



CONFEDERATION  
FISCALE  
EUROPEENNE

**Opinion Statement of the CFE  
on the right to an effective recovery of taxes levied  
in violation of EU law**

**Submitted to the European Institutions in May 2011**

*This is an Opinion Statement prepared by the ECJ Task Force<sup>1</sup> of the Confédération Fiscale Européenne (CFE) on the interrelation between EU law and national procedural legislation in the area of direct taxation. The Statement focuses on the question of how taxpayers, who were forced to pay a tax on the basis of national legislation that is not in line with the EU fundamental freedoms, can realise their claim to a refund of the overpaid amount within the national legal order of the Member State concerned. The Statement discusses, in particular, the relevant provisions and principles of EU law capable of affecting the application of national procedural rules, and puts forward a concrete proposal for both the Member States and the European institutions to address this issue effectively. The CFE is the leading European association of 33 national tax advisory organisations representing over 180,000 tax advisers.*

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## **1. Introduction: Impact of EU law on national procedural rules in the area of taxation**

1. With respect to the practical realisation of EU law-based taxpayer's rights within Member States' domestic systems, no specific rules can be found in primary EU law. Neither does secondary EU law provide for such rules in favour of the taxpayers. The few procedural rules that exist under secondary legislation, irrespective of whether they are of a general nature<sup>2</sup> or more specifically concerned with taxes,<sup>3</sup> only protect the collection of taxes by the Member States.
2. On a number of occasions the ECJ has tested national procedural rules directly against the EU fundamental freedoms. For example, the exclusion of non-resident enterprises from an interest supplement on a tax repayment was considered to infringe the freedom of establishment.<sup>4</sup> The exclusion of non-resident employees, through a final withholding tax mechanism, from the domestic tax assessment procedure was found to violate the free movement of workers.<sup>5</sup> Similarly, a special tax refund procedure which only applied to non-resident taxpayers but nevertheless contained discriminatory elements was incompatible with the freedom to provide services.<sup>6</sup> More recently, an extended recovery period for taxes on savings abroad was scrutinised, *inter alia*, under the free movement of capital.<sup>7</sup>
3. However, the most important yardsticks for national procedural measures are the general EU law principles of "equivalence" and "effectiveness" (see *infra* 3.), which serve the important purpose of safeguarding the application and realisation of EU law

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<sup>2</sup> See Art. 14 of Reg. (EC) No. 659/99 concerning the recovery of illegal State aids (which may, *inter alia*, consist in tax advantages).

<sup>3</sup> See the EU Directives on mutual assistance and on the taxation of savings income.

<sup>4</sup> ECJ, decision of 13 July 1993, C-330/01, *Commerzbank AG*.

<sup>5</sup> ECJ, decision of 14 February 1995, C-279/93, *Schumacker*, paras. 48-59. See also decisions of 8 May 1990, C-175/88, *Biehl*, and of 26 October 1995, C-151/94, *Commission v. Luxembourg*.

<sup>6</sup> ECJ, decision of 15 February 2007, C-345/04, *Centro Equestre da Lezíria Grande Ltd*. On additional problems see decisions of 12 June 2003, C-234/01, *Gerritse*, and of 3 October 2006, C-290/04, *FKP Scorpio Konzertproduktionen GmbH*.

<sup>7</sup> ECJ, decision of 11 June 2009, Joined Cases C-155/08 and C-157/08, *X and Passenheim-van Schoot*.

remedies in the national legal orders of the 27 Member States (see *infra* 2.). It is on these two general EU law principles, and their function with respect to tax refund claims, that the present statement will concentrate.

