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OPINIONS AND ARTICLES

Why international tax recovery assistance ?

Luk Vandenberghe[1]

1. The starting point of the tax recovery assistance Directive – and of any other arrangement for international tax recovery assistance between different countries – is the need to overcome the boundaries of the territorial sovereignty of the countries concerned. This sovereignty is considered to be a cornerstone of international law.[2] The competence of tax authorities to enforce their taxes is indeed traditionally limited to their own territory. Their tax investigation, collection and recovery powers can only be exercised within their own country. Any attempt to extend and use these powers beyond the national borders would impede on the sovereignty of other countries. This concept is also known as the postulate of territorial impermeability.[3]

The mutual tax recovery assistance framework enables the tax authorities to reach out to tax debtors in another country or to have their tax claims enforced on assets in another country by sending requests for assistance, inviting the tax authorities of the requested State to act for and on behalf of the applicant tax authorities.

2. Of course, a country may accept to have its own sovereignty affected by another country's direct actions in its territory. It could be agreed to allow tax officials of one country to exercise tax recovery powers in another country. This requires a valid legal basis. Within the EU, such arrangements are very limited in scope. Article 7 of Directive 2010/24[4], concerning the presence in administrative offices and participation in administrative enquiries, provides for a possibility for officials of one Member State :

- to be present in the offices where the administrative authorities of the requested Member State carry out their duties ;
- to be present during administrative enquiries carried out in the territory of the requested Member State ;
- or to assist the competent officials of the requested Member State during court proceedings in that Member State.

The use of these limited possibilities to exercise a competence in another Member State, laid down in the Directive and in the EU Member States' national laws implementing this Directive, is however still subject to a specific agreement between the applicant authority and the requested authority and it is up to the requested authority to lay down the specific arrangements (Article 7(1) of Directive 2010/24). In the same line, Article 7(2) of Directive 2010/24 provides that officials of the applicant Member State may also interview individuals and examine records, but again only if that is provided in the agreement between the two countries and in so far as it is permitted under the legislation in force in the requested Member State. Similar provisions, with corresponding limitations, appear in EU legal instruments that arrange for administrative cooperation between the tax authorities responsible for tax collection and investigation and in other similar international agreements.

3. In this context, the question can be raised whether Article 9(2) of Directive 2010/24 constitutes an anomaly in this context of territory-restricted tax enforcement powers. Article 9(2) provides that :

"Paragraph 1 shall be without prejudice to any other form of notification made by a competent authority of the applicant Member State in accordance with the rules in force in that Member State.

A competent authority established in the applicant Member State may notify any document directly by registered mail or electronically to a person within the territory of another Member State".[5]

In my view, this provision does not alter the basic principle. A notification (service of documents) is only meant to inform the debtor – or another person – about the tax claim. In itself, the notification does not entail the use of specific enforcement powers,[6] and does not affect the sovereignty of the other Member State.

In theory – although unlikely to happen in practice – it could even be imagined that a national law of a country where a tax is due would permit an official of

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[2] See for an extensive description of the concept of sovereignty and of income tax sovereignty : M. ISENBAERT, *EC law and the income tax sovereignty of the Member States*, IBFD, Amsterdam, 2010.

[3] Permanent Court of International Justice, 7 Sept. 1927, nr. 9, SS. Lotus, France v Turkey, *Publ. C.P.J.I.* Ser. A, nr. 10.

[4] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, *OJ* L 84, 31.3.2010, p. 1.

[5] The ways of notification mentioned in this second subparagraph of Article 9(2) do not restrict the freedom of the applicant Member State to apply "any other form of notification … in accordance with the rules in force in that Member State", which is confirmed in the first subparagraph of that provision.

[6] Cf. EUCJ 26 April 2018, case C-34/17, *Donnellan*, point 57 : "… a request (for recovery) cannot be made when the person has not been informed of the very existence of that claim".

that country to travel to another country to personally deliver the documents to the debtor. As long as this official would merely be acting as a postman who delivers a message, his activity would not affect the sovereignty of that other country.[7]

The above situation could be compared with the passage of a ship through the territorial sea of another country. In principle, the sovereignty of a coastal State extends, beyond its land territory, to an adjacent belt of sea, described as the territorial sea (Article 2(1) of the United Nations Convention on the Law of the Sea (the Montego Bay Convention)). Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea (Article 17). Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State (Article 19(1)). Passage of a foreign ship is considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or, in particular, in any of the specific activities listed in this provision (Article 19(2)). For instance, foreign fishing vessels may traverse that territorial sea but they should not engage in fishing activities while exercising their right of innocent passage (Article 19(2)(i)). The mere passage through the territorial sea of another country does not affect the sovereignty of that other country.

4. It can be noted that the former EU tax recovery assistance Directive (i.e. Directive 2008/55[8]) did not contain a provision corresponding to the current Article 9(2) of Directive 2010/24. This provision was first suggested in the Commission proposal COM(2009)28 that led to Directive 2010/24. This does not mean, however, that a direct notification by an EU Member State into the territory of another Member State was not possible before Directive 2010/24. In that time, this possibility of a direct notification was already accepted as a general principle of law. This principle was only codified in Directive 2010/24 in order to satisfy a request from an EU Member State to the Commission to explicitly confirm this principle.[9/10]

5. Such a direct notification into the territory of another State may have specific legal consequences under the national law of the Member State using it, e.g. it may suspend or interrupt the period of limitation with regard to the claim concerned. However, it can only lead to valid recovery or precautionary measures if the person concerned was effectively informed about the claim, in a language that he could understand, so as to be able effectively to assert his right of defence.[11]

6. Given the clear influence of the sovereignty principle in cross-border tax recovery issues, it is rather surprising to note the following practice, applied some years ago by the tax authorities of a country that faced the emigration of a considerable number of farmers who left the country without paying their tax debts. The tax authorities concerned consulted with the new states of residence of these farmers and it was agreed that the tax authorities of the former state of residence would write a letter to the farmers, asking them to pay these taxes within a short period of time. If the tax debts remained unpaid, the tax authorities of the new state of residence would send a similar letter, indicating that in case of no payment, mutual assistance would be requested under the tax treaty "and other measures would not be ruled out". If the tax debts then still remained unpaid, two tax officials of the former residence state visited the new states of residence of the farmers. They invited the farmers concerned to meet in a hotel. They had meetings with the bankers who financed the farmers and agreed with them that, if a farmer applied for new credit, this would only be granted once the farmer forwarded a declaration from their former residence state that there were no outstanding tax debts in that country (which needed to be requested by the farmer himself). With regard to farmers with a lack of funds, these tax officials also held meetings with life insurers in these other countries who offered insurance policies that provided that a loan could be taken out for payment of the tax combined with a life insurance policy. They also had meetings with institutes that disposed of statistical data about the profitability of the farmers and meetings with the advisers of these farmers. At that time, this "direct approach" appeared to be quite successful, at least in the particular circumstances of these cases, which resulted in much commotion in the communities of farmers who had moved to these foreign countries.[12] The note describing this practice commented: *"The starting point is that the requesting state has no jurisdiction in the territory of the other State. The tax and customs administrations is well aware of and respects this"*. In my view, questions can however be raised with regard

[7] It should be noted that a notification by the country where the tax is due has – or may have – a legal effect in that country, but it does not produce a legal effect under the laws of the other country (unless otherwise agreed).

[8] 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), *OJ* L 150, 10.6.2008, p. 28.

[9] The same principle was also confirmed, with a different wording, in Art. 17(4) of the multilateral Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters of 25 January 1988 : *"Nothing in the Convention shall be construed as invalidating any service of documents by a Party in accordance with its laws"*.

[10] Similarly, the concept of sovereignty of nation-states was also confirmed in legislation, starting with the Peace treaties of Westphalia of 1648 (see M. ISENBAERT, *o.c.,* Chapter 2, point 2.2.2.3.).

[11] EUCJ 26 April 2018, case C-34/17, *Donnellan*, point 58.

[12] A. VAN EIJSDEN, A practical example : Netherlands Policy on Collection of Taxes under Tax Treaties, in P. BAKER, E. CZAKERT, A. VAN EIJSDEN, M. GRAU RUIZ and L. KANA, International Assistance in the Collection of Taxes, *Bull. for International Taxation* 2011, (281), 286-287.

to the validity of this approach, insofar as the description of this practice seems to suggest that the actions of these tax officials were not foreseen in the tax treaties with these other countries and that these meetings were carried out without the presence and intervention of the tax authorities of the other countries. It may be argued that having meetings in other countries with tax debtors in order to discuss payment arrangements and having meetings with banks, insurers and institutions in the other countries in order to enquire about the farmers' payment capacity and to push them via these third parties to pay their outstanding tax debts are to be considered as affecting the sovereignty of the other countries. The legal instruments on tax recovery assistance generally provide for a very limited exercise of such a competence in the territory of another State, whereby the authorities of the requested State may allow representatives of the applicant State to be present during administrative enquiries carried out in the requested State by the requested authorities themselves (*cf. supra*, point 2).[13] The fact that tax officials of the requested State are aware of – and did not oppose to – such visits and enquiries of foreign tax officials does not imply that there was a valid legal basis for such actions. Such a direct approach would require an explicit legal basis. Insofar as tax authorities would consider the adoption of such agreements, it should be noted that the note describing this former practice indicates that this approach does not work if there are only a small number of taxpayers abroad, in which case the costs are too high in relation to the end result.[14]

7. Since the right of the tax authorities to exercise their tax enforcement powers in another country constitutes an exception to the normal rule of sovereignty of that other country, these rights, as they are laid down in the EU Directive or in other legal instruments on recovery assistance – or other forms of administrative cooperation – are subject to a strict interpretation. Tax authorities should not try to abuse the rules by adopting erroneous interpretations of their competence.

Here again, I refer per analogy to an example in the maritime field. Imagine a fishing vessel navigating through the territorial waters of another country. In the absence of any specific rule to the contrary, such a fishing vessel does not have the right to start fishing in that territorial see (*cf. supra*, point 3). It should be clear that this interdiction also prevents the fisherman from casting his empty nets into that territorial sea in order to catch the fish, in view of taking it on board once he leaves the territorial sea and arrives in the high sea.[15]

[13] See e.g. Art. 7 of Directive 2010/24 and Art. 9 of the multilateral Council of Europe-OECD Convention on mutual administrative assistance in tax matters.

[14] A. VAN EIJSDEN, *l.c.,* p. 287.

[15] This example is based on a historic judgment in the field of customs duties (EUCJ 28 March 1985, case 100/84, *Commission v United Kingdom*). In this case, the EU Court of Justice decided that in the case of a joint fishing operation the origin of the fish had to be determined by reference not to the flag flown by the vessel which merely raised the nets out of the water but to the flag flown by the vessel which carried out the essential part of the operation of catching fish, in particular the location of the fish and netting them so that they could no longer move freely in the sea.

Commentary on the EU Tax Recovery Assistance Directive (Directive 2010/24/EU)

Luk Vandenberghe[1]

Abbreviations

UNF Uniform Notification Form (→ Article 8(1) of the Directive – see point 08.02.)

UIPE Uniform Instrument Permitting Enforcement in the requested Member State (→ Article 12(1) of the Directive – see point 12.01.)

RUIPE Revised Instrument Permitting Enforcement in the requested Member State (→ Article 15(2) of the Directive – see point 15.02.)

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COUNCIL DIRECTIVE 2010/24/EU

of 16 March 2010

concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 113 and 115 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with a special legislative procedure,

Whereas:

(1) Mutual assistance between the Member States for the recovery of each others' claims and those of the Union with respect to certain taxes and other measures contributes to the proper functioning of the internal market. It ensures fiscal neutrality and has allowed Member States to remove discriminatory protective measures in cross-border transactions designed to prevent fraud and budgetary losses.

(2) Arrangements for mutual assistance for recovery were first set out in Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties. That Directive and the acts amending it were codified by 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.

(3) Those arrangements, however, while providing a first step towards improved recovery procedures within the Union by approximating applicable national rules, have proved insufficient to meet the requirements of the internal market as it has evolved over the last 30 years.

(4) To better safeguard the financial interests of the Member States and the neutrality of the internal market, it is necessary to extend the scope of mutual assistance for recovery to claims relating to taxes and duties not yet covered by mutual assistance for recovery, whilst in order to cope with the increase in assistance requests and to deliver better results, it is necessary to make assistance more efficient and effective and to facilitate it in practice. In order to fulfil these objectives, important adaptations are necessary, whereby a mere modification of the existing Directive 2008/55/EC would not be sufficient. The latter should therefore be repealed and replaced by a new legal instrument which builds on the achievements of Directive 2008/55/EC but provides for clearer and more precise rules where necessary.

(5) Clearer rules would promote a wider information exchange between Member States. They would also ensure that all legal and natural persons in the Union are covered, taking into account the ever increasing range of legal arrangements, including not only traditional arrangements such as trusts and foundations, but any new instrument which may be set up by taxpayers in the Member States. They would furthermore make it possible to take account of all forms that claims of the public authorities relating to taxes, duties, levies, refunds and interventions may take, including all pecuniary claims against the taxpayer concerned or against a third party which substitute the original claim. Clearer rules are primarily necessary to define better the rights and obligations of all the parties concerned.

(6) This Directive should not affect the Member States' competence to determine the recovery measures available under their internal legislation. However, it is necessary to ensure that neither disparities between national laws nor lack of coordination between competent authorities jeopardise the seamless operation of the mutual assistance system provided for in this Directive.

(7) Mutual assistance may consist of the following: the requested authority may supply the applicant authority with the information which the latter needs in order to recover claims arising in the applicant Member State and notify to the debtor all documents relating to such claims emanating from the applicant Member State. The requested authority may also recover, at the request of the applicant authority, the claims arising in the applicant Member State, or take precautionary measures to guarantee the recovery of these claims.

(8) The adoption of a uniform instrument to be used for enforcement measures in the requested Member State, as well as the adoption of a uniform standard form for notification of instruments and decisions relating to the claim, should resolve the problems of recognition and translation of instruments emanating from another Member State, which constitute a major cause of the inefficiency of the current arrangements for assistance.

(9) A legal basis for exchange of information without prior request on specific tax refunds should be created. For reasons of efficiency, it should also be rendered possible for tax officials of a Member State to attend or to participate in administrative enquiries in another Member State. Provision should also be made for more direct information exchange between services with a view to making assistance faster and more efficient.

(10) Given the increasing mobility within the internal market, and the restrictions imposed by the Treaty or other legislation on the guarantees that can be requested from taxpayers not established within the national territory, the possibilities for requesting recovery or precautionary measures in another Member State should be extended. As the age of a claim is a critical factor, it should be possible for Member States to make a request for mutual assistance, even though the domestic means of recovery have not yet been fully exhausted, inter alia, where recourse to such procedures in the applicant Member State would give rise to disproportionate difficulty.

(11) A general obligation to communicate requests and documents in a digital form and via an electronic network, and with precise rules on the use of

languages for requests and documents, should allow Member States to handle requests faster and more easily.

(12) During the recovery procedure in the requested Member State, the claim, the notification made by the authorities of the applicant Member State or the instrument authorising its enforcement might be contested by the person concerned. It should be laid down that in such cases the person concerned should bring the action before the competent body of the applicant Member State and that the requested authority should suspend, unless the applicant authority requests otherwise, any enforcement proceedings which it has begun until a decision is taken by the competent body of the applicant Member State.

(13) To encourage Member States to devote sufficient resources to the recovery of other Member States' claims, the requested Member State should be able to recover the costs related to recovery from the debtor.

(14) Efficiency would be best achieved if, when executing a request for assistance, the requested authority could make use of the powers provided under its national laws applying to claims concerning the same or similar taxes or duties. In the absence of a similar tax or duty, the most appropriate procedure would be that provided under the laws of the requested Member State which applies to claims concerning the tax levied on personal income. This use of national legislation should not, as a general rule, apply with regard to the preferences accorded to claims arising in the requested Member State. However, it should be made possible to extend preferences to claims of other Member States based on an agreement between the Member States concerned.

(15) With regard to questions on limitation, it is necessary to simplify the existing rules, by providing that the suspension, interruption or prolongation of periods of limitation is in general determined according to the laws in force in the requested Member State, except where suspension, interruption or prolongation of the period of limitation is not possible under the laws in force in that State.

(16) Efficiency requires that information communicated in the course of mutual assistance may be used in the Member State receiving the information for purposes other than those provided for in this Directive, where this is allowed under the domestic legislation of both the Member State providing the information and the Member State receiving the information.

(17) This Directive should not prevent the fulfilment of any obligation to provide wider assistance ensuing from bilateral or multilateral agreements or arrangements.

(18) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

(19) In accordance with point 34 of the Interinstitutional Agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interest of the Union, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(20) Since the objectives of this Directive, namely the provision of a uniform system of recovery assistance within the internal market, cannot be sufficiently achieved by the Member States and can therefore, by reason of the uniformity, effectiveness and efficiency required, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(21) This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive lays down the rules under which the Member States are to provide assistance for the recovery in a Member State of any claims referred to in Article 2 which arise in another Member State.

Article 2

Scope

1. This Directive shall apply to claims relating to the following:

(a) all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the Union;

(b) refunds, interventions and other measures forming part of the system of total or partial financing of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), including sums to be collected in connection with these actions;

(c) levies and other duties provided for under the common organisation of the market for the sugar sector.

2. The scope of this Directive shall include:

(a) administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested in accordance with paragraph 1, imposed by the administrative authorities that are competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authorities;

(b) fees for certificates and similar documents issued in connection with administrative procedures related to taxes and duties;

(c) interest and costs relating to the claims for which mutual assistance may be requested in accordance with paragraph 1 or point (a) or (b) of this paragraph.

3. This Directive shall not apply to:

(a) compulsory social security contributions payable to the Member State or a subdivision of the Member State, or to social security institutions established under public law;

(b) fees not referred to in paragraph 2;

(c) dues of a contractual nature, such as consideration for public utilities;

(d) criminal penalties imposed on the basis of a public prosecution or other criminal penalties not covered by paragraph 2(a).

Commentary

Article 2(1)

02.01. The Directive applies to claims relating to "all taxes and duties of any kind". Contrary to the previous directives (Directive 76/308, as amended, and Directive 2008/55), the scope is no longer limited to specific taxes. This change reflects a shift in the approach, which is no longer based on the idea that

recovery assistance should only be granted for national taxes that also exist in the requested Member State.[2]

02.02. The phrasing "all taxes and duties of any kind" indicates that a broad scope was intended. However, the scope does not cover claims that have no fiscal nature.[3]

The Directive does not contain a definition of the words "taxes and duties". The lack of a definition followed from discussions in the Council, where it was preferred to clarify the scope by having a list of claims excluded from the scope (in Article 2(3)).

Example: the Council agreed to explicitly exclude "dues of a contractual nature, such as consideration for public utilities". Mentioning this category of claims would make no sense if the Directive also contained a definition of "taxes and duties".

02.03. It anyhow follows from the need for uniform application of Union law and from the principle of equality that the terms of this provision of Union law – which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope – must be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by this legislation.[4]

Example: local authorities may apply parking fees as taxes, but in essence they are "consideration for public utilities", which means that they fall under the exclusion of Article 2(3)(c) of the Directive (see also point 02.11.).

02.04. The wording "claims relating to the following: (a) all taxes and duties of any kind (…)" indicates that the scope not only covers taxes but also all liability claims with regard to unpaid taxes or duties. The Commission Implementing Regulation 1189/2011 confirms this interpretation: it provides that a request for information, recovery or precautionary measures may also relate to "*a person other than a (co-)debtor, liable for settlement of the taxes, duties and other measures, or for other claims relating to these taxes, duties and other measures under the law in force in the Member State in which the applicant authority is situated"* (Article 3(2)(b) of Regulation 1189/2011).

Such liability claims are not excluded from the scope of Directive 2010/24, even though these claims may also fall within the scope of other legal instruments for assistance between Member States, in particular other instruments concerning the cross-border enforcement of civil claims.[5]

Example: In case C-266/01 *Tiard*, the EU Court of Justice decided that: "*The first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and*

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2 Cf. M. Berglund, *Cross-Border Enforcement of Claims in the EU, History, Present Time and Future*, Kluwer, 2009, 149.

3 Some authors wrongly considered that the scope now includes 'any public claim, whether of a fiscal nature or otherwise', e.g. traffic fines (J.M. Cobos Gómez, 'Administrative cooperation in the recovery of claims: Directive 2010/24/EU – A Spanish approach', in J.M. Almudí Cid, J.A. Ferreras Gutiérrez and P.A. Hernández González-Barreda (eds.), *Combating Tax Avoidance in the EU – Harmonization and Coopertion in Direct Taxes*, Wolters Kluwer 2018, 250; D. Chacón Jerez, 'La reformulación del mecanismo de asistencia mutual en materia recaudatoria en la Unión Europea: el Nuevo modelo de la Directiva 2010/24/CE de 16 de marzo', 17 *Cuadernos de Formación del Instituto de Estudios Fisc*ales 4/14 (2014), 67).

4 EUCJ 14 November 2013, C-60/12, *Baláž*, para. 26; EUCJ 16 November 2010, C-261/09 *Mantello,* para. 38; EUCJ 17 July 2008, C-66/08, Kozłowski, para. 42; EUCJ 18 October 2007, C-195/06 *Österreichischer Rundfunk,* para. 24; EUCJ 19 September 2000, C-287/98 *Linster*, para. 43; EUCJ 17 March 2005, C-170/03 *Feron*, para. 26; EUCJ 14 December 2006, C-316/05 *Nokia*, para. 21; EUCJ 18 January 1984, 327/82 *Ekro*, para. 11.

5 See I. De Troyer, 'Tax Recovery Assistance in the EU : Analysis of Directive 2010/24/EU', *EC Tax Review* 2014, issue 3, 137-138.

Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as follows:

- 'civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals;
- 'customs matters', within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the legal relationship between the State and the guarantor, under that contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals, even if the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt."

