28 Concurrence Rules

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28.1 Introduction

There are other international bodies than the EU producing rules on cross-border administrative cooperation in tax matters, such as the OECD. Furthermore, many countries have domestic provisions for administrative cooperation. Thus, in many Member States at least four levels of rules regarding cross-border cooperation in tax matters exist: (1) domestic law, (2) bilateral tax treaty provisions (Art. 26 and Art. 27 OECD-MC), (3) the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MCMAATM),[2] and (4) the EU level with the DAC, the RAD and indirect taxes Regulations. This chapter discusses the relationship between these four levels in cases of overlapping or incompatible provisions, which includes overlaps between EU rules.

28.2 DAC and RAD

Since the DAC and the RAD both cover exchange of recovery information, these Directives overlap in this respect. Art. 1(3) DAC declares itself to be without prejudice to wider administrative cooperation ensuing from other legal instruments, which would seem to include the RAD. Art. 24(1) RAD, however, only refers to wider bilateral or multilateral agreements. I would submit that the widest competence/obligation on recovery assistance contained in the two directives is decisive.

28.3. MCMAATM Convention and EU Rules

In the 1980s, the Committee of Experts of the Council of Europe (CoE) and the Committee on Fiscal Affairs of the OECD jointly drew up the MCMAATM, which was opened for signature to the Member States of the OECD and of the CoE as of 25 January 1988. Since 1 April 1995, the MCMAATM has been in force between the States that have ratified it.

Among the international instruments of administrative cooperation and recovery assistance in tax matters, the MCMAATM was the first comprehensive one. In 1987, it provided for the

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[2] http://www.oecd-ilibrary.org/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en.

widest assistance. Apart from exchange of information foreseeably relevant for the assessment of domestic taxes, it covered:

– exchange of information foreseeably relevant to the prosecution before an administrative authority or to the initiation of criminal prosecution (Art. 4(1)(b));
– mutual assistance in the recovery of tax claims, which may involve measures of conservancy and enforcement, such as seizure of property (Arts. 11-16); and
– mutual assistance in the service of documents (Art. 17).

In 2010, an amending Protocol was opened for signing, bringing the MCMAATM, which was initially the most far-reaching cooperation instrument, up to the international (OECD and Global Transparency Forum) standard. The main features of that Protocol are (i) the deletion of banking secrecy, essential national interests, and lack of domestic relevance as justifications for refusing cooperation, and (ii) the opening up of the MCMAATM to States which are a member of neither OECD nor CoE (*i.e.* for the whole world). This became feasible after the Global Forum on Transparency and Exchange of Information (counting more than a hundred States among its members), the G20 and the Committee of Experts on International Cooperation on Tax Matters (responsible for the UN Model Tax Treaty) all adhered to the OECD standard of transparency and cooperation (and after the successive global credit, bank, and budget crises). The Protocol entered into force on 1 June 2011. The amended Convention provides for all possible forms of administrative cooperation between States in the assessment and collection of all kinds of taxes, in particular with a view to combating tax avoidance and evasion. This cooperation ranges from exchange of information, including automatic exchange, to the recovery of foreign tax claims. Since the addition of the Protocol in 2010, the MCMAATM thus covers more or less the combined scopes of the 2013 DAC and the 2012 RAD (see Chapters 25 and 27).

On 22 December 2021, 144 jurisdictions participated in the convention.[3] These include all G20 countries, all BRICS, all OECD countries, major financial centres and an increasing number of developing countries.[4]

However, acceding States may make reservations as to the scope of the Convention within their jurisdiction (Art. 30). These reservations may exclude:

– assistance concerning taxes not on income or on capital;
– assistance in the recovery of tax claims or of administrative fines; and
– assistance in the service of documents.

Many signatories, including Brazil, the US, Japan and the UK have made reservations, in particular regarding recovery assistance, or added declarations.[5] Evidently, a State making reservations cannot require another Contracting State, not having made such reservation, to assist in a matter for which the requesting State itself reserved its rights (reciprocity principle). Notwithstanding these reservations, the Convention is still regarded by the OECD as the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance.[6]

[3] https://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf.

[4] https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm.

[5] Reservations and Declarations for Treaty No.127 - Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127), https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=127&codeNature=0.

[6] https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm.

As regards taxpayer protection, the Convention refers to domestic law (Art. 21(1)).

The Convention contains more grounds for refusal of cooperation than the DAC, *e.g.* essential national interests, violation of generally accepted taxation principles or of a bilateral treaty between the applying and the requested State, discrimination against nationals of the requested State as compared to nationals of the applying State in the same circumstances, and disproportionate administrative burdens (Art. 21(2)).

