

The ECJ and the Mutual Assistance Directive¹

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1 Introduction

In 1977 the European Council adopted the ‘Directive Concerning Mutual Assistance by the competent Authorities of the Member States in the Field of Direct Taxation’.³ The implementation deadline of this Directive was 1 January 1979. On 6 December 1979 the Council adopted an amendment to the Directive, extending its scope to value added tax (VAT), an extension which was rescinded by an amendment of 2003.⁴ However, it was not until 1992 that the Court of Justice of the European Communities (ECJ) made its first reference to the Directive. This was on 28 January 1992 in the *Bachman* case and the *Commission v. Belgium* case.⁵ Between 1 January 1992 and 1 May 2009 the ECJ referred to the Directive in 35 cases (34 judgments and one order). In this paper I analyse these cases with regard to the different types of references to the Directive that can be distinguished and the way references to the Directive have evolved over time. A summary of the most important features of all cases which have regard to the Directive is included in Annex I to this paper. As the references in several cases were derived from the purpose of the Directive, I start with the purpose of the Directive as defined by the ECJ.

2 Purpose of the Directive

In several cases the ECJ specified the purpose of the Directive. In the 2000 *W.N.* case,⁶ the ECJ observed that the purpose of the Directive could be found in the sixth recital in the preamble to the Directive:

“Whereas the Member States should exchange, even without any request, any information which appears relevant for the correct assessment of taxes on income and on capital, in particular where there appears to be an artificial transfer of profits between enterprises in different Member States or where such transactions are carried out between enterprises in two Member States through a third country in order to obtain tax advantages, or where tax has been or may be evaded or avoided for any reason whatever;”

In paragraph 15 and 22 of the *W.N.* case, the ECJ defined the purpose of the Directive as follows:

“15. (...) Since, in accordance with the sixth recital in the preamble thereto, the purpose of the Directive is the correct assessment of taxes on income and on capital in the different Member States, it provides for the exchange of any information which appears relevant for that purpose.”

¹ This paper is part of the research programme ‘Limits of Tax Sovereignty’ of the Leiden University Graduate School of Legal Studies.

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³ Council Directive 77/799/EEC of 19 December 1977, O.J. no. L 336 of 27 December 1977, p. 15. Hereafter the (amended) directive will be referred to as the ‘Directive’.

⁴ Council Directive 79/1070/EEC of 6 December 1979 (amending Council Directive 77/799/EEC), O.J. no. 331 of 27 December 1979, p. 8. VAT was deleted from the scope of the Directive by Council Directive 2003/93/EC of 7 October 2003 (amending Council Directive 77/799/EEC), O.J. no. L 264 of 15 October 2003, pp. 23-24.

⁵ ECJ, 28 January 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State* and ECJ, 28 January 1992, Case C-300/90, *Commission v. Kingdom of Belgium*.

⁶ ECJ, 13 April 2000, Case C-420/98, *W.N. and Staatssecretaris van Financiën*.

“22. In the light of the purpose of the Directive, which is not only to combat tax evasion and avoidance, but also to enable a correct assessment of taxes on income and on capital to be effected in the different Member States (...)”

The purpose of the Directive is therefore twofold: (1) to combat tax evasion and avoidance and (2) to enable a correct assessment of taxes on income and capital in the different member states. The ECJ confirmed this in paragraph 70 of the 2006 *Commission v. Council* case:⁷

“According to the first, fourth and sixth recitals in the preamble to Directive 77/799, its purpose is to combat tax evasion and tax avoidance extending across the frontiers of Member States, by strengthening collaboration between the tax administrations of Member States so as to enable them to make a more correct assessment of taxes on income and on capital.”

and in paragraph 30 of the 2007 *Twoh* case:⁸

“First, concerning the purpose of those two Community measures, the first and second recitals of the mutual assistance directive and the third recital of the administrative cooperation regulation show that their aim is to combat tax evasion and avoidance and to allow Member States to determine exactly the amount of tax to levy (see, by analogy, Case C-420/98 W.N. [2000] ECR I-2847, paragraphs 15 and 22 (...).”

3 The different types of references to the Directive

In the 35 cases, 12 different kinds of references to the Directive may be distinguished. I have distinguished five main references, indicated by the letters A-E, each of which can be sub-referenced, applying a number after the letter of the main reference. The main references do not have a number linked to them. This results in the following categorisation of references:

A. Under the Directive, a member state may request another member state to provide all the information necessary to make a correct assessment of the taxes referred to by the Directive (article 1(1)). Lack of effective fiscal supervision/controls is therefore not accepted as a (proportional) justification and residents and taxpayers resident in another member state are in the same situation.

A1 The information which the Directive allows a member state to request is in fact all the information which appears to them to be necessary in order to ascertain the correct amount of tax in relation to the legislation which they have to apply themselves. The Directive does not in any way affect the competence to assess in particular whether the conditions to which that legislation subjects the exemption of an operation are fulfilled.

A2 Member states are not obliged to request information from another member state (if so asked by a taxpayer who cannot provide the necessary evidence). The purpose of the Directive is to combat tax evasion and avoidance and to allow member states to determine exactly the amount of tax to levy. The Directive was not adopted for the purpose of establishing a

⁷ ECJ, 26 January 2006, Case C-533/03, *Commission v. Council of the European Union*.

⁸ ECJ, 27 September 2007, Case C-184/05, *Twoh International BV v. Staatssecretaris van Financiën*.

system for exchanging information between member states allowing them to establish facts for which a taxpayer is unable to provide the necessary evidence. The Directive was adopted to govern cooperation between the tax authorities of the member states; it confers no rights on individuals. Whilst those authorities have the possibility to request information from the competent authority of another member state, such a request does not in any way constitute an obligation.

- B. The fact that article 8(1) of the Directive imposes no obligation on the other member state to collaborate on a request for information is not a justification: there is nothing to prevent tax authorities from demanding such proof from the taxpayer involved as they consider necessary and, where appropriate, from refusing to allow a deduction or exemption where such proof is not forthcoming. Lack of effective fiscal supervision is therefore not accepted as a justification.

B1 The Directive, and in particular Article 8(1) thereof, does not preclude two member states from binding themselves by means of an international convention, with the intention of avoiding double taxation and from setting up rules for reciprocal administrative assistance in the area of taxes on income and capital which excludes from its scope, in respect of one member state, one category of taxpayers subject to a tax covered by that Directive, if the competent authority of the member state which should furnish information is prevented by its laws or administrative practices from collecting or using such information for that member state's own purposes, this being a matter which is for the national court to verify.

B2 The fact that the Directive does not apply to a specific tax cannot justify the categorical refusal to grant the tax benefits since the tax authorities could request the taxpayers concerned themselves to provide the evidence which the authorities consider necessary to be fully satisfied that such benefits are granted only where the criteria set out under national law are fulfilled.

- C. Because of the Directive, the taxation of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between member states and third countries. A difference in treatment of foreign-sourced income or the granting of tax benefits may therefore be compatible with the EC Treaty. It may also be that a member state is able to demonstrate that a restriction regarding third countries is justified for a particular reason in circumstances where that reason would not be a valid justification for a restriction regarding member states. Where the legislation of a member state makes the grant of a tax advantage dependent on satisfying certain requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that member state to refuse to grant that advantage, particularly if, because that third country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country.

- D. Directive does or does not harmonise taxes

D1 In so far as it concerns VAT, the Directive is not an act on the harmonisation of the legislation of member states.

D2 The provisions of the Directive constitute ‘fiscal provisions’. This includes all aspects of taxation, whether concerning material or procedural rules. The aim and content of the Directive is the approximation of laws, regulations and administrative provisions of the member states in tax matters.

E. Interpretation of definitions used in the Directive

E1 Interpretation of the expression ‘loss of tax’ in article 4(1)(a) of the Directive: it does not have to be covered by an express measure of another member state and it refers to an unjustified saving in tax in another member state.

E2 The Directive provides some criteria for the interpretation of the expression ‘direct tax’ for other purposes: this includes taxes on total income and capital or on elements of income or of capital, irrespective of the manner in which they are levied.

