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European Tax Law

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European Tax Law

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Course Overview

I already look forward to meeting you all for an Introduction to European Tax Law. This course examines the influence of European Community law (fundamental freedoms, directives) on the domestic tax systems of the EU Member States and discusses European Union tax policy. It will follow along the lines set by the attached Powerpoint presentation; the additional readings and materials in this compilation should help you prepare for the course and the exam.

Treaty Establishing the European Community[*]

Article 2

The Community shall have as its task, by **establishing a common market** and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, **balanced and sustainable development of economic activities**, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, **a high degree of competitiveness and convergence of economic performance**, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and **economic and social cohesion and solidarity among Member States**.

Article 3

1. For the purposes set out in Article 2, the **activities of the Community shall include**, as provided in this Treaty and in accordance with the timetable set out therein: […]

(c) **an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital**; […]

Article 12

Within the scope of application of this Treaty, and **without prejudice to any special provisions** contained therein, **any discrimination on grounds of nationality shall be prohibited**. […]

Article 14

[…]

2. The **internal market** shall comprise **an area without internal frontiers** in which the **free movement of goods, persons, services and capital is ensured** in accordance with the provisions of this Treaty.

Article 18

1. Every citizen of the Union shall have the right to **move and reside freely** within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect. […]

[Free movement of persons, services and capital: Workers]

Article 39

1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the **abolition of any discrimination based on nationality between workers of the Member States** as regards employment, **remuneration** and other conditions of work and employment. […]

[Free movement of persons, services and capital: Right of establishment]

Article 43

Within the framework of the provisions set out below, **restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited**. Such prohibition shall also apply to **restrictions on the setting-up of agencies, branches or subsidiaries** by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, **under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital**.

[*] [2006] OJ (C 321E), 1.

Article 48

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be **treated in the same way as natural persons who are nationals of Member States**.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

[Free movement of persons, services and capital: Services]

Article 49

Within the framework of the provisions set out below, **restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended**.

The Council may, acting by a qualified majority on a proposal from the Commission, **extend** the provisions of the Chapter to **nationals of a third country** who provide services and who are established within the Community.

[Free movement of persons, services and capital: Capital and payments]

Article 56

1. Within the framework of the provisions set out in this Chapter, **all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited**. […]

Article 57

1. The provisions of Article 56 shall be without prejudice to the **application to third countries** of **any restrictions which exist on 31 December 1993** under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be **31 December 1999**.[*]

Article 58

1. The provisions of Article 56 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which **distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested**;

(b) to take all requisite measures to prevent infringements of national law and regulations, **in particular in the field of taxation** and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the **right of establishment which are compatible with this Treaty**.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute **a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56**.

~~*[General and Final Provisions]*~~

~~*Article 293*~~

~~Member States shall, **so far as is necessary**, **enter into negotiations with each other** with a view to securing for the **benefit of their nationals**: […]~~

~~— **the abolition of double taxation within the Community**, […]~~[**]

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[*] This sentence was included by [2006] OJ (L 157), 203, 209.

[**] To be striken by the Treaty of Lisbon, [2007] OJ (C 306), 1.

Part I
Introduction and Fundamental Freedoms

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STUDY

EUROPEAN PARLIAMENT

Policy Department
Economic and Scientific Policy

THE IMPACT OF THE RULINGS OF THE EUROPEAN COURT OF JUSTICE IN THE AREA OF DIRECT TAXATION

IP/A/ECON/ST/2007-27

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EXECUTIVE SUMMARY

Over recent years, the influence of EC law on the Members States' direct tax systems has drawn growing attention from European institutions, national governments, tax specialists and the media. The focus of this attention has been less on the adoption of European legislation in this area, than on the development of the case-law of the European Court of Justice in direct tax matters.

Unlike for indirect taxes, as VAT and excise duties, which have been significantly harmonized by Community legislation, the EC Treaty does not contain explicit rules for the adoption of secondary legislation aimed at approximating the national income tax systems of the Member States. As to corporate taxation, the existing direct tax directives, adopted on the basis of Article 94 EC, are scarce and deal with specific cross border tax obstacles to intra-Community operations, such as corporate reorganizations or intra-group dividends, interests and royalties.

However, differences between the national direct tax systems may distort the allocation of resources and may generate double taxation, which hinders the achievement of the Internal market, an objective affirmed in Article 14 EC. This objective has certainly a political dimension, but is also reflected in Treaty provisions conferring on taxpayers certain rights which are directly applicable and enforceable by Community and national courts.

Also in unharmonized areas, like direct taxation, Member States are bound to respect their general commitment to Community loyalty under Article 10 EC. According to the Court, "*although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law*"[1]. In particular, national direct tax provisions (including international tax conventions) must not compromise the freedoms enshrined in the EC Treaty.

Since the 1986 *Avoir fiscal* case (C-270/83), the Court has repeatedly reaffirmed this principle. The number of decided cases is growing each year, together with the areas within direct taxation that have been subject to Court scrutiny. EC law has by now not only affected Member States' personal and corporate income taxes, but also wealth and property taxes, inheritance and gift taxes and taxes on commercial activities, whether adopted at national, regional or local level.

As to personal income tax, the Court's case-law has been particularly able to highlight discriminations experienced by EU workers, both employed and self-employed, who had chosen to carry their economic activity in other Member States. The Court has accepted that Member States can apply different tax rules or tax systems to resident and non-resident natural persons, since these two categories of persons are generally not comparable[2].

[1] For example, ECJ, 11 August 1995, Case C-80/94 *Wielockx ECR* I-2493, para. 16; 16 July 1998, Case C-264/96 *ICI*, *ECR* I-4695, para. 19; 29 April 1999, Case C-311/97 *Royal Bank of Scotland*, *ECR* I-2651, para. 19.

[2] According to the Court "*there are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay tax or the possibility of taking account of their personal and family circumstances*" (ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v Schumacker, ECR* I-225, paras. 31-34; *Wielockx*, para. 18; ECJ 27 June 1996, Case C-107/94 *Asscher, ECR* I-3089 para. 41). In *Asscher,* however, the ECJ ruled that Member States could not apply a higher tax rate to non-residents without proper justification (*Asscher*, para. 49; see also ECJ, 12 June 2003, Case C-55/98, *Gerritse v Finanzamt Neukölln-Nord, ECR* I-5933, para. 54).

However, depending on the circumstances of the case, the Court has considered that a specific tax burden imposed only on non-residents, or the denial by a Member States to non-residents of a tax advantage available to residents, can constitute a discrimination if "*there is no objective difference between the situations of the two such as to justify different treatment in that regard*".

According to the principle laid down in the famous *Schumacker* case, a non-resident taxpayer is deemed to be in the same situation of a resident if he derives his income entirely or almost exclusively from the economic activity which he performs in that State.

The Court of Justice has developed a case-law on personal income tax which, starting from the application of the economic freedoms, has progressively widened its scope to a much broader recognition of European citizenship in tax matters, based on Article 12 and on Article 18 EC, introduced by the Maastricht Treaty. As a consequence, many other direct tax obstacles have been removed as a result of the Court's judgements, among others as regards pension contributions and benefits, immovable property, or cross-borders services whether provided to or received from other Member States.

As to corporate income tax, landmark judgements on the freedom of establishment and on the equal treatment of branches and subsidiaries, on the cross-border compensation of losses, on the taxation of cross-borders services can be seen as significant steps towards the achievement of the Internal market.

Restrictions to the freedom of establishment can be created by tax measures adopted by the Member State where a company has its primary establishment (the Home State) that hinder the establishment of subsidiaries or branches in another Member State or by national tax measures of the State of the secondary establishment of a non-resident company (the Host State). For example, EU law thus prohibits Member States to treat branches and subsidiaries of non-resident EU companies less favourably than resident companies as to the tax rate, the right to interest on overpaid tax or to a tax deduction of research expenses carried out in other Member States.

In particular, important obstacles to the achievement of the Internal market are the difficulties to take into account losses incurred by multinational companies. When places of business are located in different countries, difficulties arise when neither the State of residence nor the State of activity admits the deduction of losses. This can be seen as a consequence of the lack of cross-border compensation of losses through a consolidation mechanism at the EU-level. Similarly, tax restrictions exist as to transfers of assets and services between associated companies established in different Member States.

At the junction of corporate and personal taxation, numerous cases have addressed the taxation of individual and corporate shareholders in one Member State of companies established in other Member States. The issues concerning the taxation of company shareholders are mainly – but not only – related to the potential (and often actual) risk of economic double taxation of distributed income. National tax measures can dissuade residents from investing in other Member States in many different ways. They can restrict incentives to the acquisition of shares to participations in resident companies. They can subject dividends received from non-resident companies (inbound dividends) or distributed to non-resident shareholders (outbound dividends) to a less favourable treatment than domestic dividends; they can overtax capital gains realized on the alienation of foreign shares. As to corporate shareholders in particular, the Court of Justice also applied the Treaty freedoms to national rules limiting the deduction of participations costs in foreign subsidiaries and to anti-abuse measures specifically targeted at multi-national groups.

The Court has nevertheless admitted that not all restrictions to intra-Community trade and movement were incompatible with EC law: In the absence of harmonizing measures, Member States keep to a certain extent the right to allocate their taxing jurisdictions among them through double taxation conventions, the right to fight tax avoidance and tax evasion, as well as the right to prevent that taxpayers engaging in cross-border activities end up in a more favourable situation than "domestic" taxpayers by benefiting from multiple tax advantages granted by different jurisdictions. In particular, EU law does not preclude – yet – Member States to apply non-discriminatory rules that may lead to situations of double taxation or to apply anti-abuse rules targeted at economic operators having cross-border activities, provided that they do not increase their tax burden as compared to a person operating in a purely national context or that they are aimed specifically at combating purely artificial arrangements entered into for tax reasons alone.

As to the implementation of the Court's case-law into national legislation, Member States have to comply with judgements. However, the effectiveness of the implementation by the Member States of the EC freedoms, as interpreted by the Court of Justice, is difficult to assess. Substantial differences exist between Member States as to the number of cases referred to the Court, as well as to the manner in which they adapt (or not) their tax systems to the requirements of EC law subsequent to ECJ judgements. However, there is no direct link between the number of cases referred to the ECJ and the legislative changes made by Member States to adapt their direct tax system to the EU requirements. Considering these differences, the term of negative harmonization, often used to describe the role presently played by the European Court of Justice in the area of direct taxation, may appear excessive.

In any case, the Court's case law in direct tax matters, especially on the EC freedoms, has potentially a rather large and at least originally not expected impact on the exercise by Member States of their taxing powers. If taxation on the basis of residence by Member States is not fundamentally jeopardized by this case-law, non-residents benefit under EU law from legal protection against discriminatory measures that are applied to them by the Member State where their income is sourced. However, uncertainties continue to exist as to the exact tax status of non-resident taxpayers**.** Member States' tax policy choices in the areas of tax incentives, of anti-abuse rules and of the exercise of taxing powers by regional and decentralized bodies are or could also be strongly influenced by the development of the Court's case-law.

In the international context, EC freedoms as interpreted by the Court affect the existing double taxation conventions (DTCs) signed between Member States, and even between Member States and third countries. If, according to the Court, "*Member States are at liberty, in the framework of [*double taxation conventions*], to determine the connecting factors for the purposes of allocating powers of taxation…*"[3], they are nevertheless bound by the superior EC Treaty obligations. A DTC as such is no justification for restricting the EC Treaty freedoms. DTCs can be taken into consideration in order to assess the overall situation of the taxpayer and its compatibility to the EC freedoms. A restriction in one Member State of a freedom may be admitted if its effects are neutralized by a DTC which produces compensating effects in the Member State other than the one of residence. However, the Court has been reluctant to decide that EC law requires extending the benefits, granted by a given Member State in a DTC to residents of another Member State, to all EU residents (most favoured nation clause).

[3] ECJ, 21 September 1999, Case C-307/97, *Saint-Gobain*, *ECR* I-6163, para. 56; 12 May 1998, Case C-336/96, *Gilly v Dir. Services fiscaux Bas-Rhin*, *ECR* I-2793, paras 24 and 30; , 14 December 2006, Case C-170/05, *Denkavit Internationaal v Ministre de l'Economie*, *ECR* I-11949,, para. 43.

Neither can be derived from the case-law so far that juridical double taxation must be considered as a breach of the EC freedoms *per se*. Double taxation, whether juridical or economical (see Annex 1, Glossary, "Double taxation"), hinders the establishment of the Internal market. Sometimes, double taxation results from the application of national rules that provide for an unjustified different tax treatment to domestic and to cross-borders situations: such rules have been declared incompatible with EU law. However, the case-law of the Court has in some circumstances resulted in accepting national rules by which cross border transactions are taxed more heavily than domestic transactions.

The fact that the EC freedoms primarily rely on the – juridical – concept of discrimination makes it difficult to analyze the Court's case-law on the basis of economic efficiency, using criteria such as capital import neutrality (in the state of source) and capital export neutrality (in the state of residence). On the one hand, economic efficiency relates to the optimal allocation of factors of production resulting in the highest possible productivity and entails the elimination (or at least the mitigation) of international double taxation. On the other hand, most of the case-law must be read as favouring "capital movement neutrality" from the perspective of non-discrimination principles, from the viewpoints of both the State of residence and the State of source, which may seem logically and economically almost impossible to achieve without full harmonization of the national direct tax systems.

Further progress towards a coordination of the national direct tax systems should nevertheless be made in order to remove remaining obstacles to the achievement of the Internal market. The case-law method has indeed various limitations, among which the fact that it is slow, expensive, often influenced by individual situations and thus not always predictable. Moreover, it is inadequate to remove situations of double taxation, where no issue of discrimination is at stake.

Targeted measures should be taken in order to avoid negative legal and economic consequences of the uncoordinated exercise of Member States' tax jurisdiction. As to corporate taxation, and in particular for multinational groups of companies, sensitive areas in this respect are the tax burdens imposed on the transfer of residence or of assets between Member States, the treatment of cross-border losses, the application of anti-abuse rules or the taxation of outbound or inbound dividends. The important judgments of the Court as well as the Commission's recent initiatives on these issues are certainly steps in the right direction.

Finally, the question is raised whether a more comprehensive scheme, such as harmonization of corporate taxation by the introduction of a common consolidated corporate tax base (CCCTB) or any other EC instrument on the elimination of double taxation, would not effectively better serve not only Community objectives, but also Member States' and taxpayers' interests.

LIST OF ABBREVIATIONS

AG	Advocate General
Ann. Sénat	Annales Sénat (Belgium)
B.T.R.	British Tax Review
Bull. Q. et R. Chambre	Bulletin des questions et réponses Chambre des Représentants (Belgium)
Cah. dr. europ.	Cahiers de Droit européen
Cah. dr. fisc. intern.	Cahiers de droit fiscal international
CGI	Code Général des Impôts (General Tax Code, France)
C.M.L.R.	Common Market Law Review
Dr. Fiscal	Revue de droit fiscal (France)
ECJ	European Court of Justice
EC Tax. Rev.	EC Tax Review
ECR	European Court Reports – Reports of Cases before the Court of Justice and the Court of First Instance
E.L.Rev.	European Law Review
Europe	Europe
Eur. Tax.	European Taxation
Intertax	Intertax
IStR	Internationales Steuerrecht (Germany)
ITC	Income Tax Code
JTDE	Journal des tribunaux de droit européen
NTER	Nederlands tijdschrift voor Europees recht
OJ	Official Journal
Rev. dr. intern. comp.	Revue de droit international et de droit comparé
R.G.F.	Revue générale de fiscalité (Belgium)
R.M.U.E.	Revue du marché unique européen
RTDE	Revue trimestrielle de droit européen
SWI	Steuer und Wirtschaft International (Austria)
TNI	Tax Notes International
TNS	Tax News Service
WFR	Weekblad voor fiscaal recht (The Netherlands)
W.P.N.R.	Weekblad voor privaatrecht, notariaat en registratie (The Netherlands)

INTRODUCTION

This study aims at describing the impact of the rulings of the European Court of Justice (the "Court") on the Members States' direct tax systems. The study contains materials available until December 31, 2007. The case-law of the Court is characterized by its continuing development, in a changing institutional, political, social and economic context.

The area of taxation, and in particular the area of international taxation, is also an evolving field, in which conflicting or converging interests between States, or between States and taxpayers, play an important role in the shaping of the applicable national rules, which face new realities due to the economic globalization.

The study is divided in four chapters.

In the first chapter, preliminary remarks are made as to the legal context in which the Court decides on its cases. The basic elements of the income tax systems of the Member States are briefly recalled, as well as the EC Treaty provisions and secondary legislation relevant for direct taxation. Finally, the methods of reasoning used by the Court of Justice are outlined, with particular reference to direct taxation.

In the second chapter, the Court's judgements in the area of direct taxation are analyzed. To facilitate comprehension, the cases have been divided in three main categories, *viz*. taxation of individuals, taxation of companies and taxation of company shareholders, with emphasis on the last two categories. Within each part, sub-categories have been drawn, which do not always correspond to classical schemes but which are intended to offer a systematic view of the dynamics at stake in the Court's case-law.

This chapter includes also, for each type of cases an attempt to describe the major trends in the implementation of the Court's case-law by Member States. Particular attention is given to Member States whose legislations have been directly assessed by Court decisions as to their compatibility with EC law.

The third chapter draws up provisional conclusions on the manner in which the development of the Court's case-law influences the direct tax systems of the Member States.

In a fourth chapter, the limits of the so-called "negative integration" through the case-law of the Court are discussed and suggestions are also made as to room for further European action, notably the adoption of EC legislative acts in direct tax matters.

I. TAXATION OF COMPANIES AND INDIVIDUALS WITHIN A EUROPEAN CONTEXT: SOME PRELIMINARY REMARKS

A. DIRECT TAXATION IN THE INTERNAL MARKET

1. States raise taxes in order to fund their budget. Taxation is thus directly linked to the exercise of sovereignty. Since the early 20th century, (direct) income taxation has become an important component of the total State revenue[4].

2. Income taxation first bears on the income of **individuals**. It also bears on the income of **incorporated entities**, the income of which on the one hand may find its substance in dividends distributed by subsidiaries which have paid income tax and on the other hand is eventually distributed to individuals. Taxation of the same economic income at the level of the subsidiary, of the parent and of the individual shareholder gives rise to the problem of "**economic double taxation**".

3. States traditionally affirm their jurisdiction to tax on the basis of criteria involving a *nexus* (link) with the income. This link may exist either with the beneficiary of the income, who is e.g. a **resident** of the State, or with the income itself, which finds e.g. its **source** in the State. The result of the interaction between the two types of criteria and of varying definitions of each type is that the same income may be taxed in two or more States, giving rise to the problem of "**international double taxation**". As to corporate taxation, the two types of double taxation interact and reinforce one another when the subsidiary, the parent and the individual shareholder are located in different States, each of which may indeed be less prone to solve a problem which concerns a foreign taxpayer.

4. Relief for international double taxation can be granted either by unilateral measures, pursuant to which a State agrees to withdraw its tax claim, or by international **double taxation conventions** (hereafter DTCs). Two main methods are proposed in order to avoid double taxation: the **exemption** method and the imputation or **tax credit** method. According to the OECD Commentary, "*under the principle of exemption, the State of Residence R does not tax the income which according to the Convention may be taxed in the State of Source*". With the ordinary "*imputation*" or "*credit*" method, "*the State of Residence allows, as a deduction from its own tax on the income of its resident, an amount equal to the tax paid in the other State … but the deduction is restricted to the appropriate proportion of its own tax*"[5]. It must be noted that those methods serve not only to relieve juridical double taxation, but also to alleviate or eliminate economic double taxation, be it at a domestic or at an international level.

5. Which of these methods – exemption or imputation – leads to the optimal use of economic factors? According to some economists (see nos. 179-189), the best allocation is reached by imposing worldwide taxation combined with an imputation system. This combination ensures "**capital export neutrality**", meaning that wherever the taxpayer invests, he will pay the same amount of tax in his State of residence. In contrast, "**capital import neutrality**" implies taxation only in the State of source, leading to territoriality that is to say to different tax burdens depending on the source country (see Annex 1, Glossary, "Territorial taxation"). Capital import neutrality allows foreign investors to compete in the State of source on an equal footing with a local investor.

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[4] In 2005, the share of direct taxes collected by EU Member States amounted on average to one third of their total tax revenue (including social contributions). Source: European Commission, *Taxation Trends in the European Union*, Luxembourg, Office for official publications of the European Communities, 2007.

[5] OECD Model Convention (2005), Commentary, 23/13 and 23/57.

From this perspective, capital import or export neutrality is appreciated from the point of view of the State of residence. Most tax systems use a hybrid structure of capital export and capital import neutrality rules. However, a great variety of regimes can be observed, reflecting the diversity of the international tax policies pursued by States[6].

6. Within the EU, most of the tax treaties concluded by the Member States follow the **OECD Model Convention**[7]. This Model Convention includes first the general provisions as to applicability and general definitions of treaty terms, which are followed by so-called "distributive rules" defined in Articles 6 to 22 of the Model Convention providing for allocation of taxing powers between the Contracting Parties. The Model Convention also contains provisions as to exchange of information and sometimes arbitration procedures.

7. Since income taxation can be regarded as a cost linked to the production of income, it influences economic choices. The obvious result of international double taxation is to discourage cross-border economic activity, hereby directly hindering the achievement of the Internal market (Article 14 EC).

B. EXTENT AND SCOPE OF EC COMPETENCE IN THE AREA OF TAXATION

1. EC Treaty provisions regarding taxation

8. Unlike Member States, the European Community does not exercise its competences in the field of taxation having primarily a revenue objective in mind. The rules governing the financing of the EU budget are indeed adopted on a different legal basis and by different institutional bodies. These differences are reflected in the EC Treaty by the distinction drawn between "tax provisions" (Articles 90 to 93 EC) under Title III (Common Policies) and "financial provisions" (Articles 269 to 280 EC).

9. Therefore, European tax law exists despite the absence of a genuine European tax system[8]. As a consequence, those few EC Treaty Articles which explicitly or implicitly refer to taxation find their justification in their contribution to Community policies, and in particular to the objective of the **achievement of the Internal market**. In order to further the Internal market, the EC Treaty provides for two types of tax provisions which aim at removing obstacles to intra-Community trade that result from the exercise of taxation powers by Member States.

[6] The exemption and imputation methods can both be applied on an "overall" and on a "per country" basis. With a "per country" limitation, an excess tax credit in relation to one State cannot be offset against tax credits remaining unused in relation to other States. The "overall" limitation allows the credit to be calculated on the global amount of income earned abroad.

[7] The OECD MC governs relations between developed countries. The UN Model Convention (the 1st edition of which was published in 1980) has been developed in order to cover the specific needs for tax treaties between developed and developing countries based on the statement that the OECD Model was less suitable for capital importing or developing countries. The general pattern of the articles follows the one of the OECD Model (Introduction. to the OECD MC Commentary, at 14). However, the UN Model globally grants more taxation rights to the source State (Introduction. to the UN MC Comm. at 3).

[8] At the moment, only the tax levied on salaries and pensions of EU officials (Regulation no. 260/68, extended to MEPs and free lance interpreters) can be considered to be real EU taxes. Moreover, some links between EC competences and EC revenues exist. Customs duties and agricultural levies show very strong characteristics of an EU tax. Harmonized VAT enters into consideration to a certain extent, when calculating the EU own resources. See European Parliament Resolution of 29 March 2007 on the future of the European Union's own resources Document A6-0066/ 2007 (2006/2205/INI), *Report on the future of European communities own resources*, Committee of Budgets, 13 March 2007, DOC A6-0066/2007 (rapporteur: A. Lamassoure) and *Report on the proposal for a council decision on the system of European communities own resources*, Committee of Budgets, 23 July 2006, DOC A6-0223/2006 (rapporteur: A. Lamassoure). See also Lang, M.(ed.), *EU-Taxes*, Linde Verlag, 2008, forthcoming.

The first type of EC Treaty provisions enables the Council (and only the Council) to adopt harmonization directives in the field of taxation. The second type regards general prohibitions for Member States to establish or maintain obstacles to intra-Community movement and trade. From the taxpayers' perspective, such prohibitions create individual rights and freedoms, directly enforceable before national and European courts.

10. In respect of indirect taxation, a distinction between empowerment provisions and – directly applicable – tax prohibitions is clearly drawn in the EC Treaty. On the one hand, **Article 93 EC** empowers "*the Council … acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, [to] adopt provisions for the harmonisation of legislation … of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market …*". This legislative power in the area of indirect taxation has been exercised as regards value added tax, excise duties and indirect taxes on the raising of capital[9]. On the other hand, **Article 90 EC** prohibits discriminatory internal taxation[10]. Together with **Article 25 EC**, prohibiting customs duties and charges having an equivalent effect, these tax prohibitions aim at ensuring the free movement of goods in the Community and the effectiveness of the Customs Union[11].

11. As regards direct taxation, the above-mentioned two types of provisions –empowerment and prohibitions – are to be found in the EC Treaty, although their wording does not explicitly refer to taxation. Concerning Treaty articles founding the power to adopt regulations or directives in direct tax matters, it must be emphasised that the **EC Treaty does not explicitly grant legislative competence to the Council in the area of direct taxation**, neither alone or jointly with the European Parliament[12]. Moreover, Article 95 EC explicitly excludes taxation from its scope of application. This does not mean however that legislative acts regarding direct taxation cannot be adopted, but rather that such provisions can only be adopted on the basis of general clauses such as Articles 94 or 308 EC, and only to the extent that these acts serve Community objectives. Moreover, and independently of the provisions on taxation, the EC Treaty confers upon European citizens general rights and freedoms aimed at guaranteeing non-discrimination and freedom to circulate and to undertake economic activities throughout the Community. These rights and freedoms are the **free movement of workers** (Articles 39 to 42 EC), the **right of establishment** (Articles 43 to 48 EC), the **freedom to provide and to receive services** (Articles 49 to 55 EC), the **free movement of capital and payments** (Articles 56 to 60 EC), and, since the Treaty of Maastricht, **the right to move and reside freely within the territory of the EU** (Article 18 EC). Since the scope of application of these rights and freedoms is not limited to the extent of the Community's legislative competence, it encompasses the direct tax provisions of the Member States.

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[9] A complete list of Community legislation in the field of indirect taxes is available on the EUR-Lex site (http://eur-lex.europa.eu/).

[10] Article 91 EC, on excessive export tax repayments and Article 92 EC on direct taxes paid affecting exports, have lost their original relevance, due to the evolution of the legislative framework in the area of the taxation of goods, See Farmer, P., and Lyal, R., *EC Tax Law*, Oxford, Clarendon Press, 1994, p. 77-82.

[11] Articles 25 and 90 EC have distinct but complementary scopes of application. See ECJ, 8 June 2006, Case C-517/04, *Visserijbedrijf D. J. Koornstra & Zn. vof v Productschap Vis, ECR* I-5015; 9 September 2004, Case C-72/03, *Carbonati Apuani v Comune di Carrara, ECR* I-8027.

[12] Article 293 EC is viewed as a mere exhortation to the Member States to negotiate agreements in order to remove double taxation. It does not grant competence to the Community and is not directly enforceable by the courts (ECJ, 12 May 1998, Case C-336/96, *Gilly v Dir. Services fiscaux Bas-Rhin, ECR* I-2793, paras. 15-17). Moreover, it has been abrogated by the Treaty of Lisbon.

According to settled case-law, "*although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law*"[13].

2. EC legislative acts in the field of direct taxation

12. Relatively scarce secondary legislation has been enacted by the Council in the area of direct taxation on the basis of **Article 94 EC on the approximation of laws**. Direct taxes may cause distortions with regard to the location of employment, to the investment in, and to the establishment of companies inside the European Union. Some of these obstacles to the achievement of the Internal market have been the object of two "packages" of EC legislation, adopted in 1990 and in 2003.

13. Concerning company taxation, the Council has so far adopted three directives. The **Merger Directive**[14] aims at mitigating the negative tax consequences that arise from reorganising one or more companies at a European level.

The **Parent-Subsidiary Directive**[15] ensures that cross-border payments of dividends within the same group of companies established in different Member States do not suffer economic double taxation.

The **Interest-Royalties Directive**[16] provides for the elimination of double taxation of interest and royalties between associated companies which are resident in different Member States, by exempting them from taxation in the State of source.[17]

These three Directives are supplemented by the **Arbitration Convention,** adopted by the Member States on the basis of Article 293 EC in order to address the problems of transfer pricing of goods, services and intangibles between associated companies[18].

14. In the area of personal taxation, the only legislative act adopted by the Council is the **Savings Directive**[19]**.** This Directive does not harmonize the provisions of the Member States as regards the taxation of interest received from savings. Its objective is rather to enhance the exchange of information between Member States, and even between Member States and a number of third countries (Switzerland, Andorra, Liechtenstein, San Marino and Monaco). In its intra-Community role, it aims at reinforcing the administrative co-operation mechanisms contained in the **Mutual Assistance Directive 77/799/EEC**[20] and in **Directive 76/308/EEC** on mutual assistance for the **recovery of claims**[21].

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[13] ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v Schumacker, ECR* I-225, para. 21; 13 December 1967, Case 17/67, *Neumann Hauptzollamt Hof/Saale, ECR* 441.

[14] Council Directive 90/434/EEC of 23 July 1990, *OJ* L 225, 20.8.1990, pp. 1–5, amended by Council Directive 2005/19/EC of 17 February 2005, *OJ* L 58, 4.3.2005.

[15] Council Directive 90/435/EEC of 23 July 1990, *OJ* L 225, 20.8.1990, pp. 6–9, significantly amended by Council Directive 2003/123/EC of 22 December 2003, *OJ* L 741, 13.1.2004.

[16] Council Directive 2003/49/EC of 3 June 2003, *OJ* L 157, 26.6.2003, pp. 49–54.

[17] In June 2006 the European Commission published a survey on the implementation of the Interest Royalty Directive, available on the DG TAXUD website (http://ec.europa.eu/taxation_customs/index_en.htm).

[18] Convention 90/436/EEC, *OJ* L 225, 20.8.1990, pp. 10–24 and *OJ* C 160, 30.6.2005, pp. 11–22, amended by the Convention of 21st December 1995 on the accession of Austria, Finland and Sweden to the Arbitration Convention, the Protocol of 25 May 1999 amending the Arbitration Convention and the Convention signed on 8 December 2004 by the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia on their accession to the Arbitration Convention. This instrument has not yet yielded significant results. However, several Communications containing guidelines should render its application more effective. More details on the EU Joint Transfer Pricing Forum are available on the DG TAXUD website (see fn 17).

[19] Council Directive 2003/48/EC of 3 June 2003, *OJ* L 157, 26.6.2003, pp. 38–48.

[20] Council Directive 77/799/EEC of 19 December 1977, *OJ* L 336, 27.12.1977, pp. 15–20.

[21] Council Directive 76/308/EEC of 15 March 1976, *OJ* L 73, 19.3.1976, p. 18.

3. Other EC acts and initiatives in the field of direct taxation

15. Besides the EC legislation and the case-law of the Court of Justice, several initiatives of the EC Commission deserve a mention[22]. These actions have not only been taken in order to enhance co-ordination between national tax systems and to remove obstacles to the freedoms of movement, but also in order to reduce harmful tax competition between Member States.

a) Fight against harmful tax competition

16. The problems caused by divergences between the corporate income tax systems of the Member States, among which (harmful) tax competition[23], have been the object of numerous reports and studies on behalf of the Commission since the very start of European integration[24]. In the 1990's, the difficulties faced by the Commission in its attempts to achieve an agreement among the Member States on a legislative act in this field led to the adoption of a soft law approach, reflected in the Monti Report[25]. This method was the basis of the Council's Code of Conduct for Business taxation[26], the implementation of which, namely through the "Primarolo Report", led to the dismantling of national tax regimes that had been found "harmful", like the Belgian Coordination Centres, the Irish International Financial Services Centre (Dublin) or the Dutch finance companies. The Code has been extended to the new Member States[27].

b) Prohibition of fiscal State aid and use of tax incentives

17. The effectiveness of the soft law approach has been strengthened by the parallel actions of the Commission concerning fiscal State aid. Indeed, harmful tax measures may also constitute State aid incompatible with the Common Market within the meaning of Articles 87 and 88 EC. In 1998, following the Code of Conduct, the Commission released a "notice on the application of the State aid rules to measures relating to direct business taxation", the implementation of which was examined in a Commission Report in 2004[28]. These documents confirm the applicability of Articles 87 and 88 EC to direct tax measures and provide guidelines for the Member States.

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[22] See van Arendonk, H.M. 'Fifty Years of European Co-operation and the Tax Policy of the European Commission', and Aujean, M., 'L'évolution de la fiscalité en Europe sous l'impulsion de la Commission' in Hinnekens, L. and Hinnekens, P. (ed.), *A vision of taxes within and outside European borders. Festschrift in honor of Prof. Dr. F. Vanistendael, Alphen aan den Rijn*, Wolters Kluwer, 2008, p. 1 and p. 21.

[23] On the definition of the concept of harmful tax competition, see among others, Pinto, C., *Tax competition and EU law*, Kluwer Law international, The Hague/London/New York, 2003, chapter 1.2.

[24] See e.g. *Report of the Committee of Independent Experts on Company Taxation* (Ruding Report) Commission of the European Communities, March 1992. For earlier studies, see European Commission, Fiscal and Financial Committee, *Report on tax harmonization in the Common Market* (Neumark Report), 8 July 1962; *The Development of a European Capital Market* (Segré Report), November 1966; van de Tempel, A.J., *Corporation Tax and Individual income tax in the European Communities*, 1970.

[25] European Commission, *Taxation in the European Union*, Discussion paper for the Informal Meeting of ECOFIN Ministers, SEC(96) 487 final, 20.03.1996. See also Communication of 2 June 1993 on improving the effectiveness of the single market (a strategic program for the Internal market), final version 22 December 1993. See van Arendonk (2008), p. 12.

[26] Conclusions of the ECOFIN Council Meeting of 1 December 1997, *OJ* C 2, 6.1.1998, pp.2-6.

[27] The Report of 23 November 1999 of the Code of Conduct Group (business taxation) to the Council (Primarolo Report, SN 4901/99), listed 66 harmful tax measures.

[28] Commission Notice on the application of the State aid rules to measures relating to direct business taxation, *OJ* C 384, 10.12.1998, p. 3; Commission Report of 9 February 2004 on the implementation of the Commission notice of 1998.

The Court of Justice substantially agrees with the Commission's views on fiscal State aid, although certain divergences can be observed in respect of the time frame for the implementation of the Code of Conduct as to regimes which are also covered by Articles 87 and 88 EC[29] and to regional taxation[30] Nevertheless, tax incentives in favour of undertakings have also been the object of more positive attention by European institutions, especially in the field of research and development, in line with the Lisbon objectives[31].

c) Towards coordination and harmonization of corporate taxation

18. The Code of Conduct and the rules on State aid restrict the power of the Member States to adopt measures that are liable to affect free and fair tax competition between enterprises and even, to a certain extent, between the Member States themselves. However, recent initiatives tend to promote a more co-operative manner of achieving the objectives of the Internal market, while taking into account the Member States' need to preserve their tax resources and to fight tax evasion and avoidance. Besides the initiatives in the field of **transfer pricing** (implementation of the Arbitration Convention 90/436/EEC), the Commission addresses concrete issues, in line with a strategy set out in the 1996 **Monti Report** and in the programmatic Communications of 2001, 2003 and 2006[32]. Co-ordinated solutions have been proposed in two areas in which the Court of Justice has issued important decisions that have triggered the need to adopt a common approach, i.e. **exit taxes** and **compensation of cross-border losses**[33] **–** this latter issue having also been the object of a Parliament resolution[34]. The **fight against tax fraud and tax evasion** has also been the object of recent initiatives, in the fields of both direct and indirect taxation[35]. However, as regards corporate taxation, the most significant project of the Commission is its proposal for a **Common consolidated corporate tax base** (CCCTB), announced for the end of 2008. This ambitious project had already been suggested in 2001 in line with the Lisbon Strategy[36].

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[29] ECJ, 22 June 2006, Case C-399/03, *Commission v Council*, *ECR* I-05629, Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium and Forum 187 ASBL v Commission, ECR* I-5479.

[30] ECJ, 6 September 2006, Case C-88/03, *Portugal v Commission*, *EC*R I-7115.

[31] Commission Communication of 22 November 2006, 'Towards a more effective use of tax incentives in favour of R&D', COM (2006) 728. See also European Parliament, Resolution of 24 October 2007 on the contribution of taxation and customs policies to the Lisbon Strategy, Report of 15 October 2007, Committee on Economic and Monetary Affairs (rapporteur: Sahra Wagenknecht), Document A6-0391/2007 (2007/2097(INI)).

[32] Commission Communication of 23 May 2001, *Tax policy in the European Union - Priorities for the years ahead*", COM (2001) 260, *OJ* C 284, 10.10.2001, p. 6; Commission Communication of 23 November 2003, *An Internal Market without company tax obstacles: achievements, ongoing initiatives and remaining challenges*, COM (2003) 726; Commission Communication of 19 January 2006, *Co-ordinating Member States' direct tax systems in the Internal Market*, COM (2006) 823.

[33] Commission Communications of 19 January 2006, *Treatment of Losses in Cross-Border Situations*, COM (2006) 824 and *Exit taxation and the need for co-ordination of Member States' tax policies*, COM (2006) 825. These Communications refer respectively to the *Marks and Spencer (C-446/03)*, the *de Lasteyrie du Saillant* (C-9/02) and the *N.* (C-470/04) cases.

[34] European Parliament, Resolution of 13 December 2007 on Tax Treatment of Losses in Cross-Border Situations, Report of 30 November 2007, Committee on Economic and Monetary Affairs (rapporteur: Piia-Noora Kauppi), Document A6-0481/ 2007 (2007/2144/INI).

[35] See among others, Commission Communication of 10 December 2007, *The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries*, COM (2007) 785; Commission Communication of 31 May 2006 concerning *the need to develop a co-ordinated strategy to improve the fight against fiscal fraud*, COM (2006) 254; Commission Communication of 22 February 2008 on *possible measures to combat VAT fraud (Introduction of taxation for intra-Community supplies and introduction of a generalised reverse charge)*, COM(2008) 109.

[36] COM (2001) 260, p. 19; COM (2003), p. 18. See also EP Resolution of 24 October 2007.

Since 2004, working groups of Members States' experts and Commission's delegates have been clearing the ground[37]. The Parliament has issued resolutions to support the project[38], and the Commission intends to present a proposal for 2008.

The CCCTB should provide a comprehensive and sustainable solution to remove numerous existing tax obstacles faced by European undertakings operating in more than one Member State. More precisely, the objectives are the adoption of **common rules defining the tax base** - and not the tax rate - of companies, in order to reduce the compliance costs arising from the differences between the 27 national corporate tax systems and the creation of a **consolidation mechanism** at European level, in order to permit cross-border compensation of losses and to avoid transfer pricing disputes. This latter goal implies inevitably the setting up of a - fair, equitable and simple - **sharing mechanism** ("apportionment") of the consolidated tax base between the Member States concerned, mainly in order to avoid artificial profit shifting between Member States and to mitigate harmful tax competition. Since the project only concerns the tax base, each Member State would then remain competent to apply its own tax rate to the portion of the companies' pan-European tax base attributed to its jurisdiction.

19. Of course, such a thorough reform raises a number of issues. Some of them are more technical, such as, among others, the relation between the rules for the determination of the tax base and the existing accounting rules - national or international -, the perimeter of the consolidation group or the optional or compulsory character of the CCCTB. Other issues are more political, i.e. the willingness to accept further integration in (direct) tax matters, the abandonment of the Member States' power to grant tax incentives in the form of a reduction of the tax base, not to mention the necessity to improve the cooperation between Member States. Indeed, one cannot underestimate the administrative and judicial apparatus that should be put in place to make the system work. At the moment, since various Member States have clearly declared that they would not participate in such a project, the possibility of **enhanced cooperation** has already been mentioned, although such option would be, according to the Commission, a "last resort approach"[39]. Moreover, enhanced cooperation would certainly add further complexity to the already sensitive issues to be solved.

C. THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN MATTERS OF DIRECT TAXATION

20. As regards direct taxation, the Court of Justice becomes involved following either an infringement procedure initiated by the Commission (and possibly by a Member State – Article 227 EC) or the request of a national jurisdiction for a preliminary ruling concerning the interpretation of EC law.

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[37] Commission Non-Paper to informal Ecofin Council, 10 and 11 September 2004, A common consolidated corporate tax base, 7 July 2004. Commission Communication of 2 May 2007, *Implementing the Community Programme for improved growth and employment and the enhanced competitiveness of EU business: Further Progress during 2006 and next steps towards a proposal on the Common Consolidated Corporate Tax Base (CCCTB)*, COM (2007) 223; Commission Communication of 5 April 2006, *Implementing the Community Lisbon Programme: Progress to date and next steps towards a Common Consolidated Corporate Tax Base (CCCTB)*, COM (2006) 157. See also the three Commission's Working Documents of 26 July 2007, CCCTB/ *Possible elements of technical outline* (WP057) and 13 November 2007, *CCCTB: possible elements of a sharing mechanism* (WP060) and *CCCTB: possible elements of the administrative framework* (WP061).

[38] European Parliament Resolution of 13 December 2005 on taxation of undertakings in the European Union: a common consolidated corporate tax base, Report of 1 December 2005, Committee on Economic and Monetary Affairs (rapporteur: Pier Luigi Bersani), Document A6-0386/ 2005 (2005/2120/INI). See also, more recently EP Resolution of 24 October 2007.

[39] CCCTB non-paper of 7 July 2004, p 4. See also European Parliament Resolution 13 December 2005, para 12.

Contrary to infringement procedures, where the Court may declare national rules to be incompatible with EC law, preliminary rulings admit merely indirect control of national legislation. In fact, in a preliminary decision, the Court interprets Community law to the extent it may affect the specific legal provisions at stake in particular proceedings before a national judge.

On the basis of Article 10 EC, Member States are obliged to accept all the consequences of the Court's rulings and to implement them in their national law, in accordance with general principles forming part of the Community's legal order, such as **effectiveness**, **equivalence** and **legal certainty**[40]. According to the Court, when a national tax measure is found to infringe European law, taxpayers may obtain a refund of unduly paid taxes[41] by claiming it before national jurisdictions according to the national procedural rules, which can lead to serious financial repercussions for the budget of a Member State (see no.219)[42].

21. The role of the Court is not limited to the strict application and interpretation of the Treaty and of the secondary legislation. The Court has also developed an array of general legal principles which are relevant in the area of taxation. An eloquent example can be found in the principles of **protection of the taxpayers' legitimate expectations** or of legal certainty. Although this principle is not written in the Treaty nor in any tax directive, it is part of Community law, and it can protect taxpayers against, for example, retroactive tax laws, at least in harmonized areas[43]. Another important principle in the area of taxation is the principle of **proportionality**, according to which national measures restricting the individual freedoms cannot exceed what is necessary to attain their legitimate objectives[44]. In tax matters, the Court has made applications of this principle in order to limit the scope of national anti-abuse provisions[45].

22. Some cases concern the application and interpretation of the direct tax Directives. Concerning the Parent Subsidiary-Directive, the Court of Justice has for example clarified the notions of "withholding tax" (***Epson Europe***[46], ***Athinaiki Zithopoïaa***[47]**,** ***Océ van der Grinten***[48]) and "holding period" (***Denkavit and others***[49]**)**. Concerning the Merger Directive, the Court has also contributed to the definition of the operations which fall within its scope of application (***Andersen og Jensen***[50]**,** ***Leur-Bloem***[51], ***Kofoed***[52]**)**.

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[40] See for example ECJ, 3 December 1998, Case C-381/97, *Belgocodex v Belgian State, ECR* I-8153.

[41] See a.o. ECJ, 2 October 2003, Case C-147/01, *Weber's Wine World, ECR* I-11365; 14 January 1997, joined Cases C-192/95 to C-218/95, *Comateb*, *ECR* p. I-165.

[42] On the effects in time of the ECJ judgements in tax matters, see the Opinions of AGs Jacobs and Stix-Hackl in Case C-475/03 *Banca Popolare di Cremona ECR* I-9373 and in Case C-292/04, *Meilicke*, *ECR* I-1835, and Lang, M., "Limitation of the temporal effects of judgments of the ECJ", *Intertax*, 2007, p. 230.

[43] ECJ, *Belgocodex* (fn. 40); 26 April 2005, Case C-376/02, *Stichting "Goed Wonen" v Staatssecretaris van Financiën, ECR* I-03445.

[44] This principle has to be distinguished from the principle laid down at Article 5 EC Treaty, governing the attribution of powers to the EC. See Protocol (no 30) on the application of the principles of subsidiarity and proportionality (1997).

[45] See e.g. ECJ, 13 March 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation, ECR* I-2107, *p. 83*.

[46] ECJ, 8 June 2000, Case C-375/98, *Epson Europe*, *ECR* I-4245.

[47] ECJ, 4 October 2001, Case C-294/99, *Athinaïki Zythopoiia v Elliniko Dimosio*, *ECR* I-6797.

[48] ECJ, 25 September 2003, Case C-58/01, *Océ van der Grinten v Revenue Commissioners*, *ECR* I-9809.

[49] ECJ, 17 October 1996, Cases C-283/94, C-291/94 and C-292/94, *Denkavit International v Bundesamt für Finanzen, ECR* I-5063.

[50] ECJ, 15 January 2002, Case C-43/00, *Andersen og Jensen v Skatteministeriet*, *ECR* I-379.

[51] ECJ, 17 July 1997, Case C-28/95, *Leur-Bloem v Inspecteur der Belastingdienst, ECR* I-2471.

[52] ECJ, 5 July 2007, Case C-321/05, *Kofoed v Skatteministeriet.*

23. However, the overwhelming majority of the cases decided by the Court of Justice deal with the compatibility of direct tax provisions of the Member States with the EC Treaty freedoms, in particular the free movement of persons, the free provision of services and the free movement of capital[53].

The **free movement of persons** covers the right of employees to take up residence for work purposes (Article 39 EC) and the right of undertakings (i.e. companies) and self-employed people to set themselves up or to open branches, subsidiaries or agencies in other Member States (Articles 43 to 48 EC). As regards shareholders, the Court has held that the situation must be appreciated from the perspective of the freedom of establishment when the "*holding gives* [the shareholders] *definite influence over the company's decisions and allows them to determine its activities*"[54].

In contrast to the right of establishment, which addresses permanent establishments, the **free movement of services** encompasses temporary economic activity carried out in another Member State. Article 49 EC not only assures the provider of a service the right to enter the market of another Member State and to be treated there in the same way as a domestic service provider, but it also protects the recipient of that service.

The **free movement of capital** prohibits obstacles to cross-border investments such as direct investments, portfolio investments, or the acquisition and sale of immovable property. It applies in situations where a person neither pursues an economic activity nor has a permanent presence in the State in which the tax measure under challenge has been enacted[55], or where a shareholder has an "*insufficient level of participation*" in a company in order to benefit from Article 43 EC[56].

In ascertaining which freedom is to be applied, the Court states that "*the purpose of the legislation concerned must be taken into consideration*"[57]. The distinction between the free movement of capital and the other freedoms is of particular importance with regard to non-EU States, since the free movement of capital extends to such third States[58], whereas the exercise of other freedoms is restricted to Community borders.

24. The four freedoms encompass two dimensions: a right of **cross-border circulation** and a **prohibition of discrimination** on grounds of nationality. In applying EC freedoms in tax matters, the Court of Justice examines first whether the national tax provisions in question create an overt (direct) discrimination on the grounds of nationality, then, if not, whether these provisions have a restrictive effect on cross-border movement, which indirectly lead to the same result (covert or indirect discrimination)[59]. Income tax raises a specific difficulty in this context, as it usually refers to residence as a connecting factor rather than to nationality.

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[53] The free movement of goods has rarely been invoked in respect of direct taxation matters. See ECJ, 7 May 1985, Case 18/84, *Commission v France*, *ECR* 1339 and ECJ, 7 March 1990, Case C-69/88, *Krantz v Ontvanger der directe belastingen*, *ECR* I-583.
[54] ECJ, 21 November 2002, Case C-436/00, *X and Y v Riksskatteverket*, *ECR* I-10829, para. 37; ECJ 13 April 2000, Case C-251/98, *Baars*, *ECR* I-2787, paras 22 and 28- to 31.
[55] See, e.g. ECJ, 11 October 2007, Case C-451/05, *ELISA v Directeur général des impôts.*
[56] *X and Y*, para. 67.
[57] For instance, see ECJ, 24 May 2007, C-157/05, *Holböck*, *ECR* I-4051para. 22.
[58] Nevertheless, Article 57 EC provides for a standstill clause regarding relations with third countries and allows the continued application of restrictive measures that existed already on 31 December 1993.
[59] For example, ECJ, 13 July 1993, Case C-330/91, *Commerzbank*, *ECR* I-4017, paras.14, 15, 19.

However, since the Court considers that the use of the residence criterion by Member States is likely to favour their own nationals[60], the key to identifying whether a measure at issue is incompatible with EC Law lies therefore in establishing whether an unjustified difference of treatment is made between residents and non residents that are in "objectively comparable" situations for the purpose of the application of the challenged tax provisions[61].

25. According to the Court of Justice, overt discrimination may be justified either by those grounds set out explicitly in the EC Treaty (such as public policy, public security and public health) whereas a restrictive measure is permissible "*only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest*". Furthermore it must "*not go beyond what is necessary to attain the objective pursued*"[62]. In the field of direct taxation, several **justifications** could potentially apply: the need for effective fiscal supervision[63]; the need to maintain fiscal cohesion[64], the prevention of abuse[65] or the need to protect the balanced allocation of taxing powers between Member States[66]. In contrast, the Court has never accepted justifications like the prevention of a reduction of tax revenue[67] or the existence of other, compensating, tax advantages[68].

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[60] *Schumacker*, para. 28 : *"However, national rules of that kind, under which a distinction is drawn on the basis of residence in that non-residents are denied certain benefits which are, conversely, granted to persons residing within national territory, are liable to operate mainly to the detriment of nationals of other Member States. Non-residents are in the majority of cases foreigners".*

[61] An increasing number of ECJ rulings seem to focus rather on the restrictive effect of national measures on cross-border movements ("non-discriminatory restrictions"). For example, ECJ, 15 May 1997, Case C-250/95, *Futura Participations and Singer*, *ECR* I-2471, para 26.

[62] For example ECJ, 11March 2004, Case C-9/02, *de Lasteyrie du Saillant*, *ECR* I-2409, para. 49.

[63] For example, *Futura Participations and Singer*, para. 31; ECJ, 8 July 1999, Case C-254/97, *Baxter, ECR* I-4811, paras. 18-19 and ECJ, 22 March 2007, C-383/05**,** *Talotta, ECR* I-2555, paras. 34-37.

[64] ECJ, 28 January 1992, Case C-204/90, *Bachmann v Belgian State*, *ECR* I-249.

[65] ECJ, 18 July 2007, Case C-231/05, *Oy AA*, paras. 62- 63.

[66] See ECJ, 8 November 2007, C-379/05, *Amurta*, para. 56.

[67] ECJ, 16 July 1988, Case C-264/96, *ICI*, ECR I-4695, para. 28; ECJ, 21 September 1999, Case C-307/97, *Saint-Gobain*, *ECR* I-6163, para. 50.

[68] *Saint-Gobain*, para. 53 and C-294/97, *Eurowings*, para. 44.

II. ANALYSIS OF THE CASE-LAW OF THE COURT AND OF ITS IMPLEMENTATION BY THE MEMBER STATES

26. In the field of direct taxation, the Court of Justice is faced primarily with questions referred to it for a preliminary ruling. The Court provides to the national judges answers enabling them to decide the case pending before them. Furthermore, the number of infringement procedures launched by the Commission against Member States potentially not complying with EC law that comes before the Court is growing[69].

27. Member States have the obligation under the Treaty to respect the Court's decisions, be it preliminary rulings or decisions in infringement procedures. **Therefore, national jurisdictions must apply Community law as interpreted by the Court and Member States have to adapt their domestic rules** accordingly. While they are free as to the means, they must respect efficient implementation. Court's decisions are part of the "*acquis*" to be implemented by candidate countries before their accession.

28. However, the Court's rulings give rise to interpretation. In this context, it is not surprising that implementation of the Court's rulings varies amongst Member States, even at the level of domestic jurisdictions. A great difference exists between Member States as to the number of cases in which their legislation has been scrutinized by the Court. On December 31st, 2007, no case had been decided involving the direct tax system of "old" Member States like Italy or Ireland (outside State aid), while the tax legislations of the Netherlands, Germany, the United Kingdom and even Finland are regularly challenged before the ECJ. Moreover, different attitudes can be observed as to the efforts made by Member States to adapt their tax legislation to the EC requirements[70]. Regarding the new Member States, it is difficult to appreciate in which measure the gaps noticed in the integration of the "*acquis*" stem from difficulties of interpretation of the case law of the Court[71].

