

# Combating Tax Avoidance in the EU

## **EUCOTAX Series on European Taxation**

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VOLUME 61

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### *Series Editors*

Prof. Dr Peter H.J. Essers, Fiscal Institute Tilburg/Center for Company Law, Tilburg University

Prof. Dr Eric C.C.M. Kemmeren, Fiscal Institute Tilburg/Center for Company Law, Tilburg University

Prof. Dr Dr h.c. Michael Lang, WU (Vienna University of Economics and Business)

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# Combating Tax Avoidance in the EU

## Harmonization and Cooperation in Direct Taxation

Edited by

José Manuel Almudí Cid  
Jorge A. Ferreras Gutiérrez  
Pablo A. Hernández González-Barreda

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## Editors

**José Manuel Almudí Cid** is Professor of Tax Law and Vice Dean for Postgraduate Studies at Law Faculty of the Complutense University of Madrid. His main fields of research are European Tax Law in the area of direct taxation, international anti-avoidance rules, the harmonized system of VAT and taxpayer guarantees in tax procedures. He is the author of several publications on Tax Law, and he is regularly invited to speak at various tax conferences both in Spain and abroad. He is a member of the International Fiscal Association and of the Spanish Association of Tax Advisors.

**Jorge A. Ferreras Gutiérrez** is Tax Inspector and currently is Financial Counsellor at the Spanish Permanent Representation to the European Union. He was previously Deputy Competent Authority for International Taxation at General Directorate for Taxation in the Ministry of Finance of Spain. He obtained Dual Degree in Law and Business Administration from Universidad Pontificia Comillas (ICADE), studied at the Université Catholique de Louvain (Belgium) under an exchange programme and obtained a Major in Finance from the Stockholm School of Economics (Sweden). He is also a frequent speaker at international tax conferences and author of articles related to international taxation, in particular BEPS project.

**Pablo A. Hernández González-Barreda** is Assistant Professor of Tax Law at Universidad Pontificia Comillas – ICADE and Secretary to the Deloitte-ICADE Chair of Business Taxation. His main research subjects are Abuse in International and European Tax Law and Taxation of the Financial sector. He has authored and edited several publications on these matters. He also frequently participates in national and international conferences and has been a visiting researcher or professor in many leading academic institutions.



# Contributors

**Aitor Navarro Ibarrola** is senior tax scholar in Carlos III University, Madrid, focused in corporate and international taxation, especially on transfer pricing matters. He has published various relevant papers and books, among which the book entitled *Transactional Adjustments in Transfer Pricing*, published in the IBFD Doctoral Series (vol. 40), may be highlighted. He also regularly participates as lecturer in various Spanish and International Tax Law seminars and conferences, as well as in regular lectures at undergraduate and LLM levels.

**Alejandro Zubimendi** is lecturer at the Instituto Superior de Derecho y Economía (Madrid), where he lectures on tax law. He is also engaged on his PhD on international taxation. Previously, Alejandro performed during years as a tax lawyer in several law firms in Spain, dealing with tax planning at domestic and international level. He obtained his Degree in Law at the Deusto University and his LLM degree in international taxation at the University of Florida.

**Andrés Báez Moreno** is Associate Professor of Tax Law at the Universidad Carlos III de Madrid and a lawyer at the Madrid Bar. He has been a visiting pre- and postdoctoral researcher at the University of Münster, the University of Cologne, the University of Padua at IBFD, and currently holds a Scholarship of the Max Planck Institute for Tax Law and Public Finance in Munich. His areas of expertise are domestic company taxation (in particular, commercial and tax accounting) and international taxation, fields in which he has published two books and more than 30 articles and contributions.

**Andrés Sánchez** is Honorary Professor of the Universidad Complutense de Madrid, has a Bachelor of Laws and a Bachelor of Business Studies (Universidad Pontificia Comillas – ICADE). He lectures at the Instituto de Empresa (IE), at the Centro de Estudios Financieros (CEF) and at the Universidad Complutense de Madrid. He is a partner at Cuatrecasas, specializing in international taxation and transfer pricing matters.

**Antoinette Musilek** is tax inspector of the State. Spanish delegate in international taxation of the Directorate General of Taxes to the OECD, the Global Forum on transparency and exchange of information, the EU and the G20. Author of several articles and chapters of international fiscal manuals. Currently, Head of the Finance Department at the Embassy of Spain in Brazil, providing counselling regarding taxation and customs matters, as well as budgets and public accounting.

**Ascensión Maldonado** is tax auditor for more than 20 years. Since 2013, she is working in the International Taxation Office at the Spanish Tax Agency. She was involved in the discussion of the amendment of Directive 2011/16/EU as regards mandatory automatic exchange of information on tax rulings and has participated in the Forum on Harmful Tax Competition (OECD) where BEPS Action 5 was discussed. Nowadays, she is mainly devoted to the discussion of mutual agreement procedures in transfer pricing cases.

**Beatriz Parejo** is Deputy Competent Authority for Corporate Taxation at General directorate for Taxation in the Ministry of Finance of Spain. Degree in Law and Business Administration from Comillas Pontifical University (ICADE). She is tax inspector, frequent speaker at international tax conferences and author of articles related to corporate taxation, in particular BEPS project. Parejo was part of the discussions of Actions 2, 3, 4 and 5 of the BEPS Action Plan at the OECD.

**Brian Leonard** is a Graduate of Strathclyde University in Bachelor of Laws (LLB). After joining Deloitte he qualified as a Chartered Accountant with the Institute of Chartered Accountants of Scotland (ICAS). In 1998, he moved from Deloitte UK to Deloitte Spain and undertook a masters in Spanish taxation with the Centro de Estudios Tributarios y Economicos. He has been a partner in the international tax practice of Deloitte since 2006. He is currently partner in charge of Deloitte's Spanish tax practice and leads the Global Business Tax service line in EMEA. He is recognized by Best Lawyer as one of Spain's leading tax advisors.

**Cristino Fayos** is Co-Chair at the Deloitte Chair of Business Taxation and Adjunct Professor at the Law Faculty at Universidad Pontificia de Comillas (ICADE). He has been a partner in the Tax Department of Deloitte Legal since 2013. He is currently in charge of the firm's tax technical committee. He is the author of several books and has published many articles at newspapers and specialized publications.

**Diego Arribas** has obtained double degree in Law and Business Administration (University of Zaragoza) and a master in Tax Law (Centro de Estudios Financieros – CEF). Currently, he is a PhD student in International Tax Law (Universidad Complutense de Madrid). Diego is a tax lawyer at Cuatrecasas. In particular, he is a member of the knowledge management team of the firm, specializing in international taxation.

**Domingo J. Jiménez-Valladolid de L'Hotellerie-Fallois** is Tenured lecturer of Tax Law at the Autonomous University of Madrid. He has authored several articles, books and chapters on International and European tax issues. He holds a PhD from the



Autonomous University of Madrid (2011) which was awarded with the 2012 European Academic Tax Award (European Association of Tax Law Professors/European Commission) and the 2013 Sorbonne Tax Law Thesis Award (University of Paris 1 Pantheone-Sorbonne). In July 2018, he was appointed to the Spanish Ministry of Labour as advisor of the Secretary of State for Employment.

**Edoardo Traversa** is Professor of Tax law and Policy at the Faculty of Law and Criminology and Head of the Institute of European Studies at Université Catholique de Louvain and visiting professor at KU Leuven and WU Vienna. He is a member of IFA and EATLP. He holds editorial responsibilities of several tax law journals (Intertax, Rivista di diritto tributario internazionale). He has extensively published on EU and international tax issues. Consultant to EU and Belgian authorities and Counsel Lawyer at Liedekerke.

**Eduardo Tapia Tejedor** has obtained Law degree from the University of Salamanca, tax inspector since 2009 and member of the Madrid Bar Association and the Institute of Accounting and Auditing. Master in Public Finance, Public Policies and Taxation.

**Elena Rodríguez Ruiz de Alda** has obtained Bachelors in Economics from the University of Navarra. Tax official since 1998, when she joined the technical corps of the Ministry of Finance. Her current post is in the Sub-Directorate General for International Taxation within the Directorate General for Taxation of the Spanish Ministry of Finance. Formerly, she worked for the Sub-Directorate General for International Fiscal Affairs and Tax Policy. Since 2002, she has been part of the team responsible for the formulation of the Spanish participations in preliminary rulings and actions for failures to fulfil in direct taxation matters.

**Eva Escribano** is Associate Professor of Tax Law in Universidad Carlos III de Madrid (Spain) since 2011. Her areas of expertise are tax treaties and tax policy, with special emphasis on the taxation of corporate profits in the light of the challenges posed by an increasingly digitalized and global economy. Her thesis (Jurisdiction to tax corporate income pursuant to the presumptive benefit principle) obtained the European Academic Tax Thesis Award 2018 granted by the European Commission and the European Association of Tax Law Professors.

**Félix Daniel Martínez Laguna** is junior lecturer and PhD candidate at the Tax Law Department of Universidad Autónoma de Madrid (UAM). His research focuses on international, comparative and domestic corporate taxation and his PhD studies on hybrid financial instruments, double non-taxation and linking rules. He has authored several articles and book chapters on domestic and International Tax Law for Spanish and international publications, and he has received the 2018 IFA President YIN Scientific Award for his article Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives – The Dividing Line between Intended and Unintended Double Non-Taxation, published in World Tax Journal, vol. 9, issue 2, 2017.

**Félix Vega Borrero** is Professor of Tax Law at the Autonomous University of Madrid, Spain. He specializes in the field of international taxation and is the author of several articles and books on Spanish and International Tax Law.

**Gianluca Mazzoni** is SJD candidate at the University of Michigan Law School, where he also completed his LLM in International Tax in 2016. As an LLM student, Gianluca Mazzoni served as a research assistant to Professor Reuven Avi-Yonah focusing on tax evasion and transparency. Before joining Michigan Law in 2015, Gianluca Mazzoni was a trainee tax lawyer in a leading Italian tax law firm, where he drafted memoranda for cases involving international and domestic tax matters and provided assistance in the context of pre-litigation settlement procedures with the Italian Tax Authority. While residing in Italy, Gianluca Mazzoni was a teaching assistant in a third-year tax law course at the University of Milan.

