



# *Changing role of the exchange of tax information in the CJ's case law*

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# Outline

- *Context: Exchange of tax information (EOI) and tax litigation*
- *Exchange of information in the CJ's fundamental freedoms case law*

## *Exchange of tax information and tax litigation*

- ***Administration-to-administration (A2A) procedure***
  - DTCs, CoE/OECD or EU secondary legislation based
  - Domestic legislation (interface for international/EU law instruments)
- ***Role of the taxpayer?***
  - External?
  - Merely an object of exchange?
  - Primary source of information?
- ***Other suppliers of information to the CA (eg. banks)***
- ***Fundamental freedoms direct tax cases***
  - EOI as element of judicial reasoning

## Fundamental freedoms - legal bases

- ***Prohibition of discrimination and restrictions on free movement***
  - Art. 18 [12], 21 [18] TFEU – General prohibition of nationality discrimination and restriction on movement
  - Art. 45 [39] Workers
  - Art. 49 [43] Establishment
  - Art. 56 [49] Services
  - Art. 63 [56] Capital

## Non-discrimination test - elements

- ***Person (entity) affected***
  - identification of similar (comparable) person/entity (situation) which is treated more favourably
    - Investigation of similarity factors
- ***Does the difference in treatment occur according to the prohibited criterion (eg. nationality)?***
- ***What is the worse treatment (less rights/more obligations)?***
- ***Is it justified?***

## Restriction test - elements

- ***No similarity tests***
  - Some change in the approach is noted
- ***Any difference in tax treatment of domestic and cross-border activities amounts to restriction***
- ***BUT more flexible application of justifications***

# The need to ensure fiscal supervision

- ***General case law***

- Legitimate aim of public interest (120/78 Rewe 'Cassis de Dijon') capable of justifying a restriction on free movement (subject to proportionality)

- ***Tax cases***

- The public interest aim capable of justifying discrimination/restriction on free movement (difference in tax treatment)
- Provided that no less restrictive measures available (proportionality *sensu stricto*)

# The need to ensure fiscal supervision

- ***“...provided that no less restrictive measures available”***
  - Less restrictive than difference in tax treatment (i.e. refusal of a tax benefit)
  - EOI under a Directive possible
    - **The Directive allows Member States to request all information deemed necessary and does not affect their competence to assess whether conditions are fulfilled**
    - **The Directive does not impose upon Member States an obligation to request information from other Member States upon request of a taxpayer**
    - **Eg. Bachmann, Futura, Vestergaard, Danner, etc.**
    - **X-football club (assistance in recovery)**



# The need to ensure fiscal supervision

- ***“...provided that no less restrictive measures available”***
  - EOI under a Directive NOT possible
    - Intra EU
  - **The fact that the Directive does not apply to a tax is not a justification: evidence may be requested from the taxpayer**
  - Vis-a-vis 3rd countries
  - **Impossible to (1) ensure fiscal supervision (to verify the proof submitted by the taxpayer), (1a) ensure fiscal supervision to verify the proof of similarity submitted by the taxpayer**
- ***Elisa, Établissements Rimbaud, Prunus***
- ***Emerging Markets***
- ***Article 65(1)(a) TFEU issue***



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***Thank you!***