29. However, it seems that there is no direct link between the number of cases referred to the ECJ and the legislative changes made by Member States to adapt their direct tax system to the EU requirements. For example, very few direct tax cases involve Austria, while that Member States has undertaken numerous reforms in order to comply with the EC freedoms as interpreted by the ECJ in judgements regarding other countries. The same diligence can be observed in Finland, a country whose legislation is often the object of ECJ rulings[72]. On the other hand, despite the lack of ECJ direct tax decisions concerning Italy, the Italian direct tax system seemingly presents features that could hinder the effectiveness of the EC freedoms[73].

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[69] Cf. the annexes at this end of the study.

[70] See the differences between Portugal and Austria, for instance. Dourado, A.P., "Portugal" in Brokelind, C., *Towards and Homogeneous Tax Law*, IBFD, 2007, p. 341. and Köfler, G., "Austria", in Brokelind (2007), p. 59.

[71] As an example, some new Member States apply tax incentives that are likely to contravene State aid provisions (see Devereux, M., "Taxes in the EU New Member States and the Location of Capital and Profit", 2006, University of Warwick, IFS and CEPR , 2006, p. 9)

[72] Potential incompatibilities of the Finnish income tax system with EC law remain, such as the rule extending the tax sovereignty of Finland to former resident taxpayers during a period of three years after their moving abroad. See Aima, K., "Finland", in Brokelind (2007), p. 209.

[73] Pistone, P., "Italy", in Brokelind (2007), p. 330-331. The *Porto antico di Genova* case (ECJ, 25 October 2007, *Porto Antico di Genova v. Agenzia delle Entrate Genova 1*) is connected to direct taxation, but cannot be considered relevant since it does not concern either the tax Directives or the EC freedoms, but the taxation of Community grants. Moreover, the Commission has decided almost two years ago to bring Italy before the ECJ on the tax treatment of foreign shareholders, but has not yet acted accordingly. See Commission decision of 12.12.2006 in the infringement procedure 2004/4350 and Commission Press release IP/07/66 of 22 January 2006. However, numerous ECJ tax cases concerning Italy have been decided in the area of indirect taxation (mainly VAT).

30. This section aims at providing an analysis of the Court's decisions in the field of direct taxation rendered until 31st of December 2007. In addition, it gives an overview of the implementation of the Court rulings in the Member States in grey shaded boxes. The case-law has been subdivided according to the types of taxpayers involved, e.g. individuals (A), companies (B) and shareholders (C).

A. TAXATION OF INDIVIDUALS

31. Regarding the application of EC freedoms, the issues addressed in the area of personal taxation cover a very wide range of situations. In the income tax systems of the Member States, individuals are treated not only as economic operators but also as persons enjoying certain rights and benefits in relation to their individual or social needs, whether or not these are connected to their economic activity. For example, most Member States grant tax advantages to married persons, or allow tax deductions for contributions to pension schemes. Throughout the years, the Court of Justice has developed a case-law which, starting from the application of the economic freedoms, has progressively widened its scope to a much broader recognition of European citizenship in tax matters, based on Articles 12 and 18 EC, introduced by the Maastricht Treaty[74].

1. Transfer of residence

32. According to the Court's settled case-law, "*provisions which prevent or deter a national of a Member State from leaving his State of Origin to exercise his right to freedom of movement constitute an obstacle to that freedom …*"[75]. The Court dealt with such a provision in an early case on direct taxation of individuals (***Biehl***[76]**)**. The case concerned a Luxembourg tax provision that excluded the possibility of a refund of an excess of income taxes withheld in a case where the employee had transferred his residence from Luxembourg to another Member State in the course of the year. The Court held such provision incompatible with the free movement of workers under Article 39 EC: "*the principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax …*"[77].

Luxembourg did not comply with the ruling. Hence, the Commission launched an infringement procedure, in which the Court decided that the relevant provisions were in breach of EC law (***Biehl II***)[78].

The Court has dealt in more recent cases with national tax provisions which hinder an individual's **ability to transfer his residence from one Member State to another**[79]. For example, the application of exit taxes on unrealized capital gains on shares owned by individuals transferring their residence to another Member State or of taxes on persons emigrating to another Member State after their retirement often lead to situations of double taxation[80].

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[74] ECJ, 11 July 2002, Case C-224/98, *D'Hoop v Office national de l'emploi, ECR* I-6191.
[75] ECJ, 12 December 2002, Case C-385/00, *de Groot v Staatssecretaris van Financiën, ECR* I-1181, para. 79; ECJ, 13 November 2003, Case C-209/01, *Schilling v Finanzamt Nürnberg-Süd, ECR* I-13389, para. 25. This principle is also applied outside the field of taxation: ECJ, 2 October 2003, Case C-232/01, *Criminal proceedings against Van Lent*, *ECR* I-11525, para. 16.
[76] ECJ, 8 May 1990, Case 175/88, *Biehl v Administration des contributions du Luxembourg, ECR* 273.
[77] *Biehl,* para. 12.
[78] ECJ, 26 October 1995, Case 151/94, *Commission v Luxembourg (Biehl II), ECR* I-3685.
[79] The double payment of social security contributions can also be a deterrent to a transfer of residence: ECJ, 26 January 1999, Case C-18/95, *Terhoeve*, *ECR* I-345, para. 42.
[80] On the taxation of pensions, see no. 44 *et seq*. On the taxation of capital gains, see no.126 *et seq*.

33. However, "*the EC Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than the one in which he previously resided will be neutral as regards taxation*"[81]. The Treaty indeed prohibits only **direct or indirect discrimination or unjustified obstacles** to the exercise of the EC freedoms. It does not address disadvantages which arise out of mere disparities between the tax systems of the Member States, like the transfer of residence from a Member State which applies progressive taxation on income to another Member State which applies a similar system with higher brackets.

A fortiori, the Treaty, and in particular Article 18 EC, does not as a rule protect taxpayers against the negative tax consequences of a relative's transfer of residence. In ***Schempp***, the transfer of residence from Germany to Austria of the taxpayer's ex-wife gave rise to the consequence that he could no longer deduct from his income the maintenance allowance which he paid to her. The Court held that there was no breach of Article 18 EC, since the wife had moved to a Member State in which income derived from maintenance payments was not taxable, while in Germany the deductibility of such payments from the income of the payer was balanced by the taxation of such income in the hands of the beneficiary[82].

Finally, in relation to a transfer of residence from a Member State to a third country, the Court has stated, in ***Van Hilten-Van der Heijden***, that "*the mere transfer of residence from one State to another*" does not fall within the scope of free movement of capital (Article 56 EC)[83], the only freedom applicable to third countries.

2. Income from cross-border economic activity (employed or self-employed)

34. The core of the Court's case-law in the area of cross-border economic activity concerns discrimination by Member States towards non-resident workers, whether employed or self-employed, and irrespective of the fact that they were previously resident in this Member State. For employed workers, such situations are not only generally covered by Article 39 EC, but are also explicitly mentioned in Article 7 of Regulation 1612/68, which states that **non-resident workers *"shall enjoy the same … tax advantages as national workers"***[84].

According to the Court, those provisions do not impede the application by Member States of different tax rules or tax systems to resident and non-resident natural persons, since these two categories of persons are **generally not comparable**[85].

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[81] ECJ, 12 July 2005, Case C-403/03, *Schempp v Finanzamt München, ECR* I-6421, para. 45. The Court has issued the same statement in cases involving indirect taxation, for example, ECJ, 29 April 2004, Case C-387/01, *Weigell v Finanzlandesdirektion für Vorarlberg, ECR* I-4981, para. 55 (on Article 39 EC) and also in cases concerning social security regulations, e.g. 19 March 2002, Cases C-393/99 and C-394/99, *INASTI v Hervein and Hervillier and Lorthiois and Comtexbel, ECR* I-2829, para. 51 (on Article 43 EC).

[82] *Schempp*, para. 46. This case has been the object of criticism by authoritative European academics. See among others Lang, M., 'Das EuGH-Urteil in der Rechtssache Schempp - Wächst der steuerpolitische Spielraum der Mitgliedstaaten?', *SWI*, 2005, p. 411.

[83] ECJ, 23 February 2006, Case C-513/03, *Van Hilten-Van der Heijden*, *ECR* I-1957 para. 49. See also Opinion AG Léger in this case, para. 58.

[84] Council Regulation 1612/68 of 15 October 1968 on the freedom of movement for workers within the Community, *OJ*, English Special Edition 1968 (II), p. 475.

[85] According to the Court "*there are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay tax or the possibility of taking account of their personal and family circumstances*" (ECJ, *Schumacker*, paras. 31-34; 11 August 1995, Case C-80/94, *Wielockx v Inspecteur der Directe Belastingen, ECR* I-2493, para. 18; ECJ 27 June 1996, Case C-107/94 *Asscher, ECR* I-3089 para. 41). In *Asscher*, however, the ECJ ruled that Member States could not apply a higher tax rate to non-residents without proper justification (*Asscher*, para. 49; see also ECJ, 12 June 2003, Case C-55/98, *Gerritse v Finanzamt Neukölln-Nord*, *ECR* I-5933, para. 54).

However, depending on the circumstances of the case, the Court may consider that a specific tax burden imposed only on non-residents, or the denial by a Member States to non-residents of a tax advantage available to residents, constitutes a discrimination if "*there is no objective difference between the situations of the two such as to justify different treatment in that regard*"[86].

An example of the first situation was found in ***Talotta***[87], which concerned a self-employed resident of Luxembourg who was running a restaurant in Belgium. The Court stated that a Belgian provision which laid down minimum tax bases, and which was only applicable to foreign undertakings operating in Belgium, was not compatible with the freedom of establishment and could not be justified by the need to ensure the effectiveness of fiscal supervision.

Belgium amended its legislation so that, as of assessment year 2005, resident taxpayers could also be subject to taxation on a minimum basis[88].

As regards the second situation, a distinction can be drawn, for the sake of clarity, between national measures denying to non-residents advantages conditional upon their personal and family situation, and national measures denying the deduction of costs and expenses in relation to an economic activity undertaken by non-residents.

a) Tax advantages related to the personal and family situation

35. The leading case in that respect is ***Schumacker***[89] which concerns a Belgian resident employed in Germany. Because of his non-resident status, Mr. Schumacker was denied in Germany the "splitting regime", an income tax regime allowing couples to benefit from a lower progression, and the procedural advantage of an overall tax assessment at the end of the year, as both advantages were only granted to German residents. Such legislation was considered to be contrary to Article 39 EC.

The *Schumacker* doctrine can be summarized as follows:

- The Court accepts the general principle of international tax law, embodied in the OECD Model convention, according to which personal and family circumstances have to be taken into account in the State of residence applying **worldwide taxation**[90].
- **Exceptions** to this principle must be made when the non-resident taxpayer undertakes **significant economic activity** in the Member State. In this case, he is deemed to be in a situation comparable to that of the taxpayers resident of that State if he derives his income entirely or almost exclusively from the economic activity which he performs in that State[91].

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[86] *Schumacker*, paras 36-38, and *Asscher*, para. 42.
[87] ECJ, 22 March 2007, Case C-383/05, *Talotta v Belgian State, ECR* I-2555.
[88] However, discrimination might still subsist in some cases: see Malherbe, J. and Wathelet, M., 'Incompatibilité avec l'article 43 du traité CE de la législation belge prévoyant une assiette minimum pour les seuls contribuables non-résidents', *Dr. Fiscal*, 2007, p. 850.
[89] ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v Schumacker, ECR* I-225.
[90] See also ECJ, 14 September 1999, Case C-391/97, *Gschwind v Finanzamt Aachen-Außenstadt, ECR* I-5451, para. 23; *Gerritse*, para. 44; ECJ 6 July 2006, Case C-346/04, *Conijn v Finanzamt Hamburg-Nord,* ECR I-6137, para.17.
[91] *De Groot* para. 89. However, according to the Court the application of criteria adopted in double taxation conventions between Member States could justify, in some circumstances, differences in treatment between resident and non-resident taxpayers. See, concerning frontier workers, ECJ, 12 May 1998, Case C-336/96, *Gilly v Directeur des services fiscaux du Bas-Rhin, ECR* I-2793.

Interestingly, the 1995 Court judgement followed the **Commission's unsuccessful attempts** to harmonize the income tax systems of the Member States in this respect, first through the 1979 Commission proposal for a directive concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the Community, which was withdrawn in 1993, and then through "soft law", with the Commission Recommendation 94/79/EC of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident[92].

36. The Court refined its position in ***Gschwind***. It considered the German legislation, as amended after ***Schumacker***, to pose no further problems of compatibility with EC law[93]. German law extended the treatment given to residents to non-resident couples earning at least 90% of their taxable income in Germany or alternatively earning less than 24,000 DEM outside Germany[94]. This doctrine has been applied in other cases involving joint taxation of married couples. In ***Zurstrassen***, the Court declared the denial of the lower tax scale applicable in joint assessments resulting from the fact that the spouses resided in two different Member States to be incompatible with Article 39 EC[95]. In ***Meindl***, the Court held that, in order to calculate the 90% fraction, the State of activity could not take into consideration income of one of the spouses which was not considered taxable by the Member State of such spouse's residence[96].

[92] *OJ* L 039, 10.02.1994, pp. 22-28.
[93] *Gschwind*, para. 6:
[94] *Gschwind*, para. 32. Commission Recommendation 94/79/EC (see above) referred to a 75% threshold.
[95] ECJ, 16 May 2000, Case C-87/99, *Zurstrassen, ECR* I-3339, at 3353.
[96] ECJ, 25 January 2007, Case C-329/05, *Finanzamt Dinslaken v Meindl, ECR* I-1107. See also ECJ, 1 July 2004, Case C-169/03, *Wallentin v Riksskatteverket*, *ECR* I-6443, para. 18.

Even though the Schumacker doctrine is clear in principle, it appears to be difficult to implement in practice. Only some Member States seem to comply with the Schumacker doctrine[97]. Moreover, amongst these Member States, there are several important differences. Some countries, like the Netherlands[98], Austria[99], Germany, Luxembourg[100] or Sweden[101] grant non-residents the choice to opt for the worldwide taxation regime of residents under certain conditions, usually linked to the proportion of the overall income earned on their territory. Others grant to non-residents the benefit only of some, but not of all the tax advantages linked to the resident status, also provided that the non-residents earn a minimum of 75%[102] or of 90%[103] of their worldwide income in the State of source.

A brief comparison between the Dutch, the Austrian and the German system shall enlighten the differences in the first category of States. The Netherlands have adopted an optional system allowing non-residents to be treated like resident taxpayers, which means that they are taxed on their worldwide income[104], provided that they are resident in an EU Member State or in countries with which the Netherlands has concluded a DTC containing an exchange of information clause[105].

Austria allows the same option to EU nationals, wherever they reside, who earn more than 90% of their income in Austria or earn less than 10,000 € outside Austria and limits the resident treatment to the income sourced in the country[106].

A third system applies in Germany, which also has the 90% threshold, but sets up the alternative maximal foreign sourced income criterion at 6,136 € and leaves the option of being taxed as a resident open to all non-residents, while, amongst these, only EEA nationals are entitled to certain tax benefits such as the deduction of alimony payments (Schempp) or the joint assessment of spouses (Zurstrassen)[107].

Luxembourg grants the resident treatment to non-residents earning more than 90% of their professional income in the country; the tax is computed taking into account foreign professional income (reserve of progression); the regime is optional and does not apply if less favourable[108]. Belgium, Cyprus, the Czech Republic and Latvia extend the benefit of personal and family provisions to qualifying non-residents.

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97 This seems to be generally the case in Austria, Germany, Greece, Luxembourg, the Netherlands, Slovenia, Spain and Sweden (Lenaerts, K., and Bernardeau, L., "L'encadrement communautaire de la fiscalité directe", *Cah. dr. eur.*, 2007, p.75).

98 Dutch Income Tax Law, Article 2(5). The non-resident is however entitled to a tax relied for the items of income that are taxable in other States according to DTCs or Dutch national law.

99 Income tax law, sec. 1(4). This regime is also applicable to EEA nationals and to nationals of countries with which Austria has signed a DTC. See Köfler, G., 'Austria' in Brokelind (2007), p. 70-71.

100 TNS-218 (1997).

101 IBFD Individual Taxation Database, January 2007.

102 A.o. Belgium, Denmark, Estonia, Finland (as from 1st January 2006), Hungary, Ireland, Latvia, Spain.

103 For example the Czech Republic, Greece, Luxembourg.

104 *Wet op inkomstenbelasting*, Art. 2(5). The non-resident is however entitled to a tax relied for the items of income that are taxable in other States according to DTCs or Dutch national law.

105 Spain applies similar rules with specific formalities (see R.D. 326/1999 of 26 February 1999, O.G. 27 February 1999, *TNS*-51 (1999).

106 Austrian Income tax law, sec. 1(4). This regime is also applicable to EEA nationals and to nationals of countries with which Austria has signed a DTC. See Kofler, G;, (2007), pp. 70-71.

107 Information on Member States tax legislation has been found on the IBFD online database (December 2007).

108 Art. 157 ter LIR ; circ. of 8 January 2003, *http://www.impotsdirects.public.lu*. The reference to "professional income" reflects the limited scope of application of the Treaty provisions. It should be abrogated in order also to put the provision in conformity with the *Lakebrink* case (see Draft Law 5801 (2007/2008), art. 31 modifying art. 157ter LIR.

37. More generally, as a result of the Court's case-law, Member States can no longer apply to non-residents a tax system differing from the system which applies to residents, such as a withholding tax based on gross earned income, denying any allowance or deduction which exists for resident taxpayers and which is linked to their personal circumstances, provided that such non-residents are in the same situation as residents. This principle has been applied by the Court in ***Wallentin*** to Sweden's refusal to grant the basic allowance (minimum taxable income) to a German student without taxable income in Germany, whose only taxable income had been earned in Sweden[109].

After *Wallentin*, Sweden subsequently amended its legislation, provided that the taxpayer's wordwide net earned income is exclusively or almost exclusively from Swedish source[110].

38. However, the EC freedoms do not oblige Member States to grant these benefits to non-residents in all circumstances. For example, insofar as the basic allowance is concerned, objective differences between residents and non-residents, such as whether the person in question is affiliated to the national social security system (***Blanckaert***)[111] or benefits from a comparable advantage in the State of residence (***De Groot*** and ***Gerritse***)[112], could justify a difference in treatment. However, the State of residence is not allowed to reduce personal and family advantages in proportion to the income earned by its residents abroad (***De Groot***)[113].

In implementing *De Groot*, the Netherlands amended their legislation but, it would seem, not perfectly[114]. Belgium still does not grant certain personal tax deductions to residents who earn part of their income abroad, Belgium and Austria are currently being investigated by the Commission in this respect[115]. Finland adjusted the domestic tax rules to make the tax burden on cross-border situations equal to the domestic ones[116].

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[109] On the legitimate refusal by Member States to grant a basic allowance to non-residents, see also *Gerritse*, paras. 51-54 and ECJ, 5 July 2005 Case C-376/03, *D. v Inspecteur van de Belastingdiens, ECR* I-5821, para. 36.

[110] Muten L.: "The effects of ECJ rulings on Member States direct tax law: introductory speech" in Brokelind (2007), p. 36. It seems that this measure is not sufficient to remove tax obstacles to the free movement of persons. When, for instance, one half of the income is earned in one country and the other half in another country. See also, as to the deduction of mortgage interests, the Commission Press Release IP/07/1163 of 24 July 2007.

[111] ECJ, 8 September 2005, Case C-512/03, *Blanckaert v Inspecteur van de Belastingdienst, ECR* I-7685. This case was decided on the ground of the free movement of capital, because Mr Blanckaert, a Belgian resident, had no income from employed or self-employed activity in the Netherlands, but only an income from savings and investments.

[112] *De Groot*, para. 100; *Gerritse*, para. 51.

[113] See the comments of Essers, P., and Elsweier, F., 'Dutch experience with European developments: a story of Dr. Jekyll and Mr. Hyde', *EC Tax Rev.*, 2003, p. 82.

[114] See Marres, O., "The Netherlands", in Brokelind, (2007), p. 105. Decree IFZ2003/189M of 28 February 2003, *TNS*-433 (2000); Decree of 8 April 2005, *TNS Online* 26 April 2005. For the application of the De Groot case-law by Dutch Supreme Court, see cases 38.067, 38.069 and 38.070 decided on 7 May 2004, *TNS Online*, 18 May 2004; case 42.111 of 1st December 2006, *TNS* Online, 10 January 2007.

[115] According to Austrian tax law certain personal expenses can be deducted from income when calculating income tax ("*Steuerabsetzbeträge*"). However, if the resident taxpayer has foreign income which is tax exempt but subject to progression, the same legislation limits this deduction to a pro rata amount of these expenses, whereas a resident with only domestic income will receive the full allowances. Cf. Commission Press Release of 26 March 2007, IP/07/414. As regards Belgium, see Commission Press Release of 20 July 2006, IP/06/1048, and comments by the Minister of Finance (P.Q. n° 13561 of 10 January 2007, Repr. Govaerts, *CRA Com. Fin. Chambre*, Com 1152, p. 8-9).

[116] *TNS Online* 15 February 2006.

b) Deduction of costs related to the economic activity of the taxpayer

39. Income from activity performed by non-residents cannot be taxed more heavily than income earned by residents, as regards **costs and expenses which are directly linked to the economic activity** that generated the taxable income.

In ***Gerritse***, German legislation which excluded almost entirely the deduction of business expenses from the taxable gross income earned in Germany by non-residents, while permitting this deduction to residents, was found to be incompatible with Article 49 EC[117]. Moreover, in ***Scorpio***[118] the Court considered that a legislation which allowed the deduction of such expenses for non-residents, but only after the payment of income tax, through a refund procedure which had to be initiated by the taxpayer himself, was also contrary to EC law. According to the Court, "*in that commencing such a procedure involves additional administrative and economic burdens, and to the extent that the procedure is inevitably necessary for the provider of services, the tax legislation in question constitutes an obstacle to the freedom to provide services …*"[119]. The Court issued a similar ruling in relation to the freedom of establishment in ***Conijn***, a case which concerned the deduction of costs incurred in obtaining tax advice, which was only granted to residents under German legislation[120].

> Following Scorpio, the Netherlands changed their legislation by simply abolishing, under certain conditions, the taxation of non-resident artists[121]. This case also gives an illustration of another type of "extended" implementation of the EC freedoms, in that the Netherlands simultaneously abolished a (very similar) direct tax regime applicable to non-resident sportsmen[122].
>
> On the contrary, the circular[123] issued by the German Ministry of Finance seems to restrict the application of Scorpio, especially as regards proving a deduction for costs, the timing of cost deductions and the introduction of a net tax rate of 40%[124]. Likewise, the German implementation of Gerritse consisted of the release of federal administrative instructions in form of a circular issued by the Ministry of Finance. It provided an *ad hoc* solution, which was only available to non-residents who were both nationals of and residents in an EEA country[125].

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[117] For a comment, see Hinnekens, L., 'European Court challenges flat rate withholding taxation of non-residents: comments on the Gerritse decision', *EC Tax Rev.*, 2003, p. 207.
[118] ECJ, 3 October 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH/Finanzamt Hamburg-Eimsbüttel,*, *ECR* I-9461, para. 44. Cf. with *Futura Participations and Singer,* para. 43 (no. 61).
[119] *Scorpio,* para. 47.
[120] *Conijn,* para. 20-25.
[121] See Molenaar, D., and Grams, H., "Scorpio and the Netherlands: Major changes in Artist and Sportsman Taxation ion the European Union", *Eur. Tax.*, 2007, p. 67-68.
[122] Belgium has also abolished the specific regime applicable to non-resident sportsmen since 1 January 2008. See Belgian Ministry of Finance Circular Ci. RH.244/587.755 (AFER 45/2007) dd. 21.11.2007 published on *www.fisconet.be*.
[123] BMF-Schreiben IV C 8 – S 2411/07/0002 of 5 April 2007.
[124] See also Bundesfinanzhof, 24 April 2007, I R 39/04 giving the final decision in Scorpio that Germany can continue to charge WHT of 20%; Bundesfinanzhof, 22 August 2007, I R 46/02 and 29 November 2007, I B 181/07 applying a restrictive view of Scorpio. The *Bundesfinanzhof* ruled that the denial of interest on the refunded withholding tax is compatible with EC law (13 February 2008, *TNS* Online, 19 February 2008).
[125] BMF-Schreiben of November 2003 (BStBl 2003, part I, at 553, available on www.bundesfinanzministerium.de) and letter of 2004 (BStBl 2004, part I, at 860). The minimal though rapid implementation of the *Gerritse* decision is criticized by Cordewener, A., "Germany" in Brokelind (2007), p. 154 and *Internationales Steuerrecht* (2004), p. 109 seq.

Currently, the Commission requests Germany in a reasoned opinion to modify the withholding tax system applied particularly on the income of non-resident artists and sportsmen[126]. Changes made by Germany to its law are not fully satisfactory to the Commission which issued a supplementary reasoned opinion[127].

Some other tax systems seem not to fully comply with the ECJ case-law: the Czech Republic[128], Estonia[129], Italy[130], Latvia[131], Poland[132], Portugal a.o. still apply a final withholding tax system on gross income from certain types of income or activities.

40. Discrimination in respect of income or expenses related to economic activity in other Member States may also be rooted in **the legislation of a worker's State of residence**. Article 49 EC implies that Member States must allow the deduction of costs and expenses incurred in another Member State in the same manner as they allow deductions of business expenses incurred on their territory. In ***Vestergaard***[133], a Danish certified auditor, employed by a company of which he was the sole shareholder, was denied deduction of the expenses incurred attending a training course in Crete, on the grounds that such courses were deemed under Danish tax law to serve primarily touristic purposes. In contrast, such a presumption did not apply for expenses incurred on similar courses in Danish tourist resorts. This difference in treatment was held to be incompatible with the freedom to provide services.

3. Income or expenses related to pensions and social benefits

41. The Treaty freedoms provide a protection that goes beyond a mere guarantee that income (including related deductions) directly earned from cross-border activity will not be treated in a discriminatory manner by any Member State. Other items of income and corresponding deductions also enjoy Treaty protection. This is the case for pensions, whether public or private, and other social benefits. In the fiscal systems of the Member States, such items of income usually enjoy a more favourable regime than the one bearing on income from work, and the related social contributions are usually deductible for income tax purposes. At a European level, numerous harmonization directives have been adopted, although none concerning direct taxation[134].

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[126] See Commission Press Release IP/07/413 of 26 March 2007.
[127] Commission Press Release IP/08/144 of 31 January 2008.
[128] 25% final withholding tax (WHT) on income from independent activities and from services paid to non-residents.
[129] Final WHT on gross income from artistic and sport activities and on fees from professional services provided in Estonia.
[130] Final 30% WHT on compensation for independent work carried out in Italy by non-residents (including director's fees).
[131] Final WHT on artists, sportsmen and coachs, directors' fees (25%), management and consultancy fees (10%).
[132] Final 20% WHT on some advisory and management services, entertainment and sport activities, directors' fees.
[133] ECJ, 28 October 1999, Case C-55/98, *Skatteministeriet v Vestergaard*, *ECR* I-07641.
[134] For legislation adopted in the field of social security see, above, Parliament and Council Regulation (EC) 883/2004 of 29 April 2004 on the coordination of social security systems, *OJ* L 166, 30.4.2004, p. 1, replacing Regulation (EEC) 1408/71 of the Council of 14 June 1971, *OJ* L 149, 5.7.1971, p. 2. Among the legislation adopted in the areas of life and non-life assurances, see Parliament and Council Directive 2002/83/EC of 5 November 2002 concerning life assurance**,** *OJ* L 345, 19.12.2002, p. 1, and Council Directive 92/49/EEC of 18 June 1992 (the third non-life insurance Directive), *OJ* L 228, 11.8.1992, p. 1.

42. The case-law provides a large number of examples where the freedom of movement has been held to apply to this area. In an early example, ***Bachmann***[135], a Belgian provision that excluded the deductibility, for income tax purposes, of insurance contributions paid in another Member State, while allowing the deductibility for contributions paid in Belgium, was held to be contrary to Articles 39 and 43 EC. At that time, eight Member States out of fifteen limited in the same way the deductibility of insurance premiums to the ones paid to a resident insurance company[136]. The Court admitted that this non-deductibility was nevertheless justified by "*the need to safeguard the cohesion of the applicable tax system*"[137]. This is the only case in which the Court has admitted such a justification and it is likely to remain so in the light of the subsequent judgements on the income tax treatment of insurance contributions, which have progressively restricted and then abandoned the justification used in Bachmann[138].

Germany extended the deductibility of contributions for health, accident, liability and life insurance paid to EU insurance companies in 1994[139]. Belgium changed its law in 2004[140].

The refusal by Member States to grant the same tax treatment to insurance contributions paid to insurance companies established on their territory and to contributions paid to companies established in other Member States has also been considered by the Court to be incompatible with the free provision of services, both from the perspective of the insurance companies established in other Members State and of their clients (***Safir, Danner, Skandia/Ramstedt***[141]***)***.

43. The case-law contains a number of other instances of discrimination or unjustified restrictions under the EC freedoms where pensions are involved. In ***Turpeinen***, the Court considered incompatible with Article 18 EC a national law subjecting a retirement pension paid in a Member State to a resident of another Member State to a higher tax burden than the same pension paid in the first Member State to one of its residents[142]. In ***Pusa***, the Court considered that, in a situation involving a resident of Spain who received a pension in Finland, "[Article 18 EC] *in principle precludes legislation of a Member State under which the attachable part of a pension paid … in that State to a debtor is calculated by deducting … the income tax prepayment levied in that State, while the tax which the holder of such a pension must pay on it subsequently in the Member State where he resides is not taken into account at all for the purposes of calculating the attachable portion of that pension*"[143].

[135] ECJ, 28 January 1992, Case C-204/90, *Bachmann v Belgian State*, *ECR* I-249 and Case C-300/90, *Commission v Belgium*, *ECR* I-305.
[136] Binon, 1996, p. 131.
[137] *Bachmann*, para. 23; *Commission v Belgium* (C-300/90), para. 16.
[138] ECJ, 30 January 2007, Case C-150/04, *Commission v Denmark*, *ECR* I-1163 (on Articles 39, 43 and 49 EC); 5 July 2007, Case C-522/04, *Commission v Belgium*, (Articles 18, 39, 43 and 49 EC – employers' contributions). Cf. in particular *Bachmann*, para. 27 and *Commission v Denmark* (C-150/04), paras. 72-74.
[139] See Sec. 10(2) no 2 of ITA ; *TNS* Online, 9 May 1994.
[140] Law of 27 December 2004, *M.B.*, 31 December 2004.
[141] ECJ, 28 April 1998, Case C-118/96, *Safir*, *ECR* I-1897; 3 October 2002, Case C-136/00, *Danner*, *ECR* I-08147; 26 June 2003, Case C-422/01, *Skandia and Ramstedt v Riksskatteverket*, *ECR* I-6817, 30 January 2007, C-150/04, *Commission v. Denmark*.
[142] ECJ, 9 November 2006, Case C-520/04, *Turpeinen*, *ECR* I-10685.
[143] ECJ, 29 April 2004, Case C-224/02, *Pusa*, *ECR* I-5763, para. 32. In the light of the latter case-law, it seems that the early *Werner* case (ECJ, 26 January 1993, Case C-112/91, *ECR* I-429)**,** in which the Court denied the protection under Article 43 EC of a German national who had moved his residence to the Netherlands while keeping his economic activity in Germany, is no longer relevant (see Terra, B.J.M., and Wattel, P.J., *European Tax Law*, The Hague, Kluwer Law International, 4th ed., 2005, p. 34).

44. Although the taxation of pensions forms the major part of the case-law in this area, the Court has also issued judgements concerning the fiscal treatment of other social benefits, such as unemployment benefits, which involved a discrimination under Article 39 EC against frontier workers in respect of whether taxes on wages could be taken into consideration for the computation of unemployment benefits in ***Merida***[144], or in cases of maternity allowances in ***Meindl***[145].

Regarding the income tax regimes applicable to pensions, a rather reluctant attitude of the Member States can be particularly damaging to the effectiveness of EC law. It can hinder the cross-border payment of contributions to pension schemes provided for in other Member States. It can also constitute an obstacle to the cross-border payment of pensions as such. On this matter, the problems arising from the emigration of retired persons, such as double taxation or double non-taxation of pension benefits, remain numerous and difficult to tackle due to the lack of Community-wide coordination in this area, despite the critiques in the doctrine[146] and the efforts made by the Commission[147], or even by Member States on a bilateral basis[148]. Today, many Member States still do not comply with the EC freedoms in that respect, a situation that motivated the Commission to initiate infringement procedures which have already led to compliance by Members States (Sweden) or to judgements stating the incompatibility of national legislation (Belgium and Denmark)[149], while others are still pending (Germany)[150]. Some countries comply, such as Finland[151].

4. Income, losses and wealth from immovable property located in other Member States

45. A third category of cases deals with the taxation of cross-border situations involving immovable property, generally situated in a Member State which is different from the State in which the owner is assessed under the income tax[152].

[144] ECJ, 16 September 2004, Case C-400/02, *Merida v Germany*, *ECR* I- 8471.
[145] ECJ, 25 January 2007, Case C-329/05, *Finanzamt Dinslaken v Meindl*, *ECR* I-1107.
[146] Stevens, L., 'Worrying about pension problems in the European Union', *EC Tax Rev.*, 2003, p. 66; de Greef, 'EU-policy for lifting pension tax obstacles does not work', *EC Tax Rev.*, 2005, p. 202; Dietvorst, 'Proposal for a pension model with a compensating layer', *EC Tax Rev.*, 2007, p. 142.
[147] Communication from the Commission to the Council, to the European Parliament and to the European Economic and Social Committee of 19 April 2001, on "The elimination of tax obstacles to the cross-border provision of occupational pensions", COM(2001) 214 final.
[148] See DTC between Netherlands and Portugal of 20 September 1999, Article 18 and DTC between Denmark and Portugal of 14 December 2000. On the issue of improving the coordination between European (and international) tax and social security law, see Lang, M., (ed.), *Double Taxation Conventions and Social Security Conventions*, Vienna, Linde Verlag, 2006.
[149] See *Commission v Denmark (C-150/04)*. As a result of *Commission v Belgium (C-522/04)*, Belgium modified in 2007 a provision, introduced in 1993 (just after Bachmann), amounting to an exit tax on the capital of a life insurance (Article 364bis CIR), by excluding from the scope of application of this provision the transfer of residence between Member States.
[150] For example, case C-269/07, *Commission v. Germany, O.J.*, C 199, 25.08.2007, p. 19.
[151] As of 1st January 2006; see also the ruling of the Finnish Supreme Administrative Court, 25 May 2007, *TNS* Online 2 July 2007.
[152] Relevant cases involving the taxation of income from immovable property concern also company taxation (Case C-451/05, *Elisa*) and the taxation of non-profit organizations (Case C-386/04, *Stauffer*). On a Dutch tax on company transactions involving immovable property, see Case C-1/93, *Halliburton*. On the taxation of a person owning immovable property subsequently to a transfer of residence, see *Van Hilten-Van der Heijden* (no. 33 above, on the transfer of residence).

46. Even if the tax treatment of losses has been the object of a number of well known decisions in the area of corporate taxation, recent decisions of the Court have also dealt with this topic in relation to natural persons and with regard to their immovable property. In ***Ritter-Coulais***, the Court held incompatible with the free movement of workers a German law which did not take into account rental income losses ("negative income") relating to the use of a private dwelling in another Member State for the purposes of determining the rate of progressive taxation, whereas positive income deriving from the use of a dwelling situated in Germany was taken into account for that purpose[153]. In ***Lakebrink***, the Court confirmed its position in respect of a similar Luxembourg provision[154].

Since the tax treatment of losses from immovable property can be seen as one where *"all the tax advantages connected with the non-resident's ability to pay tax … are not taken into account either in the State of residence or in the State of employment* (…)" and "*since the ability to pay tax may indeed be regarded as forming part of the personal situation of the non-resident …*", *Lakebrink* and *Ritter-Coulais* are thus an application of the *Schumacker* doctrine[155].

In Luxembourg, a bill has been submitted to Parliament in order to consider global worldwide income (instead of worldwide professional income) to determine the tax rate applicable to local income, thus allowing some taking into consideration of foreign losses[156].

47. Another way of hindering the freedom of movement guaranteed by the EC Treaty is to subject tax incentives for the acquisition of immovable property to the condition that the acquired property be located in the Member State granting the incentive. In two infringement procedures against ***Portugal***[157] and ***Sweden***[158], the Court ruled that under Articles 18, 39 and 43 EC these Member States could not subject a deferral of taxation on capital gains arising from the sale of a property to the condition that the reinvestment in real property be made on the territory of that Member State, thus excluding real property reinvestments in other Member States[159].

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[153] ECJ, 21 February 2006, Case C-152/03, *Ritter-Coulais v Finanzamt Germersheim*, *ECR* I-1711, para. 40. On losses, see also ECJ Order, 12 September 2002, Case C-431/01, *Mertens v Belgian State*, *ECR* I- 7073 .

[154] ECJ, 18 July 2007, Case C-182/06, *Luxembourg v Lakebrink*, para. 26. However, whereas in Ritter-Coulais the national legislation disregarded only the negative income, in Lakebrink the Luxembourg legislation took neither the negative, nor the positive foreign income into account for tax purposes. The Court did not consider this difference relevant (see paras. 20, 24-25).

[155] *Lakebrink*, para. 34. See also the Opinion of AG Léger in *Ritter-Coulais*, paras. 97-99. See also Pending Case C-527/06, *Renneberg v Staatssecretaris van Financien, OJ* C 56, 10.03.2007, p. 20.

[156] Draft Bill 5801 of 6 November 2007, *TNS* Online, 14 November 2007.

[157] ECJ, 26 October 2006, Case C-345/05, *Commission v Portugal, ECR* I-10633.

[158] ECJ, 18 January 2007, Case C-104/06 *Commission v Sweden, ECR* I-671.

[159] In both cases, the Court rejected justifications based on the coherence of the tax system, and on housing policy considerations (see *Commission v Portugal*, paras. 30-35, and *Commission v Sweden*, para. 27). On the justifications for the exclusion of foreign houses from the scope of such incentives, see the Opinion of AG Bot of 28 June 2007 in ECJ, 18 January 2008, Case C-152/05, *Commission v Germany*, paras. 83-94.

Sweden amended its national provision on the deferral of capital gains from immovable property even before the Court decided *Commission v. Sweden (C-104/06)*[160]. The Commission also recently closed an infringement procedure against Belgium regarding a tax relief for owner-occupied and secondary residences limited to houses located in Belgium, which did not go beyond the stage of the reasoned opinion[161]. A re-investment condition exists in Hungary[162], in Luxembourg[163]; Poland abolished that condition as from 1st January 2007[164].

48. Similarly, EC law, in particular Article 56 EC, prohibits national measures which subject the taxation of capital gains arising from the sale of immovable property located in a Member State by non-residents in that State to a higher burden than the one which would be applicable to such capital gains had they been earned by a resident of that State (***Hollmann***)[165].

49. Moreover, the Court has applied Article 56 EC to direct taxes on immovable property other than income tax, such as inheritance taxes, in the cases ***Heirs of Barbier***[166] and ***Jäger***[167] and wealth taxes, in ***D.***[168]. These levies can indeed cause potential restrictions to intra-Community investments. In ***Heirs of Barbier***, the Court declared incompatible with the free movement of capital a Dutch law which restricted certain debts related to immovable property from being deducted for the computation of the taxable base for Dutch inheritance tax, when the deceased was a non-resident at the time of his death, whilst allowing it for residents. In ***D.***, the Court held that Articles 56 and 58 CE could also apply to wealth taxes; however, in that particular case the Dutch legislation in question, which did not grant allowances to non-residents who owned less than 90% of their real estate wealth in the Netherlands, was found compatible with EC law under the *Schumacker* doctrine[169].

The Dutch tax authorities apply the *Barbier* doctrine[170].

5. Other income or expenses in relation to cross-border services

50. A final category of cases includes various situations in which a taxpayer receiving services from a provider established in another Member State suffers a tax disadvantage in comparison with the situation in which the provider of the service would be established in the same Member State as the recipient. These disadvantages can concern either the taxability of certain sources of income or the deductibility of specific expenses.

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160 Wiman, B., "Pending cases involving Sweden", in Lang/Schuch/ Staringer (ed.), *ECJ-Recent developments in Direct Taxation 2007*, Vienna, Linde, 2007, p. 231-233. The Swedish law on taxation of income was modified in December 2006, thus before the judgement. However, according to the Commission, "*the amended rules do not fully eliminate the restriction on the free movement of persons as stated by the Court in its judgement* (..)", and a new infringement procedure has been opened (Commission Press Release IP/07/1162 of 24 July 2007).
161 Commission Press Release IP/12/07 of 8 January 2007.
162 No difference is made according to the place of re-investment in a permanent home for the sellor (IBFD – Europe – Individual Taxation database – Hungary, point 2.4.1.
163 See art. 102bis LIR.
164 IBFD – Europe – Individual Taxation database – Poland, point 2.4.
165 ECJ, 11 October 2007, Case C-443/06, *Hollmann v Fazenda pública.*
166 ECJ, 11 December 2003, Case C-364/01, *Heirs of Barbier v Inspecteur van de Belastingdienst, ECR* I-15013. See also pending Case C-43/07, *Arens-Sikken v Staatssecretrais van Financien, OJ* C 69, 24.03.2007 p. 9.
167 ECJ, 17 January 2008, Case C-256/06, *Jäger v Finanzamt Kusel-Landstuhl*.
168 ECJ, 5 July 2005, Case C-376/03, *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen,* ECR p. I-5821.
169 The *D.* case is particularly relevant as to DTCs, since the Court refused to consider that the EC freedoms could work out as a most favoured nation clause.
170 Reply to a parliamentary question of 18 February 2004, *TNS* Online, 5 March 2004.

51. An example of the first type of disadvantage is found in ***Lindman***[171]. The Court held that legislation exempting from the calculation of taxable income winnings from Finnish lotteries but not winnings from lotteries established in other Member States was not compatible with the free provision of services[172]. Likewise, the Court ruled in ***Commission v France***[173] that France could not subject certain proceeds from investment and life assurance contracts taken out with resident companies (subject to a fixed levy) to a more favourable tax treatment than proceeds derived from contracts taken out with companies established in other Member States (included in worldwide income taxable at a progressive rate). Such a difference was found incompatible with Articles 49 and 56 EC[174].

52. As to the deductibility of foreign expenses, the cases ***Commission v Germany***[175] and ***Schwarz***[176] both concern school fees paid by parents to private establishments for the education of their children. The Court considered that Germany could not authorize the partial deduction, on certain conditions, of those fees when paid to private schools established on German soil, while refusing it in all cases in respect of fees paid to similar establishment located in other Member States. The German legislation was therefore found to be incompatible with Articles 18, 39, 43 and 49 EC[177].

The freedom to provide services also applies, correspondingly, to the "provider" of educational services, i.e. the teacher. In the ***Jundt*** case, a German lawyer, teaching on a secondary basis in a French university, from which he received expense allowances, successfully challenged German legislation exempting such allowances only when received from a national (German) public university[178].

B. TAXATION OF COMPANIES

53. Starting with the early ***Avoir fiscal*** case, the majority of the judgements issued by the Court as to company taxation concern direct tax provisions which hinder the freedom of establishment[179]. Other cases address the freedom to provide services. A specific section focuses on the much-debated question of the application of EC freedoms to national mechanisms for compensation of cross-border losses and consolidation. The corporate tax aspects of the Court's case-law on the taxation of dividends and interests, and the application of the free movement of capital and payments in this respect are analysed in C section devoted to the taxation of company shareholders.

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[171] ECJ, 13 November 2003, Case C-42/02, *Lindman*, ECR I-13519.

[172] An infringement procedure has been initiated against Spain for the same type of provision (see Commission Press Release IP/07/1030 of 6 July 2007) and a reasoned opinion was sent to Poland (Commission Press Release IP/06/1360 of 12 October 2006).

[173] ECJ, 4 March 2004, Case C-334/02, *Commission v France,* ECR p. I-2229. Finland amended its tax legislation as of 1 June 2005 (*TNS* Online, 24 May 2005).

[174] See also ECJ, 14 November 1995, Case C-484/93, *Svensson and Gustavsson v Ministre du Logement et de l'Urbanisme, ECR* I-3955. In this case the Court declared incompatible with the free movement of capital and the freedom to provide services a French measure granting an interest rate subsidy on building loans restricted to loans by credit institutions approved by France.

[175] ECJ, 11 September 2007, Case C-318/05, *Commission v Germany.*

[176] ECJ, 11 September 2007, Case C-76/05, *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach.*

[177] See *Schwarz*, para. 33.

[178] ECJ, 18 December 2007, Case C-281/06, *Jundt v Finanzamt Offenburg*.

[179] ECJ, 28 January 1986 Case 270/83 *Commission v France, "Avoir fiscal", ECR* 273, para. 18.

1. Freedom to choose the form of establishment in other Member States

54. According to Articles 43 and 48 EC, as interpreted by the Court, the freedom of establishment includes the freedom to choose the appropriate legal form in which an economic operator established in a Member State wishes to pursue activities in another Member State. Discriminations or restrictions[180] which can only arise when two "objectively comparable" situations receive a different tax treatment[181] can be found in the corporate income tax systems of the Member State, but can also concern other types of taxes imposed on companies, as ***Halliburton***[182] demonstrates. In this case, an exemption from the Dutch tax on transactions between companies relating to immovable property was considered to be contrary to Article 43 EC insofar as it did not apply when the transferring company was incorporated under the law of another Member State.

55. A distinction can be drawn between, on the one hand, rulings concerning national tax measures of the State of the secondary establishment of a non-resident company (the Host State) and, on the other hand, cases which deal with tax measures adopted by the Member State where a company has its primary establishment (the Home State) that hinder the establishment of subsidiaries or branches in another Member State.

The EC Treaty generally requires Member States not to discriminate branches of non-resident companies against domestic companies, provided that they are in comparable situations. Concerning the implementation of this principle into national law, Member States directly involved in the Court rulings tend to take compliance measures, but the same cannot always be said from Member States having a similar legislation. Despite the Court's case-law, corporate tax systems of the Member States still contain numerous provisions that could be in breach with EC law[183].

a) In the Host State

56. In the Host State, the establishment of a non-resident EU company can be effected through the creation of permanent establishments (i.e. branches) or subsidiaries. Contrary to a subsidiary, a branch, although it may constitute an economic entity separate from the head office of the company, is not endowed with a distinct legal personality, but is part of the legal entity identified as the company[184]. With regard to branches, EC law requires – in respect of certain tax benefits – that the Host State treat a branch of a non-resident company in the same way as it would treat the branch of a domestic company. Concerning subsidiaries, the Host State must treat equally subsidiaries of non-resident parent companies and those of resident parent companies.

[180] *Avoir fiscal* para. 22; ECJ 23 February 2006, Case C-253/03 *CLT-UFA*, *ECR* I-1831, para. 14; ECJ 18 July 2007, Case C-231/05, *Oy AA*, para. 40.

[181] On the comparability of situations as to company taxation, see Dahlberg, M., *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital*, Kluwer Law International, 2005, p. 106.

[182] ECJ, 12 April 1994 Case C-1/93, *Halliburton Services v Staatssecretaris van Financiën*, *ECR* I-1137.

[183] In 2004, a Price Waterhouse Coopers study concluded that possible violations of EC freedoms existed in all (then 25) Members States. See Press Release, PWC LLP, 14 October 2004 (available on *www.ukmediacentre.pwc.com*).

[184] For the purpose of the study, the terms permanent establishment, a tax treaty term, and branch, a company law term, are used synonymously.

i) Tax treatment of permanent establishments of EU companies

57. In ***Avoir fiscal***[185] (1986), the first decision in the field of direct taxation, the system of shareholder tax credit was held to be in breach of Article 43 EC, insofar as it was only available to French resident companies but not to French branches and agencies of companies established in other Member States. Although this case primarily deals with a tax mechanism aiming at limiting the economic double taxation of dividends in the hands of the shareholders, it displays, however, a good example of discrimination of branches of non-resident companies.

58. In the ***Royal Bank of Scotland*** case[186], Greece applied to profits earned by a branch of a non-resident company a tax rate higher than the rate applicable to profits earned by a resident company. The Court considered that this difference could not be justified by objective differences between resident and non-resident companies, even though these two categories of taxpayers are generally not comparable as to the extent of their tax liability (worldwide income v domestic source income)[187]. In ***CLT-UFA,*** the Court condemned under Article 43 EC German legislation subjecting the profits of a branch of a non-resident EU company to a higher tax rate than the one that would have applied if this company had chosen to establish a German subsidiary distributing its profits in full to its parent company[188].

> Greece amended the provision struck down in Royal Bank of Scotland in such a way that now both resident and non-resident banks are taxed under the higher tax rate[189]. However, in the comparable CLT-UFA case regarding Germany, the German *Bundesfinanzhof* decided in reaction to the ECJ judgement that profits earned by a non-resident company through a permanent establishment have to be taxed like the wholly distributed profits of a comparable resident subsidiary ("distribution fiction"), which meant the lower of the two tax rates.[190]

59. Furthermore, to ensure freedom of establishment, a Member State must treat equally branches of non-resident companies and resident companies with regard to tax exemptions. The fact that a tax exemption is granted even by virtue of a DTC concluded with a third state outside the EU does not relieve the State from this obligation. In ***Saint-Gobain***[191], a tax relief provided by the DTC concluded between Germany and the United States was partly denied by Germany to a German branch of a French company, on the ground that the DTC applied only to companies subject to unlimited tax liability in Germany. This practice was held to be incompatible with the right of establishment.

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[185] Case 270/83, *Avoir fiscal* (see fn 179).

[186] ECJ, 29 April 1999, Case C-311/97, *Royal Bank of Scotland*, *ECR* I-2651.

[187] *Royal Bank of Scotland*, paras. 27-29. The Court refers to its case-law relating to the taxation of income of natural persons in *Schumacker* and *Wielockx*. Greece complied as of 1 January 1996, replacing the dual rate system with a single 40% rate (*TNS Online*, 31 May 1999).

[188] ECJ, 23 February 2006, Case C-253/03, *CLT-UFA v Finanzamt Köln-West*, *ECR* I-1831.

[189] See Ernst & Young, *EuGH-Rechtsprechung Ertragssteuerrecht*, Stollfuß, 2nd edition, 2007, p. 181.

[190] The German Ministry of Finance declared the principles of this decision applicable for all open cases in years where the tax credit method was applicable, that is to say until 2001. See BMF-Schreiben of 14 September 2007 (IV B 7 - S 2800/07/0001) "Steuersatz für Gewinne EU/EWR-ausländischer Kapitalgesellschaften nach dem Körperschaftsteuer-Anrechnungsverfahren; Folgen aus der EuGH-Entscheidung in Sachen "CLT-UFA"".

[191] ECJ 14 September 1999, Case C-307/97, *Saint-Gobain v Finanzamt Aachen-Innenstadt*, *ECR* I-6163.

Even before the Court delivered its judgement, the German tax legislator extended treaty relief provisions embodied in DTCs to non-resident taxpayers[192]. Following that landmark decision, most Member States also extended their DTCs, usually restricted to residents on their territory, to EU non-residents operating through permanent establishments[193].

60. Discrimination may also be found in procedural rules. In ***Commerzbank***[194]**,** the Court had to examine UK legislation under which interest on a repayment of overpaid tax was granted to companies with "fiscal residence" in that Member State but was refused to non-resident companies. The Court ruled that the "fiscal residence" criterion, even if it were applied without discrimination on the ground of the location of a company's seat, would most likely work more particularly to the disadvantage of companies having their seat in other Member States, and held that difference to be discriminatory[195].

Following the judgement, the UK amended the Income and Corporation Taxes Act 1988 in order to entitle non-residents to receive interest on overpaid tax with effect from 1st October 1993[196].

61. In most of the above-mentioned cases, the Member State involved tried to justify the disputed tax provisions by referring, for example, to advantages that could balance the disadvantages resulting from the questionable provision, the absence of harmonization of tax law on a Community level, the risk of tax avoidance, the existence of double tax treaties or the objective differences between branches and subsidiaries[197]. However, the Court did not accept any of these grounds of justification. The ***Futura Participations and Singer*** case[198] (no. 87) concerning the tax treatment of cross-border losses incurred by a branch is an exception in this respect. The Court found that a system subjecting the carry-forward of losses of branches of non-resident companies to the condition that those losses be economically linked with the income earned in that Member State was in conformity with the fiscal principle of territoriality and thus did not entail discrimination. It also upheld the requirement for accounts to be held in the Host State, even though such requirement only applied if a carry-over of losses was claimed.