E3 Definition of ‘tax on capital’: list of taxes and duties specified in article 1(3) is not exhaustive and also relates to legal persons.

In the following paragraphs, I discuss these different types of references in detail, but first provide an analysis on the number of times the ECJ has referred to the Directive in the past 17 years and the type of references most used.

4 References to the Directive over time

Until 2006, the ECJ, with two exceptions, only used the references which it formulated in 1992 in the *Bachman* and the *Commission v. Belgium* cases (A- and B-types).⁹ As of 2006 other kind of judgments became more important, but the two 1992 types were still dominant, especially the A-type reference, which was used in 25 cases. The B-type came second with a reference in 13 cases, followed by the C-type, which was used five times. All other references were only used in one or two cases.

The table below summarises the use of the different types of references over time:

year	# ¹⁰ cases	kind of reference
Before 1991	0	
1991-1995	6	A (6x), B (2x)
1996-2000	3	A (2x), B (2x), E1 (1x)
2001-2005	4	A (3x), B (3x), D1 (1x)
2006-2009	22	A (14x), A1 (2x), A2 (2x), B (6x), B1 (1x), B2 (2x), C (5x), D2 (1x), E2 (1x), E3 (1x).

⁹ ECJ, 28 January 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State* and ECJ, 28 January 1992, Case C-300/90, *Commission v. Kingdom of Belgium*.

¹⁰ # is short for ‘number of’.

This table also shows that after the ECJ referred to the Directive in several cases between 1992 and 1995, the Directive was not so much an issue in judgments which were delivered between 1996 and 2006. As of 2006 the Directive became more prominent in the judgments of the ECJ. The year 2007 was definitely the ‘Year of the Directive’ in ECJ case law. In that year the ECJ referred to the Directive in ten different cases, which is a record up to now.

From the table in Annex I it can be concluded that the A-type reference is both used in combination with the B-type reference (13 cases) and as a stand alone reference (12 cases). The B-type reference is always used in combination with the A-type reference. This makes sense as the B-type reference builds on the A-type.

In the table in Annex I, I have also included the chamber which delivered the case. The A- and B-type references are used by all chambers. The C-type is used in four judgments by the Grand Chamber and in one order by the Fourth Chamber. The other references have not been applied in enough cases to draw conclusions about their use by specific chambers. In general, it seems that the chamber delivering the judgment does not really have an impact on the question whether, and which, reference will be made to the Directive.

5 The different types of references

5.1 A-type and its subtypes: Because the Directive provides for the possibility to request information, lack of effective fiscal supervision is not an accepted (proportional) justification and residents and taxpayers resident in another member state are in the same situation.

5.1.1 The wording of the A-type reference

Together with the B-type reference, the A-type is the oldest reference and the reference used most often, also in recent cases. The A-type reference is based on article 1(1) of the Directive:

“In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital.”

In paragraph. 19 of the *Bachman* case¹¹ the A-type reference is formulated as follows:

“As regards the effectiveness of fiscal controls, it should be observed that Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (Official Journal 1977 L 336, p. 15, hereinafter referred to as “the Directive”) may be invoked by a Member State in order to check whether payments have been made in another Member State where it is necessary, as in the main proceedings in this case, for those payments to be taken into account in order correctly to assess the income tax payable (Article 1(1)).”

Except for some minor differences (a difference which might be explained by the fact the cases were translated into English from German and French) paragraph. 11 of the *Commission v. Belgium* case¹² uses the same wording. Over the years and in

¹¹ ECJ, 28 January 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State*.

¹² ECJ, 28 January 1992, Case C-300/90, *Commission v. Kingdom of Belgium*.

accordance with the wording of article 1(1) the reference was adapted and generalised in order to be able to not only apply this reference to information on payments and income tax but also to other taxes and other information needed to assess the correct amount of tax to be paid. Already in the 1994 *Halliburton* case,¹³ the third case in which a reference was made to the Directive, the ECJ stated that the system of exchanging information relates to *any* information which may enable the competent authorities of the member state to make a correct assessment of the taxes referred to by the Directive (paragraph 22). Otherwise, the reference did not really change. In paragraph 61 of the *Persche* case¹⁴ (2009) the reference was formulated as follows:

“Moreover, the tax authorities concerned may, pursuant to Directive 77/799, call upon the authorities of another Member State in order to obtain all the information that may be necessary to effect a correct assessment of a taxpayer’s liability to tax.”

5.1.2 A-type used in all parts of the testing framework

Initially, the ECJ used the A-type reference when discussing possible justifications for a restriction of a fundamental freedom. Member states would argue that a restriction was justified because of the necessity to maintain the effectiveness of fiscal controls,¹⁵ also described as effective fiscal supervision.¹⁶ Administrative difficulties would prevent the authorities of one member state from asserting relevant facts in the other member state. However, in the 1992 *Bachmann* and *Commission v. Belgium* cases, the ECJ decided that because of the existence of the Directive, supposed difficulties of checking certain facts in another member state were not a sufficient justification. The Directive provides for ways of overcoming such administrative difficulties.¹⁷

In paragraph 51-52 of the third *Commission v Belgium* case¹⁸ ECJ did not reject a justification as such because of the Directive, but it ruled that because of the Directive an objective could be met by means of less restrictive measures. The A-type reference is therefore also used in the context of the proportionality test applied by the ECJ.

Furthermore, the ECJ also used this type of reference in the first phase of the framework the ECJ applies to test a measure, namely the question whether a measure is discriminatory. In paragraph 45 of the *Schumacker* case¹⁹ the ECJ noted that the Directive provides for ways of obtaining information comparable to those existing between tax authorities at national level. This observation was still linked to the rule of reason (the question whether a restriction is justified) as for this reason the ECJ renounced administrative difficulties as justifications for a restriction. However, in paragraphs 29 and 30 of the *Talotta* case²⁰ the ECJ explicitly stated that because of the Directive, resident taxpayers and non-resident taxpayers are in an objectively comparable situation as regards the means of proof available to the tax authorities.

¹³ ECJ, 12 April 1994, Case C-1/93, *Halliburton Services BV v. Staatssecretaris van Financiën*.

¹⁴ ECJ, 27 January 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*.

¹⁵ This is the original wording used in paragraph 11 and 18 of the *Commission v. Belgium* and *Bachman* Case respectively.

¹⁶ For example paragraph 31 of ECJ, 4 March 2004, Case C-334/02, *Commission v. French Republic*.

¹⁷ This wording is used in paragraph 29 of the *Martínez* Case (ECJ, 5 October 1995, Case C-321/93, *José Imbernon Martínez v. Bundesanstalt für Arbeit*).

¹⁸ ECJ, 5 July 2007, Case C-522/04, *Commission of the European Communities v. Kingdom of Belgium*.

¹⁹ ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland*.

²⁰ ECJ, 22 March 2007, Case C-383/05, *Raffaele Talotta v. État Belge*.

The ECJ ruled (paragraph 32) that different treatment of resident and non-resident taxpayers therefore constituted indirect discrimination.

5.1.3 ECJ assumes perfect application of Directive and does not allow for practical problems in its application

By 1995, after the first four cases in which the ECJ referred to the Directive, the ECJ had made it clear that because of the Directive, supposed difficulties in getting information from other member states could not be accepted as a justification. One might wonder why the ECJ still had to use the A-type reference in 20 cases after 1995: should member states not have known better than to rely on the argument of administrative difficulties to justify a measure?