Example: In case C-49/12 *Sunico*, the EU Court of Justice decided that: "*The concept of 'civil and commercial matters' within the meaning of Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it covers an action whereby a public authority of one Member State claims, as against natural and legal persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State".*[6]

Article 2(2)(a)

02.05. The scope includes 'administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested in accordance with paragraph 1, imposed by the administrative authorities that are competent to levy the taxes or duties concerned or carry out administrative enquiries with regard to them, or confirmed by administrative or judicial bodies at the request of those administrative authorities' (Article 2(2)(a)) but not 'criminal penalties imposed on the basis of a public prosecution or other criminal penalties not covered by paragraph 2(a)' (Article 2(3)(d)). The purpose of this long description of the penalties covered can be explained by referring to the text of the corresponding provision of the former Directive 2008/55. According to Article 2(1)(i) of Directive 2008/55, recovery assistance could be requested for "*administrative penalties and fines, (...) incidental to the claims referred to in points (a) to (h), with the exclusion of any sanction of a criminal nature as*

[6] EUCJ 12 September 2013, C-49/12, *Sunico and others*.

determined by the laws in force in the Member State in which the requested authority is situated". This former wording implied the need to have a solid knowledge about the content of the legal systems of other Member States.[7] Even more importantly, the former wording could cause discussions, taking into account the case law of the European Court of Human Rights with regard to the interpretation of the notion 'sanction of a criminal nature'. In its judgments relating to Article 6 ECHR, this Court holds that sanctions imposed by an administrative body can be considered to have a criminal nature, depending on the classification of the offence in the law of the Member State concerned, the nature of the offence, and the possible punishment. In order to avoid disputes with tax debtors arguing that recovery assistance on the basis of the Directive was not possible for administrative sanctions 'of a criminal nature' in the sense of Article 6 ECHR, it was decided to change the wording of the provision in Directive 2010/24, in order to make it clear that:

- penalties imposed by administrative authorities are covered;
- penalties confirmed by administrative or judicial bodies at the request of those administrative authorities are covered;
- penalties imposed on the basis of a public prosecution (resulting from the action of a public prosecutor), or other criminal penalties not falling within the previous categories, are not covered.

02.06. See also the comments under point 14.09., relating to Article 14(4).

02.07. The scope includes administrative penalties imposed because of non-respect of tax and duties rules, even in situations where these taxes and duties themselves are not due (or no longer due, because already paid).

Example: the scope of Article 2(2)(a) covers penalties for late filing or late payment of taxes.[8]

Example: Art. 42(1) of the Union Customs Code (Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013) provides that: *"Each Member State shall provide for penalties for failure to comply with the customs legislation."* (The term "customs legislation" is defined in Art. 5(2) of the same regulation.) There may be situations where such penalties are imposed, even though there are no customs duties to be paid. The recovery assistance Directive 2010/24/EU covers the administrative penalties applied in such situations.

Art. 2(2)(b) and 2(3)(b) and (c)

02.08. The scope includes fees for certificates and similar documents issued in connection with administrative procedures related to taxes and duties (Article 1(2)(b) of the Directive). By contrast, other fees are excluded from the scope (Article 2(3)(b) of the Directive), as are dues of a contractual nature, such as consideration for public utilities (Article 2(3)(c) of the Directive).

The following examples were mentioned by the Recovery Expert Group:[9]

- a fee for the delivery of a passport does not fall within the scope of the Directive;

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7 M. Berglund, *Cross-Border Enforcement of Claims in the EU, History, Present Time and Future*, Kluwer, 2009, 151–152.

8 (Germany) Federal Tax Court, 24 February 2015, *EU & Int. Tax Coll. News* 2016, issue 2, 81.

9 See *EU & Int. Tax Coll. News* 2017, issue 1, 17-18.

- a fee for a certificate, delivered by the tax authorities, confirming that one's taxable income is below a certain threshold, or confirming that one is considered as a non-resident for tax purposes, falls within the scope of the Directive;
- a special fee, charged because of extra work that the tax authorities have to do to assess the deemed taxable income in case of non-declaration, falls within the scope of the Directive;
- a fee charged by the tax authorities for a special analysis needed to determine the customs tariff classification of imported goods falls within the scope.

Other examples of fees falling within the scope of the Directive:[10]

- a fee for the delivery of a private tax ruling;
- a fee for the delivery of a certificate confirming that the person concerned has no outstanding tax debts;
- a fee for the delivery of a tax certificate confirming the inheritance tax paid in that Member State, which the person concerned may need to get an inheritance tax relief in another Member State;
- a fee for the delivery of a tax certificate confirming that a taxable person, resident in that State, does not receive in that State sufficient income to be subject to taxation there in a manner enabling his personal and family circumstance to be taken into account (which may be useful in another Member State to get the corresponding benefits in that other Member State, in accordance with the EUCJ case law).

Art. 2(2)(c)

02.09. The scope of the Directive includes 'costs relating to the claims for which mutual assistance may be requested in accordance with paragraph 1 or point (a) or (b) of this paragraph'. This provision covers recovery costs but also other costs.

Example: Customs authorities may charge specific costs, in accordance with Article 52 of the Union Customs Code (Regulation 905/2013), e.g. for attendance by customs staff outside official office hours or at premises other than customs premises; for analyses or expert reports on goods in respect of information requests or for verification purposes.[11]

Article 2(3)(a)

02.10. Compulsory social security contributions do not fall within the scope of this Directive. Recovery assistance for such claims is covered by other EU legislation (Regulation 883/2004 and Implementing Regulation 987/2009).

[10] I. De Troyer, 'Tax Recovery Assistance in the EU : Analysis of Directive 2010/24/EU', *EC Tax Review* 2014, issue 3, 139-140.

[11] I. De Troyer, 'Tax Recovery Assistance in the EU : Analysis of Directive 2010/24/EU', *EC Tax Review 2014*, issue 3, 139-140.

This exclusion was explicitly mentioned in the Directive, in order to make it clear that the Council did not follow the Commission proposal to include compulsory social security contributions.[12]

Art. 2(3)(c)

02.11. The Directive does not apply to 'dues of a contractual nature, such as consideration for public utilities'.

A debt for parking in a public car parking, which is not in any way punitive but merely constitutes consideration for the parking service provided, falls within the scope of Regulation 1215/2012 of 12 December 2012.[13]

[12] Article 2(2)(b) of Commission proposal COM(2009)28. At the time the Commission presented this proposal, mutual recovery assistance for compulsory social security contributions was already foreseen in Article 92 of Regulation 1408/71 and in Article 90(1) of Regulation 883/2004. However, the latter Regulation did not yet apply at that time, as the implementation regulation for Regulation 883/2004 was not yet adopted.

[13] EUCJ 9 March 2017, C-551/15, *Pula Parking*, *EU & Int. Tax Coll. News* 2017, issue 2, 106.

Article 3

Definitions

For the purpose of this Directive:

(a) 'applicant authority' means a central liaison office, a liaison office or a liaison department of a Member State which makes a request for assistance concerning a claim referred to in Article 2;

(b) 'requested authority' means a central liaison office, a liaison office or a liaison department of a Member State to which a request for assistance is made;

(c) 'person' means:

(i) a natural person

(ii) a legal person;

(iii) where the legislation in force so provides, an association of persons recognised as having the capacity to perform legal acts but lacking the legal status of a legal person; or

(iv) any other legal arrangement of whatever nature and form, which has legal personality or not, owning or managing assets which, including income derived therefrom, are subject to any of the taxes covered by this Directive;

(d) 'by electronic means' means using electronic equipment for the processing, including digital compression, and storage of data, and employing wires, radio transmission, optical technologies or other electromagnetic means;

(e) 'CCN/CSI network' means the common platform based on the common communication network ('CCN') developed by the Union for all transmissions by electronic means between competent authorities in the area of customs and taxation.

Commentary

Article 3(1)

03.01. The applicant authority and the requested authority are the authorities that ensure the communication with regard to a request. This communication can take place between central liaison offices, liaison offices or liaison departments. These terms are explained in Article 4(2) to 4(4) of the Directive.

Article 4

Organisation

1. **Each Member State shall inform the Commission by 20 May 2010 of its competent authority or authorities (hereinafter respectively referred to as the 'competent authority') for the purpose of this Directive and shall inform the Commission without delay of any changes thereof.**

   The Commission shall make the information received available to the other Member States and publish a list of the competent authorities of the Member States in the *Official Journal of the European Union*.

2. **The competent authority shall designate a central liaison office which shall have principal responsibility for contacts with other Member States in the field of mutual assistance covered by this Directive.**

   The central liaison office may also be designated as responsible for contacts with the Commission.

3. **The competent authority of each Member State may designate liaison offices which shall be responsible for contacts with other Member States concerning mutual assistance with regard to one or more specific types or categories of taxes and duties referred to in Article 2.**

4. **The competent authority of each Member State may designate offices, other than the central liaison office or liaison offices, as liaison departments. Liaison departments shall request or grant mutual assistance under this Directive in relation to their specific territorial or operational competences.**

5. **Where a liaison office or a liaison department receives a request for mutual assistance requiring action outside the competence assigned to it, it shall forward the request without delay to the competent office or department, if known, or to the central liaison office, and inorm the applicant authority thereof.**

6. **The competent authority of each Member State shall inform the Commission of its central liaison office and any liaison offices or liaison departments which it has designated. The Commission shall make the information received available to the Member States.**

7. **Every communication shall be sent by or on behalf or, on a case by case basis, with the agreement of the central liaison office, which shall ensure effectiveness of communication.**

Commentary

Article 4(1)

04.01. The competent authorities referred to in Article 4(1) are the authorities responsible for the implementation of this Directive in the Member States. In general, this competence belongs to the national Ministry of Finance. These competent authorities are not dealing with specific cases of recovery assistance. The principal responsibility for applying the recovery arrangements in practice has been attributed to the central liaison offices (see Article 4(2)).

The list of the competent authorities referred to in Article 4(1) has been published in the EU Official Journal C-301/7 of 12 October 2011.

Article 4(2)

04.02. The central liaison office (CLO) is the (main) contact point for the communication between the Member States concerned. The execution of a request for recovery assistance under Directive 2010/24 should not necessarily be done by this CLO.[14]

Article 4(7)

04.03. This seventh paragraph has been drafted in such a way that all Member States can set up their own internal organisation the way they wish. As the communication can be done by or on behalf or with the agreement of the CLO, Member States have a lot of flexibility in organising a centralised or a more decentralised approach.

[14] (Belgium) Court of First Instance of Brussels 29 November 2016, *EU & Int. Tax Coll. News* 2017, issue 2, 187.

CHAPTER II

EXCHANGE OF INFORMATION

Article 5

Request for information

1. At the request of the applicant authority, the requested authority shall provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims as referred to in Article 2.

For the purpose of providing that information, the requested authority shall arrange for the carrying-out of any administrative enquiries necessary to obtain it.

2. The requested authority shall not be obliged to supply information:

(a) which it would not be able to obtain for the purpose of recovering similar claims arising in the requested Member State;

(b) which would disclose any commercial, industrial or professional secrets;

(c) the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the requested Member State.

3. Paragraph 2 shall in no case be construed as permitting a requested authority of a Member State to decline to supply information solely because this information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

4. The requested authority shall inform the applicant authority of the grounds for refusing a request for information.

Commentary

Article 5(1)

05.01. Information requests can relate to information "which is foreseeably relevant" for the recovery of the claims of the applicant Member State. This term "foreseeably relevant" is a bit wider than the former wording "any information which would be useful to the applicant authority" (in Article 4(1) of Directive 76/308 and Directive 2008/55).

In principle, the foreseeable relevance to the applicant authority is only to be assessed by the applicant authority and not by the requested authority.[15] The assistance under Directive 2010/24 is indeed based on the principle of mutual trust.[16] It should however be noted that, although the requesting authority has

[15] Cf. H. Schaumburg, *Grenzüberschreitende Ambts- und Rechtshilfe*, in H. Schaumburg and J. Englisch, *Europäisches Steuerrecht*, Ottoschmidt, Köln, 2015, p. 874, point 20.64.

[16] EUCJ 14.03.2019, C-695/17, *Metirato Oy*, para. 42; EUCJ 26.04.2018, C-34/17, *Donnellan*, para. 41.

a discretion in that regard, it cannot request information that is of no relevance to the investigation concerned.[17]

05.02. In principle – subject to the limitations mentioned in Article 5(2) – the requested authority should arrange for the carrying-out of "any" administrative enquiries necessary to obtain the requested information.

In her conclusions of 2 October 2014 in case C-133/13, Advocate General Kokott observed that the Recovery Assistance Directive does not provide for a general restriction on the obligation to provide mutual assistance in the event of a disproportionate administrative burden.[18] With regard to requests for information, she noted that, in principle, even extensive investigations are reasonable, because cooperation between Member States' tax administrations is on a reciprocal basis. However, in the light of the principle of sincere cooperation pursuant to Article 4(3) TEU, the applicant Member State must not demand more frequent or intensive controls by the requested Member State than it would carry out itself.[19]

05.03. The exchange of information on the basis of Directive 2010/24 is complementary to the exchange of information on the basis of Regulation 904/2010 (on administrative cooperation in the field of VAT) or the exchange of information on the basis of Directive 2011/16 (on administrative cooperation in the field of other taxes than VAT and excise duties). These other legal instruments focus on the exchange of information for assessment purposes. However, the information obtained on the basis of these other instruments can also be used for tax recovery purposes:

- Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax:

  The purpose of this cooperation is to help ensure that VAT is correctly assessed (as expressed in point 7 of the preamble). Article 1(1) provides that this Regulation *"lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud"*. The information concerned *"may be used for the purpose of establishing the assessment base or the collection or administrative control of tax for the purpose of establishing the assessment base"* (Article 55(1), second subparagraph). The use for collection/recovery purposes has however been omitted from the third subparagraph of Article 55(1), which provides that the information exchanged under Regulation 904/2010 "may also be used for the assessment of other levies, duties, and taxes covered by Article 2 of Council Directive 2010/24" (Article 55(1), third subparagraph).

- Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation:

  According to Article 1 of the Commission proposal for this directive[20], the subject matter of this directive was to lay down the rules and procedures

17 Cf. EUCJ 16.05.2017, C-682/15, Berlioz Investment Fund, para. 71; EUCJ 6 October 2020, C-245/19 en C-246/19, Luxembourg v. B. and others, para. 112 (with regard to the exchange of information under Directive 2011/16).

18 There is a provision on reimbursement of costs in Article 20(2), second subparagraph. That provision however applies to recovery or precautionary measures, as it is mentioned under Chapter IV (« Recovery or precautionary measures ») and not under Chapter V (« General rules governing all types of assistance requests »).

19 Point 76 of the conclusions of Advocate General Kokott, case C-133/13, *Q*.

20 Document COM(2009)29.

for administrative cooperation with a view to the correct assessment of the taxes covered by this directive.[21] This purpose, limiting the use of the information to the correct "assessment" of taxes, was also confirmed in Article 5(1) (concerning the exchange of information on request), Article 8(3) and (4) (concerning the automatic exchange of information). Article 9 (concerning spontaneous exchange of information) focused on exchange of information that may help to facilitate the effectiveness of the control system.

The Council anyhow decided to use a general description for the purpose of the exchange of information under this directive, i.e. that this cooperation is organised with a view to exchanging information that is foreseeably relevant to the "administration and enforcement" of the domestic laws of the Member States concerning the taxes referred to in Article 2 (see Articles 1(1) and 16(1) of Directive 2011/16). The wording "enforcement" is of course very broad. It also permits to use this information for recovery purposes: enforcement actions are the actions that can be taken by tax authorities if taxes remain unpaid.

The terminology used in the French language version of this directive, however, suggests that the use for recovery purpose was not the first concern of the Council: in this French version, the exchange relates to information that is foreseeably relevant "pour l'administration et l'application des taxes". In this regard, reference could also be made to the striking difference in the French wording used in Article 16(1), second subparagraph: "Ces informations peuvent également être utilisées pour établir et appliquer d'autres droits et taxes relevant de l'article 2 de la directive 2010/24/UE du Conseil du 16 mars 2010 concernant l'assistance mutuelle en matière de recouvrement des créances relatives aux taxes, impôts, droits et autres mesures, ou pour établir et recouvrer des cotisations sociales obligatoires". The use of different words in Article 1(1) and 16(1) can also be found in other language versions.[22] In general,

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21 This was in line with the former Directive 77/799/EEC, which provided for an exchange of information enabling the Member States to effect a correct assessment of the taxes covered by this Directive (Article 1(1)). This information could be made available only to the persons directly involved in the assessment of the tax or in the administrative control of this assessment (Article 7(1), first indent).

22 German: *" … für die Anwendung und Durchsetzung des innerstaatlichen Rechts der Mitgliedstaaten über die in Artikel 2 genannten Steuern … auch zur Festsetzung und Beitreibung anderer Steuern und Abgaben gemäß Artikel 2 der Richtlinie 2010/24/EU … zur Festsetzung und Einziehung von Pflichtbeiträgen zu Sozialversicherungen"*;
Dutch: *"… voor de administratie en de handhaving van de nationale wetgeving van de lidstaten met betrekking tot de in artikel 2 bedoelde belastingen … tevens voor de vaststelling en invordering van andere belastingen en rechten vallend onder artikel 2 van Richtlijn 2010/24/EU … en voor de vaststelling en invordering van verplichte socialezekerheidsbijdragen"*;
Spanish: *"… que guarde relación con la administración y ejecución de las leyes nacionales de los Estados miembros en relación con los impuestos mencionados … también para evaluar y aplicar otros impuestos y derechos contemplados en el artículo 2 de la Directiva 2010/24/UE … o para evaluar y ejecutar las contribuciones obligatorias en el ámbito de la seguridad social"*;
Italian: *"…per l'amministrazione e l'applicazione delle leggi nazionali degli Stati membri relative alle imposte di cui all'articolo 2 … anche per l'accertamento e l'applicazione di altre imposte e dazi contemplati all'articolo 2 della direttiva 2010/24/UE … o per l'accertamento e l'applicazione dei contributi previdenziali obbligatori"*;
Portuguese: *"… para a administração e a execução da legislação interna dos Estados-Membros respeitante aos impostos a que se refere o artigo 2.º … também para o estabelecimento e a execução de outros impostos e direitos abrangidos pelo artigo 2.º da Directiva 2010/24/UE … ou para o estabelecimento e execução das contribuições obrigatórias para a segurança social"*;
Danish: *"… for administrationen og håndhævelsen af medlemsstaternes nationale love vedrørende de i artikel 2 omhandlede skatter… også til ansættelse og håndhævelse af andre skatter og afgifter, der er omfattet af artikel 2 i Rådets direktiv 2010/24/EU … eller til ansættelse og håndhævelse af obligatoriske sociale bidrag"*;
Swedish: *"… för administration och verkställighet av medlemsstaternas nationella lagstiftningar i fråga om de skatter som avses i artikel 2… också för fastställande och uppbörd av andra skatter och avgifter som omfattas av artikel 2 i rådets direktiv 2010/24/EU … eller för fastställande och uppbörd av obligatoriska socialavgifter"*.

however, they confirm a broad interpretation, in line with the word "enforcement" used in the English language version.

Article 5(2)

05.02. The exceptions of Article 5(2) should be interpreted in a restrictive way. As they derogate from the general principles that Member States should trust each other and provide assistance for the recovery of unpaid taxes, Member States should not refuse to provide information if there is no absolute necessity to do so.

05.03. The requested authority is not obliged to supply information which it would not be able to obtain for the purpose of recovering similar claims arising in the requested Member State (Article 5(2)(a) of the Directive).

However, the fact that a similar tax or duty does not exist in the requested Member State should not (necessarily) be an obstacle for providing the information requested. In this regard, it must be taken into account that the rule of Article 13(1) – which says that the requested authority has to make use of the powers and procedures applying to the same or, in the absence of the same, a similar tax or duty in the requested Member State – only applies to requests for recovery or precautionary measures.[23] There is indeed a general obligation under Article 5(1), second subparagraph, for the requested authority to arrange for the carrying-out of any administrative enquiries necessary to obtain the information requested.

05.04. It is very unlikely that the information requested for recovery purposes would lead to the disclosure of commercial, industrial or professional secrets.[24] Moreover, when considering this exception, the requested authority should carefully consider whether the alleged damage for the company outweighs the damage caused by the non-payment of the taxes due by that company.

In any case, a bank secrecy does not constitute a "commercial, industrial or professional secret". Bank secrecy cannot be invoked as a reason for not providing the information requested (see Article 5(3) of the Directive).

[23] Article 13 is part of Chapter IV 'Recovery or precautionary measures', while requests for information fall under Chatper II 'Exchange of information'.

[24] See the comments and the case law reported by I. De Troyer, *De invordering van belastingen in grensoverschrijdende situaties*, Antwerpen, Intersentia, 2009, 264-265.

Article 6

Exchange of information without prior request

Where a refund of taxes or duties, other than value-added tax, relates to a person established or resident in another Member State, the Member State from which the refund is to be made may inform the Member State of establishment or residence of the upcoming refund.

Commentary

06.01. This Article 6 provides a legal basis for exchange of information without prior request, relating to refunds of taxes or duties, other than VAT. Given the nature of the Directive – which is to be implemented in the Member States – the effective use of this provision will depend on how the Member State exchanging the information has implemented this provision in its national law.

06.02. This provision does not relate to information about refunds of VAT for the obvious reason that requests for such refunds must be submitted in the Member State of establishment of the taxable person, in accordance with the VAT refund procedure for taxable persons not established in the Member State of refund (see Directive 2008/9 and Regulation 904/2010). This means that the Member State of establishment of the person concerned is aware of any such VAT refund request as soon as it is submitted by the taxable person.

06.03. If a Member State is informed about upcoming refunds of taxes by another Member State – or if a Member State is informed about a request for a VAT refund by another Member State – that Member State may send a request for recovery or precautionary measures to the other Member State, in order to block the refund.

On this point, it should be noted that the possibility of such a recovery assistance request under Directive 2010/24 is not affected by the possibility to ask for the taxable person's consent for a direct transfer of the VAT refund by the refund State to the Member State of establishment of that person, in accordance with Article 48(1) of Regulation 904/2010.[25] In case of such a consent, there is no need for an assistance request under Directive 2010/24. Of course, the fact that a taxable person does not agree with a direct transfer of the VAT refund amount does not prevent a Member State from requesting the seizure of that amount, in accordance with Directive 2010/24.

[25] Article 1(14) of Council Regulation (EU) 2018/1541 of 2 October 2018, amending Regulations (EU) No 904/2010 and (EU) 2017/2454 as regards measures to strengthen administrative cooperation in the field of VAT, added the following subparagraphs in Article 48(1) of Regulation 904/2010:

'Where the Member State of establishment becomes aware that a taxable person making a request for refund of VAT, in accordance with Article 5 of Directive 2008/9/EC, has tax liabilities in that Member State of establishment, it may request the consent of the taxable person for the transfer of the VAT refund directly to this Member State in order to discharge the outstanding tax liabilities. Where the taxable person consents to this transfer, the Member State of establishment shall inform the Member State of refund of the amount regarding which the consent is obtained and the Member State of refund on behalf of the taxable person shall transfer this amount to the Member State of establishment. The Member State of establishment shall inform the taxable person whether the amount transferred amounts to either a full or a partial discharge of the tax liability in accordance with its national law and administrative practices. However, the transfer of the VAT refund to the Member State of establishment shall not affect the right of the Member State of refund to recover the liabilities that the taxable person has in the latter Member State.