The Luxembourg tax legislator, whose legislation was at stake in this case, eased the restrictive provisions in order to admit non-residents to prove eligibility for the loss-carry-forward with other means. However, restrictive bookkeeping provisions continue to exist in other Member States, like, for example, in Germany[199].

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[192] See Ernst & Young, *EuGH-Rechtsprechung Ertragssteuerrecht*, Stollfuß, 2nd ed. (2007), p. 192.

[193] For example, Austria complied. See Kofler, G., 'Austria' in Brokelind (2007), p. 59, 80.This does not require that Member States renegotiate their entire DTC network, nor that they adopt a specific provision, or even a circular; the Netherlands issued a Decree IFZ2003/558M of 21 January 2004 (*TNS* Online, 5 February 2004); for Ireland, see the Finance Bill 2001 of 30 March 2001 (*TNS* Online 23 May 2001).

[194] ECJ, 13 July 1993, Case C-330/91, *Commerzbank, ECR* I-4017.

[195] *Commerzbank*, para. 13-15.

[196] Press Release from 23 July 1993, DT1955 - Non-residents: UK income: Repayment supplement, *http://www.hmrc.gov.uk/manuals/dtmanual/DT1955.htm*.

[197] *Avoir fiscal*, paras. 21-26, *Saint-Gobain*, paras. 53-55; *CLT-UFA*, paras. 19-30.

[198] Case C-250/95, *Futura Participations and Singer*, fn 61. See also Aarnio, K., "Treatment of permanent establishments and subsidiaries under EC law: towards a uniform concept of secondary establishment in European tax law?", *EC Tax Rev.*, 2006, p. 18.

[199] Though, to give kudos to the *Futura Participations and Singer* decision, the German Federal Ministry of Finance issued administrative guidelines on the application of the Income Tax Act. See Cordewener, A., "Germany", in Brokelind (2007), p.119, 148.

ii) Tax treatment of subsidiaries of EU companies

62. Subsidiaries have an independent legal personality and are therefore always "nationals" or residents of the Host Member State. However, subsidiaries of non-resident EU parent companies are sometimes treated differently from subsidiaries of domestic parent companies. This situation has been considered to be incompatible with the EC Treaty freedoms in a number of cases.

63. The ***Baxter*** case[200] concerned French legislation which did not allow the deduction of expenditure for scientific and technical research carried out outside of France (and therefore in other Member States). In the Court's view, French undertakings will generally carry out research activities in France, whilst undertakings based in other Member States and operating in France through a secondary place of business such as a subsidiary will not, so that this deduction system operates to the detriment of French subsidiaries of foreign companies[201]. This unequal treatment cannot be justified by the need for effectiveness of fiscal supervision[202].

> Shortly after the outcome of the judgement, France adapted its legislation on the deductibility of research expenses, so that it is no longer linked to the fact that research has been carried out in France[203]. At present, Ireland is confronted with a reasoned opinion of the Commission requesting the country to change similar provisions by which patent royalties are tax exempt only if research leading to the patent was carried out in Ireland[204].

64. The denial of group taxation benefits in connection with subsidiaries of non-resident EU parent companies can also entail incompatibilities with the freedom of establishment, as the Court stated in respect to UK legislation on advance corporation tax due upon the distribution of dividends (ACT) in the cases ***Metallgesellschaft/Hoechst***[205] (no. 114) and ***Franked Investment Income (FII) Group Litigation***[206] (no. 106).

65. Unjustified differences of treatment between subsidiaries can also occur in the application of anti-abuse provisions, such as thin capitalisation rules (see in particular cases ***Lankhorst-Hohorst***[207] (no. 95) and ***Test Claimants in the Thin Cap Group Litigation***[208] (no. 96). Other unjustified differences of treatment have been the object of the Court's rulings in the field of intra-group dividends and intra-group payments (see nos. 106 *et seq.*).

66. In contrast, the Court in ***Oy AA***[209] upheld a Finnish law allowing a Finnish subsidiary to make a tax deductible financial transfer to a Finnish parent but not to its non-resident EU parent. The Court admitted a combination of two factors, namely the safeguarding of a balanced allocation of powers of taxation between Member States and the need to prevent tax evasion.

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[200] ECJ, 8 July 1999, Case C-254/97, *Baxter, ECR* I-4811.
[201] *Baxter*, para. 12.
[202] *Baxter*, paras. 18, 19.
[203] Decision of the Conseil d'Etat of 15 October 1999, 179049, 179054, published on the internet site of the Conseil d'Etat (*http://www.conseil-etat.fr/ce/jurispd/index_ac_ld9946.shtml*).
[204] See Commission Press Release IP/07/408 of 23 March 2007.
[205] ECJ, 8 March 2001, Joined Cases C-397/98 and C-410/98, *Metallgesellschaft/Hoechst, ECR* I- 1727. For a comment see Virgo, G., 'Hoechst revisited: the restitutionary aspects of the case', *BTR*, 2002, p. 4.
[206] ECJ 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*, *ECR* I-11753.
[207] ECJ, 12 December 2002, Case C-324/00, *Lankhorst-Hohorst, ECR* I-11779.
[208] Case C-524/04, *Test Claimants in the Thin Cap Group Litigation* (fn 45).
[209] *Oy AA*, ECJ, 18 July 2007, Case C-231/05, *Oy AA.*

The Court considered that allowing a transferor to deduct an intra-group cross-border transfer from its taxable income would result in enabling groups of companies to choose the Member State in which the profits of the subsidiary were to be taxed. That would undermine the system created by a balanced allocation of taxing powers between Member States because the Member State of the subsidiary's residence, according to the choice of the group of companies concerned, would be forced to renounce its right to tax the profits of that group's subsidiary to the benefit of the Member State of the parent company's residence[210]. Moreover, according to the Court, the possibility of transferring the taxable income of a subsidiary to a non-resident parent company carries the risk that companies establish purely artificial arrangements in order that income transfers be made to parent companies established in those Member States which apply the lowest rates of taxation, or where the income in question would not be taxed at all[211].

b) In the State of residence

67. The freedom of establishment does not only restrict the tax competence of the Host State. Since ***Daily Mail***[212] it has become clear that EC law also prohibits the Member State of residence from hindering the establishment of a company incorporated under its legislation in another Member State[213]. Most of the cases concern the establishment of foreign subsidiaries and are often linked to group schemes and the deduction of foreign losses or expenses.

i) Tax treatment of permanent establishments in other Member States

68. Only one judgement addresses the domestic regime of a foreign branch: the ***AMID*** case (no. 84)[214] concerns the setting-off of losses incurred by a Belgian company against the profits earned by its Luxembourg branch. This set-off economically subjected the Luxembourg profits to tax in Belgium, which was held discriminatory. Various pending cases also deal with the problems of deduction of losses by permanent establishments (nos. 86 *et seq.*).

69. Another pending case deserves particular attention as regards the determination of the Member State competent to avoid an undue restriction following from the combined application of the legislations of two Member States. In ***Deutsche Shell***[215] a German resident company allotted capital to its permanent establishment in Italy. The allotted capital was shown both in the Italian balance sheet and in the German head office's balance sheet in their respective national currencies (LIT and DM). When the permanent establishment was wound up and the allotted capital was repatriated back to Germany, the exchange rate had fallen and the German company suffered a substantial currency loss. This loss, however, was tax-deductible neither in Germany nor in Italy. According to the Court, which finally concludes to the existence of an unjustified restrictive effect, "*although it is true that any Member State which has concluded a double taxation convention must implement it by applying its own tax law and thereby calculate the income attributable to a permanent establishment, it is unacceptable for a Member State to exclude from the basis of assessment of the principal establishment currency losses which, by their nature, can never be suffered by the permanent establishment*"[216].

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[210] *Oy AA*, para. 56.
[211] *Oy AA*, para. 58.
[212] ECJ, 27 December 1988, Case 81/87, *Daily Mail*, *ECR* 5505 para. 16.
[213] *Daily Mail*, para. 16. See also *ICI*, para. 21, and ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer*, *ECR* I-10837 para. 31.
[214] ECJ, 14 December 2000, Case C-141/99, *AMID v Belgische Staat*, *ECR* I-11619. See no. 34.
[215] ECJ, 28 February 2008, Case C-293/06 *Deutsche Shell v Finanzamt für Grossunternehmen in Hamburg*.
[216] *Deutsche Shell*, para. 44.

ii) Tax treatment of subsidiaries established in other Member States

70. The Court of Justice has issued various rulings on the taxation of multi-national groups of companies. Some of these cases, such as ***ICI***[217]***, Marks and Spencer***[218] ***Rewe Zentralfinanz***[219]***,*** and the pending ***Lidl Belgium***[220], refer to the deductibility of foreign losses, and are discussed in nos. 86 *et seq*.

71. Other cases concern the fiscal treatment of intra-group transactions. In the case ***X AB and Y AB***[221], a Swedish group scheme according to which assets could be transferred tax-free between companies belonging to the same group was considered to be contrary to the freedom of establishment, since it did not apply to certain cross-border situations. (See also X and Y no. 94).

72. The Court found furthermore unjustified differences between parent companies on the basis of the State of residence of their subsidiaries in ***Bosal***[222] and in ***Keller Holding***[223] as to the deductibility of holding and financing costs (see nos. 124 *et seq*.)

73. Anti-abuse rules may also conflict with the freedom of establishment. ***Cadbury Schweppes***[224] concerned UK Controlled Foreign Company (CFC) legislation which commended the inclusion in the tax base of a resident company of the profits made by a CFC in a lower tax State. The Court found that companies with a CFC in low-taxation Member States were treated less favourably than resident companies with subsidiaries in the UK or in a Member State which does not apply a lower level of taxation than in the UK[225]. The UK CFC legislation was considered contrary to the freedom of establishment. Nevertheless, it was found to be justified if applied only to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned.

74. However, the Court considered in ***Columbus Container***[226] that CFC legislation does not contravene the freedom of movement when it does not submit to an additional tax burden the economic operator having cross-border activities, as compared to a person operating in a purely national context.

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[217] Case C-264/96, *ICI,* fn 67, esp. para. 28. .
[218] Case C-446/03, *Marks & Spencer,* fn 213.
[219] ECJ, 29 March 2007, Case C-347/04, *Rewe Zentralfinanz v Finanzamt Köln-Mitte*.
[220] Case C-414/06, *Lidl Belgium v Finanzamt Heilbronn, OJ* C 326, 30.12.2006, p.26. (Opinion AG Sharpston of 14 February 2008). The Court is to rule on the deductibility of losses from a foreign permanent establishment.
[221] ECJ, 18 November 1999, Case C-200/98 *X AB, Y AB, ECR*. I-8264.
[222] ECJ, 18 September 2003, Case C-168/01, *Bosal Holding, ECR* I-9401.
[223] ECJ, 23 February 2006, Case C-471/04, *Keller Holding, ECR* I-2107.
[224] ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes*, *ECR* I-7995.
[225] *Cadbury Schweppes*, para. 44.
[226] ECJ, 6 December 2007, *Columbus Container v Finanzamt Bielefeld-Innenstadt.* This case concerned a German mechanism providing a switch from the exemption to the credit method in the case of a significantly lower taxation in the State of source.

UK CFC rules were amended with immediate effect as of December 6, 2006: any apportionment of the chargeable profits of a CFC located in a Member State will be reduced by the amount that relates to the "net economic value", which arises directly to the group in consequence of the activities of employees working for the CFC in that EU territory. Profits of "genuine economic activities" are however excluded from the amount that relates to the "net economic value" and may therefore be subject of a CFC apportionment. These new more complicated[227] CFC rules might be considered as contravening European law[228]. However, the UK Government already announced its intention to overhaul the regime relating to foreign profits and released a discussion document. The new controlled companies (CC) rules should apply to domestic and cross-border situations in order to remove any element of discrimination[229].

German CFC law has been even more restrictive than the UK provisions since it did not allow the taxpayer to demonstrate that the purpose of transaction was not the circumvention of German taxes. The respective provision has been amended with effect from 1st January 2008[230], so that add-back taxation does not apply, when the tax-payer can prove that the controlled company (resident in another EU or EEA Member State) carries on a "genuine economic activity"[231]. Furthermore, it is necessary that Germany and the respective EU/EEA State concluded an agreement on the exchange of information. The new exception from the add-back taxation shall, however, not apply to the extent the controlled company derives income from other controlled companies or permanent establishments outside the EU/EEA, which might pose problems with regard to the free movement of services.

Germany[232], Denmark[233] and Sweden[234] introduced draft law amending their current CFC legislation. France published lengthy guidelines[235].

75. In conclusion, it appears that the Court, when examining tax measures from the perspective of the Host State, requires that the treatment of branches of a non-national company and of subsidiaries of non-resident parent companies be determined as if they were related to resident companies. When the Court decides on measures taken by the Home State, it requires that foreign branches and subsidiaries are to be treated like domestic branches or subsidiaries[236].

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[227] See Lovell's International Tax Team, "Impact of Cadbury Schweppes on CFC Legislation" in *01/08 European Court of Justice Tax Cases 2007: A Review*, BNA International, London, p. 9-12.
[228] Evans, D. and Delahunty, L., "E.U. perspective on U.K. CFC rules" in *01/08 European Court of Justice Tax Cases 2007: A Review*, BNA International, London, 2008, p. 13-15.
[229] *Ibid*., p. 15.
[230] Cf. Article 24 of the Jahressteuergesetz 2008 (JStG) of 20 December 2007, which entered into force on the 1st January 2008 (BGBl I 2007 Nr. 69; *http://217.160.60.235/BGBL/bgbl1f/bgbl107s3150.pdf*).
[231] German Foreign Tax Act, AStG, Sec. 8 para. 2 as amended by the Jahressteuergesetz 2008.
[232] Draft Bill for an Annual Tax Act 2008, *TNS* Online, 1 August 2007; see also Circular of 8 January 2007 clarifying the situation for pending cases (*TNS* Online, 26 January 2007).
[233] Revised Bill amending CITA of 1 June 2007, *TNS* Online, 6 June 2007.
[234] Draft Bill of 25 June 2007, *TNS* Online, 2 July 2007.
[235] BOI 4H-1-07 of 16 January 2007, *TNS* Online, 29 January 2007.
[236] For a comment, see Terra/Wattel, (2005), p. 150.

2. Cross-border provision of services

a) In the State of activity

76. The case-law of the Court of Justice on Article 49 EC often addresses situations where companies are hindered in the provision of services in a Member State where they are not residents ("the State of activity")[237]. Restrictions in the State of activity may be caused by withholding tax systems or by provisions limiting the deductibility of expenses, not only for individuals (See ***Gerritse****,* no. 39) but also for companies.

77. In Germany, non-residents are subject to withholding tax on income from work. It is the responsibility of the income provider, usually a company, to deduct the tax at source. Even if a tax treaty provides for a partial or total reduction in German tax, the tax must be withheld and is subsequently refunded. In ***Scorpio***[238] (no. 39) the Court decided that the obligation imposed on resident companies contracting with non-resident service providers to withhold tax only on payments to non-resident creditors and the consequent liability for this tax constituted an obstacle to Article 49 EC[239]. However, the obstacle was considered justified due to the necessity to secure the taxation of non-residents. Nevertheless, German legislation was considered to be in breach of EC law. It denied for the computation of the withholding by non-residents the right to claim deduction of business expenses that were directly economically linked to their German-sourced income, while permitting the immediate deduction of these expenses for residents[240].

78. In ***Centro Equestre da Lezíria Grande***[241]***,*** the same condition of a direct economic link between the deduction of operating expenses and the income received in the Member State was considered to be compatible with EC law. In line with ***Gerritse***, the Court stated that it was, however, contrary to the freedom to provide services to make the repayment of that tax subject to the condition that the operating expenses exceed half of that income[242].

> Germany did not implement properly the judgements in Scorpio and Centro Equestre. For that reason, the Commission addressed a Reasoned Opinion to the Federal Republic requesting an amendment of the questionable provisions which preclude an immediate deduction of expenses from the income for certain categories of non-residents[243].

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[237] *Danner*, para. 29; C-433/04, *Commission v Belgium,* para. 28 with referral to previous judgements, among others 25 July 1991, Case C-76/90, *Säger, ECR* I-4221.
[238] ECJ, 3 October 2006, Case C-290/04, *Scorpio, ECR* I-9461.
[239] *Scorpio*, paras. 33-34.
[240] *Scorpio*, para. 49. The Court also held that the requirement of an exemption certificate in order to benefit from a tax treaty zero rate in Germany causes extra administrative costs, which restrict the free movement of services. However, the restriction was held to be justified by the necessity to ensure the proper functioning of source taxation (see paras. 53-61).
[241] ECJ, 15 February 2007 Case C- 345/04, *Centro Equestre da Lezíria Grande v Bundesamt für Finanzen*, ECR I-1425.
[242] Following a letter of the Ministry of Finance implementing the *Gerritse* decision, the legislation in question was no longer applicable at the time of the judgement. The Court considered that this was not relevant for the purposes of assessing the compatibility of the situation of the taxpayer with EC law.
[243] See Commission Press Release IP/07/413 of 26 March 2007.

79. The Court of Justice confirmed that recourse to service providers established in other Member States could also be hindered by procedural tax rules. In ***Commission v Belgium***[244], the Belgian law which subjected undertakings in the construction sector both to a withholding obligation on the payments they made to contractors who were neither established nor registered in Belgium and to a limited joint and several liability for their Belgian tax debts was considered a disproportionate infringement on the rights conferred upon them by Articles 49 and 50 EC[245].

80. However, the same obstacles can be seen from the perspective of the Member State of residence of the recipient of the service provided by the company, since Article 49 EC also protects the (passive) freedom to receive services. In the field of direct taxation, the recipient of a service may be denied a certain tax advantage when the service is rendered by a non-resident. Such discrimination in the State of activity, even if the recipient of the service concerned is an individual, has the effect of discouraging non-resident companies from offering their services in that Member State (***Lindman,*** no. 51, ***Safir,*** no, 42, ***Danner***, no. 42, ***Skandia/Ramstedt,*** no. 42, ***Schwarz/Gootjes-Schwarz***, no. 52 *and* ***Case C-318/05 Commission v. Germany***, no. 52**)**.

b) In the State of residence

81. In the State of residence, Article 49 EC also protects companies which receive services from providers established in other Member States and therefore precludes tax advantages from being limited to domestic services. ***Eurowings***[246] concerned the German *Gewerbesteuer* (trade tax) for which relief was only available if business assets had been leased from another undertaking subject to German trade tax, i.e. resident in Germany. Otherwise, the leasing costs were added back to the taxable income. In that way, German law established a difference depending on whether the provider of the service was established in Germany or in another Member State. The legislation was held to be contrary to the freedom to provide services[247]. Similarly, in ***Laboratoires Fournier***[248]**,** the Court considered that the French legislation limiting the benefit of a tax credit for research expenses to research projects carried out in France was contrary to Article 49 EC[249], since it differentiated according to the place of establishment of the provider of services and was therefore liable to restrict cross-border activities.

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[244] ECJ, 9 November 2006, Case C-433/04, *Commission v Belgium*, *ECR* I-10653.

[245] *Commission v Belgium,* paras. 31 to 41. Cp. with *Scorpio*, para. 36, which concerns a period when no Community instrument on administrative cooperation existed between Member States.

[246] ECJ, 26 October 1999, Case C-294/97, *Eurowings, ECR* I-7447.

[247] *Eurowings*, para. 44. In this case, the Court clarified that using the Internal market in order to profit from special tax regimes is not an abuse and cannot be used by another Member State to justify less favourable treatment in tax matters.

[248] ECJ, 10 March 2005, Case C-39/04, *Laboratoires Fournier, ECR* I-2057.

[249] *Laboratoires Fournier*, paras. 16-18.

In France, the judgement has been implemented properly through legislative amendments[250]. On the contrary, Belgian law still subjects a specific profit exemption to the condition that the researcher is employed in Belgium[251]. In Finland, accelerated depreciation is granted only to certain investments in some developing regions[252]. Similar rules also exist in Germany Ireland is confronted with a reasoned opinion of the Commission requesting it to change similar provisions by which patent royalties are tax exempt only if research leading to the patent was carried out in Ireland.[253].

3. Consolidation and losses

82. The question of cross-border loss compensation has raised difficult specific problems which are directly linked with the structure of the Member States' tax systems. When companies own several places of business in the same country, all their profits and losses are aggregated in order to determine their taxable income. When places of business are located in different countries, difficulties arise when neither the State of residence nor the State of activity admits the deduction of losses.

a) Losses of EU companies with a permanent establishment in another Member State

83. How does the Court address the tax treatment of losses incurred by a company having a permanent establishment in another Member State?

i) In the State of residence

84. In ***AMID***[254] was at issue the tax treatment of a loss incurred in the State of residence by a company which had a permanent establishment in another Member State, the profits of which were exempt according to a DTC. According to the worldwide income taxation principle, the company's Belgian losses were set-off against the profits of its foreign permanent establishment, which were normally exempt according to the DTC. This compensation led economically to Belgian (double) taxation of the Luxembourg profits, since the Belgian loss could not be carried forward to be deducted from future Belgian income. The Court compared companies having all their branches in Belgium with companies with one or more foreign permanent establishments. The Court held that by setting off domestic losses against profits exempted by treaty, the legislation of that Member State establishes a differentiated tax treatment as between those two categories incompatible with EC law[255].

Belgium has not yet modified its tax legislation. However, the tax authorities comply with the ruling, even though in a very narrow reading[256].

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[250] See "Décret n° 2005-27 du 13 janvier 2005 pris en application des Articles 199 ter B 220 B, 223 O et 244 quater B du code général des impôts relatifs au crédit d'impôt pour dépenses de recherche effectuées par les entreprises industrielles et commerciales ou agricoles et modifiant l'annexe III à ce code", Official Journal no. 12 of 15 January 2005 p. 661, text no. 15.

[251] Article 67 ITC. Such a requirement also exists as regards capital gains spread taxation under the condition of reinvestment in Belgium.

[252] IBFD Database. December 2007.

[253] See Commission Press Release of 23 March 2007 IP/07/408.

[254] ECJ, 14 December 2000, Case C-141/99, *AMID v Belgian State*.

[255] *AMID*, paras. 23 and 31.

[256] Parl. Question no. 487 dated 23 September 2004, Bull. *Q.&R.* Chambre, 2006-2007, no. 162, p. 31584-31586; see also Parl. Question no. 555 dated 11 January 2001, *Bull. Q&R.* Chambre, 2002-2003, no. 141, p. 17838-17840.

85. A similar situation regarding an individual was solved in the same way[257]. In **Mertens,** the loss incurred by a Belgian resident in the exercise of his professional activities in Belgium had been set off against the profits from another professional activity in Germany, despite the fact that this profit was exempt from taxation in Belgium according to the DTC between the two countries. The Court pointed out "*that the unfavourable tax treatment … is the direct result of the application of the Belgian legislation, not of an inevitable disparity between the Belgian and German tax legislation*"[258]. In the absence of justification, the Court ruled that the provisions in question contravened the free movement of persons.

86. The company's Home State can also create an unfavourable tax treatment for losses incurred in the Host State of a permanent establishment. In ***Stahlwerk Ergste Westig***[259], a German company had two loss-making permanent establishments in the United States. Germany refused the deduction of the US losses from the profits taxable in Germany. The company claimed that this was contrary to the EC Treaty and especially to the free movement of capital. The Court, however, decided in an Order that such a situation involves the right of establishment which cannot be invoked in relations with third countries.

A similar question arises in the pending case ***Lidl Belgium***[260], which concerns a German company that has been denied the deduction of losses from a permanent establishment in Luxembourg on the grounds that, according to the Luxembourg-German DTC, income from such a permanent establishment is not subject to taxation in Germany. Moreover, in the pending case ***Krankenheim Ruhesitz***[261], the Court of Justice has to decide whether freedom of establishment allows a Home State to disallow the deduction of losses incurred by a foreign branch in a case where the loss cannot be effectively deducted in the other State.

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[257] ECJ, 12 September 2002, Case C-431/01, *Mertens v Belgian State*.
[258] *Mertens*, para. 36.
[259] ECJ, Order of 6 November 2007, Case C-415/06, *Stahlwerk Ergste Westig v Finanzamt Düsseldorf-Mettmann*.
[260] Case C-414/06, *Lidl Belgium v Finanzamt Heilbronn, OJ* C 326, 30.12.2006, p. 26 (Opinion AG Sharpston of 14 February 2008).
[261] Reference for a preliminary ruling from the German Bundesfinanzhof lodged on 21 March 2007, *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz* (Case C-157/07), *OJ* C 129, 09.06.2007, p. 5.

The "Amid situation" can occur in worldwide tax systems, where, on the one hand, the globalisation of income leads to the setting-off of the domestic loss with foreign (exempt) income, with no carry-forward of the exempt income used for the compensation or, on the other hand, in tax credit systems when no carry-over or refund is provided for excess tax credit resulting from the global income being decreased by a domestic loss.

As regards tax credit systems, various countries comply with the AMID ruling: the Netherlands, where domestic losses are set-off against foreign profit, but with a carry-over of the amount of foreign profit that does not give right to relief[262]. However, a tax credit system with no refund or carry-over of excess tax credit applies in Slovenia, Spain, Portugal[263] and the Czech Republic. A similar breach of EC Law might also occur under certain circumstances under the Irish[264], French[265], Finnish, Polish, Bulgarian, and Luxembourg systems[266].

The "*Amid* situation" does not occur in those Member States where exemption means excluding from the tax base any foreign result, be it positive or negative. This is the case, for example, in Germany, Finland[267], Poland[268], and also in Denmark which recently partially abandoned its worldwide taxation principle with the consequence that a domestic loss cannot anymore be set-off against foreign permanent establishment profits. This was also the case in Luxembourg, until a domestic decision construed the Treaty exemption in a narrow sense[269], allowing for compensation of foreign losses with domestic income; one must probably consider, in line with the Amid ruling, that no offsetting of domestic losses is allowed against foreign profits.

The restrictive concept of exemption leads to prevent setting-off foreign losses against head office profits. This situation is at present challenged by the Commission as regards Germany[270].

ii) In the Host State

87. In ***Futura Participations and Singer***[271], the questions referred to the Court dealt with the treatment of losses in the Host State. Under Luxembourg tax legislation, the carry-forward of losses for branches of non-resident companies was subject to two conditions. First, the losses had to be economically linked to the income earned by the taxpayer in Luxembourg. Second, the taxpayer had to keep and hold accounts according to Luxembourg law.

[262] Articles 31-33 of the Besluit Voorkoming Dubbele Belasting 2001. For a situation where a non-resident is refused the carry over of losses against income from another category, considered as non-discriminatory compared with resident situation, see: Hoge Raad, no. 43517, concl. P.G. of 7 December 2007, and Hoge Raad, 7 December 2007, no. 43258 deciding in the same way.
[263] This country applies a "per country" tax credit system.
[264] Recently, Ireland introduced a "pooling" system authorizing excess tax credit for one country to be credited against Irish tax on branch profits in other countries where foreign tax is not sufficient to cover the Irish tax (Section 826 and Schedule 24 9FA TCA 1997).
[265] France has a territorial system. The consolidation system leads in some cases to incomplete loss compensation. Richelle, I., *Notion et traitement des soldes déficitaires. Aspects nationaux et internationaux*, Doctoral dissertation, Free University of Brussels, 1998, chap. 11.
[266] In non-DTC situations, the credit method applies.
[267] This is only the case when the exemption is provided for by a DTC.
[268] *Ibid*.
[269] Tribunal Administratif Luxembourg, 19 April 2005, no. 17.820 confirmed by the Cour Administrative, 10 August 2005; see also in Austria a similar situation.
[270] Infringement procedure 1998/4684, Commission Press Release IP/07/1547 of 18 October 2007.
[271] Case C- 250/95, *Futura Participations & Singer v Administration des contributions*, fn. 61.

Regarding the first condition, the Court ruled that a Member State does not encroach upon the freedom of establishment by insisting that there be an economic link between the losses to be carried forward and the income earned in the Member State in question: such a system is in conformity with the fiscal principle of territoriality and does not entail discrimination.[272] However, with regard to the second condition, the Court considered that a Member State cannot oblige a non-resident taxpayer to keep accounts complying with national rules to justify the carry-forward of losses; it must allow that taxpayer other means for proving eligibility for the carry-forward.

b) Intra-group losses and transfers (consolidation)

88. Most countries restrict the setting-off of losses to the taxpayer who has incurred them[273]. A change in the ownership or control of a company, or a restructuring (e.g. a merger) can thus restrict or eliminate the right to the deduction of such losses. Moreover, as a rule, a loss incurred by a company within a group cannot be set off against the profits of another company within the same group, whether or not it is established in the same country[274], except by application of specific tax provisions on group consolidation[275]. Group taxation regimes generally apply only to resident subsidiaries, with some exceptions (i.e. Denmark, France and Italy), and a number of jurisdictions expand the scope of the regime to domestic permanent establishments of foreign corporations (e.g. Austria, Finland, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden and the UK)[276].

i) Loss offset within EU multinational groups

89. On the relation between the right to compensate losses within a group and the State of establishment of the subsidiaries, the Court has decided two cases, which both deal with the UK "group relief regime".

90. ***ICI*** was the first case regarding loss offset between companies. Together with another UK company, ICI formed a consortium through which the two companies beneficially owned the shares of a holding company, the sole business of which was to hold shares in subsidiaries operating in many countries. One of those subsidiaries located in the UK incurred losses. ICI tried to set off its part in these losses against its chargeable profits for the corresponding periods by way of tax relief. The tax relief was denied on the basis that, under UK legislation, group relief could be refused to a UK group, as regards UK losses to be set off against UK profits, if a majority of the subsidiaries of the group were outside the UK, even if a number of them were within the EU. The Court of Justice held that such legislation constituted an unjustified inequality of treatment under the Treaty's provisions on freedom of establishment and rejected all the justifications proposed by the UK[277].

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[272] *Futura Participations and Singer,* para. 22.
[273] Masui, Y., "General Report– Group Taxation", International Fiscal Association, 2004, Vienna Congress, *Cah. dr. fisc. intern*., 2004, Vol. 89b, p. 21-67, sp. p. 46.
[274] This is a fundamental difference between group structuring through subsidiaries compared to permanent establishments pertaining to a single legal entity. In this later case, as far as the [worldwide] taxation principle applies, all the profits and losses must be aggregated.
[275] On the existing and possible systems of "consolidation", see Masui, (2004).
[276] "This is a new trend among European countries especially since 2000". Masui, Y., (2004), pp. 53-54.
[277] *ICI*, para. 23-24. Dibout, P., "Territorialité de l'impôt, répression de l'évasion fiscale et liberté d'établissement dans la Communauté européenne; A propos de l'arrêt "Imperial Chemical Industries (ICI)", *Dr. Fiscal,* 1998, p. 1475.

91. Academic commentators of the ICI decision have read it as implying that the losses of a subsidiary established in a Member State other than the one of the parent company must be taken into consideration within the framework of a consolidation regime[278]. The Court of Justice dealt with this question in ***Marks and Spencer***[279]. Marks and Spencer, incorporated in the UK, established a number of subsidiaries in the UK and in other Member States. In the UK, Marks & Spencer claimed group tax relief in respect of losses incurred by its subsidiaries in Belgium, France and Germany. That claim for relief was rejected on the ground that group relief could only be granted for losses recorded in the UK.

The Court of Justice considered that losses incurred by a resident subsidiary and losses incurred by a non-resident subsidiary were treated differently for tax purposes, which amounted to a restriction on the freedom of establishment. Nonetheless, according to the Court, such a restriction is generally compatible with the EC Treaty, since it pursues a legitimate objective and is justified by imperative reasons in the public interest[280]. The Court recognized the need to preserve the allocation of the power to impose taxes between Member States so that it makes "*it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses*". In this context, "*to give companies the option to have their losses taken into account in the Member State in which they are established or in another Member State would significantly jeopardize a balanced allocation of the power to impose taxes between Member States, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred*". The Court also held that Member States must be able to prevent a double deduction of losses, and acknowledged the need to minimize the risk of tax avoidance schemes whereby losses could be transferred to companies established in those Member States which apply the highest rates of taxation[281].

However, the Court held that in the case at hand the restrictive measure went beyond what was necessary to attain the objectives pursued, since the non-resident subsidiary had exhausted all possibilities in its Home State to deduct or carry forward its losses[282].

92. As a result of the Court's case-law, a Member State cannot limit the group relief for losses incurred on its territory by a resident company which is a member of a group, simply because that company has subsidiaries in other Member States. Moreover, insofar as the loss cannot be carried over in the Home State of the subsidiary, the Home State of the parent company, when it grants a group relief regime, must allow that foreign loss to be set off against profits realized on its territory.

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[278] Boon, R., and Pelinck, M., "De ICI-zaak en Articles 15 en 13, eerste lid, Wet Vpb. 1969", *WFR*, 1998, p. 1824.
[279] ECJ (Grand Chamber), 13 December 2005, Case C-446/03, *Marks & Spencer*, *ECR* I-10837.
[280] *Marks & Spencer*, para. 51.
[281] *Marks & Spencer*, paras. 45- 49. It is worth noting that these three justifications are accepted together by the Court, which is innovative as the Court usually considers justifications separately.
[282] *Marks & Spencer*, paras. 54-56. Cf. also AG Poiares Maduro, paras. 49, 82.

The ICI decision obliged the UK to grant its group tax relief also when the UK group has subsidiaries in other EU Member States. The UK also had to modify its legislation following the Marks and Spencer decision in order to allow loss relief to parent companies for the losses of subsidiaries established in another Member State, when those losses were unrelievable in that Member State[283]. It is questionable whether the requirement that "*every step… is taken*" to secure that the loss is taken into account (abroad) and the requirement that "*the time at which the determination is to be made is the time immediately after the end of the current period*", which in practice reduces considerably possibilities of setting-off, are in line with the Court ruling and with the principle of effective remedy that must be afforded to claimants[284].

As to the other Member States, there is no uniformity in the tax treatment of intra-group losses in the EU. Some Member States apply a consolidation regime that allows the set-off of losses from foreign EU subsidiaries. For example, the Austrian group regime, applicable since 2005, allows the deduction of losses from foreign subsidiaries for the year in which they are incurred[285]. However, this regime is limited to first-level subsidiaries and does not allow setting-off losses of foreign sub-subsidiaries. Furthermore, recapture is provided when the foreign subsidiary is liquidated[286].

Latvia broadened its tax group relief regime to include foreign subsidiaries located in an EEA country and permanent establishments; a "no possibility" test has also been introduced which probably will give rise to practical difficulties or claims[287]. In Slovenia, the group regime introduced in 2005 which in groups could only be formed by two resident companies[288] has been abrogated as from 1st January 2007. Cyprus grants loss offsetting only to resident companies and to permanent establishments of non-resident companies that elect the resident companies treatment.

283 New Section 403F ICTA 1988 and new Schedule 18A, ICTA 1988 introduced via para. 4 of Sched. 1 Finance Act 2006 and para. 7 of Sched. 1 Finance Act 2006. The UK Government estimates the Exchequer's cost at £ 50 m a year, which it considers sustainable so that it does not consider the option to abolish the group relief. See Regulatory Impact Assessment of 8 March 2006 for Corporation Tax – Extension of Group Relief published on the homepage of HM Revenue & Customs http://www.hmrc.gov.uk/.

284 The Institute of Chartered Accountants in England & Wales has already sent its comments to the EU Commission on this issue. On some still open points following the ECJ ruling, see: Court of Appeal (UK), 20 February 2007.

285 Sec. 2 Abs 8 Einkommensteuergesetz (German Income Tax Code). With a recapture mechanism.

286 Under these two points the Austrian regime seems to be incompatible with EC law, see Stefaner, M.C., "Implication of Marks & Spencer on Austria's Group Tax Regime", *TNI*, January 23, 2006, p. 275-276. The author also points out a difference between domestic and foreign subsidiaries as to the shareholding requirement.

287 Act of Parliament of 19 December 2006 amending the CITA, "LV", 207 (3575), 29 December 2006. Petkevica, J., "Cross-Border Loss Relief in Latvia: The Lessons to Be Learned", *Eur. Tax.*, 2007, p. 424. It seems that carry-forward of foreign losses is not available.

288 New CITA rule introduced in 2005 (*TNS* Online, 13 June 2005).

The Danish[289] and the Italian[290] consolidation regimes also seem to be in line with the Marks and Spencer decision. In France, although the consolidation regime[291] is normally limited to French resident companies and French permanent establishments of foreign companies, the “consolidated income regime” granted upon ministerial approval[292] allows setting-off losses from foreign subsidiaries and foreign permanent establishments. Some aspects of this regime might be contrary to EC law as interpreted by the Court in Marks and Spencer[293]. Ireland also made amendments to enact Marks and Spencer[294].

Other Member States do not allow the set-off of losses from foreign subsidiaries. For instance, the “*integration regime*” in Luxembourg is optional and allows concerned companies to group or set-off their tax results during the period for which the regime applies. It only deals with entities (companies and permanent establishments) which are taxable in Luxembourg[295]. Thus, no compensation of losses from foreign subsidiaries is allowed while such setting off exists as regards domestic subsidiaries[296]. Furthermore, the Luxembourg *Cour Administrative* recently considered that the limitation of the integration regime to groups having their parent company or a permanent establishment in Luxembourg, while refusing the regime in the case of a non-resident EU parent company with no permanent establishment in Luxembourg, was in accordance with the non-discrimination clause in DTCs; the Court refused to refer the case to the Court of Justice on the basis of the freedom of establishment[297].

[289] Denmark modified considerably its consolidation regime in 2004. A mandatory “local tax consolidation” applies to all group-related resident companies and Danish branches of non-resident companies. Cross-border consolidation remains optional, on an “all or none principle”, whereby all or none of the foreign entities are included in the consolidation. Losses from an entity are set-off against profits of the others, the result of each entity being determined separately. The “all or none” principle aims at avoiding inclusion in the consolidation of loss-making companies only. Permanent establishments are included in the consolidation in order to prevent companies from setting-up permanent establishments rather than subsidiaries abroad. The decision to form a cross-border tax consolidation group is binding for a ten years period. A recapture exists in case of early dissolution of the group or at the termination of consolidation.

[290] In Italy, the consolidation regime is available to resident companies, including the Italian permanent establishment of a foreign company acting as the controlling company. A similar regime applies to foreign group companies, on an “all or none” basis, Article 117 et seq. TUIR.

[291] Articles 223 A to 223Q of the French Income Tax Code (CGI).

[292] Articles 209(5) CGI and Ann. II, art. 103-123 CGI.

[293] See Administrative Guidance BOI 4H-2-05, 19 July 2005, Secs. 27-28. Saïae, J., " Deduction of Losses Incurred in Another Member State by a non-Resident Subsidiary following Marks & Spence"', *Eur. Tax*., 2007, p. 550, Gutmann, D., "La fiscalité française des groupes de sociétés à l’épreuve du droit communautaire – Réflexions sur l’affaire Marks & Spencer pendante devant la CJCE", *Dr. fiscal*, 2004, p. 681; Zapf, H., and Andreae-Nehlsen, D., "L’affaire Marks & Spencer et ses incidences sur la fiscalité française", *Petites Affiches*, 23 novembre 2005, 233, p. 5.

[294] See new Section 411 and Section 420C TCA and Guidance notes from Irish Revenue: Section 420C Notes for Guidance TCA 1997. In force as from 1st Jan. 2006.

[295] This is also the case in Austria, and could be challenged under EU law: see Stefaner, M.C. (2006).

[296] Article 164bis LIR ; Circ. LIR no. 164bis/1 dated September 27, 2004.

[297] Cour Administrative Luxembourg, 19 April 2007, no. 21979C.

Under the German *Organschaft* regime, parents and subsidiaries must be German resident companies. They can conclude for a minimum period of five years[298] a "profit and loss pooling agreement" whereby the controlling parent covers the losses of the controlled company. In the same way, the Dutch "fiscal unity regime"[299] is limited to resident companies. Dutch AG Wattel is of the opinion that a referral has to be made to the Court[300]. The Portuguese tax relief regime is also limited to resident companies; no change has been made since Marks and Spencer[301].

Similarly, Finland restricts its group contribution regime to resident companies. Interestingly, in the Oy AA case (discussed above no. 66), the Court ruled that Article 43 EC does not preclude a regime whereby an intra-group financial transfer from a subsidiary in favour of a parent company is restricted to resident companies. The Finnish regime was thus considered compatible with EU law on this aspect[302]. In a situation similar to Marks and Spencer, the Finnish Supreme Administrative Court recently refused the deduction of a contribution by a Finnish subsidiary of a Finnish parent company to its UK sister company as regards what could be considered as "final" losses. The Court seems to rely on the Oy AA case to deny deductibility for the reason that losses were final[303]. It could be wondered what the Court would have decided in a situation where a Finnish parent would claim the deduction of a contribution to a finally insolvent foreign subsidiary (Marks and Spencer situation).

Finally, the legislation of the Member States that did not adopt any consolidation regime, like for example, Belgium, Hungary, the Czech Republic, Estonia, are – maybe paradoxically, since less "company-friendly" – fully EU compatible on this aspect. Such a consideration can explain why Slovenia chose to abolish its consolidation regime: it did not want to face uncertainty regarding tax revenues in the event of an extension of this regime to foreign companies[304].

ii) Deduction of losses from intra-group participations

93. A further question is whether a parent company which is allowed to deduct from its tax base in its State of residence the loss incurred on the shares of a subsidiary located in the same State should be allowed to do it in respect of shares in a subsidiary located in another Member State.

This question mainly deals with the concept of taxable income (i.e. what is included or excluded from taxation), since a subsidiary is usually allowed to carry over its losses against its profits in its State of residence.

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298 Anticipated termination of the agreement leads to retroactive cancellation of the group regime.
299 Art. 13c, 13d and 15 Dutch Law on Corporate Tax.
300 Hoge Raad (NL), Opinion A.G Wattel. Of 4 July 2007 in the case BB3444, CPG 43484 (see website). See also, i.e. Rechtbank Arnhem, 7 July 2006, no. 05/4260 rejecting the taxpayer's claim that the fiscal unity regime was not in line with EU freedoms.
301 Art. 63-66 CIRC.
302 Finnish Supreme Administrative Court, 31 December 2007, SAC 2007:93: the Court follows the ECJ's judgement.
303 SAC 2007:92, of 31 December 2007.
304 Zorman, G., "The Slovenian Tax Reform 2006", *Eur. Tax.*, 2007, p. 204, at 205.

In ***Rewe Zentralfinanz***[305]**,** the Court considered that the denial of the deductibility – in the State of the parent company – of write-downs on shares of a subsidiary located in another Member State, while such deductibility was granted in the case of the shares of a domestic (German) subsidiary, constituted a restriction of the freedom of establishment[306]. Several justificatory arguments were rejected by the Court. In particular, in response to the argument based on the "rule of symmetry" between the right to tax the profits of a company and the obligation to take into account the losses incurred by that company, the Court held that "… *a difference in tax treatment between resident parent companies according to whether or not they have subsidiaries abroad cannot be justified merely by the fact that they have decided to carry on economic activities in another Member State, in which the State concerned cannot exercise its taxing powers …*"[307]. The Court rejected an analogy with Marks and Spencer, since "*[s]uch a separate treatment of, first, the losses suffered by the subsidiaries themselves and, secondly, the losses incurred by the parent company cannot, on any basis, amount to using the same losses twice*"[308].

> Under German tax law in force since 1 January 2001, write-downs are no longer permitted irrespective of whether they concern internal or cross-border participations. However, the Court's decision may still have an impact for individual taxpayers (since similar rules are still applicable in Germany for individuals) to the extent that individuals own the shares as part of their "business property" for German income tax purposes. In this respect, a potential restriction of the freedom of establishment or (possibly) the free movement of capital may effectively arise depending on whether or not the shareholding confers a definite influence over the company's decisions and allows the shareholders to determine its activities[309].

iii) Intra-group transfers

94. Restrictions may also arise in relation to the tax treatment of intra-group transfers of assets[310]. In ***X and Y***[311], a case involving the Swedish intra-group transfer scheme, the Court considered that the deferral of tax due on capital gains arising from the transfer of assets at "undervalue" (i.e. below market value) without consideration to a Swedish company in which the transferor directly or indirectly held shares could not be refused when the transferee was a foreign company or a Swedish company held by a foreign company in which the Swedish transferor himself has a holding. The risk of tax evasion – by a transfer to a foreign or foreign-held company and a move of the transferor abroad – could not be inferred from the mere transfer. In any event, this risk existed also in respect of transfers to a Swedish company.

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[305] ECJ, 29 March 2007, Case C-347/04, *Rewe Zentralfinanz v Finanzamt Köln-Mitte*, *ECR* I-2647.
[306] *Rewe Zentralfinanz*, para. 36.
[307] *Rewe Zentralfinanz*, para. 43. See also Opinion AG, para. 32.
[308] *Rewe Zentralfinanz*, para. 48. The Rewe Zentralfinanz ruling is in line with the decisions in *Bosal* and *Keller Holding*.
[309] Ernst & Young, *EuGH-Rechtsprechung Ertragsteuerrecht* (2007), p. 531.
[310] These restrictions are partially addressed by the Merger Directive (90/434/EEC).
[311] ECJ, 21 November 2002, Case C-436/00, *X and Y v Risskatteverket*, *ECR* I-10829.

iv) Intra-group loans (thin capitalisation rules)

95. Finally, restrictions on the right of establishment can come up in relation with the treatment of interest payments from companies to non-resident shareholders. Under thin capitalization rules, when a loan is supplied to a subsidiary by a parent company as a substitute for equity, the interest paid on the loan will not be deductible and will be treated as a dividend. This may happen not only when the interest is excessive, but also when the subsidiary would not have obtained such a loan from a third party.

Under German tax law, the deduction of interest paid by a German corporation to a foreign parent company was denied except when the loan could have been obtained from a third party[312]. ***Lankhorst-Hohorst*** was a subsidiary in Germany of a Dutch company. The Dutch parent of that Dutch company had granted Lankhorst a loan, subordinated to the claims of other creditors and accompanied by a letter of support, as a substitute for a more expensive bank loan. Lankhorst-Hohorst was in a loss-making situation. The German tax authorities argued that no third party would have granted such a loan and denied the deduction of the interest. The Court held that the difference in treatment between non-resident and resident parent companies was in violation of the right of establishment[313].

96. Subsequently, in the ***Test Claimants in the Thin Cap Group Litigation*** case, UK thin capitalisation rules were at issue. Contrary to what might be inferred from the Lankhorst-Hohorst ruling, the Court held that such rules may be an effective tool in preventing the diversion of profits. Nevertheless, on the basis of the freedom of establishment, the Court also held that such rules would be compatible with EC law only in so far as they applied to purely artificial arrangements entered into for tax reasons alone[314].

[312] Sec. 8a of the German Corporation Tax Law.
[313] ECJ, 12 December 2002, Case C-324/00, *Lankhorst-Hohorst v Finanzamt Steinfurt*, ECR I-11779.
[314] Case C-524/04, *Test Claimants in the Thin Cap Group Litigation* (fn 45).

In reaction to the judgement, Germany abolished discrimination of cross-border thin capitalization by extending the disadvantage, namely the treatment of interest payments on loans as covert dividend, to purely domestic activities[315]. The change is purely cosmetic and does not address the substantive problem that interest disallowed and taxed in Germany may be taxed again in the residence country of the recipient, which is not the case in an all-German situation.

In a similar way, after the French *Conseil d'Etat* had found French thin capitalization rules to the sole detriment of foreign parents to be incompatible with the non-discrimination clause of some double tax treaties[316], France decided with effect from 1 January 2007 to disallow deduction of interest paid between related companies even when the beneficiary of the payment is resident[317]. In Portugal, with effect from 1 January 2006, thin capitalization rules are no longer applicable to non-resident entities resident in an EU Member State. Prior to that date, domestic rules were to be interpreted in the light of the Court rulings. Spanish rules were amended with effect from 1 January 2004[318].

Thin capitalization rules applying indiscriminately to interest paid by and to both domestic and foreign taxpayers have also been introduced by the Netherlands. However, this is an indirect consequence of Court case-law, namely the Bosal decision, which caused the Netherlands to amend the Dutch Corporation Tax Act in order to extend the deduction of interest applicable to domestic participation to foreign participations, a measure that could not be undertaken without adopting necessary anti-abuse provisions[319].

In Portugal, thin cap rules do no longer apply to EU resident entities as from 1st January 2006[320].

97. It is worth adding that, if the situation concerned a lender established in a third country the right of establishment would not apply, nor would EC law. In ***Lasertec***[321], a Swiss parent company granted the loan to a German subsidiary in which it held two thirds of the capital. Deduction of the interest paid was denied on the basis of the debt of capital rates. The Court held that the restriction of capital movement was an unavoidable consequence of the restriction on the freedom of establishment and that therefore the freedom of establishment was the governing provision. However, this provision could not be relied upon with regard to relations with a third country.

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[315] Sec. 8a German Corporate tax law (KStG).
[316] Conseil d'Etat, 30 December 2003, *Andritz*.
[317] Article 212 CGI, Finance Bill for 2006 of 30 December 2005, applicable since 1st January 2007.
[318] For a Court decision applying *Lankhorst-Hohorst*: see Spanish Central Economic-Administrative Court no. 00/2396/2004.
[319] See Marres, O., "The Netherlands", in Brokelind (2007), p. 102 and 107.
[320] *TNS* Online, 2 November 2006. See also Administrative and Tax Court of Lisbon which ruled that pre-2006 thin cap rules limiting the deduction of interest paid to EU Parent companies were incompatible with Articles 43, 49 and 56 EC, *id*.
[321] ECJ, Order of 10 May 2007, Case C-492/04, *Lasertec v FA Emmendingen, ECR* I-3775. For a comment see Cordewener, A., Kofler, G. W., Schindler, C. P., "Free movement of capital and third countries: exploring the outer boundaries with *Lasertec, A and B* and *Holböck", Eur. Tax.*, 2007, p. 371.

C. TAXATION OF COMPANY SHAREHOLDERS

98. The issues concerning the taxation of company shareholders are mainly related to the potential (and often actual) risk of economic double taxation of distributed income. Although most Member States have found solutions which mitigate the economic double taxation of such income, these national solutions vary according to the political choices of the various Member States, and therefore problems may arise when corporate income crosses national borders.

99. Concerning dividends, a distinction should be drawn between outbound dividends (i.e. dividends paid by a domestic corporation to foreign shareholders, individuals or corporations) and inbound dividends (i.e. dividends paid by a foreign EU corporation to domestic shareholders, individuals or corporations). With regard to this distinction, the issues raised before the Court concern the equal treatment of outbound dividends paid to foreign and domestic shareholders and of inbound dividends from foreign and domestic sources which are paid to domestic shareholders.

100. Moreover, other questions have been addressed by the Court, such as the taxation of capital gains and the deduction of costs related to participations**.**

1. Tax treatment of outbound dividends

a) Withholding tax on outbound dividends

101. Traditionally, the State of the company paying a dividend will impose a withholding tax. Sometimes the withholding is waived in favour of domestic shareholders, especially parent companies. In most cases, the withholding tax rate is reduced by DTCs[322], depending on the person of the shareholder (parent company or not). The DTC generally provides that the State of residence of the shareholder will grant a tax credit for the foreign withholding. However, to a foreign parent, the tax credit will often be ineffective to relieve double taxation:

- if the residence country exempts foreign dividends, no tax is due so that no credit is given;
- if the residence country grants both a direct tax credit for the withholding and an indirect tax credit for the underlying corporate tax due in the source country in respect of the dividend, the credit will often exceed the amount of national tax due and such excess credit will be lost.

102. The Court has recently issued a number of important judgements on the compatibility of withholding taxes on outbound dividends with EC law. In ***Denkavit Internationaal***[323], France levied a withholding tax on dividends paid to foreign parents. Dividends paid to domestic parents were not subject to such withholding and moreover economic double taxation of such dividends was eliminated by a 95 % exemption in the hands of the parent. The parent company established in another Member State would therefore be taxed more heavily than a domestic parent company. The Court found in this case that there was a restriction of the freedom of establishment. In fact, although the DTC between the countries of the subsidiary and the parent companies provided for a tax credit in the parent company's country (here, the Netherlands) to take into account the withholding tax, the restriction was not eliminated as the dividend was tax-exempt in the Netherlands, so that no credit was effectively granted.

[322] From, in most cases, 25% to 15% or even 5 or 0% in favour of parent companies.
[323] ECJ, 14 December 2006, Case C-170/05, *Denkavit Internationaal v Ministre de l'Economie*, *ECR* I-11949.

