EUROPEAN UNION LAW

THE DEVELOPMENT OF MUTUAL ASSISTANCE OF EU MEMBER STATES FOR THE RECOVERY OF PUBLIC CLAIMS

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Abstract
The issue of the effective enforcement of public obligations is of the essence in case of the increasing migration of people to various directions, as well as the intensifying flow of international capital. For these reasons it was necessary to establish legal frames for the assistance between the EU member states for the recovery of public claims. The main purpose of the work was to show the development of recovery of public claims of EU member states for the recovery of public claims. First part of work shows short historical outline of European regulations concerning international mutual assistance for the recovery of public claims. The main part of work concentrates on current legal frames of forms of mutual assistance. Current EU regulations retains three forms of mutual assistance the provision of information by one member state, notification of an interested party or other persons of legal acts, and enforcement or indemnification of public claims. The most significant form of mutual assistance specified as the fundamental one is the assistance for the recovery of claims. A wider analysis of the discussed issue shows that international mutual assistance of the member states for the recovery of public claims will further deepen.

Keywords: private law, recovery of public claims, enforcement of public obligations, debtor, recovery of public claims.

1. General
Ensuring the effectiveness of injunctions and prohibitions made by state administrative authorities has a crucial significance for the legal order. The ideal of
a democratic state of law is to perform legal obligations by citizens and other entities. This results from the nature of the state and of its law on account of its freedom-related objectives and goals, as well as a mode of law making\(^2\). Administration is able to effectively fulfil its tasks provided that administrative injunctions and prohibitions are effectively performed. Therefore, the state authorities must have means that allow them to exercise injunctions and prohibitions straightforwardly resulting from the laws in force and administrative acts. In the absence of such means, administration would be impossible\(^3\).

The issue of the effective enforcement of public obligations is of the essence in case of the increasing migration of people to various directions, as well as the intensifying flow of international capital. These phenomena are also intensified by political and economic approaches of EU member states. Therefore, it was necessary to establish legal frames for the assistance between the EU member states for the recovery of public claims and consequently this fact was to deepen the mutual assistance inside the EU as part of the common legal and economic space\(^4\). This state-level assistance for the recovery of public claims should include all its forms, most notably exchange of information, conducting of simultaneous inspections, conducting of administrative procedures brought by a competent authority of another state and presence of authorized officials in the office of the authority which conveys information and this assistance is provided by competent authorities of minimum two states to the extent of the broadly-defined administrative issues\(^5\). In German this assistance is defined by two words (\textit{Amtshilfe} and \textit{Rechtshilfe}) emphasizing their different meanings and, in simple terms, the semantic difference between them is that the first word describes the assistance between state administrative authorities, whereas the latter one refers to the assistance between courts\(^6\). In English this assistance is described as \textit{mutual assistance}\(^7\). In French the words \textit{entraide}, \textit{assistance mutuelle}, \textit{coopération}\(^8\) are used interchangeably. In Polish the scientists apply the expression \textit{wzajemna pomoc pomiędzy państwami członkowskimi} or \textit{międzynarodowa współpraca}\(^9\) and in this way they describe both the essence of this process and its name which does not have its statutory definition.

The fundamental aim of the regulations pertaining to the international mutual assistance to the discussed extent is to ensure that in each member state it is

\[^2\text{See: Smoktunowicz, Warsaw (1995).}\]
\[^4\text{See: Wettner (2005), Ślebzak (2012).}\]
\[^5\text{See: Mączyński (2009).}\]
\[^6\text{The indicated difference is, however, disputable in literature. More: A. Idziok (1997), Wettner (2005).}\]
\[^7\text{More: Lao (2013).}\]
\[^8\text{More: F. Wettner (2005) and listed reference books.}\]
possible to recover claims that aroused in another member state. The international mutual assistance is one of the fundamental principles of the international tax law. Since it allows enforcement measures to be applied with respect to the entity obliged to pay public debts, irrespective of its abode or registered office.

2. The historical outline of European regulations concerning international mutual assistance for the recovery of public claims

The first legal act that governed the mutual assistance of member states for the recovery of public claims was Council Directive No 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties. This legal act was implemented as a consequence of the failure to enforce the claim for recovering public claims that emerged prior to its enactment. The preamble of Directive No 76/308/EEC provided that a lack of specific regulations constituted the obstacle to implement and function the common market and that was one of the purposes of uniting member states.