Where the tax liabilities in the Member State of establishment are disputed, the transfer of the refund amounts can be used by the Member State of establishment as a retention measure, with the consent of the taxable person, in so far as an effective judicial review is ensured in that Member State.'

Article 7

Presence in administrative offices and participation in administrative enquiries

1. By agreement between the applicant authority and the requested authority and in accordance with the arrangements laid down by the requested authority, officials authorised by the applicant authority may, with a view to promoting mutual assistance provided for in this Directive:

(a) be present in the offices where the administrative authorities of the requested Member State carry out their duties;

(b) be present during administrative enquiries carried out in the territory of the requested Member State;

(c) assist the competent officials of the requested Member State during court proceedings in that Member State.

2. In so far as it is permitted under the legislation in force in the requested Member State, the agreement referred to in paragraph 1(b) may provide that officials of the applicant Member State may interview individuals and examine records.

3. Officials authorised by the applicant authority who make use of the possibilities offered by paragraphs 1 and 2 shall at all times be able to produce written authority stating their identity and their official capacity.

Commentary

Article 7(1)

07.01. The aim of Article 7 is to make recovery assistance faster and more efficient:[26]

- under Article 7(1)(a), tax officials of the applicant Member State may come to the offices where the administrative authorities of the requested Member State carry out their duties, in order to discuss problems related to (complex) recovery cases;
- under Article 7(1)(b), tax officials of the applicant Member State may be present during administrative enquiries carried out in the territory of the requested Member State. This presence of the officials of the applicant Member State is in principle passive: they cannot exercise any investigation activities themselves. An exception is, however, possible, as the authorities of both Member States may agree that the officials of the applicant Member State can interview individuals and examine records, in so far as that is permitted under the legislation in force in the requested Member State (see point 07.03.);
- under Article 7(1)(c), tax officials of the applicant Member State may assist the competent officials of the requested Member State during court proceedings in that State, e.g. in cases where specific recovery or precautionary measures require a judicial authorization or where they are contested before a court. The tax official of the applicant Member State may

[26] See point 9 of the preamble.

then be invited to support the officials of the requested Member State to defend their actions and measures.

07.02. The agreement referred to in Article 7(1) can be a general one, or it may be concluded for a specific case. A written agreement is not absolutely required.

Article 7(2)

07.03. If permitted by the legislation of the requested Member State and accepted by the authorities of the requested Member State, the officials of the applicant Member State may interview individuals and examine records in that requested Member State.

In that case, the officials of the applicant Member State have to respect the rules of the Member State where these investigation powers are used. For instance, the individuals have the right to be interviewed in the official language that applies to them under the law of the requested Member State and they cannot be obliged to speak another language; and the examination of records by the officials of the applicant Member State should be done with respect for the requested Member State's rules concerning the accessibility of (private) premises.

Article 7(3)

07.04. Officials authorised by the applicant authority who make use of the possibilities offered by Article 7 shall at all times be able to produce written authority stating their identity and their official capacity. This document should be drafted in such a way that the persons in the requested Member State can have no doubt about the identity and the official capacity of the officials concerned.

CHAPTER III

ASSISTANCE FOR THE NOTIFICATION OF DOCUMENTS

Article 8

Request for notification of certain documents relating to claims

1. At the request of the applicant authority, the requested authority shall notify to the addressee all documents, including those of a judicial nature, which emanate from the applicant Member State and which relate to a claim as referred to in Article 2 or to its recovery.

The request for notification shall be accompanied by a standard form containing at least the following information:

(a) name, address and other data relevant to the identification of the addressee;

(b) the purpose of the notification and the period within which notification should be effected;

(c) a description of the attached document and the nature and amount of the claim concerned;

(d) name, address and other contact details regarding:

(i) the office responsible with regard to the attached document, and, if different;

(ii) the office where further information can be obtained concerning the notified document or concerning the possibilities to contest the payment obligation.

2. The applicant authority shall make a request for notification pursuant to this article only when it is unable to notify in accordance with the rules governing the notification of the document concerned in the applicant Member State, or when such notification would give rise to disproportionate difficulties.

3. The requested authority shall forthwith inform the applicant authority of any action taken on its request for notification and, more especially, of the date of notification of the document to the addressee.

Commentary

Article 8(1)

08.01. Notification of the tax (related) claim is necessary before any recovery measure can be taken. The notification should make it possible for the addressee to understand the subject matter of the claim and the cause of action.[27] In this regard, the EU Court of Justice has decided that *"in order for the addressee of an instrument permitting enforcement to be placed in a position to enforce his*

[27] EUCJ 14.01.2010, C-233/08, *Kyrian*, para. 59; EUCJ 26.04.2018, C-34/17, *Donnellan*, para. 58.

rights, he must receive the notification of that instrument in an official language of the Member State in which the requested authority is situated".[28]

The above consideration of the *Kyrian* judgment must be read in the context of the facts of that particular case, relating to a Czech person who was confronted with an excise duties (and penalties) claim, sent to him by the German customs authorities in German. When the Czech authorities wanted to take recovery measures following the German request for recovery assistance, the person concerned complained that he did not understand the German documents and that he was thus unable to take the appropriate legal steps to defend his rights.

It is obvious that such language problem will not always arise in situations of cross-border recovery assistance. For instance: if a German director of a German company retires and moves his residence to Portugal, he could (normally) not complain that his right of defence is not respected if he later receives documents in German, relating to his – or his company's – unpaid tax debts in Germany.

08.02. The adoption of the Uniform Notification Form for the notification of instruments and decisions relating to the claim (UNF; Article 8(1)), which is to be used by the requested Member State when notifying such documents at the request of another Member State – just as the Uniform Instrument Permitting Enforcement measures in the requested Member State (UIPE; see Article 12(1)) – has resolved the problems of translation of instruments emanating from other Member States: this uniform document can be translated automatically into all official languages of the EU Member States. The use of this uniform document enables the Member States to ensure that the tax debtors – or other addressees – are sufficiently informed about the request and about their rights and obligations, in an official language of the Member State in which the requested authority is situated.[29] The UNF permits to communicate the essential data of the claim and it mentions the contact details of the offices where further information about the notified document(s) or about the contestation possibilities can be obtained. In this way, the notification with this uniform document can be considered as fulfilling the criteria for a valid notification, set out by the EU Court of Justice: *"(…) in order to be able to exercise his right to an effective legal remedy, within the meaning of Article 47 of the Charter, against a decision adversely affecting his interests, the person concerned must know the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, in order that he may defend his rights in the best possible conditions and decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction"*[30] This consideration of the EUCJ judgment clearly confirms the validity of the approach to have the notified documents accompanied by the UNF, in an official language of the requested Member State.[31]

Article 8(1) of the Directive only mentions that the request for notification must be accompanied by the standard UNF; it does not explicitly confirm that this UNF must accompany the documents notified by the requested authorities to the debtor (or to another addressee). However, the content of this UNF

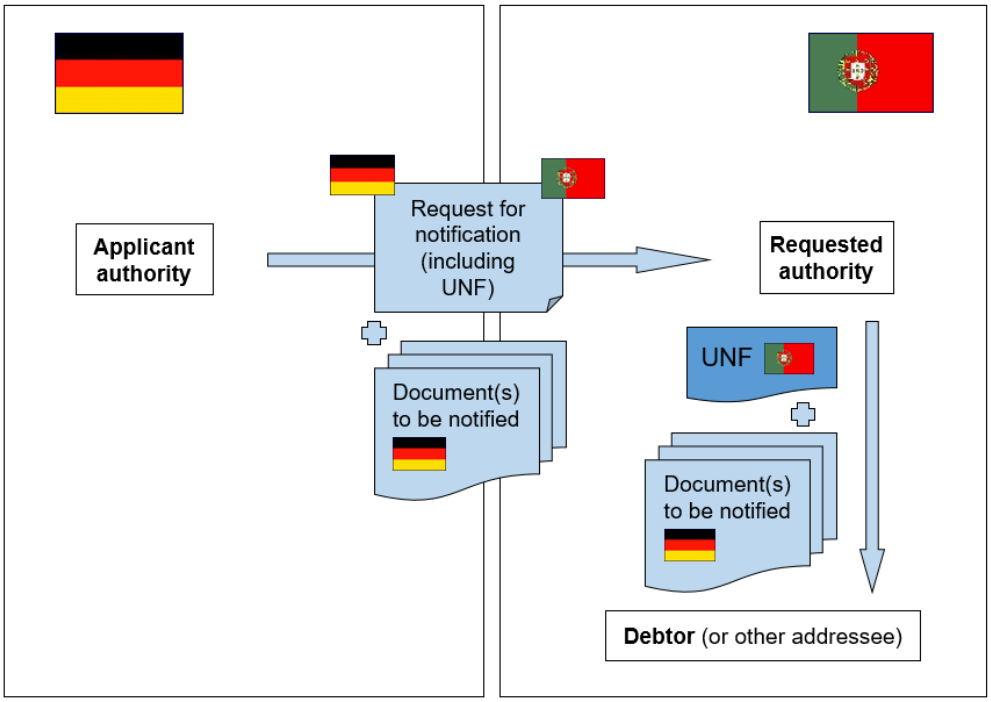
28 EUCJ 14.01.2010, C-233/08, *Kyrian*, para. 63.

29 It is the responsibility of the requested State to ensure that the addressee receives the UNF in a language version that applies to him under the language regime of the requested Member State (of relevance in Member States that have more than one official language).

30 EUCJ 26.04.2018, C-34/17, *Donnellan*, para. 58.

31 I. De Troyer, The Tax Debtor's Right of Defence in Case of Cross-Border Collection of Taxes, *EC Tax Review* 2019, issue 1, p. 22, point 7.

clearly indicates that the UNF must be communicated to the debtor (or to another addressee), together with the documents for which notification assistance is requested. This is also confirmed by recital 8 of the Directive's preamble and by Article 10(1), second subparagraph, of Implementing Regulation 1189/2011. With regard to the example under point 08.01. (about the German tax debtor who moved his residence to Portugal), this means that any documents in German[32], notified by the Portuguese authorities to the German person on behalf of the German authorities, should be accompanied by the UNF. This UNF should be notified to the debtor (as required by the above rules), providing him with clear guidance with regard to the contact points in Germany). Normally, the Portuguese authorities will communicate this UNF to him in Portuguese (in accordance with Article 22(1) of the Directive), but it is obvious that if they communicated a German version of the UNF (which is not excluded by Article 22(1) of the Directive), the burden of proof would rest with this German person if he argued that he could not understand the documents concerned.



08.03. The debtor's native language may be another language than (one of the) official language(s) of the applicant and requested Member State. The Recovery Expert Group therefore developed an additional document "Note to the addressee", which the requested Member State can use if it wants to explain to the addressee that he can ask for another language version of the UNF than the version in the official language of the requested Member State.[33] Member States are, however, not obliged to use this additional document.

08.04. The details of the UNF are laid down in Article 10 and Annex 1 of Commission Implementing Regulation 1189/2011.

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[32] The documents of which notification is requested pursuant to Article 8 may be sent to the requested authority in an official language of the applicant Member State (Article 22(2) of the Directive). These documents do not require a translation, as they are accompanied by the UNF.

[33] Commission staff working document SWD(2017)461 accompanying Commission evaluation report COM(2017)778 of 18 December 2017, point 6.3.3.2.c. (*EU & Int. Tax Coll. News* 2018, issue 1, 50-51).

08.05. Article 8(1), second subparagraph, (a) of this Directive provides that the UNF should mention the "name, address and other data relevant to the identification of the addressee". It may occur that the address is no longer correct. In that case, the (old) address mentioned in the UNF may still be "relevant to the identification of the addressee", which implies that the UNF does not (necessarily) become invalid or obsolete.[34] Of course, the notification will only be successful and valid if it actually reaches the addressee.

08.06. Article 8(1), second subparagraph, (b) of this Directive provides that the UNF should mention the purpose of the notification and the period within which notification should be effected. On this point, Article 10(2)(b) of the Commission Implementing Regulation 1189/2011 provides hat the indication of the period within which notification is to be effected may be done by an indication of the date before which the applicant authority intends the notification to take place. This means that the date mentioned here is not necessarily the last date of the limitation period (even if (one of) the purpose(s) of the notification would be to interrupt the period of limitation with regard to the claim(s) mentioned in the notified document(s)[35]).

08.07. Article 8(1), second subparagraph, (c) of this Directive provides that the UNF should contain a description of the attached document and the nature "and the amount" of the claim concerned. On this point, Article 10(2)(a) of the Commission Implementing Regulation 1189/2011 confirms that the amount of the claim can only be mentioned where it is already established.

08.08. Of course, the request for notification should not only be accompanied by the UNF; it must also include the original or a certified copy of each document, notification of which is requested (Article 10(1) of Commission Implementing Regulation 1189/2011).

Article 8(2)

08.09. The applicant authority should only make a request for notification when it is unable to notify in accordance with the rules governing the notification of the document concerned in the applicant Member State, or when such notification would give rise to disproportionate difficulties. The purpose of this limitation is to avoid too much inconvenience for the requested Member State.

08.10. This provision is to be interpreted, taking account of the need to ensure that the addressee actually receives the document(s) concerned.[36]

Article 8(3)

08.11. The requested authority should forthwith inform the applicant authority of any notification action. The date of notification must be communicated (Article 8(3) of the Directive), but also the manner of notification (Article 12(2) of Regulation 1189/2011). The latter information may be useful for the applicant authority if the debtor would later argue that he did not receive the document concerned.

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34 See I. De Troyer, 'Tax recovery assistance in the EU : analysis of Directive 2010/24/EU', *EC Tax Review* 2014, issue 3, 146.

35 See point B.1. of Annex I of Commission implementing Regulation 1189/2011.

36 Cf. EUCJ 26.04.2018, C-34/17, *Donnellan*, para. 58.

Article 9

Means of notification

1. The requested authority shall ensure that notification in the requested Member State is effected in accordance with the national laws, regulations and administrative practices in force in the requested Member State.

2. Paragraph 1 shall be without prejudice to any other form of notification made by a competent authority of the applicant Member State in accordance with the rules in force in that Member State.

A competent authority established in the applicant Member State may notify any document directly by registered mail or electronically to a person within the territory of another Member State.

Commentary

Article 9(1)

09.01. With regard to the way of notification used by the requested authority, reference is made to the national law and practice in force in the requested Member State.

A notification made by the requested Member State in accordance with its national law, regulations and administrative practices, is deemed to have the same effect in the applicant Member State as if it had been made by the applicant Member State itself, in accordance with its own laws, regulations and administrative practices (Article 13(1) of Commission Implementing Regulation 1189/2011).

The use of the UNF is (normally) not imposed for notification of claims originating in the requested State. However, the national law of the requested State – implementing Article 8 of this Directive – should provide for the use of the UNF in case of execution of requests for notification of documents from the applicant Member State.

09.02. Article 13(2) of Commission Implementing Regulation 1189/2011 provides that a notification of a document relating to more than one type of tax, duty or other measure, shall be deemed valid if it is made by an authority of the requested Member State which is competent for at least one of the taxes, duties or other measures mentioned in the notified document, provided that it is allowed under the national law of the requested Member State.

This provision enables the requested Member State to optimise the notification process in cases where this Member State receives a request for notification with regard to different claims, which would normally fall under the competence of different tax authorities in that Member State: the notification is deemed valid if it is made by an authority which is competent for at least one of the types of claims mentioned in the notified document (insofar as this single notification is permitted under the national law of the requested Member State).

Article 9(2)

09.03. A question has been raised with regard to the relationship between Article 9(2) and Article 8(2).[37] There is certainly no contradiction between these two provisions. Article 9(2) does not affect the basic conditions of Article 8(2), under which a request for notification assistance can be sent.

Article 9(2), first subparagraph, only confirms that an addressee in the requested Member State cannot rely on the argument that a notification made by the authorities of the applicant Member State cannot produce any effect in the requested Member State if it is not done in accordance with the notification rules of that requested Member State (but in accordance with different notification rules applying in the applicant Member State).

Article 9(2), second subparagraph, explicitly confirms the validity of two notification methods that could be used by the authorities of the applicant Member State (i.e. notification by registered mail or electronically) to a person within the territory of another Member State.

Article 9(1) and (2)

09.04. Any notification method used by the applicant or requested authorities should ensure that the addressee of a document actually receives the document concerned, and understands what it is about.

See EUCJ 26.04.2018, C-34/17, *Donnellan*, para. 58: *'(…) in order to ensure respect for the rights laid down in Article 47 of the Charter, it is important not only to ensure that the addressee of a document actually receives the document in question but also that he is able to know and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able effectively to assert his rights in the Member State of transmission (see to that effect, judgment of 16 September 2015, Alpha Bank Cyprus, C-519/13, EU:C:2015:603, paragraphs 31 and 32 and the case-law cited). Such considerations are also relevant in the context of Directive 2010/24'*.

In the *Donnellan* judgment, the EU Court of Justice considered that a publication of a Greek tax claim in the Official Journal of Greece was not sufficient to notify that claim to an Irish resident.[38]

In another case, a Spanish court decided that, although notification by publication did not infringe the Spanish constitution in situations where the tax debtor changed his residence (from Spain to Germany) without informing the tax authorities of this address change, the tax authorities nevertheless had to act with the appropriate diligence and good faith. This good faith required the authorities to notify at the new address if that was easy to find.[39]

A similar conclusion was reached by a Belgian court, in a case relating to a Belgian tax debtor who had moved to the Netherlands. This judgment related to a "deemed notification" of a tax claim to the public prosecutor, in accordance with Belgian law. The tax authorities argued that this notification was valid, since the national registers mentioned that the tax debtor had moved to the Netherlands without indicating his new address. The court, however, observed

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37 See M.J. Virseda Moreno, 'Contenido y análisis de la Directiva 2010/24/UE del Consejo, de 16 de marzo de 2010', *Tribuna fiscal* 2011, N° 245, 67.

38 See for a detailed analysis of this judgment: I. De Troyer, 'The Tax Debtor's Right of Defence in Case of Cross-Border Collection of Taxes', *EC Tax Review* 2019, issue 1, 18-31.

39 (Spain) Audiencia nacional, 12 March 2015, *EU & Int. Tax Coll. News* 2016, issue 1, 7.

that the tax authorities could – and should – have sent a request for information to their Dutch colleagues, before proceeding with the deemed notification. In practice, it appeared that the Belgian tax authorities had sent such a request for information at a later moment and that they had obtained the exact address of the debtor within a few days. Under these circumstances, the court concluded that the tax claim documents had not been validly served upon the tax debtor, so that the limitation period for the recovery of the tax claim had not been interrupted.[40] In our view, however, this conclusion is not completely appropriate, and some nuance should be applied: on the one hand, it must be acknowledged that a deemed notification does not actually reach the debtor, so that his time period for contesting the claim cannot start by this deemed notification – which means that this time period cannot expire neither; on the other hand, it should also be accepted that tax authorities proceed with a deemed notification where they wish to interrupt or stop a limitation period that applies to them, at a moment where the address of the tax debtor is unknown.

Other case law also emphasized that before reverting to a method of "deemed notification", tax authorities should examine carefully whether it is possible to retrieve the actual address of the person concerned.[41]

09.05. Proof that the addressee actually received the documents notified to him can be provided by circumstancial evidence.[42]

09.06. Contestations of notifications should be done in accordance with the rules of Article 14(1) and (2) of the Directive, i.e.:

- disputes concerning the validity of a notification made by a competent authority of the applicant Member State fall within the competence of the competent bodies of the applicant Member State (Article 14(1));

- disputes concerning the validity of a notification made by a competent authority of the requested Member State should be brought before the competent body of that Member State in accordance with its laws and regulations (Article 14(2)).

09.07. The Directive does not oblige the requested Member State to notify or communicate the uniform instrument permitting enforcement in the requested Member State before launching the recovery or precautionary measures in that Member State, but it may be done in accordance with the national law or administrative practice of the requested Member State, when the request for recovery or precautionary measures is executed (see Article 13 of the Directive). In any case, the notification or communication of the uniform instrument permitting enforcement in the requested Member State does not justify a claim for a prolongation or a re-opening of the time period to contest the claim or the initial instrument permitting enforcement if that has already been validly notified to the person concerned (Article 17 of Commission Implementing Regulation 1189/2011).

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40 (Belgium) Court of first instance of Antwerp, 15 January 2016.

41 It has been decided that tax authorities should attempt to actually reach the person concerned in the other State, if there is no urgency to apply a method of 'deemed notification' ((Australia) Federal Court, Victoria District Registry, 28 August 2015, *EU & Int. Tax Coll. News* 2016, issue 1, 10).

42 See e.g. (Netherlands) Court of appeal Arnhem-Leeuwarden, 15 December 2015, *EU & Int. Tax Coll. News* 2016, issue 1, 9.

CHAPTER IV

RECOVERY OR PRECAUTIONARY MEASURES

Article 10

Request for recovery

1. At the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the applicant Member State.

2. As soon as any relevant information relating to the matter which gave rise to the request for recovery comes to the knowledge of the applicant authority, it shall forward it to the requested authority.

Commentary

Article 10(1)

10.01. Requests for recovery have to include a declaration that the conditions governing such a request (see Article 11 of the Directive) are fulfilled (Article 15 of Commission Implementing Regulation 1189/2011).

Article 10(2)

10.02. The immediate communication of any relevant information is particularly important in the light of the applicant Member State's liability for any costs and any losses incurred by the requested Member State as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument permitting enforcement and/or precautionary measures issued by the applicant authority are concerned (in accordance with Article 20(3) of the Directive).

Article 11

Conditions governing a request for recovery

1. The applicant authority may not make a request for recovery if and as long as the claim and/or the instrument permitting its enforcement in the applicant Member State are contested in that Member State, except in cases where the third subparagraph of Article 14(4) applies.

2. Before the applicant authority makes a request for recovery, appropriate recovery procedures available in the applicant Member State shall be applied, except in the following situations:

(a) where it is obvious that there are no assets for recovery in the applicant Member State or that such procedures will not result in the payment in full of the claim, and the applicant authority has specific information indicating that the person concerned has assets in the requested Member State;

(b) where recourse to such procedures in the applicant Member State would give rise to disproportionate difficulty.

Commentary

Article 11(1)

11.01. The applicant authority is only allowed to send a request for recovery if the claim and/or the instrument permitting its enforcement is not (or no longer) contested in the applicant Member State. There is, however, one exception to this rule: a request for recovery can relate to a contested claim (or a contested part of a claim) in so far as the law and administrative practice in force in both the applicant and the requested Member States allow such action (see Article 14(4), third subparagraph, of the Directive).