103. In ***Amurta***[324], the Court was faced with a similar situation but in the absence of sufficient shareholder influence. The case was analysed under the free movement of capital and not under the right of establishment. The Court found that the free movement of capital was restricted and that the difference in the treatment of non-residents and residents could not be justified. Indeed, the Court held that once a country taxes residents and non-residents on dividends distributed by a resident company, it puts them in a comparable situation and the coherence of the tax system does not justify such a difference in treatment, as there is no link between the exemption for resident companies and a compensatory tax which they would bear. It was alleged that Portuguese law and the DTC between Portugal and the Netherlands provided for a credit of the withholding tax at source in the State of residence. The Court responded that, although a Member State may not rely on a tax benefit granted unilaterally by another Member State to justify a violation of Community law, it may, however, achieve conformity with Community law by treaty provisions, subject to the scrutiny of national Courts.

The *Denkavit Internationaal* decision had ramifications across Europe. Member States had already begun to amend their tax legislation in anticipation of the ruling. However, compliance by Member States varies. France complied by waiving the withholding in favour of companies established in the EU or in the EEA, holding 5 % of the shares of a French company and deprived of the possibility to credit the withholding in their State of residence[325]. The Netherlands complied by extending the withholding waiver in respect of dividends distributed to shareholders which would have been eligible for the Dutch participation exemption to parent companies resident in other EU Member States, but, surprisingly, not in EEA States[326]. The waiver also benefits foreign exempt legal persons, such as pension funds, which would be exempt if they were Dutch. The withholding tax systems of countries such as Germany, Italy[327] or Spain will also require amendments. Iceland also abolished the existing 15% withholding tax on dividends paid to non-Icelandic resident companies[328].

The Commission on its side has initiated procedure against numerous Member States:

- Austria and Germany: Reasoned Opinion[329];

- Italy and Finland: request for information[330].

The Italian Finance Bill for 2008 should lead to amendments of Italian legislation so that the rate of the withholding tax on outbound dividends would be reduced to 1,375% (corresponding to the tax paid on domestic dividends) on the condition that the recipient be a company or entity resident in the EU or the EEA or a company or entity resident in a State included in the list of countries granting exchange of information and subject to corporate income tax in its State of Residence[331].

[324] ECJ, 8 November 2007, Case C-379/05, *Amurta v Inspecteur van de Belastingdienst.*
[325] Instructions no. 67 of 10 May 2007, 4 C-7-07 and no. 89 of 12 July 2007, 4 C-8-07 (CGI, Article 119 bis 2).
[326] As regards Court decisions applying Denkavit, see: Hoge Raad, 30 novembre 2007, no.42679. See also Marres, O., "The Netherlands" in Brokelind (2007), p. 101, at 114.
[327] 27%., subject to a refund of 4/9ths
[328] *TNS* Online, 16 April 2007.
[329] Commission Press Release IP/07/1152 of 23 July 2007.
[330] *Ibid.*
[331] For dividends accrued starting from the financial year 2008.

Regarding outbound dividends and non-resident individuals, the Finnish Central Tax Board recently granted an advance ruling on the fact that withholding tax on dividends received by non-residents may not be more burdensome that taxation of a resident recipient when the two are in a comparable situation[332].

- Belgium, Spain, Portugal, the Netherlands, Luxembourg and Latvia[333].

The Commission has also opened infringement procedures against nine Member States on the particular issue of foreign investments by pension funds (portfolio investment)[334]. Recently, an Estonian court decided on the compatibility of domestic rules on dividends paid to a non-resident UCIT and refused to refer the case to the Court[335].

b) Tax credit for dividends

104. In ***Fokus Bank***[336], the EFTA Court, which interprets the Agreement on the European Economic Area with regard to the EFTA States (Iceland, Liechtenstein and Norway), was faced with the issue of a tax credit granted to shareholders in respect of corporation tax paid by the distributing company: such a credit is granted in Norway to resident shareholders, but not to non-resident shareholders. Contrary to what the Court of Justice would later hold, the EFTA Court considered that this differential treatment was in violation of the free movement of capital (Article 40 EEA), as it deterred non-residents from investing in Norway.

105. In the two following cases, the issues stemmed from the system then in force in the UK to prevent economic double taxation. A shareholder receiving a dividend was entitled to a partial tax credit on account of the tax paid by the distributing company which accordingly had to pay "advance corporation tax" (ACT, abolished in 1999). When the recipient of the dividend was another company, it could apply the ACT against the ACT due on its own distributions and a UK final shareholder would be granted a tax credit.

However, when a non-resident company received a dividend from a company resident in the UK, it was in principle not entitled to a tax credit, except if a DTC so provided. The ACT was nevertheless payable by the distributing company.

When a UK parent company held at least 51% of a UK subsidiary, both companies could make a group income election. In that case, no ACT was payable by the subsidiary upon distribution of a dividend. The parent company was not entitled to a tax credit. ACT was payable only when the parent company redistributed the dividend.

106. In ***Metallgesellschaft/Hoechst***[337], the Court found that the denial of the group income election to foreign parent companies constituted an unjustified restriction of the freedom of establishment.

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[332] Advance ruling no. 10/2007, March 2007.
[333] Only as regards dividends to EEA countries for Luxembourg. Also see Commission Press Release IP/07/06 of 22 January 2007 and Press Release IP/06/1060 of 25 July 2007. As to Latvia, changes have been announced (see *TNS* Online, 9 March 2007).
[334] See Commission cases 2006/4102 (Czech Republic), 2006/4103 (Denmark), 2006/4106 (Spain), 2006/4095 (Lithuania), 2006/4108 (Netherlands), 2006/4093 (Poland), 2006/4104 (Portugal), 2006/4105 (Slovenia), 2006/4107 (Sweden) and Commission Press release IP/07/616 of 7 May 2007.
[335] Tallinn Administrative Court, 10 May 2007, appealed. The Court mainly considered Estonian and non-resident UCITS as non comparable.
[336] EFTA Court, 23 November 2004, Case E-1/04, *Fokus Bank v The Norwegian State*, *OJ* C 45, 23.2.2006, p. 10.
[337] ECJ, 8 March 2001, Cases C-397/98 and C-410/98, *Metallgesellschaft/Hoechst*, *ECR* I-1727.

In fact, according to the ACT regime, UK subsidiaries had to pay ACT on dividends paid to non-resident (EU) shareholders while no ACT was due on dividends paid to resident shareholders. This system led to a cash-flow disadvantage detrimental to non-resident shareholders.

> The UK House of Lords awarded compound interest in order to compensate for this ACT-related timing disadvantage, but refused to extend this case-law to non-EU residents[338].

107. ***ACT Group Litigation***[339] raised various questions concerning the ACT regime (see no. 105). According to the Court, the fact that a resident parent company which received a dividend was entitled to a tax credit, whilst – except under certain DTCs – a non-resident parent company was not, did not constitute a restriction on the freedom of establishment or on the free movement of capital. In effect, as regards the mitigation of economic double taxation of profits in the hands of a subsidiary and a parent company, a non-resident parent company is not in the same situation as a domestic parent company: it is for the State of residence of the parent company to avoid double taxation. It is not compelled to do so, except when the Parent-Subsidiary Directive[340] applies. To impose the duty to avoid double taxation upon the subsidiary's State of residence would deprive this State from the right to tax profits which arise in its territory.

The Court of Justice, furthermore, considered that the UK, in granting by treaty the right to a full or partial tax credit to parent companies resident in the Contracting States alone, did not unduly restrict the freedom of establishment of parent companies resident in States to which no such treaty applied. In the absence of tax harmonization, in particular in the field of elimination of double taxation, Member States are free to allocate fiscal jurisdiction amongst themselves by means of bilateral agreements.

> The UK ACT regime was abolished already in 1999 and replaced by a system of quarterly installment payments of corporation tax[341].

2. Tax treatment of inbound dividends

108. The treatment of inbound dividends has also been scrutinized by the Court. These cases often address the compatibility with EC law of national mechanisms, aimed at avoiding or mitigating economic double taxation of dividends in the hands of the shareholders, but restricted either to resident shareholders or to dividends distributed by resident companies. A further group of judgements specifically addresses the issue of intra-group dividends between parent companies and subsidiaries which are located in different Member States.

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338 House of Lords, 23 May 2007, *Boake Allen Ltd & Ors v Revenue and Customs* [2007] UKHL 25, published on the website of the Parliament *http://www.publications.parliament.uk/.* The case was mainly decided on the ground of the DTC non-discrimination clause. However, regarding the free movement of capital, the House of Lords ruled that even if the domestic provisions constituted a restriction, Article 57 EC disapplied the application of Article 56 EC.

339 ECJ, 12 December 2006, Case C-374/04, *Test claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue, ECR* I-11673.

340 Council Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, *OJ* L 225, 20.8.1990, p. 6.

341 *http://www.hmrc.gov.uk/stats/corporate_tax/introduction.pdf.*

a) Branches and economic double taxation of dividends

109. A national tax regime of dividends can discriminate between branches of non-resident companies and subsidiaries of domestic companies. The first case brought before the Court of Justice in the field of direct taxation concerned the "***avoir fiscal***"[342], a tax credit granted to French resident shareholders equal to half the dividend received, as a partial relief from corporation tax paid on the distributed profits[343]. This credit was denied to non-residents and in particular to French branches of foreign insurance companies. It was extended to non-residents, but never to branches, by some DTCs concluded by France. The Court found this denial to be in a breach of the Treaty provision securing freedom of establishment, whether by creation of a branch or a subsidiary[344].

110. The favourable tax regime for dividends applicable to residents can also find its source in a DTC**.** In ***Saint-Gobain***, a tax relief provided for in a DTC concluded between Germany and the United States was partly denied to a German branch of a French company, on the ground that the DTC applied only to German companies and companies subject to unlimited tax liability in Germany. The Court held that the Member States must grant to permanent establishments the same advantages as to resident companies.

> As from 1994[345], even before the judgement was delivered, German law extended to permanent establishments both the dividend exemptions granted by DTCs[346] and the indirect credit on account of foreign corporation tax paid by a subsidiary on distributed profits[347]. The discriminatory provision concerning wealth tax was also repealed[348].

b) Differential taxation of shareholders based on company residence

111. Member State laws can also be found to be incompatible with EC requirements with regard to the introduction of distinctions in the tax treatment of their (resident) shareholders as concerns the State of residence of the company in which those shareholders have their holding. In ***Verkooijen***[349], the Court found a Dutch exemption only available for dividends received from a domestic company to be contrary to the free movement of capital.

112. Discrimination can also occur as regards a difference in the tax rate on foreign and domestic inbound dividends, as the Court held in ***Lenz***[350]. The case concerned Austrian legislation, which provided that dividends from domestic corporations were taxed at a reduced rate while dividends from foreign shares were taxed at the ordinary rate of income tax.

113. One method to avoid double taxation of dividends consists in granting the shareholder a credit corresponding to all or part of the corporation tax paid by the distributing company. In Finland, the shareholder of a Finnish company was granted such a credit, corresponding to the Finnish corporation tax rate.

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[342] *Avoir fiscal*, (see fn 179).
[343] French CGI, Art. 158 bis, Art. 158 ter and Art. 204 CGI.
[344] French CGI , Art. 158 bis, Art. 158 *ter* CGI and Art. 204 CGI.
[345] Law to Maintain and Improve the Attraction of the Federal Republic as a Site for Business of 13 September 1993, BGBI I, p.1569.
[346] Sec. 8b (4) German Corporate tax law (KStG).
[347] Sec. 26(7) KStG.
[348] Law on the Furtherance of Corporation Tax Reform of 29 October 1997.
[349] ECJ, 6 June 2000, Case C-35/98, *Staatssecretaris van Financiën v Verkooijen*, *ECR* I-4073.
[350] ECJ, 15 July 2004, Case C-315/02, *Lenz v Finanzlandesdirektion für Tirol*, *ECR* I-7063.

The credit did not apply in respect of foreign dividends. In ***Manninen***[351], the Court held that the denial of the credit in respect of dividends from other Member States constituted a restriction on the free movement of capital.

In reaction to the Court's judgement, Finland abolished the tax credit regime[352], as did France[353], the United Kingdom and Germany.

114. The same conclusion was reached in ***Meilicke***[354] in respect of the German tax credit granted to shareholders of domestic corporations, corresponding to the (lower) corporation tax rate on distributed profits (30%).

Following the decision, Germany in order to limit the foreseeable claims for tax refunds has changed its procedural law[355].

115. However, an unfavourable tax treatment of foreign dividends is not always contrary to the EC Treaty. In ***Kerckhaert-Morres***[356], the Court found that Belgian law was not contrary to the free movement of capital as it did not discriminate between Belgian dividends and dividends from other Member States. Even if Belgian individual taxpayers receiving foreign dividends bear a foreign withholding tax burden plus Belgian taxation on the net dividend at the rate of the Belgian withholding tax, whereas Belgian taxpayers receiving Belgian dividends will only bear the Belgian withholding tax, resulting in a higher net dividend, the same rate of tax applies in Belgium to both classes of income. The situation in ***Kerckhaert-Morres*** is thus different from the one found in the ***Verkooijen***, ***Lenz***, or ***Manninen*** cases, where the State of residence treated foreign dividends differently from domestic dividends, denying to the former a tax benefit granted to the latter.

The European Commission does not seem to share that view and has decided to bring Belgium to the Court[357].

116. Dividends could also come from a non-EU Member State. In ***Holböck***[358], the Court held that the free movement of capital was applicable to dividends received by an Austrian shareholder from a Swiss company[359]. In this case, however, the restriction created under Austrian law could be upheld under Article 57 EC, grandfathering provisions in existence in 1993.

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351 ECJ, 7 September 2004, Case C-319/02, *Manninen*, *ECR* I-7215.

352 Aima, K., 'Finland', in Brokelind (2007), p. 189. As regards refunds, see Bill HE 57/2005 effective as of 15 August 2005 (*TNS* Online, 18 August 2005), extending refunds to EEA situations.

353 See Finance Law 2004. On 21 December 2006, the Administrative Lower Court of Versailles ruled that the French legislation on the "avoir fiscal" tax credit and the precompte was not compatible with the free movement of capital principle and ordered for a refund of EUR 156 million. *TNS* Online (21 February 2007) mentions a possibility for the French State to have to refund between EUR 3 and EUR 5 billion.

354 ECJ, 6 March 2007, Case C-292/04, *Meilicke, Weyde, Stöffler v Finanzamt Bonn-Innenstadt, ECR* I-1835.

355 Sec. 175 of the General Tax Code; Cordewener, A., Germany, in Brokelind (2007), p. 151.

356 ECJ, 14 November 2006, C-513/04, *Kerckhaert-Morres v Min. of Finance, ECR* I-10967; description of the facts in Malherbe, J., and Wathelet, M., 'Pending cases Filed by Belgian Courts: The Kerckhaert-Morres case', in Lang, M., Schuch, J. and Staringer, C., *ECJ – Recent Developments in Direct Taxation*, Vienna, Linde Verlag, 2006, p. 53.

357 Infringement procedure 2005/4504. - Commission Press Release IP/07/67. of 22 January 2007 The application has not been introduced yet.

358 ECJ, 24 May 2007, Case C 157/05, *Holböck v FA Salzburg-Land*.

359 An investment creating lasting and direct links between a person and an undertaking falls within the category of direct investment, which is inspired from the nomenclature of capital movements set out in Annex I of the Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [Article repealed by the Treaty of Amsterdam], *OJ*. L 178, 8.7.1988, p. 5.

117. Investment in a third country was also discussed in ***A and B***[360]. Sweden had enacted a special regime for companies with "concentrated shareholding" (i.e. companies in which 50% of the shares are held by less than five individuals). Dividends of such companies were taxed as income from capital only up to a given return on the capital invested, including a fraction of any salaries paid to employees, provided that they were employed in Sweden or in another Member State, but not in a third country. The Court held that the freedom of establishment did not apply to the creation of a branch in a third country and that the free movement of capital could not apply, since the restriction was merely an unavoidable consequence of the restriction of the right of establishment.

118. In the recent **A** case, however, the Court considered that the freedom of capital was restricted by a Swedish legislation exempting a shareholder in respect of certain dividends, provided that the distributing company is established in a EEA State or a third State with which a DTC providing for the exchange of information has been concluded. Nevertheless, the national provision at stake was considered justified, because in the relations with third countries, a Member State cannot verify with the same degree of reliability that the conditions for the granting of the exemption are met as in intra-Community relations[361].

119. Finally, the question of the tax treatment of intra-group dividends has also been addressed by the Court**.** In ***Franked Investment Income (FII) Group Litigation***[362], the Court had to examine various differences in the tax treatment of foreign and domestic inbound dividends received by UK parent companies in relation with ACT (see no. 105), some of which were found incompatible with EC law.

> These cases led to the demise of imputation systems in the Union (see no. 113). They were generally replaced by systems under which part of the dividend received by an individual shareholder is subject to tax. This is the case in Finland. The UK Government published in June 2007 a discussion document proposing a.o. an exemption regime for foreign dividends received by large companies[363]. However as regards inbound dividends received by UK-resident individuals, the tax credit should be extended to dividends from non-UK companies[364]. France on its side finally withdrew the whole tax credit for dividends[365], which formerly had been extended to French permanent establishments of non-resident companies in application of the Avoir Fiscal case[366].
>
> As regards exemption, the Austrian Independent Tax Senate stated that a minimum holding requirement for the exemption of dividends received from a foreign company while there is no such requirement for domestic dividends is in breach of the free movement of capital and thus this opinion also extends to dividends received from non-EU or non-EAA based companies[367].

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[360] ECJ, 10 May 2007, Case C-102/05, *Skatteverket v A and B, ECR* I-3871.
[361] ECJ, 18 December 2007, Case C-101/05, *A*, paras. 60-64.
[362] Case C-446/04, *Test Claimants in the FII Group Litigation*, fn 206.
[363] Discussion document of 21 June 2007, Taxation of the foreign profits of companies: a discussion document, published on the website http://www.hmrc.gov.uk/. The new regime might enter into force in 2009.
[364] These changes will have effect from 6 April 2008. See UK Budget of 21 March 2007 published on http://www.hmrc.gov.uk/budget2007/master-notes.pdf, p. 97.
[365] Law no. 2003-1311 of 30 December 2003, art. 93.
[366] See Brokelind (2007), p. 157, 161.
[367] 13 January 2005. Based on the "acte clair" doctrine, the case was not referred to the ECJ.

The Commission is challenging the Greek regime which exempts dividends received by individuals from resident companies while taxing dividends paid by non-resident companies; according to the Commission the credit granted for the foreign corporate tax can lead to a higher tax burden due to the progressive tax scale applicable to individuals[368].

3. Tax treatment of acquisition, holding and alienation of shares

120. Shareholders of EU companies which are resident in other Member States can also suffer disadvantages that are not directly related to the taxation of dividends. These disadvantages can concern, amongst others, the acquisition or the holding of shares, the possibility of deducting the costs related to participations, the tax treatment of capital gains arising from the alienation of these shares, and the tax treatment of interest received from a company in which they have a holding.

a) Acquisition and holding of shares

121. Shareholders of EU companies which are resident in other Member States can be excluded from tax advantages linked to the acquisition of shares. In ***Weidert-Paulus***[369]**,** Luxembourg law granted tax relief up to LUF 60,000[370] for the acquisition of shares in Luxembourg companies, but denied that relief in respect of foreign participations. As regards shares owned in Belgian companies by the taxpayer, the denial of the relief was held to be contrary to the free movement of capital.

122. The mere ownership of foreign shares cannot be taxed in a discriminatory manner. In ***Baars***, Dutch law provided for an exemption for wealth tax applicable to substantial holdings in Dutch companies[371] but not in foreign companies. The Court considered that in respect of a 100% holding of a Dutch resident in an Irish company, this disallowance was contrary to the freedom of establishment[372].

123. Next to wealth tax come inheritance duties. The ***Geurts and Vogten*** case[373] addressed the inheritance tax law of the Flemish Region of Belgium which exempted from inheritance tax shares in family undertakings employing at least five workers in Flanders. The Court ruled that the freedom of establishment prohibits such legislation insofar as the exemption condition is not satisfied by employing workers in other Member States.

b) Costs related to participations

124. Discrimination can arise with regard to the possibility of deducting the costs connected with participations in foreign companies. For example, under Dutch law, interest and costs linked to participations could be deducted only if they were incurred in connection with profits taxable in the Netherlands[374], i.e. when the subsidiary was Dutch or had a permanent establishment in the Netherlands. The Court in ***Bosal*** saw in this limitation a restriction on the right of establishment which hindered the creation of subsidiaries in other Member States[375].

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[368] Pending procedure C-406/07- Commission Press Release IP/07/1019 of 5 July 2007.
[369] ECJ, 15 July 2004, Case C-242/03, *Ministre des Finances v Weidert, Paulus, ECR* I-7379.
[370] Art. 129 c). Income Tax Law of 4 December 1967 as amended by the Law of 22 December 1993.
[371] Art. 7 (2) and 3 (c) Luxembourg Wealth Tax Law 1964.
[372] ECJ, 13 April 2000, Case C-251/98, *Baars, ECR* I-2787.
[373] ECJ, 25 October 2007, Case C-464/05, *Geurts and Vogten v Administratie van de BTW, registratie en domeinen and Belgische Staat*.
[374] Art. 13(1) Dutch Law on Corporation tax 1969.
[375] ECJ, 18 September 2003, Case C-168/01, *Bosal Holding v Staatssecretaris van Financiën, ECR* I-9401.

Indeed, even though the Parent-Subsidiary Directive allows Member States to provide that charges relating to a holding may not be deducted when the Directive applies to relieve double taxation of dividends, Member States must exercise this right in accordance with the EC law.

The implementation of the judgement in the Netherlands by amending the Corporation Tax Law in 2004 was closely linked with the adoption of thin capitalization rules[376]. See above no. 96.

125. In ***Keller Holding***[377], the Court was confronted with a German law denying the deduction of expenditure linked to dividends received from a subsidiary located abroad and exempt from tax under a DTC[378]. Keller Holding, a German company, was barred from deducting the fraction of its financing costs corresponding to its Austrian subsidiary, because the foreign dividend was exempt, whilst a dividend of German origin would have been taxable, but subject to a credit for the underlying German corporate income tax, which has the effect of an exemption[379]. The Court held that denying the deduction in respect of legally exempt foreign dividends whilst allowing it in respect of economically exempt domestic dividends was a restriction on the right of establishment.

The implementation into German law required several amendments of the relevant legislation. Initially, Germany amended the provisions to the extent that exemption for profits in the form of foreign dividends was extended to internal situations. However, a difference remained when the costs did not exceed a certain percentage of the dividend: in this case, cross-border situations were still treated less favourably. Hence, Germany had to re-amend its legislation. Under current law, 5% of all dividends, both domestic and foreign, are treated as non-deductible business expenses and actual holding costs are fully deductible[380].

c) Capital gains on shares

126. Shareholders can be liable to tax on the capital gain realised on a sale of their shares. Under Belgian tax law, capital gains were taxed when they were realized by individuals selling a substantial holding to a foreign company, whilst they were not taxed when selling to a Belgian company[381]. In ***De Baeck***[382], the Court found that this difference in treatment was contrary to freedom of establishment if the seller's holding conferred on him an influence in management, and that the difference was contrary to the free movement of capital otherwise.

Although Belgium did not so far amend its statute, the tax administration no longer applies the taxation when the sale is in favour of a company established in the European Union or the EEA[383].

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[376] Decree of 9 February 2004, *TNS* Online 4 March 2004. See also Court of Appeal of Amsterdam (1st February 2006) which concluded to the application of Bosal to costs relating to sub-subsidiaries within the EU and extend this statement to situations non-covered by the Parent Subsidiary Directive on the base of the free movement of capital (*TNS* Online, 22 February 2006). The same solution applies to situations before 1 January 1992 in application of the free movement principle (Supreme Court, 1st April 2005, *TNS* Online, 7 April 2005); the Court that art. 67 has no direct effect.

[377] ECJ, 23 February 2006, Case C-471/04, *Keller Holding*, *ECR* I-2107.

[378] Sec. 8 b(1) German Corporation Tax Law 1991.

[379] Sec. 36 (2) (3) German Income Tax Law 1990.

[380] See § 8b Abs. 5 Körperschaftssteuergesetz 2002, *www.bundesrecht.iuris.de*. See also Ernst & Young, *EuGH-Rechtsprechung Ertragsteuerrecht* (2007), p. 398.

[381] Art. 67 (8) of the Belgian Income Tax Code 1964, now Article 90 (9) of the Income Tax Code 1992.

[382] ECJ, 8 June 2004, Case C-268/03, *De Baeck v Belgische Staat* (Order), *ECR* I-5961.

[383] Parl. Quest. no. 3-336 of 8 July 2004, *Ann. Sénat*, 2003-2004, no. 3 – 70, p. 61.

Similarly, in ***Commission v Spain***[384], a Spanish law which granted a differentiated relief for capital gains on shares according to their quotation on Spanish regulated stock exchanges or on other exchanges was found to be in violation of the freedom to supply services and of the free movement of capital.

127. In ***Grønfeldt***[385], the Court examined a German law, which was amended to tax capital gains on shares as soon as the taxpayer held a 1% participation (as opposed to 10 % participation formerly). This new law applied as of the start of the 2001 financial year to participations in foreign companies and as of the start of the 2002 financial year to participations in domestic companies[386]. This differentiation was held to be contrary to the free movement of capital and could not be justified by reasons linked to the prior reform of the tax treatment of domestic dividends in Germany.

128. In some instances the treatment of a gain made on the disposal of shares can differ according to the residence of the taxpayer, following the application of international conventions. ***Bouanich***[387] addressed the consequences for a French resident shareholder of the repurchase by a Swedish company of its own shares. Under Swedish tax law, that transaction may generate to Swedish residents capital gains taxable at 30% after deduction of the acquisition cost, whilst the same income is characterized as a dividend for non-residents and is taxable without any deduction. The Court held that this difference of treatment was incompatible with the free movement of capital. However, under the French-Swedish DTC, as interpreted in the light of the OECD's commentaries on the Model OECD Convention[388], a French resident is allowed to deduct from the price received the nominal value of the repurchased shares and is taxed at 15% on the difference. The Court acknowledged that the DTC must be taken into account: it left it for the national judge to determine, in view of both the cost of acquisition and the nominal value of the shares, whether equality was thus reinstated.

> In the course of the procedure, Swedish law was amended in order to eliminate the discrimination. To both resident and non-resident taxpayers, the tax base will be the difference between the sales proceeds and the acquisition cost of the shares[389]. However, the income is still categorized as a capital gain to residents and as a dividend to non-residents. Thus, if the repurchase results in a loss, a resident taxpayer may offset it against capital gains otherwise realized, whereas the non-resident taxpayer may not, since his income is considered to be a dividend[390].

129. Capital gains are often taxable in the country of residence and at the moment of the disposal of the shares. This situation can lead EU residents to transfer their residence before selling their participations in order to benefit from a more favourable tax regime. In **de Lasteyrie**[391] a French provision under which unrealized capital gains on important shareholdings were taxable at the time of transfer of the taxpayer's residence was found contrary to Article 43 EC.

[384] ECJ, 9 December 2004, Case C-219/03, *Commission v Spain*, not published in ECR.
[385] ECJ, 21 December 2007, Case C-436/06, *Grønfeldt v Finanzamt Hamburg-Am Tierpark.*
[386] Sec. 17 of the German Income Tax Law, amended by the Law on Tax Reduction 2001/2002 of 23.10.2000.
[387] ECJ, 19 January 2006, Case C-265/04, *Bouanich v Skatteverket*, *ECR* I-923.
[388] OECD Commentary, Article 13.31.
[389] Art. 27.2 Dividend Tax Law. See Brokelind, C., "The ECJ Bouanich case: The Capital Gains and Dividend Classification of Share Buy-Backs in Swedish Tax Law", *Eur. Tax.*, 2006, 268 at 270.
[390] Brokelind C. and Kanter M., Sweden in Brokelind (2007), p. 273.
[391] ECJ, 11 March 2004, Case C-9/02, *de Lasteyrie du Saillant*, ECR I-2409.

Even if under certain conditions, the payment of the exit tax could have been deferred, the Court found that the taxpayer was, by establishing himself abroad, subjected to a tax on an unrealized gain which he would not have had to pay had he stayed in France.

130. In **N**[392], the Court examined the Dutch exit tax legislation in the case of a taxpayer holding 100% of the shares of a company. The Court found that the freedom of establishment was indeed hindered, but only to the extent that the deferral of the tax until actual disposal was made subject to a security for payment and a decrease in value, subsequent to departure, was excluded in the computation of the gain. The Court found the principle of assessment with deferred payment in line with the allocation of taxing powers according to the principle of territoriality[393].

According to the Court's case law, Germany amended its exit tax for individuals[394] after the Ministry of Finance tried to render it compatible with EU law by an administrative order[395]. Similarly, France, although it has complied with the Lasteyrie judgement as to individual taxation[396], maintains for the deferral of corporate taxation a general requirement that the shares received in exchange for the contribution of the branch of activity must be kept during three years. This condition seems to go beyond permissible anti-abuse rules that must, according to the Court, be applied following a case-by-case standard[397]. Austria[398]and Denmark[399] modified their law according to the judgement.

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[392] ECJ, 7 September 2006, Case C-470/04, *N v Inspecteur van de Belastingdienst*, *ECR* I-7409.
[393] *N*, para. 46.
[394] Sec. 6 of the German Foreign Tax Act has been modified in December 2006 by the "Gesetz über steuerliche Begleitmaßnahmen zur Einführung der Europäischen Gesellschaft und zur Änderung weiterer steuerrechtlicher Vorschriften (SEStEG)" (07.12.2006 BGBl. I S. 2782, 2007 S. 68) The exit tax has been amended for the case, where the holder of the shares moves to another EU Member state. The payment of the tax is deferred to the moment, when the shares are effectively sold or the shareholder moves outside the EU. Germany decided to modify its legislation after the Commission launched an infringement procedure.
[395] Brokelind (2007), p. 149.
[396] French Finance Law 2005 (law 2004-1484 of 30 December 2004), *O.J.* no. 304 of 31 December 2004.
[397] French CGI, Art. 210 B.
[398] Proposal (*TNS* Online of 1st October 2004).
[399] Danish Law L199 of 30 March 2004, *TNS* Online, 19 May 2004.

III. TOWARDS THE EUROPEANIZATION OF DIRECT TAX SYSTEMS

A. ADAPTATION OF NATIONAL TAX SYSTEMS

131. The Court's case law, especially on the EC freedoms, has a large impact on the exercise by Member States of their sovereignty. National direct tax systems must be framed in accordance with the requirements set up by EU law as interpreted by the Court.

1. Residence as a legitimate criterion to apply different tax rules

132. In line with international practice, the fiscal systems of the Member States are based on the **distinction between residents and non-residents**. As long as residence in a given Member State, and not "EU residence", is the relevant criterion for tax purposes, the tax systems shall keep causing fragmentation of the Internal market. Under international tax practice, residence is considered as a connecting factor more appropriate than nationality in order to found fair and efficient taxation based on the ability-to-pay and equity principles[400]. This is reflected by DTCs practice[401]. Residents may be taxed on their **worldwide income** and the tax burden is fixed taking into consideration the fact that they benefit from the State welfare. Non-residents are considered to be in a different situation and are therefore taxable only on the **income sourced in that State,** taking into consideration that such State has no taxing power on the non-residents' foreign income. However, under DTCs the actual taxing of worldwide income only takes place in States which have opted for the credit method, not in those who favour the exemption method; in the latter case the actual taxation is limited to the domestic territory.

133. The Internal market is inspired by the idea of a single area within which movement is free. In this respect, national measures that would hinder taxpayers engaging in cross-border activities with other Member States are often incompatible with EC law. The Treaty freedoms are also specific expressions of the non-discrimination principle voiced by Article 12 EC. As such they prohibit Member States to discriminate nationals of other Member States as against their own nationals[402]. In tax matters, this principle has been adapted to differences of treatment between residents and non-residents, since such differences are likely to constitute indirect or disguised discrimination. The most classical example of direct taxation provisions incompatible with the Internal market occurs when a Member State grants a tax advantage to residents, but denies it to non-residents who are in a comparable situation. The Court has made numerous applications of this principle, such as the ***Schumacker*** ruling concerning the taking into account of the **personal situation of the non-resident taxpayer** earning almost all his income in the State of activity (no. 35), or the ***Gerritse*** and ***Conijn*** decisions on the right of non-residents to **deduct expenses** incurred in direct relation with the income earned in the State of activity (no. 39).

As to corporate taxation, the freedom of establishment enshrines the right to choose the **form of establishment** (Article 43 EC). It thus prohibits Member States to treat **branches** and **subsidiaries** of non-resident EU companies less favourably than resident companies as to the tax rate (***Royal Bank of Scotland***, no. 58), the right to interest on overpaid tax (***Commerzbank***) or as to a tax deduction of research expenses carried out in other Member States (***Baxter***, no. 63).

[400] Ability to pay and equity – horizontal and vertical – are indeed principles which are founding modern tax systems. See *inter alia* Vanistendael, F., "Legal Framework for taxation" in Thuronyi, V. (ed.), *Tax Law design and drafting*, Washington, IMF; 1996, vol. 1, Chap. 2, p. 5.
[401] Note that the USA also refer to the criterion of nationality.
[402] While at the origin limited to economic activities, the freedom of movement is now recognized to all EU citizens (Article 18 EC, introduced with the Treaty of Maastricht).

Another clear-cut situation incompatible with the EC freedoms occurs when persons engaging in genuine cross-border activities **are denied tax advantages in their country of residence** which they would have been granted if they had operated in a purely national context (***De Groot***, no.38 ***Laboratoires Fournier***, no. 81).

134. Nevertheless, the EC freedoms do not require Member States to apply the same tax treatment to residents and non-residents across the board. Member States can indeed in many cases assume that tax advantages similar to those which they confer to their residents should be granted to non-resident taxpayers by their own State of residence. As to personal taxation, this is the case for the taking into account of the personal and family situation when the taxpayer does not earn a substantial part of its income in the Member State concerned. As to corporate taxation, losses of a subsidiary with a parent company resident in another Member State are deemed to be taken into consideration in the State of residence of the subsidiary. It is only in **exceptional circumstances** that the parent company's State of residence has to admit the deductibility of losses incurred by the subsidiary resident in a different Member State (***Marks and Spencer***, no.91).

135. It remains unclear to what extent the EC Treaty limits Member States in adopting different income tax systems for residents and non-residents as regards taxable events, tax base, tax rates or tax assessment[403]. In several Member States, non-residents are indeed subject to a **withholding tax** on the gross amount of income earned in that State. According to the Court, the withholding system can constitute a restriction on the EC freedoms, but can often be justified (***Gerritse***, ***Scorpio***, no. 39). Withholding taxes on dividends can also contravene the EC freedoms, when they apply only to non-resident shareholders (***Denkavit Internationaal,*** no. 102)[404].

136. Another issue in the field of direct taxation concerns the possibility for the Member States to **differentiate between non-residents of different Member States** among each other, i.e. to grant the resident treatment only to residents of certain Member States but not to all of them[405]. Currently, an infringement procedure is pending against Ireland on the taxation of investment income sourced in the UK, which could lead to a judgement of the Court[406].

137. As to **residents of third countries**, Member States remain at liberty to regulate the applicable tax treatment, except in cases where the free movement of capital – and only that freedom[407] - is at stake. This happens, in particular, for outbound investments by EU residents in third country companies, as the ***Holböck*** case (no. 116) shows. However, numerous exceptions, such as the "grandfathering clause" of Article 57 EC and justifications for the restrictions on this freedom, such as the effectiveness of fiscal supervision (***A***, no. 118), are allowed by the EC Treaty.

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[403] *Scorpio*, paras. 36-38.

[404] Some commentators conclude that whilst it is prohibited to discriminate by unilateral measures, it would be lawful to do so by means of international conventions (Wathelet, M., 'Tax sovereignty of the Member States and the European Court of Justice: new trends or confirmation?' in Hinnekens, L. and Hinnekens, Ph. (ed.), *A vision of taxes within and outside European Borders, Festschrift in honor of Prof. Dr. Frans Vanistendael*, Kluwer Law International, 2008, p. 905.

[405] See also *infra* on the most-favoured nation clause in DTCs.

[406] Commission Press Release IP/07/445 of 30 March 2007. Normally, Ireland does not tax income received by non-residents from money invested abroad if the interest is left on the foreign bank account. Excluded from this rule is income sourced in the UK. Ireland thus treats such income less favourably than income arising elsewhere in the EU, what the Commission considers contrary to the free movement of capital.

[407] Sometime the restrictive effect of a national legislation on the free movement of capital is an unavoidable consequence of the restriction on freedom of establishment, which does not apply in relations with third countries. See ECJ, *Lasertec* (fn 321).

138. Accordingly, taxation on the basis of residence by Member States is not fundamentally jeopardized by the application of EC freedoms. However, uncertainties continue to exist as to the **tax status of non-resident taxpayers**[408]. The ***Schumacker*** doctrine (no. 35) indeed, according to which the personal and family circumstances of a non-resident worker must be taken into account by the State of source when he derives a significant part of his overall income in that State, seems clear as to its principle but appears more difficult to implement in practice. As "*Community law contains no specific requirement with regards the way in which [Member States] must take into account [these] personal and family circumstances …, except that the conditions governing the way in which [this Member State] takes those circumstances into account must not constitute discrimination, either direct or indirect, on grounds of nationality, or an obstacle to the exercise of a fundamental freedom guaranteed by the Treaty*"[409], the Court has not derived from the Treaty any obligation for Member States to generally adopt the same tax system for residents and non-residents. There is thus need for initiatives towards **better coordination between Member States**.

2. Adoption of tax incentives

139. The area of tax incentives is often related to the **prohibition of State aid** (Articles 87 and 88 EC)[410]. However, the EC freedoms as interpreted by the Court can also be seen as limitations to the power of the Member States to freely define the scope of application of such incentives. In fact, tax incentives may not be used as tools to favour domestic operations and transactions to the detriment of cross-border ones. This principle is applicable to all kinds of taxes, including inheritance and gift taxes, and, within the scope of application of income taxes, to every type of incentives. It should be recalled that tax systems as a whole are apt and used to operate as general incentives (determining when such systems become harmful tax competition is a politically highly controversial problem).

140. As to individuals, Member States willing to encourage the acquisition of **housing** (***Commission v Sweden and v Portugal***, no. 47) or of **shares** (***Weidert-Paulus***, no. 121), or to foster the transmission of **family enterprises** (***Geurts and Vogten***, no. 123), the **education** of the youth (***Schwarz/Gootjes-Schwarz,*** no. 80*)* or the constitution of **private pensions** (amongst others, ***Commission v Denmark,*** no. 42) are bound to cover all intra-EU situations.

As to legal persons, the tax treatment of **foreign charities** by Member States is also under tight scrutiny of the Commission: infringement procedures have been launched against Belgium, Ireland, Poland (which complied) and the United Kingdom[411].

141. The application of the EC freedoms may certainly entail serious financial consequences for the Member States or even for the federal and local bodies in the carrying out of sensitive national policies such as housing and education. As seen in the implementation of the Court's case-law by Member States, the costs of the extension of beneficial tax regimes to all EU residents, which would be the most logical manner to comply with the EC Treaty could lead on the contrary to the abolition of those tax incentives even within the domestic context, which would result in an overall worsening of the taxpayers' situation.

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[408] Cordewener, A., "Personal Income Taxation of Non-Residents and the Increasing Impact of the EC Treaty Freedoms", in: Weber, *The Influence of European Law on Direct Taxation-Recent and Future Developments*, Brussels, 2007, 35.

[409] *De Groot*, para. 115.

[410] For a recent analysis of the EU State aid control, see Derenne, J./ Merola, M.(ed.), *Economic analysis of state aid rules – contributions and limits*-, Berlin, Lexxion, 2007.

[411] See Commission Press Releases IP/06/1879 of 21 December 2006 (Belgium), IP/06/1408 of 17 October 2006 (Ireland and Poland) and IP/06/964 of 10 July 2006, (United Kingdom).

Moreover, from the Member States' prospective, this limits the option for the deployment on of national policies[412]. In order to avoid such an undesirable result, better coordination at the EU level seems appropriate.

142. Concerning company taxation, national tax incentives for research and development have been examined by the Court (***Baxter***, no. 63, ***Laboratoires Fournier***, no. 81). This area is particularly important as regards the EU objectives of the Lisbon agenda. Recommendations on an improved EU coordination, both concerning the EC freedoms and the prohibition of State aid, have already been issued by the Commission in a Communication, which also synthesised the Court's case-law[413]. Nevertheless, there might be further room for European coordination in that field.

3. Fight against tax evasion and fraud

143. Another sensitive issue in the area of direct taxation concerns the competence of the Member States to adopt anti-abuse rules that aim specifically at fighting **cross-border tax avoidance or fraud**. The notion of "anti-abuse rules" is very wide. Anti-abuse rules generally limit the incentives for economic operators to establish themselves in or to use foreign structures situated in low taxing jurisdictions; such measures thus often conflict with the freedom of establishment[414].

144. It follows from the Court's case-law that anti-avoidance mechanisms that restrict movements and transactions between Member States are often incompatible with the EC Treaty. For example, an intra-EU transfer of residence may not trigger specific actual tax liability in the State of origin, such as a tax of unrealized capital gains (***de Lasteyrie***, no. 129, ***N***., no. 130).

145. As to corporate taxation, CFC and thin capitalization provisions applicable only to companies established in other Member States constitute a breach of the freedom of establishment, whatever the effective level of taxation existing in those Member States. They could however remain in force only insofar as they target "**wholly artificial arrangements intended to escape the national tax normally payable**" (***Cadbury Schweppes***, no. 73; ***Thin Cap***, no. 96). The principles of the Internal market require that (genuine) economic activities could be carried out on the entire territory of the EC as if it were a single market. However, one must not forget that differences in taxation on the same income are in themselves restrictions to a genuine Internal market. Nevertheless, EC freedoms do not guarantee to residents of a Member State the right to benefit from the lower taxation in other Member States without becoming residents there.

[412] See for instance, outside the tax area, how the Court's decision impeding the Austrian universities to limit the benefit of free education to Austrian nationals has resulted in the increasing of the tuition fees for all students, whether Austrian or EU nationals (ECJ, 7 July 2005, Case C-147/03. *Commission v Austria. ECR*, I-5969). Similar problems exist in the French-speaking part of Belgium. However, the Commission seems to have partly accepted the Member States justifications to these restrictions, at least in the medical sector. See Commission Press Releases IP/07/1788 of 28 November 2007 and IP/07/76 of 24 January 2007 .

[413] COM (2006) 728**.** On the present situation in the EU Member and some third countries, see the IBFD study "Tax treatment of research and development expenses", Dec. 2004, on the DG TAXUD website (see fn 17).

[414] For example, Controlled Foreign Corporations (CFC) rules, adopted by most of the Member States, mitigate the risk that their residents, whether natural or corporate persons, use corporations established in other States in order to reduce their tax liability in their State of residence. Such rules have as a common characteristic to subject an income earned by the CFC in the hands of the shareholder as if it were a distributed dividend. See Malherbe, J., de Monès, S. Jacobs, F., Silvestri, A., et al., "Controlled Foreign Corporations in the EU after the Cadbury-Schweppes", 36 *Tax Management International Journal*, 2007, p. 607.

The State of residence is thus allowed to introduce mechanisms targeted at avoiding that, by pretending to exercise their right under EC law, resident taxpayers substantially diminish their tax burden in comparison with taxpayers who have not entered into cross-border activities (***Columbus Container***, no. 74).

146. These anti-avoidance mechanisms specifically applicable to cross-border situations are to be distinguished from measures taken by Member States in favour of resident taxpayers but excluding cross-border situations from their scope. Such restrictions of tax advantages to internal situations certainly constitute a difference of treatment but could nevertheless be justified by the "*safeguarding [*of*]* ***the balanced allocation of the power to impose taxes between Member States*** *and the prevention of tax avoidance*" (**Oy AA,** no. 66). Indeed, EC law cannot be interpreted as granting (corporate) taxpayers the right to freely decide in which Member State they ought to be taxed. In harmonized direct tax areas, anti-abuse provisions also enable, in a similar manner, Member States to restrict the benefits of the (favourable) tax regime laid down by the Directives[415].

147. On the contrary, according to the Court, Member States remain free to adopt anti-avoidance mechanisms limiting the use of foreign structures located in **third countries**, since the freedom of establishment does not apply outside the territory of the EU, and the hypothetic restrictive effect of such mechanisms on the free movement of capital has often been considered by the Court as an "*unavoidable consequence of the restriction of the freedom of establishment*" (***Lasertec****,* no.97; ***Thin Cap GLO****,* no. 96 and ***Fidium Finanz***[416]). Similarly, it seems that Member States are allowed to take measures to retain their taxing rights (on the basis of nationality) in the case of transfer of residence to a third country fiscally more attractive (***Van Hilten–Van der Heijden***, no. 33). Nevertheless, the free movement of capital (Article 56 EC) applies in relation with third countries even if the Court seems to accept broader justifications to restrictions in relation with third States (***A***).

148. As the Commission pointed out in a recent Communication, coordination between Member States in that area is necessary, not only for exit taxes, but for anti-abuse measures in general[417]. In an intra-Community context, unilateral approaches could even worsen the overall situation of taxpayers, for instance in cases where a Member State, in order to formally comply with the non discrimination principle, instead of renegotiating its DTCs, pretends to extend an anti-abuse rule to purely domestic situations (as, for example, Germany did after ***Lankhorst-Hohorst***, no. 95). Moreover, the possible application of Article 56 EC in relation to third countries together with the risk that a lack of coordination would erode the tax base of the Member States could foster the need for better coordination.

4. Transfer of taxing powers to regional and local authorities

149. The decentralization processes in some Member States, like Spain, Italy or Belgium, may have unexpected consequences. In these States rather important autonomous powers have been transferred to regional or even local authorities.

[415] According to some academics, these anti-abuse provisions are redundant with the justifications to the restrictions to the EC freedoms as interpreted by the ECJ. For example, on the Merger Directive and redundancy, see Terra/Wattel (2005), p. 571.

[416] ECJ, 3 October 2006, Case 452/04, *Fidium Finanz, ECR* I- 9521.

[417] Commission Communication of 10 December 2007 on the application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries, COM (2007) 785.

In order to allow these authorities to properly exercise their powers, financial means have also been transferred, among which, besides conditional and unconditional direct financial transfers, also tax legislative powers and the corresponding tax revenues. These taxing powers are also used as tools to implement regional or local policies, i.e. as economic instruments to stimulate investments, activity and employment.

150. However, on the one hand, in the area of direct taxation, i.e. personal and corporate income taxes, the transfer of important tax powers to local and regional bodies raises serious issues of compatibility with the **EC State aid regime** (Articles 87 and 88 EC), the main issue being their potentially selective (i.e. limited to certain undertakings) character [418].

151. On the other hand, these transfers could render it necessary to set up intra-State apportionment criteria as to the delimitation of these "new" tax competences and to create a concept of regional or local residence. In a purely national context, these criteria would be used to –lawfully- "discriminate" between regional or local residents. This would be seen as a normal consequence of the **political and constitutional choice** made by the authorities of the Member State to adopt a federal or decentralized structure, which inevitably leads to the application of different rules to different parts of the country.

152. However, in the light of ***Geurts and Vogten*** (no. 123)[419], it is still unclear whether the application of EC law could jeopardize the very reason why these taxing powers have been transferred to intra-State bodies, i.e. the possibility to develop autonomous policies only in respect of a part of the national territory[420]. The question needs to be put whether the decentralization processes in some Member States are compatible with a greater approximation or coordination of the national tax systems, not only from a political point of view, but also from a purely legal perspective. As the Court stated, EC law requires indeed a **uniform application** of its provisions by the Members States, which cannot be hindered by administrative or even constitutional obstacles due to the institutional structure of the Member States[421].

B. ALLOCATION OF TAXING POWERS BETWEEN MEMBER STATES

153. Not only does the Court's case law affect the tax treatment by a Member State of situations and types of incomes that fall under its competences, but it also obliges the Member States to "look at the broader picture", by taking into account the manner in which other Member States exercise their tax powers, and in some cases, to take active measures to avoid the negative consequences arising from the simultaneous application of tax rules of two or more national tax systems. In this perspective, it is not surprising that EC law also affects the legal instruments used by the Members States to allocate taxing powers between themselves, i.e. double taxation conventions. However, foreign tax law systems/developments are normally not discussed when fiscal bills are presented or debated. Insofar a (preferably common) code of conduct adopted by national parliaments would be useful with the aim of explicitly addressing the impact of proposed measures on relations with other States and in particular on the existing DTCs.

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[418] On fiscal State aid, see ECJ, Case C-88/03 (fn 30) and Di Bucci, V., "Direct taxation – state aid in form of fiscal measures", in Sanchez Rydelski, M. (ed.), *The EC State Aid Regime Distortive Effects of State Aid on Trade Competition & Trade*, London, Cameron May, 2006, p. 73.

[419] See also the Opinion of AG Saggio of 1 July 1999 in the joined Cases C-400/97, C-401/97 and C-402/97, *Guipúzcoa e.a* , *ECR* I-1073.

[420] See Traversa, E., *L'autonomie fiscale des Régions et des collectivités locales des Etats membres face au droit communautaire. Analyse et réflexion à la lumière des expériences belge et italienne*, Doctoral Dissertation, Catholic University of Louvain/University of Bologna, 2007, not yet published.

[421] See for example ECJ, 4 May 2005, Case C-335/04, *Commission v Austria,* para. 9.

1. EC Treaty freedoms as limits of the Member States treaty making power in respect of double taxation conventions

154. DTCs are part of the national law of the Member State for the purpose of the application of EC law. Beside general provisions about their application and general definitions, DTCs mainly provide for "distributive rules" sharing the taxing power between the Contracting States by limiting their respective taxing rights towards each other with a view of avoiding double taxation. When this distribution is not exclusive, additional provisions in order to eliminate double taxation by means of exemption or tax credit are introduced (Article 23 of the OECD Model Convention). Since these conventions allocate taxing powers and thus (potential) revenue between States, incompatibilities between some of their provisions and EC law can modify the extension of these taxing rights as regards certain types of income and thus modify the balance negotiated by the contracting States.

155. As decided in the ***Saint-Gobain*** case (no. 59 and 110), "*Member States are at liberty, in the framework of [*double taxation conventions*], to determine the connecting factors for the purposes of allocating powers of taxation…*"[422]. In this allocation, it is not unreasonable for the Member States to base their agreements on international practice and the model convention drawn up by the OECD, so that, as these rules allow different options, the connecting factor may be different for various types in the same class of income[423].

156. However, when it comes to exercising the allocated jurisdiction thus confirmed, Member States "*may not disregard Community rules*"[424] and, more particularly, must respect the principle of national treatment of nationals of other Member States and of their own nationals who exercise the freedoms guaranteed by the Treaty[425]. According to the national treatment principle, a Member State which is party to a DTC, even signed with a third country, is required to grant to permanent establishments of non-resident companies the benefits provided for by that DTC under the same conditions as those which apply to resident companies. This was applied, for instance, to an exemption of dividends (***Saint-Gobain***) [426].

157. The fact that, in allocating powers of taxation among themselves, Member States choose various connecting factors "*cannot in itself constitute discrimination prohibited by Community law*"[427].

158. **The Court is concerned by results**. The Member States thus have the choice as to the methods, but must achieve elimination of any restriction of an EC freedom. Notably, they must permit the taxpayers in the States concerned to be certain that, as the end result, all their personal and family circumstances will be duly taken into account, irrespective of how those Member States have allocated that obligation amongst themselves in DTCs[428]. If different systems of taxation apply to residents and non-residents because of a DTC, the Court, rather than to reject the differentiation altogether, mandated the national court to look at the result so as to make sure that non-resident shareholders are not treated less favourably than resident shareholders[429].

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[422] *Saint-Gobain*, para. 56; *Gilly*, paras 24 and 30; *Denkavit Internationaal*, para. 43.
[423] *Gilly*, para. 31.
[424] *Saint-Gobain*, para. 58 ; *De Groot*, para. 94.
[425] *De Groot*, para. 94 ; *Saint-Gobain*, paras. 57-58.
[426] *Saint-Gobain*, para. 59.
[427] *Gilly*, para. 53.
[428] *De Groot*, para. 101.
[429] *Bouanich*, para. 56.

159. Concerning the access to tax advantages provided in bilateral conventions, a question not yet treated by the Court is whether under free provision of services or free movement of capital EU taxpayers could be entitled to such benefits even if they are not resident (or have a permanent establishment) in one of the Member States that are party to the convention, i.e. their only connecting factor with one of these States is the fact that they have invested or performed a service there.