This might be explained by the fact that in its judgments the ECJ only took into account the Directive itself, the juridical rules. It never looked at the practical application of the Directive. Member states were of course confronted with the fact that the Directive, in practice, did not always work as it should in theory. Gustafsson Myslinski distinguishes three different kinds of problems related to the efficiency of mutual assistance in tax affairs: (1) political problems; (2) administrative problems; and (3) legal problems.²¹ Furthermore, she notes that problems regarding the use of received information can arise if the tax authorities involved use different methods in communication and that another problem may be to identify the correct taxpayer. Language problems may also make the Directive less effective in practice than it should be in theory. Gabert,²² Selicato²³ and Äimä, Lahdenperä and Soimila²⁴ refer to such problems. Gabert also mentions the poor quality of answers received (p. 48), lack of a comprehensive electronification of the process and standardised application forms and delays in the exchange of information because of the need or right to a hearing based on national law (p. 49). Such problems may explain the fact that up to the last case included in this research (the 2009 Persche case), member states continue trying to justify certain restrictions based on difficulties in obtaining the information needed. Governments have argued that the Directive is not a sufficiently effective tool to overcome certain difficulties²⁵ or is simply inadequate.²⁶ However, the ECJ does not take into account the way the Directive works in practice. This might help in making the Directive more effective. Member states will by now probably be aware that the ECJ is not allowing for any excuses when the Directive may be applied and will therefore have an incentive to strive to resolve practical problems which currently have negative effects on the effectiveness of the Directive.

²¹ U. Gustafsson Myslinski, *Mutual assistance in Tax Affairs. Swedish national report to the conference of the European Association of Tax Law Professors in Santiago de Compostela, June 2009*, p. 20-21.

²² I. Gabert, *Mutual Assistance in Tax Affairs (German Report)*, p. 48.

²³ P. Selicato, *Questionnaire on the mutual assistance in tax affairs (Italian report)*, p. 46.

²⁴ K. Äimä, O. Lahdenperä and H. Soimila *Finish National report on Mutual Assistance in Tax Affairs*, p. 18.

²⁵ The Finnish and Danish government in paragraph 47 of ECJ, 3 October 2002, Case C-136/00, *Rolf Dieter Danner*.

²⁶ The Swedish and Danish government in paragraph 38 of ECJ, 26 June 2003, Case C-422/01, *Försäkringsaktiebolaget Skandia (publ), Ola Ramstedt and Riksskatteverket*.

5.1.4 A1-Type: The Directive allows member states to request all information deemed necessary and does not affect their competence to assess whether conditions are fulfilled

The A1-type reference was introduced in paragraph 28 of the Vestergaard case:²⁷

“(…) it should be emphasised that the information which Directive 77/799 allows the competent authorities of a Member State to request is in fact all the information which appears to them to be necessary to ascertain the correct amount of revenue tax payable by a taxpayer in relation to the legislation which they have to apply themselves (see, to this effect, Futura Participations and Singer, at paragraph 41) and that the directive does not in any way affect the competence of those authorities to assess in particular whether the conditions to which that legislation subjects the deduction of certain costs are fulfilled.”

The A1-type reference is, in fact, a sub-type of the A-type reference and was used in a similar way as the A-type reference in the Vestergaard case. The reason for distinguishing the A1-type from the A-type is that the ECJ has given it a different function since the Vestergaard case. In paragraph 36 of the Twoh Case²⁸ this reference was used to define the purpose and scope of the Directive. In paragraphs 62-63 of the Persche case²⁹ it was also used to determine the scope of the Directive. Therefore, the A1-type reference has been used in a different way from the A-type reference's usage. The ECJ does not apply the A-type to define the scope of the Directive, but to reject (the proportionality of) justifications or to assess indirect discrimination.

5.1.5 A2-type: The Directive does not impose upon member states an obligation to request information from other member states upon request of a taxpayer

In 1992 the ECJ clearly established that member states may invoke the Directive in order to receive specific information about a taxpayer from another member state. However, it left unclear whether a member state was *obliged* to request information from another member state in particular circumstances, for example, in a situation where a taxpayer does not possess information that is needed to qualify for a specific tax benefit. In the 2007 Twoh case,³⁰ this question was answered. The ECJ deduced the answer from the purpose and content of the Directive (paragraph 29). It observed that the first and second recitals of the Directive show that its aim is to combat tax evasion and avoidance and to allow member states to determine exactly the amount of tax to levy. Furthermore, the ECJ stated that it is clear from the title of the Directive that it was adopted to govern cooperation between the tax authorities of the member states (paragraph 31). The ECJ concluded in paragraph 32:

“The mutual assistance directive does provide, with a view to preventing tax evasion, for the possibility of national tax authorities requesting information which they cannot obtain for themselves. Thus, the fact that, (...) in Article 2(1) of that directive (...), the Community legislature used the word ‘may’ indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning

²⁷ ECJ, 28 October 1999, Case C-55/98, *Skatteministeriet and Bent Vestergaard*.

²⁸ ECJ, 27 September 2007, Case C-184/05, *Twoh International BV v. Staatssecretaris van Financiën*.

²⁹ ECJ, 27 January 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*.

³⁰ ECJ, 27 September 2007, Case C-184/05, *Twoh International BV v. Staatssecretaris van Financiën*.

transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State.”

The Directive therefore does not impose an obligation on member states to request information from another member state: it does not give rights to taxpayers. Furthermore, the ECJ observed in paragraph 33 that the Directive also limits the cooperation between member states, as the state from which information is requested is not required to supply the information in all circumstances; for example, when the requesting state has not exhausted its own usual sources of information (article 2(1) of the Directive).

In the Persche case,³¹ the ECJ repeated its observation that the Directive does not require a member state to use the mechanism of mutual assistance under the Directive each time that the information provided by the taxpayer insufficient to establish whether certain conditions of the tax legislation are met (paragraph 64). In paragraph 65 of this case, the ECJ quoted paragraph 32 of the Twoh case. The ECJ, therefore, did not change its view that taxpayers cannot derive rights from the Directive and that it is up to the member states to decide whether they want to submit a request for information based on the Directive. If a taxpayer cannot himself provide the information needed to be granted a tax benefit, he cannot force his member state to obtain such information through the Directive.

5.2 B-type and its sub-types: Even if the Directive does not apply, a categorical refusal of a tax benefit is not allowed: the taxpayer must be allowed to provide proof

5.2.1 B-type: That the Directive imposes no obligation to collaborate is not a justification: proof may be required from the taxpayer

Article 8(1) of the Directive limits its scope, as it does not require member states to provide information which, based on national legislation, may not be exchanged. This is, for example, important for countries with bank secrecy regulations. The wording of article 8(1) is as follows:

“This Directive shall impose no obligation to have enquiries carried out or to provide information if the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes.”

In the first cases in which the Directive was mentioned, a question arose whether this article, and the supposed lack of effectiveness of fiscal supervision caused by it, provided a justification for refusing to grant specific tax benefits to a taxpayer in another member state. The ECJ decided in the 1992 *Bachman and Commission v. Belgium* cases, that no such justification existed as member states can request the information directly from the taxpayer if the other state would not exchange information. Paragraph 20 of the *Bachman* case (and, with slightly different words, probably due to translation differences, paragraph 13 of the *Commission v. Belgium* case) introduced this type of reference:

³¹ ECJ, 27 January 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*.

“It should be noted in that regard that Article 8(1) of the Directive imposes no obligation on the tax authorities of Member States to collaborate where their laws or administrative practices prevent the competent authorities from carrying out enquiries or from collecting or using information for those States’ own purposes. However, the inability to request such collaboration cannot justify the non-deductibility of insurance contributions. There is nothing to prevent the tax authorities concerned from demanding from the person involved such proof as they consider necessary and, where appropriate, from refusing to allow deduction where such proof is not forthcoming.”

In both the A-type and B-type reference, the ECJ therefore made clear that member states have to actively request information, either from other member states or from the taxpayer. The fact that information is not readily available is not a justification to deny a resident of another member state a tax benefit. The taxpayer has to be given the possibility to provide the proof that he is entitled to such benefit.