Article 11(2)

11.02. This provision aims at reconciling interests of both the applicant Member State and the requested Member State:

- on the one hand, the authorities of the applicant Member State can be expected to take appropriate recovery measures in their own territory before burdening other Member States' authorities with their requests for recovery assistance. This means that unnecessary requests for assistance should be avoided;
- on the other hand, speeding up mutual recovery assistance is important to increase the recovery chances. This means that the authorities of the applicant Member State cannot be expected to first completely exhaust their own recovery proceedings if that is not useful or if that is disproportionately difficult.

Article 12

Instrument permitting enforcement in the requested Member State and other accompanying documents

1. Any request for recovery shall be accompanied by a uniform instrument permitting enforcement in the requested Member State.

This uniform instrument permitting enforcement in the requested Member State shall reflect the substantial contents of the initial instrument permitting enforcement, and constitute the sole basis for the recovery and precautionary measures taken in the requested Member State. It shall not be subject to any act of recognition, supplementing or replacement in that Member State.

The uniform instrument permitting enforcement shall contain at least the following information:

(a) information relevant to the identification of the initial instrument permitting enforcement, a description of the claim, including its nature, the period covered by the claim, any dates of relevance to the enforcement process, and the amount of the claim and its different components such as principal, interest accrued, etc.;

(b) name and other data relevant to the identification of the debtor;

(c) name, address and other contact details regarding:

(i) the office responsible for the assessment of the claim, and, if different;

(ii) the office where further information can be obtained concerning the claim or the possibilities for contesting the payment obligation.

2. The request for recovery of a claim may be accompanied by other documents relating to the claim issued in the applicant Member State.

Commentary

Article 12(1)

12.01. The uniform instrument permitting enforcement in the requested Member State (UIPE) constitutes the legal basis for the recovery measures taken in the requested Member State.[43] The adoption of the UIPE has permitted to resolve the former problems of recognition and translation of enforcement titles emanating from other Member States. The computer system used by the competent authorities permits to have an automatic translation of this UIPE into all official EU languages. In this way, the language condition of Article 22 of the Directive can be fulfilled without any problem: the requested authority can print the UIPE in any of the official EU languages, including the official language(s) of the requested Member State.

12.02. As soon as the requested Member State has received the request for recovery assistance, with the UIPE, it can start the recovery measures. There is no

[43] Article 12(1) also provides that this UIPE constitutes the sole basis for the precautionary measures taken in the requested Member state. In this regard, see point 16.06 of the commentary.

obligation – at least not under the Directive – to notify the UIPE before launching any recovery measures.[44] Of course, this presupposes that the debtor has already been properly informed, through a direct notification by the applicant Member Sate or by the requested Member State executing a request for notification assistance (*cf. supra*, comments on Articles 8 and 9).

12.03. The UIPE itself has to contain information relevant to the identification of the initial instrument permitting enforcement in the applicant Member State, a description of the claim(s), including the nature of the claim(s) and the period covered, any dates of relevance to the enforcement process, and the amount of each claim and its different components (Article 12(1), third subparagraph, (a) of the Directive).

It is also important that the UIPE mentions the contact details of the office responsible for the assessment of the claim, and, if different, the office where further information can be obtained concerning the claim or the possibilities for contesting the payment obligation (Article 12(1), third subparagraph, (c) of the Directive).

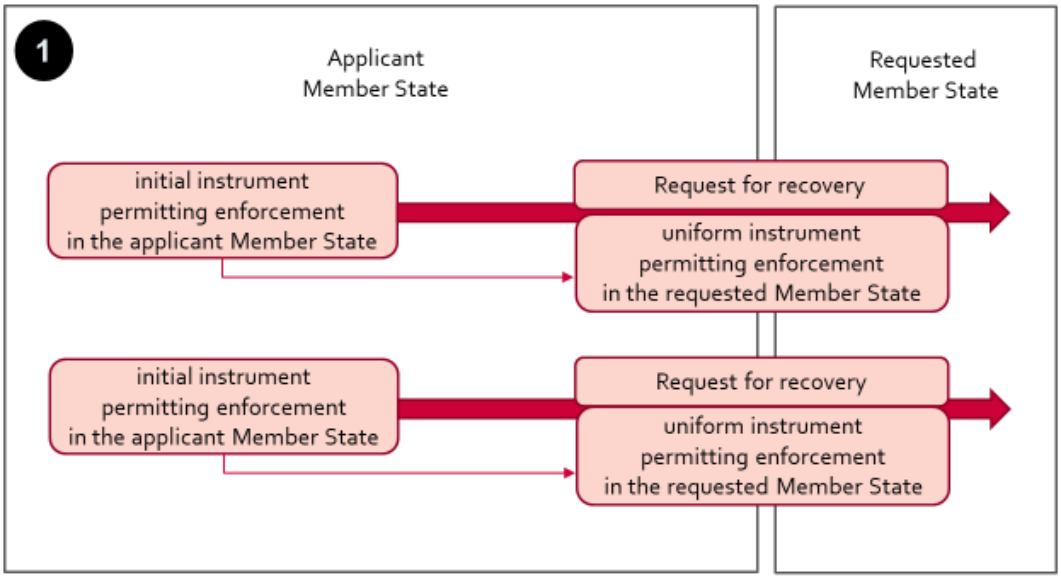
With regard to the information about the possibilities for contesting, it should be noted that the period for contesting the claim may already have come to its end by the time of the recovery request or by the time the recovery request is executed. This time period is governed by the laws in force in the applicant Member State (see Article 19(1) of the Directive). Here again, it must be noted that this presupposes that the debtor had already been properly informed and thus really had the possibility to use effectively his right of defence (see point 09.04.).

12.04. Implementing provisions concerning the UIPE are laid down in Article 16 of the Commission Implementing Regulation 1189/2011.

The uniform instrument permitting enforcement in the requested Member State should be based on the initial instrument permitting enforcement in the applicant Member State (Article 16(1), first subparagraph of Regulation 1189/2011). In practice, it should be taken into account that recovery assistance requests may relate to multiple claims, which can be found in one or more initial instruments permitting enforcement. This means there are different possibilities, which are described below.

1) In a simple case ❶, the uniform instrument permitting enforcement in the requested Member State (UIPE) will be based on a single initial instrument permitting enforcement in the applicant Member State (in accordance with Article 16(1), first subparagraph of Regulation 1189/2011).

[44] Cf. I. De Troyer, 'The Tax Debtor's Right of Defence in Case of Cross-Border Collection of Taxes', *EC Tax Review* 2019, issue 1, 23, with reference to EUCJ 28 April 2018, C-34/17, *Donnellan*, point 53.



2) If there are several initial instruments permitting enforcement in the applicant Member State (relating to different claims/persons) ❷, the applicant Member State may issue a single uniform instrument permitting enforcement in the requested Member State (in accordance with Article 16(2) (amended) of Regulation 1189/2011), based on all (or some) of the initial instruments permitting enforcement in the applicant Member State. The applicant authority may also decide to issue more than one uniform instrument permitting enforcement in the requested Member State, but there is no obligation to do so.

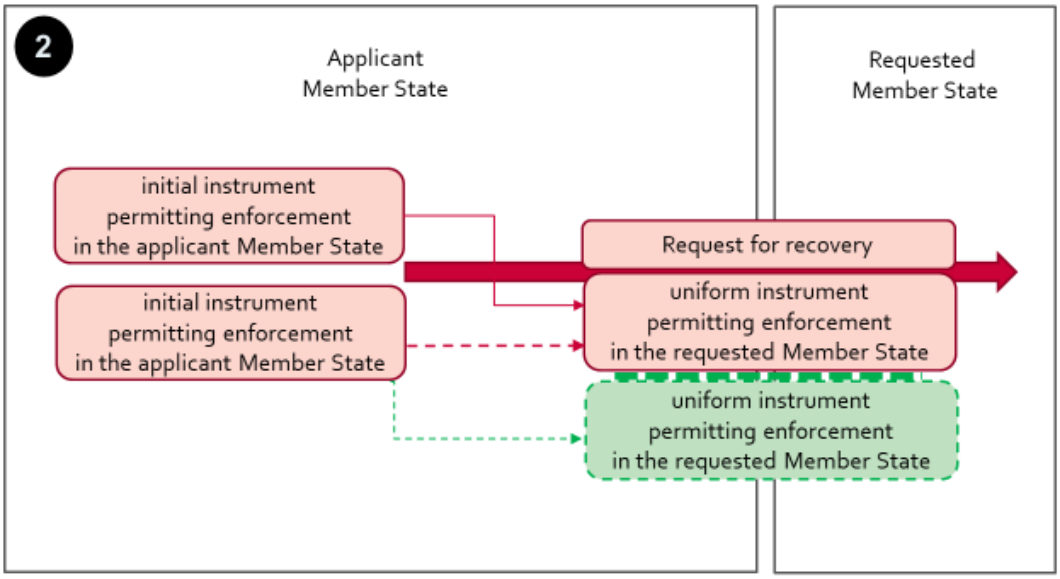
Article 16(2) of Regulation 1189/2011 (as amended) indeed confirms that: *"A single uniform instrument permitting enforcement in the requested Member State may be issued in respect of several claims and several persons, corresponding to the initial instrument or instruments permitting enforcement in the applicant Member State"*.

It does not make sense to oblige the applicant Member State to create systematically a separate uniform instrument permitting enforcement in the requested Member State for each separate initial instrument permitting enforcement in the applicant Member State, as this would entail an unnecessary administrative burden.[45] There may, however, be a good reason for issuing different uniform instruments permitting enforcement in the requested Member State, notably where the applicant Member State wishes to take account of the tax type related division of competences of the respective recovery offices in the requested Member State (Article 16(3b) of Commission Implementing Regulation, inserted by Article 1(3)(b) of Commission Implementing Regulation 2017/1966).

Example : a tax debtor has several income tax and VAT debts. In the applicant Member State, these different types of claims all fall within the competence of the same tax recovery authority and they are mentioned in the same initial instrument(s) permitting enforcement in the applicant Member State. In the requested

[45] C. Edery, H. Michard and L. Vandenberghe, 'The 2017 amendments of Commission Implementing Regulation 1189/2011: what's new?', *EU & Int. Tax Coll. News* 2017, issue 1, 14.

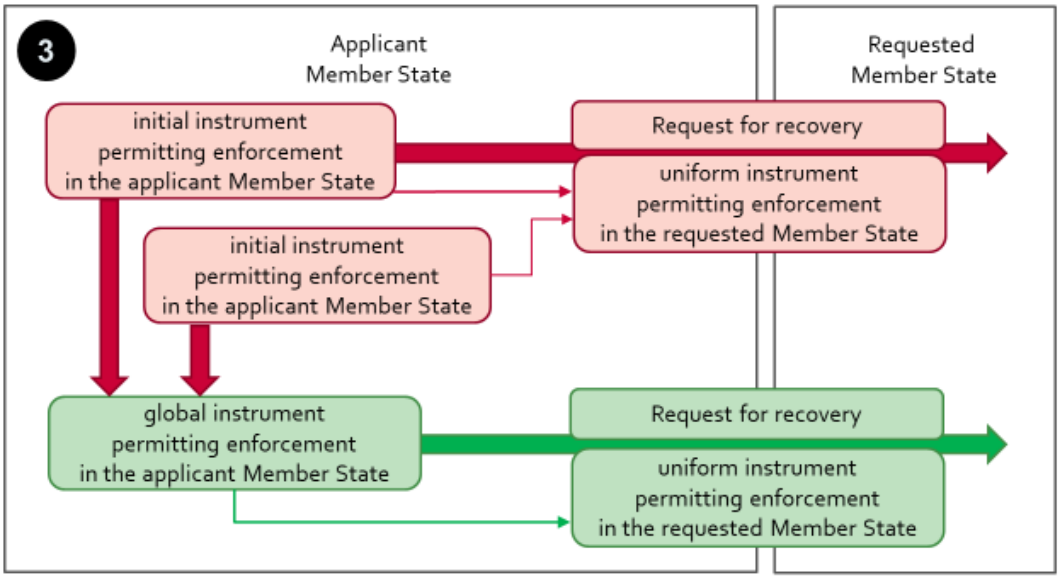
Member State, recovery of income taxes and recovery of VAT fall within the competence of different tax recovery authorities. In that case, the applicant Member State may wish to issue separate uniform instruments permitting enforcement in the requested Member State (one for the income taxes and one for the VAT claims).[46]



3) In so far as initial instruments permitting enforcement for several claims in the applicant Member State have already been replaced by a global instrument permitting enforcement for all these claims in that applicant Member State ❸, the uniform instrument permitting enforcement in the requested Member State may be based on the initial instruments permitting enforcement in the applicant Member State or on that global instrument regrouping those initial instruments in the applicant Member State (in so far as all the claims concerned still remain unpaid and unrecovered at the moment of the request for recovery measures; *cf. infra*, point 12.05.).

Article 16(3a) of Regulation 1189/2011 (as amended by Regulation 2017/1966) indeed provides that: *"In so far as initial instruments permitting enforcement for several claims in the applicant Member State have already been replaced by a global instrument permitting enforcement for all these claims in that Member State, the uniform instrument permitting enforcement in the requested Member State may be based on the initial instruments permitting enforcement in the applicant Member State or on that global instrument regrouping those initial instruments in the applicant Member State"*.

[46] C. Edery, H. Michard and L. Vandenberghe, 'The 2017 amendments of Commission implementing Regulation 1189/2011: what's new?', *EU & Int. Tax Coll. News* 2017, issue 1, 14.



12.05. It is important to note that the uniform instrument(s) permitting enforcement in the requested State should only take account of those claims that still remain unpaid or unrecovered in the applicant Member State – which means that claims mentioned in the initial or global instrument(s) permitting enforcement should not be "copied" into the uniform instrument(s) permitting enforcement in the requested Member State if they were in the meantime paid or recovered (Article 16(3a) of Commission Implementing Regulation 1189/2011, inserted by Article 1(3)(b) of Commisison Implementing Regulation 2017/1966). This may help to avoid errors and confusion in the requested Member State, for the requested authorities and the debtor concerned. [47]

12.06. The UIPE constitutes the sole basis "for the recovery **and precautionary measures** taken in the requested Member State". In this regard, the reference to precautionary measures must be understood within the framework of this provision, which relates to requests for recovery (see the first sentence of Article 12(1)). In this regard, precautionary measures, which are auxiliary and ancillary to the recovery, can also be taken on the basis of the UIPE and do not require another specific document or instrument. Of course, this does not imply that a request for precautionary measures – as referred to in Article 16 of Council Directive 2010/24/EU – should always be accompanied by a UIPE (*cf. infra*, points 16.06.-16.07).

Article 12(2)

12.07. The request for recovery may be accompanied by other documents relating to the claim issued in the applicant Member State. The use of the word "may" clearly indicates that there is no obligation for the applicant Member State to add other documents; the UIPE is the sole – and thus sufficient – legal basis for the recovery measures taken in the requested Member State (Article 12(1), second subparagraph of the Directive).

[47] C. Edery, H. Michard and L. Vandenberghe, 'The 2017 amendments of Commission Implementing Regulation 1189/2011: what's new?', *EU & Int. Tax Coll. News* 2017, issue 1, 14.

Adding other documents – in particular the initial instrument(s) permitting enforcement in the applicant Member State – may, however, be useful.

Example: another document may be useful for the requested authorities, for instance to assess the nature of the tax concerned (in view of their obligation to apply the laws of their Member State for the recovery of claims concerning "the same or, in the absence of the same, a similar tax or duty" (in accordance with Article 13(1), first subparagraph, of the Directive).[48]

Example: it may help to ensure or speed up the recovery if the debtor or another addressee can immediately have access to the underlying documents, which may have been served on him a long time ago (although his request for explanation should officially be addressed to the authorities of the applicant Member State, in accordance with Article 12(1), third subparagraph, (c) of the Directive).

[48] I. De Troyer, 'Tax recovery assistance in the EU', *EC Tax Review* 2014, issue 4, 208.

Article 13

Execution of the request for recovery

1. For the purpose of the recovery in the requested Member State, any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State, except where otherwise provided for in this Directive. The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State applying to claims concerning the same or, in the absence of the same, a similar tax or duty, except where otherwise provided for in this Directive.

If the requested authority considers that the same or similar taxes or duties are not levied on its territory, it shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State which apply to claims concerning the tax levied on personal income, except where otherwise provided for in this Directive.

The requested Member State shall not be obliged to grant other Member States' claims preferences accorded to similar claims arising in that Member State, except where otherwise agreed between the Member States concerned or provided in the law of the requested Member State. A Member State which grants preferences to another Member State's claims may not refuse to grant the same preferences to the same or similar claims of other Member States on the same conditions.

The requested Member State shall recover the claim in its own currency.

2. The requested authority shall inform the applicant authority with due diligence of any action it has taken on the request for recovery.

3. From the date on which the recovery request is received, the requested authority shall charge interest for late payment in accordance with the laws, regulations and administrative provisions in force in the requested Member State.

4. The requested authority may, where the laws, regulations or administrative provisions in force in the requested Member State so permit, allow the debtor time to pay or authorise payment by instalment and it may charge interest in that respect. It shall subsequently inform the applicant authority of any such decision.

5. Without prejudice to Article 20(1), the requested authority shall remit to the applicant authority the amounts recovered with respect to the claim and the interest referred to in paragraphs 3 and 4 of this Article.

Commentary

Article 13(1), first and second subparagraphs

13.01. The execution of the request in accordance with the law and administrative practice of the requested Member State implies that the authorities of the

requested Member State also have to respect the "public policy" ("ordre public") principles or provisions of that Member State.[49]

13.02. The use of powers and procedures provided under the national law of the requested Member State implies that the authorities of the requested Member State may lodge an insolvency petition, if that is also possible for tax debts originating in the requested Member State.[50]

Article 13(1), third subparagraph

13.03. With regard to preferences (privileges[51]), Article 13(1), third subparagraph, of the Directive specifies that the concrete situation with regard to the (non) preferential treatment of other Member States' tax claims depends on the national law of the requested Member State (or possibly on an agreement between the Member States concerned). The requested Member State is not obliged to grant other Member States' claims preferences accorded to similar claims arising in the requested Member State, except where otherwise agreed between the Member States concerned or provided in the law of the requested Member State. On this point, the finally adopted text of this Directive clearly deviates from the initial Commission proposal.[52]

The same principle applies to tax claims that are lodged in insolvency proceedings in another Member State: the law of the Member State of opening of the proceedings determines whether the same preferential status is given to the other Member States' tax claims.[53]

13.04. It is appropriate to adopt a broad understanding of the term 'preference (privilege)' as referred to in this provision, encompassing all the mechanisms that enable the requested Member State to obtain preferential or priority payment of its claims in the event of concurrent claims, by way of derogation from the principle of equality of creditors.[54]

In this regard, the EU Court of Justice provided the following clarification:

- an ordinary set-off mechanism intended to simplify the recovery procedure, without conferring on the requested State a preferential right or a right of priority for the purposes of payment of its claims or any privilege derogating from the principle of equality of creditors, would have to be regarded as falling within the scope of Directive 2010/24 and should also be used by the requested State to recover another Member State's claims in respect of which a request for recovery has been made, pursuant to this directive;

- conversely, should the use of the set-off option have the effect of conferring on the requested State such a preferential right or right of priority not available to the other creditors, that option would constitute, in derogation of the principle

49 Cf. EUCJ 26 April 2018, C-34/17, Donnellan; cf. R. Seer, "Internationale Beitreibungshilfe", *IWB* 25.08.2017, Nr. 16, 585.

50 (United Kingdom) Bankruptcy High Court, 23 Jun 2016, *Smart*, *EU & Int. Tax Coll. News* 2017, issue 2, 198.

51 In the former tax recovery assistance directive, the word « privileges » was used in the English language version, with the same meaning as the currently used term « preferences » (see Art. 10 of Directive 2008/55).

52 According to Article 22 of Commission proposal COM(2009)28 of 2 February 2009, the requested Member State was expected to apply the same privileges to claims arising in its own Member State and to claims from other Member States.

53 See L. Vandenberghe, 'Cross-border insolvency proceedings and tax recovery', *EU & Int. Tax Coll. News 2019*, issue 1, p. 44-45, points 5-7.

54 EUCJ 11 June 2020, C-19/19, Pantochim, point 44.

of equality of creditors in the event of concurrent claims, a 'preference (privilege)' within the meaning of Article 13 of Directive 2010/24.[55]

Article 13(2)

13.05. The requested authority has to inform the applicant authority with due diligence of any action it has taken on the request for recovery.

More detailed arrangements are laid down in the Implementing Regulation 1189/2011 :

- the requested authority has to acknowledge the receipt of the request as soon as possible or in any event within seven calendar days of receipt of the request (Article 19(1) of the Implementing Regulation);

- no later than at the end of each six-month period following the date of acknowledgement of the receipt of the request, the requested authority should inform the applicant authority of the state of progress or the outcome of the procedure for recovery (Article 20(2) of the Implementing Regulation).

13.06. Where, with respect to the particularity of a case, all or part of the claim cannot be recovered or precautionary measures cannot be taken within a reasonable time, the requested authority shall inform the applicant authority thereof and state the reasons (Article 20(1), first subparagraph, of the Implementing Regulation).

On the basis of the information received from the requested authority, the applicant authority may request the latter to re-open the procedure for recovery or for precautionary measures. That request shall be made within two months of the receipt of the notification of the outcome of that procedure, and shall be treated by the requested authority in accordance with the provisions applying to the initial request (Article 20(1), second subparagraph, of the Implementing Regulation).

Article 13(3)

13.07. The requested authority should charge interest from the date on which the recovery request is received, in accordance with the laws, regulations and administrative provisions in force in the requested Member State. This reference to the national law of the requested State also includes a reference to the fundamental principles governing this matter in the requested State.

Article 13(4)

13.08. The requested authority may allow the debtor time to pay or authorise payment by instalment (if permitted under its national law). The Directive specifies that the requested authority should "subsequently" inform the applicant of any such decision.[56]

When sending the request for recovery, the applicant Member State can inform the requested authority about its concerns or preferences in this regard. For

55 EUCJ 11 June 2020, C-19/19, Pantochim, points 46-47. (This judgement related to the former Directives 76/308 and 2008/55).

56 In the past, the requested authority first had to consult with the applicant authority before allowing the debtor time to pay or before authorizing payment by instalment (Article 9(2), first subparagraph, of Directive 1976/308).

instance, the applicant authority could warn the requested authority that the debtor concerned did not respect an instalment plan previously agreed to him by the competent authorities of the applicant Member State.