2. Existence of a DTC as a limit to EC Treaty freedoms

160. Another question regards the possibility for a Member State to invoke a DTC in order to justify a difference of treatment which otherwise would infringe EC law. Since ***Avoir fiscal*** (no. 53), the Court has generally ruled that the freedom of establishment is unconditional and cannot be limited by a tax treaty with another Member State[430]. DTCs could neither hinder the application of secondary legislation, as the Court ruled in ***Athinaïki Zythopoiia***[431] (no. 22), concerning the Parent-Subsidiary Directive, save for the exceptions provided by the legislation itself (***Océ van der Grinten***[432], no. 22).

161. However, the Court's case-law concerning the taxation of cross-border dividends seems to mitigate this view. In ***ACT Class IV*** (no.107) for instance, the Court said that a Member State does not infringe EU law if, in a DTC, it extends its tax credit for residents to non-resident recipients of dividends and at the same time imposes a withholding on the amount of the dividend and grants a credit. The reason was that as the State of source is not obliged to grant the credit to non-residents, it may also vary its treaty policy. Moreover, according to ***Amurta*** (no. 103) and ***Denkavit Internationaal*** (no. 102) a withholding tax on dividends in the source Member State provided by a DTC, even though found discriminatory because dividends paid to a domestic shareholder are not subject thereto, could be considered permissible if the DTC which authorizes it also organizes a tax credit in the residence Member State, provided that the parent company is effectively able to set off the tax in that other Member State[433] so that the withholding tax is neutralized[434]. Thus, in some situations, the State of source becomes dependent on how the State of residence exercises its taxing power.

162. Nevertheless, the Court pointed out that it would be sufficient for the withholding tax to be considered compatible with EU law if the tax credit was granted unilaterally by the Member State of residence[435].

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[430] *Avoir fiscal*, para. 26. Furthermore, freedom of establishment does not permit Member States to subject those rights to a condition of reciprocity imposed for the purpose of obtaining corresponding advantages in other Member States. On anti abuse-rule, in the *Thin Cap Group litigation* case (fn 45), the ECJ found that the fact that DTCs admitted the principle and organized the effect of the British rules on re-characterization of interest in dividends was not sufficient to prevent any criticism: it found that the United Kingdom had not demonstrated that any increase of tax in the source Member State was offset by a reduction in the residence Member State. It accordingly admitted the system only to the extent that it applied to purely artificial arrangements and admitted without undue administrative burden evidence to the contrary.

[431] *Athinaïki Zythopoiia*, para. 32 "*... the rights conferred on economic operators by ... the Directive are unconditional and a Member State cannot make their observance subject to an agreement concluded with another Member State.*"

[432] *Océ van der Grinten*, paras. 84-89.

[433] *Denkavit Internationaal*.

[434] *Amurta*.

[435] *Amurta* , para. 78.

Moreover, the State of source cannot justify the withholding on the grounds that "*in accordance with the principles laid down under international tax law and as the [Bilateral Double Tax] Convention provides, it is for the State in which the taxpayer is resident, and not for the State in which the taxed income has its source, to rectify the effects of double taxation*"[436]. This judgement comes closer to a **two-country-approach**, by which the legal assessment is based not only on the situation in one State, but also by taking into account the effects in another Member State.

163. Conversely, as the Court stated in ***Elisa***[437], the absence of applicable DTC provisions, in particular as to the exchange of information, between the State of source and the State of residence could not in itself justify the non-respect of EC Law.

164. Thus, according to the Court's case-law, a DTC as such is no justification for restricting the EC Treaty freedoms. However, a restriction in one Member State of a freedom may be admitted if its effects are neutralized by a DTC which produces compensating effects in the other Member State. Nevertheless, uncertainties remain as to issues that have not (yet) been addressed by the Court, in particular in situations involving more than two (Member) States, the so-called **polyangular situations**[438].

3. EC Treaty freedoms as intra-Community most favoured nation clauses

165. Could a Member State grant in a DTC certain benefits to residents of one Member State, while in another DTC denying the same benefit to the residents of the other Member State? In the ***D.*** case (no. 49) it was asked whether the EC freedoms could have the same effect as a **most-favoured nation clause** and extend to all EU-residents the advantages granted by a Member State on a bilateral basis to residents of another Member State. The Court has decided that a bilateral DTC inherently applies to the residents of the two Member States concerned so that residents of a third Member State were not in the same situation; it found that the benefit at stake was not separable from the remainder of the Convention, but was an integral part thereof and contributed to its overall balance[439]. In ***ACT CLASS IV***, the Court came to the same conclusion after scrutinizing DTCs made by the United Kingdom with other Member States, of which certain granted a tax credit and others did not: it found that this difference was not discriminatory but "*by contributing to the overall balance of the DTCs in question, were an integral part of them*"[440].

[436] *Denkavit Internationaal*, para. 51. Previously, the ECJ had, in De Groot (para. 100) in what seems to be an *obiter dictum*, considered that a Member State's legislation could limit deductions based on the taxpayer's personal circumstances and thus encroach on a freedom provided it finds, in the absence of a DTC, that the other Member State unilaterally grants advantages based on such personal circumstances.
[437] ECJ, 11 October 2007, Case C-451/2005, Européenne et Luxembourgeoise d'Investissement SA (ELISA) v Directeur général des impôts, Ministère public.
[438] Pistone, P., "Tax Treaties and the Internal Market in the New European Scenario", *Intertax*, 2007, p. 75; see also Workshop on "*EC Law and Tax Treaties*" organized by the EU Commission in Brussels on 5 July 2005, available on the DG TAXUD website (see fn 17).
[439] Numerous authors have criticized the Court's decision and reasoning. See a.o. Pistone, P., "National treatment for all non-resident EU nationals : looking beyond the D decision", *Intertax*, 2005, p. 412 ; Schuch, J., "Critical notes on the European Court of Justice's *D* case decision on most-favoured-nation treatment under tax treaties", *EC Tax Rev.*, 2006 p. 6 and the quoted doctrine ; van Thiel, S., "Why the ECJ should interpret directly applicable European law as a right to intra-Community most-favoured-nation treatment", *Eur. Tax.*, 2007, p. 263 (Part 1) and p. 314 (Part 2) and "A slip of the European Court in the D case (C-376/03): denial of the most-favoured-nation treatment because of absence of similarity", *Intertax*, 2005, p. 454.
[440] *ACT Class IV*, para. 90.

The issue whether a benefit is separable from the rest of the DTC or not thus appears to be a factual issue to be decided on a case-by-case basis, so that there remains the possibility to invoke some kind of most favoured nation treatment if the benefit is found to be separable.

166. In practice, that case-law allows a Member State to reduce the withholding tax on dividends or interest to a level varying according to the contracting Member State. A dividend paid from Member State A to Member State X might thus be charged at 10% while the same dividend paid to Member State Y would be charged at 5 or 0%.

167. The case-law on DTCs leaves **many questions unresolved**, which causes uncertainties from the point of view of the taxpayers and of the Member States[441]. The Court's contribution to the creation of a "European international tax law"[442], could nevertheless open a path towards a more coherent web of DTCs. A CCCTB would automatically eliminate this problem for the companies falling within its scope of application.

C. AVOIDANCE OF DOUBLE TAXATION WITHIN THE EU

168. According to *Saint-Gobain*[443], EU law applies to double taxation conventions, at least as far as the exercise of the power of taxation so allocated by convention is concerned, obliging the EU contracting country to grant national treatment by virtue of EU principles to EU non-residents Another question is whether Member States are bound by EC law to conclude these conventions in order to remove international double taxation. International double taxation results from the simultaneous subjection to (at least) two different tax jurisdictions. Under international law, there is no obligation to eliminate or avoid international double taxation, even though such situation collides with the principle of taxpayers' equality.

1. Avoidance of international - juridical - double taxation

169. International juridical double taxation occurs when two different States apply the same tax on the same tax base to the same taxable person.

170. According to the Court, double taxation may result from "*from the exercise in parallel by two Member States of their fiscal sovereignty*". It is up to the Member States to conclude international conventions in order to prevent double taxation, since "*Community law, in its current state …, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community*" and since apart from the existing legislation, "*no uniform or harmonization measure designed to eliminate double taxation has as yet been adopted at Community law level*"[444].

171. This **rather formalistic approach** is not followed in other areas of Community law where situations of double taxation are likely to occur. In the **VAT** field, for example, where the present case-law of the ECJ exclusively deals with matters of interpretation of provisions of secondary legislation (Directive 2006/112/EC, replacing the former Sixth Directive), the Court considers that the avoidance of double taxation is an objective of the harmonization[445].

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441 Kofler (2007), p. 1067.

442 Vogel, K., "Harmonisierung des Internationalen Steuerrechts in Europa als Alternative zur Harmonisierung des (materiellen) Körperschaftssteuerrechts", *SWI*, 1993, p. 380; Pistone, P., "Towards European international tax law", *EC Tax Rev.*, 2005, p. 4.

443 *Saint-Gobain*, para. 57-58.

444 *Kerckhaert-Morres*, paras. 20-24. Kofler, G.W., and Mason, R., 'Kerckhaert and Morres: A European "Switch in Time"?', in Van Thiel, S., ed., *The internal market and direct taxation : Is the European Court of Justice taking a new approach ?*, Brussels, Confédération Fiscale Européenne, 2007, p. 176.

445 See the second recital of the 8th VAT Directive.

According to the ECJ, double taxation infringes on the principle of fiscal neutrality inherent to the common system of VAT established by the Directives on the basis of Article 93 EC[446].

In the area of **social security**, which shows a number of questions parallel to those regarding taxation, the path chosen by the European legislator in order to implement the free movement of workers has been one of coordination and not harmonization (Art. 51 EC). As a consequence, national rules organizing the social security system remain – at least in theory- not affected by EC intervention, while the latter focuses more on "bridging the gaps" that could arise when people exercise their freedom of movement, i.e. move from one national social security system to another. An EC regulation has therefore replaced the existing bilateral conventions between the Member States. Double "taxation" in the form of the double payment of contributions is considered incompatible with the EC regulation, and in particular with the principle of the unicity of the applicable legislation. According to this principle, a person is always covered by one - and only one - national social security system, for which she pays contributions and from which she receives benefits.

172. Thus, there is a departure between some case-law of the Court in the field of social security or of VAT, which seems to point in the direction of condemning juridical double taxation, and direct tax, where such juridical double taxation has not yet been said to be prohibited. This departure might be connected with the fact that both in VAT and in social security secondary legislation has implemented the principles of the EC Treaty. Although a general obligation under European law to eliminate or avoid international double taxation has not yet been considered to stem from the Treaty by the ECJ, one can well argue that double taxation between Member States is unlawful as it compromises the Internal market, i.e. that double taxation is implicitly prohibited by the existence of the Internal market[447]. This point of view can be reinforced by the abolition of Article 293 EC by the Treaty of Lisbon.

2. Avoidance of economic double taxation

173. In an international context, double taxation often occurs when a subsidiary in a country distributes dividends to its shareholders in another country. Within the EU, such double taxation between associated companies established in different Member States is eliminated through the application of the Parent-Subsidiary Directive within its (limited) scope. However, the Directive does not apply to dividends paid to non associated shareholder companies, to individual shareholders or to shareholders in third countries.

174. Outbound dividends are paid out of profits which have usually borne corporate tax at the level of the paying company. For the foreign shareholder receiving the dividend, it is treated as income having its source in the country of the paying company; under domestic law and DTCs, a withholding tax is often imposed by the source State upon payment to the foreign shareholders. When the source State grants a credit to resident shareholders in respect of dividends in order to compensate the corporate tax paid by the distributing company, it is not obliged to grant that credit to non-resident shareholders who are not subject to tax on dividends in that State[448].

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[446] ECJ, 27 September 2007, Case C-146/05, *Albert Collée v Finanzamt Limburg an der Lahn*, para. 23; 27 September 2007, Case C-409/04, *Teleos e.a*., paras. 24 and 25.

[447] Van Thiel, S., "Why the ECJ should interpret directly applicable European law as a right to intra-community most-favoured-nation treatment and a prohibition of double taxation", in Weber, D.(ed) (2007), p. 118.

[448] *ACT Group Litigation*. Cp. with *Fokus Bank*. Nevertheless, in the case of intra-group dividends**,** if, upon distribution, part of the corporation tax of the distributing company is due in the form of an advance corporation tax and if a domestic parent can avoid the levy of this charge by a group election, this possibility must also be available to a foreign parent established in another Member State (*Metallgesellschaft/Hoechst*).

As regards withholding tax, the Treaty appears not to be respected when such a tax is levied on outbound dividends paid to non-residents whilst no significant taxation (withholding tax and participation exemption) applies to dividends distributed to resident companies or individuals.

This is not modified by the fact that a DTC would provide for a tax credit to be applied in the State of residence of the shareholder when a parent company is unable to set off tax in that other Member State in the manner provided for by that convention (***Denkavit Internationaal***, no. 102). The fact that the State of the receiving company unilaterally grants a full tax credit to avoid double taxation of dividends does not allow the State of the paying company to tax the dividends paid to non-resident shareholders although it prevents economic double taxation of dividends distributed in its territory (***Amurta***, no. 103). Such measures might however be justified by the application of a DTC (***ACT Group Litigation***, no. 107; ***Denkavit Internationaal, Amurta***).

This could be seen as a **departure from internationally accepted standards**, which leave to the State of residence the duty to mitigate the double taxation that has arisen from the exercise by the source State of its tax sovereignty[449], but it is in line with the system of the Parent-Subsidiary Directive[450]. If the source State cannot withhold tax on dividends paid to a foreign parent (often with foreign individual shareholders), why could it withhold tax on dividends paid directly to foreign individual shareholders?

175. As to inbound dividends, the tax system must not result in the penalization of shareholders who have invested in other Member States. Therefore, if the State of residence grants a tax credit in respect of corporation tax paid by its domestic company, it must extend that tax credit to corporate tax paid by companies in other Member States in respect of the dividends received (***Manninen***, no. 113; ***Meilicke***, no. 114). It follows from ***Manninen*** that the tax credit must be based on the amount of corporate tax paid in the State of source[451], so that the impact in terms of revenue for the State of the shareholder is directly dependent on the level of the tax rate in the State of source. It implies a budgetary shifting of revenue from one Member State to another; this situation may conceivably result in a claim of the crediting Member State against the other one.

When a Member State abolishes its tax credit system both for domestic and cross-border dividends, it complies with the requirement of non-discrimination provided for by the Treaty. However, this reinstatement of economic double taxation is **detrimental to the good functioning of the Single market**.

176. Similarly, if an exemption or a reduction of the tax rate (which economically also aims at remedying economic double taxation of dividends) applies to individual shareholders in respect of domestic dividends, it should be extended to dividends arising in other Member States (***Verkooijen***, no. 111; ***Baars***, no. 122; ***Lenz***, no. 112). According to the Court, if a Member State avoids economic double taxation in respect of domestic dividends, it must achieve the same result in respect of dividends from other Member States, but it may apply an exemption method to domestic dividends and a credit method to foreign dividends. However, disparities added to the application of the two methods should be eliminated (***FII Group Litigation***, no. 119).

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[449] Garabedian, D., and Malherbe, J., "Cross-border dividend taxation: testing the Belgian rules against the ECJ case-law (or Testing the ECJ case-law against the Belgian rules)", in *Festschrift Vanistendael* (2008), p. 427.
[450] Malherbe, Ph., "Belgian Report", *Trends in Company Shareholder Taxation: Single or Double Taxation*, International Fiscal Association; 2003 Sydney Congress, *Cah. Dr. Fisc. intern.*, Vol. 88a, p. 203.
[451] *Manninen*, paras. 46, 53, 54.

Member States are therefore bound to avoid economic double taxation in cross-border situations insofar as they avoid economic double taxation in domestic situations. This implies extending the regime to outbound dividends which are taxed in the State of source and to inbound dividends in all cases, albeit under different methods. As a rule, except if a DTC applies, the assessment of the compatibility of the legislation at stake with EU law cannot be made dependent on the tax treatment of the same income in another Member State.

177. The case-law of the Court has in some circumstances as result to **uphold situations in which cross-border transactions are taxed more heavily than domestic transactions**. This was the case in ***Kerckhaert-Morres*** (no. 115) where the Court considered that, if a country taxes domestic and foreign dividends at the same rate, as Belgium does, it does not have to grant double tax relief in respect of a withholding tax levied abroad.

178. It is clear that the **present situation is an obstacle to investment in foreign shares**, as shown in some more or less successful systems of dual stock exchange listings coupled with "twin shares"[452]. Further EU coordination, in the spirit of the Commission Communications[453], or even harmonization in the area of individual dividend taxation would help opening up the financial markets. Furthermore, these disadvantages could burden originally domestic shareholders who become foreign shareholders by virtue of cross-border mergers or who lose the benefit of the Parent-Subsidiary Directive because their entrepreneurial investment is diluted to become a mere portfolio investment due to a take-over by a large undertaking.

3. Choice between capital export and import neutrality

179. Taxation of international activities raises the question of the **division of taxes on capital and income amongst States**. Traditionally, it is suggested that these questions must be solved by reference to the principles of equity and economic efficiency[454], which must be combined with the international tax principles according to which the State of source has jurisdiction to tax income or capital having its source on its territory while the State of residence has jurisdiction to tax the worldwide income or capital of its residents if it so wishes[455].

180. **Equity** relates to the idea of an equivalent treatment between categories of taxpayers. In an international context, equity can be considered from the viewpoint of the State of residence or of the State of source. The foreign income or capital must be taxed at the level of the State of residence or of the State of source. Economic efficiency relates to the optimal allocation of factors of production resulting in the highest possible productivity. Both equity and economic efficiency entail eliminating or reducing international double taxation.

[452] It is unfavourable for a Belgian investor to receive Dutch-source dividends and conversely. When a Dutch and a Belgian banks merged into "Fortis", they devised a sophisticated system, which obviously only works for Belgian and Dutch investors and immediately shows its limitations: "The Twinned Share Principle of Fortis is truly unique. It implies that a single unit represents a share in two legal entities, each with a different nationality. Shareholders have voting rights in both parent companies and may choose to receive a wholly Belgian-sourced or a wholly Dutch-sourced dividend" (*http://www.fortis.com/governance/media/pdf/ fortis_governance_statement_UK.pdf*, p. 13). The Belgian-French bank "Dexia" had a similar system, but abandoned it.

[453] See Commission Communication of 19 December 2003 - Dividend taxation of individuals in the Internal Market, COM/2003/810, p. 20; Communication of 19 January 2006, COM (2006) 823, p. 7.

[454] See a.o. Musgrave, R. and P., "Inter-Nation Equity", in Musgrave, R., *Public Finance in a Democratic Society*, vol. 2, New-York, Harvester Wheatsheaf, 1986, p. 43-63 ; Musgrave, P.B., *United States Taxation of Foreign Investment Income : Issues and Arguments*, Cambridge (ass), Harvard Law School International Tax Program, 1984.

[455] Worldwide taxation is not mandatory to the State of residence that can choose to tax only the territorial income or capital (as for example France as regards corporate income tax).

Equity in the State of residence means that all taxpayers with the same amount of income (or capital) pay the same amount of tax wherever their income originates from. This "capital export neutrality" (CEN) is reached by worldwide taxation combined with the imputation of taxes paid abroad. On the contrary, equity viewed from the State of investment (or State of source) supposes that investors of all origins are treated in a same way in the State of investment and that foreign investments bear the same level of taxation in the country of investment as local ones. Reaching that "capital import neutrality" (CIN) requires the State of residence to exempt foreign income.

181. Traditionally, CEN is presented as **economically more efficient** than CIN[456]. This postulate is questionable[457]. Imputation systems (CEN) are dependent on the level of taxation in the State of source. When this level is higher than in the State of residence, the latter has to accept the imputation of an amount of taxes higher than the tax it raises on the foreign income. Indirectly, the State of residence subsidizes the State of source while the State of source could have an incentive to increase its tax rates; this would be economically inefficient.

In order to avoid such subsidizing, some States of residence limit the imputation of the foreign taxes to the amount of their taxes relating to the foreign income (so-called "ordinary tax credit"). This increases the total tax burden on the foreign source income in all cases where the rate is higher in the source country than in the State of residence. This also obviates CEN which aims at taxing at the same level foreign and domestic income. Limited CEN leads to restrictions to investments in countries having higher tax rates and thus to inefficient allocation of resources.

182. It must also be noted that when the foreign rate is higher than the one in the State of residence, no taxation occurs in the latter, the tax revenue being wholly allocated to the source country. This has the same effect as a CIN system. In such conditions, investors have an incentive to operate through subsidiaries so as to deter taxation. On the contrary, lower rates in the State of source allow the State of residence to "recover" a part of the total tax burden. In other words, from a pure tax point of view, there is no interest for investors from a CEN State to invest in a lower taxing country.

183. From the viewpoint of the **State of residence**, CEN has as advantages an equal treatment of domestic and foreign investments income, an increase of revenue in case of lower taxation in the State of source, and a disincentive effect for investors to invest abroad when the tax rates are higher in the foreign country.

As regards CIN, it is argued that this system necessarily leads to territoriality, i.e. to taxation by the State of residence of the sole income or capital located in its territory; in that view, foreign income or capital as well as foreign losses would be outside its tax jurisdiction. This leads to hindering foreign investments in favour of investments in the State of residence, thus to possible economic inefficiency. From a systemic point of view, it is doubtful whether a territorial system is equivalent to a worldwide taxation system with exemption of the foreign income.

[456] Cf. a.o. R. and P. Musgrave (1986). This postulate has founded the international tax policy of the USA.

[457] Present authors considers that CIN would be more efficient, and specifically would favour worldwide, global economic efficiency, rather than efficiency appreciated from the point of view of one single State (see a.o. Stephens, N., "The progressive analysis of the efficiencies of capital import neutrality", *Law and Policy in International Business*, Fall 1998, 30, 1, p. 159; Bird, R. and McLure, Ch., "The personal income tax in an interdependent world", in Cnossen, S., and Bird, R. (ed.), *The Personal Income Tax. Phoenix from the Ashes?*, Amsterdam, North-Holland, 1990, p. 235-255; Vogel, K., "Worldwide vs source taxation of income – A review and re-evaluation of arguments", *Intertax*, 1980, p. 310-321. Others authors are of the opinion that CIN would best favour the internal market (see a.o. Vanistendael, F., "Does the ECJ have the power of interpretation to build a tax system compatible with the fundamental freedoms?", Speech held on 14 December 2007 on the occasion of the presentation of the *Festschrift* in his honor (2008), p.17.

Worldwide taxation supposes the integration of the foreign result, positive as well as negative; the **exemption** aims at eliminating the double taxation, thus deals only with positive foreign results. Technically, there is no obstacle to combine offsetting foreign losses with a "recapture" mechanism.

184. A correct comparison between CEN and CIN should take account of external elements such as the costs of infrastructure financed by taxes (the level of which relates to the level of taxation) or the redistributive effect of the tax system[458]. Under efficiency analysis, taxes are considered as a cost. However, the portion of tax revenues used for redistributive purposes cannot as such be treated as a cost. Redistribution should be reflected in the quality of life of the country which in turn has an impact on the return on investment opportunities. CEN in this context appears to be inefficient as it discourages investments in higher tax rates countries and fails to redistribute taxes to all individuals who benefit from infrastructure costs and redistribution[459].

185. It has often been asked whether **the Court's case-law serves better the purpose of either one of the two objectives**[460]. Since CEN and CIN only highlight certain characteristics of systems aiming at eliminating double taxation and since the Court has decided that prevention of double taxation was not a taxpayer's right, the case-law can by definition not further one system rather that the other. The Court checks domestic tax laws for discrimination, not for economic efficiency in preventing double taxation[461]. Consequently, the Court limits itself, whatever the system used in a Member State or selected in a DTC between Member States, to check its compatibility with the fundamental freedoms. It is true that some of the decisions of the Court might be read as encouraging CEN or CIN, depending on the cases. As an example, the ***Manninen*** (no. 113) doctrine induces CEN when obliging the State of residence to grant a tax credit corresponding to the amount of the foreign tax; as a reaction, various Member States have abandoned the credit relief which they applied only to domestic dividends and grant an exemption or reduction both for domestic and EU dividends, which indirectly favours CIN. In this sense, the Court contributed to the disappearance in the Union of imputation systems. However, this disappearance is a **logical consequence** of the Court's case-law applying non-discrimination provisions.

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[458] When taxes are used for infrastructure costs, it can be argued that taxation should occur in the place where investment costs are incurred, so favouring CIN. When calculating efficiency in CEN, additional costs incurred by investors in a low tax country in order to compensate lesser infrastructures finally reduce the after-tax return on such investments, with the consequence that investors will prefer not to invest in that country. Suppose a rate of 40% in State of residence (SR) and 30% in State of source (SS). Suppose a pre-tax return of 10. The after-tax return is 6 both in case of investment in SR (10 – 40% = 6) or in SS ((10 – 30%) + (10 – 40% + 30%) = 6). If additional costs of 1 is incurred in SS, the pre-tax returns falls to 9, with an after-tax return of 5,4%, lower than the after-tax return of investment in SR. Under CIN, due to the absence of tax catching up in the State of residence, the same investment could remain attractive.

[459] Stephens (1998), p. 171.

[460] See for instance, Garcia Prats, F.A., "Is it Possible to set a coherent system of rules on Direct taxation under EC law Requirements?", in *Festschrift Vanistendael* (2008), p. 433.

[461] However, some authors have tried to assess the economical foundations of the Court's case-law. Graetz and Warren (2006, p. 1253) find that "*the ECJ's non-discrimination jurisprudence reveals an impossible quest: to eliminate discrimination based on both the origin and the destination of economic activity*" and that "*this quest must fail in the absence of harmonized income tax rates and bases among EU Member States*". Similarly, Terra and Wattel (2005, p. 150) criticize the Court for applying an economic approach which equates branches and subsidiaries where measures taken by a Host State are at issue, and by contrast applying a legal approach, comparing foreign subsidiaries to resident subsidiaries when it examines measures taken by the State of Origin.

186. However, most of the case-law in the field of dividend taxation must be read as favouring "**capital movement neutrality**" from the perspective of non-discrimination principles. Considering, for example, the ***Denkavit Internationaal*** case (no. 102), where the State of source has to grant relief for withholding tax on outbound dividends, when such exemption is granted to internal dividends, it is hard to conclude to an application of CEN or CIN; what can only be said is that the solution chosen by the Court aims at avoiding international double taxation and thus favours free movement within the Internal market. Moreover, this capital movement neutrality should be achieved from the viewpoint of both the State of residence and of the State of source, which may seem logically and economically almost impossible to achieve without full harmonization of the national direct tax systems.

187. A predominance of either CEN or CIN cannot either be inferred from the case law of the Court in the field of **compensation of losses**. It seems that the Court, implicitly at least, considers that losses must be set off once and only once (***Amid***, no. 84; ***Marks & Spencer***, no. 91). However, setting-off should occur in the first place in the country where losses are incurred; cross-border setting-off on income from the State of residence appears as a subsidiary solution where no setting-off is possible in the State of source (***Marks & Spencer***). This again shows a tendency to recognize that taxation must take place where the income accrues. This is not fully satisfactory as regards losses because territoriality appears to be economically inefficient and hindering foreign investments. An efficient Internal market would require immediate loss setting-off with an efficient recapture mechanism. Reluctance of Member States to grant such setting-off can be explained by the fact that doing so has a direct impact in terms of tax revenue.

188. As regards individuals, the ***Schumacker*** doctrine (no. 35) deserves specific attention: the State of source has to take into consideration personal and family circumstances of the non-resident receiving most of its taxable income in that State. That statement reinforces taxation at the place of source of income, thus CIN. However, this solution leads to disconnect the place where the taxes are paid and the place of residence where the taxpayer normally benefits from tax expenditures in infrastructures and redistribution. What should be reconsidered is not the solution of the Court, but rather the "distributive rule" itself granting jurisdiction to tax the sole taxable income to State of source.

189. The concepts of CEN and CIN are used to generally qualify situations that negatively affect the allocation of investment (and labor). They do not make a distinction according to the source of the distortions, which is actually the crucial question in order to assess whether a situation is compatible with the EC provisions prohibiting Member States to infringe EC freedoms. It appears from the case law that the Court generally focuses its analysis not on the overall situation of the taxpayer, which often involves the simultaneous application of different tax provisions of the same national system (like the corporate and personal income tax rules for individuals shareholders), and even of different national tax systems of Member States, but rather on the provisions of the legislation of the Member State at stake in the proceedings (including the applicable double taxation conventions). Such an approach is in line with the manner in which the freedom provisions are drafted in the EC Treaty. The EC freedoms are indeed **prohibitions to the Member States taken individually** to either discriminate or restrict.

For the application of EC law, the final results on the taxpayer's situation are an element of lesser importance than the manner in which the rules of the single Member State involved in the proceedings are drafted and applied. In this prospect, the ***Marks and Spencer*** decision (no. 91), in which the Court made the acceptability of the restrictive UK rules dependent on the taking into account of losses incurred by a subsidiary in another Member State, looks more like an exception than like a new trend in the Court's approach[462].

D. RELATIONS BETWEEN MEMBER STATES AND THIRD COUNTRIES

190. As a rule, EC tax law only applies in an intra-Community context and thus should not influence the relations between Member States and third countries. However, exceptions exist. According to its wording, Article 56 EC on the free movement of capital and payments is applicable in this context, whereas the other Treaty freedoms may only indirectly affect direct tax matters in third country relations (***Saint-Gobain*,** no. 59). As to secondary legislation, the regimes laid down by some directives have been extended, through EU-Member States joint agreements, to some third countries[463].

191. Concerning the application of the free movement of capital to third countries residents or nationals, the Court seems reluctant to examine the free movement of capital issues as soon as it finds that another freedom is affected. In the ***Holböck*** judgement (no. 116), however, the Court recognized that the legislation at stake applied irrespectively of the percentage of the holding and – since the right of establishment was not applicable in relation to third countries – it scrutinized the legislation under the angle of Article 56 EC.[464] The EC Treaty freedoms as interpreted by the Court apply only to EU nationals and if they were extended to non-EU nationals, the non-EU nationals concerned cannot be expected to behave reciprocally. This might be one reason because of which the Court for the time being did not pursue the line of the *Holböck* case and has refused in other cases to grant EU law protection to capital movements in third country situations[465].

192. Nevertheless, the relations with third States in the field of direct taxation are certainly an area in which EU initiatives will have to be taken, due to the increasingly globalized economy. This subject has been under tight scrutiny from prominent authors during the recent years, and developments are expected. Amongst the issues at stake in this context - and thus the potential problems -, one could quote the application of double taxation conventions signed with third countries to all EU residents, the right for the Member States to unilaterally extend the benefits of Community legislation in DTCs with third countries or the tax implications of the agreements signed by the European Community[466].

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[462] See Lang,, M., "Direct Taxation : is the ECJ Heading in a New Direction?" in Van Thiel, S. (ed.), *The internal market and direct taxation : is the European Court of Justice taking a new approach?,* Brussels, CFE , 2007, p. 75. Contra, Kemmeren, E.C.C.M., "The internal market approach should prevail over the single country approach", in *Festschrift Vanistendael,* p. 555.

[463] It is the case for the Savings Directive (2003/48/CE), but also for the Parent-Subsidiary and the Interests–Royalties Directives: Bilateral Agreement II between the EU and Switzerland extends the exemption of WHT on dividends and interest in "parent-subsidiary" relations (as defined by the Agreement) between the EU and Switzerland (art. 15). See Pistone, P., *General Report* in Lang, M./Pistone, P., *The EU and Third Countries. Direct Taxation*, Vienna, Linde Verlag 2007, p. 20.

[464] Nonetheless, the ECJ declared Austrian tax rules to comply with the freedom of capital since they were already in force on December 31, 1993 (see para. 41 of the judgement).

[465] ECJ, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation* (fn 45), para. 34; ECJ, 10 May 2007, Order in Case C-492/04, *Lasertec v Finanzamt Emmendingen* (fn 321); ECJ, 6 November 2007, Order in Case C-415/06, *Stahlwerk Ergste Westig v Finanzamt Düsseldorf-Mettmann*.

[466] Lang, M., and Pistone, P.(ed.), *The EU and third countries : Direct Taxation,* Vienna, Linde Verlag, 2007 ; Lyal, R. "Free Movement of Capital and Non-Member Countries-Consequences for direct taxation" in Weber,

E. TAX TREATMENT OF EUROPEAN GROUPS OF COMPANIES (CONSOLIDATION)

193. In most cases, resident taxpayers are taxed on their worldwide income; France with its territorial corporate tax is a noteworthy exception. As regards international structuring of companies, a first point of attention is the possible choice between setting up a foreign branch or a subsidiary; a second point of attention, as regards more specifically foreign subsidiaries, is the possibility to take them into consideration for group consolidation[467]. In this context, specific questions arise in loss situations.

194. As to **permanent establishments**, the Court held that enterprises having several branches in the same State were comparable with enterprises having foreign branches within the EU so that the off-setting of domestic losses against exempt profits of permanent establishments is in breach of the freedom of establishment as it leads to a higher tax burden. The controversial fact here is that the national law at hand provided for the compensation of losses on the foreign income, just as it was the case for a domestic situation[468]. The difference lies in the fact that the compensation was made with an income that was not taxed in the State of residence[469], with the consequence of economic double taxation[470]. Thus, first, beyond the comparability test, the Court correctly noticed the economic double taxation; second, the Court's case-law indirectly leads to territoriality or "per country" method, as it implies that domestic losses cannot be set-off against foreign exempt profits and thus can only be set off against taxable (domestic) profits.

The reverse situation is pending before the Court[471]: is it a breach of the freedom of establishment not to allow the off-setting of the losses of the foreign permanent establishment against domestic profits, whilst in pure domestic situations such compensation occurs, granting to the pure domestic company a "cash advantage" not available to the one acting cross-border?

195. The argument of "cash advantage" has also been put forward as regards group consolidation, i.e. compensation of losses between companies forming a group. The different treatment for tax purposes of losses incurred by a resident and a non-resident subsidiary amounts to a restriction of the freedom of establishment. The domestic group is at a "cash advantage" compared to the cross-border group as losses are immediately deductible, thus reducing the tax burden. However, such a restriction is justified. The Court dampened its statement by saying that the domestic rule went beyond what was necessary to attain the objective pursued, considering the fact that the non-resident subsidiary had exhausted all possibilities in its Member State of residence to deduct or carry forward its losses by itself or by a third party.

D., (ed.), *The influence of European Law on Direct taxation*, Kluwer Law International, 2007, p. 17; see also in this context the papers of the Workshop on "*EC Law and Tax Treaties*" organized by the EU Commission in Brussels on 5 July 2005, available on the DG TAXUD website (see fn 17).

[467] These terms must be construed here in a broad sense, independently of the technique applied for consolidation.

[468] Hinnekens, L., "AMID: the wrong bridge or a bridge too far? An analysis of a recent decision of the European Court of Justice", *Eur. Tax.*, 2001, p. 206.

[469] Due to exemption granted by DTCs.

[470] Richelle, I., *Notion et traitement des soldes déficitaires. Aspects nationaux et internationaux*, Doctoral dissertation, Free University of Brussels, 1998, chapters 3 and 12.

[471] Pending case C- 414/06, *Lidl Belgium.*

196. As a consequence, the State allowing consolidation has to take into account losses of foreign subsidiaries **only if and when all possibilities of carry-over have been exhausted abroad**. Thus, domestic and international groups are not in the same economic position as the first ones have an immediate "cash advantage" not available to the others. Similarly, structuring foreign investment through permanent establishments rather than subsidiaries allows an immediate loss offset and thus an immediate benefit of the "cash advantage"; branches and subsidiaries are no longer treated in the same way[472]. The case-law also leads to paradoxical situations: the loss treatment in the State of consolidation will be closely linked to the loss compensation rules in the State of the subsidiary: the narrower the latter, the broader the former will have to be[473]. This might lead Member States to limit their possibilities for loss carry-over[474] which would hamper economic efficiency[475].

197. The consolidation perimeter is also a fundamental question to be considered. ***ICI*** (no. 90) prohibits to subject domestic group relief to the condition that the group does not hold shareholdings in foreign, be it EU, subsidiaries. In ***Marks and Spencer*** (no. 91) the Court considered sub-subsidiaries of the UK parent company. In ***Oy AA*** (no. 66), the Court upheld a domestic rule refusing a domestic subsidiary to deduct a contribution to its distressed parent in another Member State. Cases are being referred to the Court concerning the availability of consolidation to sister subsidiaries in one Member State when the parent company is located in another Member State. Questions referred to the Court are growing in complexity.

198. In the prospective of achieving the Internal market for multinational companies, **EU-wide consolidation is at the moment the most urgent issue to be considered**. This finding can be supported by the fact that several cross-border problems recently faced by the Court in its case-law, i.e. cross-border compensation of losses, transfer pricing issues, treatment of cross-border participation costs and exit taxes on transfers between associated companies, could be solved by the adoption of a consolidation mechanism at the EU-level. It is thus not surprising that the harmonization project launched by the Commission as to corporate taxation not only refers to a common tax base, but to a consolidated one.

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472 It must be noted that the ECJ did not examine as such that comparison which however had been suggested to it.

473 Thus, if the State of the subsidiary provides for an unlimited carry-over of losses, the State of consolidation will hide behind the argument that "all possibilities have not been exhausted" as long as the subsidiary exists; on the contrary, if no carry-over is provided for by the State of the subsidiary, the other State will have to grant immediate relief.

474 Carry-over in time, in case of restructuring or change of control.

475 As it would increase the risk for enterprises in loss situation to face excessive tax burden (which can, in some cases amount to their total taxable income).

IV. LIMITS TO THE CASE-LAW METHOD AND NEED FOR LEGISLATIVE INITIATIVES: FINDINGS AND PROPOSALS

199. Any conclusions drawn on the influence of an ongoing process like the case-law of the Court on the direct tax systems of the Member States are necessarily incomplete and provisional. They can indeed only be based on the shifting sands of the judicial process, which resists any attempt to transform a shed of individual decisions into one or more general rules applicable to an indefinite number of situations.

200. However, it may be said that the –quite remarkable- development of the case-law of the Court in direct tax matters is a consequence of the –very original- Community framework as to the division of powers between Community institutions and Member States in this area. From an economic point of view, (direct) taxation is undoubtedly an essential tool to be used in order to achieve the political objective of the Internal market (Article 3 EC). From a legal perspective, it must be acknowledged that the Treaty –and this reflects the opinion of at least some of the Members States- does not explicitly organise the legislative EC competence for attaining the level of harmonization, approximation or coordination in direct taxation that would be required in order to remove the existing tax obstacles to intra-Community trade and industry.

201. The Court's case-law thus originates in the incapability or unwillingness of the national direct tax systems to provide for adequate recognition of cross-border situations, i.e. to consider for tax purposes that extraneity cannot be regarded as a discriminating factor as such. As we have seen, the case-law of the Court has dealt with all sorts of situations. This is probably due to the most interesting feature of EC individual rights and freedoms, i.e. their **open-endedness**. There is indeed no restricting measure that cannot be caught by the EC fundamental freedoms. As to the judicial protection of European citizens and businesses, this is undoubtedly an improvement.

202. Nevertheless, the coin has another side which is uncertainty about the exact scope of application of those freedoms and **unpredictability** concerning the outcome of cases pending before the Court. Moreover, the Court always decides on the basis of an individual situation: the judgement depends thus on the facts that are presented before it and the only way to be sure that a similar but not identical situation will warrant the same decision is often to submit another question to the Court. For instance, one may see the limits of the case-law method when, on a technical distinction, similar CFC rules are condemned in ***Cadbury Schweppes*** (no. 73) and upheld in ***Columbus Container*** (no. 74).

203. In defence of the Court, it is always difficult to decide a case where no sufficiently precise (EC secondary) legislation has been enacted, and where the (Member States') applicable legislation often pursues other objectives than the removal of the obstacles to the establishment of the Internal market, or – even worse- the applicable legislation should have the goal of remove such obstacle, like the DTCs, but merely organize the allocation of powers of taxation between two States, without regard to the situation of double taxation in the hands of the taxpayer[476].

[476] See for example the taxation of cross-border dividends under the DTC between France and Belgium.

204. However, there is no convincing argument to level a fundamental criticism of the Court's attitude and to interpret the Treaty as denying the right for European taxpayers to seek remedy under the EC freedoms. The failed attempt by some Member States to limit the Court jurisdiction in direct tax matters is eloquent evidence that that interpretation cannot be followed[477].

205. It is also symptomatic that criticism on the Court has been going in both directions; some reproaching the Court not to sufficiently take into consideration the interests of the Member States, e.g. by further acknowledging the principles of territoriality of the tax systems or of fiscal cohesion, but others regretting the Court to be too reluctant to promote full implementation of the idea of Internal market in tax matters, e.g. by condemning double taxation or applying the most-favoured nation's principle to Member States' DTCs[478].

206. In this context, it is not surprising that implementation of the Court's rulings varies amongst Member States, even at the level of domestic jurisdictions. Basically, facing a discriminatory situation, the domestic judge will grant the favourable treatment to the discriminated party, whilst the legislator has a broader choice. For example, after Marks & Spencer, recognizing the right for a consolidation of the trans-national losses within an EU group in certain circumstances, Member States have the choice to extend their consolidation regime to non-resident subsidiaries established on the EU territory or to do away with consolidation altogether. In this choice, of course, **revenue consequences** can be of paramount importance[479].

207. This difference in the implementation of the Court's case-law among the Member States is not coherent with the idea underlying the role of the Court of Justice, which is to provide a **uniform interpretation and application** of EC law in all the Member States, as Article 10 EC requires. At this point, a comparison with the situation as to VAT, on the one hand, and social security, on the other hand, as to the role of the EC freedoms can be enlightening.

208. In **VAT matters,** the existence of a rather extensive and detailed set of harmonized rules in secondary legislation entails that the role of the economic freedoms contained in the EC Treaty (in this case the free movement of goods of articles 25 EC and 90 EC) is limited, although not irrelevant. These freedoms guide the interpretation of the provisions of the Directives. Moreover, they can potentially apply in case of loopholes in secondary legislation[480] or to national indirect taxes that are not (yet) harmonized, like taxes on vehicles[481]. The issue of the cases involving VAT is thus generally more predictable than in direct tax matters.

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477 See the Memorandum presented by United Kingdom and Germany during the Intergovernmental Conference preceding the adoption of the Treaty of Amsterdam (1997).

478 Cf. e.g. Avery Jones, J.F., "A comment on 'AMID: The wrong bridge or a bridge too far?", *Eur. Tax.*, 2001, p. 251; Wattel, P.J., "Corporate tax jurisdiction in the EU with respect to branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality", *EC Tax Rev.*, 2003, p. 194, Van Thiel, S., 'Why the ECJ should interpret directly applicable European law as a right to intra-community most-favoured-nation treatment and a prohibition of double taxation,' in Weber, D.(ed) (2007), p. 118 and Vanistendael, F., "The ECJ at the crossroads: balancing tax sovereignty against the imperatives of the single market", *Eur. Tax.*, 2006, p. 413.

479 Thömmes, O., 'Effect of ECJ decisions on budgets of EU Member States: EC law without mercy?', *Intertax*, 2005, p. 560.

480 ECJ, 5 May 1982, Case 15/81, *Staatssecretaris van Financiën v Gaston Schul Douane-Expediteur BV*, *ECR* 1409; 21 May 1985. Case 47/84, *Gaston Schul*, *ECR* 1491 ; 6 July 1988, Case 127/86, *Ministère public and Ministre des Finances du royaume de Belgique v Yves Ledoux, ECR* 3741.

481 See e.g. ECR, 15 July 2004, Case C-365/02, *Marie Lindfors*, *ECR* I- 7183; *Weigel* (fn 81).

Notable exceptions where the role of the Court has been more creative deserve to be mentioned like the judgements on the compatibility of national taxes with the prohibition of turnover taxes having the same characteristics as the VAT[482], and in a minor measure, on the compatibility of national anti-abuse provisions. In this latter case, it is thus not surprising that the same standards are applied by the Court both in direct and indirect taxation[483].

209. However, the path towards greater harmonization in direct taxation seems difficult and slow. The true obstacles are much more political than technical, juridical or economical. Nevertheless, the diversity of Member States tax systems, combined with the application of the EC freedoms by the Court, often lead to damaging consequences for the taxing powers of the Member States themselves, not to mention for the taxpayers.

210. Also **social security** could inspire the European legislator as to direct taxation, especially as to issues where both areas almost collide, and synchronization (i.e. the horizontal harmonization between two different areas of law) is urgently needed, like the treatment of frontier workers or of cross-border pensions[484]. Nevertheless, the essential differences between social security and direct taxation make the hypothesis of a comprehensive EC regulation concerning the allocation of direct taxing powers between Members States very unlikely. In particular, the fact that powers as to social security are allocated by virtue of the **coordination** made by Reg. 1408/71 and soon by Reg. 883/2004, to one State exclusively greatly differs from the scope of the allocation of taxing powers, that is almost always shared between two or more States in cross-border situations[485]. One reason could be that for the Member States affiliation to social security entails both revenues (contributions) and burdens (benefits), while subjection to tax only consists in revenues. However, using different connecting factors may create deep injustice, since there unquestionably exists a certain “vases communicants” effect: higher tax rates coincide with lower social security contribution rates and conversely. Moreover, EC regulation on social security only concerns physical persons, i.e. employed or self-employed workers and their family, while an hypothetical comprehensive EC direct tax regulation replacing the existing DTCs between Member States would also have to include legal persons into its scope of application.

211. The area of direct taxation, and in particular corporate taxation, is thus an area torn between non-intervention, coordination and harmonization.

212. **Non-intervention** is certainly the solution that leaves the most room to the Court. Again, it must be emphasized that it is not a room that the Court has itself created. In this prospective, the phrases “negative harmonization” or “negative integration” can be misleading, because harmonization implies that the “harmonizators” consciously decide to adopt and implement common rules in order to attain a common objective whilst there is no real integration between the national tax systems as a result of the EC judgements, since these systems continue to co-exist without looking alike.

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[482] Cf. *Banca Popolare di Cremona (*fn 42*)*.

[483] Cf. ECJ, 21 February 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, ECR* I-1609 *(VAT);* 21 February 2006, Case C-419/02, *BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise*, *ECR* I-1685 (VAT); *Cadbury Schweppes* (fn 224); *Test Claimants in the Thin Cap Group Litigation* (fn 45).

[484] Branganca, S., “Some notes on social security pensions and tax evasion in Portugal”, *Intertax*, 2006/3, p. 167.

[485] Traversa, E., « National Report : Belgium », in Lang, M. (ed.), *Social Security Conventions and Tax conventions,* Vienna, Linde Verlag, 2006, p. 164.

213. **Coordination** aims at allocating the power to tax between the Member States without interfering with their power to decide if and how the income allocated to them is to be taxed. Secondary legislation in this prospective would have the same objective as double taxation conventions between Member States, as it can be seen from the application of the existing Directives in direct tax matters (No. 22). As the Commission has shown in recent communications, better coordination could improve both the Member States' and the taxpayers' situations in critical areas, like cross border compensation of losses or exit taxes. Coordination can be achieved either by coordinated unilateral or bilateral (DTCs) measures taken by Member States, by multilateral instruments of international law (multilateral tax convention) or by secondary legislation based on article 94 EC[486]. Several authors have proposed -and even drafted- a multilateral EC convention, but such proposals have never received much attention from the Member States[487]. However, an instrument of secondary legislation would better fit into the institutional framework of the Internal market.

214. Finally, **harmonization** aims at adopting common principles or general rules at the European level and leaves the Member States the task to implement them in their national systems, in order to reach a certain level of uniformity and to remove the obstacles due to the disparity between the Member States' legislations.

215. The theoretical distinction between harmonization and coordination is not always simple to draw in practice. Concerning for example the Parent Subsidiary Directive, it could be said that the Directive is an instrument of coordination since it allocates the power to tax to the State of the Subsidiary, who is then free to tax it according to it own national rules. However, from the Parent company' State perspective, the Directive can be regarded as an harmonization tool because, by forcing exemption of a part of the corporate income, i.e. the income derived from subsidiaries located in other Member States, the Directive leads to the indirect result – by application of constitutional constraints and for reasons of economic policy – of exempting most of the intra-group flows of dividends, whether internal or cross-border.

216. The announced proposal on a **Common consolidated corporate tax base** clearly belongs to the harmonization instruments. Such a piece of legislation would certainly enhance European integration and limit the "creative" power of the ECJ. It would make the outcome of its judgements more predictable, and as the Commission already pointed out in 2004, "[a]t the same time, it would in many areas effectively reduce the risk that Member States' tax laws are declared to be unlawful restrictions to the fundamental freedoms of the Treaty by the European Court of Justice"[488]. Of course, it has to be borne in mind that the CCCTB, if adopted on an optional basis, would apply only –at least in a first phase- to a limited number of companies.

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[486] See the Commission framework Communication on coordination, COM (2006) 823. The abrogation of article 293 EC by the Treaty of Lisbon seems to put an end to the possibility of the intermediary solution between EC and international law chosen for the Arbitration Convention 90/436/EC i,e, a multilateral instrument based on the EC Treaty but adopted by the Member states in the form of an international convention.

[487] Pistone, P., "An EU Model Tax Convention", *EC Tax Rev.*, 2002, p. 129 ; Pistone, P, *The impact of Community Law on Tax Treaties : issues and solutions*, Kluwer Law International, 2002, p. 235seq.; Lang, M. and Schuch, J., "Europe on its way to a multilateral tax treaty", *EC Tax Rev.*, 2000, p. 39 ; Lang, M. (ed.), *Multilateral Tax Treaties*, Kluwer Law International, 1998.

[488] Commission Non-Paper to informal Ecofin Council, 10 and 11 September 2004, "A common consolidated corporate tax base", 7 July 2004, p. 1.

Even if all Member States would agree to join the project, it seems that the CCCTB would remain optional, which means that national systems would continue to govern the taxation of the companies that did not opt for the CCCTB regime[489]. Moreover, as the failure of an early attempt to introduce a common imputation system of corporation taxes in the EC[490] has shown, harmonization of corporate tax systems cannot be achieved without some kind of compensation mechanism in order to avoid improper shifting of tax revenues between Members States.

217. If harmonization of the corporate income taxes of the Member States falls into the scope of the Internal market, full harmonization of the national direct tax systems of the Member States (including thus personal income taxes) is neither practicable, nor necessary. **Personal income taxes** reflect indeed too many other policy objectives to be only seen as mere hindrances to the economic freedoms; their social, political and even environmental dimensions are also to be taken into due consideration.

218. Nevertheless, unjustified obstacles to the free movement of individuals could be removed without jeopardizing national policies in the fields of housing, education, protection of the family and the youth, environment, etc. An intermediate solution could be to separate the issues at stake and to harmonize the taxation of companies (CCCTB) and to coordinate, i.e. allocate the taxing powers in respect of, the taxation of income from work (and assimilated, like pensions) according to the same criteria as the ones used in social security, both instruments being under the Court's jurisdiction. Intra-EU DTC would see their scope reduced to non-harmonized and non-coordinated categories of income (mostly income of physical persons from immovable property and from investment), where the Court would directly apply the EC Treaty freedoms.

219. Moreover, coordination or harmonization of direct tax provisions would also prevent Member States from unpleasant surprises as to revenue consequences of Court decisions. In various direct tax cases the question of limiting the judgements' effects in time was subject to lively discussions by the AGs[491] and academics[492], since a retroactive effect of the decisions would have had severe economic repercussions in the Member State concerned. However, the Court seems to be careful in limiting time effects[493].

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[489] However, considering the experience of the Parent-Subsidiary Directive, we think that the CCCTB will have a strong influence also on the domestic tax provisions of the Member States and that this will lead to a more thorough harmonization of the national corporate tax systems.

[490] Proposal for a Council Directive concerning the harmonization of systems of company taxation and of withholding taxes on dividends, COM (75) 392, *OJ* C 253, 5.11.1975, p. 2, withdrawn 23.4.1990.

[491] See Opinion of AG Geelhoed delivered on 6 April 2006 in Case C-446/04 *Test Claimants in the FII Group Litigation*, *ECR* I-11753, paras. 140-146; Opinions of AG Tizzano delivered on 10 November 2005 (paras. 31-63) and of AG Stix-Hackl delivered on 5 October 2006 (paras. 10-67), both in Case C-292/04 *Meilicke* (fn 354). Furthermore, the conclusions of the two AGs in the IRAP case concerning indirect taxation are relevant for the economic consequences of ECJ decisions. See Opinions of AG Jacobs delivered on 17 March 2005, paras. 130-186, and of AG Stix-Hackl delivered on 14 March 2006, both in Case C-475/03 *Banca Popolare di Cremona* (fn 42).