Up to 1 May 2009 this B-type reference was used in 13 cases, amongst others well known cases such as *Futura* (1997, paragraph 43),³² *Danner* (2002, paragraph 49)³³ and *Papillon* (2008, paragraph 56)³⁴ and it did not change significantly. Over time, the ECJ adapted and generalised the wording of this reference to be able to apply the reference to tax benefits other than the deductibility of insurance premiums. For example, the ECJ used this reference in relation to the carry forward of losses (*Futura*), a deduction for losses stemming from write-downs to the book value of shareholdings in subsidiaries established in other member states (*Rewe Zentralfinanz*)³⁵ and tax exemptions (*ELISA*,³⁶ A³⁷). However, the content of the reference remained basically the same. Paragraph. 69 of the *Persche* case³⁸ reads:

“Indeed, even if it proves difficult to verify the information provided by the taxpayer, in particular due to the limited nature of the exchange of information provided for by Article 8 of Directive 77/799, nothing prevents the tax authorities concerned refusing the deduction applied for if the evidence that they consider they need to effect a correct assessment of the tax is not supplied.”

The main message of the B-type reference did therefore not change between 28 January 1992 and 27 January 2009.

5.2.2 Cases referred to in A- and B-type references

In paragraphs 5.1.1 and 5.2.1 it was concluded that the A- and B-type references have changed little since their introduction in the *Bachman* and *Commission v. Belgium* cases in 1992. Although the content of both the A- and B-type reference did not really change, the ECJ did vary the cases it referred to when applying these references. The following table summarises the various cases the ECJ mentioned when using the A- and B-type references:

³² ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*.

³³ ECJ, 3 October 2002, Case C-136/00, *Rolf Dieter Danner*.

³⁴ ECJ, 27 November 2008, Case C-418/07, *Société Papillon v. Ministère du Budget, des Comptes publics et de la Fonction publique*.

³⁵ ECJ, 29 March 2007, Case C-347/04, *Rewe Zentralfinanz eG, as universal legal successor of ITS Reisen GmbH v Finanzamt Köln-Mitte*.

³⁶ ECJ, 11 October 2007, Case C-451/05, *Européenne et Luxembourgeoise d’investissements SA (ELISA) v. Directeur général des impôts, Ministère public*.

³⁷ ECJ, 18 December 2007, Case C-101/05, *Skatteverket v. A*.

³⁸ ECJ, 27 January 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*.

References to other cases in A- and B-type references

Case (year of case, type if A only)	no.	Year of reference (amount if >1 ref.)	Type ref.
Schumacker (1995, A)	1	1995	A
Bachmann (1992)	5	1999, 2002, 2003, 2007, 2009	B
Commission v. Belgium (1992)	5	1999, 2003, 2004, 2007 (2x)	B
Futura (1997)	1	1999	A
Vestergaard (1999)	8	2002, 2003, 2004, 2006 (2x), 2007(3x)	A, B
Wielockx (1995, A)	4	2002, 2003, 2004, 2007	A
Danner (2002)	1	2003	A, B
Skandia and Ramstedt (2003)	5	2006 (3x), 2007, 2008	A
Cadbury Schweppes (2006, A)	1	2007	A
Commission v. Denmark (2007)	1	2007, 2008	A, B
ELISA (2007)	3	2007, 2008, 2009	B
Stauffer (2006, A)	2	2008, 2009	A, B
Rewe (2007)	1	2008	B
A (2007)	2	2008, 2009	B

Several facts catch the eye when analysing this table. First of all, the ECJ only refers to the Bachman and Commission v. Belgium cases for B-type references, notwithstanding the fact that these cases also introduced the A-type. Furthermore, even though the references in both 1992 cases were the same except for some translation differences, the ECJ sometimes refers to both cases and sometimes to either one of the cases. There does not seem to be a real pattern in these references, nor can a reason be found why in certain cases the ECJ refers to both cases and in other just refers to one or the other. Besides, the 1992 cases are not the cases the ECJ refers to most. The prime position in the ranking of cases most referred to is taken by the 1999 Vestergaard case.³⁹

In my opinion, a difference in wording cannot fully explain this preference for the Vestergaard case over the 1992 cases, especially as paragraph. 26 (A- and B-type) of this case refers to the 1992 cases:

“26. In that regard, it should be remembered that Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) can be invoked by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer himself to produce the proof which they consider necessary to assess whether or not the deduction requested should be allowed (see Bachmann and Commission v Belgium, cited above, at respectively paragraphs 18 and 20 and paragraphs 11 and 13).”

It is correct that in paragraph. 28 of the Vestergaard case, the ECJ extends the A-type reference with the A1-type (the Directive allows the competent authorities to request all the information which appears to them necessary to ascertain the correct amount of tax and does not affect the competence to assess whether the conditions of the legislation are fulfilled), but this does not seem to explain the preference of referring to this case. In most references to the Vestergaard case, the A1-type is not mentioned and the reference is limited to paragraph 26. It might be that the ECJ preferred the

³⁹ ECJ, 28 October 1999, Case C-55/98, *Skatteministeriet and Bent Vestergaard*.

Vestergaard case over the 1992 cases as the wording is broader. However, this does not explain the following. Except for the Turpeinen (2006)⁴⁰ and Talotta (2007) case,⁴¹ the Vestergaard case was referred to in every case which included references to other cases from the Danner case (2002)⁴² up and until the Twoh case (2007).⁴³ However, after the Twoh case, the Vestergaard case is suddenly no longer mentioned, whereas the 1992 cases still make their appearances. Therefore, the breadth of the wording does not seem to be a full explanation for the preferences of the ECJ. It might be that the ECJ is not really taking a methodological approach in the way it refers to other cases. This presumption seems to be confirmed by the fact that the table of references above does not reveal a pattern in the references. It does suggest a certain degree of arbitrariness.

Interestingly, the 1992 cases have to share second place in the ranking of cases most referred to with the 2003 Skandia and Ramstedt case.⁴⁴ In five cases the ECJ refers to paragraph 42 of this case:

“It should first be recalled that Directive 77/799 may be relied on by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax (see Case C-55/98 Vestergaard [1999] ECR I-7641, paragraph 26), or all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer according to the legislation which it applies (see Wielockx, cited above, paragraph 26, and Danner, paragraph 49).”

Even though the Skandia and Ramstedt case itself includes both an A-type (paragraph 42) and B-type (paragraph 43) reference to the Directive, it is only referred to in pure A-type cases. The reference to this case is limited to paragraph 42. In this respect these references differ from the reference to the Schumacker case which was also used in an exclusive A-type context, as the Schumacker case itself only included an A-type reference.

5.2.3 B1-type: Exclusion of certain taxpayers from mutual assistance in international conventions allowed

A question which has been raised, not only in relation to the Directive, but also in relation to other European regulations, for example in the EC Treaty, is whether such regulations limit the freedom of member states to conclude bilateral treaties. In the 2007 ELISA case⁴⁵ the ECJ had to answer the question as to whether the obligations that the Directive imposes on member states concerning mutual assistance preclude the implementation by the member states, under a bilateral convention, of obligations of the same kind which exclude particular categories of taxpayers. The ECJ observed that it is evident from article 8(1) of the Directive that it does not impose on member states any obligation to have enquiries carried out to provide information if the competent authority of the member state which should furnish the information would

⁴⁰ ECJ, 9 November 2006, Case C-520/04, *Pirkko Marjatta Turpeinen*.

⁴¹ ECJ, 22 March 2007, Case C-383/05, *Raffaele Talotta v. État belge*.

⁴² ECJ, 3 October 2002, Case C-136/00, *Rolf Dieter Danner*.

⁴³ ECJ, 27 September 2007, Case C-184/05, *Twoh International BV v. Staatssecretaris van Financiën*.

⁴⁴ ECJ, 26 June 2003, Case C-422/01, *Försäkringsaktiebolaget Skandia (publ), Ola Ramstedt and Riksskatteverket*.

⁴⁵ ECJ, 11 October 2007, Case C-451/05, *Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts, Ministère public*.

be prevented by its laws or administrative practices from carrying out those enquiries or from collecting or using that information for that State's own purposes (paragraph 50). In the ELISA case, the exclusion of certain taxpayers from the supply of information in the national legislation of Luxembourg, was reflected in the bilateral treaty between Luxembourg and France. The ECJ concluded in paragraph 55:

“(…) Directive 77/799, and in particular Article 8(1) thereof, does not preclude two Member States from binding themselves by means of an international convention, with the intention of avoiding double taxation and setting up rules for reciprocal administrative assistance in the area of taxes on income and capital, which excludes from its scope, in respect of one Member State, one category of taxpayers subject to a tax covered by that directive, if the competent authority of the Member State which should furnish information is prevented by its laws or administrative practices from collecting or using such information for that State's own purposes, this being a matter which it is for the national court to verify.”

