellations.⁸

Interestingly, the ECJ has, to date, not distinguished among legal foundations for mutual assistance. It would be natural to attach lesser importance to mutual assistance agreed under international law than to a corresponding obligation under EU law: if another *contracting state* fails to meet its obligation under international law, the possibilities of sanctions are narrowly delimited. In an extreme case, this may be cause for termination of the tax treaty. This is a far-reaching step, however. The terminating contracting state usually suffers equally from the consequences. If another *Member State*, however, fails to meet its obligations arising from the Mutual Assistance Directive (2011/16),⁹ the affected Member State may take the issue to the ECJ and, in that way, force the obligations under EU law to be fulfilled. This might entitle the ECJ to attach lesser importance to the mutual assistance rules set out in a tax treaty or other treaty under international law than to the application of the Mutual Assistance Directive.¹⁰ While the ECJ indicated in the *Com-*

mission v. Netherlands (Case C-521/07) decision that this distinction might be crucial,¹¹ this consideration was not taken up in more recent decisions.¹² The ECJ has thus not taken the opportunity to limit the significance of the free movement of capital in relation to third countries in general. Instead, its case law has created an incentive for third countries to satisfy the wishes of Member States in the area of mutual assistance. Practically at the same time as the European Union, the OECD and the G-20 states have been building up considerable political pressure to expand the exchange of information between countries worldwide, the case law of the ECJ has been sending signals that Member State rules that are discriminatory from the perspective of the freedoms are acceptable in relation to third countries unwilling to enter into treaty obligations governing the exchange of information.

The significance that the ECJ attaches to exchange of information with third countries was also seen in *Haribo and Österreichische Salinen* (Joined Cases C-436/08 and C-437/08):¹³ Austrian tax law had made preferential treatment of portfolio investments in third-country companies dependent on an obligation under international treaty law to exchange information. In regard to larger investments, however, this requirement was not a precondition for earning tax-exempt dividends. The Austrian government's argument, according to which the discriminatory treatment of portfolio dividends from third countries was justified due to the lack of a treaty obligation to exchange information, while other third-country dividends were exempted even if the authorities did not have the option of mutual assistance at their disposal, therefore, had its weaknesses.¹⁴ Nevertheless, the ECJ accepted this justification and thus made it clear that it attaches great significance to the exchange of information agreed in treaties.¹⁵ The ECJ, however, found the additional possibility of mutual assistance in enforcement demanded by the Austrian legislator to be disproportionate.¹⁶ The Court's decision is thus in line with the trends encountered in the political discussion: the focus is currently on the expansion of worldwide information exchange, but not necessarily mutual assistance in enforcement.¹⁷

J. Schuch & C. Staringer eds, Kluwer 2007); S. Heidenbauer & V. Metzler, *National Report Austria*, in *The EU and Third Countries: Direct Taxation* p. 97 at p. 107 (M. Lang & P. Pistone eds., Kluwer 2007); D. Hohenwarter & F. Koppensteiner, *Die Erhebung von Quellensteuern im Verhältnis zu Drittstaaten aus gemeinschaftsrechtlicher Sicht*, in *Quellensteuern* p. 67 at p. 99 (M. Lang, J. Schuch & C. Staringer eds., Linde 2010); D. Hohenwarter, *Verlustverwertung im Konzern* p. 137 (LexisNexis 2010); see also the submission of the Netherlands in NL: ECJ, 11 June 2009, Case C-521/07, *Commission v. Netherlands*, para. 28 et seq.