[492] Lang, M. 'Limitation of the Temporal Effects of Judgments of the ECJ' in Weber D., *The Influence of European Law on direct Taxation*, p. 157. Wathelet M., 'Fiscalité directe et limitation dans le temps des effets des arrêts de la Cour de Justice des Communautés européennes', in *Liber Amicorum Jacques Malherbe*, Brussels, Bruylant, 2006, p. 1143.

[493] The Court did so in a number of preliminary rulings regarding indirect taxation, e.g. *Defrenne II* or *EKW*, cases involving very large amounts of money. With regard to direct tax matters, for the time being the Court restrained from limiting time effects. See *Test Claimants in the FII Group Litigation*, paras. 221-225; *Meilicke*, paras. 32-37. In *Banca Popolare di Cremona* the Court decided that the tax in question was not contrary to the Directive so that it did not had to examine the question of time limits anymore.

220. Before the ***Meilicke*** (no. 114) decision for example, the German legislator was perfectly aware of the fact that the German imputation system was contrary to EC law as interpreted by the Court in ***Manninen*** (no. 115). Thus, it amended the time limits for potential refund claims. For the rest, Germany did not take proactive steps to amend its legislation but awaited the *Meilicke* decision and requested that the Court's decision have either effect for the future or have effect for fiscal years after the year ***Verkooijen*** was decided[494]. In fact, allowing Member States to continue to apply non-EC compatible legislation until a decision against their own national law was handed down creates an incentive for noncompliant behaviour. Severe economic consequences might represent the most effective motivation for Member States to render their tax provisions compatible with EC law.

221. In conclusion, the development of the Court's case-law in direct tax matters is **neither surprising, nor contrary to the objectives of the European process** and to the balance of powers between European community and Member States .However, the case-law method has various limitations: it is slow, and years can lapse before a case reaches the Court and further years before a judgement finds its way into domestic legislation, years during which the Internal market suffers; it is expensive and leaves it to the taxpayer to fund the shaping of the law; it may even be said to be pervert, since it expects the taxpayers and not the Member States to promote the Community interest. But the main problem is that in the existing framework, it is inadequate: the Court only condemns discrimination and has explicitly declined to condemn double taxation, so that the case-law method would only be adequate if absence of discrimination in tax matters would suffice to remove obstacles to the Internal market, let alone to establish justice and efficiency in cross-border taxation throughout Europe.

222. This raises the question whether a **more comprehensive scheme**, such as harmonization of corporate taxation or any other EC instrument on the elimination of double taxation, would not effectively serve not only Community objectives, but also Member States' interests[495]. Member States, not to mention the taxpayers, are indeed not always able to predict with a sufficient degree of certainty which will be the outcome of the cases that concern them. Considering the financial consequences which breaches of EC law can entail for the Member States, including the reimbursement of undue taxes, harmonization may be preferred even for myopic reasons, even though the superior reasons remain that in the Internal market it is both unjust and inefficient to overtax cross-border situations.

[494] See Thömmes (2005), p. 560.

[495] The more radical solution to avoid any problems of EC compatibility of national corporate taxes would be their abolition, by taxing "corporate" income at the level of the shareholder. This was partially realized by the imputation system, which several Member States, like Germany and Finland, applied domestically but refused to extend to foreign corporation taxes (see *Meilicke* and *Manninen*). See Cerioni, L., "A hypothesis for radical tax reform in the European Union – The implication of the abolition of corporate income taxes", *Eur. Tax.*, 2007, p. 377.

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Communication, *Towards an Internal Market without tax obstacles. A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities,* COM (2001) 582.

Staff Working Paper, *Company taxation in the Internal Market*, (+ annex), SEC (2001) 1681.

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Parliament

Resolution of 24 October 2007 on the contribution of taxation and customs policies to the Lisbon Strategy, Report of 15 October 2007, Committee on Economic and Monetary Affairs (rapporteur: Sahra Wagenknecht), Document A6-0391/2007 (2007/2097(INI)

Resolution of 29 March 2007 on the future of the European Union's own resources Document A6-0066/ 2007 (2006/2205/INI), *Report on the future of European communities own resources*, Committee of Budgets, 13 March 2007, DOC A6-0066/2007 (rapporteur: A. Lamassoure) and

Report on the proposal for a council decision on the system of European communities own resources, Committee of Budgets, 23 July 2006, DOC A6-0223/2006 (rapporteur: A. Lamassoure).

Resolution of 13 December 2005 on Tax Treatment of Losses in Cross-Border Situations, Report of 30 November 2007, Committee on Economic and Monetary Affairs (rapporteur: Piia-Noora Kauppi), Document A6-0481/ 2007 (2007/2144/INI)

Resolution of 13 December 2005 on taxation of undertakings in the European Union: a common consolidated corporate tax base, Report of 1 December 2005, Committee on Economic and Monetary Affairs (rapporteur: Pier Luigi Bersani), Document A6-0386/ 2005 (2005/2120/INI).

ANNEXES

1. Glossary
2. Alphabetical table of cases
3. Chronological table of cases
4. Systematic overview of the Court's case law in direct taxation

1. GLOSSARY[496]

Capital export neutrality: Public concept describing the situation where investors are subject to the same level of taxes on capital or income regardless of the country in which income is earned. This principle is often illustrated by the credit method of relieving international double taxation.

Capital import neutrality: Public concept describing the situation where investors are subject to the same level of taxes on capital income regardless of whether they are made by a domestic of foreign investor. This principle is often illustrated by the exemption method of relieving international double taxation.

Direct tax (as opposed to indirect taxes): A tax, such as an income or property tax, levied directly on the taxpayer. Direct taxes are generally imposed on income, capital gains capital and net worth.

Double taxation (juridical double taxation, economic double taxation, international double taxation): Double taxation is traditionally divided into two kinds:

a. ***Juridical double taxation***: it may be defined as the imposition of income taxes in two (or more) States on the same taxpayer in respect of the same taxable income or capital.

b. ***Economic double taxation***: refers to situations where a same element of income is taxed in the hands of two or more different taxpayers. This is especially the case for dividends which are taxed initially at the level of the paying company and subsequently at the shareholder level.

c. ***International double taxation***: refers to situations where taxes are imposed by two or several different States on the same or different taxpayers. International double taxation occurs, for example, when an individual resident in one State accrues income from its employment in another State: this income is taxable in both the State of residence and the State of source. International double taxation also occurs as regards dividends when the paying company and the shareholders are located in different States.

Double taxation conventions: agreements concluded under public international law to eliminate double taxation between Contracting States. They are in most cases bilateral but may also be multilateral involving more than two countries. Tax treaty rules are mainly "rules of limitation of law" whereby Contracting States accept to limit the content of their domestic tax law either by excluding application of provisions of their tax law or by obliging one or both States to grant a tax credit against their domestic law for taxes paid in the other State. Tax treaties mainly contain general provisions (definitions of concept, scope of application), so-called "distributive rules" allocating tax jurisdiction amongst Contracting States, completed by a provision on the methods for elimination of double taxation, and special provisions with regard to non-discrimination, mutual agreement procedure, exchange of information and administrative assistance, entry into force and termination of the agreement.

Exemption method (see also imputation): Method aiming at avoiding, unilaterally or under tax treaties, double taxation by excluding the foreign income from the tax basis in the State of residence. The exemption method puts investors from different countries in equal competitive conditions in the State of source.

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[496] Most of the definitions given are inspired from Larking, B. (ed.), *International Tax Glossary*, IBFD Publications, 4th ed., 2001.

Fiscal sovereignty: The fiscal sovereignty is the right for a State to exercise to the exclusion of any other State the tax functions of a State, including both a right to legislate so as to tax according to defined connecting factors and a right to enforce taxation. The right of enforcement is as a rule limited to the State territory. Usually, as regards the right to legislate in the field of income tax, connecting factors are the taxpayer residence or (more rarely) nationality. It is of international tax practice that the State of residence is allowed to tax the worldwide income of its residents (but it is not obliged to do so) while the jurisdiction to tax on non-residents is limited to income having their source within the territory.

Imputation system or credit method (see also exemption): Method aiming at preventing or partly eliminating double taxation in the State of residence through the grant of credit for taxes paid in the source State. Under a "full tax credit", imputation on the tax in the State of residence is granted up to the full amount of tax paid in the State of source, with a possibility of refund or carry-over of the excess amount on the tax to be paid in the State of residence. Usually, the States' practice limits the imputation of the foreign tax to the amount of tax in the State of residence relative to the foreign income ("ordinary credit").

Inbound dividend (as opposed to outbound dividend): Dividends received by a shareholder A resident in a country A from a paying company B in the country B, considered for taxation from the viewpoint of the State of residence.

Losses: Although each country has its single definition, the term may broadly be defined as the excess of expenses (as broadly understood) over revenues for a period, or the excess of the cost of assets over the proceeds, if any, when the assets are sold or otherwise disposed of, or abandoned or destroyed.

Outbound dividend: Dividends paid by a company B in a Member State B to a foreign shareholder A in country A considered for taxation from the point of view of the State of source B.

Permanent establishment: This term is generally used to refer to a fixed place of business in a particular country through which the business of an enterprise is wholly or partly carried on and which is of a sufficient level to justify that country's taxation.

State of residence: the State wherein the taxpayer has the strongest connection justifying taxation on his worldwide income or domestic-source income, and wherein its ability to pay has to be taken into consideration.

State of source: the State where a particular item of income is deemed to originate.

Subsidiary company: A company that is directly controlled by another company (the parent company). A foreign subsidiary of a company is a company resident outside the country of residence of the parent company.

Residence principle of taxation (as connecting factor; opposed to nationality): International principle according to which residents of a country are subject to tax on their worldwide income or domestic-source income. Indeed, contrary to the State of source which is prohibited to tax foreign income, the State of residence is allowed to tax either the worldwide income or the domestic-source income. Personal and family circumstances have to be taken into account in the State of residence applying worldwide taxation (ability to pay principle).

Shareholder: the owner of the shares of a company. Shareholders can be individuals or legal persons.

Tax avoidance: It implies that a taxpayer has arranged his affairs in such a way that his tax burden is less than it would otherwise have been, or that no tax is payable because of such arrangement. It refers to the reduction of tax liability by legal means. It has to be distinguished from tax evasion and tax fraud.

The scope of this term may vary from country to country, depending on attitudes of government, courts and public opinion.

Tax evasion: Illegally and intentional behaviour in order to escape payment of tax. Criminal penalties often accompany tax evasion.

Tax fraud: An intentional wrongdoing on the part of a taxpayer, with the specific purpose of evading a tax known or believed to be owing. Being a form of deliberate evasion of tax, legal sanctions may include civil or criminal penalties.

Taxable income (gross income – net income; accrual basis – cash basis): The elements of income which are deemed taxable. Valuation of these elements gives the “tax basis” on which the tax is calculated. The tax basis is usually represented by the “net income” composed of the “gross income” reduced by deductible costs and expenses.

The **accrual basis accounting:** is the most commonly used accounting method, which reports income when earned and expenses when incurred, as opposed to cash basis **accounting**, which reports income when received and expenses when paid.

Territorial taxation (see also worldwide taxation): Principle according to which tax is levied by one State only on income deemed to originate in its territory. It is of international tax practice that the jurisdiction to tax on non-residents is limited to territorial income while it can be extended to worldwide income as regards residents.

Territorial taxation also refers to the rule according to which enforcement of tax law is limited to the territory of the taxing country.

Worldwide taxation (see also territorial taxation): Principle according to which tax is levied by including income from all sources, i.e. irrespective of their geographical origin. Most countries tax worldwide income of residents.

2. ALPHABETICAL TABLE OF THE JUDGMENTS

Date	Case number	**Parties**	European Court Report	Paragraph number
18.12.2007	C-101/05	**A (S)**		118
10.05.2007	C-102/05	**A and B (S)**	ECR I-3871	117
14.12.2000	C-141/99	**AMID (B)**	ECR I-11619	68, **84**, 86, 187
08.11.2007	C-379/05	**Amurta (NL)**		**103**, 161, 174
15.01.2002	C-43/00	**Andersen & Jensen (DK)**	ECR I-379	22
27.06.1996	C-107/94	**Asscher (NL)**	ECR I-3089	34 (fn. 86 and 87)
04.10.2001	C-294/99	**Athinaiki (EL)**	ECR I-6797	22, **160**
13.04.2000	C-251/98	**Baars (NL)**	ECR I-2787	**122**, 176
28.01.1992	C-204/90	**Bachmann (B)**	ECR I-249	42
03.10.2006	C-475/03	**Banca Popolare di Cremona** (I) – IRAP	ECR I-9373	20 (fn. 43)
08.07.1999	C-254/97	**Baxter (F)**	ECR I-4811	63
22.06.2006	C-182/03 and C-217/03	**Belgium v Commission**	ECR I-5479	17 (fn. 29)
08.05.1990	175/88	**Biehl l (L)**	ECR I-1779	32
08.09.2005	C-512/03	**Blanckaert (NL)**	ECR I-7685	38
18.09.2003	C-168/01	**Bosal Holding (NL)**	ECR I-9401	72, 96, **124**
19.01.2006	C-265/04	**Bouanich (S)**	ECR I-923	128
12.9.2006	C-196/04	**Cadbury Schweppes (UK)**	ECR I-7995	73, 145, 202
15.02.2007	C-345/04	**Centro Equestre** da Lezíria Grande **(D)**	ECR I-1425	78
23.02.2006	C-253/03	**CLT-UFA (D)**	ECR p. I-1831	58
06.12.2007	C-298/05	**Columbus Container Services (D)**		**74**, 145, 202
13.07.1993	C-330/91	**Commerzbank (UK)**	ECR I-4017	60
28.01.1992	C-300/90	**Commission v Belgium**	ECR I-305	42 (fn. 136 and 138)
09.11.2006	C-433/04	**Commission v Belgium**		79
05.07.2007	C-522/04	**Commission v Belgium**		44 (fn. 150)
22.06.2006	C-399/03	**Commission v Council**	ECR I-05629	17 (fn. 29)
30.01.2007	C-150/04	**Commission** v **Denmark** (supported by **Sweden**)	ECR I-1163	42 (fn. 139)
04.03.2004	C-334/02	**Commission v France**	ECR I-2229	51
28.01.1986	270/83	**Commission v France “avoir fiscal”**	ECR 273	53, **57**, 109
11.09.2007	C-318/05	**Commission v Germany**		52
26.10.1995	C-151/94	**Commission v Luxembourg-Biehl II**	ECR I-3699	32

26.10.2006	C-345/05	**Commission v Portugal**	ECR I-10633	47
09.12.2004	C-219/03	**Commission v Spain**	not published in ECR	126
18.01.2007	C-104/06	**Commission** v **Sweden**	ECR I-671	47
06.07.2006	C-346/04	**Conijn (D)**	ECR I-6137	39
05.07.2005	C-376/03	**D. (NL)**	ECR I- 5821	49, **165**
27.09.1988	81/87	**Daily Mail (UK)**	ECR 5505	67
03.10.2002	C-136/00	**Danner (FIN)**	ECR I-8147	42, 80
08.06.2004	C-268/03	**De Baeck (B)**	ECR I-5961	126
12.12.2002	C-385/00	**de Groot (NL)**	ECR I-11819	38
11.03.2004	C-9/02	**de Lasteyrie du Saillant (F)**	ECR I-2409	129
14.12.2006	C-170/05	**Denkavit Internationaal (F)**	ECR I-11949	**102**, 103, 161, 174
11.07.2002	C-224/98	**D'Hoop (B)**	ECR I-6191	31 (fn. 75)
11.10.2007	C-451/05	**Elisa (F)**		163
08.06.2000	C-375/98	**EPSON Europe BV (P)**	ECR I-4245	22
26.10.1999	C-294/97	**Eurowings (D)**	ECR I- 7449	81
03.10.2006	C-452/04	**Fidium Finanz (D)**	ECR I- 9521	147
14.09.1999	C-391/97	**Frans Gschwind (D)**	ECR I-5453	36
15.05.1997	C-250/95	**Futura Participations and Singer (L)**	ECR I-2471	61, **87**
12.06.2003	C-234/01	**Gerritse (D)**	ECR I-5933	38, **39**
25.10.2007	C-464/05	**Geurts** and **Vogten (B)**		123, **152**
12.05.1998	C-336/96	**Gilly (F)**	ECR I-2823	11 (fn. 12)
18.12.2007	C-436/06	**Grønfeldt (D)**		127
12.04.1994	C-1/93	**Halliburton (NL)**	ECR I-1137	54
24.05.2007	C-157/05	**Holböck (A)**		**116**, 137, 191
11.10.2007	C-443/06	**Hollmann (P)**		48
16.07.1998	C-264/96	**ICI (UK)**	ECR I-471	70, **90**, 92
19.03.2002	C-393/99 and C-394/99	**INASTI**	ECR I-2829	33 (fn. 82)
17.01.2008	C-256/06	**Jäger**		49
28.04.1998	C-118/96	**Jessica Safir (S)**	ECR I-1897	**42**, 80
18.12.2007	C-281/06	**Jundt (D**		52
23.02.2006	C-471/04	**Keller Holding (D)**	ECR I-2107	72, **125**
14.11.2006	C-513/04	**Kerckhaert-Morres (B)**	ECR I-10967	115, **177**
10.03.2005	C-39/04	**Laboratoires Fournier (F)**	ECR I-2057	81
18.07.2007	C-182/06	**Lakebrink** v **Luxemburg**		46
12.12.2002	C-324/00	**Lankhorst-Hohorst (D)**	ECR I-11779	65, **95**
10.05.2007	C-492/04	**Lasertec (D)**	ECR I-3775	**97**, 147

15.07.2004	C-315/02	**Lenz (A)**	ECR I-7063	**112**, 115, 176
17.07.1997	C-28/95	**Leur-Bloem (NL)**	ECR I-4161	22
13.11.2003	C-42/02	**Lindman (FIN)**	ECR I-13519	**51**, 80
07.09.2004	C-319/02	**Manninen (FIN)**	ECR I-7477	**113**, **115**, 175, 185, 220
13.12.2005	C-446/03	**Marks and Spencer (UK)**	ECR I- 10837	70, **91**, 92, 187
06.03.2007	C-292/04	**Meilicke (D)**	ECR I-1835	**114**, 175, 220
25.01.2007	C-329/05	**Meindl (D)**	ECR I-1107	**36**, 44
16.09.2004	C-400/02	**Merida**	ECR I-8471	44
12.09.2002	C-431/01	**Mertens (B)**	ECR I-7073	85
08.03.2001	C-397/98 and C-410/98	**Metallgesellschaft/Hoechst (UK)**	ECR I-1727	64, **106**
07.09.2006	C-470/04	**N. (NL)**	ECR I-7409	130
25.09.2003	C-58/01	**Océ Van der Grinten (UK)**	ECR I- 9809	22, 160
18.07.2007	C-231/05	**Oy AA**		**66**, 92, 146, 197
06.09.2006	C-88/03	**Portugal (**supported by **Spain)** v **Commission**	ECR I-7115	47
29.04.2004	C-224/02	**Pusa (FIN)**	ECR I-5763	43
29.03.2007	C-347/04	**Rewe Zentralfinanz (D)**	ECR I-2647	70, **93**
21.02.2006	C-152/03	**Ritter-Coulais (D)**	ECR I-1711	46
29.04.1999	C-311/97	**Royal Bank of Scotland (EL)**	ECR I-2651	**58**, 133
21.09.1999	C-307/97	**Saint-Gobain (D)**	ECR I-6163	**59**, **110**, 155, 168, 190
12.07.2005	C-403/03	**Schempp (D)**	ECR I-6421	33
13.11.2003	C-209/01	**Schilling (D)**	ECR I-13389	32 (fn. 76)
14.02.1995	C-279/93	**Schumacker (D)**	ECR I-225	**35**, 188
11.09.2007	C-76/05	**Schwarz (D)**		**52**, 80
03.10.2006	C-290/04	**Scorpio (D)**	ECR I-9461	39, **77**, 78
26.06.2003	C-422/01	**Skandia and Ramstedt (S)**	ECR I-6817	**42**, 80
06.11.2007	C-415/06	**Stahlwerk Ergste Westig (D)**		86
14.09.2006	C-386/04	**Stauffer (D)**	ECR I-8203	45 (fn. 153)
14.11.1995	C-484/93	**Svensson & Gustavsson (L)**	ECR I-3955	51 (fn. 175)
22.03.2007	C-383/05	**Talotta** v Belgium	ECR I-2555	34
26.01.1999	C-18/95	**Terhoeve (NL)**	ECR I-345	32 (fn. 80)
12.12.2006	C-374/04	Test Claimants in Class IV of the **ACT Group Litigation (UK)**	ECR I-11673	**107**, 161, 174
12.12.2006	C-446/04	Test Claimants in the **Franked Investment Income (FII) Group Litigation (UK)**	ECR I-11753	64, **119,** 176
13.03.2007	C-524/04	Test Claimants in the **Thin Cap Group Litigation (UK)**	ECR I-2107	65, **96**, 145
11.12.2003	C-364/01	**The Heirs of H. Barbier (NL)**	ECR I-15013	49

09.11.2006	C-520/04	**Turpeinen (FIN)**	ECR I-10685	43
23.02.2006	C-513/03	**van Hilten-van der Heijden (NL)**	ECR I-1957	**33**, 147
06.06.2000	C-35/98	**Verkooijen (NL)**	ECR I-4073	**111**, 115, 176
28.10.1999	C-55/98	**Vestergaard (DK)**	ECR I-7643	40
01.07.2004	C-169/03	**Wallentin (S)**	ECR I-6443	37
15.07.2004	C-242/03	**Weidert/Paulus (L)**	ECR I-7379	121
29.04.2004	C-387/01	**Weigel (A)**	ECR I-4981	33 (fn. 82)
26.01.1993	C-112/91	**Werner (D)**	ECR I-429	43 (fn. 144)
11.08.1995	C-80/94	**Wielockx (NL)**	ECR I- 2508	34 (fn. 86)
18.11.1999	C-200/98	**X AB et Y AB (S)**	ECR I-8264	71
21.11.2002	C-436/00	**X and Y (S)**	ECR I-10829	94
16.05.2000	C-87/99	**Zurstrassen (L)**	ECR I-3339	36

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3. CHRONOLOGICAL TABLE OF THE JUDGMENTS

Date	Case number	**Parties**	European Court Report	Paragraph number
28.01.1986	270/83	**Commission v France "avoir fiscal"**	ECR 273	53, **57**, 109
27.09.1988	81/87	**Daily Mail (UK)**	ECR 5505	67
08.05.1990	175/88	**Biehl l (L)**	ECR I-1779	32
28.01.1992	C-204/90	**Bachmann (B)**	ECR I-249	42
28.01.1992	C-300/90	**Commission v Belgium**	ECR I-305	42 (fn. 136 and 138)
26.01.1993	C-112/91	**Werner (D)**	ECR I-429	43 (fn. 144)
13.07.1993	C-330/91	**Commerzbank (UK)**	ECR I-4017	60
12.04.1994	C-1/93	**Halliburton (NL)**	ECR I-1137	54
14.02.1995	C-279/93	**Schumacker (D)**	ECR I-225	**35**, 188
26.10.1995	C-151/94	**Commission v Luxembourg - Biehl II**	ECR I-3699	32
11.08.1995	C-80/94	**Wielockx (NL)**	ECR I- 2508	34 (fn. 86)
14.11.1995	C-484/93	**Svensson & Gustavsson (L)**	ECR I-3955	51 (fn. 175)
27.06.1996	C-107/94	**Asscher (NL)**	ECR I-3089	34 (fn. 86 and 87)
15.05.1997	C-250/95	**Futura Participations and Singer (L)**	ECR I-2471	61, **87**
17.07.1997	C-28/95	**Leur-Bloem (NL)**	ECR I-4161	22
28.04.1998	C-118/96	**Jessica Safir (S)**	ECR I-1897	**42**, 80
12.05.1998	C-336/96	**Gilly (F)**	ECR I-2823	11 (fn. 12)
16.07.1998	C-264/96	**ICI (UK)**	ECR I-471	70, **90**, 92
26.01.1999	C-18/95	**Terhoeve (NL)**	ECR I-345	32 (fn. 80)
29.04.1999	C-311/97	**Royal Bank of Scotland (EL)**	ECR I-2651	**58**, 133
08.07.1999	C-254/97	**Baxter (F)**	ECR I-4811	63
14.09.1999	C-391/97	**Frans Gschwind (D)**	ECR I-5453	36
21.09.1999	C-307/97	**Saint-Gobain (D)**	ECR I-6163	**59**, **110**, 155, 168, 190
26.10.1999	C-294/97	**Eurowings (D)**	ECR I- 7449	81
28.10.1999	C-55/98	**Vestergaard (DK)**	ECR I-7643	40
18.11.1999	C-200/98	**X AB et Y AB (S)**	ECR I-8264	71
13.04.2000	C-251/98	**Baars (NL)**	ECR I-2787	**122**, 176
16.05.2000	C-87/99	**Zurstrassen (L)**	ECR I-3339	36
06.06.2000	C-35/98	**Verkooijen (NL)**	ECR I-4073	**111**, 115, 176
08.06.2000	C-375/98	**EPSON Europe BV (P)**	ECR I-4245	22
14.12.2000	C-141/99	**AMID (B)**	ECR I-11619	68, **84**, 86, 187
08.03.2001	C-397/98 and C-410/98	**Metallgesellschaft/Hoechst (UK)**	ECR I-1727	64, **106**
04.10.2001	C-294/99	**Athinaiki (EL)**	ECR I-6797	22, **160**
15.01.2002	C-43/00	**Andersen & Jensen (DK)**	ECR I-379	22
19.03.2002	C-393/99 and C-394/99	**INASTI**	ECR I-2829	33 (fn. 82)
11.07.2002	C-224/98	**D'Hoop (B)**	ECR I-6191	31 (fn. 75)

12.09.2002	C-431/01	**Mertens (B)**	ECR I-7073	85
03.10.2002	C-136/00	**Danner (FIN)**	ECR I-8147	42, 80
21.11.2002	C-436/00	**X and Y (S)**	ECR I-10829	94
12.12.2002	C-324/00	**Lankhorst-Hohorst (D)**	ECR I-11779	65, **95**
12.12.2002	C-385/00	**de Groot (NL)**	ECR I-11819	38
12.06.2003	C-234/01	**Gerritse (D)**	ECR I-5933	38, **39**
26.06.2003	C-422/01	**Skandia and Ramstedt (S)**	ECR I-6817	**42**, 80
18.09.2003	C-168/01	**Bosal Holding (NL)**	ECR I-9401	72, 96, **124**
25.09.2003	C-58/01	**Océ Van der Grinten (UK)**	ECR I- 9809	22, 160
13.11.2003	C-209/01	**Schilling (D)**	ECR I-13389	32 (fn. 76)
13.11.2003	C-42/02	**Lindman (FIN)**	ECR I-13519	**51**, 80
11.12.2003	C-364/01	**The Heirs of H. Barbier (NL)**	ECR I-15013	49
04.03.2004	C-334/02	**Commission v France**	ECR I-2229	51
11.03.2004	C-9/02	**de Lasteyrie du Saillant (F)**	ECR I-2409	129
29.04.2004	C-387/01	**Weigel (A)**	ECR I-4981	33 (fn. 82)
29.04.2004	C-224/02	**Pusa (FIN)**	ECR I-5763	43
08.06.2004	C-268/03	**De Baeck (B)**	ECR I-5961	126
01.07.2004	C-169/03	**Wallentin (S)**	ECR I-6443	37
15.07.2004	C-315/02	**Lenz (A)**	ECR I-7063	**112**, 115, 176
15.07.2004	C-242/03	**Weidert/Paulus (L)**	ECR I-7379	121
07.09.2004	C-319/02	**Manninen (FIN)**	ECR I-7477	**113**, **115**, 175, 185, 220
16.09.2004	C-400/02	**Merida**	ECR I-8471	44
09.12.2004	C-219/03	**Commission v Spain**	not published in ECR	126
10.03.2005	C-39/04	**Laboratoires Fournier (F)**	ECR I-2057	81
05.07.2005	C-376/03	**D. (NL)**	ECR I- 5821	49, **165**
12.07.2005	C-403/03	**Schempp (D)**	ECR I-6421	33
08.09.2005	C-512/03	**Blanckaert (NL)**	ECR I-7685	38
13.12.2005	C-446/03	**Marks and Spencer (UK)**	ECR I- 10837	70, **91**, 92, 187
19.01.2006	C-265/04	**Bouanich (S)**	ECR I-923	128
21.02.2006	C-152/03	**Ritter-Coulais (D)**	ECR I-1711	46
23.02.2006	C-253/03	**CLT-UFA (D)**	ECR p. I-1831	58
23.02.2006	C-513/03	**van Hilten-van der Heijden (NL)**	ECR I-1957	**33**, 147
23.02.2006	C-471/04	**Keller Holding (D)**	ECR I-2107	72, **125**
22.06.2006	C-182/03 and C-217/03	**Belgium v Commission**	ECR I-5479	17 (fn. 29)
22.06.2006	C-399/03	**Commission v Council**	ECR I-05629	17 (fn. 29)
06.07.2006	C-346/04	**Conijn (D)**	ECR I-6137	39
06.09.2006	C-88/03	**Portugal (**supported by **Spain)** v **Commission**	ECR I-7115	47
07.09.2006	C-470/04	**N. (NL)**	ECR I-7409	130
12.9.2006	C-196/04	**Cadbury Schweppes (UK)**	ECR I-7995	73, 145, 202
14.09.2006	C-386/04	**Stauffer (D)**	ECR I-8203	45 (fn. 153)
03.10.2006	C-475/03	**Banca Popolare di Cremona** (I) – IRAP	ECR I-9373	20 (fn. 43)
03.10.2006	C-290/04	**Scorpio (D)**	ECR I-9461	39, **77**, 78
03.10.2006	C-452/04	**Fidium Finanz (D)**	ECR I- 9521	147

26.10.2006	C-345/05	**Commission v Portugal**	ECR I-10633	47
09.11.2006	C-433/04	**Commission v Belgium**		79
09.11.2006	C-520/04	**Turpeinen (FIN)**	ECR I-10685	43
14.11.2006	C-513/04	**Kerckhaert-Morres (B)**	ECR I-10967	115, **177**
12.12.2006	C-374/04	Test Claimants in Class IV of the **ACT Group Litigation (UK)**	ECR I-11673	**107**, 161, 174
12.12.2006	C-446/04	Test Claimants in the **Franked Investment Income (FII) Group Litigation (UK)**	ECR I-11753	64, **119,** 176
14.12.2006	C-170/05	**Denkavit Internationaal (F)**	ECR I-11949	**102**, 103, 161, 174
18.01.2007	C-104/06	**Commission** v **Sweden**	ECR I-671	47
25.01.2007	C-329/05	**Meindl (D)**	ECR I-1107	**36**, 44
30.01.2007	C-150/04	**Commission** v **Denmark** (supported by **Sweden**)	ECR I-1163	42 (fn. 139)
15.02.2007	C-345/04	**Centro Equestre** da Lezíria Grande **(D)**	ECR I-1425	78
06.03.2007	C-292/04	**Meilicke (D)**	ECR I-1835	**114**, 175, 220
13.03.2007	C-524/04	Test Claimants in the **Thin Cap Group Litigation (UK)**	ECR I-2107	65, **96**, 145
22.03.2007	C-383/05	**Talotta** v Belgium	ECR I-2555	34
29.03.2007	C-347/04	**Rewe Zentralfinanz (D)**	ECR I-2647	70, **93**
10.05.2007	C-492/04	**Lasertec (D)**	ECR I-3775	**97**, 147
10.05.2007	C-102/05	**A and B (S)**	ECR I-3871	117
24.05.2007	C-157/05	**Holböck (A)**		**116**, 137, 191
05.07.2007	C-522/04	**Commission v Belgium**		44 (fn. 150)
18.07.2007	C-231/05	**Oy AA**		**66**, 92, 146, 197
18.07.2007	C-182/06	**Lakebrink** v **Luxemburg**		46
11.09.2007	C-76/05	**Schwarz (D)**		**52**, 80
11.09.2007	C-318/05	**Commission v Germany**		52
11.10.2007	C-451/05	**Elisa (F)**		163
11.10.2007	C-443/06	**Hollmann (P)**		48
25.10.2007	C-464/05	**Geurts** and **Vogten (B)**		123, **152**
06.11.2007	C-415/06	**Stahlwerk Ergste Westig (D)**		86
08.11.2007	C-379/05	**Amurta (NL)**		**103**, 161, 174
06.12.2007	C-298/05	**Columbus Container Services (D)**		**74**, 145, 202
18.12.2007	C-101/05	**A (S)**		118
18.12.2007	C-281/06	**Jundt (D**		52
18.12.2007	C-436/06	**Grønfeldt (D)**		127
17.01.2008	C-256/06	**Jäger**		49

Pending

C-527/06	**Renneberg**		46 (fn. 156)
C-43/07	**Arens-Sikken**		49 (fn. 167)
C-293/06	**Deutsche Shell**		69
C-414/06	**Lidl Belgium**		70, 86

4. SYSTEMATIC OVERVIEW OF THE COURT'S CASE LAW IN DIRECT TAXATION

TAXATION OF INDIVIDUALS	C-175/88	C-204/90	C-300/90	C-112/91	C-279/93	C-80/94	C-151/94	C-107/94	C-118/96	C-336/96	C-18/95	C-391/97	C-55/98	C-87/99	C-431/01	C-136/00	C-385/00	C-234/01	C-422/01	C-42/02	C-209/01	C-364/01	C-334/02	C-224/02	C-169/03
	Biehl I	**Bachmann**	**COM v Belgium**	**Werner**	**Schumacker**	**Wielockx**	**Biehl II**	**Asscher**	**Safir**	**Gilly**	**Terhoeve (social security)**	**Gschwind**	**Vestergaard**	**Zurstrassen**	**Mertens**	**Danner**	**de Groot**	**Gerritse**	**Skandia/Ramstedt**	**Lindman**	**Schilling**	**The heirs of H. Barbier**	**COM v France**	**Pusa**	**Wallentin**
Country	**L**	**B**	**B**	**D**	**D**	**NL**	**L**	**NL**	**S**	**F**	**NL**	**D**	**Dk**	**L**	**B**	**Fin**	**NL**	**D**	**S**	**Fin**	**D**	**NL**	**F**	**Fin**	**S**
Free movement of persons (Art. 39-42 EC)	X	X	X	X	X	X	X	X		X	X	X		X	X		X				X	X			X
Right of establishment (Art. 43-48 EC)				X		X		X																	
Free provision of services (Art. 49-55 EC)		X	X						X				X			X		X	X	X			X		
Free movement of capital (Art. 56-60 EC)									X													X	X		
Citizenship of the Union (Art. 18 EC)																								X	
Transfer of residence	X						X				X														
Tax advantages related to the personal and family situation	X			X	X		X	X				X		X			X								X
Deduction of costs related to the economic activity						X							X			X		X			X				
Pensions and other social benefits		X	X						X										X				X	X	
Immovable property																						X			
DTC		X		X		X		X		X		X			X	X	X	X						X	
State of activity – Inbound situation	X		X	X	X	X	X	X				X			X	X		X							X
State of residence – Outbound situation		X							X	X			X				X		X	X	X		X		
Date of Decision	08/05/1990	28/01/1992	28/01/1992	26/01/1993	14/02/1995	04/08/1995	26/10/1995	27/06/1996	28/04/1998	12/05/1998	26/01/1999	14/09/1999	28/10/1999	16/05/2000	12/09/2002	03/10/2002	12/12/2002	12/06/2003	26/06/2003	13/11/2003	13/11/2003	11/12/2003	04/03/2004	29/04/2004	01/07/2004

	C-400/02	C-376/03	C-403/03	C-512/03	C-152/03	C-513/03	C-346/04	C-290/04	C-345/05	C-520/04	C-104/06	C-329/05	C-150/04	C-383/05	C-522/04	C-182/06	C-76/05	C-318/05	C-443/06	C-281/06	C-256/06
	Merida	**D.**	**Schempp**	**Blanckaert**	**Ritter-Coulais**	**van Hilten-van der Heijden**	**Conijn**	**Scorpio**	**COM v Portugal**	**Turpeinen**	**COM v Sweden**	**Meindl**	**COM v Denmark**	**Talotta**	**COM v Belgium**	**Lakebrink**	**Schwarz/Gootjes-Schwarz**	**COM v Germany**	**Hollmann**	**Jundt**	**Jäger**
Country	**D**	**NL**	**D**	**NL**	**D**	**NL**	**D**	**D**	**P**	**Fin**	**S**	**D**	**Dk**	**B**	**B**	**L**	**D**	**D**	**P**	**D**	**D**
Free movement of persons (Art. 39-42 EC)	X				X				X		X		X		X	X		X			
Right of establishment (Art. 43-48 EC)							X		X		X	X	X	X	X			X			
Free provision of services (Art. 49-55 EC)								X					X		X		X	X		X	
Free movement of capital (Art. 56-60 EC)		X		X		X													X		X
Citizenship of the Union (Art. 18 EC)			X						X		X				X		X	X			
Transfer of residence			X			X															
Tax advantages related to the personal and family situation												X									
Other tax advantages																	X	X		X	
Deduction of costs related to the economic activity							X														
Pensions and other social benefits				X						X			X		X						
Immovable property					X				X		X					X			X		X
DTC	X	X		X	X	X		X					X	X	X	X					X
State of activity – Inbound situation		X		X		X	X					X		X		X			X		
State of residence – Outbound situation	X		X		X			X		X			X		X		X	X		X	X
Date of Decision	16/09/2004	05/07/2005	12/07/2005	08/09/2005	21/02/2006	23/02/2006	06/07/2006	03/10/2006	26/10/2006	09/11/2006	18/01/2007	25/01/2007	30/01/2007	22/03/2007	05/07/2007	18/07/2007	11/09/2007	11/09/2007	11/10/2007	18/12/2007	17/01/2008

COMPANY TAXATION	270/83 Avoir fiscal	81/87 Daily Mail	C-330/91 Commerzbank	C-1/93 Halliburton	C-250/95 Futura and Singer	C-264/96 ICI	C-311/97 Royal Bank of Scotland	C-254/97 Baxter	C-307/97 Saint-Gobain	C-294/97 Eurowings	C-200/98 X AB and Y AB	C-141/99 AMID	C-397/98 C-410/98 Metallgesellschaft/Hoechst	C-436/00 X and Y	C-234/00 Lankhorst-Hohorst	C-168/01 Bosal Holding
Country	F	UK	UK	NL	L	UK	EL	F	D	D	S	B	UK	S	D	NL
Right of establishment (Art. 43-48 EC)	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X
Free provision of services (Art. 49-55 EC)										X						
Free movement of capital (Art. 56-60 EC)														X		
Transfer of residence		X														
Choice of form of establishment	X			X			X									
Losses					X	X						X				
Tax advantage/exemption/relief	X			X					X	X	X				X	
CFC legislation																
Anti-abuse provisions (e.g. thin cap rules)															X	
DTC									X			X				
Deduction of expenses/costs								X								X
Intra-group transfers											X		X	X		
Host State – Inbound situation	X		X	X	X		X	X	X				X		X	
State of residence – Outbound situation		X				X					X	X		X		X
Permanent establishment	X		X		X		X		X			X				
Subsidiary						X		X			X		X	X	X	X
Date of decision	28/01/1986	27/09/1988	13/07/1993	12/04/1994	15/05/1997	16/07/1998	19/04/1999	08/07/1999	21/09/1999	26/10/1999	18/11/1999	14/12/2000	08/03/2001	21/11/2002	12/12/2002	18/09/2003

COMPANY TAXATION	C-39/04 Laboratoires Fournier	C-446/03 Marks & Spencer	C-253/03 CLT-UFA	C-471/04 Keller Holding	C-196/04 Cadbury Schweppes	C-290/04 Scorpio	C-433/04 COM. v Belgium	C-446/04 Test Claimants FII GL	C-170/05 Denkavit Internationaal	C-524/04 Test Claimants Thin Cap	C-345/04 Centro Equestro	C-247/04 Rewe Zentralfinanz	C-492/04 Lasertec	C-231/05 Oy AA	C-415/06 Stahlwerk Ergste Westig	C-298/05 Columbus Cotainer
Country	F	UK	D	D	UK	D	B	UK	F	UK	D	D	D	Fin	D	D
Right of establishment (Art. 43-48 EC)		X	X	X	X			X	X	X		X	X	X		X
Free provision of services (Art. 49-55 EC)	X					X	X				X					
Free movement of capital (Art. 56-60 EC)								X		X			X		X	X
Transfer of residence																
Choice of form of establishment			X													
Losses		X										X			X	
Tax advantage/exemption/relief	X															
CFC legislation					X											X
Anti-abuse provisions (e.g. thin cap rules)										X			X			
DTC			X						X							X
Deduction of expenses/costs				X		X					X					
Intra-group transfers								X		X			X	X		
Host State – Inbound situation			X					X		X				X		
State of residence – Outbound situation		X		X	X				X			X	X		X	X
Permanent establishment			X												X	
Subsidiary		X		X	X			X	X	X		X	X	X		
Date of decision	10/03/2005	13/12/2005	23/02/2006	23/02/2006	12/09/2006	03/10/2006	09/11/2006	12/12/2006	14/12/2006	13/03/2007	15/02/2007	29/03/2007	10/05/2007	18/07/2007	06/11/2007	06/12/2007

TAXATION OF COMPANY SHAREHOLDERS	270/83	C-307/97	C-251/98	C-35/98	C-397/98, C-410/98	C-168/01	C-9/02	C-268/03	C-315/02	C-242/03	C-319/02	C-219/03	C-265/04	C-470/04	C-513/04	C-374/04	C-446/04	C-170/05	C-292/04	C-102/05	C-157/05	C-464/05	C-379/05	C-101/05	C-436/06
	COM v F – Avoir fiscal	**Saint-Gobain**	**Baars**	**Verkooijen**	**Metallgesellschaft/ Hoechst**	**Bosal Holding**	**de Lasteyrie du Saillant**	**De Baeck**	**Lenz**	**Weidert/Paulus**	**Manninen**	**COM v Spain**	**Bouanich**	**N**	**Kerckhaert-Morres**	**Test Claimants ACT GL**	**Test Claimants FII GL**	**Denkavit International**	**Meilicke**	**A and B**	**Holböck**	**Geurts and Vogten**	**Amurta**	**A**	**Grønfeldt**
Country	**F**	**D**	**NL**	**NL**	**UK**	**NL**	**F**	**B**	**A**	**L**	**Fin**	**E**	**S**	**NL**	**B**	**UK**	**UK**	**F**	**D**	**S**	**A**	**B**	**NL**	**S**	**D**
Freedom of establishment (Art. 43-48 EC)	X	X	X		X	X	X	X						X		X	X	X		X		X			
Free provision of services (Art. 49-55 EC)												X													
Free movement of capital (Art. 56-60 EC)				X	X			X	X	X	X	X	X		X	X	X		X	X	X	X	X	X	X
Citizenship (Art. 18 EC)														X											
Withholding tax															X			X					X		
Taxation of dividends	X	X		X	X				X		X				X	X	X	X	X	X	X		X	X	
Acquisition/holding of shares			X							X												X			
Capital gains on shares							X	X				X	X	X											X
Deduction of costs related to participation						X																			
DTC		X			X					X	X		X		X	X	X	X					X	X	
State of source – Inbound dividends	X	X		X					X		X		X		X		X		X	X	X			X	
State of residence – Outbound dividends			X		X	X	X	X		X		X		X		X		X				X	X		X
Individual shareholder			X	X			X	X	X	X	X	X	X	X	X				X	X	X	X		X	X
Corporate shareholder	X	X			X	X										X	X	X					X		
Date of Decision	28/01/1986	21/09/1999	13/04/2000	06/06/2000	08/03/2001	18/09/2003	11/03/2004	08/06/2004	15/07/2004	15/07/2004	07/09/2004	09/12/2004	19/01/2006	07/09/2006	14/11/2006	12/12/2006	12/12/2006	14/12/2006	06/03/2007	10/05/2007	24/05/2007	25/10/2007	08/11/2007	18/12/2007	18/12/2007

■ ÖStZ 2006/218, 106

Wer hat das Sagen im Steuerrecht – EuGH (Teil 1)

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Die Rechtsprechung des Europäischen Gerichtshofs zum direkten Steuerrecht hat nicht nur die österreichische Rechtsprechung und Verwaltungspraxis, sondern auch und gerade den Gesetzgeber vor neue Herausforderungen gestellt. Ausgehend von den gemeinschaftsrechtlichen Grundlagen soll der folgende Beitrag diesen Einfluss des Gemeinschaftsrechts auf das österreichische Steuerrecht kurz skizzieren.

Teil 1

Teil 2

I. Einleitung

1. Steuersouveränität der Mitgliedstaaten und Gemeinschaftsrecht

„Die Steuersouveränität ist eines der wesentlichen Elemente der nationalen Souveränität, und die Mitgliedstaaten halten derzeit alle an der Respektierung dieser Souveränität fest"[1]. Ohne Übertreibung kann aber dennoch behauptet werden, dass das europäische Gemeinschaftsrecht die nationalen Steuerrechtssysteme der Mitgliedstaaten revolutioniert hat. Damit ist nicht nur die weitgehende Harmonisierung des indirekten Steuerrechts angesprochen[2], sondern auch der massive Einfluss auf das direkte Steuerrecht der Mitgliedstaaten[3]. Dass das Gemeinschaftsrecht aber überhaupt das nationale direkte Steuerrecht berühren kann, ist nicht von vornherein klar: Anders als für den mittlerweile weitgehend harmonisierten Bereich der indirekten Steuern enthält der EG-Vertrag nämlich keinen expliziten Harmonisierungsauftrag für den Bereich der direkten Besteuerung[4], in dem die Mitgliedstaaten somit ihre Regelungskompetenz behalten haben. Aus der parallelen Existenz des Harmonisierungsauftrages des Art 93 EG für den Bereich der indirekten Steuern und dem gleichzeitigen Fehlen von expliziten Harmonisierungsvorgaben für direkte Steuern könnte nach dem allgemeinen Rechtstheorem *expressio unis est exclusio alterius* sogar vermeint werden, dass die direkte Besteuerung gänzlich in der Souveränität der Mitgliedstaaten verblieben ist. Eine solch enge Sichtweise war aber vor dem Hintergrund der historischen Entwicklung der Gemeinschaft kontraindiziert[5]. Sie würde nämlich die Gemeinschaft jeder Kompetenz im Bereich des direkten Steuerrechts berauben und damit unzweifelhaft das Ziel des Gemeinsamen Marktes und seit der Einheitlichen Europäischen Akte[6] auch jenes des Binnenmarktes gefährden, die beide auf eine Gewährleistung des freien Verkehrs von Waren, Personen, Dienstleistungen und Kapital abzielen[7]. In Ermangelung expliziter Vorschriften zur Erreichung dieser Zielvorgaben auch im Bereich des direkten Steuerrechts wird die Harmonisierungskompetenz freilich durch die allgemeinen Bestimmungen zur Verwirklichung des Gemeinsamen Marktes insbesondere in Art 94 impliziert[8]. Auf dieser Basis ist auch eine Harmonisierung des materiellen Steuerrechts der Mitgliedstaaten in den Bereichen der grenzüberschreitenden Umgründungen[9], der konzerninternen Gewinnausschüttungen[10] sowie Zins- und Lizenzgebührenzahlungen[11] erfolgt.

Die Bedeutung des Gemeinschaftsrechts liegt freilich auch auf einer anderen Ebene: Gerade im internationalen Steuerrecht der Mitgliedstaaten, in dem die Ungleichbehandlung von unbeschränkt und beschränkt Steuerpflichtigen einen jahrzehntelang akzeptierten Eckpfeiler darstellte, eröffneten die Grundfreiheiten den grenzüberschreitend tätigen Steuerpflichtigen einen rechtlichen Schutz, der in seiner Effektivität nicht nur über die Wirkungen bilateraler Doppelbesteuerungsabkommen, sondern auch über jene des Verfassungsrechts weit hinausreicht. Denn schon relativ frühzeitig hat der EuGH den Überlegungen der Mitgliedstaaten, dass das direkte Steuerrecht vom Anwendungsbereich der Grundfreiheiten ausgenommen sei, eine klare Absage erteilt[12]. Vielmehr entspricht es mittlerweile ständiger Rechtsprechung, dass *„die direkten Steuern zwar in die Zuständigkeit der Mitgliedstaaten fallen, dass diese ihre Befugnisse jedoch unter Wahrung des Gemeinschaftsrechts ausüben müssen"* und insbesondere jede offene oder verdeckte Diskriminierung aufgrund der Staatsangehörigkeit zu unterlassen haben[13]. Der durch diese harmlos scheinende Formulierung geweckte Eindruck, die Steuersouveränität der EU-Staaten werde durch das Gemeinschaftsrecht weitestgehend geschont und nur in Randbereichen tangiert, täuscht[14]: Das gesamte nationale direkte Steuerrecht ist damit keine *domaine réservé* der Mitgliedstaaten, sondern wird von der mit Anwendungsvorrang ausgestatteten Gemeinschaftsrechtsordnung überlagert und jede einzelne Kompetenzausübung im Bereich der Besteuerung muss sich innerhalb des gemeinschaftsrechtlich zugestandenen Rahmens bewegen. Zu diesem Rahmen gehören vor allem die gemeinschaftsrechtlichen Grundfreiheiten.

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1) Bericht der Kommission an den Rat über die Aussichten für eine Angleichung der Steuersysteme in der Gemeinschaft, Bulletin der EG, Beilage 1/80 – Tz 5.
2) Für einen Überblick siehe zB *Terra/Wattel*, European Tax Law[4] (2005) 199 ff.
3) Ausgeblendet bleiben hier die steuerlichen Aspekte, die sich aus anderen Rechtsmassen des Europarechts (iwS) ergeben: Dazu gehören zunächst die Grundfreiheiten des EWR-Abkommens, die eine ähnliche Wirkung wie die Grundfreiheiten des EG-Vertrags entfalten und für Österreich seit 1. 1. 1994 anwendbar sind; vgl dazu bereits *Tumpel*, ecolex 1992, 583 (583 ff) und 655 (655 ff); ausführlich zur Bedeutung des EWR-Abkommens für das direkte Steuerrecht zuletzt *Cordewener*, FR 2005, 236 (236 ff); *Gudmundsson*, Intertax 2006, 58 (58 ff); siehe auch das steuerliche Urteil des EFTA-Gerichtshofes 23. 11. 2004, E-1/04, *Fokus Bank ASA*, und dazu *G. Kofler*, ÖStZ 2005/279, 143 (143 ff); *G. Kofler*, ÖStZ 2005/357, 169 (169 ff); *Cordewener*, FR 2005, 345 (345 ff). Überdies erlangt die Europäische Menschenrechtskonvention zunehmende steuerliche Relevanz: Siehe Art 14 („Diskriminierungsverbot") iVm Art 1 des 1. Zusatzprotokolls und dazu insbesondere EGMR 23. 10. 1990, 17/1989, 13 EHRR 774 (1990), *Darby v. Sweden*; ausführlich zu den steuerlichen Aspekten der EMRK *Baker*, BTR 2000, 211 (211 ff).
4) Abgesehen von Art 175 Abs 2 EG, der eine Ermächtigung des Rates zum Erlass steuerlicher Lenkungsnormen auf dem Gebiet des Umweltrechts vorsieht.
5) Dazu etwa *Wunderlich/Albath*, DStZ 2005, 547 (549 mwN).
6) ABl L 169/1 ff (29. 6. 1987).
7) Zum detaillierten Inhalt dieser Begriffe siehe etwa *Zorn* in *Pelka* (Hrsg), Europa- und verfassungsrechtliche Grenzen der Unternehmensbesteuerung, DStJG 23 (2000) 227 (230 f mwN).
8) Siehe zum *status quo* und möglichen Zukunftsperspektiven *Beiser/Pülzl*, SWI 2004, 596 (596 ff).
9) Richtlinie 90/434/EWG des Rates vom 23. Juli 1990 über das gemeinsame Steuersystem für Fusionen, Spaltungen, die Einbringung von Unternehmensteilen und den Austausch von Anteilen, die Gesellschaften verschiedener Mitgliedstaaten betreffen, ABl L 225/01 (20. 8. 1990) idF Richtlinie 2005/19/EG des Rates vom 17. Februar 2005, ABl L 58/19 ff (4. 3. 2005) (FusionsRL, in Österreich insbesondere im UmgrStG umgesetzt).
10) Richtlinie des Rates vom 23. Juli 1990 über das gemeinsame Steuersystem der Mutter- und Tochtergesellschaften verschiedener Mitgliedstaaten (90/435/EWG), ABl L 225/6 ff (20. 8. 1990), idF Richtlinie 2003/123/EG des Rates vom 22. Dezember 2003, ABl L 7/41 ff (13. 1. 2004) (Mutter-Tochter-RL, in Österreich umgesetzt durch § 10 Abs 2 KStG und § 94a EStG).
11) Richtlinie 2003/49/EG des Rates vom 3. Juni 2003 über eine gemeinsame Steuerregelung für Zahlungen von Zinsen und Lizenzgebühren zwischen verbundenen Unternehmen verschiedener Mitgliedstaaten, ABl L 157/49 ff (26. 6. 2003) (Zinsen-Lizenzgebühren-RL, in Österreich umgesetzt durch § 99a EStG).
12) Sog *strict* oder *moderate sovereignty exception*, wonach die direkte Besteuerung vom Anwendungsbereich der gemeinschaftsrechtlichen Grundfreiheiten ausgenommen sei oder deren Einfluss auf das direkte Steuerrecht zumindest einen gewissen Grad der Harmonisierung voraussetze; siehe dazu zB *van Thiel*, Free movement of Persons and Income Tax Law (2002) 21 ff und 153 ff mwN; *Birk*, FR 2005, 121 (121 ff); dieser Ansatz wird auch in der Vorlagefrage des BFH im *Schumacker*-Fall (BFH 14. 4. 1993, I R 29/92, BFHE 170, 454, BStBl 1994 II 27) deutlich.
13) Siehe statt vieler EuGH 14. 2. 1995, C-279/93, Slg 1995, I-225, *Schumacker* – Tz 21.
14) Siehe zB *Tumpel* in *Pelka* (Hrsg), Europa- und verfassungsrechtliche Grenzen der Unternehmensbesteuerung, DStJG 23 (2000) 321 (321 ff); *Birk*, FR 2005, 121 (124); treffend auch *Drüen/Kahler*, StuW 2005, 171 (171 f).