Article 13(5)

13.09. See the comments under point 20.2.

Article 14

Disputes

1. **Disputes concerning the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State and disputes concerning the validity of a notification made by a competent authority of the applicant Member State shall fall within the competence of the competent bodies of the applicant Member State. If, in the course of the recovery procedure, the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State is contested by an interested party, the requested authority shall inform that party that such an action must be brought by the latter before the competent body of the applicant Member State in accordance with the laws in force there.**
2. **Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by a competent authority of the requested Member State shall be brought before the competent body of that Member State in accordance with its laws and regulations.**
3. **Where an action as referred to in paragraph 1 has been brought before the competent body of the applicant Member State, the applicant authority shall inform the requested authority thereof and shall indicate the extent to which the claim is not contested.**
4. **As soon as the requested authority has received the information referred to in paragraph 3, either from the applicant authority or from the interested party, it shall suspend the enforcement procedure, as far as the contested part of the claim is concerned, pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the third subparagraph of this paragraph.**

   At the request of the applicant authority, or where otherwise deemed to be necessary by the requested authority, and without prejudice to Article 16, the requested authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the requested Member State allow such action.

   The applicant authority may, in accordance with the laws, regulations and administrative practices in force in the applicant Member State, ask the requested authority to recover a contested claim or the contested part of a claim, in so far as the relevant laws, regulations and administrative practices in force in the requested Member State allow such action. Any such request shall be reasoned. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for reimbursing any sums recovered, together with any compensation due, in accordance with the laws in force in the requested Member State.

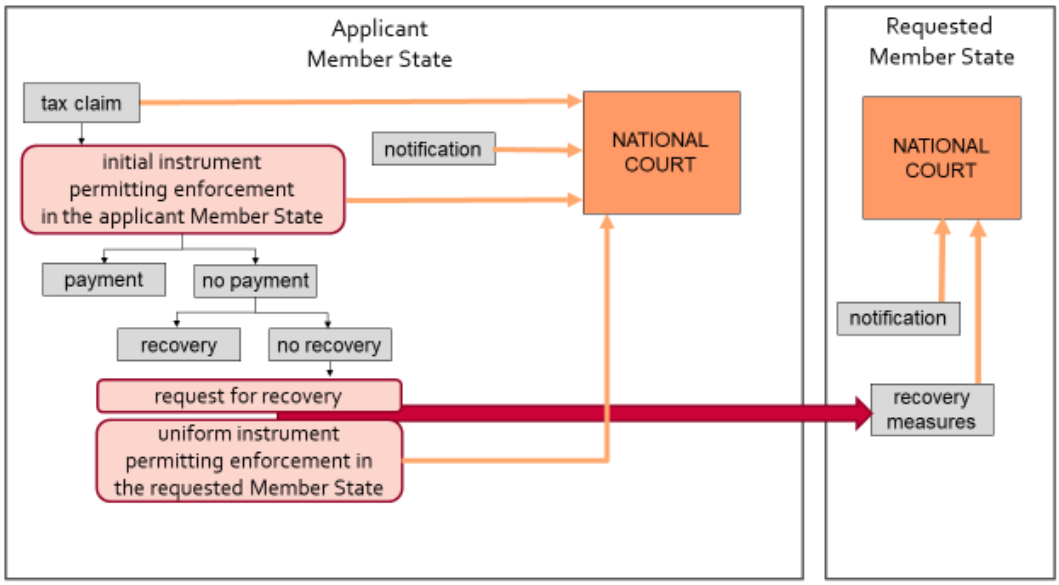
   If a mutual agreement procedure has been initiated by the competent authorities of the applicant Member State or the requested Member State, and the outcome of the procedure may affect the claim in respect of which assistance has been requested, the recovery measures shall be suspended or stopped until that procedure has been terminated, unless it concerns a case of

immediate urgency because of fraud or insolvency. If the recovery measures are suspended or stopped, the second subparagraph shall apply.

Commentary

Article 14(1)

14.01. The following disputes have to be brought before the courts or other competent bodies of the applicant Member State:
- disputes concerning the claim;
- disputes concerning the initial instrument permitting enforcement in the applicant Member State;
- disputes about the uniform instrument permitting enforcement in the requested Member State (since this uniform instrument is completed by or under the responsibility of the applicant authority, on the basis of the initial instrument permitting enforcement in the applicant Member State, in accordance with Article 16(1) of Commission Implementing Regulation 1189/2011);
- disputes concerning the validity of a notification made by a competent authority of the applicant Member State.



14.02. Disputes concerning the claim may relate to its existence, its lawfulness,[57] its amount, or to the liability for that claim.

The contestation of the UIPE may relate to the consistency between the initial instrument permitting enforcement and the UIPE. If the UIPE corresponds to the initial instrument, that initial instrument will have to be contested (and not only the UIPE).

14.03. In principle, the applicant authority has to apply appropriate recovery measures available in its own Member State before making a request for recovery (Article 11(2) of the Directive).

[57] Cf. (Austria) Federal Tax Court, 6 April 2017, *EU & Int. Tax Coll. News* 2017, issue 2, 206.

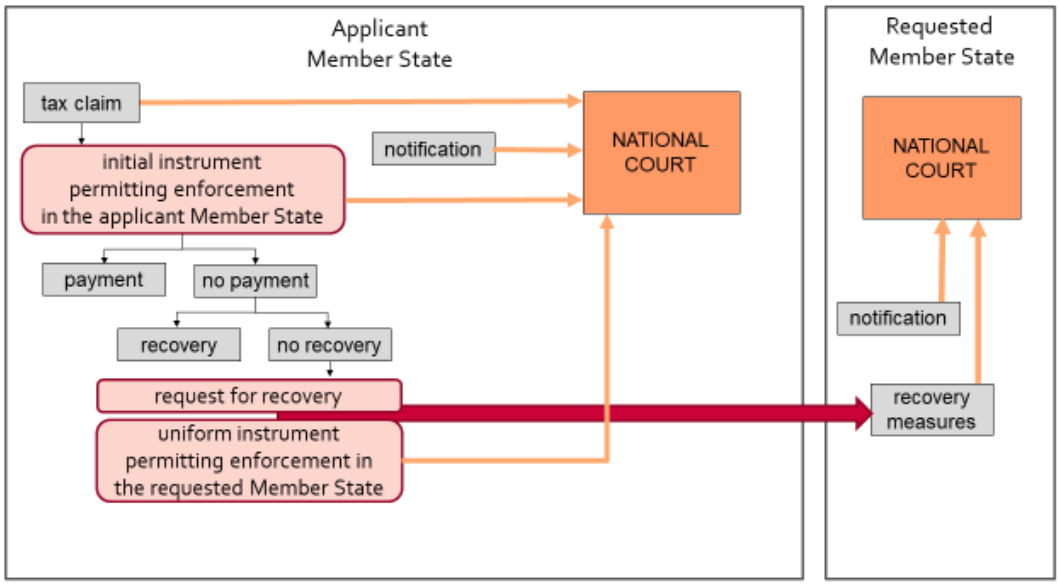
The Italian Supreme Court decided that a dispute about the fulfilment of that condition is to be brought before the competent bodies of the applicant Member State.[58] This is not explicitly confirmed in Article 14, but this decision is in line with the general approach of Article 14. It would indeed be difficult for the authorities and courts in the requested Member State to check which appropriate measures were available and effectively used in the applicant Member State.

14.04. A French company had a tax debt in Germany. The German tax authorities held the director of the company personally liable for the tax due by the company. They sent a request for recovery assistance to France. In the meantime, insolvency proceedings against this company had been started in France, where the director argued that his tax liability was violating the Insolvency Regulation 1346/2000. The French court decided that this contestation should be raised before the competent bodies in Germany, and not before the French court.[59]

A UK court decided that if insolvency proceedings are opened in the requested Member State, the competent insolvency court in that Member State cannot decide on the validity of the foreign tax claim that would be lodged in these proceedings.[60]

Article 14(2)

14.05. The following disputes have to be brought before the courts or other competent bodies of the requested Member State:
- disputes concerning the enforcement measures taken in the requested Member State;
- disputes concerning the validity of a notification made by a competent authority of the requested Member State.



[58] (Italy) Supreme Court (Cassation), 17 March 2017, *EU & Int. Tax Coll. News* 2017, issue 2, 203 (with regard to the former Directive 76/308).
[59] (France) Court of Appeal of Metz, 7 February 2017, *EU & Int. Tax Coll. News* 2017, issue 2, 190.
[60] (United Kingdom) Bankruptcy High Court, 23 Jun 2016, *Smart*, *EU & Int. Tax Coll. News* 2017, issue 2, 198.

14.06. The right to dispute the recovery measures in the requested Member State does not dispense the tax debtor from his obligation to dispute the claim and/or the instrument permitting enforcement before the courts of the applicant Member State, once he is properly informed about this claim/instrument permitting enforcement and able to defend his rights. [61]

14.07. In the *Kyrian* judgment – relating to the former Directive 76/308 – the EU Court of Justice decided that the courts of the requested State had the power to review whether the notification by the authorities of the applicant Member State was validly effected, i.e. whether the addressee was effectively and sufficiently informed.[62] The reasoning of the CJEU in that *Kyrian* case, that the notification is to be considered as part of the enforcement measures, no longer applies to situations covered by the current EU legislation. Article 14 (1) and (2) of Directive 2010/24 clearly distinguishes notifications from enforcement measures, and these provisions now contain precise rules with regard to the question in which Member State notification actions can be contested: the validity of a notification has to be contested in the Member State of the competent authority that made this notification.[63] In case of doubts concerning the effectiveness of the notification, the public policy exception may however still imply the suspension of recovery measures in the requested Member State, in view of respecting the tax debtor's right of defence, in line with the *Donnellan* judgment. [64]

Article 14(3)

14.08. Where the claim or the instrument permitting enforcement (in the applicant Member State or in the requested State) or the notification by the authorities of the applicant Member State is contested, the applicant authority should inform the requested authority as soon as possible about the extent to which the claim is contested. This communication should be done rapidly, in order to limit or avoid the liability of the applicant Member State for any costs or lossed incurred by the requested authority as a result of actions that are held to be unfounded (see Article 20(3)).

Article 14(4), first subparagraph

14.09. Tax recovery assistance can also be provided for administrative penalties. The wording of Article 2(2)(a) of Directive 2010/24 (see point 02.05.) does not exclude the possibility that such administrative penalties are considered as having a criminal nature within the sense of Article 6 of the European Convention of Human Rights (ECHR). The Belgian Supreme Court in 2018 decided that the presumption of innocence guaranteed by Article 6(2) ECHR does not prevent the tax authorities from being entrusted with the task of imposing administrative fines in the event of violation of the Tax Code, even if

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61 Cf. I. De Troyer, 'The Tax Debtor's Right of Defence in Case of Cross-Border Collection of Taxes', *EC Tax Review* 2019, issue 1, 27.

62 EUCJ 14.01.2010, C-233/08, *Kyrian*, para. 50: *"Therefore, in reply to the first question, Article 12(3) of Directive 76/308 must be interpreted as meaning that the courts of the Member State where the requested authority is situated do not, in principle, have jurisdiction to review the enforceability of an instrument permitting enforcement. Conversely, where a court of that Member State hears a claim against the validity or correctness of the enforcement measures, such as the notification of the instrument permitting enforcement, that court has the power to review whether those measures were correctly effected in accordance with the laws and regulations of that Member State."*

63 Cf. I. De Troyer, 'The Tax Debtor's Right of Defence in Case of Cross-Border Collection of Taxes', *EC Tax Review* 2019, issue 1, p. 23, point 9.

64 *Idem*.

these penalties are severe, insofar as the taxpayer has the possibility to ask for a judicial review of the penalty by a judge with full jurisdiction. This Court further decided that *'in principle, the presumption of innocence guaranteed by Article 6(2) ECHR does not preclude that the authorities proceed with the enforcement of the administrative fine before the taxpayer has been found guilty in a final judicial decision. In view of the serious consequences that immediate enforcement may have for the person concerned, the tax authorities are obliged to proceed to such immediate implementation within reasonable limits, while maintaining a fair balance between all the interests at stake'*.[65] This judgment of the Belgian Supreme Court is in line with the case law of the European Court of Human Rights.[66]

Anyhow, if such administrative penalties are contested, the recovery measures in the requested Member State should normally be suspended or stopped, in accordance with Article 14(4), first subparagraph, of the Directive. The recovery of the contested penalties could only be continued if that is possible under the laws of both the applicant and requested Member States, and on condition that the request to continue the recovery is reasoned (Article 14(4), third subparagraph of the Directive) (see point 14.11.).

Article 14(4), second subparagraph

14.10. Contested claims – or the contested part of claims – may be the subject of precautionary measures. These can be taken by the requested authority at the request of the applicant authority or whenever the requested authority considers that such measures are necessary. The word "necessary" should here be interpreted as meaning that there is some justification for such measures, given the specific circumstances of the case concerned.

Article 14(4), third subparagraph

14.11. Article 14(4), third subparagraph, of the Directive provides that the recovery of a contested claim or the contested part of a claim can be requested by the applicant authority "in accordance with the laws, regulations and administrative practices in force in the applicant Member State", "in so far as the relevant laws, regulations and administrative practices in force in the requested Member State allow such action". This provision must be understood in such a way that the recovery of a contested claim (or the contested part of a claim) in the requested Member State is only permitted if recovery of a contested claim is possible under the laws and administrative practices of the applicant Member State and the requested Member State.[67]

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65 (Belgium) Supreme Court (Hof van Cassatie – Cour de Cassation) 18 January 2018, *EU & Int. Tax Coll. News* 2018, issue 2, 117.

66 ECtHR 23 July 2002, *Janosevic v. Sweden*, point 106: "*The Court notes that neither Article 6 nor, indeed, any other provision of the Convention can be seen as excluding, in principle, enforcement measures being taken before decisions on tax surcharges have become final. Moreover, provisions allowing early enforcement of certain criminal penalties can be found in the laws of other Contracting States. However, considering that the early enforcement of tax surcharges may have serious implications for the person concerned and may adversely affect his or her defence in the subsequent court proceedings, as with the position with the use of presumptions in criminal law, the States are required to confine such enforcement within reasonable limits that strike a fair balance between the interests involved. This is especially important in cases like the present one in which enforcement measures were taken on the basis of decisions by an administrative authority, that is, before there had been a court determination of the liability to pay the surcharges in question.*"

67 Cf. I. De Troyer, 'Tax recovery assistance in the EU: analysis of Directive 2010/24/EU', *EC Tax Review* 2014, issue 3, 147.

The recovery of a contested claim should be considered as exceptional. The focus should be on situations of (clear) abuse of the right to contest/appeal, where it is very likely that the contestation/appeal will be rejected, given its lack of justification or given the fact that it is not submitted timely, and where the only aim of the contestation/appeal is to obtain a suspension of the recovery actions.[68] Therefore, any such request shall be reasoned (Article 14(4), third subparagraph of the Directive). Given the need to maintain a fair balance between the interests at stake, this condition of a reasoned request implies that the request must be duly motivated.

14.12. If the result of the contestation is favourable to the debtor, the applicant authority shall be liable for reimbursing any sums recovered, together with any compensation due, in accordance with the laws in force in the requested Member State (Article 14(4), third subparagraph of the Directive).

Article 14(4), fourth subparagraph[69]

14.13. Article 14(4), fourth subparagraph, introduces a clear exception to the the third subparagraph. This fourth subparagraph did not yet appear in the former EU directives on tax recovery assistance[70] nor in the Commission proposal that led to Directive 2010/24.[71] It was suggested and agreed at Council level when the new Directive was adopted.

Article 14(4), fourth subparagraph applies in case of a "mutual agreement procedure". Strictly speaking, this procedure relates to the first stage in the discussions between Member States in case of a complaint about double taxation or about taxation not in accordance with the allocation of taxing rights between Member States.[72] Between EU Member States, this procedure is now governed by the rules of Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union. This Directive lays down rules on the mechanisms to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise.

If the competent authorities of the Member States do not reach an agreement during the "mutual agreement procedure" as to how to resolve the question in dispute, further arbitration (dispute resolution) steps may follow: an Advisory Commission or an Alternative Dispute Resolution Commission may examine the case.[73] Article 14(4), fourth subparagraph, of Directive 2010/24 confirms that recovery measures should be suspended or stopped as soon as a mutual agreement procedure has been initiated, "until that procedure has been terminated". It is clear that if the affected person requests the competent authorities to set up an Advisory Commission or if the dispute is submitted to the Alternative Dispute Resolution Commission, the recovery in the requested State should be suspended or stopped until a final decision is reached in

68 Cf. H. Schaumburg, *Grenzüberschreitende Amts- und Rechtshilfe*, in H. Schaumburg and J. Englisch, *Europäisches Steuerrecht* 2015, Ottoschmidt, Köln, p. 866, point 20.47.

69 This text is based on L. Vandenberghe, *The limits to arbitration posed by the natural judge theory (due process of law) and cross-border tax disputes*, topical report for the EATLP seminar 2019, in P. Pistone (ed.), Tax procedures, IBFD, 2020, (p. 197), p. 225-226, section 6.5.2.2.

70 Directive 76/308 (as amended) and Directive 2008/55 (codified version).

71 Commission proposal for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, COM(2009)28 of 2 February 2009.

72 Art. 4 of Directive 2017/1852.

73 See Art. 6-14 of Directive 2017/1852.

accordance with Article 15(1) of Directive 2017/1852. The arbitration is a kind of extension of the mutual agreement procedure[74] and must be considered to be covered by Article 14(4), fourth subparagraph of Directive 2010/24. Indeed, as long as the double taxation issue remains, the reason for suspending or stopping the recovery measures also remains.

The Council's approach to refuse assistance for recovery of contested claims in case of an ongoing mutual agreement (possibly including arbitration) procedure is logic. Such cases do not relate to situations where the tax debtor is unwilling to pay taxes, but to situations where he is subject to a double taxation, which should be avoided or solved. In practice, it is difficult to imagine that the requested Member State would execute a request to proceed/continue with the recovery of a claim that is contested in the applicant Member State if the contestation relates to a situation of double taxation in the applicant and the requested Member States.

14.14. Even without this explicit confirmation in Article 14(4), fourth subparagraph, of Directive 2010/24, it could be argued that if the same transaction or income was already declared and taxed in the requested Member State, that requested Member State could justify its refusal to provide assistance for the recovery of the applicant Member State's tax claim on the same transaction or income, on the ground that this would be contrary to the public policy of the requested Member State. This "public policy" argument is not mentioned under the limits to the requested authority's obligation to provide recovery assistance (Article 18 of Directive 2010/24) but only under the limits to the requested authority's obligation to supply information (Article 5(2) of this Directive). However, the EU Court of Justice has made it clear that this "public policy" exception also applies when it comes to the execution of requests for recovery or precautionary measures,[75] just as it also applies to internal enforcement of the own taxes of the requested State.[76]

The relevance of this "public policy" exception is twofold:

- if the taxation in the applicant Member State is conflicting with the taxation in the requested Member State, the requested authority may consider that the tax claim of the other Member State is unlawful and contrary to its own taxing right.[77] Accordingly, the requested authority may refuse to execute the request for recovery with regard to that claim of the applicant Member State, since providing recovery assistance would be against the interests of the requested Member State. In this regard, it should be noted that the current EU law does not impose on the tax authorities of the Member States an obligation on each of them to recognize the other's decision. For the same reasons, it could be argued that the requested authority may refuse to take precautionary measures with regard to the claim of the applicant Member

74 C. Garbarino and M. Lombardo, *Arbitration of Unresolved Issues in Mutual Agreement Cases: The New Para. 5, Art. 25 of the OECD Model Convention, a Multi-Tiered Dispute Resolution Clause*, in M. Lang and Others, *Tax Treaties: Building Bridges between Law and Economics*, IBFD, Amsterdam, 2010, p. 475.

75 EUCJ 26 April 2018, C-34/17, *Donnellan*, para. 47; EUCJ 14 January 2010, C-233/08, *Kyrian*, para. 43.

76 Art. 13(1) of Directive 2010/24 provides that "any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State".

77 It is true that the EU Court of Justice has decided that the fact that a judgment given in a Member State is contrary to EU law does not justify that judgment's not being recognised and executed in another Member State on the grounds that it infringes public policy in that State where the error of law relied on does not constitute a manifest breach of a rule of law regarded as essential in the EU legal order and therefore in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental in those legal orders (EUCJ 16 July 2015, C-681/13, *Diageo Brands*; EUCJ 23 October 2014, *flyLAL-Lithuanian Airlines*, point 49; cf. EUCJ 28 March 2000, C-7/98, *Krombach*, point 37 (with regard to a provision in the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters).

State[78] that is considered to be conflicting with the taxation competence of the requested Member State;

- providing recovery assistance for a tax claim which the requested Member State considers to be unlawful and contrary to its own taxing right, may also be considered to unacceptably affect the interests of the person concerned, insofar as he is already required to pay tax on the same income or transaction in the requested Member State. The immediate payment or recovery of the double tax may seriously affect his right of defence.[79]

[78] Such precautionary measures could be requested under Art. 14(4), second subparagraph, of Directive 2010/24.

[79] See also earlier case law concerning judicial cooperation in civil and commercial matters, where the Court interpreted the term "public policy" as covering the right of defence (EUCJ 28 March 2000, C-7/98, *Krombach*, points 37-38; see M. Hazelhorst, 'Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and the Rule of Law', *Netherlands International Law Review* 2018, 111-114; cf. I. De Troyer, 'The Tax Debtor's Right of Defence in Case of Cross-Border Collection of Taxes', *EC Tax Review* 2019, issue 1, 24-25.

Article 15

Amendment or withdrawal of the request for recovery assistance

1. The applicant authority shall inform the requested authority immediately of any subsequent amendment to its request for recovery or of the withdrawal of its request, indicating the reasons for amendment or withdrawal.

2. If the amendment of the request is caused by a decision of the competent body referred to in Article 14(1), the applicant authority shall communicate this decision together with a revised uniform instrument permitting enforcement in the requested Member State. The requested authority shall then proceed with further recovery measures on the basis of the revised instrument.

Recovery or precautionary measures already taken on the basis of the original uniform instrument permitting enforcement in the requested Member State may be continued on the basis of the revised instrument, unless the amendment of the request is due to invalidity of the initial instrument permitting enforcement in the applicant Member State or the original uniform instrument permitting enforcement in the requested Member State.

Articles 12 and 14 shall apply in relation to the revised instrument.

Commentary

Article 15(1)

15.01. The applicant authority may amend or withdraw its request for recovery. In that case, it has to inform the requested authority immediately, indicating the reasons for amendment or withdrawal.

This is of course important for the debtor, who should not be confronted with recovery measures if – and insofar as – such measures are no longer needed.

This obligation is particularly relevant for the applicant Member State's liability, referred to in Article 20(3) of the Directive: the applicant Member State remains liable to the requested Member State for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument permitting enforcement and/or precautionary measures issued by the applicant authority are concerned. For that reason, the applicant authority has to inform the requested authority immediately and has to provide a clear indication of the reasons for amendment or withdrawal.