The intensification of the flow of capital between the member states and the increase in migration of people resulted in the growth in the significance of the discussed regulations. This was expressed by the intensification of works that aimed at deepening the mutual assistance of the member states and the growth in efficiency of the actions taken. It was stated that there was a risk that problems with the trans-border recovery of claims may hinder the proper development of the internal market. Therefore, in 2008 there was executed the consolidated version of Directive No 76/308/EEC in a form of a new Directive No 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 scope of implementation of this legal act was considerably expanded in comparison with Directive No 76/308/EEC. The provisions of the 2008 Directive were elaborated through the implementation

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10 See: Mączynski (2009).
13 Concurrently, it is necessary to emphasize that the international mutual assistance to the discussed extent between the European states was still held in the mid-war period, more: Cannes (2013).

In connection with social and economic changes and gradual expansion of the EU, and for the purpose of the better protection of the member states’ financial interest and the assurance of the internal market, it was necessary to expand the scope of mutual assistance, and hence increase its efficiency. It was of paramount importance to replace the regulations in force with Council Directive No 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures\textsuperscript{17}. The adoption of this legal act created new and presently applicable mutual assistance frames for the development of the idea of the compulsory claim of public obligations, irrespective of the abode or the registered office of the entity obliged to perform such obligations\textsuperscript{18}.

### 3. Legislation in force in the European Union

In the reference books the reasons for adopting the 2010 Directive are classified in two groups. Firstly, the procedural argument was the excessive length of procedures conducted under the previous regulations, the increase in the number of EU member states and - this partly results from the increased number of the EU member states - the growing number of requests for the mutual legal assistance\textsuperscript{19}. Secondly, the argument concerning the European Community’s goal was to ensure the proper operation of the internal market, convergence of legal systems (including tax ones) of the member states, assurance of tax neutrality and security of the member states’ financial interests\textsuperscript{20}.

The selection of the form that determines the scope of mutual assistance between the member states needs to be considered as justified due to the legal


\textsuperscript{17} Council Directive No 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (Official Journal of the European Union L 84/1 of 31 March 2010), hereinafter referred to as Directive No 2010/24/EU.


\textsuperscript{20} See: Kortz (2012), Paduch (2012).
nature of the directive. Since this legal act is the key tool for harmonization of national laws in individual member states. This results from the adopted model of the integration of the member states’ legislations - the replacement of unification (substitution) with the harmonization process with respect to the fundamental and uniform level of regulation. The directives (at least direct ones) are addressed to the member states. This is depicted by the fact that directives constitute guidelines for the member states how to achieve objectives thereof. Therefore, the foregoing - in connection with the Community case-law that provides for the direct effectiveness of directives and the ability to derive rights from them - results in advancing a thesis about the hybrid nature of directives: on the one hand, this instrument is specific and individual (vis-à-vis addresses of directives), but on the other hand, it has some features of the general and abstract legal act to which - as the source of law - persons may refer.

Directive No 2010/24/EU retains three forms of mutual assistance specified in previous regulations, id est the provision of information by one member state, notification of an interested party or other persons of legal acts, and enforcement or indemnification of public claims. Whereas, the scope of mutual assistance was expanded and, in general, it covered any and all public claims. Concurrently, it is necessary to add that albeit the directive does not specify it directly, the mutual assistance may only apply to pecuniary claims.

Article 2, letter (c) of Directive No 2010/24/EU defines the term “person”, id est an entity to which mechanisms formulated in this legal act may apply. The aforesaid article provides that except for natural and legal persons, any other entities lacking the legal status of a legal person, but having legal capacity, as well as any other legal arrangement of whatever nature and form owning or managing assets which, including income derived therefrom, are subject to any of the taxes covered by this directive. The reference books indicate that the adopted legislative solution should ensure that norms concerning the international mutual assistance will cover any and all entities, the activity of which is subject to the tax obligation.

At the same time, as a result of the increased possibility of mutual assistance between the member states, the administrative apparatus authorised to perform activities pertaining to the legal assistance is developed. In particular, it is noteworthy that the uniform instrument permitting enforcement was established and solutions concerning the so-called mutual assistance of officials were implemented. Pursuant to Art. 7 of Directive No 2010/24/EU officials authorised

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23 See: Paduch (2012).
25 Skoczylas (2010).
by the applicant authority may be present in the offices where the administrative authorities of the requested member state carry out their duties, during administrative enquiries carried out in the territory of the requested member state, as well as assist the competent officials of the requested member state during court proceedings in that member state. The presence of officials of the applicant member state may be, however, limited by the requested state’s legislation27.