2. Die Wirkung der Grundfreiheiten im Steuerrecht

2.1 Der steuerliche Binnenmarkt als Leitmotiv

Die überragende Bedeutung der gemeinschaftsrechtlichen Grundfreiheiten („Marktfreiheiten") auch für den Bereich der direkten Besteuerung wurde erstmals 1986 sichtbar, als der EuGH die Rechtsprechung zum Diskriminierungsverbot der Grundfreiheiten im berühmten *Avoir Fiscal*-Urteil[15] auf das Steuerrecht ausdehnte. In diesem – von der Kommission dem Vernehmen nach wegen des zurückhaltenden Harmonisierungswillens der Mitgliedstaaten angestrengten – Verfahren gelangte der EuGH zu dem Ergebnis, dass die Nichterstreckung einer für französische Gesellschaften vorgesehenen Steuergutschrift (*avoir fiscal*) auf französische Betriebsstätten beschränkt steuerpflichtiger Auslandsgesellschaften dem Gemeinschaftsrecht widerspricht. Seit dieser Entscheidung in *Avoir Fiscal* hat sich die Rechtsprechung des EuGH mit unglaublicher Geschwindigkeit entwickelt und in den mittlerweile weit über 70 Urteilen[16] zum direkten Steuerrecht durch so genannte „negative Integration" nicht nur zahlreiche Pfeiler des tradierten Systems grenzüberschreitender Besteuerung in Frage gestellt, sondern sich als der bislang effizienteste „Motor" zur Überwindung von steuerlichen Hindernissen grenzüberschreitender wirtschaftlicher Aktivitäten in der Gemeinschaft erwiesen. Die Rechtsprechung des EuGH zum direkten Steuerrecht ist auch an Österreich nicht spurlos vorüber gegangen. Während der potenzielle Einfluss des Gemeinschaftsrechts zu Beginn der 1990er Jahre allgemein noch skeptisch betrachtet und erheblich unterschätzt wurde, hat sich durch das 1995 ergangene *Schumacker*-Urteil[17] diese Sichtweise innerhalb kurzer Zeit erheblich geändert, indem es den nationalen Staatsgewalten, aber auch den Steuerpflichtigen die Bedeutung des Europarechts bewusst gemacht hat. Österreichs Beitritt zur Gemeinschaft am 1. 1. 1995 ist exakt in diese Phase der wachsenden Bedeutung des Gemeinschaftsrechts gefallen. Schon vor dem Beitritt hat Österreich daher Bemühungen gezeigt, das direkte Steuerrecht gemeinschaftskonform auszurichten[18], der Einfluss der Rechtsprechung des EuGH zu den Grundfreiheiten ist aber wohl dennoch unterbewertet worden.

Die durch den EuGH operationalisierten Grundfreiheitsgarantien des EG-Vertrages formen die tragenden Säulen der europäischen Wirtschaftsintegration im Binnenmarkt und verwirklichen damit in ihrem jeweiligen Anwendungsbereich das in Art 3 Abs 1 lit c und Art 14 Abs 2 EG angelegte Binnenmarktkonzept[19], welches insbesondere die Beseitigung der Hindernisse für den freien Waren-, Personen-, Dienstleistungs- und Kapitalverkehr zwischen den Mitgliedstaaten umfasst. Dabei ist den Grundfreiheiten aufgrund ihrer Fundierung durch die (klassisch-)neoklassische Vorstellung einer Wirtschaftsordnung daran gelegen, für eine optimale Allokation der Produktionsfaktoren im Gemeinschaftsraum zu sorgen[20]; sie richten sich daher in ihrer wohlfahrtsmaximierenden Zielsetzung gegen nationale Maßnahmen, die eine grenzüberschreitende Wertschöpfung behindern oder eine nicht auf ökonomischen Daten beruhende Verzerrung der Investitionsentscheidung bewirken. Für wirtschaftliche Betätigungen mit grenzüberschreitendem Charakter wird damit aus ökonomischer Sicht die vollständige Beseitigung von Beschränkungen des zwischenstaatlichen Wirtschaftsverkehrs postuliert[21]. Dabei schützen Art 28, 29 EG den freien Warenverkehr, die Personenverkehrsfreiheit garantiert in ihren beiden Ausprägungen die Freizügigkeit von Arbeitnehmern innerhalb der Gemeinschaft (Art 39 EG) und die freie Niederlassung im Gebiet eines anderen Mitgliedstaates (Art 43 EG), Art 49 EG verhindert Beschränkungen des freien Dienstleistungsverkehrs und Art 56 EG steht Beschränkungen des freien Kapital- und Zahlungsverkehrs entgegen[22].

2.2 Der Schutzgehalt der Grundfreiheiten auf der Tatbestandsebene: Marktgleichheit und Marktfreiheit

Die Grundfreiheiten zeichnen sich nach dem derzeitigen Stand der Rechtsprechung durch eine zweischneidige Struktur aus, die sich in einer *gleichheitsrechtlichen Komponente* und einer *freiheitsrechtliche Komponente* ausdrückt und damit sowohl *diskriminierende* wie auch *nicht diskriminierende Beschränkungen*[23] in den Wirkungsbereich des Gemeinschaftsrechts einbezieht[24]:

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15) EuGH 28. 1. 1986, 270/83, Slg 1986, 273, *Kommission/Frankreich* („*avoir fiscal*").

16) Siehe dazu jüngst die Übersicht bei *G. Kofler*, taxlex 2006, 13 (13 ff) (Teil I) und taxlex 2006, 63 (63 ff) (Teil II).

17) EuGH 14. 2. 1995, C-279/93, Slg 1995, I-225, *Schumacker*.

18) So wurde beispielsweise die gemeinschaftsrechtliche FusionsRL bereits vor dem EU-Beitritt Österreichs in der Stammfassung des UmgrStG weitgehend berücksichtigt; siehe nur *Staringer* in *Gassner/Gröhs/Lang* (Hrsg), Zukunftsaufgaben der Wirtschaftsprüfung, FS Deloitte & Touche (1997) 219 (221). Ähnliches gilt für die rasche Implementation der Mutter-Tochter-Richtlinie durch das EU-AnpG (BGBl 681/1994); siehe dazu etwa *Quantschnigg*, RdW 1994, 221 (221 ff).

19) Dazu zB *Cordewener*, DStR 2004, 6 (6 f).

20) Vgl aus dem steuerlichen Schrifttum etwa *Schön* in *Pelka* (Hrsg), Europa- und verfassungsrechtliche Grenzen der Unternehmensbesteuerung DStJG 23 (2000) 191 (191 ff); *Schönfeld*, Hinzurechnungsbesteuerung und Europäisches Gemeinschaftsrecht (2005) 16 ff mwN; *Rödder/Schönfeld*, IStR 2005, 523 (525).

21) Zu den theoretischen Grundlagen ausführlich *Schönfeld*, Hinzurechnungsbesteuerung und Europäisches Gemeinschaftsrecht (2005) 17.

22) Zum – zumeist intuitiven – Anwendungsbereich der Grundfreiheiten siehe zB *Terra/Wattel*, European Tax Law[4] (2005) 38 ff; jüngst auch noch *Hahn*, DStZ 2005, 469 (469 ff).

23) Selbstverständlich enthält jede Diskriminierung automatisch auch eine Beschränkung (siehe zB Schlussanträge GA *La Pergola* 24. 6. 1999, C-35/98, Slg 2000, I-4071, *Verkooijen* – Tz 18; vgl weiters *Eilmansberger*, JBl 1999, 345 (347); *Jarass*, EuR 2000, 705 [709]; *Bergström/Bruzelius*, Intertax 2001, 233 [235]), umgekehrt aber natürlich nicht jede Beschränkung zugleich eine Diskriminierung (siehe nur *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 286 mwN).

24) Dazu insbesondere *Roth* in *Schön* (Hrsg), GedS Knobbe-Keuk (1997) 729 (740 f); *Reimer* in *Lehner* (Hrsg), Grundfreiheiten im Steuerrecht der EU-Staaten (2000) 39 (55 ff); *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 249 ff, 322 ff mwN; *Cordewener*, DStR 2004, 6 (8); tendenziell ebenso *Lehner* in *Pelka* (Hrsg), Europa- und verfassungsrechtliche Grenzen der Unternehmensbesteuerung, DStJG 23 (2000) 263 (266); aA aber jüngst *Englisch*, StuW 2003, 88 (89 f), sowie *Englisch*, Dividendenbesteuerung (2005) 247 ff, der den *freiheitsrechtlichen* Charakter der Grundfreiheiten im Grunde verneint und hier auf eine *faktische* Schlechterstellung trotz *rechtlicher* Gleichstellung abstellt und damit eine spezifische Benachteiligung der grenzüberschreitenden Tätigkeit zB durch Mehrbelastungen als Eingriffsvoraussetzung eines *gleichheitsrechtlich* orientierten Beschränkungsverbots fordert. In eine ähnliche Richtung auch *Lang* in *Lechner/Staringer/Tumpel* (Hrsg), Kapitalverkehrsfreiheit und Steuerrecht (2000) 181 (189 ff), wonach das Beschränkungsverbot lediglich eine argumentative Verkürzung einer Vergleichbarkeitsprüfung darstelle und es damit stets um eine Vergleichpaarbildung – uU sogar um den Vergleich zur gesamten Rechtsordnung – gehe. Auch wenn diesem Ansatz, der im Ergebnis auf die Betrachtung einer den grenzüberschreitenden Wirtschaftsverkehr benachteiligenden Mehrbelastung hinausläuft, argumentativ sicherlich Meriten hat, ist dennoch zu bemerken, dass der EuGH – beispielsweise in *Bosman* (EuGH 15. 12. 1995, C-415/93, Slg 1995, I-4921, *Bosman* – Tz 99 ff) oder im *Golden Shares*-Urteil (EuGH 13. 5. 2003, C-98/01, Slg 2003, I-4641, *Kommission/Vereinigtes Königreich* – Tz 47) – einen anderen Weg beschreitet. Der befürchteten „Überdehnung" des Beschränkungsbegriffes kann mE wirkungsvoll über eine entsprechende Fallgruppenbildung und eine nähere Analyse von bloßen, grundfreiheitsrechtlich unbedenklichen Disparitäten zwischen den nationalen Steuersystemen begegnet werden; dazu zusammenfassend auch Schlussanträge GA *Poiares Maduro* 7. 4. 2005, C-446/03, Slg 2006, I-0000, *Marks & Spencer* – Tz 23 mwN.

2.2.1 Das Verbot offener und verdeckter Staatsangehörigkeitsdiskriminierung

Historisch wurden die Grundfreiheiten bloß als spezielle Ausformungen des Staatsangehörigendiskriminierungsverbotes des Art 12 EG betrachtet[25)]. Der prädominante steuerliche Konfliktbereich zwischen den gemeinschaftsrechtlichen Grundfreiheiten und nationalen Steuersystemen liegt nämlich traditionell in jenen Fallgestaltungen, die sich aus der Sicht des Bestimmungs- oder Gastmitgliedstaats als „*Inbound*"- bzw Importsituation aus einem anderen EG-Mitgliedstaat darstellen[26)]. Dieses Verbot der Staatsangehörigkeitsdiskriminierung – und damit *vice versa* das Gebot zur „*Inländergleichbehandlung*"[27)] – findet nicht nur in Art 12 EG, sondern explizit auch im Rahmen der Arbeitnehmerfreizügigkeit (Art 39 Abs 2, 3 EG) sowie der Niederlassungs- (Art 43 Abs 2 EG) und Dienstleistungsfreiheit (Art 50 Abs 3 EG) Ausdruck und ergibt sich auch für den Bereich der Kapitalverkehrs, für den Art 56 EG „*alle Beschränkungen*" verbietet, deutlich durch die ergänzende Heranziehung der Vorgängerregelung des Art 67 Abs 1 EWG-Vertrag[28)]. Das Diskriminierungsverbot ist damit ein essentieller Bestandteil sämtlicher Grundfreiheiten. Würden nämlich die spezielleren Grundfreiheiten hinter diesen Diskriminierungsstandard zurückfallen, wäre überdies die vom EuGH angenommene Subsidiarität des allgemeinen Diskriminierungsverbotes nach Art 12 EG[29)] nicht tragfähig. Die Grundfreiheiten gebieten somit, dass „*vergleichbare Sachverhalte nicht unterschiedlich behandelt werden*" dürfen[30)], es sei denn, „*dass eine Differenzierung objektiv gerechtfertigt wäre*"[31)].

Gemeinschaftsrechtlich ruht der Fokus in diesen Fällen regelmäßig auf der Prüfung von Regelungen des Quellenstaats über die dort bestehende beschränkte Steuerpflicht von nichtansässigen natürlichen oder juristischen Personen. Ausgangspunkt der steuerlichen Rechtsprechung des EuGH in diesem Bereich ist eine strenge Handhabung des Gebots der Inländergleichbehandlung, welches die Kehrseite des mehrfach im EG-Vertrag angelegten Verbots darstellt, die Staatsangehörigen anderer Mitgliedstaaten schlechter zu behandeln als die eigenen Angehörigen; die Feststellung der Schlechterstellung fordert freilich eine relative Beurteilung durch die Bildung eines Vergleichspaares und die Identifikation des einschlägigen Vergleichskriteriums, des *tertium comparationis*. Vor diesem Hintergrund wurde die „Einbruchsschleuse" der Grundfreiheiten auf nationale Steuersysteme insbesondere durch das vom EuGH entwickelte Konzept der *verdeckten* – bzw *verschleierten* oder *indirekten*[32)] – Diskriminierung geöffnet. Demnach verbieten die grundfreiheitlichen Diskriminierungsverbote – ebenso wie das Diskriminierungsverbot des Art 12 EG[33)] – nicht nur die *offene* Diskriminierung auf Basis der Staatsangehörigkeit, sondern auch alle Formen *verdeckter* Diskriminierung, die zwar auf anderen Kriterien als jener der Staatsangehörigkeit basieren, faktisch aber zum selben Ergebnis führen[34)], womit für den hier interessierenden Bereich insbesondere Unterscheidungen nach der steuerlichen Ansässigkeit[35)] oder die Anknüpfung an die Veranlagung zur inländischen Steuer[36)] angesprochen sind. Das Konzept der verdeckten Diskriminierung findet sich erstmals im *Sotgiu*-Fall[37)] und wurde durch die *Biehl*- und *Bachmann*-Fälle[38)] auch in die Rechtsprechung zum direkten Steuerrecht übernommen. Zahlreiche nachfolgende Urteile, wie zB *Schumacker* und *Gerritse*[39)], demonstrieren diesen Ansatz des EuGH.

2.2.2 Ausdehnung des Diskriminierungsschutzes auf „Exportsituationen": Verbot der Diskriminierung durch den Herkunfts- bzw Ansässigkeitsmitgliedstaat

Dieser traditionelle Bereich *offener* und *verdeckter* Staatsangehörigkeitsdiskriminierungen wurde vom EuGH zu einem umfassenden, *gleichheitsrechtlich* orientierten Verbot der Benachteiligung grenzüberschreitender Aktivitäten auch durch den Herkunfts- bzw Heimatstaat ausgedehnt. In mittlerweile ständiger Rechtsprechung hat der EuGH nämlich auch im Steuerrecht die Anwendbarkeit der Grundfreiheiten auf Sachverhaltsgestaltungen eröffnet, in denen aus der Sicht des Herkunfts- bzw Ansässigkeitsmitgliedstaats eine „*Outbound*"- bzw Exportsituation seiner „eigenen" Steuerpflichtigen vorliegt und es sich daher nicht um eine offene oder verdeckte Staatsangehörigkeitsdiskriminierung handelt. Wenngleich diese Wirkungsrichtung im Vertragswortlaut nicht deutlich angelegt ist, wird sie durch das in Art 43 Abs 1, Art 49 Abs 1 und Art 56 Abs 1 EG enthaltene Verbot der „Beschränkungen" der freien grenzüberschreitenden Betätigung bzw über die in Art 39 Abs 1 EG bedingungslos gewährleistete „Freizügigkeit" nicht nur gedeckt, sondern auch gefordert. Wären nämlich die Freiheitsgarantien

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25) Deutlich etwa EuGH 29. 4. 1999, C-311/97, Slg 1999, I-2651, *Royal Bank of Scotland* – Tz 21; für eine Übersicht zur außersteuerlichen Rechtsprechung siehe zB *Wouters*, EC Tax Rev. 1999, 98 (102 ff); *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 104 ff.

26) Zur historischen Entwicklung siehe auch jüngst *Englisch*, Dividendenbesteuerung (2005) 230 ff.

27) Verstanden als ein durch Bildung einer Präpositionalkonstruktion aufgelöstes Composition im Sinne einer Gleichbehandlung von „Ausländern" *mit* „Inländern"; siehe auch *Reimer* in *Lehner* (Hrsg), Grundfreiheiten im Steuerrecht der EU-Staaten (2000) 39 (46 m FN 45).

28) Siehe nur *Schaumburg* in *Ebling* (Hrsg), Besteuerung von Einkommen, DStJG 24 (2001) 225 (229); *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 222 ff, 245 f; *Englisch*, Dividendenbesteuerung (2005) 236 mwN; siehe auch *Englisch*, Intertax 2005, 310 (313).

29) Siehe zu dieser Subsidiarität zB EuGH 8. 3. 2001, C-397/98, C-410/98, Slg 2001, I-1727, *Metallgesellschaft and Hoechst* – Tz 38; weiters *Kingreen/Störmer*, EuR 1998, 263 (265 f).

30) Das Diskriminierungsverbot („*Gleiches soll nicht ungleich, Ungleiches nicht gleich behandelt werden*") ist somit lediglich eine negative Formulierung des Gleichheitsgrundsatzes („*Gleiches soll gleich, Ungleiches ungleich behandelt werden*").

31) EuGH 19. 10. 1977, 117/76 und 16/77, Slg 1977, 1753, *Ruckdeschel* – Tz 7.

32) Diese Begriffe werden in der Rechtsprechung und Literatur meist synonym verwendet; siehe zB EuGH 23. 5. 1996, C-237/94, Slg 1996, I-2617, *O'Flynn* – Tz 17 ff; EuGH 27. 6. 1996, C-107/94, Slg 1996, I-3089, *Asscher* – Tz 49; weiters zB *Wouters*, EC Tax Rev. 1999, 98 (103 f); *Oliveira*, CML Rev. 2002, 77 (85); *Farmer*, EC Tax Rev. 2003, 75 (76); anders *Lyal*, EC Tax Rev. 2003, 68 (74).

33) Siehe zB EuGH 7. 7. 1988, 143/87, Slg 1988, 3877, *Stanton* – Tz 9; EuGH 10. 2. 1994, C-398/92, Slg 1994, I-467, *Mund & Fester* – Tz 14; EuGH 23. 1. 1997, C-29/95, Slg 1997, I-285, *Pastoors* – Tz 16.

34) Instruktiv EuGH 23. 5. 1996, C-237/94, Slg 1996, I-2617, *O'Flynn* – Tz 17 ff.

35) Nur am Rande sei auf das Problem hingewiesen, dass bei Gesellschaften die steuerliche Ansässigkeit idR an jene Kriterien anknüpft, die auch das Gemeinschaftsrecht für die Feststellung der „Staatsangehörigkeit" heranzieht, wie zB den Sitz einer Gesellschaft. Entsprechend wurde in der Literatur auch vorgeschlagen, eine Diskriminierung auf Basis der steuerlichen Ansässigkeit einer Gesellschaft als offene Diskriminierung aufzufassen (siehe zB *Lyons*, EC Tax J. 1995/96, 27 [33]), während wohl die hA und die überwiegende Rsp hier zu Recht von einer verdeckten Diskriminierung ausgeht (EuGH 13. 7. 1993, C-330/91, Slg 1993, I-4017, *Commerzbank* – Tz 15; EuGH 8. 7. 1999, C-254/97, Slg 1999, I-4809, *Société Baxter* – Tz 13), was – wie beim Parallelfall der Diskriminierung nach der steuerlichen Ansässigkeit natürlicher Personen – weitergehende Rechtfertigungsmöglichkeiten eröffnet; dazu unten I.B.3.

36) EuGH 12. 12. 2002, C-324/00, Slg 2002, I-11779, *Lankhorst-Hohorst* – Tz 28 f.

37) EuGH 3. 2. 1974, 152/73, Slg 1974, 153, *Sotgiu* – Tz 11.

38) EuGH 8. 5. 1990, 175/88, Slg 1990, I-1779, *Biehl*; EuGH 28. 1. 1992, C-204/90, Slg 1992, I-249, *Bachmann*.

39) Siehe EuGH 14. 2. 1995, C-279/93, Slg 1995, I-225, *Schumacker* – Tz 26 und 29 (zu Art 39 EG); EuGH 12. 6. 2003, C-234/01, Slg 2003, I-5933, *Gerritse* – Tz 53 (zu Art 43 EG).

nur gegen den Gast- bzw Bestimmungsstaat wirksam, blieben sie bei fehlender Kontrolle des Herkunfts- bzw Ansässigkeitsstaates letztlich doch weitgehend wirkungslos[40]. In dieser symmetrischen Ausrichtung der Grundfreiheiten gegenüber allen durch einen transnationalen Wirtschaftsvorgang tangierten Mitgliedstaaten ist aber systematisch bereits angelegt, dass es sich ebenso wie in „*Inbound*"- bzw Importkonstellationen auch in der „*Outbound*"- bzw Exportperspektive in struktureller Hinsicht um Diskriminierungsverbote und damit die *gleichheitsrechtliche* Ausrichtung der Grundfreiheiten handelt[41]. Regelmäßig geht es in diesen „*Outbound*"- bzw Exportkonstellationen um die gemeinschaftsrechtliche Prüfung nationaler Steuernormen, die im Rahmen der unbeschränkten Steuerpflicht juristischer oder natürlicher Personen in deren Ansässigkeitsstaat gerade wegen der Ausübung einer Grundfreiheit zur Anwendung gelangen und zwischen Inlands- und Auslandssachverhalt differenzieren. Diese Stossrichtung der Grundfreiheiten zielt somit in einen Bereich, dem durch das Konzept der *Inländergleichbehandlung* nicht beizukommen ist, der aber nichtsdestoweniger eine unakzeptable Behinderung grenzüberschreitender Wirtschaftsaktivität darstellt. Schöne Beispiele für diesen Ansatz sind die Urteile in *ICI*, *X AB und Y AB*, *Baars*, *Bosal* und *Marks & Spencer*[42] zur so genannten Exportneutralität der Niederlassung, die Urteile in *Verkooijen*, *Lenz* und *Manninen*[43] zur Dividendenbesteuerung sowie das *Hughes de Lasteyrie du Saillant*-Urteil[44] zur Wegzugsbesteuerung.

2.2.3 Der Schutzbereich der Grundfreiheiten in ihrer freiheitsrechtlichen Ausprägung: Das „echte" Beschränkungsverbot

Darüber hinaus finden sich in der Rechtsprechung aber auch deutliche Ansätze, den Grundfreiheitsschutz über das Verbot einer *relativ* durch Vergleich zweier Situationen zu beurteilenden Schlechterstellung grenzüberschreitender Tätigkeiten hinaus zu einem echten – absolut wirkenden – Beschränkungsverbot (ieS) auszudehnen. Solcherart fordern nämlich die Grundfreiheiten nicht nur in ihrer Ausformung als *Diskriminierungsverbote* die Beseitigung ungerechtfertigter Benachteiligungen grenzüberschreitender Wirtschaftsaktivitäten durch die Rechtsordnung *eines* Mitgliedstaates, sondern in ihrer Ausformung als *Beschränkungsverbote* auch die Beseitigung von Beschränkungen, die nicht aus solchen Ungleichbehandlungen erfließen[45]. Insofern hat der EuGH auch ungerechtfertigte *nichtdiskriminierende* Beschränkungen des *Marktzu- oder Marktabganges* auf Basis der freiheitsrechtlichen Ausprägung der Grundfreiheiten als gemeinschaftsrechtswidrig erkannt. Durch das Einbeziehen auch nichtdiskriminierender, aber marktzu- oder marktabgangshindernder Bestimmungen in den gemeinschaftsrechtlichen Schutzbereich findet auch der Grundgedanke Anerkennung, dass das gleichheitsrechtlich orientierte Prinzip der Nichtdiskriminierung zwar *sine qua non* des Binnenmarktkonzeptes ist, aber nicht *per se* ausreicht, alle relevanten Behinderungen grenzüberschreitender Wirtschaftsaktivität, insbesondere des Zugangs zu fremden Märkten, zu verhindern[46]. Diese Entwicklung nahm ihren Ausgang in den die Warenverkehrsfreiheit betreffenden berühmten *Dassonville*-[47] und *Cassis-de-Dijon*-Fällen[48]. Nachfolgend hat der Gerichtshof dieses Verbot nichtdiskriminierender Beschränkungen des Marktzuganges ab den 1990er Jahren in den *Säger*-[49], *Gebhard*-[50] und *Bosman*-Urteilen[51] auch auf die übrigen Grundfreiheiten ausgedehnt, wenngleich – wie etwa das *Keck*-Urteil[52] impliziert – die Weite dieses Ansatzes nach wie vor unklar ist. Klar ist aber, dass die Stoßrichtung der Grundfreiheiten in ihrer *freiheitsrechtlichen Ausprägung* darauf abzielt, Zu- oder Abgangshemmnisse zu beseitigen, selbst wenn die betroffene nationale Rechtslage keine diskriminierende Ungleichbehandlung zur Folge hat: Der Marktteilnehmer strebt gerade nicht eine Gleichbehandlung, sondern vielmehr die Beseitigung von Hemmnissen des Marktzu- oder -abgangs an.

2.2.4 Zwischenergebnis

Zusammenfassend zeigt sich also, dass die in ihrem Schutzbereich konvergierenden Grundfreiheiten nicht nur *offene* und *verdeckte* Staatsangehörigkeitsdiskriminierungen durch den Gast- bzw Bestimmungsstaat erfassen, sondern generell jede nicht gerechtfertigte benachteiligende Behandlung des grenzüberschreitenden Wirtschaftsverkehrs gegenüber dem vergleichbaren innerstaatlichen Vorgang, und zwar unabhängig davon, von welchem der beteiligten Mitgliedstaaten diese diskriminierende Maßnahme gesetzt wurde[53]. In ihrer Ausrichtung als „Diskriminierungsverbote" hat der EuGH die primärrechtlichen Grundfreiheiten somit schrittweise über ein Verbot der Benachteiligung ausländischer Staatsangehöriger auf Basis eines *ad personam*-Vergleichs zu einem weitgefassten Verbot der Benachteiligung von grenzüberschreitenden gegenüber vergleichbaren (hypothetischen) rein landesinternen Wirtschaftsvorgängen auf Basis eines *ad rem*-Vergleichs fortentwickelt: Diskriminierungsverdächtig sind somit im Grunde alle Schlechterstellungen grenzüberschreitender Betätigungen, die aus Differenzierungen anhand der ausländischen Staatsangehörigkeit oder Ansässigkeit bzw des ausländischen Investitions- oder Tätigkeitsortes resultieren. Dadurch wird in Form des Verbots verdeckter Staatsangehörigkeitsdiskriminierungen nicht allein der traditionelle Kernbereich eines Gebotes der Inländergleichbehandlung im Bestimmungsstaat für „*Inbound*"-Situationen erweitert, sondern es wird zudem für „*Outbound*"-Situationen ein an den Herkunftsstaat adressiertes Verbot der Benachteiligung von Auslands- gegenüber vergleichbaren Inlandsaktivitäten hinzugefügt.

Die Grundfreiheiten werden dementsprechend im steuerlichen Kontext sowohl für „*Inbound*"- wie auch „*Outbound*"-Situati-

40) Insofern eindrucksvoll EuGH 27. 9. 1988, 81/87, Slg 1988, 5483, *Daily Mail* – Tz 16.
41) Dazu ausführlich *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 825 ff; *Cordewener*, ET 2003, 294 (299); *Englisch*, Dividendenbesteuerung (2005) 232; *Englisch*, Intertax 2005, 310 (314); *Herzig/Englisch/Wagner*, Der Konzern 2005, 298 (300).
42) EuGH 16. 7. 1998, C-264/96, Slg 1998, I-4695, *ICI*; EuGH 18. 11. 1999, C-200/98, Slg 1999, I-8261, *X AB and Y AB*; EuGH 13. 4. 2000, C-251/98, Slg 2000, I-2787, *Baars*; EuGH 18. 9. 2003, C-168/01, Slg 2003, I-9409, *Bosal*; EuGH 13. 12. 2005, C-446/03, Slg 2005, I-0000, *Marks & Spencer*.
43) EuGH 6. 6. 2000, C-35/98, Slg 2000, I-4071, *Verkooijen*; EuGH 15. 7. 2004, C-315/02, Slg 2004, I-7063, *Lenz*; EuGH 15. 7. 2004, C-242/03, Slg 2004, I-7379, *Weidert und Paulus*; EuGH 7. 9. 2004, C-319/02, Slg 2004, I-7477, *Manninen*.
44) EuGH 11. 3. 2004, C-9/02, Slg 2004, I-2409, *Hughes de Lasteyrie du Saillant*.
45) Grundlegend dazu *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 175 ff mwN; siehe weiters etwa *Kingreen/Störmer*, EuR 1998, 263 (268 f); *Hey*, StuW 2004, 193 (194).
46) Siehe zu diesem Dualismus von Freiheit des Marktzugangs und Marktgleichheit insbesondere *Roth* in *Schön* (Hrsg), GedS Knobbe-Keuk (1997) 729 (737 ff); *Vanistendael* in *Gocke/Gosch/Lang* (Hrsg), Körperschaftsteuer – Internationales Steuerrecht – Doppelbesteuerung, FS Wassermeyer (2005) 523 (530, 534 ff).
47) EuGH 11. 7. 1974, 8/74, Slg 1974, 837, *Dassonville*.
48) EuGH 20. 2. 1979, 120/78, Slg 1979, 649, *Rewe-Zentral GA* („*Cassis-de-Dijon*").
49) EuGH 25. 7. 1991, C-76/90, Slg 1991, I-4221, *Säger*.
50) EuGH 30. 11. 1995, C-55/94, Slg 1995, I-4165, *Gebhard* – Tz 37.
51) EuGH 15. 12. 1995, C-415/93, Slg 1995, I-4921, *Bosman*.
52) EuGH 24. 11. 1993, C-26791 and C-268/91, Slg 1993, I-6097, *Keck*.
53) In diese Richtung auch *Farmer*, EC Tax Rev. 2003, 75 (77); vgl weiters *Lyal*, EC Tax Rev. 2003, 68 (74).

onen vom EuGH in struktureller Hinsicht regelmäßig unter Vornahme eines *vertikalen Vergleichs* als *Diskriminierungsverbote* gehandhabt[54]: Entweder wird im „*Inbound*"-Fall geprüft, ob die in den Mitgliedstaat hineingehende Wirtschaftstransaktion gegenüber rein inländischen Vergleichstransaktionen benachteiligt wird, oder es wird im „*Outbound*"-Fall eine entsprechende Schlechterstellung der aus dem Mitgliedstaat hinausgehenden Wirtschaftstransaktion gegenüber dem rein internen Vergleichsvorgang untersucht. Offene und verdeckte Diskriminierung erweisen sich damit als bloße Untergruppen eines weiten gemeinschaftsrechtlichen Diskriminierungskonzepts, wenngleich die Wirkung der Grundfreiheiten gegen den Herkunfts- bzw Ansässigkeitsstaat im Schrifttum oftmals auch unter dem Begriff des „Beschränkungsverbots" (iwS) firmiert[55]. Demgegenüber zielt das echte, freiheitsrechtliche Beschränkungsverbot (ieS) auf den Schutz des Marktzu- und Marktabgangs ab. Im Steuerrecht hat der EuGH diesen Beschränkungsansatz (ieS) aber bisher lediglich auf steuerliche Formalpflichten angewandt[56]. Es wäre aber wohl zu weitgehend, dem freiheitsrechtlichen Beschränkungsverbot für den Bereich der direkten Besteuerung *a priori* jede Bedeutung abzuerkennen[57]. Gerade den potenziellen Einfluss auf Fragen der Mehrbelastungen der grenzüberschreitenden Tätigkeit beispielsweise durch eine Doppelbesteuerung wird man nämlich nicht generell verneinen können[58].

Grundvoraussetzung für das Eingreifen des Grundfreiheitsschutzes ist allerdings stets, dass die zu schützende Tätigkeit in irgendeiner Weise einen grenzüberschreitenden Charakter aufweist[59]. Der persönliche Anwendungs- bzw Schutzbereich aller Grundfreiheiten ist grundsätzlich den Staatsangehörigen der EG-Mitgliedstaaten eröffnet, also bei natürlichen Personen jedem „Unionsbürger" iSd Art 17 EG[60], wobei dies auch für Gesellschaften sowie juristische Personen des öffentlichen und privaten Rechts gilt, wenn sie nach den Rechtsvorschriften eines Mitgliedstaates gegründet wurden und „*ihren satzungsmäßigen Sitz, ihre Hauptverwaltung oder ihre Hauptniederlassung innerhalb der Gemeinschaft haben*". Während die Grundfreiheiten in ihrer Ausrichtung aber nur wirtschaftlichen Aktivitäten Schutz gewähren, tritt in der jüngeren Rechtsprechung auch der Schutz der allgemeinen Freizügigkeit nach Art 18 EG ergänzend hinzu[61].

2.3 Rechtfertigung und Verhältnismäßigkeit beschränkender Steuernormen

Steht fest, dass eine nationale Steuernorm auf Tatbestandsebene eine relevante – diskriminierende oder nichtdiskriminierende – Beschränkung einer Grundfreiheit darstellt, verschiebt sich der Fokus auf die Frage, ob diese Beschränkung gerechtfertigt werden kann. Insofern ergibt sich aus der – dogmatisch wenig überzeugenden und im Fluss befindlichen[62] – Rechtsprechung des EuGH zunächst, dass *offene* Staatsangehörigkeitsdiskriminierungen nur unter den engen, im EG-Vertrag ausdrücklich vorgesehenen Gründen der öffentlichen Ordnung, Sicherheit und Gesundheit gerechtfertigt werden können[63]. Demgegenüber sind alle anderen Beschränkungen einschließlich *verdeckter* Staatsangehörigkeitsdiskriminierungen der Rechtfertigung auch aufgrund ungeschriebener Rechtfertigungsgründe unter der wesentlich weiteren, im *Cassis-de-Dijon*-Fall[64] entwickelten „*rule of reason*" zugänglich[65]. Danach müssen – wie der EuGH im insofern wegweisenden *Gebhard*-Fall zusammengefasst hat – nationale Maßnahmen, die die Ausübung der durch den Vertrag garantierten grundlegenden Freiheiten behindern oder weniger attraktiv machen können, vier Voraussetzungen erfüllen: „*Sie müssen in nichtdiskriminierender Weise angewandt werden*[66]*; sie müssen aus zwingenden Gründen des Allgemeininteresses gerechtfertigt sein; sie müssen geeignet sein, die Verwirklichung des mit ihnen verfolgten Zieles zu gewährleisten, und sie dürfen nicht über das hinausgehen, was zur Erreichung dieses Zieles erforderlich ist*"[67]. Erst Rechtfertigungsgrund und Verhältnismäßigkeit der Mittel zusammen ergeben die erforderliche Rechtfertigung für nationale Maßnahmen, die die Ausübung einer Grundfreiheit beschränken.

Eine Analyse der Rechtsprechung des EuGH zeigt freilich, dass die Rechtfertigung einer beschränkten Maßnahme nur schwer möglich ist und die Rechtfertigungsebene generell streng gehandhabt wird[68]. So hat der EuGH in seiner steuerrechtlichen Rechtsprechung betreffend Binnenmarktsituationen *a priori* etwa eine Rechfertigung wegen befürchteter (zukünftiger) Steuermindereinnahmen[69], der Notwendigkeit der Progressivität des Steuersystems, der Existenz von mit dem Nachteil nicht unmittelbar zusammenhängenden anderweitigen Vorteilen[70], der Niedrigbesteuerung im Ausland[71], der fehlenden Rechtsharmonisierung[72], mangelnder Gegenseitigkeit[73], der Möglichkeit einer Diskriminierung durch eine andere Sachverhaltsgestaltung zu entgehen[74], der Existenz von Billigkeits- oder Ermessensmaßnahmen zur Abwendung von Beschränkungen[75] oder über-

54) Dazu insbesondere *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 822 ff; siehe weiters zB *Reimer* in *Lehner* (Hrsg), Grundfreiheiten im Steuerrecht der EU-Staaten (2000) 39 (43 f).
55) ZB jüngst noch *Terra/Wattel*, European Tax Law³ (2001) 41 ff, und *Terra/Wattel*, European Tax Law⁴ (2005) 53 ff; *Dautzenberg*, BB-Special 6/2004, 8 (8); siehe auch *Hey*, StuW 2004, 193 (195).
56) Vgl EuGH 15. 5. 1997, C-250/95, Slg 1997, I-2471, *Futura Participations*; vgl weiters *Hinnekens,* EC Tax Rev. 2002, 112 (115 ff); *Lyal*, EC Tax Rev. 2003, 68 (70 ff); *Farmer*, EC Tax Rev. 2003, 75 (78 ff).
57) So aber zB *Randelzhofer/Forsthoff* in *Grabitz/Hilf* (Hrsg), Das Recht der Europäischen Union I (2001) Vor Art 39–55 Tz 216.
58) Dazu ausführlich *G. Kofler*, SWI 2006, 62 (62 ff mwN).
59) Siehe ausführlich zB *Jarass*, EuR 2000, 705 (706 f); *Englisch*, Dividendenbesteuerung (2005) 243; *Hahn*, DStZ 2005, 433 (438 f); an diesem grenzüberschreitenden Element mangelte es nach Ansicht des EuGH im vieldiskutierten *Werner*-Fall (EuGH 26. 1. 1993, C-112/91, Slg 1993, I-429, *Werner*); dazu ausführlich *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 359 ff mwN.
60) EuGH 12. 7. 2005, C-403/03, Slg 2005, I-0000, *Schempp* – 15 ff mwN.
61) Siehe zB *Cordewener*, DStR 2004, 6 (9 mwN).
62) Für eine diesbezügliche Übersicht siehe etwa *G. Kofler*, ÖStZ 2003/874, 404 (406 ff); siehe auch *Englisch*, Dividendenbesteuerung (2005) 274 f mwN.
63) Art 39 Abs 3, 46 Abs 1 und 55 EG.
64) EuGH 20. 2. 1979, 120/78, Slg 1979, 649, *Rewe-Zentral GA* („*Cassis-de-Dijon*").
65) Siehe dazu ausführlich *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 143 ff.
66) Verstanden als nicht *offen* nach der Staatsangehörigkeit diskriminierend; so ausdrücklich Schlussanträge GA *Alber* 24. 9. 2002, C-168/01, Slg 2003, I-9409, *Bosal* – Tz 41.
67) EuGH 30. 11. 1995, C-55/94, Slg 1995, I-4165, *Gebhard* – Tz 37.
68) Siehe dazu jüngst den umfassenden Überblick bei *Englisch*, Dividendenbesteuerung (2005) 286 ff.
69) Siehe zB EuGH 21. 11. 2002, C-436/00, Slg 2002, I-10829, *X und Y* – Tz 50; EuGH 12. 12. 2002, C-324/00, Slg 2002 I-11779, *Lankhorst-Hohorst* – Tz 36.
70) Siehe etwa EuGH 21. 9. 1999, C-307/97, Slg 1999, I-6161, *Saint-Gobain* – Tz 51 ff; EuGH 14. 12. 2000, C-141/99, Slg 2000, I-11619, *AMID* – Tz 27
71) Siehe zu diesem „Kompensationsverbot" etwa EuGH 26. 10. 1999, C-294/97, Slg 1999, I-7447, *Eurowings* – Tz 43 ff; EuGH 3. 10. 2002, C-136/00, Slg 2002, I-8147, *Danner* – Tz 56.
72) EuGH 28. 1. 1986, 270/83, Slg 1986, 273, *Kommission/Frankreich* („*avoir fiscal*") – Tz 24; EuGH 28. 1. 1992, C-204/90, Slg 1992, I-276, *Bachmann* – Tz 10 ff.
73) Siehe zB EuGH 28. 1. 1986, 270/83, Slg 1986, 273, *Kommission/Frankreich* („*avoir fiscal*") – Tz 26.
74) EuGH 28. 1. 1986, 270/83, Slg 1986, 273, *Kommission/Frankreich* („*avoir fiscal*") – Tz 22; siehe auch EuGH 21. 9. 1999, C-307/97, Slg 1999, I-6161, *Saint-Gobain* – Tz 42.
75) Siehe statt vieler EuGH 15. 10. 1986, 168/85, Slg 1986, 2945, *Kommission/Italien* – Tz 11.

haupt wegen rein wirtschaftlicher Gründe[76)] abgelehnt. Andererseits hat der EuGH aber bereits mehrfach zugestanden, dass zB die Vermeidung der Steuerumgehung oder -hinterziehung[77)] sowie die Wirksamkeit der Finanzaufsicht[78)] zwingende Gründe des Allgemeininteresses darstellen und damit eine Beschränkung der Grundfreiheitsausübung rechtfertigen können[79)]. Allerdings hat diese *in abstracto* Anerkennung der Vermeidung der Steuerumgehung oder -hinterziehung als Rechtfertigungsgrund aufgrund der strengen Anforderungen des EuGH auf der Verhältnismäßigkeitsebene bisher *in concreto* noch nie zu einer Rechtfertigung geführt[80)]. Auch hinsichtlich möglicher Probleme der steuerlichen Administration agiert der EuGH zurückhaltend und verweist regelmäßig auf die Möglichkeit der Zusammenarbeit zwischen den mitgliedstaatlichen Finanzverwaltungen auf Basis des Instrumentariums der AmtshilfeRL[81)]; vor dem Hintergrund dieser Rechtsprechung ist auch zu erwarten, dass der EuGH eine ähnliche Argumentation für den Bereich der Steuererhebung und -vollstreckung, etwa in Wegzugsbesteuerungsfällen, verfolgen und hier auf das – seit kurzem auch direkte Steuern umfassende – Instrument der BeitreibungsRL verweisen wird[82)]. Obwohl zuzugestehen ist, dass es beiden Instrumenten in der Praxis an Effizienz mangelt[83)], liegt der Rechtsprechung hier offensichtlich die Überlegung zurunde, dass diese Schwierigkeiten zu Lasten der Mitgliedstaaten und nicht zum Nachteil der Steuerpflichtigen gehen sollen.

Einen besonderen Stellenwert auf der Rechtfertigungsebene hat die Kohärenz des Steuerrechtes eingenommen. Dieser Rechtfertigungsgrund ist vom EuGH in den *Bachmann*-[84)] und *Kommission/Belgien*-Fällen[85)] anerkannt worden: In diesen beiden Fällen erblickte der EuGH einen die Diskriminierung rechtfertigenden unmittelbaren Zusammenhang zwischen steuerlichem Vor- und Nachteil darin, dass die Nichtabzugsfähigkeit von Versicherungsbeiträgen an ausländische Versicherungen mit der innerstaatlichen Steuerfreiheit der Versicherungsleistungen einherging. Der EuGH führte damals aber weiter aus, dass die Kohärenz der Steuerregelung voraussetze, dass Belgien, „*wäre es verpflichtet, den Abzug der in einem anderen Mitgliedstaat gezahlten Lebensversicherungsbeiträge zuzulassen, die von den Versicherern zu zahlenden Beiträge besteuern könnte*“[86)]. Da diese Voraussetzung bei einem im Ausland ansässigen Versicherer nicht erfüllt sei, rechtfertige die Kohärenz der Steuerregelung eine Versagung der Abzugsfähigkeit der Versicherungsprämien. Wenngleich diese Argumentation im konkreten Fall wohl wenig überzeugend war[87)], lässt sich grundsätzlich die grundfreiheitsrechtliche Beachtlichkeit der Kohärenz eines Steuersystems nicht bestreiten. Der grundsätzlichen Anerkennung der rechtfertigenden Wirkung der steuerlichen Kohärenz liegt die Erkenntnis zugrunde, dass man bei der Beurteilung einer steuerlichen Regelung im Hinblick auf ihre Gemeinschaftskonformität nicht bloß auf einen (diskriminierenden) Einzelaspekt abzustellen und einen isolierten Vorteil unbesehen auf Auslandsfälle auszudehnen hat – und damit den „*free mover*“ zum vielbeschworenen „*free rider*“[88)] machen würde –, sondern den Regelungskomplex als Ganzes und damit auch in unmittelbarem Zusammenhang stehende, vom legistischen Regelungssystem intendierte Ausgleichswirkungen zu betrachten hat und dadurch auf *substanzielle* Gleichbehandlung abzielen muss[89)]. Während also – plastisch formuliert – die Diskriminierungsprüfung grundsätzlich „bis zum Anschlag“ auf die im grenzüberschreitenden Sachverhalt erlittene Benachteiligung „hineinzoomt“, erlaubt das Kohärenzargument eine Anpassung des Fokus auf eine breitere Perspektive, die eine Berücksichtigung der Zusammenhänge im jeweiligen Steuersystem gestattet[90)]. Allerdings sei hier in Erinnerung gerufen, dass der EuGH – trotz berechtigter Kritik im Schrifttum[91)] – in seiner jüngeren Rechtsprechung den Kohärenzgedanken zunehmend restriktiveren Voraussetzungen unterworfen und seit *Bachmann* und *Kommission/Belgien* eine Rechtfertigung auf Basis der Kohärenz stets verneint hat[92)]. In mittlerweile ständiger Judikatur wird nämlich grundsätzlich ein – tendenziell formell verstandener – „*unmittelbarer Zusammenhang*“ („*direct link*“) zwischen Steuervorteil und Steuernachteil gefordert: Stehen einem steuerlichen Nachteil nämlich bloß irgendwelche, sachlich nicht zusammenhängende Steuervorteile

76) EuGH 6. 6. 2000, C-35/98, Slg 2000, I-4071, *Verkooijen* – Tz 48 mwN.

77) EuGH 16. 7. 1998, C-264/96, Slg 1998, I-4695, *ICI* – Tz 26; EuGH 8. 3. 2001, C-397/98, C-410/98, Slg 2001, I-1727, *Metallgesellschaft and Hoechst* – Tz 57.

78) EuGH 15. 5. 1997, C-250/95, Slg 1997, I-2471, *Futura Participations*– Tz 31; EuGH 8. 7. 1999, C-254/97, Slg 1999, I-4809, *Baxter* – Tz 18; dazu jüngst ausführlich *Ruiz Almendral*, Intertax 2005, 562 (562 ff).

79) EuGH 28. 10. 1999, C-55/98, Slg 1999, I-7641, *Bent Vestergaard* – Tz 23.

80) Siehe zB EuGH 16. 7. 1998, C-264/96, Slg 1998, I-4695, *ICI* – Tz 26; EuGH 12. 12. 2002, C-324/00, Slg 2002 I-11779, *Lankhorst-Hohorst* – Tz 37. Eine mögliche Auflockerung dieser strengen Sicht könnte aber durch das Urteil in der Rechtssache *Marks & Spencer* eingeläutet sein; siehe EuGH 13. 12. 2005, C-446/03, *Marks & Spencer* – Tz 49; kritisch dazu aber *Lang*, SWI 2006, 3 (7); *Englisch*, IStR 2006, 19 (23).

81) Für diese Rechtsprechungslinie siehe zB EuGH 14. 2. 1995, C-279/93, Slg 1995, I-225, *Schumacker* – Tz 45; EuGH 28. 10. 1999, C-55/98, Slg 1999, I-7641, *Bent Vestergaard* – Tz 26; EuGH 3. 10. 2002, C-136/00, Slg 2002, I-8147, *Danner* – Tz 44 f; EuGH 4. 3. 2004, C-334/02, Slg 2004, I-2229, *Kommission/Frankreich* – Tz 31 ff.

82) Dazu *G. Kofler*, ÖStZ 2003/503, 262 (265 ff) und ÖStZ 2004/483, 195 (195 ff).

83) Dies betont beispielsweise auch *Vermeend*, EC Tax Rev. 1996, 54 (55); siehe jüngst aus der Sicht der Finanzverwaltung auch *Steiner*, ÖStZ 2005/461, 219 (219), unter Hinweis auf *G. Kofler*, taxlex 2005, 16 (19).

84) EuGH 28. 1. 1992, C-204/90, Slg 1992, I-249, *Bachmann*.

85) EuGH 28. 1. 1992, C-300/90, Slg 1992, I-305, *Kommission/Belgien*.

86) EuGH 28. 1. 1992, C-204/90, Slg 1992, I-249, *Bachmann* – Tz 23.

87) Der EuGH hat sich in *Bachmann* und *Kommission/Belgien* offensichtlich stark davon beeindrucken lassen, dass die Versicherungsprämien an einen ausländischen Versicherer gezahlt worden waren und sah darin den Grund für die Annahme, dass die spätere Besteuerung der Versicherungsleistungen nach einem – vom EuGH für wahrscheinlich gehaltenen – Rückzug des Versicherten von Belgien nach Deutschland dem belgischen Staat nicht mehr möglich sei. Damit hat der EuGH aber verkannt, dass dies lediglich eine Folge der dem OECD-MA folgenden belgischen DBA ist, wonach das Besteuerungsrecht an den Rentenleistungen oder sonstigen Versicherungsleistungen ausschließlich dem Ansässigkeitsstaat des Rentenempfängers zugewiesen ist (Art 18, 21 OECD-MA), und zwar unabhängig davon, wo die leistende Versicherungsgesellschaft ansässig ist (siehe auch *Thömmes* in *Schön* (Hrsg), GedS Knobbe-Keuk [1997] 795 [826 ff]; *Knobbe-Keuk*, EC Tax Rev. 1994, 74 [80]); die Besteuerung durch den späteren Wohnsitzstaat ist wiederum davon unabhängig, ob ein Beitragsabzug in Belgien gewährt wurde. Durch die abkommensrechtliche Zuweisung ist also der Zusammenhang zwischen Abzugsfähigkeit der Versicherungsprämien und der späteren Besteuerung der Versicherungsleistungen durchbrochen. Es scheint aber ohnehin so, dass der EuGH in *Wielockx* (EuGH 11. 8. 1995, C-80/94, Slg 1995, I-2493, *Wielockx*) inhaltlich für die Fälle des Bestehens eines Doppelbesteuerungsabkommens von diesen beiden Urteilen abgegangen ist; siehe zu diesem Erfordernis der „Makrokohärenz“ auch *G. Kofler*, ÖStZ 2003/874, 404 (406 f mwN).

88) Siehe auch Schlussanträge GA *Poiares Maduro* 7. 4. 2005, C-446/03, Slg 2006, I-0000, *Marks & Spencer* – Tz 67; siehe zu diesem plakativen Begriffspaar *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 567, 963 f, 980 f; jüngst *Fischer*, FR 2005, 457 (458).

89) Ähnlich etwa *Dautzenberg*, BB-Special 6/2004, 8 (11); *Englisch*, ET 2004, 355 (356 f).