Article 15(2)

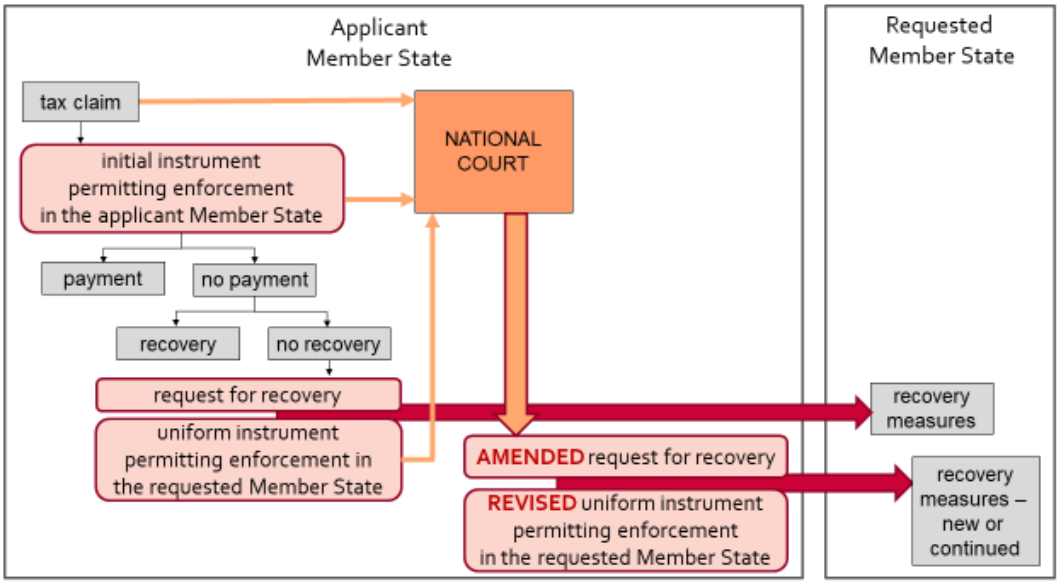
15.02. If the dispute before a court (or before another competent body) leads to a decision amending the claim – without completely annulling it – then the applicant authority has to inform the requested authority, in order to limit the recovery in the requested Member State to the (lower) amount decided by the court (or by the other competent body).

This communication is done as follows:

- the applicant authority will send an amended request, taking into account the decision concerned;
- this amended request should be accompanied by the decision concerned. A translation of this decision could only be requested by the requested authority "where necessary" (see Article 22(3) of the Directive);
- the amended request should be accompanied by a revised instrument permitting enforcement in the requested Member State (RUIPE), which also takes account of the decision concerned. In principle, this revised instrument permitting enforcement in the requested Member State (RUIPE) is automatically attached to the amended request.

15.03. The requested authority shall then proceed with further recovery measures on the basis of the revised instrument permitting enforcement in the requested Member State (Article 15(2), first subparagraph, of the Directive).

Recovery or precautionary measures already taken on the basis of the original uniform instrument permitting enforcement in the requested Member State may be continued on the basis of the revised instrument, unless the amendment of the request is due to invalidity of the initial instrument permitting enforcement in the applicant Member State or the original uniform instrument permitting enforcement in the requested Member State (Article 15(2), second subparagraph, of the Directive).



15.04. Where the adjustment entails an increase in the amount of the claim, the applicant authority may address to the requested authority an amended request for recovery (or for precautionary measures). That amended request shall, as far as possible, be dealt with by the requested authority at the same time as the initial request from the applicant authority. Where, in view of the state of progress of the existing procedure, consolidation of the amended request with the initial request is not possible, the requested authority shall comply with the amended request only if it concerns an amount not less than that referred to in Article 18(3) of Directive 2010/24/EU (Article 22(5) of Implementing Regulation 1189/2011).

15.05. Articles 12 and 14 of the Directive apply in relation to the revised instrument permitting enforcement in the requested Member State (Article 15(2), third subparagraph, of the Directive). This implies that:

- this revised instrument is the legal basis for the recovery and precautionary measures taken in the requested Member State. It is not subject to any act of recognition, supplementing or replacement in that Member State (in accordance with Article 12(1), second subparagraph);
- this revised instrument can still be disputed in the applicant Member State, in accordance with the law of that Member State (in accordance with Article 14(1)). In practice, this could be relevant if the revised instrument is not in accordance with the decision of the court (or the other competent body that took a decision) with regard to the dispute raised in the applicant Member State.

It should be noted that a revised uniform instrument permitting enforcement in the requested Member State does not have any consequences with regard to the possibilities to contest the initial claim, the initial instrument permitting enforcement in the applicant Member State or the decision that resulted in the amendment (Article 22(3) of Implementing Regulation 1189/2011).

Article 16

Request for precautionary measures

1. At the request of the applicant authority, the requested authority shall take precautionary measures, if allowed by its national law and in accordance with its administrative practices, to ensure recovery where a claim or the instrument permitting enforcement in the applicant Member State is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the applicant Member State, in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant Member State.

The document drawn up for permitting precautionary measures in the applicant Member State and relating to the claim for which mutual assistance is requested, if any, shall be attached to the request for precautionary measures in the requested Member State. This document shall not be subject to any act of recognition, supplementing or replacement in the requested Member State.

2. The request for precautionary measures may be accompanied by other documents relating to the claim, issued in the applicant Member State.

Commentary

Article 16(1), first subparagraph

16.01. Directive 2010/24 does not define the term "precautionary measures".[80] Such measures aim at safeguarding the rights of the tax authorities, in particular where a claim or the instrument permitting enforcement are contested, or where the claim is not yet the subject of an instrument permitting enforcement. Precautionary measures have a temporary character, while recovery measures aim at creating a definitive effect.

The use of precautionary measures is indeed important to guarantee the collection of taxes, particularly in the fight against fraudsters arranging their own insolvency.

Examples of precautionary measures: the freezing of assets of the taxpayer before a final judgment on the tax debt, to guarantee that they will still be there when the enforcement takes place; bank guarantees, freezing of assets belonging to the taxpayer but held by contracting parties.

16.02. A request for precautionary measures can be sent where the claim is not yet the subject of an instrument permitting enforcement in the applicant Member State or where a claim or the instrument permitting enforcement in the applicant Member State is contested at the time when the request is made.[81]

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[80] In the OECD and the UN model conventions (Art. 27(4)) and the OECD-Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (Art. 12), the term "measures of conservancy" is used to describe this type of actions.

[81] It is also possible that a request for recovery assistance is sent before the claim or the related instrument is contested. In that case, the requested authority can still take precautionary measures once it is contested, at the

16.03. It is not necessary for the applicant Member State to apply precautionary measures available on its own territory before sending a request for precautionary measures to another Member State. In this regard, it should be noted that Article 17 of the Directive, concerning "rules governing the request for precautionary measures" does not refer “mutatis mutandis” to Article 11(2) of the Directive, which imposes this condition in case of requests for recovery. On this point, the different treatment of requests for precautionary measures is justified: precautionary measures are mostly needed in situations where an immediate action is wishful or required to guarantee the later enforcement; and normally a request for precautionary measures will only be sent if the applicant authorities have specific reasons to believe that precautionary measures can effectively be taken in the requested Member State. That is why the EU Directive does not submit such a request for precautionary measures to the condition of prior application of appropriate precautionary measures in the applicant Member State. Of course, it is clear that such measures will also – or first – be taken in the applicant Member State if they can be applied there.[82]

16.04. Article 16(1), first subparagraph, of Directive 2010/24 implies that a request for precautionary measures is only allowed if precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the applicant Member State. On this point, it should be noted that the directive only refers to "precautionary measures" in general. It means that such a request is possible in situations where the national law and administrative practice of the applicant Member State allow some but not all precautionary measures.[83] There is no need for a complete correspondence between the precautionary measures in the applicant Member State and the precautionary measures in the requested Member State.

16.05. The authorities of the requested Member State have to take precautionary measures in accordance with their laws and administrative practices (Article 16(1), first subparagraph, of the Directive). The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State applying to claims concerning the same or, in the absence of the same, a similar tax or duty, (except where otherwise provided for in the directive) (Art. 17 referring to Art. 13(1) of Directive 2010/24).

This in principle implies that the precautionary measures taken by the authorities of the requested Member State with regard to a contested tax claim of another Member State must respect the conditions relating to these precautionary measures in the requested Member State.

Article 16(1), second subparagraph

16.06. A request for precautionary measures may be accompanied by a uniform instrument permitting recovery (and, consequently, precautionary) measures in the requested Member State (*cf. supra*, point 12.06.). This could be the case if the claim or the instrument permitting enforcement in the applicant Member State is contested. In that situation, this uniform instrument permitting

request of the applicant authority "or where otherwise deemed necessary by the requested authority" (Art. 14(4), second subparagraph, of Directive 2010/24).

82 L. Vandenberghe, H. Steffens and J.M. Moriceau, ‘Requests for precautionary measures : the EU framework’, *EU & Int. Tax Coll. News* 2015, issue 3, 122, point 7; I. De Troyer, ‘Tax recovery assistance in the EU : analysis of Directive 2010/24/EU’, *EC Tax Review* 2014, issue 3, 148.

83 L. Vandenberghe, H. Steffens and J.M. Moriceau, ‘Requests for precautionary measures: the EU framework’, *EU & Int. Tax Coll. News* 2015, issue 3, 124, points 12-15.

recovery measures in the requested Member State shall constitute the sole basis for the precautionary measures taken in the requested Member State; it shall not be subject to any act of recognition, supplementing or replacement in that requested Member State (Article 12(1), second subparagraph, of the Directive[84]).

16.07. A request for precautionary measures may be accompanied by another document (than a uniform instrument permitting recovery measures in the requested Member State[85]) drawn up for permitting precautionary measures in the applicant Member State. If this other document exists, it should be added to the request ("shall be attached"). Also this document "shall not be subject to any act of recognition, supplementing or replacement in the requested Member State" (Article 16(1), second subparagraph, of the Directive). However, the requested authority may, where necessary, require from the applicant authority a translation of this document into the official language, or one of the official languages, of the requested Member State, or into any other language bilaterally agreed between the Member States concerned (Art. 22(3) of the Directive). The document drawn up for permitting precautionary measures in the applicant Member State may be useful for the authorities of the requested Member State but the Directive does not oblige Member States to treat this document as a sufficient instrument permitting precautionary measures in the requested Member State.[86]

16.08. A preliminary question is currently pending before the EU Court of Justice, asking the Court: *"Is Article 16 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures to be interpreted as meaning that the court of the Member State which has received the request for precautionary measures, when ruling on that request on the basis of national law (which is possible for the requested court under the first sentence of Article 16), is bound to the view taken by the court of the State of establishment of the applicant in relation to the necessity and possibility of the precautionary measure when a document containing that view has been submitted to the court (last sentence of the second subparagraph of Article 16(1), according to which this document shall not be subject to any recognition, supplementing or replacement in the requested Member State)?"* [87]

Article 16(2)

16.09. The fact that a request for precautionary measures is accompanied by a uniform instrument permitting recovery measures in the requested Member State (see point 16.06.) or an instrument permitting precautionary measures in the applicant Member State (see point 16.07.) does not prevent the applicant

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84 See Article 12(1), second subparagraph, of Directive 2010/24*: "This uniform instrument permitting enforcement in the requested Member State shall (…) constitute the sole basis for the recovery and precautionary measures taken in the requested Member State"*.

85 The uniform instrument permitting recovery measures in the requested Member State does not necessarily exist at the time of the request for precautionary measures. Indeed, Article 16(1), first subparagraph, of Directive 2010/24 clearly confirms that precautionary measures can be requested "where the claim is not yet the subject of an instrument permitting enforcement in the applicant Member State", which implies that there is no possibility to create a uniform instrument permitting enforcement in the requested Member State that reflects the substantial contents of the initial instrument permitting enforcement.

86 See for a detailed analysis: I. De Troyer, 'Tax Recovery Assistance in the EU: Execution of Requests for Recovery and/or Precautionary Measures in Other EU Member States', *EC Tax Review* 2014, issue 4, (207), 208-209. (contra: M. Vascega and S. Van Thiel, 'Council adopts New Directive on Mutual Assistance in Recovery of Tax and Similar Claims', *European Taxation* 2010, (231), 236).

87 Case C-420/19, *Heavyinstall*.

authority from adding other documents. This may be useful to clarify the circumstances of the request.

16.10. With regard to other documents accompanying the request for precautionary measures, the "declaration specifying the reasons and circumstances of the request" can be mentioned in particular. A model for this document is set out in Annex III of Regulation 1189/2011, as amended by Article 1(2) of Regulation 2017/1966. This standard form has been developed in order to help the applicant authority to provide a clear indication of the circumstances and reasons justifying its request for precautionary measures. This facilitates the use of these measures in the requested Member State, in particular in view of authorisation procedures in the requested Member State or disputes with the debtor.[88]

Directive 2010/24 does not impose the use of such a form for substantiating and justifying a request for precautionary measures. For that reason, the use of this declaration is not made obligatory (see Article 15(2) of implementing Regulation 1189/2011). However, Member States are encouraged to effectively use this form.

[88] C. Edery, H. Michard and L. Vandenberghe, 'The 2017 amendments of Commission Implementing Regulation 1189/2011 : what's new ?', *EU & Int. Tax Coll. News* 2017, issue 1, 13.

Article 17

Rules governing the request for precautionary measures

In order to give effect to Article 16, Articles 10(2), 13(1) and (2), 14, and 15 shall apply *mutatis mutandis*.

Commentary

Article 17

17.01. The reference "mutatis mutandis" means that the rules governing the request for recovery measures, laid down in Articles 10(2), 13(1) and (2), 14 and 15 of the Directive, also apply to requests for precautionary measures, but it has to be taken into account that these rules must be adapted to the difference in the type of request (request for precautionary measures instead of a request for recovery measures).

17.02. The reference *mutatis mutandis* to Article 10(2) ("Requests for recovery"): implies the following:

> *"2. As soon as any relevant information relating to the matter which gave rise to the request for ~~recovery~~ precautionary measures comes to the knowledge of the applicant authority, it shall forward it to the requested authority*."

17.03. The reference *mutatis mutandis* to Article 13(1) and (2) ("Execution of the requests for recovery") implies the following:

> *"1. For the purpose of the ~~recovery~~ precautionary measures in the requested Member State, any claim in respect of which a request for ~~recovery~~ precautionary measures has been made shall be treated as if it was a claim of the requested Member State, except where otherwise provided for in this Directive. The requested authority shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State applying to claims concerning the same or, in the absence of the same, a similar tax or duty, except where otherwise provided for in this Directive.*
>
> *If the requested authority considers that the same or similar taxes or duties are not levied on its territory, it shall make use of the powers and procedures provided under the laws, regulations or administrative provisions of the requested Member State which apply to claims concerning the tax levied on personal income, except where otherwise provided for in this Directive.*
>
> *The requested Member State shall not be obliged to grant other Member States' claims preferences accorded to similar claims arising in that Member State, except where otherwise agreed between the Member States concerned or provided in the law of the requested Member State. A Member State which grants preferences to another Member State's*

claims may not refuse to grant the same preferences to the same or similar claims of other Member States on the same conditions.

The requested Member State shall ~~recover~~ take precautionary measures for the claim in its own currency.

2. *The requested authority shall inform the applicant authority with due diligence of any action it has taken on the request for ~~recovery~~ precautionary measures."*

17.04. The reference *mutatis mutandis* to Article 14 ("Disputes") implies the following:

"1. Disputes concerning the claim, the initial instrument permitting enforcement or precautionary measures in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State and disputes concerning the validity of a notification made by a competent authority of the applicant Member State shall fall within the competence of the competent bodies of the applicant Member State. If, in the course of the ~~recovery~~ precautionary measures procedure, the claim, the initial instrument permitting enforcement or precautionary measures in the applicant Member State or the uniform instrument permitting enforcement (and precautionary measures) in the requested Member State is contested by an interested party, the requested authority shall inform that party that such an action must be brought by the latter before the competent body of the applicant Member State in accordance with the laws in force there.

2. *Disputes concerning the ~~enforcement~~ precautionary measures taken in the requested Member State or concerning the validity of a notification made by a competent authority of the requested Member State shall be brought before the competent body of that Member State in accordance with its laws and regulations.*
3. *Where an action as referred to in paragraph 1 has been brought before the competent body of the applicant Member State, the applicant authority shall inform the requested authority thereof and shall indicate the extent to which the claim is not contested."*

The reference *mutatis mutandis* to Article 14 does not make any sense insofar as it also includes a reference to Article 14(4) of the Directive, which confirms that:

"4. As soon as the requested authority has received the information referred to in paragraph 3, either from the applicant authority or from the interested party, it shall suspend the enforcement procedure, as far as the contested part of the claim is concerned, pending the decision of the body competent in the matter, unless the applicant authority requests otherwise in accordance with the third subparagraph of this paragraph.

At the request of the applicant authority, or where otherwise deemed to be necessary by the requested authority, and without prejudice to Article 16, the requested authority may take precautionary measures to guarantee recovery in so far as the laws or regulations in force in the requested Member State allow such action.

The applicant authority may, in accordance with the laws, regulations and administrative practices in force in the applicant Member State, ask the requested authority to recover a contested claim or the contested part of a claim, in so far as the relevant laws, regulations and

administrative practices in force in the requested Member State allow such action. Any such request shall be reasoned. If the result of contestation is subsequently favourable to the debtor, the applicant authority shall be liable for reimbursing any sums recovered, together with any compensation due, in accordance with the laws in force in the requested Member State.

If a mutual agreement procedure has been initiated by the competent authorities of the applicant Member State or the requested Member State, and the outcome of the procedure may affect the claim in respect of which assistance has been requested, the recovery measures shall be suspended or stopped until that procedure has been terminated, unless it concerns a case of immediate urgency because of fraud or insolvency. If the recovery measures are suspended or stopped, the second subparagraph shall apply."

17.05. The reference *mutatis mutandis* to Article 15 ("Amendment or withdrawal of the request for recovery assistance") implies the following:

"1. The applicant authority shall inform the requested authority immediately of any subsequent amendment to its request for ~~recovery~~ precautionary measures or of the withdrawal of its request, indicating the reasons for amendment or withdrawal.

2. If the amendment of the request is caused by a decision of the competent body referred to in Article 14(1), the applicant authority shall communicate this decision together with a revised uniform instrument permitting enforcement in the requested Member State. The requested authority shall then proceed with further recovery measures on the basis of the revised instrument.

Recovery or precautionary measures already taken on the basis of the original uniform instrument permitting enforcement in the requested Member State may be continued on the basis of the revised instrument, unless the amendment of the request is due to invalidity of the initial instrument permitting enforcement in the applicant Member State or the original uniform instrument permitting enforcement in the requested Member State.

Articles 12 and 14 shall apply in relation to the revised instrument."

Article 18

Limits to the requested authority's obligations

1. The requested authority shall not be obliged to grant the assistance provided for in Articles 10 to 16 if recovery of the claim would, because of the situation of the debtor, create serious economic or social difficulties in the requested Member State, in so far as the laws, regulations and administrative practices in force in that Member State allow such exception for national claims.

2. The requested authority shall not be obliged to grant the assistance provided for in Articles 5 and 7 to 16, if the initial request for assistance pursuant to Article 5, 7, 8, 10 or 16 is made in respect of claims which are more than 5 years old, dating from the due date of the claim in the applicant Member State to the date of the initial request for assistance.

However, in cases where the claim or the initial instrument permitting enforcement in the applicant Member State is contested, the 5-year period shall be deemed to begin from the moment when it is established in the applicant Member State that the claim or the instrument permitting enforcement may no longer be contested.

Moreover, in cases where a postponement of the payment or instalment plan is granted by the competent authorities of the applicant Member State, the 5-year period shall be deemed to begin from the moment when the entire payment period has come to its end.

However, in those cases the requested authority shall not be obliged to grant the assistance in respect of claims which are more than 10 years old, dating from the due date of the claim in the applicant Member State.

3. A Member State shall not be obliged to grant assistance if the total amount of the claims covered by this Directive, for which assistance is requested, is less than EUR 1 500.

4. The requested authority shall inform the applicant authority of the grounds for refusing a request for assistance.

Commentary

Article 18(1)

18.01. The requested authority is not obliged to grant the assistance provided for in Article 10 to 16 – which refer to requests for recovery or precautionary measures – if recovery of the claim would create serious economic or social difficulties in the requested Member State, taking into account the situation of the debtor. This exception of course applies insofar as such exception is also permitted for national claims.

In general, this provision does not imply that the requested authority should contact the tax debtor before launching recovery or precautionary measures. It is mainly up to the tax debtor to raise this point and to provide explanation with regard to his serious economic or social difficulties, as soon as he is confronted with the actions launched by the requested authority.

Of course, if the requested authority is already aware of the existence of serious economic or social difficulties, it should carefully consider whether it is useful and proportionate to launch new recovery or precautionary measures.

Article 18(2)

18.02. There is no obligation for the requested authority to grant assistance if the initial request for assistance is made in respect of claims which are more than 5 years old (Article 18(2), first subparagraph).

This provision is inspired by the wish to optimize the cost-efficiency of cross-border tax recovery assistance: recovery of older claims is more difficult and less successful than the recovery of more recent claims. Accordingly, the EU legislature did not want to impose a strict and absolute obligation – nor a prohibition (see point 18.04.)! – to provide recovery assistance for these old claims.

18.03. This provision refers to the assistance provided for in Articles 5 and 7 to 16, which means that it covers all types of assistance (except the spontaneous exchange of information referred to in Article 6). In practice, this provision is mainly relevant for requests for recovery or precautionary measures – in particular in situations where these requests follow an earlier request for information or notification – and that is the reason why this provision is inserted here, in Article 18.

Example: An income tax is assessed on 4 June of the year X. This tax assessment is notified to the tax debtor on 6 June X, and the due date (= the last day of the normal payment period allowed to the tax debtor) is 31 July X. The time period of 5 years is counted from 1 August X until 31 July X+5.

→ A request for recovery should normally be executed if it is sent by 31 July X+5.

→ A request for recovery may be executed – but there is no obligation for the requested authority to do so – if it is sent on 1 August X+5.

The 5-years period relates to the initial request (Article 18(2), first subparagraph). If the initial request is sent within this time period, then subsequent requests with regard to the same claim are not subject to any specific time period. (Of course, the authorities concerned have to take account of the limitation period that applies to the claim concerned).