For EU Member States, the MCMAATM rules and the EU rules may overlap *(i.e.* for the subjects covered by the DAC, the RAD and the EU regulations on administrative cooperation in the field of indirect taxes and the VAT information exchange system). In such case, only the EU rules apply so as to avoid differences between different bilateral relationships between EU Members (Union preference, see Section 25.2). Art. 27(2) of the MCMAATM allows Member States to do so by providing that Member States of the EU can apply the possibilities of assistance provided for in the MCMAATM in so far as they allow a wider cooperation than the possibilities offered by the applicable EU rules. Therefore, for the exchange of tax information and for the recovery assistance within the Union, the MCMAATM only applies where the Directives do not provide common rules. As the current cooperation rules in the EU have a very wide scope, there is very little scope left for the MCMAATM for EU Member States in their mutual relations.

28.4 Domestic Law, Bilateral or Multilateral (Tax) Treaties and EU Rules

Between EU Member States (at the interstate level), EU Directives and Regulations take priority over domestic law and over bilateral or multilateral (tax) treaties between them, whether anterior or posterior to the Directive or Regulation.[7] Therefore, at the level of State obligations (horizontal obligations), for EU Member States the Directives and Regulations apply exclusively, unless any other rule (such as a bilateral treaty provision or a provision in the MCMAATM) would provide for a wider obligation to cooperate (see Art. 1(3) of the DAC and Art. 24(1) of the RAD). In short, between EU Member States, the most effective rule (from the point of view of the tax authorities) applies, whether domestic, EU-law-based, bilateral or multilateral; the common EU rules are the minimum level of cooperation.

Between a Member State and a taxpayer, however (vertical relation), things are different. As Directives are addressed to the Member States rather than to their residents, they cannot of themselves directly impose obligations on individuals and undertakings.[8] If a Member State has failed to transpose a Directive into national law, it cannot rely on its provisions against economic operators. Consequently, neither the DAC nor the RAD lends legal basis to Member States wishing to compel individuals or undertakings to cooperate in fiscal enquiries or in the collection of tax instituted at the request of another Member State. For that, they need legal basis in domestic (implementation) law.[9] Reversely, given Art. 1(3) of the DAC (delimitation clause), individuals and undertakings cannot rely on the Directive in order to limit the scope of other, wider, legal instruments requiring them to cooperate. Depending on the constitutional system of

[7] See Art. 5 TEU, and Case 6/64, *Costa v. ENEL*, EU:C:1964:66, Case 106/77, *Simmenthal*, EU:C:1978:49, and Case 235/87, *Annunziata Mateucci*, EU:C:1988:460.

[8] See, for example, Case 152/84, *Marshall*, EU:C:1986:84, Case 80/86, *Kolpinghuis*, EU:C:1987:431, and Case C-168/95, *Arcaro*, EU:C:1996:363.

[9] Possibly, under some constitutional systems a bilateral treaty provision (*cf*. Arts. 26 and 27 of the OECD Model Tax Treaty) may also suffice.

the State concerned, an individual or an undertaking may in some States, however, in order to escape from a domestic law obligation, rely on a provision in a bilateral or multilateral treaty prohibiting the exchange of information, provided this provision of international law is self-executing (clear and unconditional enough to be applied directly by a Court in concrete cases). Usually, however, bilateral tax treaties do not contain such self- executing prohibitions on the exchange of information. It is true that older tax treaties sometimes contain rather limited cooperation provisions (*e.g.* only in so far as necessary to apply the treaty itself), and do not usually envisage any use of the information for other than assessment purposes, nor for the passing on to third States, but these older limitations do not prohibit the wider exchange of information either. They merely grant the Contracting States the discretionary choice to comply or not to comply with a request for such information. The States remain entirely free to furnish the information sought anyway if that is what they consider expedient in the given circumstances (and if domestic law allows). In other words, these old limitations do not confer any rights on individuals.

In conclusion, between EU Member States (horizontally) the EU Directives prevail, unless a further-reaching obligation to exchange information or assist in recovery exists between them, in which case that further-reaching provision must (also) be applied. The only other cases in which other instruments than the Directives may apply between EU Member States, are the cases in which the Directives are silent on the subject. Such a case is hard to find after 2013. Between a Member State and its subjects (vertically), on the other hand, in principle only domestic (implementation) law applies. However, an individual may rely on directly effective Directive provisions where these protect him better than domestic law. Only Arts. 16(1) and 25 of the DAC, concerning confidentiality and data protection, and Arts. 11 and 23(1) of the RAD, concerning a prohibition on recovery requests in certain circumstances and confidentiality, may possibly have such protective direct effect, but the right to confidentiality usually already exists under national law. Art. 17 DAC and Art. 18 RAD (limitations on the obligation to cooperate) have no direct effect, since they merely grant discretionary refusal grounds to Member States, rather than conferring rights on individuals. Possibly, depending on the constitutional system of the Member State concerned, an individual may also rely on self-executing provisions in bilateral or multilateral tax treaties. However, Arts. 26 and 27 OECD-MC do not seem to confer any (confidentiality or limitation) rights on taxpayers they do not already enjoy under domestic law either, at least not self-executing.