## **2. EU law remedies available for the infringement of EU law by national tax measures**

4. In order to preserve and further the “effet utile” of EU law within the domestic legal systems of the Member States, the ECJ has developed two important remedies on which a taxpayer can rely in a case where it was obliged to pay taxes in a certain Member State, even though the relevant national tax legislation was in breach of EU law.
5. On the one hand, the ECJ has decided that EU law obliges Member States to make good any loss and damage caused to individuals by breaches of EU law for which they can be held responsible. More precisely, the ECJ held that in the event of infringement of a right directly conferred by an EU law provision upon which individuals are entitled to rely before the national courts, the right to reparation is the necessary corollary of the direct effect of the EU law provision whose breach had caused the damage sustained. Further requirements are that the breach must be sufficiently serious, and that there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by those affected.<sup>8</sup> This principle of State liability also applies in the area of taxation, but until now has played a rather limited role in this field.<sup>9</sup>
6. On the other hand, the ECJ has recognised that entitlement to the recovery of sums levied in breach of EU law is a consequence of, and an adjunct to, the rights conferred on individuals by the relevant EU provisions, so that a Member State is therefore in principle required to repay charges levied in breach of EU law.<sup>10</sup> This right to a refund of charges levied in violation of EU law has a rather broad scope of application and is therefore of particular importance for every taxpayer.

## **3. General principles of primary EU law with potential effects on national tax procedures**

7. As there are no EU rules governing the matter, the ECJ has decided that repayment of charges levied though not due may be claimed by the taxpayer concerned only if the substantive and formal conditions laid down by the national law of the relevant Member State are complied with. In particular, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay

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<sup>8</sup> See ECJ, decision of 19 November 1991, C-6/90 and C-9/90, *Francovich et al.*, paras 28. et seq.; decision of 5 March 1996, C-46/93 and C-48/93, *Brasserie du Pêcheur*, paras. 17-22.

<sup>9</sup> See ECJ, decision of 17 October 1996, Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit International BV et al.*, paras. 41 et seq.; decision of 8 March 2001, Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd et al.*, paras. 77 et seq.; decision of 12 December 2006, C-446/04, *Test Claimants FII Group Litigation*, paras. 209 et seq. However, the principle was applied in two Spanish VAT cases, on which see ECJ, decision of 12 November 2009, case C-154/08, *Commission vs. Spain [registradores liquidadores]* and decision of 26 January 2010, case C-118/08, *Transportes Urbanos y Servicios Generales SAL*.

<sup>10</sup> See, inter alia, ECJ, decision of 2 December 1997, C-188/95, *Fantask*, para. 38; decision of 22 October 1998, C-10/97 et al., *IN.CO.GE '90 et al.*, para. 24.

down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.<sup>11</sup> Furthermore, it is likewise for national law to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated.<sup>12</sup>

8. However, this so-called “procedural autonomy” enjoyed by the Member States is not unlimited. In its case-law, the ECJ has derived two important yardsticks from the general EU law principle of Union loyalty (Art. 10 EC, now Art. 4(3) TFEU), and the origins of those principles were themselves tax-related.<sup>13</sup>
9. First, the ECJ has ruled that the conditions applied by Member States to claims based on an infringement of EU law must not be less favourable than those governing
10. similar domestic actions. This is the so-called principle of “**equivalence**”.<sup>14</sup>
11. Second, the ECJ has held that those conditions applicable under national law must not render virtually impossible or excessively difficult the exercise of rights conferred by EU law. This is the so-called principle of “**effectiveness**”.<sup>15</sup>
12. Both afore-mentioned principles have been applied by the ECJ in a large number of tax cases (including also indirect taxes and customs duties). The issues addressed in the ECJ’s case-law concern, inter alia, time limits for starting administrative objection procedures or court procedures, time limits for alterations of tax assessments (statutes of limitation), measures introduced by Member States in order to limit the consequences of ECJ judgments etc.<sup>16</sup>

#### **4. The increasing complexity of the ECJ’s fundamental freedoms case-law and of its procedural consequences – the example of dividend taxation**

13. In the area of direct taxation, the vast majority of ECJ decisions still concern the interpretation and application of the EU fundamental freedoms. However, in recent years the ECJ has been confronted with increasingly complicated and sometimes highly technical issues, and at the same time the Court has tried to give more weight to the revenue interests of the Member States<sup>17</sup>. This has resulted in a significant increase

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<sup>11</sup> ECJ, decision of 9 November 1983, 199/82, *SpA San Giorgio*, para. 12; decision of 12 December 2006, C-446/04, *Test Claimants FII Group Litigation*, para. 203.

<sup>12</sup> See ECJ, decision of 8 March 2001, Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd et al.*, para. 86..