**Giulio Allevato** is Assistant Professor of Tax Law at IE University Law School in Madrid. He is also Affiliate Professor of Tax and Law at SDA Bocconi School of Management in Milan. In the past, he has been Hauser Global Fellow at NYU School of Law and Ernst Mach Scholar at the Institute for Austrian and International Tax Law of the Vienna University of Economics and Business. His research and publications encompass topics of international taxation and tax risk management. He holds a PhD in International Law and Economics from Università Bocconi and an International Tax LLM from the University of Michigan Law School.

**Gloria Marín Benítez** is adjunct professor at the Comillas Pontifical University and lawyer in Uría Menéndez's Madrid office since 1997. She has devoted her entire professional career to advising on tax law and specifically corporate taxation, including litigation, tax aspects of corporate reorganizations and day-to-day matters. Gloria holds a doctor of law and she has published numerous contributions. Her areas of specialization include anti-avoidance regulations and legitimate tax planning.

**Jaime Mas Hernández** graduated in Economics and Business Management and tax inspector. He started his professional career in 2001 at the inspection services of the Spanish Tax Agency. He also worked at the Office of the Secretary General for Finance of the Ministry of Finance, where he was appointed Head of the Legal Tax Advisory service. He has also served as officer at the OECD Center for Tax Policy and Administration. Since 2013 and until 2018 he worked as International Tax Coordinator at the Adjunct Directorate General for International Taxation at the Ministry of Finance. In September 2018 he was appointed Financial Counsellor at the Permanent Representation of Spain to the OECD.

**Javier Doldán** is a tax inspector. He belongs to the Directorate General for Taxation, Ministry of Finance of Spain. He has ten years of experience as Financial Transactions Taxation Coordinator. His main activities have been: drafting, analysis and interpretation of legislation in the field of taxation of the financial sector or in the taxation of securities income. Mr Doldán has participated in numerous EU meetings. In particular,

he recently was a member of the experts group established to develop the Code of Conduct on Withholding Tax, which was put forward in December 2017. He has a degree in Economics from the Universidad Autónoma de Madrid, specializing in Public Economics.

**José María Cobos Gómez** is partner in the tax practice area of Garrigues and Adjunct Professor at Universidad Pontificia Comillas. He obtained degree in Law and Business Administration, Universidad Pontificia Comillas (ICADE E-3) and PhD in Law, Universidad Cardenal Herrera-CEU. He has extensive experience in the field of business taxation, restructuring transactions, advisory to sports companies, artists and professional sportsmen and women and advisory relating to environmental taxation, R&D and environmental tax incentives.

**Juan Zornoza Pérez** is Professor of Public Finance and Tax Law at the Universidad Carlos III de Madrid, where he holds the PwC Chair on International Corporate Taxation. Prof. Zornoza is a founding member of the Ibero-American Observatory of International Taxation and is the author of five books and more than 120 chapters and articles published in textbooks and journals in Spain and abroad. His areas of expertise are domestic company taxation, international taxation and tax crimes.

**Manuel Santaella** has obtained degree in Economics and Business Administration at Universidad Pontificia Comillas (ICADE) and in Law at the Universidad Nacional de Educación a Distancia (UNED). He was finance inspector at the Spanish Ministry of Finance and currently serves as Head of the Tax Counselling Department in Tax Matters of the Directorate General of Taxation, where he coordinates the EU tax issues. Previously, he has held the positions of Fiscal Attaché at the Permanent Representation of Spain to the EU in Brussels.

**María Cruz Barreiro Carril** is lecturer in Tax Law at the University of Vigo (Spain), where she obtained her doctoral degree with the mention of *European Doctor*. Her thesis on ‘Direct taxation and EU Law: Negative tax integration by the ECJ’, received the PhD award by this University and the Law Institute of Fiscal Studies (Spanish Ministry of the Finance) Thesis Award. She has been researching in European and International Tax Law at different centres and Universities such as the IBFD, WU Vienna University of Economics and Business and NYU.

**María del Mar Barreno Asensio** is tax inspector with 8+ years of experience. Since 2013, she is working in the field of international taxation, dealing with mutual agreement procedures, Double Tax Agreements’ negotiation and domestic regulations’ proposals, among other issues. Since February 2017, she is the Assistant Deputy Director for International Taxation, in charge of other MAP cases’ coordination. She attends MAP’s bilateral meetings as Head of Spanish delegation. Additionally, she was the Spanish delegate at the Sub-Group on Arbitration of OECD Multilateral Instrument and, at the moment, she represents Spain at the FTA MAP Forum of the OECD. She has

written several articles highlighting her participation as co-author of the book ‘El Plan de Acción sobre Erosión de Bases Imponibles y Traslado de Beneficios (BEPS)’.

**Paula Benéitez** obtained double degree in Law and Economics from Carlos III University and an Adv. LLM in International Tax Law from the International Tax Center (Leiden University) where she served as Teaching Assistant. Paula is a tax lawyer at Cuatrecasas, specializing in international tax.

**Plácido Martos Belmonte** obtained degree in Law, is Spanish tax auditor and is highly specialized in International Taxation and Financial Transactions Taxation. Belmonte has fourteen years of experience in international tax matters, attended numerous meetings as the Spanish delegate at OECD/EU and also participated as member of the Spanish Delegation in negotiations of DTCs and TIEAs. He has deep expertise on automatic exchange of information and is responsible of implementing domestic legislation on FATCA and CRS. He is currently working in the Spanish Tax Agency.

**Reuven Avi-Yonah** is Irwin I. Cohn Professor of Law and Director of the International Tax LLM Program, and he specializes in corporate and international taxation. He has served as a consultant to the U.S. Department of the Treasury and the Organisation for Economic Co-operation and Development (OECD) on tax competition, and is a member of the steering group for OECD’s International Network for Tax Research. He has published more than 150 books and articles, including *Advanced Introduction to International Tax* (Elgar, 2015), *Global Perspectives on Income Taxation Law* (Oxford University Press, 2011) and *International Tax as International Law* (Cambridge University Press, 2007).

**Roberta Poza Cid** is partner on International Taxation at PwC since 2017. She had qualified in both Economics and Law and belongs to the National body of Finance Inspectors. Roberta has been the Head of International Tax within Spanish Ministry of Finance responsible for legislative projects, tax rulings, Double Tax Agreements and competent authority for MAP. She represented Spain at the EU and the OECD. Since 2014 and until 2017, she was Finance Counsellor of Spain before the EU.

**Salvador Pastoriza** is lecturer at Universidad Complutense and at Centro de Estudios Garrigues and Lawyer at Garrigues. He obtained PhD in European Tax Law from the University of Bologna and the Royal College of Spain (Italy) and master’s in Tax and Accounting from Universidad de Santiago de Compostela, executive master’s in Tax Advice from Centro de Estudios Garrigues. LLM in Advanced European Legal Studies from the College of Europe (Bruges).

**Silvia López Ribas** holds degrees on Business Administration and on Political Science, and a masters in Public Administration from Harvard University. She is a tax inspector and has held different positions in the Spanish Agency for Tax Administration concerning tax auditing of international and corporate taxation as well as in the General Directorate of Taxes regarding Corporate Income tax. She is Spanish Delegate in WP11 (Aggressive Tax Planning) and in WP1 (Double Tax Conventions) at OECD.

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## CHAPTER 12

# Administrative Cooperation in the Recovery of Claims: Directive 2010/24/EU – A Spanish Approach

*José María Cobos Gómez*

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### §12.01 INTRODUCTION

Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (hereinafter the Directive) aims to establish rules in accordance with which Member States shall provide assistance for the recovery in one Member State of certain claims of a public nature (fiscal or otherwise) which have originated in another Member State.<sup>1</sup>

As the first recital of the Directive points out, mutual assistance between the Member States for the recovery of claims contributes to the proper functioning of the internal market and ensures fiscal neutrality. It has also allowed Member States to remove discriminatory protective measures in cross-border transactions designed to prevent fraud and budgetary losses.

Arrangements for mutual assistance in the recovery of claims are not new in the European Union, having been first established in Council Directive 76/308/EEC of 15 March 1976, which underwent successive amendments before its ultimate codification 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. The new Directive, approved barely two years later, attempts to address certain problems

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1. For this reason, when we talk about mutual assistance we are not referring to mere technical or statistical cooperation between tax authorities, but to the exchange of information or the taking of administrative measures which facilitate the recovery of taxes owing to any of the authorities involved, A. Delgado Pacheco, *La asistencia mutua entre Administraciones tributarias*, 1 Impuestos, p. 163 (1990).

detected, in order to better safeguard the financial interests of the Member States and the neutrality of the internal market, improving the efficiency and effectiveness of assistance and facilitating it in practice.<sup>2</sup>

The Directive provided for its transposition no later than 31 December 2011, with immediate notification thereof to the Commission, and the application of its provisions from 1 January 2012.<sup>3</sup>

The incorporation of the Directive into Spanish law took place just before the deadline by the first Final Provision of Royal Decree-Law 20/2011 of 30 December on urgent measures in budgetary, tax and financial matters for the correction of the public deficit.<sup>4</sup> As pointed out in the preamble to this law, ‘the importance of these changes justifies the transposition of the above-mentioned Directive by way of General Tax Law 58/2003 of 17 December such that, taking into account its codifying nature, it should incorporate all the rules required to govern mutual assistance’.<sup>5</sup>

The importance accorded to the Directive is such that this amendment extends the purpose and scope of Article 1 of the General Tax Law 58/2003 of 17 December (hereinafter the LGT). Thus, the LGT, as well as stating that it establishes the principles and general legal rules of the Spanish tax system, adds that it also establishes the principles and general legal rules that govern the actions of the tax authorities due to the application in Spain of the rules on mutual assistance between Member States of the