Example: An income tax is assessed on 4 June of the year X. This tax assessment is notified to the tax debtor on 6 June X, and the due date (= the last day of the normal payment period allowed to the tax debtor) is 31 July X. The time period of 5 years is counted from 1 August X until 31 July X+5.

→ A request for information, based on Article 5 of Directive 2010/24, is sent to another Member State on 3 April X+1. This request is sent within the 5-years time period of Article 18(2), first subparagraph.

→ At a later stage, a request for recovery is sent for the same claim. Since the initial request (the request for information) was sent

timely, the requested authority cannot refuse to execute the request for recovery on the basis of Article 18(2) of the Directive.

18.04. Although the requested authority "shall not be obliged" to execute a request sent after the 5-years period has expired, the Directive does not prevent the requested authority from executing this request. It is indeed for the requested authority to decide whether it accepts a request with regard to an old claim, having regard to the circumstances of a specific case, possibly taking account of particular evidence, reasons or expectations communicated by the applicant authority.[89]

18.05. If the claim or the initial instrument permitting enforcement in the applicant Member State is contested, the 5-years period shall be deemed to begin from the moment when it is established in the applicant Member State that the claim or the instrument permitting enforcement may no longer be contested (Article 18(2), second subparagraph, of the Directive).

Example: On 18 April of the year X, tax authorities notify a claim for VAT on transactions that were not declared by the taxable person himself. The claim is contested and the dispute is brought before the competent tribunal. This tribunal takes a decision on 4 May of the year X+2. If the period for appeal against this judgment would be two months following the date of the judgment, the 5-years period would normally start on 5 July of the year X+2. In that situation, the 5-years period would end on 4 July of the year X+7.

18.06. In cases where a postponement of the payment or instalment plan is granted by the competent authorities of the applicant Member State, the 5-years period shall be deemed to begin from the moment when the entire payment period has come to its end (Article 18(2), third subparagraph, of the Directive).

Example: On 18 April of the year X, the tax authorities of the applicant Member State send a tax assessment to a tax debtor. On 24 June of the year X, this person obtains an instalment plan, permitting him to spread the payment over two years. According to this payment plan, the final payment should take place on 1 July X+2. However, from 1 September of the year X+1, the person no longer respects the instalment plan and he does not make any further payment. In this case, the 5-years period begins on 2 July X+2 and ends on 1 July X+7.

However, in those cases the requested authority shall not be obliged to grant assistance in respect of claims which are more than 10 years old, dating from the due date of the claim in the applicant Member State (Article 18(2), fourth subparagraph, of the Directive).[90] This subparagraph 4 only refers to the situations of subparagraph 3, i.e. the cases where a postponement of the payment or instalment plan is granted by the competent authorities of the applicant Member State.[91]

[89] The possibility to grant recovery assistance with regard to such "older" claims of course also depends on the correct implementation of the Directive in the national law of the requested Member State.

[90] It is clear that this situation of Article 18(2), fourth subparagraph, of the Directive, will only occur in situations where a long payment period has been agreed.

[91] Cf. Explanatory Note DIR-Article 18 – 1, relating to Article 18(2) of the Directive, *EU & Int. Tax Coll. News* 2017-1, p. 20.

Article 18(3)

18.07. The Directive does not oblige Member States to grant assistance if the total amount of the claims covered by this Directive, for which assistance is requested, is less than EUR 1500.

The aim of this provision is to avoid situations where the administrative burden for the requested Member State is disproportionate to the benefit to be derived by the applicant Member State.

18.08. For the calculation of the total amount of the claims, a Member State should take account of the amounts of all claims (including penalties, interest, costs) mentioned in the request concerned, but also of the amounts of claims mentioned in other pending requests for assistance that were already sent to the same Member State with regard to the same debtor.

18.09. The condition concerning the threshold of EUR 1500 applies at the moment when the request for recovery or precautionary measures is sent to the requested Member State. A partial payment or a partial recovery at a later stage – which would have the effect that the remaining amount due is lower than EUR 1500 – should not be taken into account.

A later adjustment entailing an increase of the amount of the claim (for which the applicant authority may address to the requested authority an amended request for recovery or for precautionary measures) that cannot be consolidated with the initial request, may be refused by the requested authority if the increase concerns an amount of less than EUR 1500 (Article 22(5) of implementing Regulation 1189/2011) (see point 15.04.) (unless the total amount of all pending requests still exceeds the threshold (see point 18.08.)).

18.10. This threshold of EUR 1500 only applies to requests for recovery or precautionary measures.[92]

18.11. The Directive does not forbid to provide such assistance for lower amounts.[93]

This provision of the Directive corresponds to the condition of Article 27(8)(d) of the OECD Model Convention, which provides that a Contracting State is not obliged to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State. In order to avoid uncertainty and discussions about the question whether the administrative burden was clearly "disproportionate", the specific amount of EUR 1500 was introduced. The purpose was thus to achieve the same result as under the corresponding provisions of the bilateral tax treaties. It can thus be expected that Member States implement this provision of the Directive in the same way as the corresponding provision of the bilateral treaties based on the OECD model, i.e.

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92 Cf. Explanatory Note DIR-Article 18 – 2, relating to Article 18(3) of the Directive, *EU & Int. Tax Coll. News* 2017-1, p. 20.
In the past, this threshold was mentioned in the Implementing Regulation 1179/2008 of 28 November 2008 laying down detailed rules for implementing certain provisions of Council Directive 2008/55/EC. Article 22 of Directive 2008/55 provided that the detailed rules, to be adopted under the comitology procedure, also had to include the fixing of a minimum amount for claims which could lead to a request for assistance. Article 25(2) of Regulation 1179/2008 provided in a general way (not only for requests for recovery or precautionary measures) that: "*No request for assistance may be made if the total amount of the relevant claim or claims listed in Article 2 of Directive 2008/55/EC is less than EUR 1 500"*. This provision corresponded to the former Article 25(2) of Commission Directive 2002/94/EC of 9 December 2002 laying down detailed rules for implementing certain provisions of Council Directive 76/308/EEC.

93 The possibility to grant recovery assistance with regard to lower amounts of course also depends on the correct implementation of the Directive in the national law of the requested Member State.

by confirming that, when acting as a requested Member State, "the requested Member State is not obliged" to grant assistance for amounts below EUR 1500.

In this regard, it can also be observed that the above intention is confirmed by the change in the wording, compared to the relevant provisions of the former implementing legislation. Article 25(2) of Commission Regulation 1179/2008 provided that: "*No request for assistance may be made if the total amount of the relevant claim or claims listed in Article 2 of Directive 2008/55/EC is less than EUR 1 500."* The same wording was used in the previous versions (Article 25(2) of Commission Directive 2002/94 and Art. 20(2) of Commission Directive 77/794).

Article 18(4)

18.12. The requested authority has to inform the applicant authority of the grounds for refusing a request for assistance.

Article 19

Questions on limitation

1. Questions concerning periods of limitation shall be governed solely by the laws in force in the applicant Member State.

2. In relation to the suspension, interruption or prolongation of periods of limitation, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which have the effect of suspending, interrupting or prolonging the period of limitation according to the laws in force in the requested Member State shall be deemed to have the same effect in the applicant Member State, on condition that the corresponding effect is provided for under the laws in force in the applicant Member State.

If suspension, interruption or prolongation of the period of limitation is not possible under the laws in force in the requested Member State, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which, if they had been carried out by or on behalf of the applicant authority in its Member State, would have had the effect of suspending, interrupting or prolonging the period of limitation according to the laws in force in the applicant Member State shall be deemed to have been taken in the latter State, in so far as that effect is concerned.

The first and second subparagraphs shall not affect the right of the competent authorities in the applicant Member State to take measures to suspend, interrupt or prolong the period of limitation in accordance with the laws in force in that Member State.

3. The applicant authority and the requested authority shall inform each other of any action which interrupts, suspends or prolongs the limitation period of the claim for which the recovery or precautionary measures were requested, or which may have this effect.

Commentary

Article 19(1)

19.01. Questions concerning periods of limitation are governed solely by the law in force in the applicant Member State.

This means that:

- the initial period of limitation is determined by the law of the applicant Member State;
- the additional or new period of limitation after a suspension, interruption or prolongation of the period of limitation (see Article 19(2)) is also determined by the law of the applicant Member State.

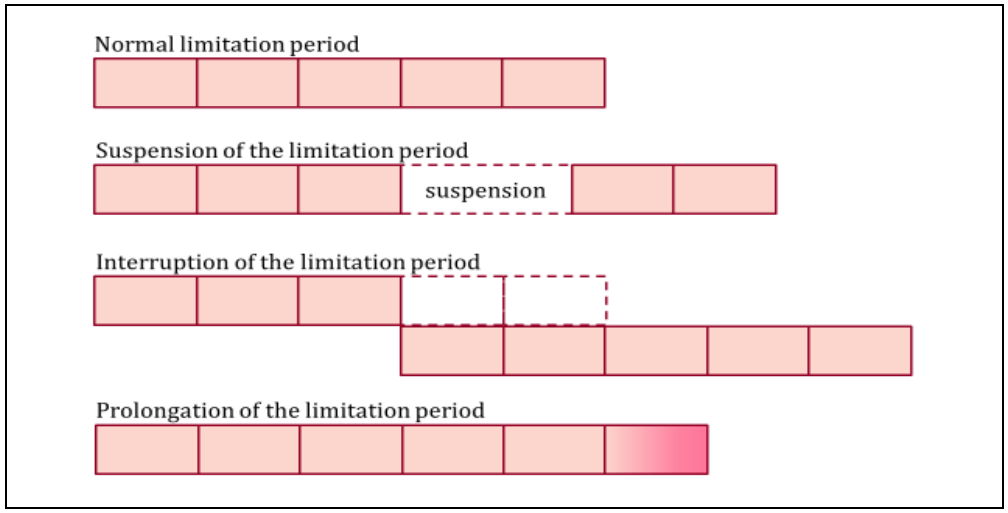
Article 19(2)

19.02. Article 19(2) determines the rules with regard to suspension, interruption or prolongation of the limitation period.

Suspension of an on-going period of limitation means that this on-going period is temporarily suspended, until the fact or the act leading to the suspension stops to have this suspensive effect.

Interruption of an on-going period of limitation means that this on-going period comes to an end. A new period of limitation starts. The length of the new limitation period can be the same as the length of the initial (but interrupted) period, but it may be longer or shorter (as determined by the law of the applicant Member State, in accordance with Article 19(1) of the Directive).

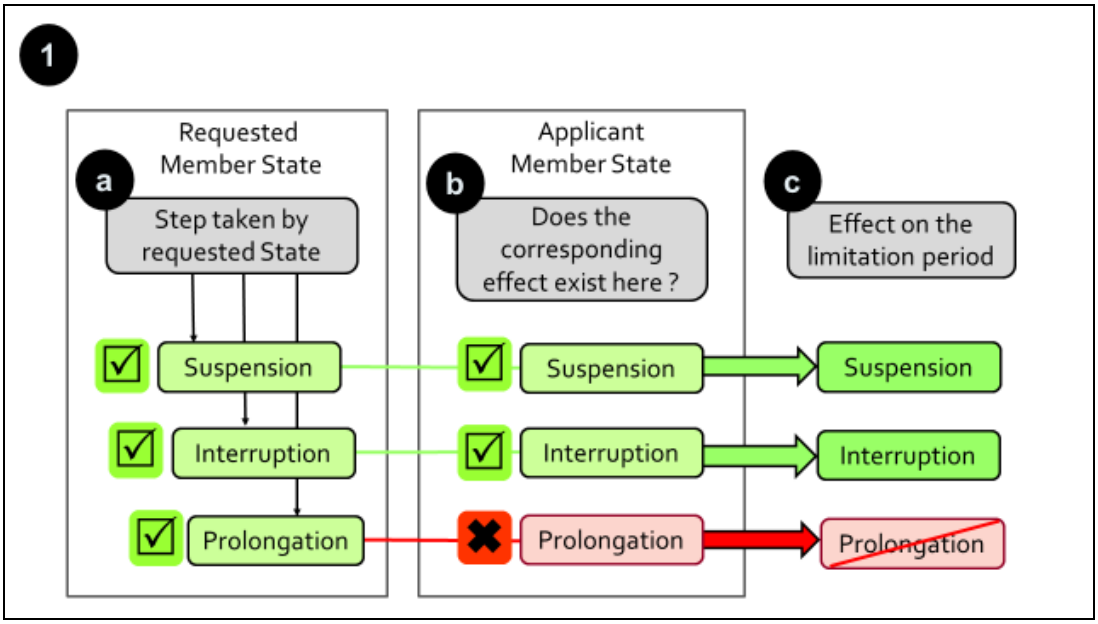
Prolongation of the period of limitation means that an additional period of limitation (of which the length is determined by the law of the applicant Member State, also in accordance with Article 19(1) of the Directive) is added to the on-going period of limitation.



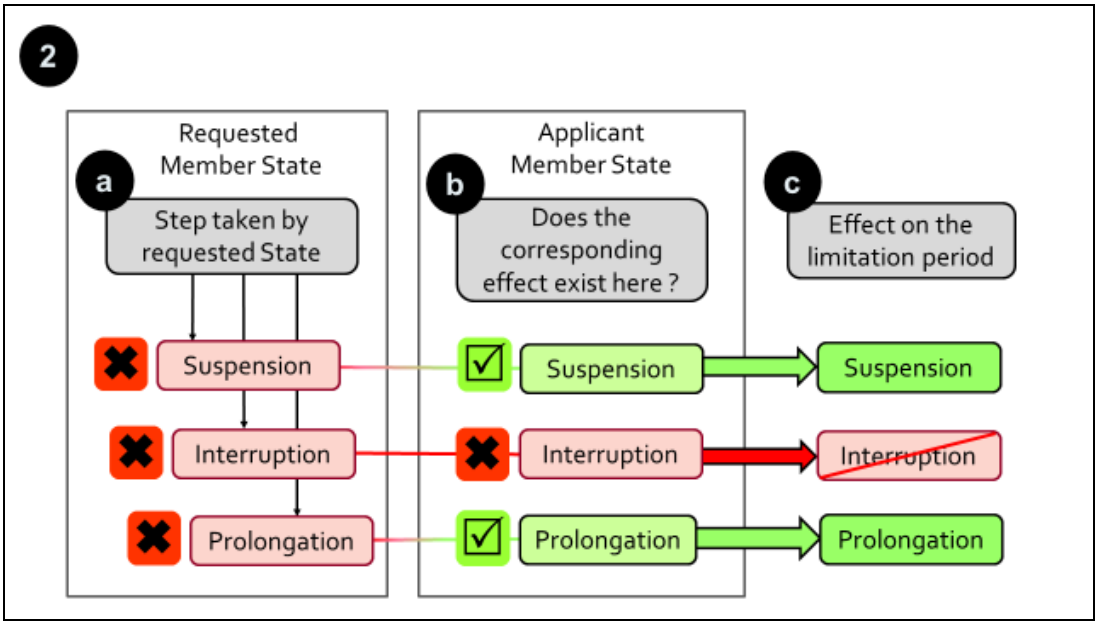
The Directive contains several complementary rules with regard to the suspension, interruption or prolongation of the limitation period. This multitude of rules can be explained by the fact that at the moment of adoption of the Directive, the EU legislature wanted to take account of the then existing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

19.03. Any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which have the effect of suspending, interrupting or prolonging the period of limitation according to the laws in force in the requested Member State shall be deemed to have the same effect in the applicant Member State, on condition that the corresponding effect is provided for under the laws in force in the applicant Member State (Article 19(2), first subparagraph, of the Directive).[94] This is illustrated in figure ❶ below.

[94] The condition that the corresponding effect must also be possible under the laws of the applicant Member State was added to take account of the special situation of one Member State, where suspension, interruption or prolongation of the limitation period was not possible at the time of adoption of this Directive. At that time, it was considered that it would not be logic to have the limitation period of this Member State's claims interrupted or suspended by actions of another Member State.

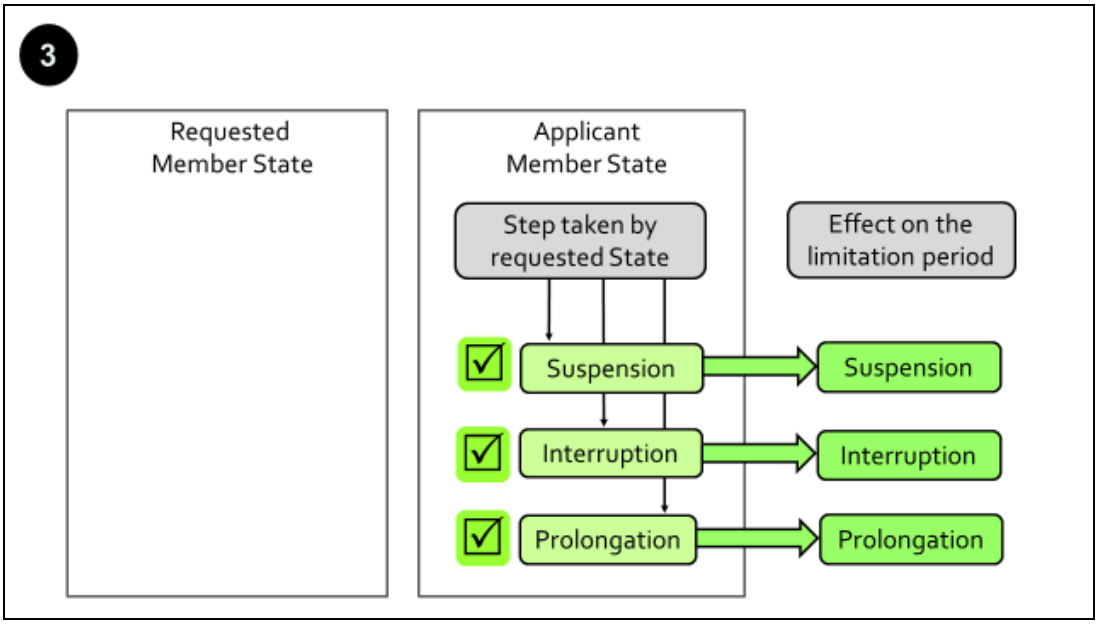


19.04. If suspension, interruption or prolongation of the period of limitation is not possible under the laws in force in the requested Member State, any steps taken in the recovery of claims by or on behalf of the requested authority in pursuance of a request for assistance which, if they had been carried out by or on behalf of the applicant authority in its Member State, would have had the effect of suspending, interrupting or prolonging the period of limitation according to the laws in force in the applicant Member State shall be deemed to have been taken in the latter State, in so far as that effect is concerned (Article 19(2), second subparagraph, of the Directive).[95] This is illustrated in figure ❷ below.



[95] This rule was also meant to take account of the particular situation of one Member State at the time of adoption of the Directive (see the previous footnote). It was considered that the execution of an assistance request by that specific Member State should not prevent a suspension, interruption or prolongation of the limitation period for claims of the applicant Member State, where this execution measure would have had such an effect if it had been taken by the applicant Member State itself.

19.05. The preceding rules do not affect the right of the competent authorities in the applicant Member State to take measures to suspend, interrupt or prolong the period of limitation in accordance with the laws in force in that Member State (Article 19(2), third subparagraph, of the Directive). This is illustrated in figure ❸ below.



Article 19(3)

19.06 The above rules concerning suspension, interruption or prolongation of the period of limitation imply, of course, that the applicant and requested authorities have to inform each other with regard to the specific measures that they have taken and with regard to their possible effect on the suspension, interruption or prolongation of the period of limitation, in accordance with their national law.

Article 20

Costs

1. In addition to the amounts referred to in Article 13(5), the requested authority shall seek to recover from the person concerned and retain the costs linked to the recovery that it incurred, in accordance with the laws and regulations of the requested Member State.

2. Member States shall renounce all claims on each other for the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Directive.

However, where recovery creates a specific problem, concerns a very large amount in costs or relates to organised crime, the applicant and requested authorities may agree reimbursement arrangements specific to the cases in question.

3. Notwithstanding paragraph 2, the applicant Member State shall remain liable to the requested Member State for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument permitting enforcement and/or precautionary measures issued by the applicant authority are concerned.

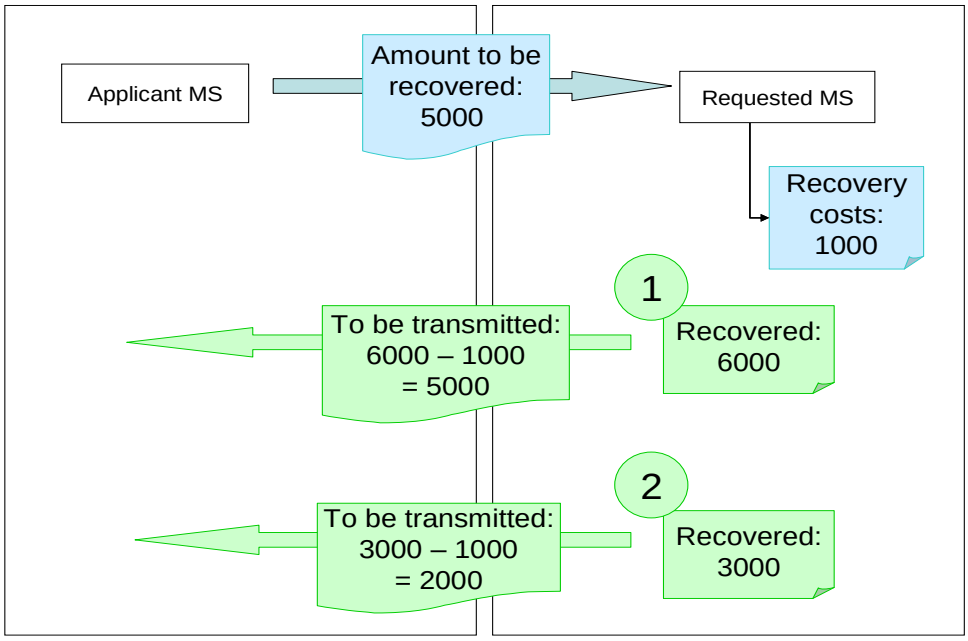
Commentary

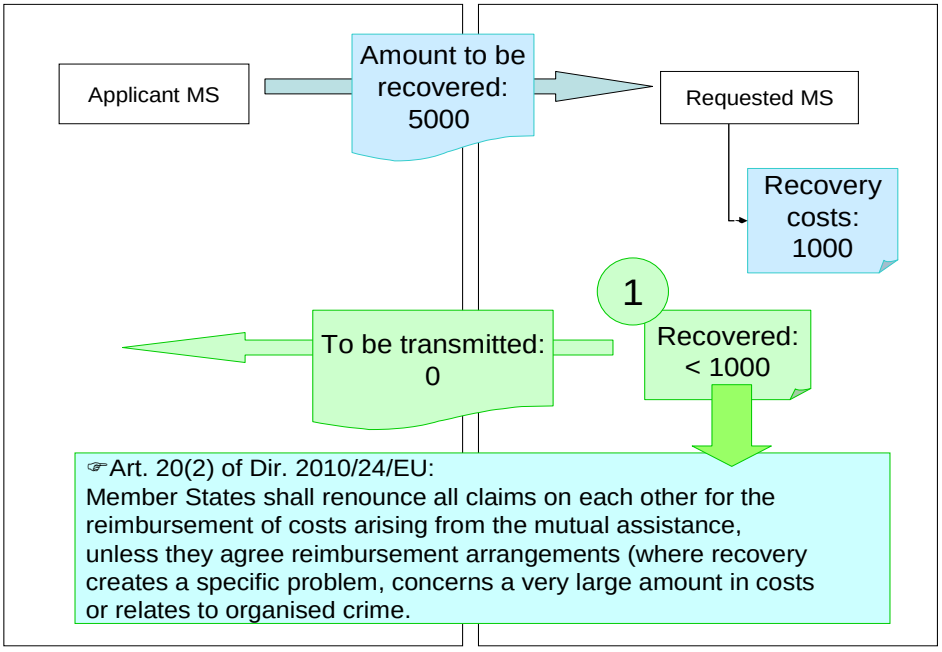
Article 20(1)

20.01. Article 20(1) of the Directive relates to the costs specifically linked to the recovery of the claims for which recovery assistance is requested. The underlying idea is to permit the requested Member State to charge and recover the costs that would also be charged and recovered in a similar case of recovery of a domestic claim. This idea is confirmed by the wording "in accordance with the laws and regulations of the requested Member State".