<sup>13</sup> See ECJ, decisions of 16 December 1976, 33/76, *REWE*, and 45/76, *Comet* (both on repayment of customs duties).

<sup>14</sup> See, inter alia, ECJ, decision of 9 November 1983, 199/82, *SpA San Giorgio*, para. 12; decision of 12 December 2006, C-446/04, *Test Claimants FII Group Litigation*, para. 203.

<sup>15</sup> See, in particular, ECJ, decision of 14 December 1995, C-312/93, *Peterbroeck et al.*, paras. 12 et seq.; decision of 11 July 2002, C-62/00, *Marks & Spencer plc*, paras. 34-42.

<sup>16</sup> See, inter alia, ECJ, decision of 29 June 1988, 240/87, *Deville*, para. 13; decision of 17 July 1997, C-90/94, *Haahr Petroleum*, paras. 46 et seq.; decision of 15 September 1998, C-231/98, *Edis*; decision of 2 October 2003, C-147/01, *Weber’s Wine World et al.*, para. 86; decision of 21 January 2010, C-472/08, *Alstom Power Hydro*, paras. 17 et seq. See for the question of whether EU law requires Member States, in addition to reimbursement of overpaid taxes, also to pay compound interest on top of simple interest already provided for by national legislation, the pending Case C-591/10, *Littlewoods Retail Ltd et al.*

<sup>17</sup> See the Task Force’s Opinion Statement on ECJ, decision of 25 February 2010, C-337/08, *X Holding BV* (published in the April issue of European Taxation 2011).

in the complexity of the ECJ's case-law concerning substantive tax issues. One striking example of this increased complexity are the developments in the field of cross-border loss compensation.<sup>18</sup> Another area that is intensively discussed at the moment is the tax treatment of cross-border dividends. In the latter area it is particularly obvious that the ECJ neglects the potential procedural consequences of breaches of EU law, and that Member States are tempted to install massive hindrances to potential refund claims which might be brought by the taxpayers concerned.

14. A first example to be mentioned in this respect is the treatment of *inbound* dividends paid by foreign corporations to domestic shareholders. Such dividends, which regularly already bear the burden of the corporate income tax paid by the relevant corporation abroad, very often do not (or at least not fully) participate in the mechanisms for relief of economic double taxation in the shareholder's home State. The ECJ has identified restrictive (i.e., discriminatory) hindrances on inbound dividends not only in classical systems,<sup>19</sup> but also in more refined shareholder relief systems<sup>20</sup> and in particular in imputation systems<sup>21</sup>
15. The last-mentioned cases concerning imputation systems, in particular, have raised a multitude of follow-up questions with respect to the amount of foreign corporate income tax to be imputed, and
16. the way a refund of domestic personal (or corporate) income tax can be obtained by the shareholder in his Member State of residence. Above all the German example has also demonstrated that Member States may feel inclined to introduce specific measures in their domestic procedural tax legislation with the aim of barring refund claims. In fact, after the ECJ had clarified in the (first) *Meilicke* case that also the (former) German imputation system violated the free movement of capital, the competent German tax court still found it necessary to refer several additional questions to the ECJ.
17. In her opinion of 13 January 2011, Advocate General Trstenjak acknowledged that Member States are basically entitled to put in place legislation limiting the possibilities to re-open formal tax assessments, as long as they pay due respect to the principles of "equivalence" and "effectiveness". In particular, Advocate General Trstenjak emphasised that national measures tightening the possibilities to amend tax assessments in a way that EU law-based claims are excluded, would render the exercise of those rights excessively difficult if no adequate transitional period is provided for. According to Advocate General Trstenjak, that period should be at least one year after the promulgation of the law introducing the new limitation.<sup>22</sup>
18. A second and currently even more pressing problem concerns the tax treatment of *outbound* dividends paid to non-resident shareholders. In numerous cases not covered

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<sup>18</sup> See, in particular, ECJ, decision of 13 December 1995, C-446/03, *Marks & Spencer plc*; decision of 15 May 2008, C-414/06, *Lidl Belgium*; decision of 23 October 2008, C-157/07, *Krankenheim Ruhesitz am Wannsee*; decision of 25 February 2010, C-337/08, *X Holding BV*. Compare also the Task Force's Opinion Statements on *Lidl* (published in *European Taxation* 2008, 590-596) and on *X Holding BV*.