- 
2. The Directive has been developed by two instruments: (i) Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (hereinafter the Implementing Regulation), which has been amended by Commission Implementing Regulation (EU) 2017/1966 of 27 October 2017 as regards the communication of assistance requests and the follow-up to those requests; and (ii) Commission Implementing Decision of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (hereinafter the Implementing Decision).
  3. Calderón Carrero points out that these provisions shall also apply to claims arising and due prior to the entry into force of those provisions, given their retroactive character established by Joined Cases C-361/02 and C-362/02, *Elliniko Dimosio v Nikolaos Tsapalos and Konstantinos Diamantakis*, ECLI:EU:C:2004:401. J.M. Calderón Carrero, *Hacia una nueva era de cooperación fiscal europea: las Directivas 2010/24/UE y 2011/16/CE de asistencia en la recaudación y de cooperación administrativa en materia fiscal*, Revista de Contabilidad y Tributación 343, p. 53 (2011).
  4. The use of a Decree-law has been questioned by R. Falcón y Tella, *El Real Decreto-Ley 20/2011, de 30 de diciembre y la técnica jurídica*, Quincena Fiscal 3, p. 4 (2012, electronic version); S. Moreno González, *Reflexiones en torno a la asistencia mutua en la Ley General Tributaria in Estudios sobre fraude fiscal e intercambio internacional de información tributaria* p. 187 (M.A. Collado Yurrita & S. Moreno González, eds, Atelier 2012); S. Arana Landín, *Aplicación de los instrumentos jurídicos para la recuperación de deudas en otros estados miembros: algunos problemas prácticos en relación a los territorios forales*, Nueva Fiscalidad 5, p. 66 (2014).
  5. In addition, the twentieth Final Provision refers to the fact that this law incorporates the Directive into Spanish law, as required by Art. 28 of the former, while at the same time adopting the legislation required to implement it. Regarding implementation, Bas Soria highlights the higher ranking of the legislation (previously it was contained in Royal Decree 704/2002 of 19 July) as well as the fact that it goes further than the Directive to the extent that it also covers assistance deriving from bilateral and multilateral conventions. J. Bas Soria, *Novedades en asistencia mutua: la Directiva 2010/24/CE y el Real Decreto-Ley 20/2011*, Revista de Contabilidad y Tributación 350, p. 5 (2012).

European Union or in the framework of double taxation conventions or other international conventions.

For the purposes of the LGT, mutual assistance is defined as:

[A]cts of assistance, collaboration, cooperation and others of an analogous nature taken together which the Spanish state grants, receives or develops with the European Union and other international or supranational entities, and with other States pursuant to the rules on mutual assistance between the Member States of the European Union or in the framework of conventions for the avoidance of double taxation or other international conventions. Mutual assistance can include the taking of action in relation to debtors.<sup>6</sup>

Moreover, mutual assistance shares the legal nature of international relations to which Article 149(1)(3) of the Constitution refers, namely those in relation to which the state has exclusive competence.

## §12.02 SCOPE OF THE DIRECTIVE

### [A] Subject Matter

As already mentioned, the purpose of the Directive is to establish rules in accordance with which Member States shall provide assistance for the recovery in one Member State of claims which have originated in another Member State.

The claims to which the Directive applies and in respect of which the Member States must therefore provide assistance for their recovery, are:

- (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,<sup>7</sup> or on behalf of the Union;<sup>8</sup>
- (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; and

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6. A definition which attempts to cover a purpose as broad and diverse as that of the Directive, which, as we shall see, not only covers claims of a fiscal nature, but all public law claims; A. Montero Domínguez, *Modificaciones introducidas en la Ley General Tributaria y su normativa de desarrollo durante 2011*, Revista de Contabilidad y Tributación 348, pp. 123 and 129 (2012).

7. Thus resolving doubts which had arisen in relation to the extent of the Directive's application to the provincial governments in Navarra and the Basque Country (*Diputaciones Forales*), Autonomous Communities and local bodies; A. Ribes Ribes, *Reflexiones en torno a la propuesta de nueva directiva comunitaria sobre la asistencia mutua en materia recaudatoria*, Quincena Fiscal 15, p. 5 (2009, electronic version); Arana Landín, *supra* n. 4, at p. 74; J. Muguruza Arrese, *The Recovery of Tax Claims in Proceedings for Collection Applied to Assets Overseas*, Forum Fiscal 222, p. 50 (July 2016).

8. Thus the decisive element is not ownership of the claim, rather the power to recover it; A. Montero Domínguez, *La nueva Directiva Comunitaria de asistencia mutua en materia de recaudación: análisis del articulado de la norma positiva*, Carta Tributaria 14, p. 4 (2010, electronic version); J.F. García de Pablos, *La asistencia mutua en materia de cobro de créditos tributarios y derechos*, REDF 155, p. 79 (2012).

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

The scope of the Directive also includes a series of items related to the above-mentioned claims, such as:

- (a) administrative penalties, fines, fees and surcharges relating to the claims for which mutual assistance may be requested;
- (b) fees for certificates and similar documents issued in connection with administrative procedures related to taxes and duties; and
- (c) interest and costs relating to the claims covered by points (a) or (b) above.

The Directive may not be used to request assistance for the recovery of compulsory social security contributions, fees not referred to above,<sup>9</sup> dues of a contractual nature, such as consideration for public utilities, and criminal penalties imposed on the basis of a public prosecution or other criminal penalties not covered by the items described above.

Notwithstanding these restrictions, it has been generally acknowledged that the scope of the Directive is broader than that of its precursors,<sup>10</sup> to the point of classifying it as extremely ambitious compared to the model followed by previous directives, in that it abandons the traditional system of a closed list in favour of an open list system including any public claim, whether of a fiscal nature or otherwise.<sup>11</sup>

## **[B] To Whom the Directive Applies**

The directive applies to two categories of subjects which, following the terminology used by Montero Domínguez,<sup>12</sup> can be classified as either active subjects or passive subjects.

### **[1] Active Subjects**

The authorities of the Member States taking part in the mutual assistance procedure are active subjects of the Directive, whether as the authority requesting the assistance for

9. Vírveda Moreno clarifies that the reference to ‘tasas’ in the Spanish version has its origin in the English version of the Directive, which uses the term ‘fees’, which is wider than the Spanish concept of ‘tasa’ into which it has been translated; M.J. Vírveda Moreno, *Contenido y análisis de la Directiva 2010/24/UE del Consejo, de 16 de marzo de 2010*, Tribuna fiscal 245, p. 62 (2011).

10. Bas Soria, *supra* n. 5, at p. 7.

11. D. Chacón Jerez, *La reformulación del mecanismo de asistencia mutua 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 Fiscales 4/14, p. 67 (2014). In this way, for example, one state can recover traffic fines for breaches committed in another state; Muguruza Arrese, *supra* n. 7, at p. 50.

12. Montero Domínguez, *supra* n. 8, at p. 6.

the recovery of a claim (the applicant authority) or as the authority to which a request for assistance is made (the requested authority).

Article 4 of the Directive envisages up to three levels of authorities:<sup>13</sup>

- (a) A central liaison office, which shall have principal responsibility for contacts with other Member States in the field of mutual assistance covered by the Directive and which may also be designated as responsible for contacts with the Commission.
- (b) 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 the Directive.
- (c) Liaison services, other than the central liaison office or liaison offices, which shall request or grant mutual assistance under the Directive in relation to their specific territorial or operational competences.

When a liaison office or liaison service 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 inform the applicant authority thereof.

The list of competent authorities responsible for applying the Directive was published in the Official Journal of the European Union on 12 October 2011. In the case of Spain, this is the State Tax Administration Agency (*Agencia Estatal de Administración Tributaria*, AEAT).

As indicated above, mutual assistance falls within the category of international relations referred to in Article 149(1)(3) of the Constitution, namely those in relation to which the state has exclusive competence. This exclusivity is reiterated in the new drafting of Article 5(3) of the LGT, which provides that the AEAT shall have the competences conferred by legislation on mutual assistance,<sup>14</sup> without prejudice to the ability of the AEAT to make a request for the necessary assistance from the relevant body, depending on the subject matter of the assistance.<sup>15</sup>

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13. 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.

14. This is reiterated in Art. 5(3) of the General Regulation on Recovery, approved by Royal Decree 939/2005 of 29 July, which provides that 'recovery management ... to be carried out by the Spanish State in favour of other States or other international or supranational bodies, pursuant to the rules on mutual assistance between Member States of the European Union or under double taxation conventions or other international conventions, shall be performed by the State Tax Administration Agency'. It goes on to indicate that 'the State Tax Administration Agency shall make requests for mutual assistance from other States, or from other international or supranational bodies'. Similarly, Art. 204(3) of the Regulation on Tax Application, approved by Royal Decree 1065/2007 of 27 July indicates that 'all requests for mutual assistance from other States or from other international or supranational bodies made in accordance with Article 177 *bis* 1 of General Tax Law 58/2003 of 17 December, shall be made through the competent arm of the State Tax Administration Agency, in accordance with Article 5(3) of General Tax Law 58/2003, of 17 December'.

15. Article 204(1) of the Regulation on Tax Application.

Therefore, any request for mutual assistance, whether made or received, shall be centralized through the AEAT, even when it relates to debts of autonomous communities or local bodies.

**[2] Passive Subjects**

The Directive uses the term ‘person’ to identify those to whom the request for mutual assistance relates<sup>16</sup> and this term is defined very broadly<sup>17</sup> to include not only natural and legal persons, but also associations of persons recognized as having the capacity to perform legal acts but lacking the legal status of a legal person and 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 the Directive.

As recital (5) of the Directive indicates, ‘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’ should be taken into account.<sup>18</sup>

Article 3 of the Implementing Regulation provides that the applicant authority may make a request for assistance in respect of either a single claim or several claims where those are recoverable from one and the same person. A request for information, recovery or precautionary measures may relate to any of the following persons:

- (a) the principal debtor or a co-debtor;
- (b) 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; and
- (c) any third party holding assets belonging to or having debts towards one of the persons referred to in (a) or (b).

**§12.03 MUTUAL ASSISTANCE ARRANGEMENTS FOR THE RECOVERY OF CLAIMS**

As recital (7) of the Directive points out:

[M]utual assistance may consist of the following: the requested authority may supply the applicant authority with the information which the latter needs in order

16. Bas Soria, *supra* n. 5, at p. 9.

17. Calderón Carrero, *supra* n. 3, at p. 56.

18. Calderón Carrero refers to the ‘legal arrangements’ as ‘*fiducias*’ in Spanish, or ‘trusts’, although, as Bas Soria points out, more traditional Spanish legal concepts are also included, such as all those referred to in Art. 35(4) of the LGT (joint ownership regimes (*comunidades de bienes*), inheritances not yet accepted (*herencias yacentes*), etc.), Calderón Carrero, *supra* n. 3, at p. 56; Bas Soria, *supra* n. 5, at p. 9.