The first form of mutual assistance set forth in the directive is the possibility to request to provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims [Art. 5(1) of Directive No 2010/24/EU]. In case of this kind of mutual assistance there applies the mutuality principle, which, by the way, is considered as the fundamental requirement for ensuring the efficiency of the international mutual assistance for the recovery of public claims28. In view of this principle the requested authority is not obliged to supply information which it would not be able to obtain for the purpose of recovering similar claims arising in the requested member state [Art. 5(2)(a) of Directive No 2010/24/EU]. At the same time, it is worth mentioning that Art. 6 of Directive No 2010/24/EU also provides for the exchange of information without any prior request. In the reference books this kind of regulation is referred to as the “spontaneous, occasional” exchange of information29. In practice, this kind of providing information may emerge to be more effective than the provision of information at the request because it applies to information obtained by the tax authority as part of its official actions30.

Another available form of mutual assistance is the assistance for the notification of documents. The requested authority notifies to the addressee all documents which emanate from the applicant member state and which relate to claims as referred to in Directive No 2010/24/EU. A request for notification may be made only when it is unable to notify in accordance with the rules governing the notification of the document concerned in the applicant member state, or when such notification would give rise to disproportionate difficulties (Art. 8(2) of Directive No 2010/24/EU). This solution protects against the excessive and unjustified use of the applied mechanisms by the individual member states in cases where it is possible to implement other legal instruments that do not request the authorities of the requested state to involve31.

The most significant form of mutual assistance specified as the fundamental one32 is the assistance for the recovery of claims covered by Directive No 2010/24/EU. However, in order to apply this kind of mechanism, it is necessary to observe some

30 More on this exchange of information, see: Jeong (2013).
specific formal conditions. Firstly, it is necessary to draw attention to the fact that the making of the request for mutual assistance for the recovery of claims - as a matter of principle - is possible only after conducting the procedure in the home state of the obliged party. It is exceptionally essential due to the possibility to refuse to grant the mutual assistance in the event that from the maturity date of the claim to the date of making a request lapsed at least five years\textsuperscript{33}. The exception to this rule in a situation when in the applicant member state there are no assets for recovery or the procedure does not result in the entire reimbursement of claims, and the applicant has information on assets located in the requested member state. It is possible to withdraw from conducting the prior enforcement procedure in the applicant member state when it would give rise to disproportionate difficulty. The exception to the rule that necessitates the prior exhaustion of means of recovery claims in the member state that applies for mutual assistance is a novelty in comparison with the previous laws that did not lay down any exceptions to this extent\textsuperscript{34}. In terms of the protection of interests of the entity obliged to pay claims the guarantee provision is the inability to make a request for recovery as long as the claim or the instrument permitting its enforcement in the applicant member state are contested in that member state [Art. 11(1) of Directive No 2010/24/EU].

In order to facilitate the mutual assistance between member states there was implemented the obligation to append the uniform instrument permitting its enforcement to the request for recovery in that member state. Its aim is to reflect the content of the initial instrument permitting its enforcement and its supplement or approval in the requested member state is impermissible. Further, there is no need to approve its content prior to commencing the recovery procedure [Art. 11(1) of Directive No 2010/24/EU]. The adoption of the mechanism of making a uniform instrument permitting its enforcement aims at solving problems concerning the recognition and translation of instruments permitting its enforcement made in various member states\textsuperscript{35}. A lack of this solution constitutes one of the crucial reasons for the ineffectiveness of the applicable findings with respect for the mutual assistance for recovery of claims.

Directive No 2010/24/EU directly provided that, as a rule, any claims in respect of which a request for recovery has been made by the applicant member state should be treated as if they were claims of the requested member state [Art. 13 (1) of the Directive]. The introduction of this kind of mechanism in juxtaposition with the rule of inability to recognise, supplement or replace the uniform instrument permitting its enforcement undoubtedly forms the basis for the deepening trust between the EU member states. Further, the equation of the

\textsuperscript{33} More: Lao (2013).
\textsuperscript{34} More: Seer (2011).
\textsuperscript{35} More: Lao (2013).
mode of recovering claims as part of the discussed provisions with the recovery on the basis of the national law ensures the efficiency of the mutual assistance system.