7. SE: ECJ, 18 Dec. 2007, Case C-101/05, *Skatteverket v. A.*, para. 60 et seq.
8. For a critical view, see K. Simader, *Die Bedeutung der internationalen Amtshilfe in Steuersachen in der Rechtsprechung des EuGH zu den Grundfreiheiten*, in *Internationale Amtshilfe in Steuersachen* p. 309 at p. 340 et seq. (M. Lang, J. Schuch & C. Staringer eds., Linde 2011).
9. EU Mutual Assistance Directive (2011): Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, EU Law IBFD.
10. See M. Lang, *Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions*, EC Tax Review 98, p. 111 (2009); M. Lang, *Zum Seminar G: Verbieta das Gemeinschaftsrecht die Erhebung von Quellensteuern?* IStR 15 p. 539 at p. 541 et seq. (2009); M. Lang, *Die Zukunft des Steuerabzugs bei beschränkter Steuerpflicht*, in *Wirtschaftsprüfung im Wandel* p. 445 at p. 551 (W. Ballwieser & W. Grewe eds., C.H. Beck 2007); P. Plansky, *The impact of the fundamental freedoms on tax treaties with third countries*, in *Tax Treaty Law and EC Law* p. 293 at p. 318 (M. Lang,

11. *Commission v. Netherlands* (C-521/07), para. 47.
12. See, for example, IT: ECJ, 19 Nov. 2009, Case C-540/07, *Commission v. Italy*, para. 70; *Haribo and Österreichische Salinen* (C-436/08 and C-437/08), para. 66; and PT: ECJ, 5 May 2011, Case C-267/09, *Commission v. Portugal*, para. 55.
13. *Haribo and Österreichische Salinen* (C-436/08 and C-437/08).
14. For a critical view, see Lang, *supra* n. 6, at p. 223 and K. Simader, *Die Rs. Haribo und Österreichische Salinen: Neues zur Bedeutung der Amtshilfe mit Drittstaaten?*, SWI 6, p. 244 at p. 245 et seq. (2011).
15. In contrast to its earlier judgment in *Commission v. Netherlands* (C-521/07), para. 47.
16. See Simader, *supra* n. 14, at p. 247.
17. See also NL: Opinion of Advocate General Kokott, 21 Dec. 2011, Case C-498/10, X, para. 47 et seq.

Among other countries, Liechtenstein, an EEA country, has also come under political pressure to reposition itself in the international community and, in particular, to undertake exchange of information. The ECJ's case law contributed to this pressure: In *Établissements Rimbaud* (Case C-72/09), the Court applied the standard it developed in the *A* decision in relation to Switzerland to Liechtenstein.¹⁸ The Court was apparently not impressed by the fact that, on the basis of the EEA Agreement, the freedoms largely realize a Single Market also in relation to the EEA states. The Court relied solely on the lack of applicability of the mutual assistance rules.¹⁹ In this decision, the ECJ made it clear that it views the possibility of demanding evidence from taxpayers, also in relation to EEA states, as sufficient only if mutual assistance instruments are available at the same time to verify such evidence. The different constellations within the European Union became clear, in particular, in the earlier decision in *ELISA* (Case C-451/05).²⁰ This case involved the same French rule as in *Établissements Rimbaud*, but in relation to a Member State, namely Luxembourg; also, in this case, the Mutual Assistance Directive (2011/16) was irrelevant, because it was not applicable to the facts at hand. Nevertheless, the ECJ did not accept that *ELISA* had been subject to discrimination under the French rule and found it to be sufficient that the authority could reverse the burden of proof upon the taxpayer. The lack of an option to verify such evidence by way of mutual assistance was not significant to the ECJ in this case. The way in which the ECJ distinguished the two decisions is not very convincing.²¹ The ECJ stated that:

[...] the framework established by Directive 77/799 for cooperation between the competent authorities of the Member States does not exist between those authorities and the competent authorities of a non-member State where that State has not entered into any undertaking of mutual assistance.²²

The "legal framework" that was normally applicable left the French tax authorities with just as little possibility to verify the furnished documents in Luxembourg as they had in Liechtenstein, due to the fact that the Mutual Assistance Directive did not apply. In light of the fact that important EU law provisions – such as, in particular, the freedoms – are applicable in relation to the EEA states in the same way as within the European Union, it is difficult to find legal arguments that would support the *Établissements Rimbaud* decision and the distinction from *ELISA* expressed therein. Ignoring the described political envi-

ronment, it would be difficult to identify the reasons for the divergent case law.