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.

Along these lines, and in light of the purpose of the Directive, Vírseda Moreno has highlighted that assistance does not necessarily imply the adoption of measures directly determining payment, such as administrative action against the debtor's assets, but can also consist of the notification of an act dictated by the applicant authority in order to proceed to the taking of such administrative action or of the exchange of information facilitating the recovery of a claim.<sup>19</sup>

Thus, arrangements for assistance fall into three categories. The Directive dedicates one chapter to each arrangement: (a) Assistance for obtaining information; (b) Assistance for notification and (c) Assistance for recovery and the adoption of precautionary measures.

According to Bas Soria, the latter is fundamental, as its purpose is directly related to recovery and it closes the recovery cycle with the receipt of income, while the first two are of an instrumental nature.<sup>20</sup>

Before analysing each of these mutual assistance arrangements, we shall consider a few issues common to all of them.

## **[A] Common Issues**

### **[1] Standard Forms and Means of Communication**

For the purpose of dealing with requests more quickly and easily, Article 21 of the Directive encourages the use of electronic means<sup>21</sup> and standard forms for requests for different types of mutual assistance for the recovery of claims,<sup>22</sup> as well as for any other type of communication with regard to requests, unless this is impracticable for technical reasons.<sup>23</sup>

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19. Vírseda Moreno, *supra* n. 9, at p. 61.

20. Bas Soria, *supra* n. 5, at J., p. 18.

21. Article 3 of the Directive defines electronic means as follows: using electronic equipment for the processing, including digital compression, and storage of data, and employing wires, radio transmission, optical technologies or other electromagnetic means. Article 2 of the Implementing Regulation envisages the platform being the CCN network, which is the common platform based on the common communication network developed by the Union for all transmissions by electronic means between competent authorities in the area of customs and taxation, and that documents transmitted in electronic form or print outs thereof shall be deemed to have the same legal effect as documents transmitted by post.

22. The standard forms for the three assistance arrangements (request for information, request for notification and request for recovery and adoption of precautionary measures) have been approved by the Commission's Implementing Decision of 18 Nov. 2011.

23. In this case, the request shall be transmitted by post in accordance with the procedure described in Art. 2(3) of the Implementing Regulation, using the uniform notification forms set out in the Annex to the Implementing Regulation itself.

The use of electronic means is also encouraged, again unless impracticable for technical reasons, for sending the following documents:

- (a) The uniform instrument permitting enforcement in the requested Member State.
- (b) The document permitting precautionary measures in the applicant Member State.
- (c) Other documents accompanying the above two documents.
- (d) Reports, statements and any other documents, or certified true copies or extracts thereof, accompanying the standard forms.

The purpose of this provision is to improve the effectiveness of assistance. Nevertheless, in order for this purpose not to become an obstacle to the ultimate aim (recovery of claims), it is made clear that if communication is not made by electronic means or with the 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.

In Spain, this preference for electronic means of communication has been reflected in Article 177 *septies* of the LGT,<sup>24</sup> according to which, without prejudice to the legislation governing assistance in each case, electronic, computer and telematic means shall be used where possible. Reference should also be made to Article 202 of the Regulation on Tax Application, according to which when, in compliance with the obligations of mutual assistance, the tax authorities must supply documentation to another state, the Spanish competent authority may, provided it gives reasons, refuse to supply original documentation, unless the legislation on mutual assistance otherwise provides.

## **[2] Use of Languages**

Pursuant to Article 22 of the Directive, 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.

Two exceptions to this general rule are provided for:

- (a) The fact that certain parts of such documents 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.

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24. And in Art. 207 of the Regulation on Tax Application.

- (b) 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.

Where a request is accompanied by documents other than those referred to above, 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.<sup>25</sup>

Information and other particulars communicated by the requested authority to the applicant authority in response to its request for assistance, in any of its forms, shall be conveyed in the official language or one of the official languages of the Member State of the requested authority or in another language agreed between the applicant and requested authorities (Article 4 of the Implementing Regulation).

### [3] *Disclosure of Information*

Article 23 of the Directive governs the disclosure of information and documents. In accordance with this article, information communicated in any form pursuant to the 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 States which receive it.

Such information may be used for two purposes: (a) applying enforcement or precautionary measures with regard to claims covered by the Directive or (b) assessment and enforcement of compulsory social security contributions.

Nevertheless, for the sake of efficiency, such information may be used by the state which receives it for other purposes which, according to *Virseda Moreno*,<sup>26</sup> fall into two categories:

- (a) *An internal purpose or use*: Article 23(3) of the Directive permits the use of the information 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.
- (b) *An external purpose or use*: Article 23(4) and (5) of the Directive provides that where the applicant or requested authority considers that information obtained is likely to be useful for the purposes referred to above 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

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25. Consequently, the debtor cannot allege that the documents for which notification is requested have not been translated into the official language of the requested Member State if the requested authority has not required the translation from the applicant authority (judgment of the Spanish National Appellate Court on 14 May 2018, JUR 2018\146494).

26. *Virseda Moreno*, *supra* n. 9, at p. 78.

down in the Directive. In this case 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 on which it received the communication from the Member State wishing to share the information.

As far as Spanish domestic law is concerned, Article 95(6) of the LGT permits the disclosure of information within the framework of mutual assistance on the terms set out in Article 177*ter* of the LGT, which distinguishes between information provided and information obtained by the tax authorities:

- (a) As far as information provided by the Spanish tax authorities in response to requests for information made by other states is concerned, it is envisaged that the tax authorities may oppose or shall expressly authorize, on the terms set out in mutual assistance legislation, the transmission of the information provided to another state (or to an international or supranational body).
- (b) As far as information provided to the Spanish tax authorities by other states is concerned, its reserved character in accordance with Article 95(1) of the LGT is declared and the following disclosure regime is established, depending on whether its use is internal or external:<sup>27</sup>
  - Disclosure to third parties (internal use), in accordance with Article 95(1) of the LGT, shall be possible only if the laws of the state which provided the information permits its use for similar purposes.
  - Disclosure to other states (external use) shall be possible if permitted by mutual assistance legislation and on the terms set out therein.

Article 23(6) of the Directive provides that information communicated in any form pursuant to the 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 Member State.<sup>28</sup> This provision has been transposed into Spanish law by way of Article 106(2) of the LGT.<sup>29</sup>

Finally, an additional guarantee of confidentiality is set out in the provision that persons duly accredited by the security accreditation authority of the European

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27. Although in both cases Art. 203 of the Regulation on Tax Application establishes the obligation that the competent body of the AEAT should obtain from the state which supplied the information its permission to proceed with such disclosure, which may be formulated at the time the assistance is requested or after the receipt of the information, and such disclosure may not be made until express permission is obtained.

28. Calderón Carrero queries the true reach of this clause and whether it should be understood that the information obtained can only be used for the purpose of recovery or also for any other purpose as though it were information obtained locally by the national authorities, favouring the former interpretation; Calderón Carrero, *supra* n. 3, at p. 65.

29. 'Evidence or information supplied by other States or international or supranational bodies in the framework of mutual assistance may be incorporated, with the evidential weight accorded to it in the preceding paragraph, into the relevant procedure.'

Commission may have access to this information only in so far as it is necessary for care, maintenance and development of the CCN network, which is the common platform based on the common communication network developed by the Union for all transmissions by electronic means between competent authorities in the area of customs and taxation.

#### **[4] Refusal to Handle a Request**

The requested authority could refuse to handle a request for assistance. As we will see, there is no absolute obligation to handle a request, given that each type of assistance arrangement envisages a series of limitations. In such case, Article 5 of the Implementing Regulation provides that the requested authority shall notify the applicant authority of the reasons for its refusal, specifying the provisions of the directive on which it relies. Such notification shall be given by the requested authority as soon as it has taken its decision and in any event within one month of the date of acknowledgement of receipt of the request.

#### **[B] Assistance for Obtaining Information**

The first arrangement for assistance set out in the Directive is assistance for obtaining information, which may be provided in three ways: (i) in response to a prior request by a Member State (Article 5); (ii) spontaneously, without the need to receive a prior request (Article 6) and (iii) allowing the presence and participation of foreign officials (Article 7).

#### **[1] Exchange of Information with Prior Request**

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 to which the Directive applies. As commentators have highlighted, the Directive does not specify what information may be requested from another Member State, although it is clear that it must be useful ('foreseeably relevant') for the purpose of recovering a claim<sup>30</sup> and the requested authority must be able to assess the relevance of the requested information for the purpose of recovering the claim.<sup>31</sup>

The information must therefore be aimed at the recovery of outstanding claims<sup>32</sup> and not at obtaining information for establishing the existence of a tax debt<sup>33</sup> or for the

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30. Bas Soria, *supra* n. 5, at p. 10.

31. García de Pablos, *supra* n. 8, at p. 80.

32. Vírveda Moreno, *supra* n. 9, at pp. 60 and 64.

33. V. Selma Penalva, *La importancia de la colaboración europea en el procedimiento de declaración de responsabilidad tributaria por sucesión empresarial*, Nueva Fiscalidad 4, pp. 149–150 (July 2016); Calderón Carrero, *supra* n. 3, at pp. 56–57.

purposes of tax control instead of assistance in the recovery of claims.<sup>34</sup> Requests for information are therefore usually focused on determining whether the taxpayer resides in the territory of the requested authority or whether the taxpayer has assets or rights with which to settle the outstanding claims.<sup>35</sup>

For the purpose of providing that information, the requested authority shall arrange for the carrying out of any administrative enquiries required to obtain it. In this regard, Article 177*ter* of the LGT establishes that the tax authorities may provide other states with details, reports or records obtained in carrying out their duties and, for the purpose of providing such information, shall take all necessary steps for obtaining it, even when the requested information is not necessary for determining its internal tax, and may for this purpose use any of the arrangements for obtaining information governed by the LGT.<sup>36</sup>

The exchange of information is subject to a series of limits, such that the requested authority shall not be obliged to supply information in any of the following three circumstances:

- (a) if the requested authority would not be able to obtain such information for the purpose of recovering similar claims arising in the requested Member State;<sup>37</sup>
- (b) if the requested information would disclose any commercial, industrial or professional secrets; or
- (c) if the disclosure of such information would be liable to prejudice the security of or be contrary to the public policy of the requested Member State.