The mode of procedure that applies to the request for granting the mutual assistance is fundamentally governed by the law of the state granting the mutual assistance. This means that the lex fori principle applies in compliance with the locus regit actum principle. Therefore, the procedure for granting the mutual assistance is affected by the legal system that applies in the office of the authority granting the mutual assistance. The Polish reference books set forth that the qualification of a given action in compliance with the legis fori principle is much simpler as the requested authority better knows its own law36.

A display of the mutual assistance and trust between the member states which realize requests for recovery of claims is to implement the duty to inform the applicant authority of any action it has taken on the request for recovery (Art. 13(2) of Directive No 2010/24/EU). Further, the requested authority may, where the laws, regulations or administrative provisions in force in the requested member state so permit, allow the debtor time to pay or authorise payment by instalment (Art. 13(4) of the Directive). Moreover, there was implemented the rule that the requested member states renounce - pursuant to Art. 20 (2) of Directive No 2010/24/EU - all claims on each other for the reimbursement of costs arising from any mutual assistance.

A display of the trust between the member states is also the possibility to use precautionary measures as part of the international mutual assistance conducted under Directive No 2010/24/EU (Art. 16)37. In this case, the mutual assistance principle applies, as well. In addition, the condition essential for taking precautionary measures is also to ensure that the national law of the requested state provides for their implementation and it is in compliance with the applicable administrative practices.

In order to fully protect the entity’s rights against which the procedure for the recovery of claims is conducted, authorities of the applicant state has jurisdiction with respect to disputes about claims covered by the initial instrument permitting enforcement. In this case, the enforcement procedure is suspended. In exceptional and justified cases it is possible to conduct the procedure at the request of the applicant state. In the event that the dispute is solved for the benefit of the debtor, any costs of the procedure and any possible damages will be incurred by the applicant member state. Disputes concerning the enforcement measures taken in the requested member state will be brought before the competent body of that member state (Art. 14(2) of Directive No 2010/24/EU).

Directive No 2010/24/EU provided for the possibility to refuse to grant the assistance, if recovery of the claim would, because of the situation of the debtor,

36 See: Skoczylas (2010).
create any 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 renunciation [Art. 18(1) of Directive No 2010/24/EU]. The requested authority is not obliged to grant the assistance provided for in the provisions thereof in respect of the claims which are more than 5 years old, dating from the due date of the claim in the applicant member state [Art. 18(2) of Directive No 2010/24/EU]. At the same time, there was introduced a quota limitation concerning the obligation to grant the assistance with a proviso that the member state may refuse to grant assistance if the total amount of the claims covered by this directive is less than EUR 1,500. The introduction of this kind of regulations specified by the de minimis principle is justified by the need to limit a potential growth in the number of requests for mutual assistance only to those cases in which the involvement of administrative authorities of the member states is economically justified.  

Directive No 2010/24/EU also postulated to implement the obligation to communicate requests and documents in a digital form and via an electronic network. This allows the member states to handle requests faster and more easily. There was developed a common platform based on the common communication network (CCN). The rule is that requests are sent in the official language of the requested member state.  

Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive No 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures implemented regulations aimed at establishing practical aspects of mutual assistance between the member states. This legal act details the mode of performing the mutual assistance via the CCN. Furthermore, the regulation includes some detailed regulations pertaining to the mode of mutual assistance between the member states with respect to each of the forms of mutual assistance referred to in the directive, id est the communication of information, notification and recovery of claims.  

The significance of the provisions of Regulation No 1189/2011 play a crucial role for the course of mutual assistance between the member states for the recovery of claims covered by this directive. Although the Community regulations have general application, they are binding in their entirety and directly applicable in all member states (second paragraph of Art. 249 of the Treaty Establishing the European Community). It is noteworthy that as a rule provisions of the Community regulations should be complete in order not to be supplemented by the national law.

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38 See: Vascega, Van Thiel (2010).  
4. The national regulations on the basis of Polish law

Directive No 2010/24/EU imposed the obligation to adopt and publish not later than 31 December 2011 the statutory secondary and administrative regulations that would implement the solutions referred to therein. Since it is necessary to point out that the directive is binding on the member state not only with respect to the purpose (result) therein, but also to the deadline as referred to therein. This strengthens the legally binding directive41.