2. Further Case Law Development

Meanwhile, there has been further political development: numerous countries outside the European Union have bowed to international pressure and have reformulated their tax and treaty policy. The willingness of third countries to conclude tax treaties containing a full mutual assistance clause or even just to conclude any international treaties in the field of mutual assistance in tax matters has increased significantly. These states now also count on being able to claim the reward offered by the ECJ: they expect that many of the discriminatory rules imposed by Member States in relation to non-cooperating third countries will no longer be applicable in relation to them. Discrimination of cross-border fact patterns relative to domestic or EU-internal fact patterns, which, until now, has often been justified by a lack of information exchange, should now be removed in relation to third countries willing to cooperate. The *Haribo and Österreichische Salinen* decision indicated that, at least in some cases, a precondition imposed under national law of comprehensive mutual assistance in the collection of taxes is not proportionate and goes too far.²³ Third countries, therefore, justifiably hold out hope that the ECJ will critically review rules that make equal treatment of fact patterns in relation to those third countries dependent on comprehensive mutual assistance in tax collection, as compared with internal or EU-internal fact patterns, and that the ECJ might force Member States to abandon such preconditions in some cases.

This leads to an issue that has hardly been raised in the past: many third countries have a significantly greater interest in concluding tax agreements with Member States that also or exclusively address mutual assistance. The political pressure exerted on third countries is enormous. International organizations demand that they conclude a certain number of mutual assistance agreements so that they are not ostracized by the "international community". Often, countries that, in the past, had no problem with their image as tax havens are now very interested in introducing a tax system that meets the international standard. As a visible sign of international acceptance, they strive to be integrated within a network of bilateral or multilateral treaties. Member States, in turn, see this as an opportunity to expand mutual assistance instruments and, in this way, to combat tax evasion more effectively than before and to make it less attractive for taxpayers to shift their sources of income to low-tax countries. But the equal treatment of third-country constellations with domestic or EU-internal fact patterns that is necessary to achieve that purpose may also lead to lower tax revenues. The elimination of the protectionist effect of numerous restrictive tax rules, which, until now, were essentially only inapplicable in relation to EU countries, but otherwise did not have to be abandoned, will not be easily accepted by numerous Member States. For this reason, it can by no means be

18. FR: ECJ, 28 Oct. 2010, Case C-72/09, *Société Établissements Rimbaud v. Direction Générale des Impôts*, ECJ Case Law IBFD, para. 40 et seq.

19. On the equal treatment of EEA states and other third countries, see K. Simader, *Rechtsprechung des EuGH*, in *Internationale Amtshilfe in Steuersachen* p. 340 (M. Lang, J. Schuch & C. Staringer eds., Linde 2011); and Simader, *supra* n. 14, at p. 249.

20. *ELISA* (C-451/05).

21. See D. Gutmann, *France: The Rimbaud and Prunus Cases*, in *ECJ – Recent Developments in Direct Taxation 2010* p. 89 at p. 96 et seq. (M. Lang, P. Pistone, J. Schuch, C. Staringer and A. Storck eds., Linde 2011); J. Gruber & K. Spies, *Direkte Steuern*, in *Jahrbuch Europarecht 2010* p. 337 at p. 357 (T. Eilmansberger & G. Herzig eds., NW Verlag 2011); and K. Simader, *Rechtsprechung des EuGH*, in *Internationale Amtshilfe in Steuersachen*, *supra* n. 19, at p. 340 et seq.

22. *Rimbaud* (C-72/09), para. 41.

23. *Haribo and Österreichische Salinen* (C-436/08 and C-437/08), para. 73.

ruled out that some Member States will at least hesitate to conclude tax agreements with third countries.