In such circumstances, the requested authority shall inform the applicant authority of the grounds for refusing a request for information.

Such limits on the exchange of information shall in no case be construed as permitting a requested authority of a Member State to refuse to supply information solely because this information is held by a bank, other financial institution, nominee

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34. Which logically does not allow ‘fishing expeditions’; Calderón Carrero, *supra* n. 3, at p. 57; Arana Landín, *supra* n. 4, at p. 80.

35. Selma Penalva, *supra* n. 32, at p. 150; Calderón Carrero, *supra* n. 3, at pp. 56–57.

36. In relation to this point, reference should be made to Art. 204(2) of the Regulation on Tax Application, which provides that when cooperation consists of the supply of details, reports, rulings, assessments or documents, the relevant body shall send the AEAT such information within a maximum period of three months, unless the legislation on mutual assistance establishes a period of less than six months for the provision of assistance. In this case, the AEAT shall set a time limit for the supply of information no greater than half of that established in the mutual assistance legislation for compliance with the obligation to assist the applicant state or body. If the relevant body is not able to respond to the request in the time period established, it shall notify the relevant body of the AEAT as soon as possible of the reasons for this, as well as the date on which it considers that it will be able to provide a response.

37. Which, in the case of Spain, leads us to Art. 93 of the LGT, whose limit is the existence of a tax liability; Arana Landín, *supra* n. 4, at p. 80. Vírseda Moreno highlights the absence of a reciprocal clause which would not oblige the requested authority to supply the information if the applicant authority could not obtain or supply such information in accordance with its domestic laws; Vírseda Moreno, *supra* n. 9, at p. 65.

or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.<sup>38</sup>

The procedure for the handling of requests for information is set out in Articles 7, 8 and 9 of the Implementing Regulation.

### **[2] Spontaneous Exchange of Information or Exchange of Information Without Prior Request**

The possibility is also envisaged of one Member State, from which a refund should be made in favour of a person established or resident in another Member State, spontaneously providing information relating to the future refund of taxes or duties to the Member State of establishment or residence of the person to which the refund relates.<sup>39</sup> This allows the state receiving the information to check whether the recipient of the refund has any outstanding liabilities and, if necessary, to request assistance for their recovery.

In the opinion of García de Pablos, this exchange of information without prior request should be construed as falling within the simultaneous controls referred to in Article 177*quater* of the LGT,<sup>40</sup> in accordance with which the tax authorities may take part, together with the competent authorities of other states, in simultaneous controls, on the terms set out in mutual assistance legislation.<sup>41</sup>

According to Article 21 of the Directive, the spontaneous exchange of information may take place using standard forms and electronic means.

As far as Spanish law is concerned, the spontaneous exchange of information in compliance with mutual assistance legislation is contemplated in Article 201(c) of the Regulation on Tax Application. In the event that such information could be useful to another state, the body in possession of the information shall provide it, with reasons for doing so, to the competent body of the AEAT for the purposes of its transmission to the state to which it could be useful (Article 206).

### **[3] Presence and Participation in Acts of Assistance**

To improve the effectiveness of the exchange of information arrangements, the Directive contemplates the possibility of allowing officials from the tax authorities of

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38. This lifting of banking and commercial secrecy is in line with OECD standards, despite warnings of the risk of eventual relocation of European assets to non-European countries; Calderón Carrero, *supra* n. 3, at p. 57.

39. The purpose of this arrangement, of an optional nature, would be for the state of establishment or residence to have the opportunity to verify those liabilities which are due from the debtor with the other state and, if necessary, request from the informing state assistance for recovery of payment through the outstanding refund; Vírveda Moreno, *supra* n. 9, at p. 65; Montero Domínguez, *supra* n. 6, at p. 11.

40. García de Pablos, *supra* n. 8, at p. 91.

41. This provision defines 'simultaneous controls' as action taken in agreement with another state or other states for the purpose of exchanging the information obtained in relation to persons or entities which are of common or complementary interest for the states involved.

one Member State to be present at or to participate in administrative enquiries to take place in another Member State.<sup>42</sup>

This is set out in Article 7 of the Directive, pursuant to which, by agreement between the applicant authority and the requested authority<sup>43</sup> and in accordance with the arrangements laid down by the requested authority, officials authorized by the applicant authority may, with a view to promoting mutual assistance:

- (a) be present in the offices where the administrative authorities of the requested Member State carry out their duties;<sup>44</sup>
- (b) be present during administrative enquiries carried out in the territory of the requested Member State (including the possibility of interviewing individuals and examining records);<sup>45</sup> and
- (c) assist the competent officials of the requested Member State during court proceedings in that Member State.<sup>46</sup>

For this purpose, officials authorized by the applicant authority shall at all times be able to produce written authority stating their identity and their official capacity.<sup>47</sup>

Article 21(2) of the Directive provides an exception to the general regime of electronic communication in matters of assistance for 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 Spain, this provision has been transposed by Article 177*quinquies* of the LGT, which allows both the presence of officials designated by the applicant state in the carrying out of acts of assistance at the request of other states, with the prior approval of the competent Spanish authority or the prior agreement among states, and the sending of officials designated by the competent Spanish authority within the framework of requests for assistance made by the AEAT.

Furthermore, any resistance, obstruction, excuse or refusal in relation to allowing foreign officials to act in Spain in the framework of mutual assistance is considered a tax infringement (Article 206(3) of the LGT).

42. 'Nevertheless, it must be emphasised that their presence and, as the case may be, active cooperation, relate exclusively to the procedure for obtaining information which habitually precedes the administrative enforcement of the liability, it being the exclusive competence of the officials of the requested State to enforce the requested tax liability'; Ribes Ribes, *supra* n. 4, at p. 7.

43. Which should define the extent of involvement; Vírseda Moreno, *supra* n. 9, at p. 66.

44. In the opinion of Bas Soria, this should be understood to mean the possibility of using the records and details available in the administrative offices without the need to make enquiries close to the taxpayer, Bas Soria, *supra* n. 5, at p. 14.

45. This would allow assistance and participation in enquiries taking place close to the taxpayer, for any purpose, by the administrative bodies, Bas Soria, *ibid.*

46. This possibility, which fits into the Spanish legal system with greater difficulty, as a result of the self-governing powers (*autotutela administrativa*) that government authorities enjoy, is more relevant in other jurisdictions in which the enforcement of debts must take place through the judiciary; Bas Soria, *supra* n. 5, at pp. 14–15.

47. The need to have the clearest and most protective regulation possible has been emphasized, considering the extraterritorial nature of these actions and the relaxation of fiscal sovereignty that they imply; Calderón Carrero, *supra* n. 3, at p. 58.



**[C] Assistance for the Notification of Documents**

The second arrangement for mutual assistance is the possibility of one state requesting another to serve upon the addressee all documents, including those of a judicial nature, which emanate from the applicant Member State and which relate to a claim referred to in the Directive, or to its recovery,<sup>48</sup> which, as in the previous case, should be due and payable.<sup>49</sup>

A request cannot be made in any circumstances, but only when the applicant state has serious difficulties in carrying out the notification on its own,<sup>50</sup> thus avoiding indiscriminate requests.<sup>51</sup> Specifically, the possibility of using this assistance arrangement is envisaged only when the applicant authority is unable to notify in accordance with its own rules governing the notification of the document concerned or when such notification would give rise to disproportionate difficulties.

Thus, when there are circumstances which give rise to serious difficulties for notification, one state may request the authorities of another state to notify the documents concerned. Such request shall be accompanied by a standard form containing certain minimum information, including identification data relating to the addressee, the purpose of the notification and the period within which notification should be effected, a description of the attached document and the nature and amount of the claim concerned, and contact details regarding the office responsible for the document for which notification is requested or the office where further information can be obtained concerning the notified document or concerning the possibilities of contesting the payment obligation.

Pursuant to Article 22(2) of the Directive, the documents for which notification is requested may be sent to the requested authority in an official language of the applicant Member State.

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. The procedure for the handling of notification requests is set out in Articles 10–14 of the Implementing Regulation.

As regards the procedure for carrying out the notification, Article 9 of the Directive provides that it shall be effected in accordance with the national laws, regulations and administrative practices in force in the requested Member State (paragraph 1), 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 (paragraph 2).<sup>52</sup>

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48. This arrangement for mutual assistance therefore relates not only to the notification of the claim but also to any document relating to it; García de Pablos, *supra* n. 8, at p. 81.

49. Vírveda Moreno, *supra* n. 9, at pp. 60 and 66.

50. Nevertheless, as pointed out by Bas Soria, the effectiveness of this requirement in practice may be weakened as it is not accompanied by measures to verify its compliance; Bas Soria, *supra* n. 5, at p. 15.

51. Vírveda Moreno, *supra* n. 9, at p. 67.

52. Vírveda Moreno considers that there are two possible interpretations to resolve the possible contradiction between Art. 9(2) and Art. 8(2): (i) that Art. 9(2) refers to situations in which, the circumstances in Art. 8(2) allowing a request for mutual assistance having existed, the

Finally, the last paragraph of Article 9(2) of the Directive establishes the possibility that 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.

**[1] Requests for Notification of Documents Made by the Spanish Authorities**

Paragraph 1 of Article 177*sexies* of the LGT governs assistance for the notification of administrative acts of the Spanish tax authorities, contemplating the possibility that they may be notified in the territory of another state with the assistance of the competent authority of that state. In the same sense, Article 114(4) of the Regulation on Tax Application indicates that ‘the tax authorities, pursuant to the rules on mutual assistance, may request the competent authority of another State to carry out the notification of any act of such tax authorities’.<sup>53</sup>

Such notifications shall have the same effect as those carried out in accordance with Spanish rules, the only requirement being a communication received from the requested authority that the requested notification has been effected.

The only additional precaution established for those cases in which assistance has been requested from another state is that in order to proceed to notification in person in accordance with Article 112 of the LGT, two months must have passed since the request for notification was sent without having been able to carry out the notification abroad or without the tax authorities having received a response from the requested authority with respect to the date of the notification of the document to its addressee.<sup>54</sup>

Anticipating the possibility of double notification (e.g., if the authorities in the other state eventually manage to effect notification and in Spain notification has taken place by way of publication), it is provided that the date of notification shall be deemed to be that of the first to take place.