The ECJ, in fact, judged that the bilateral convention was in line with the Directive, as the exclusion was covered by article 8(1).

5.2.4 B2-type: The fact that the Directive does not apply to a tax is not a justification: evidence may be requested from the taxpayer

The traditional B-type reference regards information a member state cannot obtain through application of the Directive, because of article 8(1). However, in the *Geurts and Vogten* case⁴⁶ the Directive did not apply because it did not apply to the tax involved (inheritance tax). The ECJ decided in paragraph 28 that also in such cases the effectiveness of fiscal supervision does not provide for a justification to categorically refuse to grant tax benefits. As in the B-type references (the ECJ even refers to the B-type reference in paragraph 98 of the ELISA case⁴⁷) the ECJ observed that the tax authorities could request the taxpayers concerned to provide the evidence which the authorities consider necessary to be fully satisfied that those benefits are granted only where the criteria set out under national law are fulfilled. The ECJ repeated this observation in paragraph 41 of the *Bauer* case.⁴⁸ This made it therefore absolutely clear that even if the Directive is not applicable, different treatment of resident taxpayers and taxpayers resident in other member states cannot be justified with practical administrative problems regarding facts in other member states. The B2-type reference may therefore be regarded as an extension of the B-type. It is an important extension, as it leaves no doubt that even if, for whatever reason, the Directive is not applicable, member states have to enable taxpayers to provide the proof that they qualify for a tax benefit. An absolute refusal of a benefit is not allowed even if the Directive applies or not.

5.3 C-type: Because of the Directive third countries are not always comparable

⁴⁶ ECJ, 25 October 2007, Case C-464/05, *Maria Geurts, Dennis Vogten v. Administratie van de BTW, registratie en domeinen, Belgische Staat*.

⁴⁷ ECJ, 11 October 2007, Case C-451/05, *Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts, Ministère public*.

⁴⁸ ECJ, 2 October 2008, Case C-360/06, *Heinrich Bauer Verlag BeteiligungsGmbH v Finanzamt für Großunternehmen in Hamburg*.

In cross-border transactions to which the free movement of capital of article 56 EC Treaty applies, the question may arise whether a transaction with a third country should be treated in the same way as a transaction with a member state. In several cases the ECJ referred to the Directive to solve this question: the C-type references.

5.3.1 The A-type reference and third countries

In paragraph 29 and 30 of the 2007 *Talotta* case⁴⁹ the ECJ observed that because of the Directive, resident taxpayers and non-resident taxpayers are in an objectively comparable situation as regards the means of proof available to the tax authorities. The ECJ therefore ruled (paragraph 32) that different treatment of resident and non-resident taxpayers therefore constituted indirect discrimination. However, the case concerned a taxpayer who was resident in another member state. When using the word ‘non-resident taxpayers’ the ECJ probably referred to residents of another member state and not to residents of third countries. In the 2006 *FII* case⁵⁰ the ECJ did make this distinction between residents of other member states and residents of third countries. In paragraph 170 the ECJ observed:

“It is true that, because of the degree of legal integration that exists between Member States of the Union, in particular by reason of the presence of Community legislation which seeks to ensure cooperation between national tax authorities, such as Council Directive 77/799/EEC of 19 December 1977 (...), the taxation by a Member State of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between Member States and non-member countries.”

The A-type reference is therefore not applicable to residents of third countries. This makes sense, as the Directive does not consider such cases. However, in paragraph 67 of the *A* case,⁵¹ the ECJ seems to extend the scope of the A-type reference to some third countries, namely to EEA states and states with which a taxation convention providing for the exchange of information has been concluded:

“In the light of the foregoing, the answer to the question referred must be that Articles 56 EC and 58 EC are to be interpreted as not precluding the legislation of a Member State which provides that exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary may be granted only if the distributing company is established in a State within the EEA or a State with which a taxation convention providing for the exchange of information has been concluded by the Member State imposing the tax, where that exemption is subject to conditions compliance with which can be verified by the competent authorities of that Member State only by obtaining information from the State of establishment of the distributing company.”

The ECJ repeated this conclusion in paragraph 96 of the Order of 23 April 2008 in the *CFC and Dividend Group Litigation Case*.⁵²

5.3.2 The B-type reference and third countries

⁴⁹ ECJ, 22 March 2007, Case C-383/05, *Raffaele Talotta v. État Belge*.

⁵⁰ ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue*.

⁵¹ ECJ, 18 December 2007, Case C-101/05, *Skatteverket v. A.*

⁵² ECJ, 23 April 2008, Case C-201/05, *The Test Claimants in the CFC and Dividend Group Litigation v. Commissioners of Inland Revenue*.

In the A case⁵³ the ECJ also seems to extend the difference between member states and third countries to B-type references. This is, in my opinion, less obvious. A and the Commission argued that the Swedish legislation was disproportionate, since the Swedish tax authorities could require the taxpayer to provide proof that the requirements for an exemption were satisfied. To me this argument makes sense. In the B-type reference and even more so in the B2-type reference (as discussed in paragraph 5.2.4) the fact that the Directive is not applicable is not deemed relevant: member states may not unconditionally refuse the taxpayer to prove that he is entitled to a benefit. The B2-type reference, which allows taxpayers to bring forward proof regarding taxes which are not covered by the Directive, was introduced by the Fourth Chamber of the ECJ in the *Geurts and Vogten* case⁵⁴ less than two months before the Grand Chamber of the ECJ gave its judgment in the A case. Notwithstanding this judgment, the ECJ observed in paragraph 60-63 of the A case:

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

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

62 In second place, as the Advocate General pointed out at points 141 to 143 of his Opinion, with regard to the documentary evidence which the taxpayer may provide to enable the tax authorities to ascertain whether the requirements under national legislation are satisfied, the Community harmonisation measures on company accounts which apply in the Member States allow the taxpayer to produce reliable and verifiable evidence on the structure or activities of a company established in another Member State, whereas the taxpayer is not ensured of such an opportunity in the case of a company established in a third country which is not required to apply those Community measures.

63 It follows that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, in particular, because that third country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country.”

In my view, paragraph 61 of the A case is not in line with paragraph 28 of the *Geurts and Vogten* case, where the ECJ observed:

“ Further, as for the Belgian Government’s argument regarding the need to maintain the effectiveness of fiscal supervision on account of the fact that Council Directive 77/799/EEC (...) does not apply to inheritance tax, it suffices to point out that that difficulty cannot justify the categorical refusal to grant the tax benefits in question since the tax authorities could request the taxpayers concerned to provide themselves the evidence which the authorities consider necessary to be fully satisfied that those benefits are granted only where the jobs in question fulfill the criteria set out under national law (see, to that effect, Case C-451/05 *Elisa* [2007] ECR I-0000, paragraph 98).”

⁵³ ECJ, 18 December 2007, Case C-101/05, *Skatteverket v. A*.

⁵⁴ ECJ, 25 October 2007, Case C-464/05, *Maria Geurts, Dennis Vogten v Administratie van de BTW, registratie en domeinen, Belgische Staat*.

In cases where the Directive does not apply, for example because a specific tax is not covered in the Directive, there is no framework for cooperation. Furthermore, in the field of inheritance taxes no harmonisation measures, such as those referred to in paragraph 62 of the A case, exist. To me, it is not clear why there is a difference between such cases and cases in which the Directive does not apply because the taxpayer is resident in a third country and why in the latter case, taxpayers should not be given the possibility to provide proof that they are entitled to the benefit. The ECJ does not seem to perceive this dichotomy. In October 2008 the Second Chamber used the B2-type reference again in paragraph 41 of the Bauer case,⁵⁵ stating in very general terms:

“Even if Council Directive 77/799/EEC (...) were not applicable in the main proceedings, that could not justify the method of calculating the value of holdings in companies or firms established in other Member States being designed in such a way as to be less favourable than the method of calculating the value of holdings in companies or firms established in the Member State concerned. The tax authorities could request the taxpayers concerned to provide themselves the evidence which the authorities consider necessary to carry out a calculation of the value of the holdings of those taxpayers in companies or firms established in other Member States (see, to that effect, Case C-464/05 Geurts and Votgen [2007] ECR I-9325, paragraph 28).”