<sup>19</sup> ECJ, decision of 6 June 2000, C-35/98, *Verkooijen*.

<sup>20</sup> See ECJ, decision of 15 July 2004, C-315/02, *Lenz*, concerning the Austrian "half rate" system.

<sup>21</sup> ECJ, decision of 7 September 2004, C-319/02, *Manninen*; decision of 6 March 2007, C-292/04, *Meilicke I*.

<sup>22</sup> Advocate General Trstenjak, opinion of 13 January 2011, C-262/09, *Meilicke II*, paras. 101 et seq., relying inter alia on ECJ, decision of 11 July 2002, C-62/00, *Marks & Spencer plc*, paras. 36 et seq.

by the Parent-Subsidiary-Directive, in particular participations held by individuals or portfolio shareholdings held by legal persons (frequently institutional investors), such dividends are subject to a final withholding tax in the moment of distribution, and the resulting tax burden in the hands of the recipient may differ from that of purely domestic dividends paid to resident shareholders within the Member State concerned. Although national systems differ in detail, the ECJ and also the EFTA-Court<sup>23</sup> have already identified several (discriminatory) infringements of the free movement of capital and also of the freedom of establishment.<sup>24</sup> In addition, a large number of infringement procedures have been initiated by the Commission, and some of these cases have already been brought before the ECJ.<sup>25</sup>

19. A striking feature of these procedures is that they generally focus solely on the issue of a potential violation of the fundamental freedoms, i.e. on the question of whether the final withholding tax burden of a non-resident shareholder exceeds the tax burden of a resident shareholder receiving an otherwise identical dividend distribution. Without doubt it is true that already with respect to this substantive question, the ECJ's case-law is of considerable complexity, since after the EFTA-Court's ruling that a tax treaty between the source State and the State of residence was irrelevant<sup>26</sup>, the ECJ had first indicated that a tax treaty should be taken into account,<sup>27</sup> but then made it clear that a *full* withholding tax credit would be required in the State of residence to release the source State from its obligation not to discriminate.<sup>28</sup>
20. Nevertheless, the complexity of this test should not obstruct the clear view of the fact that the real problem taxpayers are facing in practice is not (only) to prove that they have been the victim of substantive discrimination, but also to find a proper way to obtain a refund for taxes eventually overpaid due to that discrimination.
21. A good example of this unsatisfactory situation can, once more, be found in the German legislation. Of the two infringement procedures currently pending against Germany before the ECJ, one is concerned with the treatment of non-resident shareholders in a more general way,<sup>29</sup> while the other is concentrating on dividend payments to non-resident pension institutions<sup>30</sup>. In particular the second case makes clear that the issue of final withholding taxes is generally situated at the borderline between substantive and procedural tax law, for in its submission to the ECJ the Commission has pointed out that it sees the main problem in the fact that the gross withholding tax on dividends paid to non-resident shareholders is considered final,

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<sup>23</sup> EFTA-Court, decision 23 November 2004, E-1/04, *Fokus Bank* (Norwegian legislation).

<sup>24</sup> See ECJ, decision of 14 December 2006, C-170/05, *Denkavit Internationaal BV* (French legislation); decision 8 November 2007, C-379/05, *Amurta S.G.P.S.* (Dutch legislation); decision of 11 June 2009, C-521/07, *Commission v. Netherlands*; decision of 18 June 2009, C-303/07, *Aberdeen Property Fininvest Alpha* (Finnish legislation); decision of 19 November 2009, C-540/07, *Commission v. Italy*; decision of 3 June 2010, C-487/09, *Commission v. Spain*.

<sup>25</sup> See C-284/09, *Commission v. Germany*; C-493/09, *Commission v. Portugal*; C-342/10, *Commission v. Finland*; C-600/10, *Commission v. Germany*.

<sup>26</sup> EFTA-Court, decision of 23 November 2004, E-1/04, *Fokus Bank*, paras. 35 et seq.