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possibility of effecting the notification in the territory of the applicant state subsequently arises and (ii) that Art. 8(2) refers exclusively to the ordinary or traditional notification method existing in the applicant Member State, whereas Art. 9(2) refers to other extraordinary notification methods; Vírseda Moreno, *ibid.*

53. This provision goes on to point out that notifications thus effected in another state must be accredited by including in the file the notification or the communication to the Spanish competent authority of the notification effected by such state in accordance with its own rules. Notifications effected in another state whose accreditation is carried out in the manner set out in this paragraph shall be deemed to have been validly effected.
54. ‘That is, the request for mutual assistance for the notification and the passing of the two month period shall, for the purposes of the application of Article 112 of the LGT, equate to the two valid attempts to notify (or one, in the case of those unknown at their address) which facilitate the publication of the advertisement, in the electronic site or in the bulletins, for the appearance of the taxpayer’; Bas Soria, *supra* n. 5, at p. 16.

**[2] Requests for Notification of Documents Received by the Spanish Tax Authorities**

Paragraph 2 of Article 177*sexies* of the LGT deals with requests received by the Spanish tax authorities, in the framework of mutual assistance, from the competent authority of another state or from an international or supranational body, for the notification of documents.

In this case, the general regime for notifications contained in the LGT (Articles 109–112) shall apply, with the exception that a notification may be sent not only to the places set out in Article 110 of the LGT,<sup>55</sup> but also, if necessary, to the place indicated by the foreign authority.<sup>56</sup>

In those circumstances in which notification is not possible for reasons not attributable to the tax authorities despite having been properly attempted at the tax address or place indicated for this purpose by the foreign authority, notification by way of official publication is possible in accordance with Article 112 of the LGT.

Regardless of the place and procedure for notification, the documents to which the notification relates shall be served upon the addressee in the language in which they are received by the tax authorities, unless mutual assistance rules provide otherwise.<sup>57</sup>

**[D] Assistance for the Recovery of Claims or the Adoption of Precautionary Measures**

**[1] Commencement of the Procedure**

The procedure for assistance for the recovery of claims is initiated by a request for recovery by the applicant authority, pursuant to which the requested authority shall

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55. In proceedings commenced by the party concerned, the notification shall be sent to the place indicated for that purpose by the taxpayer or the taxpayer's representative or, failing which, to the tax address of either of them. In proceedings commenced by operation of law, the notification may be sent to the tax address of the taxpayer or the taxpayer's representative, to the work place, to the place where economic activity takes place or to any other place adapted for such purpose.

56. It should be recalled that, as we have just pointed out, the Directive envisages that notification shall take place in accordance with the national laws, regulations and administrative practices in force in the requested Member State, without prejudice to any other form of notification used by a competent authority of the applicant Member State in accordance with the rules in force in that Member State. In the opinion of Bas Soria, this is an alternative rather than a substitute place of notification, with the same validity as the tax address, and which could arise as a result of a discrepancy between the address appearing in the records of the Spanish authorities and that appearing in the records of the foreign authorities; Bas Soria, *supra* n. 5, at p. 17.

57. In the opinion of Arana Landín, based on the judgment in Case C-233/08, *Milan Kyrián v Celní úřad Tábor*, ECLI:EU:C:2010:11, use should have been made of the possibility of the requested state requesting the applicant state to provide a translation of the documentation in the event that it is considered essential for the purposes of proceedings, given that it is in the requested state that administrative proceedings regarding the notification or enforcement have to take place, in the event that it has been made by it, and, according to the principle of equivalence, conditions cannot be less favourable than those applying under domestic law; Arana Landín, *supra* n. 4, at pp. 86–87.

proceed to recover the claims that are the subject of an instrument permitting enforcement in the applicant Member State.<sup>58</sup> For this purpose, the applicant authority shall, as soon as any relevant information relating to the matter which gave rise to the request for recovery comes to its knowledge, forward it to the requested authority (Article 10 of the Directive) and the procedure shall be handled in accordance with Articles 15–24 of the Implementing Regulation.

Article 11 of the Directive establishes two conditions for the commencement of the mutual assistance procedure:

- (a) A request for recovery may not be made 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 claim has only been partially contested, in which case a request for recovery may be made in relation to the part of the claim that is not contested.
- (b) The applicant Member State shall have exhausted appropriate recovery procedures available in the applicant Member State except in the following situations: (i) 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; and (ii) where recourse to such procedures in the applicant Member State would give rise to disproportionate difficulty.<sup>59</sup>

The 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. Most notably, in accordance with Article 12 of the Directive, the uniform instrument shall not be subject to any act of recognition, supplementing or replacement in that Member State.<sup>60</sup>

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

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58. It therefore relates to claims which are already at the enforcement stage in the applicant state; *Vírseda Moreno, supra* n. 9; at p. 67.

59. Chacón Jerez warns that although this provision relaxes the principle of subsidiarity for the purpose of improving the effectiveness of the mutual assistance arrangements, it can represent a real risk of abuse of what should be its natural purpose, such risk being greater given that no reasons are required to be provided for its exercise; Chacón Jerez, *supra* n. 11, at p. 70.

60. What therefore stands out is the directly enforceable nature of the enforcement instrument, which does not need to be accompanied by any other document; *Vírseda Moreno, supra* n. 9, p. 69; Chacón Jerez, *supra* n. 11, at p. 68. This characteristic is recognized in Art. 200 of the Regulation on Tax Application, which provides that, ‘as a general rule, requests which have been received in accordance with the rules on mutual assistance shall not be subject to any act of recognition, supplementing or replacement by the Spanish tax authorities, unless such rules otherwise provide, without prejudice to any rectification which such authorities may demand in relation to the same’.

- (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; and
- (c) name, address and other contact details regarding 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.

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

The enforcement instrument received by the Spanish authorities receives legal recognition in Article 177*nonies* of the LGT, which defines enforcement instruments as those which, pursuant to the rules on mutual assistance, provide for the exercise of the recovery measures set out in the LGT. This provision consists of three rules:

- (a) The enforcement instrument is similar to a court order for payment. In particular, it shall be considered sufficient to commence the recovery procedure and shall carry the same weight of enforcement as the court order for payment referred to in Article 167(2) of the LGT for proceeding against the assets and rights of debtors.<sup>61</sup> However, in accordance with Article 28(6) of the LGT, surcharges shall not accrue in the enforcement period unless the rules on mutual assistance otherwise provide.<sup>62</sup>
- (b) When the enforcement instrument is accompanied by other documents relating to it and issued by the applicant state, such documents shall be sent to the addressee in the language in which they are received by the tax authorities, unless otherwise provided by the rules on mutual assistance.
- (c) Under no circumstances shall the enforcement instrument or the documents accompanying and relating to it, which have been received in accordance with rules on mutual assistance, be subject to any act of recognition, supplementing or replacement by the Spanish tax authorities, unless otherwise provided by such rules.<sup>63</sup>

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61. In accordance with Art. 167(2) of the LGT, 'a court order for payment shall be sufficient to commence the procedure for recovery of such payment and shall have the same effect as a court judgment for proceeding against the assets and rights of taxpayers'.

62. The explanation for this rule is to be found in the fact that surcharges in relation to the enforcement period accrue at the start of such period and, technically, we are not dealing with either a taxable event in Spain or a debt incurred in Spain; Montero Domínguez, *supra* n. 8, at p. 125.

63. This is repeated in Art. 200 of Royal Decree 1065/2007 of 27 July, according to which, as a general rule, requests which have been received in accordance with mutual assistance rules shall not be subject to any act of recognition, supplementing or replacement by the Spanish tax authorities, unless otherwise provided by such rules, without prejudice to any rectification which such authorities may demand in relation to the same.

Regarding execution of the request for recovery, Article 13 of the Directive 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. In this regard, the seventeenth Additional Provision of the LGT considers claims of another state in relation to which acts of assistance, collaboration, cooperation and analogous acts have been provided by the Spanish state in the exercise of mutual assistance to be rights of the Inland Revenue of a public nature.<sup>64</sup>

The LGT makes no mention of requests for assistance for recovery made by the Spanish tax authorities; therefore, it must be concluded that the relevant enforcement instrument is the court order for payment.<sup>65</sup>

## [2] *Handling of the Procedure*

Once a request for recovery is received, 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 a similar tax or duty. 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 that apply to claims concerning the tax levied on personal income.

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. However, a Member State that grants preferences to another Member State's claims may not refuse to grant the same preferences to the same or similar claims<sup>66</sup> of other Member States on the same conditions.<sup>67</sup> In this

64. It goes on to state that 'for the purpose of the exercise of such acts of mutual assistance, such rights shall maintain their original legal nature in accordance with Spanish law and the legal regime contained in General Tax Law 47/2003 of 26 November, and in this Law, shall apply to them'.

65. Bas Soria, *supra* n. 5, at pp. 19 and 21. This author also considers the question of whether a prior declaration of taxpayer default could be necessary. He rejects this in view of the fact that Art. 61 of the General Regulation on Recovery requires that for a declaration of default there should exist no assets or rights that are subject to attachment or available for the recovery of the claims, whereas in cases of a request for mutual assistance there is at least a suspicion of its existence, albeit such assistance is necessary to make it effective. A different question is that posed by Ribes Ribes on the need for a prior declaration of default in order to require payment of the debt from the person secondarily responsible, in which case the tax authorities would have to resort to assistance for proving the insolvency of the non-resident taxpayer; A. Ribes Ribes, *Ámbito subjetivo de la asistencia mutua recaudatoria a la luz de la Directiva 2010/24/CE y los diversos instrumentos convencionales*, in *Estudios sobre fraude fiscal e intercambio internacional de información tributaria* p. 148 (M.A. Collado Yurrita & S. Moreno González eds, Atelier 2012).

66. The expression 'same or similar' is not defined, which renders difficult the intended homogeneity; García de Pablos, *supra* n. 8, at p. 84.

67. It has been pointed out that on this point the Directive allows states to establish legislation that discriminates against the tax claims of other Member States, which, as well as evidencing a nationally tinted focus in the assistance for the recovery of claims, poses several doubts regarding the scope of this safeguard; Calderón Carrero, *supra* n. 3, at p. 61.

regard, Article 80*bis* of the LGT provides that claims belonging to other states shall not enjoy any preference when they coincide with other public law claims, nor any of the other guarantees contained in the LGT for tax debts (preference rights, unregistered legal mortgages, encumbrances and liens),<sup>68</sup> without prejudice to their consideration as rights of the Inland Revenue of a public nature to which we have referred above and the maintenance of their original legal nature in accordance with Spanish law (the legal regime set out in General Tax Law 47/2003 of 26 November, and in the LGT being applicable to them).