On the other hand, the Grand Chamber repeated the C-type reference paragraph 89 of the Orange European Smallcap Fund case⁵⁶ and paragraph 70 of the the Persche case.⁵⁷ Notwithstanding its B2-type reference in the Geurts and Votgen case, the Fourth Chamber also used the C-type reference in paragraphs 92 and 95 of the Order in the CFC and Dividend Group Litigation case.⁵⁸ The unsatisfactory result seems to be that taxpayers resident in other member states should always be given the possibility to provide evidence, even if there is no basis for harmonisation or cooperation between the member states, but that residents of third countries may not be allowed to give this evidence based on the fact that there is no such harmonisation or cooperation.

5.4 D-type: Does the Directive harmonise tax legislation of the member states?

In two cases the ECJ had to decide whether the Directive harmonises tax legislation of the member states. Interestingly, the ECJ came to two opposite conclusions in these cases, which will be discussed below.

5.4.1 D1-type: the Directive does not harmonise tax legislation

In the 2005 *Commission v. UK* case⁵⁹ the ECJ had to decide whether the Directive is an ‘act on the harmonisation of legislation of member states concerning turnover taxes’ within the meaning of article 28 of the Act of Accession of (amongst others)

⁵⁵ ECJ, 2 October 2008, Case C-360/06, *Heinrich Bauer Verlag BeteiligungsGmbH v Finanzamt für Großunternehmen in Hamburg*.

⁵⁶ ECJ, 20 May 2008, Case C-194/06, *Staatssecretaris van Financiën v. Orange European Smallcap Fund NV*.

⁵⁷ ECJ, 27 January 2009, Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*.

⁵⁸ ECJ, 23 April 2008, Case C-201/05, *The Test Claimants in the CFC and Dividend Group Litigation v. Commissioners of Inland Revenue*.

⁵⁹ ECJ, 21 July 2005, Case C-349/03, *Commission v. United Kingdom of Great Britain and Northern Ireland*, in particular paragraphs 41-50.

the UK.⁶⁰ The answer to this question was relevant, as, based on article 28, such provisions, in general, do not apply to Gibraltar. The wording of article 28 is as follows:

“Acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty and the products subject, on importation into the Community, to specific rules as a result of the implementation of the common agricultural policy, as well as the acts on the harmonisation of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar unless the Council, acting unanimously on a proposal from the Commission, provides otherwise.”

The ECJ observed that if a provision merely requires cooperation between the member states, leaving each of them to use their own methods of enquiry and communication of information, it cannot be regarded as an act on the harmonisation of legislation of member states. The ECJ was of the opinion that the Directive did not go further. According to the ECJ this is apparent particularly from article 8(1) of the Directive, which refers to the limits of exchange of information arising from the laws or administrative practices of the member states concerned. The ECJ therefore concluded that the Directive, in so far as it concerned VAT, was not one of the acts on the harmonisation of legislation of member states concerning turnover taxes. In the table in Annex 1 this is referred to as the D1-type reference.

5.4.2 D2-type: the Directive does harmonise tax legislation

A few months after the *Commission v. UK* case, the ECJ had to decide in the *Commission v. Council* case⁶¹ on a question which, at first sight, seems similar. The question in this case was whether the provisions of the Directive constitute ‘fiscal provisions’ and harmonise legislation concerning turnover taxes (article 93 EC Treaty). If this were not the case, the European Council would have taken the wrong legal basis for an amendment of the Directive: article 93 instead of article 95. The relevance of this difference is that article 95 calls for qualified majority voting whereas articles 93 and 94 require unanimity.

The text of these articles is as follows:

Article 93

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.

Article 94

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

Article 95

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the

⁶⁰ Act concerning the Conditions of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the Adjustments to the Treaties (OJ, English Special Edition of 27 March 1972, p. 14).

⁶¹ ECJ, 26 January 2006, Case C-533/03, *Commission v. Council of the European Union*.

following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

In its judgment, the ECJ referred to a 2004 *Commission v. Council* case⁶² regarding Directive 76/308/EEC on mutual assistance for the recovery of certain claims.⁶³ In paragraph 63 of that case the ECJ observed that:

“With regard to the interpretation of the words ‘fiscal provisions’, there is nothing in the Treaty to indicate how that concept should be construed. It is, however, necessary to point out that, by reason of their general character, those words cover not only all areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether material rules or procedural rules.”

In paragraph 67 of that 2004 *Commission v. Council* case the ECJ decided that the words ‘fiscal provisions’ must be interpreted as covering not only the provisions determining taxable persons, taxable transactions, the basis of imposition, and rates of and exemptions from direct and indirect taxes, but also those relating to arrangements for the collection of such taxes.

In the 2006 *Commission v. Council* case, the ECJ came to the conclusion that the Directive is intended to approximate the laws, regulations and administrative provisions of the member states in tax matters (paragraphs 66-76). It based this decision on the purpose of the Directive, to combat tax evasion and tax avoidance extending across the frontiers of member states by strengthening collaboration between the tax administrations of member states so as to enable them to make a more correct assessment of taxes on income and capital. In order to achieve that objective, article 1(1) requires the competent authorities to exchange all information that may enable them to effect a correct assessment of those taxes. Furthermore, the Directive lays down the detailed rules for the exchange of such information, which can be on request, automatic or spontaneous. Notwithstanding the fact that the obligation to have enquiries carried out and to provide the information in question is not unlimited (the ECJ refers to article 8(1)), as a result of this obligation the circle of persons having access to such information is significantly widened in order to allow the correct assessment of tax on income and capital. Given these characteristics, the ECJ decided that the Directive falls within the scope of article 95(2).

At first sight one might argue that this judgment, in which it is decided that the aim and content of the Directive is the approximation of laws, regulations and administrative provisions of the member states in tax matters, is in conflict with the 2005 *Commission v. UK* case mentioned before and in which the ECJ judged that the Directive is not one of the acts on the harmonisation of legislation of member states.

⁶² ECJ, 29 April 2004, Case C-338/01, *Commission v. Council of the European Union*.

⁶³ Directive 76/308/EEC 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 and in respect of value added tax and certain excise duties (OJ 2001 L 175, p. 17).

In the 2005 case, article 8(1) was decisive for the judgment that the Directive did not harmonise legislation. However, in the 2006 case article 8(1) is explicitly dismissed as a barrier for the conclusion that the Directive harmonises the legislation of the member states.

In this respect it should be noted that already in paragraph 47 of the 2005 Commission v. UK case the ECJ observed that the finding that the Directive is not an ‘act on the harmonisation of legislation of member states concerning turnover taxes’ is not inconsistent with the 2004 Commission v. Council case⁶⁴ mentioned before. The reasoning the ECJ gives is that the Commission v Council decision provides an interpretation of ‘fiscal provisions’ within the meaning of Article 95(2) EC, and not of ‘acts on ... harmonisation’ within the meaning of Article 28 of the Act of Accession. The ECJ would probably use the same motivation to explain the difference between the Commission v. UK case and the 2006 Commission v. Council case.

Personally, I have problems in understanding this reasoning of the ECJ. What is the difference between ‘acts on the harmonisation of legislation of member states concerning turnover taxes’(article 28) and ‘provisions for the harmonisation of legislation concerning turnover taxes’ (article 93)? In both cases the question is whether the Directive harmonises legislation. The only objective difference is the use of the word ‘act’ in article 28 and the word ‘provisions’ in article 93. However, the ECJ does not discuss the question whether or not the Directive is an act in Commission v. UK. This difference in wording therefore does not seem to be relevant. In both decisions article 8(1) of the Directive is decisive. To me, it is not clear which difference between article 28 of the Act of Accession and article 95 of the ECJ Treaty results in article 8(1) having the effect that for article 28 the Directive does not harmonise tax legislation and for article 95 it does. The ECJ should at least have made it clear where this difference in the influence of article 8(1) can be found in both articles, as in neither of the articles can a clear (let alone a different) link with article 8(1) be established. The only motivation now seems to be an unsatisfactory ‘it is different because we say so’.