<sup>27</sup> ECJ, decision of 14 December 2006, C-170/05, *Denkavit Internationaal BV*, paras. 45 et seq.

<sup>28</sup> ECJ, decision of 8 November 2007, C-379/05, *Amurta S.G.P.S.*, paras. 62, 79 et seq., and in particular decision of 19 November 2009, C-540/07, *Commission v. Italy*, paras. 34 et seq. See on the latter case also the Task Force's Opinion Statement (published in the July issue of European Taxation 2010).

<sup>29</sup> C-284/09, *Commission v. Germany*.

<sup>30</sup> C-600/10, *Commission v. Germany*.

while resident shareholders have access to an assessment procedure which allows them to be taxed on a net basis (after cost deduction), depending on the circumstances also against low tax rate, and to receive a refund of overpaid withholding taxes.

22. Even though it has already been suspected in Germany for some years now that levying a final gross withholding tax on dividends discriminates against non-residents, no specific procedure has been introduced yet to allow the non-resident taxpayers concerned to get a full refund of (that part of) the withholding tax which exceeds the tax burden of a resident taxpayer receiving an equivalent dividend.<sup>31</sup> The situation has only become more confusing due to the fact that, in one and the same case, German courts have recently come to diverging results as to which existing procedure under German law would enable non-resident taxpayers to obtain a refund of overpaid withholding tax:
23. In the case concerned, the non-resident shareholder had, in 2002, submitted a refund claim to the Federal Tax Office (*Bundeszentralamt*), based both on tax treaty and additional grounds.<sup>32</sup> While that central institution granted tax treaty relief, it declared itself incompetent for the claim of any excess refund based on other considerations, and referred the taxpayer in this respect to the local tax office to which the German corporation had paid the withholding tax. Once the claim had also been rejected by that local office, the taxpayer brought an action before the regional tax court, which then told him that the Federal Tax Office was indeed competent to deal with his EU law-based claim.<sup>33</sup> In the subsequent appeal proceedings, however, the Federal Tax Court took the view that it was the local tax office which originally had received the withholding tax that also had to deal with refund claims based on the EU fundamental freedoms.<sup>34</sup> And since the taxpayer concerned has lodged a constitutional complaint against the Federal Tax Court's judgment, it is not even clear whether this is the final word.
24. It should be obvious that it is not in line with the EU law principles of "equivalence" and "effectiveness" that taxpayers are sent around in circles from one authority to the next. Moreover, even though the idea of an individual refund procedure for each single dividend to be started with the local German tax authority that is responsible for the corporation distributing the dividend may not look completely irrational at first sight if a non-resident with only one or two German shareholdings is concerned, this concept turns into a sheer *horror iuris* where a non-resident holds several small participations in different German corporations. For these persons, and in particular also for foreign institutional investors with large portfolios, it will often be impossible to identify the

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<sup>31</sup> It is true that, as of 2009, Sec. 44a(9) Income Tax Act provides non-resident corporate taxpayers with the possibility to obtain a refund of 2/5 of the 25 % domestic withholding tax. However, this rule only removes the part of the discrimination related to the tax rate (the German corporate income tax rate being 15 % since 2008), not to the tax base, and it does not apply retroactively to previous tax years. Furthermore, it is also true that non-resident taxpayers may be able to rely on a bilateral double tax treaty in order to reduce their withholding tax burden as such (Sec. 50d(1), (2) Income Tax Act). However, the remaining gross tax burden will in many cases still be higher than the German tax burden on purely domestic dividends, and the German tax treaty relief measures do not cover the excess amount.

<sup>32</sup> It appears that the taxpayer had originally based this excess part of his claim on a mere interpretation of domestic law, but that later during the court proceedings in first instance also EU law arguments were added.

<sup>33</sup> Finanzgericht Baden-Württemberg, decision of 18 June 2007, 6 K 31/06.