The requested Member State shall proceed to recover the claim in its own currency and shall inform the applicant authority with due diligence of any action it has taken on the request for recovery.

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.<sup>69</sup> In this regard, in the case of requests for recovery received by the Spanish tax authorities from other states, Article 26 of the LGT provides for the charging of interest for late payment,<sup>70</sup> the calculation of which shall be carried out in accordance with Article 27*bis* of the General Regulation on Recovery.<sup>71</sup> The rate applicable shall be the legal rate for debts of a non-tax nature.<sup>72</sup>

Where the laws, regulations or administrative provisions in force in the requested Member State so permit, the requested authority may also allow the debtor time to pay or authorize payment by instalments and it may charge interest in that respect and it shall subsequently inform the applicant authority of any such decision. This possibility is regulated in Articles 62(6) and 65(6) of the LGT, which refer to Article 177*octies* in regulating the procedure for the recovery of claims within the framework of mutual assistance.

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68. Foreign claims in respect of which assistance is provided are therefore treated in the same way as private law claims; Montero Domínguez, *supra* n. 6, at p. 128.

69. There have been warnings that in practice there is no guarantee that there will be no overlapping of interest as a result of possible asymmetry between the laws governing interest in the applicant state and in the requested state; E. Miguel Canuto, *Cooperation between Tax Authorities in the Recovery of Claims: Analysis of Directive 2010/24/EU*, in *Intercambio internacional de información tributaria: avances y proyección futura* p. 288 (M.A. Collado Yurrita ed., Cizur Menor 2011).

70. Without prejudice to the fact that if further legislation on mutual assistance for the recovery of claims established a different rule on the accrual of interest, such rule would be applicable; Montero Domínguez, *supra* n. 6, at p. 124.

71. Calculation of accrued interest shall take place subsequent to payment of the debt after the end of the period set out in Art. 62(6) of the LGT and the general procedure established for calculations carried out by public authorities shall be followed, with the following particularities: (a) the body responsible for recovery may, if advisable in light of the requirements of the service, calculate and require payment of interest together with payment of the debt; (b) in the event of the enforcement of security over assets or guarantees, the calculation of interest for late payment shall take place upon applying the enforcement proceeds towards cancellation of the debt, if the former is greater than the latter; and (c) if security is taken over cash or accounts or credit receivables, interest for late payment may be calculated and withheld upon enforcement of the security if the amount available is greater than the debt whose payment is sought.

72. E. Miguel Canuto, *Asistencia en la recaudación: la normativa interna*, *Crónica Tributaria*. Boletín de Actualidad 3, p. 40 (2012).

Thus, in accordance with the first of the provisions cited, the payment of claims belonging to other states the recovery of which has been undertaken within the framework of mutual assistance shall be required of the taxpayer, who shall make payment in the timeframes established in an equivalent manner to those established for court orders for payment.<sup>73</sup>

- (a) If notification of the enforcement instrument takes place between the first and the fifteenth day of each month, from the date of receipt of the notification until the twentieth day of that month or, if this is not a working day, until the immediately following working day.
- (b) If notification of the enforcement instrument takes place between the sixteenth and the last day of each month, from the date of receipt of the notification until the fifth day of the following month or, if this is not a working day, until the immediately following working day.<sup>74</sup>

Nevertheless, as Chacón Jerez has pointed out, this timeframe is a mere courtesy given that the debts are received directly after the expiry of an enforcement period; therefore, as the last paragraph of such provision indicates, the tax authorities can take recovery measures from the receipt of the recovery request from the applicant state without waiting for the time limits to expire.<sup>75</sup>

As regards the deferment of debts, Article 65(6) of the LGT contemplates the possibility of requesting deferments and payment in instalments of claims belonging to other states in respect of which a recovery request has been received on the same terms as those applying to tax debts originating in Spain.

The requested authority shall remit to the applicant authority the amounts recovered with respect to the claim and interest for late payment accrued. It should be recalled that, if this is not done, the debtor cannot be required to pay surcharges relating to the enforcement period.

### **[3] Disputes During the Recovery Procedure**

Both the Directive (Article 14) and the LGT (Articles 177*decies*–177*terdecies*) contemplate the possibility of the taxpayer contesting the procedure for mutual assistance. The following rules govern this scenario:

- (a) All disputes concerning the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting

73. Along the same lines, Bas Soria, *supra* n. 5, at p. 9.

74. The justification for the regulation of these time periods is that ‘foreign claims whose payment is requested from the Spanish tax authorities generally already find themselves in the enforcement stage in the State to which the claims belong. Nevertheless, as a taxable event has not taken place in Spain and the debt has not accrued in Spanish territory, strictly speaking we cannot talk about payment in the voluntary period or the enforcement period’; Montero Domínguez, *supra* n. 6, at p. 126.

75. Chacón Jerez, *supra* n. 11, at p. 69.



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. In this regard, paragraph 1 of Article 177<sup>duodecies</sup> grants the applicant state competence to review the instrument permitting enforcement.

Therefore, 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.

In this context, Article 177<sup>decies</sup> of the LGT provides that the grounds of challenge referred to in Article 167(3) of the LGT<sup>76</sup> shall not be admissible against an instrument permitting enforcement issued under the rules for mutual assistance and that Article 177<sup>duodecies</sup>.1 of the LGT<sup>77</sup> shall apply.

Based on these EU and domestic provisions, the judgment of the High Court of Justice of Catalonia on 8 November 2013 (JUR 2014\20688) rejected a contentious administrative application for the protection of the fundamental rights of the person brought by a Spanish resident against the notification of a uniform instrument permitting enforcement issued by the Greek authorities, based on the defects of the notification in Greece which gave rise to the calculation of the tax whose recovery was intended. The judgment concluded that the court, and by extension the Spanish judicial authorities, lacked jurisdiction to hear the claim, given that the defects which were intended to be the subject matter of the claim were not intrinsic to the instrument permitting execution, but rather what was being challenged was the defective notification by the Greek state.<sup>78</sup>

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76. Total extinction of the debt or prescription of the right to demand payment; request for deferment, payment in instalments or set-off in the voluntary period and other reasons for the suspension of the recovery procedure; failure to notify the calculation; annulment of the calculation; error or omission in the content of the court order requiring payment which prevents the identification of the debtor or of the debt subject to the court order.

77. Bas Soria clarifies that, ‘in reality, rather than not being able to invoke those grounds, what happens is that the grounds of challenge shall be invoked before the authority which has required the recovery of the debt and which has issued the specific instrument to facilitate the request, and the grounds of challenge shall be those contained in its specific laws’; Bas Soria, *supra* n. 5, at p. 22.

78. Calderón Carrero considers that this judgment adopts a strict and not very protective interpretation of Art. 14 of the Directive, in view of the judgments in Case C-349/07, *Sopropé – Organizações de Calçado Lda v Fazenda Pública*, ECLI:EU:C:2008:746 and Joined Cases C-129/13 and C-130/13, *Kamino International Logistics BV et Datema Hellmann Worldwide Logistics BV v Staatssecretaris van Financiën*, ECLI:EU:C:2014:2041; J.M. Calderón Carrero, *La asistencia mutua en materia de recaudación tributaria*, in *Convenios fiscales internacionales y fiscalidad de la Unión Europea* p. 1518 (N. Carmona Fernández ed., Wolters Kluwer 2014).

In this regard, it is worth mentioning the judgment of the Spanish National Appellate Court on 18 January 2010 (JUR 2010\34052), which affirmed that any irregularity in relation to the determination of the debt or its amount is a fundamental issue which should be argued before the creditor state and not the requested state as a mere collaborator or auxiliary in the recovery of the debt.

Notwithstanding, the judgment on 26 April 2018, in case *Eamonn Donnellan* (C-34/17), ECLI:EU:C:2018:282, rules that Article 14(1) and (2) of the Directive, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding an authority of a Member State from refusing to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State, on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to that authority pursuant to that directive.

- (b) 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. Thus, paragraph 2 of Article 177(2)*duodecies* provides that the review of attachment proceedings and other measures taken by the tax authorities deriving from a recovery request received shall be carried out by the reviewing bodies set out in the LGT and its implementing legislation.

In this regard, Article 177*undecies* of the LGT provides that the only admissible grounds for challenging attachment proceedings within the framework of mutual assistance shall be those referred to in Article 170(3) of the LGT for the challenge of attachment proceedings in relation to domestic tax debts.<sup>79</sup>

In the event that grounds of challenge are based on evidence obtained during proceedings before the administrative or judicial bodies of the other state or international or supranational body, due accreditation of the same should be requested through the competent body.<sup>80</sup> The information sent for these purposes shall carry the evidential weight attributed to it by law in accordance with Article 106(2) of the LGT.<sup>81</sup>

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79. Extinction of the debt or prescription of the right to demand payment; failure to notify the court order requiring payment, failure to comply with the rules on attachment contained in the LGT and suspension of the recovery procedure.

80. As Bas Soria points out, in Spain information will not be available when the various grounds for the challenge of attachment proceedings are invoked (e.g., the failure to notify the initial enforcement instrument provided for under the laws of the applicant state); Bas Soria, *supra* n. 5, at p. 23.

81. '1. The rules on the weighing of evidence contained in the Civil Code and in Law 1/2000 of 7 January on Civil Procedure shall apply in tax proceedings unless otherwise provided by law. 2. Evidence or information supplied by other States or international or supranational bodies within the framework of mutual assistance may be incorporated, with the evidential weight accorded to it by the previous paragraph, into the relevant proceedings.'

The grounds of challenge deriving from the LGT and its implementing legislation shall apply against other measures of the Spanish tax authorities taken in response to a request for recovery received within the framework of mutual assistance.

In the first case, that is, when an action is 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 interested party may also carry out such notification.

The consequence of this notification is that unless the applicant authority requests otherwise, as soon as the requested authority has received it, 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.