5.5 E-type: Interpretation of definitions used in the Directive

In three cases the ECJ clarified expressions used in the Directive, either for purposes of interpreting the Directive itself or for the interpretation of other provisions. In these cases, which will be discussed in the following paragraphs, the ECJ defined the expressions ‘loss of tax’, ‘direct tax’ and ‘tax on capital’.

5.5.1 E1-type: interpretation of ‘loss of tax’

In the 2000 W.N. case,⁶⁵ the ECJ had to interpret the expression ‘loss of tax’ in article 4(1)(a) of the Directive:

“4 (1) The competent authority of a Member State shall without prior request forward the information referred to in Article 1(1), of which it has knowledge, to the competent authority of any other Member State concerned, in the following circumstances:

⁶⁴ ECJ, 29 April 2004, Case C-338/01, *Commission v. Council of the European Union*.

⁶⁵ ECJ, 13 April 2000, Case C-420/98, *W.N. and Staatssecretaris van Financiën*.

(a) the competent authority of the one Member State has grounds for supposing that there may be a loss of tax in the other Member State;”

The ECJ observed (paragraph 14) that in accordance with the wording of article 4(1)(a) it is sufficient for the loss of tax to be supposed: it does not have to be proven. The ECJ stated that this literal interpretation corresponds with the purpose of the Directive as stated in the sixth recital in the preamble thereto: the correct assessment of taxes on income and capital in the different member states, for which reason it provides for the exchange of any information which appears relevant for that purpose. The ECJ emphasised that only if the information reaches the authorities of the other member state before the tax assessment has been made will those authorities be in a position to use it in the way most suited to the purpose of the Directive. Furthermore, if the forwarding of the information were subject to the requirement that the assessment should have been made beforehand, the authorities would need to have extensive knowledge of the factual and legal framework of the other member state. The ECJ observed that to subject the obligation to exchange information spontaneously to such a requirement would run counter to the objective of the Directive. Therefore, it is not necessary for the loss of tax referred to in article 4(1)(a) to be covered by an express measure on the part of the competent authority of another member state.

Secondly, the ECJ had to decide on the relevance of differences in the various language versions. The Danish, Spanish, French, Italian, Dutch, Portuguese and Finnish versions of Article 4(1)(a) of the Directive, refer to an ‘abnormal reduction or exemption of tax’ (‘unormal skattenedsaettelse’, ‘una reducción o una exención anormales de impuestos’, ‘une réduction ou une exonération anormales d’impôts’, ‘una riduzione od un esonero d’imposta anormali’, ‘abnormale vrijstelling of vermindering van belasting’, ‘uma redução ou uma isenção anormais de impostos’, ‘epätavanomaista veronalennusta tai verovapautusta’). However, the German, Greek, Swedish and English versions, refer in more general terms to ‘a loss of tax’ in using the terms ‘Steuerverkürzung’, ‘διαφυγή φόρων’, ‘förlust av skatt’ and ‘loss of tax’ respectively. Because of this divergence between the language versions the ECJ observed that article 4(1)(a) must be interpreted by reference to the purpose and general scheme of the Directive. Therefore, the ECJ held that in the light of the purpose of the Directive, which is not only to combat tax evasion and avoidance, but also to enable a correct assessment of taxes on income and capital to be effected in the different member states, article 4(1)(a) of the Directive must be interpreted as meaning that a member state is, without prior request, to forward information to the tax authorities of another member state where it has grounds for supposing that, without that information, an unjustified saving in tax might exist or be granted in that other State. It is not necessary for that saving to amount to a large sum. The ECJ stated that this interpretation is borne out by the general scheme of the Directive, according to which the obligation to forward information is not connected with the magnitude of the tax evasion and avoidance which might arise if such information were not forwarded. Therefore, the expression ‘a loss of tax’ refers to an unjustified saving in tax in another member state.

5.5.2 E2-type: interpretation of ‘direct tax’

The Directive has also been used to give guidance on the interpretation of specific terms in another provision. In the 2007 *Commission v. Belgium* case,⁶⁶ the ECJ had to interpret the expression ‘direct tax’ in the Protocol on the privileges and immunities of the European Communities. Article 3 of this Protocol states:

“The Communities, their assets, revenues and other property shall be exempt from all direct taxes.”

For the interpretation of the expression ‘direct taxes’ in this article, the ECJ referred to the old version of the Directive, which was originally restricted to direct taxes. In paragraph 44 of the 2007 *Commission v. Belgium* case the ECJ refers to article 1(2) of the original Directive in which, according to the ECJ, direct taxes were defined as tax on income and on capital, including in that term taxes on total capital, or on elements of capital, irrespective of the manner in which they are levied. A tax imposed directly on persons on the basis of their assets or their real property rights having a value as assets, could be regarded as being levied on an element of capital within the meaning of the Directive and therefore fell within the definition of a direct tax. It is important to mention that article 1(2) also in the original version of the Directive did not include the expression ‘direct tax’, but merely gave a definition of ‘taxes on income and on capital’:

1 (2). There shall be regarded as taxes on income and on capital, irrespective of the manner in which they are levied, all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the disposal of movable or immovable property, taxes on the amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

However, the ECJ has probably interpreted this article as a definition of ‘direct taxes’ based on the title of the original Directive: ‘Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the member states *in the field of direct taxation (77/799/EEC)*’ [italics by the author].

5.5.3 The E3-type: definition of ‘tax on capital’

In paragraphs 20-37 of the *ELISA* case,⁶⁷ the ECJ had to interpret the expression ‘tax on capital’ in article 1(2). The ECJ held that it follows clearly from article 1(2) that, in addition to taxes on total income and total capital, the Directive also relates to taxes imposed on elements of income or capital, irrespective of what they are called. This is fully in line with the 2007 *Commission v. Belgium* case mentioned in paragraph 5.5.2. Furthermore, the ECJ observed that the list of taxes and duties in article 1(3) is not exhaustive, which, the ECJ observed, is confirmed by Article 1(4), which provides that the member states must also exchange any information which may enable them to effect the correct assessment of any identical or similar taxes imposed subsequently, whether in addition to or in place of the taxes listed in paragraph 3. Therefore the fact that a tax is not included in this list does therefore, not necessarily mean that such tax does not fall within the scope of the Directive. The ECJ clarified the scope of the Directive further in this case by emphasising that taxes levied from legal persons are included, as are taxes the object of which is to combat tax avoidance.

⁶⁶ ECJ, 22 March 2007, Case C-437/04, *Commission of the European Communities v. Kingdom of Belgium*.

⁶⁷ ECJ, 11 October 2007, Case C-451/05, *Européenne et Luxembourgeoise d’investissements SA (ELISA) v. Directeur général des impôts, Ministère public*.

6 Concluding remarks

After a relatively slow start, the ECJ has used the Directive in its case law extensively since 2006. Furthermore, since that year the ECJ greatly increased the variety of references to the Directive. Currently, 12 different references may be distinguished, which can be subdivided into five main categories of references. The oldest references, the A-type and B-type references, are still the most important references. The A-type references make it clear that member states cannot justify restrictions on administrative difficulties related to obtaining information from another member state, as member states may use the Directive to obtain such information. However, the Directive does not give rights to taxpayers: they cannot rely upon the Directive to oblige their member state to request specific information for their benefit. The B-type reference makes it clear that member states must allow taxpayers to bring forward proof that they qualify for a tax benefit in cases to which the Directive does not apply. It is not relevant why the Directive does not apply. However, in relation to third countries the ECJ does not deem it necessary that taxpayers are allowed to bring forward proof. This C-type reference is, in my view, not consistent with the B2-type reference, in which the ECJ concluded that taxpayers must be allowed to provide proof, even if the Directive does not apply. To me, it is not clear why in such cases there would be a difference between member states and third countries. Another inconsistency can be found in the D-type references: without clear motivation the ECJ has concluded that the Directive both harmonises and does not harmonise tax legislation. With regard to the E-type references the ECJ has given practical definitions of several expressions used in the Directive.