In the Polish legal system regulations that govern the course of mutual assistance between the member states and Poland for the recovery of claims were initially regulated in the Act of 17 June 1966 on Administrative Enforcement Proceedings42. The need to regulate the issue of granting the mutual assistance to a foreign state and the use of its assistance for the recovery of pecuniary claims in the Polish enforcement act resulted from the need to follow the principle of application of domestic procedural law (lex fori processualis) which constitutes one of the fundamental principles of all procedures43. Since the sovereignty of the state requires it to establish the form and methods of its authorities’ activity44.

The Act of 11 October 2013 on Mutual Assistance for the Recovery of Taxes, Duties and Other Measures45 eliminated the provisions governing modes of mutual assistance with foreign states for the recovery of claims arising out of the Act on Administrative Enforcement Proceedings. They were replaced with a structurally separate act, and thus Directive 2010/24/EU was finally transposed to Polish law and the framework of principles of mutual assistance between the member states for the recovery of public claims so far governed by the Act on Administrative Enforcement Proceedings was expanded. It is necessary to point out that Art. 4(1) of this Act lays down that the procedure under the mutual assistance for the recovery of public claims is conducted under principles set forth in the Act on Administrative Enforcement Proceedings, whereas Art. 4(2) provides for the obligation to properly apply the provisions referred to in Act of 14 June 1960 on Code of Administrative Procedure46 unless otherwise specified therein. Therefore, the discussed legal act refers, with respect to the course of the procedure, to two key acts for the course of the administrative procedure, the aim of which is to seek claims.

The resignation from implementing the regulations concerning the international mutual assistance for the recovery of public claims in the legal act

43 See: Skoczylas (2010).
governing the administrative enforcement procedure to the development of a new separate act was to more effectively use and grant the mutual assistance and ensure the broader exchange of information between the member states. The development of the act separate from the Act on Administrative Enforcement Proceedings is to guarantee the efficiency, reliability, transparency and promptness of activities carried out by the authorities of the member state with respect to the mutual assistance for the recovery of pecuniary claims\textsuperscript{47}. In the remaining EU member states, for instance Germany, directive 2010/24/EU was also implemented through the enactment of a separate legal act\textsuperscript{48}. As for the German act it is noteworthy that the realisation of requests for mutual assistance refers to the Tax Ordinance, not to the provisions of the general administrative procedure\textsuperscript{49}. 

5. Summary

Undoubtedly, the international mutual assistance of the member states for the recovery of public claims will further deepen. Since it is necessary to emphasize that the tax system cannot be considered as fair and complete, if it does not guarantee mechanisms aimed at the compulsory recovery of claims\textsuperscript{50}. The speeding up and improvement of the realisation of requests for granting the mutual assistance facilitate providing the request to the member state or a third-party state, which guarantees more effective enforcement.

At the same time, the laws in force lease some judicial discretion with respect to some disputable situations between the member states. From the discussed regulations there may also be drawn a conclusion that they reflect the deepening mutual trust of enforcement authorities of the member states. For example, this is proved by a situation in which some employees of the third-party state’s authorities can be present in the performance of any actions concerning the request for the mutual assistance. Moreover, it is noteworthy that the rule of resigning from seeking the reimbursement of costs arising in connection with the assistance procedure was established.

It needs to be emphasized that the EU and national laws in force should not narrow the mutual assistance between the individual member states as part of mutual or multilateral arrangement or agreements. As part of these mutual or multilateral arrangement or agreements it is possible meet any and all obligations broader than specified in Directive No 2010/24/EU. Concurrently, Art. 24 (3) of Directive No 2010/24/EU makes it possible to carry out the mutual assistance to the broader extent via the communication network established for the needs of the member states and standard forms.

\textsuperscript{47} The statement of reasons for the proposal is available at www.rcl.gov.pl.
\textsuperscript{49} More: Gabert (2012).
\textsuperscript{50} See: Bal (2011).
Despite some limitations resulting from the applicable regulations, it needs to be said that they ensure the broad and effective cooperation between the member states for the recovery of public claims. The introduction of standards with respect to the content and form of the uniform instrument permitting enforcement and the establishment of the communication network between the authorities authorized to meet obligations resulting from the adopted regulations ensure that there are not any misunderstandings and language problems and introduce the unified framework of the course of the procedure itself. Concurrently, the possibility to intensify the cooperation under the bilateral agreements undoubtedly allows for a possible tightening of the cooperation between the individual member states due to the increased turnover with respect to the economic relationships between individual EU member states.

References