This rule is reflected in Article 177*terdecies*,<sup>82</sup> pursuant to which, unless the applicant state otherwise indicates, the recovery procedure commenced under the rules on mutual assistance shall be suspended automatically upon the notification of the existence of a dispute by the applicant state that could affect the claim in respect of which the assistance is requested. Such suspension shall also take place when the interested party notifies and duly evidences the existence of the same.

The above-mentioned provision also contemplates that when the dispute relates only to part of the request for assistance, the suspension referred to in the preceding paragraph shall only be deemed to affect the contested part and enforcement of the uncontested part may continue.

In these circumstances, the Directive gives the applicant state two options for limiting the possible adverse effects of a suspension:

- (a) On the one hand, the possibility of requesting the requested authority to take precautionary measures to ensure recovery, if allowed by the laws and regulations in force in the requested state. The adoption of these types of measures is permitted by Article 81(1) of the LGT, provided there are reasonable indications that recovery could be frustrated or encounter serious difficulties, and this request, in accordance with Article 81(2) of the LGT, shall not be subject to any recognition, supplementing or replacement measures by the Spanish tax authorities. The Directive also allows the requested authority to adopt such measures of its own accord if it deems them necessary, even when they have not been requested by the applicant state.
- (b) On the other hand, the possibility of requesting the requested authority, in accordance with the laws, regulations and administrative practices in force in the applicant state itself, to recover a contested claim or the contested part of a claim, in so far as the relevant laws, regulations and administrative practices

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82. And Art. 73(3) of the General Regulation on Recovery.

in force in the requested Member State allow such action.<sup>83</sup> 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.

The recovery measures shall also be suspended if the competent authorities of the applicant Member State or<sup>84</sup> the requested Member State have initiated a mutual agreement procedure (MAP)<sup>85</sup> and the outcome of the procedure may affect the claim in respect of which assistance has been requested. In this case, the recovery measures shall be stopped or suspended until that procedure has been terminated, unless it concerns a case of immediate urgency because of fraud or insolvency. In this regard, Article 177*terdecies* of the LGT allows suspension not to take place when, among other circumstances, there are reasonable indications that recovery would be frustrated or encounter serious difficulties, in which case enforcement shall continue.

In the event that recovery measures are stopped or suspended, precautionary measures may be adopted to guarantee the recovery of the claim in accordance with Article 81(2) of the LGT.

#### [4] *Termination of the Procedure*

Recovery procedures within the framework of mutual assistance may terminate for the reasons set out in Article 173 of the LGT, namely, those which apply to the termination of the payment enforcement procedure,<sup>86</sup> in accordance with the legal nature attributed to the enforcement instrument.

Moreover, Article 177*quaterdecies* of the LGT envisages the possibility that the procedure ends due to the amendment or withdrawal of the original request for recovery made by the state requesting mutual assistance.<sup>87</sup>

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83. It is therefore necessary that both the laws in force in the applicant state and those in force in the requested state allow the contested claims not to be suspended; Vírveda Moreno, *supra* n. 9, at p. 71.

84. That is to say, it is not necessary that the MAP be initiated by both states taking part in the assistance, rather, it is enough for only one of them to be involved in the procedure; Vírveda Moreno, *ibid.*, at p. 72.

85. Calderón Carrero's interpretation is that the MAP referred to in the Directive is that contained in the double tax conventions or in Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises itself; Calderón Carrero, *supra* n. 3, at p. 60.

86. Payment of the due amount, including the unpaid debt, interest accrued up to the date on which payment is received by the Treasury, surcharges for the enforcement period and the costs of the payment enforcement procedure; agreement declaring the claim wholly or partially irrecoverable, once all debtors have been declared to be failed debtors; the debt having been declared extinguished for any other reason.

87. Similarly, Art. 116(4) of the General Regulation on Recovery.

This provision is derived from Article 15 of the Directive, according to which 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.

Furthermore, if the amendment of the request is caused by a decision of the competent body of the applicant state as a result of a dispute relating to the claim, the initial instrument permitting enforcement, the uniform instrument permitting enforcement in the requested state or the notification made by a competent authority of the applicant state, 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 the invalidity of the initial instrument permitting enforcement in the applicant Member State or the original uniform instrument permitting enforcement in the requested Member State.

#### **[5] Request for Precautionary Measures**

Precautionary measures are measures designed to guarantee the recovery of a claim in cases in which payment cannot be enforced.<sup>88</sup> Article 16 of the Directive contemplates the possibility that the applicant state may request the requested authority to take precautionary measures, if allowed by its national law and in accordance with its administrative practices,<sup>89</sup> to ensure recovery in two circumstances:

- (a) where a claim or the instrument permitting enforcement in the applicant Member State is contested at the time when the request is made; or
- (b) where the claim is not yet the subject of an instrument permitting enforcement in the applicant Member State.

In addition, precautionary measures must also be 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

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88. García de Pablos, *supra* n. 8, at p. 86.

89. Although not expressly stated, as it was in the previous directive, it should be understood that the request for the adoption of precautionary measures must always provide reasons, Montero Domínguez, *supra* n. 8, at p. 24.

State. This document shall not be subject to any act of recognition, supplementing or replacement in the requested Member State.<sup>90</sup>

As explained above, the adoption of this type of measure is permitted by Article 81 of the LGT, provided there are rational indications that recovery could be frustrated or encounter serious difficulties.

According to Article 17 of the Directive, the procedure shall be handled by applying the rules governing assistance for recovery *mutatis mutandis*.

### **[6] *Limits to the Requested Authority's Obligations***

Article 18 of the Directive establishes three circumstances in which the requested authority may, providing grounds, refuse a request for assistance from an applicant state:

- (a) The requested authority shall not be obliged to grant assistance for the recovery of claims or the adoption of precautionary measures 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.
- (b) The requested authority shall not be obliged to grant assistance for obtaining information (Article 5), the presence and participation of foreign officials in administrative enquiries (Article 7), assistance for notification (Article 8), assistance for the adoption of recovery measures (Article 10) or assistance for the adoption of precautionary measures (Article 16), if the initial request for assistance is made in respect of claims which are more than five years old, dating from the due date<sup>91</sup> of the claim in the applicant Member State to the date of the initial request for assistance. Two particularities are envisaged in the calculation of this period:
  - In cases where the claim or the initial instrument permitting enforcement in the applicant Member State is contested, the five-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

90. However, for Bas Soria, 'notwithstanding this literal mention, if there is no national measure stating, in view of the request, compliance with all of the conditions set out in this article for the adoption of the measures (i.e., a measure virtually identical to the national measure adopting precautionary measures) it is highly likely that any challenge of the request would succeed'; Bas Soria, *supra* n. 5, at p. 26.

91. The term 'due date' is used to refer to the last day of the voluntary period for paying the debt in the applicant state; Montero Domínguez, *supra* n. 8, at p. 27; Calderón Carrero, *supra* n. 3, at p. 62.

State, the five-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 ten years old, dating from the due date of the claim in the applicant Member State.

- (c) Member States shall not be obliged to grant assistance if the total amount of the claims covered by the Directive, for which assistance is requested, is less than EUR 1,500.

Santolaya Blay points out that this last ground for refusal always operates automatically, while the others are at the discretion of the requested authority.<sup>92</sup>

### [7] *Limitation Periods*

Article 19 of the Directive deals with limitation periods, making clear that these shall be governed solely by the laws in force in the applicant Member State.

It contains three provisions on the interruption of limitation periods:

- (a) 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<sup>93</sup> 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.
- (b) 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.
- (c) The above two subparagraphs shall not affect the right of the competent authorities in the applicant Member State to take measures to suspend,

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92. M. Santolaya Blay, *La asistencia mutua en el ámbito de la recaudación: origen y evolución*, Carta Tributaria 13, p. 4 (2010, electronic version).

93. Calderón Carrero points out that 'the fact that the terminology used by the Directive in relation to the interruption, suspension or prolongation of limitation periods does not entirely coincide with that used in our LGT – which fundamentally considers the interruption of the limitation period and exceptionally the suspension of the calculation of the limitation periods (Arts. 150 and 180(1) LGT) – has the purpose of integrating the different national rules on this matter and not so much of articulating new material rules on tax limitation periods'; Calderón Carrero, *supra* n. 77, at p. 1522.

interrupt or prolong the period of limitation in accordance with the laws in force in that Member State.

It is not necessary for the measures taken by the requested authority to be identical to those which would have to be taken by the applicant state in order for them to have an interruptive effect, it being sufficient for them to have a similar or analogous content, the degree of similarity depending on each state's implementation of Article 19.<sup>94</sup>

This provision has been implemented by Article 68(5) of the LGT, pursuant to which 'the measures referred to in the preceding paragraphs and those of an analogous nature shall have interruptive effects on limitation when they are taken in another State within the framework of mutual assistance, even when those measures do not produce similar interruptive effects in the State in which they are materially taken'. It is not necessary for the measures taken abroad to be the same as those which would have to be taken in Spain for the interruption to take place, rather, that their nature or content should be similar or analogous.<sup>95</sup> In the opinion of Calderón Carrero, by adopting this wording, the Spanish legislator has broadened, or at least made more flexible, the circumstances set out in the Directive in which tax limitation periods may be interrupted, which could give rise to some doubts in light of the judgment in Case C-132/10, *Halley*, ECLI:EU:C:2011:586.<sup>96</sup>

Finally, the Directive provides that 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.

### **[8] Costs**

In order to encourage Member States to allocate sufficient resources to the recovery of the claims of other Member States, Article 20 of the Directive provides that in addition to the amounts relating to the claim and interest for late payment, the requested authority shall seek to recover from the person concerned the costs linked to the recovery that it has incurred, in accordance with the laws and regulations of the requested Member State.

Such costs shall be retained by the requested state and, if it does not recover them, wholly or partially, from the debtor, it shall not generally be able to claim them from the applicant state, given that the Directive provides that 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 the Directive.

However, there are three circumstances in which, exceptionally, both states may agree reimbursement arrangements relating to costs:

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94. Vírveda Moreno, *supra* n. 9, at p. 76.

95. Montero Domínguez, *supra* n. 6, at p. 127.

96. Calderón Carrero, *supra* n. 77, at p. 1522.



- (a) where recovery creates a specific problem;
- (b) where recovery concerns a very large amount; or
- (c) where recovery relates to organized crime.

Notwithstanding the above, 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.