It is to be expected that also after May 2009 the ECJ will refer to the Directive, where appropriate, using new references. It is hoped that such new references will be consistent with old references and, if this is not the case, that the ECJ makes clear why this is not the case.

Annex I: summary of ECJ Case law on the mutual assistance Directive

	Case	Date	Type*	Reference to	Chamber
1	Bachmann, C-204/90	28-1-1992	A, B		
2	Commission v. Belgium, C-300/90	28-1-1992	A, B		
3	Halliburton, C-1/93	12-4-1994	A		
4	Schumacker, C-279/93	14-2-1995	A		
5	Wielockx, C-80/94	11-8-1995	A		
6	Martínez, C-321/93	5-10-1995	A	Schumacker	5
7	Futura, C-250/95	15-5-1997	A, B		
8	Vestergaard, C-55/98	28-10-1999	A, B, A1	Bachmann, Commission v. Belgium, Futura	6
9	W.N., C-420/98	13-4-2000	E1		1
10	Danner, C-136/00	3-10-2002	A, B	Vestergaard, Wielockx, Bachmann, Commission v. Belgium	5
11	Skandia and Ramstedt, C-422/01	26-6-2003	A, B	Vestergaard, Wielockx, Danner, Bachmann, Commission v. Belgium	5
12	Commission v. France, C-334/02	4-3-2004	A, B	Vestergaard, Wielockx, Commission v. Belgium	5
13	Commission v. UK, C-349/03	21-6-2005	D1		G
14	Commission v. Council, C-533/03	26-1-2006	D2		2
15	N, C-470/04	7-9-2006	A	Vestergaard, Skandia and Ramstedt	2
16	Cadbury Schweppes, C-196/04	12-9-2006	A		G
17	Stauffer, C-386/04	14-9-2006	A	Vestergaard, Skandia and Ramstedt	3
18	Turpeinen, C-520/04	9-11-2006	A	Skandia and Ramstedt	1
19	FII, C-446/04	12-12-2006	C		G
20	Commission v. Denmark, C-150/04	30-1-2007	A, B	Vestergaard, Wielockx, Commission v. Belgium	G
21	Centro Equestre, C-345/04	15-2-2007	A		3

22	Commission v. Belgium (2) ⁶⁸ , C-437/04	22-3-2007	E2		1
23	Talotta, C-383/05	22-3-2007	A	Skandia and Ramstedt	1
24	Rewe Zentralfinanz, C-347/04	29-3-2007	A, B	Vestergaard	2
25	Commission v. Belgium (3) ⁶⁹ , C-522/04	5-7-2007	A		2
26	Twoh, C-184/05	27-9-2007	A1, A2	W.N, Commission v. Council, Vestergaard, Danner	3
27	ELISA, C-451/05	11-10-2007	A, B, B1, E3	Commission v. Denmark, Cadbury Schweppes	4
28	Geurts and Vogten, C-464/05	25-10-2007	B2	ELISA	4
29	A, C-101/05	18-12-2007	A, B, C	FII, Bachmann, Commission v. Belgium, ELISA	G
30	CFC and Dividend group litigation, C-201/05	23-4-2008	C	FII, A	4
31	Orange European Smallcap Fund, C-194/06	20-5-2008	C	A, FII	G
32	Bauer, C-360/06	2-10-2008	B2	Geurts and Vogten	2
33	Renneberg, C-527/06	16-10-2008	A	Skandia and Ramstedt	3
34	Papillon, C-418/07	27-11-2008	A, B	Stauffer, Commission v. Denmark, Rewe, ELISA, A	4
35	Persche, C-318/07	27-1-2009	A, B, A1, A2, C	Stauffer, Twoh, Bachman, ELISA, A	G

***Type of reference:**

A Under the Directive, a member state may request another member state to provide all information necessary to make a correct assessment of the taxes referred to by the Directive (article 1(1)). Lack of effectiveness of fiscal supervision/controls is therefore not accepted as a (proportional) justification and residents and taxpayers resident in another member state are in the same situation.

A1 The information which the Directive allows a member state to request is in fact all the

⁶⁸ To distinguish this case C-437/04 from the first Commission v. Belgium case in which the mutual assistance Directive was mentioned (Case C-300/90), I will refer to case C-437/04 as Commission v. Belgium (2).

⁶⁹ To distinguish this case C-522/04 from the other Commission v. Belgium cases in which the mutual assistance Directive was mentioned (case C-300/90 and case C-437/04), I will refer to case C-522/04 as Commission v. Belgium (3).

information which appears to them to be necessary in order to ascertain the correct amount of tax in relation to the legislation which they have to apply themselves. The Directive does not in any way affect the competence particularly to assess whether the conditions to which that legislation subjects the exemption of an operation are fulfilled.

- A2 Member states are not obliged to request information if asked to do so by a taxpayer who cannot provide the necessary evidence. The purpose of the Directive is to combat tax evasion and avoidance and to allow member states to determine exactly the amount of tax to levy. The Directive was not adopted for the purpose of establishing a system for exchanging information between member states allowing them to establish facts for which a taxpayer is unable to provide the necessary evidence. The Directive was adopted to govern cooperation between the tax authorities of the member states; it confers no rights on individuals. Whilst those authorities have the possibility to request information from the competent authority of another member state, such a request does not in any way constitute an obligation.
- B The fact that article 8(1) of the Directive imposes no obligation on the other member state to collaborate on a request for information is not a justification: there is nothing to prevent tax authorities from demanding such proof from the taxpayer involved as they consider necessary and, where appropriate, from refusing to allow a deduction or exemption where such proof is not forthcoming. Lack of effective fiscal supervision is therefore not a justification.
- B1 The Directive, and in particular Article 8(1) thereof, does not preclude two member states from binding themselves by means of an international convention, with the intention of avoiding double taxation and from setting up rules for reciprocal administrative assistance in the area of taxes on income and capital which excludes from its scope, in respect of one member state, one category of taxpayers subject to a tax covered by that Directive, if the competent authority of the member state which should furnish information is prevented by its laws or administrative practices from collecting or using such information for that member state's own purposes, this being a matter which is for the national court to verify.
- B2 The fact that the Directive does not apply to a specific tax cannot justify the categorical refusal to grant the tax benefits since the tax authorities could request the taxpayers concerned themselves to provide the evidence which the authorities consider necessary to be fully satisfied that such benefits are granted only where the criteria set out under national law are fulfilled.
- C Because of the Directive, the taxation of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between member states and third countries. A difference in treatment of foreign-sourced income or the granting of tax benefits may therefore be compatible with the EC Treaty. It may also be that a member state is able to demonstrate that a restriction regarding third countries is justified for a particular reason in circumstances where that reason would not be a valid justification for a restriction regarding member states. Where the legislation of a member state makes the grant of a tax advantage dependent on satisfying certain requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that member state to refuse to grant that advantage, particularly if, because that third country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country.
- D1 In so far as it concerns VAT, the Directive is not an act on the harmonisation of the legislation of member states.
- D2 The provisions of the Directive constitute 'fiscal provisions'. This includes all aspects of taxation, whether concerning material or procedural rules. The aim and content of the Directive is the approximation of laws, regulations and administrative provisions of the member states in tax matters.
- E1 Interpretation of the expression 'loss of tax' in article 4(1)(a) of the Directive: it does not have to be covered by an express measure of another member state and it refers to an unjustified saving in tax in another member state.
- E2 The Directive provides some criteria for the interpretation of the expression 'direct tax' for other purposes: this includes taxes on total income and capital or on elements of income or of capital, irrespective of the manner in which they are levied.
- E3 Definition of 'tax on capital': list of taxes and duties specified in article 1(3) is not exhaustive and also relates to legal persons.