20.02. The requested authority may deduct its own costs before remitting the remainder of the amounts recovered to the applicant Member State. This is also expressed in Article 13(5) of the Directive, which provides that the requested authority shall remit to the applicant authority the amounts recovered "without prejudice to Article 20(1)".

This provision thus permits the requested Member State to deduct its own costs from the recovered amounts, and to transfer the balance only.





Article 20(2)

20.03. The following rules apply if the requested authority cannot recover all its costs from the debtor (or from another party held liable):

- in principle, the requested authority should not ask the applicant authority for reimbursement of costs;
- unless the applicant and requested authorities have agreed specific reimbursement arrangements to deal with situations where recovery creates a specific problem or concerns a very large amount in costs or relates to organised crime.

Article 20(3)

20.04. Of course, the applicant Member State remains liable to the requested Member State for any costs and any losses incurred as a result of actions held to be unfounded, as far as either the substance of the claim or the validity of the instrument permitting enforcement and/or precautionary measures issued by the applicant authority are concerned.

Example: applicant Member State A requests recovery assistance from Member State B. The recovery takes place in Member State B. Member State B also charges recovery costs, which are effectively paid by the tax debtor. Afterwards, the claim is successfully contested in Member State A. Accordingly, the amount of the claim itself and the costs charged to the debtor have to be reimbursed to that person. It is clear that Member State B can reclaim from Member State A any costs that the requested authority would have to reimburse to the tax debtor.

CHAPTER V

GENERAL RULES GOVERNING ALL TYPES OF ASSISTANCE REQUESTS

Article 21

Standard forms and means of communication

1. Requests pursuant to Article 5(1) for information, requests pursuant to Article 8(1) for notification, requests pursuant to Article 10(1) for recovery or requests pursuant to Article 16(1) for precautionary measures shall be sent by electronic means, using a standard form, unless this is impracticable for technical reasons. As far as possible, these forms shall also be used for any further communication with regard to the request.

The uniform instrument permitting enforcement in the requested Member State, the document permitting precautionary measures in the applicant Member State and the other documents referred to in Articles 12 and 16 shall also be sent by electronic means, unless this is impracticable for technical reasons.

Where appropriate, the standard forms may be accompanied by reports, statements and any other documents, or certified true copies or extracts thereof, which shall also be sent by electronic means, unless this is impracticable for technical reasons.

Standard forms and communication by electronic means may also be used for the exchange of information pursuant to Article 6.

2. Paragraph 1 shall not apply to the information and documentation obtained through the presence in administrative offices in another Member State or through the participation in administrative enquiries in another Member State, in accordance with Article 7.

3. If communication is not made by electronic means or with use of standard forms, this shall not affect the validity of the information obtained or of the measures taken in the execution of a request for assistance.

Commentary

Article 21(1)

21.01. All request forms and other documents should be sent electronically "unless this is impracticable for technical reasons". The term "impracticable" is (somewhat) less strict then "impossible" but stricter than "inconvenient".[96] The intention of the Council was indeed to permit another communication in situations where the normal electronic communication of the usual standard form would be very difficult. The Council did not want to limit other

[96] Cf. (Australia) Federal Court 18 September 2019, *Deputy Commissioner of Taxation v Huang* [2019] FCA 1537, *Int. Tax Coll. News* 2019, issue 2, point 94.

communications to situations where the use of the normal electronic communication was simply impossible.[97]

21.02. The Directive leaves some margin of appreciation to the Member States, to decide whether it is impracticable for technical reasons to send electronically their request forms and other documents. However, it is important for the Member States concerned to agree on this.

21.03. Discussions with tax debtors on this point should be avoided. For that reason, Article 21(3) provides that a discussion about the way of communication cannot be used as an argument to challenge the validity of the information obtained or of the measures taken in the execution of a request for assistance.

21.04. With regard to Article 21(1), second subparagraph, it should be noted that there is no uniform document permitting precautionary measures, but there may be national documents permitting precautionary measures in the applicant Member State. Of course, this depends on the national situation of each Member State. Normally, the instrument permitting enforcement in the applicant Member State already permits to take precautionary measures as well, but a Member State may also adopt specific documents permitting precautionary measures (e.g. a document drawn up by the tax authorities in case of suspicions of fraud, to retain VAT credits; or specific judgements ordering or allowing precautionary measures). If such documents accompany a request for precautionary measures, they should also be sent by electronic means.

Article 21(2)

21.05. No specific communication rules exist with regard to the information and documentation obtained directly by officials of a Member State, when they are present in the administrative offices in another Member State or when they participate in administrative enquiries in another Member State (see Article 7).

Article 21(3)

21.06. See the explanation under point 21.03.

[97] Some language versions seem to suggest a stricter interpretation (French: *"à moins que cette solution ne soit impossible pour des raisons techniques"*; Italian: *"a meno che ciò risulti impossibile per motivi tecnici"*). Other language versions are, however, more in line with the English version (German: *"es sei denn, dies ist aus technischen Gründen nicht durchführbar"*; Dutch: *"tenzij dit om technische redenen ondoenlijk is"*; Spanish: *"a menos que ello resulte impracticable por razones técnicas"*).

Article 22

Use of languages

1. All requests for assistance, standard forms for notification and uniform instruments permitting enforcement in the requested Member States shall be sent in, or shall be accompanied by a translation into, the official language, or one of the official languages, of the requested Member State. The fact that certain parts thereof are written in a language other than the official language, or one of the official languages, of the requested Member State, shall not affect their validity or the validity of the procedure, in so far as that other language is one agreed between the Member States concerned.

2. The documents for which notification is requested pursuant to Article 8 may be sent to the requested authority in an official language of the applicant Member State.

3. Where a request is accompanied by documents other than those referred to in paragraphs 1 and 2, the requested authority may, where necessary, require from the applicant authority a translation of such documents into the official language, or one of the official languages of the requested Member State, or into any other language bilaterally agreed between the Member States concerned.

Commentary

Article 22(1)

22.01. In principle, requests for assistance, standard forms for notification (see Article 8(1), second subparagraph) and uniform instruments permitting enforcement in the requested Member State (see Article 12(1)) have to be sent in, or be accompanied by a translation into, an official language of the requested Member State.

In practice, this condition is easily fulfilled: the computer system is developed in such a way that the above forms are available in all official languages of the EU Member States, and the competent authorities can at all times switch from one language version to another.

22.02. The standardised forms contain some free text fields, permitting the authorities concerned to add some specific information. This information is normally communicated in a language that the authorities of the other Member State can understand, but not necessarily in an official language of that other country. However, the latter does not affect the validity of the document or of the procedure, in so far as that other language is one agreed between the Member States concerned (Article 18(1), second sentence, of the Directive).

Article 22(2)

22.03. The documents that need to be notified to the tax debtor – or to another addressee – emanate from the tax authorities of the applicant Member State and are normally written in an official language of that applicant Member State.

There is no need to have them translated, since these documents are accompanied by the uniform notification form. The latter can be translated automatically into all official languages of the EU Member States. The use of this uniform notification form ensures that the tax debtor – or another addressee – is sufficiently informed about the notified documents (see point 08.02.).

Article 22(3)

22.04. Other documents may be added to the request, e.g. to provide additional information with regard to a request for recovery measures or a request for precautionary measures (in accordance with Article 12(2) or Article 16(2) of the Directive). If needed, the requested authority can ask for a translation of these documents.

Article 23

Disclosure of information and documents

1. **Information communicated in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it.**

   Such information may be used for the purpose of applying enforcement or precautionary measures with regard to claims covered by this Directive. It may also be used for assessment and enforcement of compulsory social security contributions.

2. **Persons duly accredited by the Security Accreditation Authority of the European Commission may have access to this information only in so far as it is necessary for care, maintenance and development of the CCN network.**

3. **The Member State providing the information shall permit its use for purposes other than those referred to in paragraph 1 in the Member State receiving the information, if, under the legislation of the Member State providing the information, the information may be used for similar purposes.**

4. **Where the applicant or requested authority considers that information obtained pursuant to this Directive is likely to be useful for the purposes referred to in paragraph 1 to a third Member State, it may transmit that information to that third Member State, provided this transmission is in accordance with the rules and procedures laid down in this Directive. It shall inform the Member State of origin of the information about its intention to share that information with a third Member State. The Member State of origin of the information may oppose such a sharing of information within ten working days of the date at which it received the communication from the Member State wishing to share the information.**

5. **Permission to use information pursuant to paragraph 3 which has been transmitted pursuant to paragraph 4 may be granted only by the Member State from which the information originates.**

6. **Information communicated in any form pursuant to this Directive may be invoked or used as evidence by all authorities within the Member State receiving the information on the same basis as similar information obtained within that State.**

Commentary

Article 23(6)

23.01. The rule that the information may be invoked or used as evidence by all authorities within the Member State receiving the information on the same basis as similar information obtained within that State is not meant to change anything to the basic rules of Article 23(1) and (3) with regard to the purposes for which this information may be used.

CHAPTER VI

FINAL PROVISIONS

Article 24

Application of other agreements on assistance

1. This Directive shall be without prejudice to the fulfilment of any obligation to provide wider assistance ensuing from bilateral or multilateral agreements or arrangements, including for the notification of legal or extra-legal acts.

2. Where the Member States conclude such bilateral or multilateral agreements or arrangements on matters covered by this Directive other than to deal with individual cases, they shall inform the Commission thereof without delay. The Commission shall in turn inform the other Member States.

3. When providing such greater measure of mutual assistance under a bilateral or multilateral agreement or arrangement, Member States may make use of the electronic communication network and the standard forms adopted for the implementation of this Directive.

Commentary

Article 24

24.01. Other agreements can only be concluded and applied in situations where Member States wish to apply a wider assistance than under the Directive.

This means that the tax authorities of the EU Member States are not totally free to adopt any other agreements nor to choose any of these other agreements for their assistance requests. As now confirmed in Article 4(3), second subparagraph, of the Treaty on European Union (TEU), they have to respect the priority and effectiveness of Union law.[98]

[98] See e.g. EUCJ 19 June 1990, C-213/89, *Factortame*, point 20; EUCJ 6 march 2018, C-284/16, *Achmea*, point 34.

Article 25

Committee

1. **The Commission shall be assisted by the Recovery Committee.**
2. **Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply.**

   The period referred to in Article 5(6) of Decision 1999/468/EC shall be set at 3 months.

Commentary

Article 25(1)

25.01. Rules for the implementation of the Directive are officially adopted by the European Commission (see Article 26), after a formal consultation of the Member States within the Recovery Committee.

Other discussions on mutual tax recovery assistance – not relating to the formal adoption of implementing provisions – take place within the Recovery Expert Group.

Article 25(2)

25.02. This provision refers to the procedure that must be respected when implementing provisions are adopted.

Article 26

Implementing provisions

The Commission shall adopt, in accordance with the procedure referred to in Article 25(2), detailed rules for implementing Article 4(2), (3) and (4), Article 5(1), Articles 8, 10, 12(1), Article 13(2), (3), (4) and (5), Articles 15, 16(1) and 21(1).

Those rules shall relate to at least the following:

(a) the practical arrangements with regard to the organisation of the contacts between the central liaison offices, the other liaison offices and the liaison departments, referred to in Article 4(2), (3) and (4), of different Member States, and the contacts with the Commission;

(b) the means by which communications between authorities may be transmitted;

(c) the format and other details of the standard forms to be used for the purposes of Article 5(1), Articles 8, 10(1), Article 12(1) and Article 16(1);

(d) the conversion of the sums to be recovered and the transfer of sums recovered.

Commentary

Article 26

26.01. Implementing rules are laid down in Commission Implementing Regulation 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU. Some of its provisions were amended by Commission Implementing Regulation 2017/1966 of 27 October 2017.[99]

Article 26, second subparagraph, (b)

26.02. The rules concerning the means by which communications between authorities may be transmitted can be found in Article 2 of Commission Implementing Regulation 1189/2011.

Article 26, second subparagraph, (d)

26.03. The rules on the conversion of the sums to be recovered are implemented in Article 18 of Commission Implementing Regulation 1189/2011. Initially, the exchange rate to be used for the purposes of recovery assistance was the last exchange rate published in the Official Journal of the EU before the date the request was sent (former Article 18(2) of the Regulation).[100]

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99 See C. . Edery, H. Michard and L. Vandenberghe, 'The 2017 amendments of Commission Implementing Regulation 1189/2011: what's new?', *EU & Int. Tax Coll. News* 2017, issue 2, 13-15.

100 See the (now outdated) Explanatory Note REG-Article 18 – 1, *EU & Int. Tax Coll. News* 2017, issue 2, 24.

Commission implementing Regulation 2017/1966 has changed this rule. Now, the exchange rate to be used is the exchange rate published by the European Central Bank on the date before the date the request is sent. Where there is no such rate available on that date, the exchange rate used shall be the latest exchange rate published by the European Central Bank before the date the request is sent (current Article 18(2) of Regulation 1189/2011).[101]

Example: on Friday 8 November 2019, the website of the European Central Bank showed the Euro foreign exchange reference rates on Thursday 7 November 2019 (uploaded in the evening of 7 November, around or after 16:00 h CET). These exchange rates had to be applied in a request for recovery sent on 8 November 2019.

Around or after 16:00 CET on 8 November 2019, the European Central Bank published the Euro foreign exchange reference rates of 8 November 2019. However, if a request was sent on 8 November 2019, after 16:00 CET, the request still had to make use of the latest exchange rate published before the date the request was sent, which means that the request still had to make use of the exchange rate uploaded in the evening of 7 November 2019.

On Monday 11 November 2019 (before 16:00), the website still showed the exchange rates on Friday 8 November 2019 (uploaded in the evening of 8 November). Any request sent on 11 November 2019 thus had to use the exchange rate of 8 November 2019.

On Tuesday 12 November 2019, the website showed the exchange rates on Monday 11 November 2019[102] (uploaded in the evening of 11 November 2019, around or after 16:00). Any request sent on 12 November 2019 thus had to use the exchange rate of 11 November 2019.

In practice, this amendment does not entail a real change, since the publication in the Official Journal is based on the data of the European Central Bank. The above amendment is meant to reduce the administrative burden for the applicant Member State. Instead of searching the relevant issue of the Official Journal, the tax authorities just have to consult the website of the European Central Bank. By using this reference, future technical developments of the electronic request forms will permit an automated integration of the currency exchange rate.[103]

26.04. The exchange rate used in the request for recovery shall also be used by the requested Member State for the follow-up of that request (Article 24 of the Regulation; see also Article 22(6) of Regulation 1189/2011, which confirms that the exchange rate used in the initial request shall be applied in case of an adjustment following a dispute).

26.05. The transfer of recovered amounts has to take place within two months of the date on which recovery was effected, unless otherwise agreed between the Member States (Article 23(1), second subparagraph, of Regulation 1189/2011). Such other arrangement may be useful in situations where the requested authority receives several small partial payments, in accordance with an instalment plan accorded to the tax debtor.

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101 https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/index.en.html

102 11 November is considered as a working day for the EU institutions.

103 C. Edery, H. Michard and L. Vandenberghe, 'The 2017 amendments of Commission Implementing Regulation 1189/2011: what's new?', *EU & Int. Tax Coll. News*, 2017, issue 1, p. 14, point 4.

If recovery measures applied by the requested authority are contested for a reason not falling within the responsibility of the applicant Member State, the requested authority may wait to transfer any sums recovered in relation to the applicant Member State's claim until the dispute is settled, if the following conditions are simultaneously fulfilled:

(a) the requested authority finds it likely that the outcome of this contestation will be favourable to the party concerned, and

(b) the applicant authority has not declared that it will reimburse the sums already transferred if the outcome of that contestation is favourable to the party concerned (Article 23(1), third subparagraph, of the Regulation).

If the applicant authority has made a declaration to reimburse in accordance with point (b) above, it shall return the recovered amounts already transferred by the requested authority within one month of the receipt of the request for reimbursement. Any other compensation due shall, in that case, be borne solely by the requested authority (Article 23(1), fourth subparagraph, of the Regulation).

Article 27

Reporting

1. Each Member State shall inform the Commission annually by 31 March of the following:

(a) the number of requests for information, notification and recovery or for precautionary measures which it sends to each requested Member State and which it receives from each applicant Member State each year;

(b) the amount of the claims for which recovery assistance is requested and the amounts recovered.

2. Member States may also provide any other information that may be useful for evaluating the provision of mutual assistance under this Directive.

3. The Commission shall report every 5 years to the European Parliament and the Council on the operation of the arrangements established by this Directive.

Commentary

Article 27(3)

27.01. Two Commission reports have been published since the adoption of the current Directive:

- Report COM(2017)778 of 18 December 2017 + Commission staff working document SWD(2017)461 of 18 December 2017.
- Report COM(2020)813 of 18 December 2020 + Commission staff working document SWD(2020)340 of 18 December 2020.

The following Commission reports have been published with regard to tax recovery assistance under previous Directives:

- Report COM(2012)58 of 15 February 2012 (on recovery assistance in 2009-2010);
- Report COM(2009)451 of 4 September 2009 (on recovery assistance in 2005-2008);
- Report COM(2006)43 of 8 February 2006 (on recovery assistance in 2003-2004).

Article 28

Transposition

1. Member States shall adopt and publish, by 31 December 2011, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

They shall apply these provisions from 1 January 2012.

When these provisions are adopted by Member States, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Commentary

Article 28

28.01. This overview of Member States' transposition of Directive 2010/24 in their national law has been published by the European Commission:[104] / [105]

	adoption	publication	entry into force
BE	09.01.2012 – 21.12.2012	26.01.2012 – 28.12.2012	01.01.2012
BG	07.12.2011	16.12.2011	01.01.2012
CZ	20.12.2011	30.12.2011	01.01.2012
DK	07.02.2012	08.12.2012	15.02.2012
DE	07.12.2011	13.12.2011	01.01.2012
EE	23.11.2011	13.12.2011	01.01.2012
IE		16.12.2011	01.01.2012
EL	10.04.2012	11.04.2012	01.01.2012
ES	30.12.2011	31.01.2012	01.01.2012
FR	25.01.2012 – 28.03.2012	27.01.2012 – 29.03.2012	01.01.2012
HR	14.06.2013	18.06.2013	01.07.2013
IT	14.08.2012	30.08.2012	14.09.2012
CY	29.06.2012	29.06.2012	01.01.2012
LV	15.03.2012	28.03.2012	01.04.2012
LT	20.06.2011	05.07.2011	01.01.2012
LU	21.07.2012	26.07.2012	01.01.2012
HU	08.04.2013	18.04.2013	21.04.2013
MT	01.01.2012	08.05.2012	01.01.2012
NL	08.12.2011	21.12.2011	01.01.2012

[104] Commission staff working document SWD(2017)461 (p. 20), accompanying the Commission report COM(2017)778 to the European Parliament and to the Council on the operation of the arrangements established by Directive 2010/24.

[105] In some Member States, different laws were adopted, sometimes at different levels. In these situations, multiple dates of adoption and publication of the national laws are mentioned.

AT	07.12.2011	07.12.2011	01.01.2012
PL	11.10.2013 – 06.11.2013	06.11.2013 – 07.11.2013	21.11.2013
PT	20.12.2012	20.12.2012	21.12.2012
RO	31.08.2011	02.09.2011	01.01.2012
SI	30.04.2012	24.05.2012	25.05.2012
SK	30.11.2011	30.12.2011	01.01.2012
FI	29.12.2011	30.12.2011	01.01.2012
SE	15.12.2011	23.12.2011	01.01.2012
UK	*19.07.2011 – 09.12.2011*	*xx.07.2011 – xx.12.2011*	*01.01.2012*

28.02. In accordance with general principles of EU law, Member States can only invoke the Directive against tax debtors insofar as that Directive is correctly implemented in the legal order of the Member States.

Article 29

Repeal of Directive 2008/55/EC

Directive 2008/55/EC is repealed with effect from 1 January 2012.

References to the repealed Directive shall be construed as references to this Directive.

Article 30

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Commentary

Article 30

30.01. Directive 2010/24 applies to claims which arose in a Member State before the entry into force of the Directive in that Member State, or before the entry into force of the Directive in the requested Member State.[106] (The age of the claim may, however, be taken into account by the requested authority for deciding whether it wishes to grant assistance or not, in accordance with Article 18(2) of the Directive).

Article 31

Addressees

This Directive is addressed to the Member States.

106 EUCJ 1 July 2004, joined cases C-361/02 and C-362/02, *Tsapalos and Diamantakis*; cf. (United Kingdom) Court of Appeal of England and Wales 23 May 2013, *Ben Nevis and Metlika Trading*, *EU & Int. Tax Coll. News* 2015, issue 2, 63 (with regard to recovery assistance on the basis of a bilateral tax convention); (South Africa) Supreme Court of Appeal 20 August 2015, *Krok and Jucool Enterprises*, *EU & Int. Tax Coll. News* 2015, issue 2, 102; (South Africa) North Gauteng High Court 31 January 2014, *South African Revenue Service v. Mark Krok and Jucool Enterprises*, *EU & Int. Tax Coll. News* 2015, issue 2, 94.