To date, the ECJ has not been confronted with constellations of this sort. The cases decided until now by the ECJ were based on the unspoken assumption that the countries refusing to conclude international treaties governing mutual assistance were *third countries*. If, instead, the conclusion of a mutual assistance agreement were to fail due to the resistance of a *Member State*, this would result in strange consequences: it would then be within the legally non-reviewable discretion of that Member State to decide whether and in relation to which third countries discrimination would be permissible under national tax law. By refusing to conclude mutual assistance treaties or by cancelling existing agreements, every Member State would have the option of sustaining or reviving discriminatory rules in relation to specific countries. If Member States were essentially able to determine the scope of application of the free movement of capital in relation to third countries by concluding and cancelling mutual assistance agreements, this freedom would be deprived of most of its significance. If this had been the intention of the ECJ, it likely would have had more obvious means at its disposal to withhold application of the free movement of capital in relation to third countries.²⁴

These consequences would be nearly intolerable in relation to EEA states: the goal of the EEA Agreement is to open up participation in the Single Market to EEA states.²⁵ Against this background, it would be unacceptable for a Member State to reject, without justification, the offer of an EEA state to grant mutual assistance on the basis of an international treaty, and even to be “rewarded” for such behaviour by being able to continue to apply discriminatory rules in its tax law in relation to that EEA state. Accordingly, the existing case law of the ECJ only makes sense if it is interpreted in such a way that a Member State can successfully justify the discrimination under its tax law, at least in relation to EEA states, on the basis of the lack of mutual assistance options pursuant to an international treaty only if it also demonstrates that the failure to conclude such an international treaty is not due to its own conduct. Any other result would counteract the incentive for third countries to conclude such agreements – an incentive that is at least accepted, if not intended, by the ECJ as a side effect of its case law. Member States would, namely, otherwise be able to continue to apply protectionist measures to their advantage even in circumstances where they delayed or even rejected offers to negotiate such agreements.

The task of ECJ case law should, accordingly, be to ask which state is responsible in the event no international treaty governing mutual assistance is available. Clearly, this is not an easy undertaking. From a legal point of view, it is not easy to establish the relevant criteria. A failure to negotiate may have complex causes that cannot necessarily be attributed exclusively to one side. Extreme situations, however, can at least be dealt with from a legal perspective. If a Member State generally refuses a request by a third country to engage in negotiations on a mutual assistance agreement, this may be legitimate in terms of international and EU law, but that state should then no longer have the option of successfully justifying discriminatory rules in relation to the third country on the basis of a lack of mutual assistance pursuant to an international treaty. Where a third country is willing to respond to the desire of the Member State to engage in negotiations, but the Member State nevertheless delays the conclusion of the treaty without a discernible reason, this should be dealt with in the same manner. If, however, a Member State is justifiably concerned that the authorities of the other state might use information inappropriately, so that the standard of the rule of law would not be met, this justification should be accepted. But this justification does not apply, in any event, in relation to EEA states.

3. Appraisal and Outlook

The ECJ case law on the role of mutual assistance in the review of justifications and proportionality with respect to the freedoms has always taken into account the political environment. Against this background, it would be consistent for the ECJ to take into account political developments and prevent the emergence of previously unintended incentives. If Member States were allowed the possibility to refuse to conclude international mutual assistance treaties and, at the same, continue to apply discriminatory rules arbitrarily in relation to third countries, this would be counterproductive in view of existing case law and nearly intolerable in relation to EEA states. For this reason, it would not be surprising if the ECJ were to clarify, in the future, that Member States may cite a lack of mutual assistance options pursuant to international treaties only if they are not themselves responsible for that state of affairs. The consequence of this would be that delays in concluding mutual assistance agreements would not just have an impact on political discussions, but might also have legal ramifications. The further development of case law proposed here would ensure that the expansion of international mutual assistance would continue to be backed by case law, even under changed conditions that might dampen the interest of individual Member States in concluding such treaties.

24. For an analysis of ECJ case law on the free movement of capital with respect to tax law, see Lang, *supra* n. 6, at p. 209 et seq.

25. See AT: ECJ, 23 Sept. 2003, Case C-452/01, *Margarethe Ospelt and Schloßle Weissenberg Familienstiftung*, para. 28 et seq.