<sup>34</sup> Bundesfinanzhof, decision of 22 April 2009, I R 53/07.

competent local authority. And even where such identification is possible, the amount of work related to the submission of several refund claims (language problems included<sup>35</sup>) may be immense and deter the foreign shareholder from raising his claims altogether, despite the fact that these claims as such may be well founded.<sup>36</sup>

## 5. The Statement

25. Against the background of the foregoing examples from the area of dividend taxation, the Confédération Fiscale Européenne urges that the principles of “equivalence” and “effectiveness”, as general principles of primary EU law, should be taken more seriously both at the EU and the national level.
26. In this respect, it is particularly desirable that the ECJ puts a stronger emphasis on the principle of “effectiveness”. Already at the stage of developing solutions for cross-border substantive issues (which, in particular under the EU fundamental freedoms, are becoming increasingly complex), the ECJ should keep in mind that national procedural laws very often do not yet provide the necessary framework for the practical realisation of complex concepts. It cannot be in the interest of EU law that taxpayers have to go through cumbersome litigation before national courts (and eventually before the ECJ) in order to “win” in substance, while the practical realisation of their claims is excessively difficult due to the complexity of the approach chosen by the ECJ and the inaptness of national procedural rules to give this approach full force and effect.
27. Since the right to recover taxes levied in breach of EU law is a consequence of the rights conferred on individuals by EU law (see *supra* 2.), Member States should not create direct hindrances to the realisation of such recovery through the introduction of procedural rules specifically aimed at barring EU law-based refund claims. Furthermore, Member States should also refrain from creating indirect hindrances to the realisation of such recovery claims by maintaining legislation that is unclear with respect to the exact circumstances and conditions under which such claims must be submitted (in particular, as regards the competent authority and the relevant time frame for submission). It is highly advisable that Member States (including their tax authorities<sup>37</sup> and domestic courts) screen their procedural rules to improve and amend them with respect to claims covered by EU law. Member States should either open the formal assessment procedures available to resident taxpayers also to non-resident shareholders with respect to their dividend income, or at least install equivalent procedural alternatives like a centralised refund procedure for EU law-based refund claims, like for instance Austria did in 2009.<sup>38</sup>

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<sup>35</sup> While the Federal Tax Office at least maintains a website also in English, the local tax authorities will generally only communicate in German.

<sup>36</sup> See for a similar conclusion the Commission’s press release IP/09/1543 of 19 October 2009, stating that the amount of withholding tax relief foregone by investors under domestic and tax treaty relief mechanisms alone is more than €5 billion per year.

<sup>37</sup> Tax authorities, just as much as all other civil servants of the Member States, are obliged to comply with the obligation of Union loyalty. See further on this ECJ decision of 29 April 1999, case C-224/97, *Ciola*.

<sup>38</sup> See Sec. 21(1) no. 1a Corporate Income Tax Act.

28. Finally, the European Commission should continue to improve the situation of cross-border shareholdings (and other activities) with respect to withholding tax burdens. Simplified relief procedures applying *ex ante* at source would already be very helpful, but they should be accompanied by an *ex post* refund procedure to be handled by a centralised office or institution (as a “single contact point”), possibly in an electronic format.<sup>39</sup> In this context it should also be added that, just like Member States seem to require longer time for handling foreign rather than domestic income of resident taxpayers,<sup>40</sup> non-resident taxpayers may require more time to prepare and submit their refund claims than resident taxpayers. The Commission should pursue these issues also during the analysis and evaluation of its current public consultation concerning “Taxation problems that arise when dividends are distributed across borders to portfolio and individual investors and possible solution”. In the long run the principles of “equivalence” and “effectiveness”, as developed by the ECJ (*supra* 3.), will not be sufficient to provide taxpayers with adequate protection. In order to allow taxpayers to receive a proper refund of taxes levied in breach of EU law, the Commission should therefore develop common minimum standards for Member States on how to treat such refund claims, which may be combined with an increased administrative co-operation between the Member States. In fact, there is no reason why procedural rules should only protect the collection of taxes by the Member States (see *supra* 1.), and not also the refund of overpaid taxes to the taxpayers.

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<sup>39</sup> See Commission Recommendation 2009/784/EC of 19 October 2009 on withholding tax relief procedures, OJ 2009 L 279/8.

<sup>40</sup> See ECJ, 11 June 2009, Joined Cases C-155/08 and C-157/08, *von Passenheim et al.*