90) Siehe zu diesem anschaulichen Bild *Reimer* in *Lehner* (Hrsg), Grundfreiheiten im Steuerrecht der EU-Staaten (2000) 39 (50 f); *Englisch*, ET 2004, 355 (357).

91) Siehe zB *Schön*, FR 2001, 381 (389).

92) Siehe zB *Hughes de Lasteyrie du Saillant* – Tz 61 ff; EuGH 1. 7. 2004, C-169/03, Slg 2004, I-6443, *Wallentin* – Tz 21; EuGH 15. 7. 2004, C-242/03, Slg 2004, I-7379, *Weidert und Paulus* – Tz 22 ff; EuGH 15. 7. 2004, C-315/02, Slg 2004, I-7063, *Lenz* – Tz 36.

gegenüber, ist ein Rückgriff auf die Kohärenz nicht möglich[93]. Die Kohärenz kann nach dieser Rechtsprechung aber auch dann nicht geltend gemacht werden, wenn es um verschiedene Steuern oder die steuerliche Behandlung verschiedener Steuerpflichtiger (zB Mutter- und Tochtergesellschaften) geht[94]. Tendenziell zeigt sich darin, dass der EuGH offenbar nicht darauf abstellt, ob zwischen einem Vor- und einem Nachteil innerhalb eines Regelungskomplexes *materiell* ein sachlicher Zusammenhang besteht, sondern ob eine Regelung isoliert noch *sinnvoll* angewendet werden könnte[95]. Eine leichte Tendenz zur „Auflockerung" dieser engen Sichtweise wurde unlängst aber im *Manninen*-Fall[96] angedeutet[97].

II. Wirkung von EuGH-Urteilen und Rückforderung gemeinschaftsrechtswidrig erhobener Abgaben

Die Bedeutung der Grundfreiheiten für das direkte Steuerrecht ergibt sich allerdings erst aus dem Umstand, dass jede Grundfreiheit – überwiegend seit dem Ablauf der Übergangszeit am 31. 12. 1969 – unmittelbar anwendbar ist[98], dem Einzelnen Rechte verleiht und als *lex superior* Vorrang vor dem inferioren nationalen Recht, aber auch anderen völkerrechtlichen Abkommen im Fall der Inkonsistenz beansprucht[99]. Die Grundfreiheiten wirken allerdings nicht nur „negativ", sondern auch „positiv" in dem Sinne, dass ein Marktteilnehmer unmittelbar eine ihm gemeinschaftsrechtswidrig versagte Begünstigung (zB höhere Abzugsmöglichkeiten oder einen niedrigeren Steuersatz) für sich beanspruchen kann[100]. Dem EuGH obliegt dabei nach Art 234 Abs 1 lit a und lit b EG das Monopol der „*Auslegung dieses Vertrags*" sowie die Entscheidung „*über die Gültigkeit und die Auslegung der Handlungen der Organe der Gemeinschaft*". Wird also der Gerichtshof von einem nationalen Gericht im Wege eines Vorabentscheidungsersuchens nach Art 234 EG angerufen („konkrete Normenkontrolle") oder von der Kommission im Rahmen eines Vertragsverletzungsverfahrens nach Art 226 EG mit einer Frage des Gemeinschaftsrechts befasst („abstrakte Normenkontrolle"), so legt er das Gemeinschaftsrecht – also beispielsweise die Grundfreiheiten – verbindlich aus[101]. Im steuerlichen Bereich sind aus österreichischer Sicht sowohl VfGH und VwGH wie auch der UFS vorlageberechtigt[102].

Eine durch den EuGH vorgenommene Auslegung einer Vorschrift des Gemeinschaftsrechts entfaltet dabei grundsätzlich *ex-tunc*-Wirkung: Der EuGH erläutert und definiert die Bedeutung und Tragweite der betreffenden Vorschrift, so wie diese von ihrem In-Kraft-Treten an hätte verstanden und angewandt werden sollen. Allerdings kann der EuGH in Anbetracht des Erfordernisses der Rechtssicherheit ausnahmsweise die Möglichkeit für die Beteiligten einschränken, sich auf die in einem solchen Urteil vorgenommene Auslegung mit dem Ziel zu berufen, Rechtsverhältnisse in Frage zu stellen, die in der Vergangenheit in gutem Glauben begründet wurden; hiefür werden nach ständiger Rechtsprechung zwei wesentliche Kriterien geprüft, nämlich, dass die Betroffenen gutgläubig gehandelt haben und dass Schwierigkeiten von großer Tragweite bestehen[103]. Trotz eines gescheiterten Vorstoßes des Vereinigten Königreichs im Jahr 1996[104] zur Sicherung des nationalen Steueraufkommens wird dieser Aspekt der Einschränkung der „Rückwirkung" angesichts der steigenden Komplexität der Vorlagen zum direkten Steuerrecht in Zukunft vermutlich immer mehr an Bedeutung gewinnen[105], [106].

Ein Gemeinschaftsrechtsverstoß kann damit – „rückwirkend" – auch besondere gemeinschaftsrechtlich fundierte Ansprüche auslösen, wie etwa einen Anspruch des Steuerpflichtigen auf (verzinste) Rückerstattung grundfreiheitswidrig erhobener Steuerbeträge[107] oder – unter gewissen Voraussetzungen – die staatliche Verantwortlichkeit nach den *Francovich*-Prinzipien der

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93) Vgl in diesem Sinne EuGH 28. 1. 1986, Rechtssache 270/83, Slg 1986, 273, *Kommission/Frankreich („avoir fiscal")* – Tz 21; EuGH 27. 6. 1996, C-107/94, Slg 1996, I-3089, *Asscher* – Tz 53.

94) EuGH 12. 12. 2002, C-324/00, Slg 2002 I-11779, *Lankhorst-Hohorst* – Tz 42; EuGH 18. 9. 2003, C-168/01, Slg 2003, I-9409, *Bosal* – Tz 30; EuGH 15. 7. 2004, C-315/02, Slg 2004, I-7063, *Lenz* – Tz 36.

95) Ähnlich *Dautzenberg*, BB-Special 6/2004, 8 (12).

96) EuGH 7. 9. 2004, C-319/02, Slg 2004, I-7477, *Manninen.*

97) Ausführlich dazu jüngst *Schnitger*, FR 2004, 1357 (1360 ff); *G. Kofler*, ÖStZ 2005/59, 26 (26 ff); zuletzt *Kokott/Henze* in *Lüdicke* (Hrsg), Tendenzen der Europäischen Unternehmensbesteuerung (2005) 67 (89).

98) Art 8 EWG-Vertrag; siehe zB EuGH 25. 7. 1991, C-353/89, Slg 1991, I-4069, *Kommission/Niederlande* – Tz 27 mwN (zu Art 49 EG). Während allerdings die Vorschriften über die Waren-, Dienstleistungs- und Niederlassungsfreiheit und die Arbeitnehmerfreizügigkeit ab dem Ende der Übergangsperiode am 31. 12. 1969 unmittelbar anwendbar sind, hat die Kapitalverkehrsfreiheit eine bewegtere Vergangenheit hinter sich: Art 67 EWGV wurde nicht als unmittelbar anwendbar betrachtet (EuGH 11. 11. 1981, 203/80, Slg 1981, 2595, *Casati* – Tz 10 ff; EuGH 14. 11. 1995, C-484/93, Slg 1995, I3955, *Svensson and Gustavsson* – Tz 5 ff). Der Richtlinie 88/361/EWG zur Implementierung dieses Artikels (ABl 1988 L 178/5 ff [8. 7. 1988]) wurde allerdings unmittelbare Wirkung ab 1. 7. 1990 zuerkannt (vgl EuGH 23. 2. 1995, C-358/93 and 416/93, Slg 1995, I-361, *Bordessa* – Tz 32 ff; EuGH 14. 11. 1995, C-484/93, Slg 1995, I3955, *Svensson and Gustavsson* – Tz 6). Mit Wirkung ab 1. 1. 1994 hat der Vertrag von Maastricht neue Bestimmungen über den Kapital- und Zahlungsverkehr in den EG-Vertrag eingeführt, nämlich ua Art 73b, der inhaltlich Art 1 der genannten Richtlinie übernommen hat. Nach dem Vertrag von Amsterdam, wurde Art 73b in Art 56 EG umnummeriert. Erst seit 1. 1. 1994 ist damit die Kapital- und Zahlungsverkehrsfreiheit ein „gleichberechtigtes Mitglied" im Konzert der Grundfreiheiten.

99) Dazu zB EuGH 22. 6. 1989, 103/88, Slg 1989, 1839, *Fratelli Constanzo SpA* – Tz 28 ff; ausführlich *Cordewener*, DStR 2004, 6 (9 f); *Gammie*, BIFD 2003, 86 (88); *Terra/Wattel*, European Tax Law4 (2005) 37 f.

100) Siehe etwa EuGH 26. 1. 1999, C-18/95, Slg 1999, I-345, *Terhoeve* – Tz 57; EuGH 15. 1. 1998, C-15/96, Slg 1998, I-47, *Schöning-Kougebetopoulou* – Tz 33 mwN; dazu auch *Cordewener*, DStR 2004, 6 (12).

101) Der EuGH ist nicht zur Entscheidung über die Vereinbarkeit einer nationalen Maßnahme mit dem Gemeinschaftsrecht befugt; er kann jedoch dem vorlegenden Gericht alle Hinweise zur Auslegung des Gemeinschaftsrechts geben, die es diesem ermöglichen, die Frage der Vereinbarkeit für die Entscheidung des bei ihm anhängigen Rechtsstreits zu beurteilen; vgl zB EuGH 14. 7. 1994, C-438/92, Slg 1994, I-3519, *Rustica Semences* – Tz 10; EuGH 11. 8. 1995, C-63/94, Slg 1995, I-2467, *Belgapom* – Tz 7; EuGH 3. 10. 2000, C-58/98, Slg 2000, I-7919, *Corsten* – Tz 24.

102) Siehe zur Gerichtseigenschaft des UFS EuGH 24. 6. 2004, C-278/02, Slg 2004, I-6171, *Handlbauer*; ausführlich Schlussanträge GA *Tizzano* 15. 1. 2004, C-278/02, Slg 2004, I-6171, *Handlbauer* – Tz 24 ff; vgl weiters EuGH 26. 5. 2005, C-465/03, *Kretztechnik*. Demgegenüber waren die „alten" Berufungssenate mangels Gerichtseigenschaft nicht vorlageberechtigt; dazu EuGH 30. 5. 2002, C-516/99, Slg 2002, I-4573, *Schmid*.

103) Vgl dazu etwa EuGH 15. 3. 2005, C-209/03, Slg 2005, I-0000, *Bidar* – Tz 66 ff; siehe zu den zeitlichen Dimensionen auch den Überblick bei *Drüen/Kahler*, StuW 2005, 171 (180 f).

104) Memorandum des Vereinigten Königreichs vom Juli 1996 betreffend „The European Court of Justice".

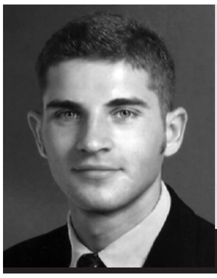
105) In dieser Richtung bereits FG München 14. 2. 2005, 1 V 305/04, EFG 2005, 928; auch in der Rechtssache *Meilicke* betreffend das frühere deutsche Anrechnungssystem trat Generalanwalt *Tizzano* auf Basis der konkreten Umstände des Falles für eine beschränkte Rückwirkung ein; vgl Schlussanträge GA *Tizzano* 10. 11. 2005, C-292/04, Slg 2006, I-0000, *Meilicke* – Tz 31 ff. In diese Richtung jüngst Schlussanträge GA *Jacobs* 17. 3. 2005, C-475/03, *Banca Popolare di Cremona* („*IRAP*") – Tz 70 ff mwN, hinsichtlich einer mehrwertsteuerähnlichen italienischen Abgabe (IRAP), deren Summe sich in dem nach italienischem Recht „aufrollbaren" Zeitraum auf 120 Milliarden Euro beläuft.

106) Für eine entsprechende Lockerung der Rechtsprechung plädierend *Wunderlich/Albath*, DStZ 2005, 547 (552); kritisch aber *Vogel*, StuW 2005, 373 (375 f).

107) Siehe zu solchen Konstellationen EuGH 8. 3. 2001, C-397/98, C-410/98, Slg 2001, I-1727, *Metallgesellschaft and Hoechst* –Tz 86, 89; siehe auch EuGH 9. 2. 1999, C-343/96, Slg 1999, I-579, *Dilexport* – Tz 23; EuGH 21. 9. 2000, C-441/98 und C-442/98, Slg 2000, I-7145, *Michaïlidis* – Tz 30.

Staatshaftung[108, 109]. Der Einzelne hat somit Anspruch auf Erstattung von innerstaatlichen Abgaben, die unter Verstoß gegen das Gemeinschaftsrecht erhoben wurden[110], wobei der nationale Gesetzgeber nicht nach Verkündung eines Urteils des Gerichtshofes, dem zufolge bestimmte Rechtsvorschriften mit dem EG-Vertrag unvereinbar sind, eine Verfahrensregel erlassen kann, die speziell die Möglichkeiten auf Erstattung der unrechtmäßig erhobenen Abgaben einschränkt[111]. Hinsichtlich der näheren Ausformung und Durchsetzung derartiger Rückerstattungsansprüche kommt es nämlich zu einer Verzahnung mit dem nationalen Verfahrensrecht. Zum effektiven Schutz der gemeinschaftsrechtlichen Ansprüche hat der EuGH die allgemeinen Rahmenbedingungen entwickelt, dass diese Ansprüche zum einen nicht ungünstiger behandelt werden dürfen als vergleichbare rein nationale Ansprüche („*Äquivalenzgrundsatz*") und dass zum anderen die Ausübung der gemeinschaftsrechtlichen Positionen nicht durch das nationale Recht praktisch unmöglich oder übermäßig erschwert werden dürfen („*Effektivitätsgrundsatz*")[112]. Kann daher dem Gemeinschaftsrecht nicht im offenen Verfahren im Rahmen des Anwendungsvorranges zur Geltung verholfen werden, da das konkrete Steuerverfahren bereits rechtskräftig beendet wurde, sind nach österreichischem Verfahrensrecht dem Gemeinschaftsrecht widersprechende Bescheide grundsätzlich nach § 299 BAO aufzuheben und neue Sachbescheide zu erlassen[113]. Solche – seit dem AbgRmRefG 2002[114] auch auf Antrag möglichen – Aufhebungen nach § 299 BAO, „*die wegen Widerspruches mit zwischenstaatlichen abgabenrechtlichen Vereinbarungen oder mit Gemeinschaftsrecht der Europäischen Union erfolgen*", sind nach § 302 Abs 2 lit c BAO „*bis zum Ablauf der Verjährungsfrist oder wenn der Antrag auf Aufhebung innerhalb dieser Frist eingebracht ist, auch nach Ablauf dieser Frist*", zulässig. Demgegenüber kommt nach zweifelhafter hA[115] eine Wiederaufnahme eines abgeschlossenen Verfahrens auf Basis des Vorfragentatbestands des § 303 Abs 1 lit c BAO regelmäßig mangels Parteienidentität nicht in Betracht.

108) EuGH 19. 11. 1991, C-6/90 and C-9/90, Slg 1991, I-5357, *Francovich*.
109) Siehe dazu im Kontext gemeinschaftsrechtswidriger Abkommensbestimmungen zB *G. Kofler*, 35 Tax Notes Int'l 45 (79 f mwN) (July 5, 2004); weiters zB *Werlauff*, ET 1999, 475 (475 ff).
110) Siehe zB EuGH 11. 7. 2002, C-62/00, Slg 2002, I-6325, *Marks & Spencer* – Tz 30 mwN; dazu auch jüngst *Lindemann/Hackemann*, IStR 2005, 786 (786 ff).
111) Siehe zB EuGH 29. 6. 1988, 240/87, Slg 1988, 3513, *Deville* – Tz 13; EuGH 9. 2. 1999, C-343/96, Slg 1999, I-579, *Dilexport* – Tz 38 f; EuGH 11. 7. 2002, C-62/00, Slg 2002, I-6325, *Marks & Spencer* – Tz 36; EuGH 2. 10. 2003, C-147/01, Slg 2003, I-11365, *Weber's Wine World* – Tz 86.
112) Siehe dazu EuGH 8. 3. 2001, C-397/98, C-410/98, Slg 2001, I-1727, *Metallgesellschaft and Hoechst* –Tz 85; EuGH 24. 9. 2002, C-255/00, Slg 2002, I-8003, *Grundig Italiana* – Tz 33; EuGH 2. 10. 2003, C-147/01, Slg 2003, I-11365, *Weber's Wine World* – Tz 103 ff.
113) Vgl Rz 7377i EStR 2000; weiters *BMF*, ÖStZ 2004/886, 453, sowie vorgehend *BMF*, StInfo 2004/104 = ARD 5518/26/2004 (jeweils zu den Folgen des *Lenz*-Urteils); zum Ganzen und auch zur gemeinschaftsrechtskonformen Ermessensübung ausführlich *Althuber* in *Althuber/Toifl* (Hrsg), Rückforderung rechtswidrig erhobener Abgaben (2005) 37 (49 ff).
114) BGBl I 2002/97.
115) Rz 7377i EStR 2000; *BMF*, StInfo 2004/104 = ARD 5518/26/2004 (zu den Folgen des *Lenz*-Urteils); siehe auch *BMF*, ÖStZ 2002, 94; aus dem Schrifttum ebenso etwa *Tumpel/Gaedke*, SWK 2002, S 96 (S 96 ff); *Ehrke*, ÖStZ 2002/487, 293 (293 ff); *Ritz*, BAO³ (2005) § 303 Rz 20; *Ehrke-Rabel*, SWK 2005, S 577 (S 577 ff); *Keppert/Bruckner*, SWK 2005, S 583 (S 583 ff); aA aber *Schwarz/Fraberger*, ecolex 1998, 165 (165 ff); *Fraberger* in *Holoubek/Lang* (Hrsg), Das EuGH-Verfahren in Steuersachen (2000) 151 (170 ff); *Beiser*, SWK 2005, S 493 (S 493 ff); *Beiser*, RFG 2005, 74 (74 ff); *Beiser*, ÖStZ 2005/851, 394 (394 ff).



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■ ÖStZ 2006/299, 154

Wer hat das Sagen im Steuerrecht – EuGH

Basierend auf den dogmatischen Überlegungen zur Wirkung der Grundfreiheiten im direkten Steuerrecht im ersten Teil dieses Beitrages in ÖStZ 2006/218, 106, soll im Folgenden – ohne Anspruch auf Vollständigkeit – ein Überblick über die bisherigen und potenziellen Einflüsse der Rechtsprechung des EuGH auf das österreichische Ertragsteuerrecht gegeben werden. Fokussiert werden dabei sowohl die Auswirkungen auf die Tätigkeit von Steuerausländern in Österreich (*Inbound*-Situationen) als auch auf die Tätigkeit von Steuerinländern im Ausland (*Outbound*-Situationen). Abschließend ist noch ein kurzer Blick auf die Entwicklungstendenzen der Rechtsprechung zu werfen.

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III. Einflüsse der EuGH-Rechtsprechung auf das österreichische Steuerrecht

1. „Inbound"-Situationen

Die in „Inbound"-Situationen typischerweise angesprochenen *verdeckten* Diskriminierungen resultieren regelmäßig aus einer benachteiligenden Ungleichbehandlung beschränkt StPfl durch den Quellenstaat. Zur Feststellung einer tatbestandlichen Diskriminierung ist die Vergleichbarkeit von Situationen ein Kernbereich der Diskriminierungsrechtsprechung des EuGH[1]. Sie verlangt die Bildung eines Vergleichspaares und die Identifikation des einschlägigen Vergleichskriteriums, des *tertium comparationis*, und resultiert im Wesentlichen in einer Verpflichtung des Quellenstaates, alle beschränkt StPfl in vergleichbarer Weise wie unbeschränkt StPfl zu behandeln, soweit sie ihrer Besteuerungskompetenz unterliegen und selbst wenn sie die Staatsangehörigkeit des Quellenstaates haben[2]. Generell wendet der EuGH einen engen Vergleichbarkeitstest insofern an, als er gewisse steuerrelevante Aspekte fokussiert und nicht auf die generelle Situation des StPfl abstellt[3]. Innerhalb dieses Rahmens ist die bisherige Rsp aber keineswegs konsistent: Während der EuGH in manchen Verfahren die *rechtliche* Situation des StPfl in den Vordergrund rückt[4], fokussiert er in anderen die *tatsächliche* Situation[5] oder vermengt beide Ansätze in einer Gesamtbetrachtung[6].

Jedenfalls folgt aber aus dem vom EuGH verwendeten Vergleichbarkeitstest als Grundregel, dass konzeptionell auf die steuerliche Behandlung in *einem* Mitgliedstaat abzustellen ist und daher rechtliche Beurteilungen auszublenden sind, die sich in anderen Mitgliedstaaten hinsichtlich derselben grenzüberschreitenden Tätigkeit ergeben[7]. Insofern lässt sich auch von einer „*Kästchengleichheit*" iS einer Gleichbehandlung in den einzelnen Teilmärkten des Binnenmarkts sprechen[8]. Somit trifft zwar jeden der an einem grenzüberschreitenden Wirtschaftsvorgang beteiligten Mitgliedstaat eine Gleichbehandlungspflicht, dies allerdings unabhängig voneinander und nur innerhalb der jeweils eigenen Rechtsordnung[9]. Entgegen dieser Grundregel findet sich in der Rsp aber in gewissen „Sonderkonstellationen" auch eine über das Steuersystem des betroffenen Mitgliedstaates hinausgehende Einbeziehung der ausländischen Besteuerung in die Vergleichbarkeitsprüfung[10]. Diesen Ansatz einer staatenübergreifenden Gesamtschau wählte der EuGH etwa in seiner *Schumacker*-Rsp zu personen- und familienbezogenen Steuerentlastungen, zumal die Feststellung der subjektiven Leistungsfähigkeit nur in einer über die Besteuerung in *einem* Mitgliedstaat hinausgehenden Gesamtbetrachtung erfolgen kann und damit auch die Einbeziehung ausländischer Steuerfaktoren erfordert[11].

1.1 Beschränkte Steuerpflicht natürlicher Personen

1.1.1 Persönliche Steuerbegünstigungen für beschränkt Steuerpflichtige: Schumacker *und § 1 Abs 4 EStG*

Differenziert ein Steuersystem zwischen beschränkter und unbeschränkter StPfl, ist ein gewisses Spannungsverhältnis zu den gemeinschaftsrechtlichen Grundfreiheiten vorprogrammiert. Seit dem Urteil in *Schumacker*[12] hat sich aber der Grundsatz heraus-

1) Siehe zB EuGH 14. 2. 1995, C-279/93, Slg 1995, I-225, *Schumacker* – Tz 30; EuGH 11. 8. 1995, C-80/94, Slg 1995, I-2493, *Wielockx* – Tz 17; EuGH 27. 6. 1996, C-107/94, Slg 1996, I-3089, *Asscher* – Tz 40; EuGH 29. 4. 1999, C-311/97, Slg 1999, I-2651, *Royal Bank of Scotland* – Tz 26 ff; EuGH 14. 9. 1999, C-391/97, Slg 1999, I-5451, *Gschwind* – Tz 21; EuGH 12. 9. 2002, C-431/01, Slg 2002, I-7073, *Mertens* – Tz 32.

2) EuGH 27. 6. 1996, C-107/94, Slg 1996, I-3089, *Asscher*; EuGH 12. 5. 1998, C-336/96, Slg 1998, I-2793, *Gilly*.

3) Dazu nur *Knobbe-Keuk*, EC Tax Rev. 1994, 74 (77 f); für eine breitere Perspektive jüngst *Teixeira*, Intertax 2006, 50 (52). Die Vergleichbarkeitsprüfung ist auch kein „Alles-oder-Nichts"-Test: Denn selbst bei objektiv unterschiedlichen Situationen kann eine Diskriminierung nicht automatisch verneint werden, wenn das Ausmaß der Ungleichbehandlung im Hinblick auf die tatsächlich existierenden Unterschiede unverhältnismäßig ist; siehe EuGH 12. 6. 2003, C-234/01, Slg 2003, I-5933, *Gerritse* – Tz 47 ff; siehe bereits *Lyal*, EC Tax Rev. 2003, 68 (68).

4) So etwa EuGH 29. 4. 1999, C-311/97, Slg 1999, I-2651, *Royal Bank of Scotland* – Tz 24 ff; deutlich EuGH 5. 7. 2005, C-376/03, *D* – Tz 58 ff; siehe dazu *Lang*, SWI 2005, 365 (370); *G. Kofler*, ÖStZ 2005/949, 432 (436 f).

5) So etwa EuGH 14. 2. 1995, C-279/93, Slg 1995, I-225, *Schumacker*.

6) So etwa EuGH 12. 9. 2002, C-431/01, Slg 2002, I-7073, *Mertens* – Tz 32 mwN.

7) Ausführlich *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 828 ff mwN; *Englisch*, Dividendenbesteuerung (2005) 240; *Lang*, IStR 2005, 289 (292).

8) *Birk* in *Lehner* (Hrsg), Steuerrecht im Europäischen Binnenmarkt, DStJG 19 (1996) 63 (65 ff); *Reimer* in *Lehner* (Hrsg), Grundfreiheiten im Steuerrecht der EU-Staaten (2000) 39 (73 f); *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 829; *Hey*, StuW 2004, 193 (194).

9) Siehe auch *Kokott* in *Lehner* (Hrsg), Grundfreiheiten im Steuerrecht der EU-Staaten (2000) 1 (6). Eine davon streng zu trennende Frage ist allerdings, ob eine rechtlich vorgegebene Kompensationsverpflichtung eines anderen Mitgliedstaates Einfluss auf die Diskriminierungsprüfung haben kann; dazu bereits *G. Kofler*, 2005/357, 169 (169 ff); ebenso nunmehr Schlussanträge GA *Geelhoed* 23. 2. 2006, C-374/04, *ACT Group Litigation* – Tz 71 m FN 83.

10) Siehe dazu die berechtigte Kritik zB bei *Englisch*, Dividendenbesteuerung (2005) 240 mwN.

11) Dazu sogleich III.1.1.1.

12) EuGH 14. 2. 1995, C-279/93, Slg 1995, I-0225, *Schumacker*; siehe auch EuGH 11. 8. 1995, C-80/94, Slg 1995, I-2493, *Wielockx*; EuGH 27. 6. 1996, C-107/94, Slg 1996, I-3089, *Asscher*; EuGH 12. 5. 1998, C-336/96, Slg 1998, I-02739, *Gilly*; EuGH 14. 9. 1999, C-291/97, Slg 1999, I-05451, Gschwind; EuGH 16. 5. 2000, C-87/99, Slg 2000, I-03337, Zurstrassen; EuGH 1. 7. 2004, C-169/03, Slg 2004, I-6443, *Wallentin*; siehe jüngst EuGH 5. 7. 2005, C-376/03, *D* – Tz 26 ff (Ausdehnung auf die Vermögensteuer).

kristallisiert, dass Gebietsansässige und Gebietsfremde im Hinblick auf ihre subjektive Leistungsfähigkeit idR nicht in einer vergleichbaren Situation sind und es daher zulässig ist, dass der Beschäftigungsstaat die persönliche und familiäre Situation[13] eines Gebietsfremden nicht berücksichtigt, zumal dies grundsätzlich die Aufgabe des Wohnsitzstaates ist[14]. Die Verpflichtung zur Berücksichtigung dieser Umstände geht allerdings vom Wohnsitz- auf den Beschäftigungsstaat über, wenn der gebietsfremde StPfl in seinem Wohnsitzstaat keine nennenswerten Einkünfte hat und *„sein zu versteuerndes Einkommen im Wesentlichen“*[15] bzw seine *„gesamten oder nahezu seine gesamten Einkünfte“*[16] aus einer Tätigkeit im Beschäftigungsstaat bezieht[17]. Mittlerweile hat der EuGH auch mehrfach klargestellt, dass ein Grundfreibetrag jenen beschränkt StPfl vorenthalten werden kann, die sich nicht in einer *Schumacker*-Situation befinden[18].

Österreich hat die Vorgaben der *Schmumacker*-Rechtsprechung durch das EU-AbgÄG[19] in § 1 Abs 4 EStG in Form der fingiert unbeschränkten StPfl implementiert. Damit wird es unter gewissen Voraussetzungen auch beschränkt StPfl ermöglicht, in den Genuss der ansonsten bloß unbeschränkt StPfl zustehenden Vergünstigungen (zB Null-Steuerzone, Absetzbeträge, Berücksichtigung außergewöhnlicher Belastungen etc) zu kommen. Nach § 1 Abs 4 EStG werden auf Antrag nämlich auch jene Staatsangehörigen von EU- oder EWR-Mitgliedstaaten mit ihren inländischen Einkünften iSd § 98 EStG als unbeschränkt steuerpflichtig behandelt. Dies gilt allerdings nur, wenn ihre gesamten Einkünfte im Kalenderjahr mindestens zu 90 % der österreichischen Einkommensteuer unterliegen oder wenn die nicht der österreichischen Einkommensteuer unterliegenden Einkünfte nicht mehr als 10.000 €[20] betragen. Diese Rechtslage dürfte dem Gemeinschaftsrecht entsprechen, zumal der EuGH in *Gschwind* das deutsches Pendant zum österreichischen § 1 Abs 4 EStG als akzeptable Umsetzung dieser Grundsätze betrachtet hat[21].

Zahlreiche Fragestellungen rund um die *Schumacker*-Doktrin sind aber im Einzelnen noch ungeklärt[22]:

- Spätestens in *De Groot*[23] hat der EuGH durch seine Forderung der *vollen* Berücksichtigung der persönlichen und familiären Verhältnisse des StPfl im Wohnsitzstaat eine *proratarische* Aufteilung der persönlichen Abzüge auf die verschiedenen Staaten der Einkünfteerzielung (sog *fractional taxation*)[24], abgelehnt. Offen ist daher zB die Behandlung von Konstellationen, in denen der StPfl seine Einkünfte in mehreren Mitgliedstaaten erzielt, sich aber in keinem in der *Schumacker*-Situation befindet, und auch im Wohnsitzstaat nicht genügend Steuersubstrat zur *vollen* Berücksichtigung der persönlichen Verhältnisse besteht. Wie der EuGH seine Rsp in solchen Fällen fortzuführen gedenkt und ob er dabei letztlich zu einem System der *fractional taxation* oder zu einer Berücksichtigungspflicht des Staates mit den überwiegenden Einkünfte gelangen wird, bleibt daher abzuwarten.
- Zu den weiterhin offenen Problemen gehört beispielsweise auch die Auswirkung von im Ansässigkeitsstaat nicht steuerbaren oder steuerfreien Einkünften auf den – in § 1 Abs 4 EStG implementierten – 90%-*Schumacker*-Test im Tätigkeitsstaat. In der Rs *Wallentin*[25] hatte der EuGH entschieden, dass Einnahmen eines StPfl, die in seinem Wohnsitzstaat nicht steuerbar sind (konkret: Unterhaltsleistungen und Stipendien), bei der Berechnung der 90%-Grenze im Tätigkeitsstaat außer Betracht zu lassen sind, was freilich eher zu einer entsprechenden Berücksichtigungsverpflichtung des Tätigkeitsstaates führt[26]. Keine derartige „Ausblendung“ zur Ermittlung der 90%-Grenze im Tätigkeitsstaat nahm der Gerichtshof aber in der Rs *D* hinsichtlich des im Wohnsitzstaat belegenen und dort mangels existierender Vermögensbesteuerung nicht stpfl Vermögens vor[27]. Diese Inkonsistenz zwischen *Wallentin* und *D* hat bereits Anlass zu literarischer Kritik gegeben[28], zumal unklar ist, ob der EuGH zukünftig Einkommen oder Vermögen im Wohnsitzstaat für die Anwendung des *Schumacker*-Tests im Tätigkeitsstaat „ausblenden“ wird, wenn der Wohnsitzstaat die Entscheidung zur Nichtbesteuerung des betreffenden Einkommens oder Vermögens getroffen hat[29].

Schließlich sei ein kurzer Exkurs auf eine weitere Konsequenz für den umgekehrten Fall der Tätigkeit eines unbeschränkt StPfl im Ausland erlaubt: Diesfalls zeigt nämlich die *De Groot*-Rsp, dass der Ansässigkeitsstaat personen- und familienbezogene Begünstigungen – sowohl im Bereich der Bemessungsgrundlage als auch im Bereich des Tarifs – unbeschränkt StPfl unabhängig von der Gefahr eines *salery splitting* nur mehr dann und insoweit verwehren darf, als die Berücksichtigungsverpflichtung nach der *Schumacker*-Rsp auf den Tätigkeitsstaat übergegangen ist oder sie dieser ganz oder teilweise freiwillig übernommen hat[30]. Die in *De Groot* als gemeinschaftswidrig erkannte niederländische Bestimmung findet ihr österreichisches Pendant in § 33 Abs 10 EStG: Ist nämlich bei der Berechnung des Progressionsvorbehalts bei Auslandseinkünften oder bei der Ermittlung des anrechenbaren Höchstbetrages ausländischer Steuern ein Durchschnittssteuersatz anzuwenden, so ist dieser gem § 33 Abs 10 EStG im Wesentlichen nach Berücksichtigung der personen- und familienbezogenen *tariflichen* Begünstigungen zu ermitteln[31]. Entgegen der früheren Rsp des VwGH[32]

13) Zur inhaltlichen Begrenztheit der *Schumacker*-Rechtsprechung auf personen- und familienbezogene Entlastungen siehe nur Schlussanträge GA *Léger* 9. 3. 2006, C-346/04, *Conijn* – Tz 33, sowie aus dem Schrifttum insb *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 888 ff.
14) Ebenso Rz 4 EStR 2000; siehe auch EuGH 14. 2. 1995, C-279/93, Slg 1995, I-0225, *Schumacker* – Tz 34; EuGH 14. 9. 1999, C-291/97, Slg 1999, I-05451, *Gschwind* – Tz 23; EuGH 12. 6. 2003, C-234/01, Slg 2003, I-5933, *Gerritse* – Tz 44.
15) EuGH 14. 2. 1995, C-279/93, Slg 1995, I-0225, *Schumacker* – Tz 36.
16) EuGH 11. 8. 1995, C-80/94, Slg 1995, I-2493, *Wielockx* – Tz 20.
17) Siehe zB EuGH 14. 2. 1995, C-279/93, Slg 1995, I-0225, *Schumacker* – Tz 36 ff.
18) EuGH 12. 6. 2003, C-234/01, Slg 2003, I-5933, *Gerritse* – Tz 48 ff; EuGH 1. 7. 2004, C-169/03, Slg 2004, I-6443, *Wallentin* – Tz 19; dazu auch *G. Kofler*, ÖStZ 2003/613, 307 (308 mwN).
19) BGBl 1996/798.
20) Früher 6.975 €; dazu krit *Novacek*, RdW 2003/458.
21) EuGH 14. 9. 1999, C-291/97, Slg 1999, I-05451, *Gschwind* – Tz 28; dazu Rz 36 EStR 2000.
22) Zur Kritik an *Schumacker* jüngst ausführlich *Lang*, RIW 2005, 336 (336 ff); ausf zur *Schumacker*-Rsp *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 888 ff.
23) EuGH 12. 12. 2002, C-385/00, Slg 2002, I-11819, *De Groot*.
24) Siehe für diesen Alternativvorschlag einer *„fractional taxation“* nur *Wattel*, ET 2000, 210 (210 ff); *van Raad*, 26 Brook. J. Int'l L 1481 (1490 ff) (2000-2001).
25) EuGH 1. 7. 2004, C-169/03, Slg 2004, I-6443, *Wallentin*; dazu etwa *G. Kofler*, ÖStZ 2004/829, 423 (423 ff).
26) Dazu einerseits *G. Kofler*, ÖStZ 2004/829, 423 (425), und andererseits *Lang*, SWI 2005, 156 (163).
27) EuGH 5. 7. 2005, C-376/03, *D* – Tz 39 ff; aA zuvor Schlussanträge GA *Colomer* 26. 10. 2004, C-376/03, *D* – Tz 63 ff, und dazu zust *Schnitger*, IStR 2004, 793 (801).
28) *Lang*, SWI 2005, 365 (367 f); *G. Kofler*, ÖStZ 2005/949, 432 (434 f).
29) Siehe auch die Kritik bei *G. Kofler/Schindler*, ET 2005, 530 (534 ff).
30) EuGH 12. 12. 2002, C-385/00, Slg 2002, I-11819, *De Groot*; siehe zu dieser Konsequenz des *De Groot*-Urteils auch *Terra/Wattel*, European Tax Law⁴ (2005) 98; weiters *Schnitger*, FR 2004, 185 (194 f).
31) Zur diesbezüglichen Anwendung des § 33 Abs 10 EStG siehe etwa ErlRV 1237 BlgNR 18. GP, 55; Rz 813 LStR 2002; *H. J. Aigner/Reinisch*, SWI 2002, 467 (470); VwGH 7. 8. 2001, 97/14/0109, ecolex 2002/55 m Anm *G. Kofler*.
32) So zB VwGH 18. 12. 1990, 89/14/0283, ÖStZB 1991, 537; VwGH 11. 3. 1992, 90/13/0131, ÖStZB 1992, 742.

werden also durch § 33 Abs 10 EStG Absetzbeträge im Ergebnis anteilig den in- und ausländischen Einkünften zugeordnet: Resultat dieser Vorgehensweise ist daher – wie im *De Groot*-Fall –, dass persönliche Begünstigungen nur im anteiligen Verhältnis der in Österreich erzielten Einkünfte berücksichtigt werden[33]. Diese Reflexwirkungen auf die abkommensrechtlichen Entlastungsmechanismen im Hinblick auf *tarifliche* personen- und familienbezogene Begünstigungen[34] entsprechen daher offensichtlich nicht dem Gemeinschaftsrecht[35].

1.1.2 Geltung des objektiven Nettoprinzips auch für Steuerausländer: Gerritse und die Reform der beschränkten Steuerpflicht durch das AbgÄG 2004

In *Gerritse*[36] erblickte der EuGH in der pauschalen Besteuerung der Bruttoeinkünfte eines beschränkt StPfl ohne Veranlagungsmöglichkeit einen ungerechtfertigten Verstoß gegen die konkret anwendbare Dienstleistungsfreiheit. Anders als im Falle des in der *Schumacker*-Rsp fokussierten *subjektiven* Nettoprinzips muss also die für Steuerinländer geltende Besteuerung nach dem *objektiven* Nettoprinzip jedenfalls auch auf Steuerausländer ausgedehnt werden[37]. Ebenfalls in *Gerritse* behandelte der EuGH die Frage des Pauschalsteuersatzes bei beschränkt StPfl und gelangte hier zu dem Ergebnis, dass ein höherer Steuersatz für Gebietsfremde eine verbotene Diskriminierung darstellt[38]. Der EuGH bestätigte damit die hA im Schrifttum, die aus dem *Asscher*-Urteil[39] zu Recht ganz allgemein ableitet, dass benachteiligende differenzierte Steuersätze bei beschränkter bzw unbeschränkter Steuerpflicht nur mehr dann haltbar sind, wenn sie gerechtfertigt werden können[40].

Das Urteil in *Gerritse* hat die schon lange gehegten Bedenken gegen das frühere österreichische System der – außerhalb des § 1 Abs 4 EStG erfolgenden – Besteuerung beschränkt StPfl bestätigt, zumal etwa bei den Einkünften iSd § 99 Abs 1 Z 3 bis 5 EStG ein 20%iger Bruttosteuerabzug vorzunehmen war, ohne dass dem beschränkt StPfl eine Veranlagung und damit eine Berücksichtigung seiner Aufwendungen ermöglicht wurde (§ 102 Abs 4 EStG). Im Hinblick auf die Rsp des EuGH ist der österreichische Gesetzgeber im AbgÄG 2004[41] allerdings den Vorschlägen des Schrifttums[42] weitgehend gefolgt und hat versucht, das System der Besteuerung beschränkt StPfl an die gemeinschaftsrechtlichen Vorgaben anzupassen[43].

- Durch die Änderung des § 102 Abs 1 Z 3 EStG wurde zunächst die Veranlagungsoption auch auf die Fälle der Abzugssteuer nach § 99 Abs 1 Z 3 bis 5 EStG ausgedehnt und durch den Entfall des § 102 Abs 4 EStG auch der Ausschluss von der Veranlagungsoption im Bezug auf die der Steuerabgeltung nach § 97 EStG unterliegenden Einkünften aufgehoben.
- Da aber – außerhalb des § 1 Abs 4 EStG – die Berücksichtigung des Existenzminimums nach der Rsp grundsätzlich Sache des Wohnsitzstaates ist[44], nehmen beschränkt StPfl nicht mehr zu Gänze an der das Existenzminimum sichernden Null-Steuerzone von 10.000 € nach § 33 Abs 1 EStG[45] teil, sondern lediglich im Ausmaß von 2.000 €[46]. Dies wird durch die Hinzurechnung eines Betrages von 8.000 € zur Bemessungsgrundlage erreicht (§ 102 Abs 3 EStG); entsprechend wurde der Grenzbetrag für die Steuererklärungspflicht bei beschränkter Steuerpflicht auf 2.000 € herabgesetzt (§ 42 Abs 2 EStG).
- Beschränkt Lohnsteuerpflichtige mit „inländischem" Arbeitgeber (§ 70 Abs 2 Z 1 EStG) unterliegen zur Vermeidung von Differenzierungen in der Lohnverrechnung wie bisher dem auch für unbeschränkt StPfl geltenden einheitlichen Lohnsteuertarif, wobei aber Freibeträge aufgrund eines Freibetragsbescheides nicht mehr berücksichtigt werden. Damit soll der Lohnsteuerabzug nach § 70 Abs 2 Z 1 EStG der Brutto(lohn)besteuerung im Falle eines „ausländischen" Arbeitgebers nach § 70 Abs 2 Z 2 EStG angenähert werden[47]. In beiden Fällen besteht auch die Möglichkeit einer Antragsveranlagung, bei der allerdings der besondere „Tarif" nach § 102 Abs 3 EStG zur Anwendung kommt.

Schließlich ist mit dem AbgÄG 2004 die Beibringung eines inländischen Besteuerungsnachweises als Voraussetzung für den Werbungskostenabzug (bei § 70 Abs 2 Z 2 EStG) bzw den Betriebsausgabenabzug (bei § 99 Abs 1 Z 1 EStG) entfallen, sofern der beschränkt steuerpflichtige Zahlungsempfänger in einem EU- oder EWR-Mitgliedstaat (mit umfassender Amts- und Vollstreckungshilfe)[48] ansässig ist (§ 102 Abs 1 Z 3 EStG)[49]. Dennoch erscheinen durch dieser partiellen Änderung noch nicht alle gemeinschaftsrechtlichen Bedenken gegen den Besteuerungsnachweis ausgeräumt[50].

33) Siehe zur alten Rechtslage auch *G. Kofler*, ÖStZ 2003/315, 184 (187 m FN 41).
34) Demgegenüber erscheint die von der hA vertretene Ansicht gemeinschaftsrechtskonform, dass außergewöhnliche Belastungen und Sonderausgaben ausschließlich den inländischen Teil der Bemessungsgrundlage vermindern; siehe Rz 7601 EStR 2000; VwGH 11. 10. 1977, 1830/77, ÖStZB 1978, 90.
35) Ebenso *H. J. Aigner/Reinisch*, SWI 2002, 467 (471); *Mühlehner*, SWI 2003, 61 (61 f); *G. Kofler*, ÖStZ 2003/315, 184 (187); *H.J. Aigner/Reinisch*, SWI 2003, 539 (539 ff); aA *Loukota*, SWI 2003, 488 (488 ff).
36) EuGH 12. 6. 2003, C-234/01, Slg 2003, I-5933, *Gerritse*; dazu etwa *G. Kofler*, ÖStZ 2003/504, 266 (266 ff); *G. Kofler*, ÖStZ 2003/613, 307 (307 ff); *Burgstaller/W. Loukota*, SWI 2003, 244 (244 ff); *Cordewener*, IStR 2004, 109 (109 ff).
37) Dazu ausführlich *Cordewener*, IStR 2004, 109 (110).
38) EuGH 12. 6. 2003, Rs C-234/01, *Gerritse* – Tz 53; EuGH 27. 6. 1996, C-107/94, Slg 1996, I-3089, *Asscher* – Tz 49; siehe auch BFH 5. 2. 2001, I B 140/00, BFHE 195, 156, BStBl 2001 II 598; FG Berlin 28. 5. 2001, 9 K 9312/99, IStR 2001, 443 m Anm *Grams/Molenaar*.
39) EuGH 27. 6. 1996, C-107/94, Slg 1996, I-3089, *Asscher*.
40) So zB *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 896 f, 901 ff.
41) BGBl I 180/2004.
42) Siehe zB *G. Kofler*, ÖStZ 2003/504, 266 (266 ff); *Kofler*, ÖStZ 2003/613, 307 (307 ff mwN); siehe zur deutschen Reaktion auf das *Gerritse*-Urteil (BMF-Schreiben vom 3. 11. 2003, BStBl 2003 I 553) *Cordewener*, IStR 2004, 109 (109 ff).
43) Dazu *G. Kofler*, taxlex 2005, 16 (16 ff); *Lang*, SWI 2005, 156 (156 ff); *G. Kofler*, JAP 2005/2005, 174 (174 ff).
44) Siehe zB EuGH 14. 2. 1995, C-279/93, Slg 1995, I-0225, *Schumacker*; EuGH 11. 8. 1995, C-80/94, Slg 1995, I-2493, *Wielockx*; EuGH 27. 6. 1996, C-107/94, Slg 1996, I-3089, *Asscher*.
45) Zur zulässigen Nichtberücksichtigung jener Absetzbeträge des § 33 EStG, die der Erfassung der familiären oder persönlichen Situation des StPfl dienen, siehe EuGH 12. 12. 2002, C-385/00, Slg 2002, I-11819, *De Groot* – Tz 99 ff; dazu *G. Kofler*, ÖStZ 2003/315, 186 mwN.
46) Die teilweise Beibehaltung einer Null-Steuerzone für beschränkt StPfl erklärt sich aus Vereinfachungsüberlegungen; dazu *Atzmüller/Herzog/Mayr*, RdW 2004/581, 621 (627).
47) Allerdings begegnet wohl auch diese Differenzierung zwischen beschränkt steuerpflichtigen Arbeitnehmern mit „inländischem" Arbeitgeber und solchen mit „ausländischem" Arbeitgeber ebenfalls gemeinschaftsrechtlichen Bedenken; dazu *G. Kofler*, taxlex 2005, 16 (18 m FN 28).
48) Derzeit nur im Verhältnis zu Norwegen.
49) Zur europarechtlichen Kritik an der früheren Fassung ausf *Lang/W. Loukota*, SWI 2003, 67 (72 ff).
50) Siehe *Lang*, SWI 2005, 156 (159 f); *Ehrke-Rabel*, Gemeinschaftsrecht und österreichisches Abgabenverfahren (2006) 171 ff; weiters *Lang/W. Loukota*, SWI 2003, 67 (68 ff und 76 ff).

1.1.3 Das Ende des Steuerabzuges durch Scorpio?

Als eine verbleibende gemeinschaftsrechtliche „Problemzone" sticht der Brutto-Steuerabzug nach § 99 EStG ins Auge. Sieht man hier vom – gleichermaßen für beschränkt wie unbeschränkt StPfl geltenden – Lohn- und Kapitalertragsteuerabzug ab, stellt sich trotz der umfassenden Veranlagungsmöglichkeit die europarechtliche Frage, ob der derzeitige – nur für beschränkt StPfl geltende – Bruttosteuerabzug nach § 99 EStG (und die daran anknüpfende Haftung des Abzugsverpflichteten nach § 100 Abs 2 EStG) zur Sicherung des österreichischen Besteuerungsrechts beibehalten werden kann[51]. Aus *Gerritse* ergibt sich nämlich nicht eindeutig, ob die Steuererhebung im Wege eines sich nach den *Brutto*einnahmen bemessenden Steuerabzugs und die sie flankierende Haftungsregelung auch dann gemeinschaftswidrig sind, wenn den Gebietsfremden die Möglichkeit zur Antragsveranlagung eröffnet wird[52].

So könnte bereits eine als Vorauszahlung wirkende Steuererhebung im Wege des Steuerabzugs nach § 99 EStG und die Haftung des Abzugsverpflichteten (§ 100 Abs 2 EStG) den Gebietsfremden gegenüber dem Gebietsansässigen benachteiligen und solcherart eine verbotene Diskriminierung darstellen[53]. Einerseits führt der vorläufige Bruttosteuerabzug nämlich – gerade auch im Vergleich zu den auf eine Nettogröße bezogenen Einkommensteuervorauszahlungen Gebietsansässiger – zu Liquiditätsnachteilen des Gebietsfremden oder sogar zu Situationen, in denen Gebietsfremde Vorauszahlungen auf eine Steuerschuld leisten müssen, die niemals entstehen wird[54]. Andererseits können die Abzugsverpflichtung des Vergütungsschuldners und sein Haftungsrisiko in Wettbewerbsnachteilen der Gebietsfremden resultieren, da beim Engagement Gebietsansässiger vergleichbare Kosten und Risiken nicht entstehen. Allerdings sind in der Rs *Scorpio* bereits Vorlagefragen des BFH zur insofern vergleichbaren deutschen Rechtslage beim EuGH anhängig[55]. Diese Rs wird zeigen, ob in Zukunft der nur für beschränkt StPfl anwendbarer Steuerabzug nach § 99 EStG in irgendeiner Form – also etwa als Steuerabzug von den *Netto*einkünften – beibehalten werden kann. Im Hinblick auf dieses Vorabentscheidungsersuchen hat der VwGH auch ein bei ihm anhängiges Beschwerdeverfahren betreffend die Abzugssteuer nach § 99 Abs 1 Z 3 EStG ausgesetzt[56].

1.1.4 Verbleibende Problembereiche: Betriebsstättenverlustvortrag

Nach § 102 Abs 2 Z 2 letzter Satz EStG steht der Verlustabzug bei betrieblich tätigen Betriebsstätten nur insoweit zu, als der Verlust die übrigen Einkünfte im Verlustentstehungsjahr oder in einem der folgenden Jahre übersteigt[57]. Obwohl keine unmittelbar einschlägige Rsp zu dieser Frage existiert, hat dieses Erfordernis eines negativen Welteinkommens nach zutreffender hA[58] eine gemeinschaftsrechtlich verbotene Schlechterstellung von Steuerausländern zur Folge: Im Rahmen der beschränkten StPfl entstandene Verluste können wegen § 102 Abs 2 Z 2 letzter Satz EStG oftmals nicht oder nur teilweise geltend gemacht werden, während unbeschränkt Stpfl den Verlustvortrag unter den Voraussetzungen des § 18 Abs 6 und 7 EStG stets in voller Höhe beanspruchen können[59]. Derzeit ist auf Ebene der Finanzverwaltung und des UFS allerdings lediglich gesichert, dass § 102 Abs 2 Z 2 letzter Satz EStG nicht zur Anwendung kommen soll, wenn ein dem Art 24 Abs 3 OECD-MA nachgebildetes abkommensrechtliches Diskriminierungsverbot eingreift[60]; diesfalls ist bei Nachweis, dass eine Verlustverwertung im Ansässigkeitsstaat nicht möglich ist, für die inländische Betriebsstätte der Verlustvortrag einzuräumen. Vor dem Hintergrund des in *Avoir Fiscal* und *Saint-Gobain*[61] operationalisierten gemeinschaftsrechtlichen Betriebsstättendiskriminierungsverbot kann freilich nichts Anderes gelten, wenn (lediglich) die Grundfreiheiten des EG-Vertrages oder des EWR-Abkommens anwendbar sind[62].

1.2 Beschränkte Steuerpflicht juristischer Personen

1.2.1 Schachtelprivileg auch für Betriebsstätten: Avoir Fiscal und § 21 Abs 1 Z 2 lit a KStG

Die Betriebsstättenbesteuerung war schon mehrfach Gegenstand der Rsp des EuGH[63], zumal Art 43 Abs 2 zweiter Satz EG ausdrücklich „*Beschränkungen der Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften durch Angehörige eines Mitgliedstaats*" verbietet, „*die im Hoheitsgebiet eines Mitgliedstaats ansässig sind*". Dementsprechend hat der EuGH bereits in *Avoir Fiscal*[64] deutlich gemacht, dass im Falle vergleichbarer Situationen die Gleichbehandlung der als Zweigniederlassung iSd Art 43 Abs 2 zweiter Satz EG anzusehenden Betriebsstätte eines Gebietsfremden mit einem Gebietsansässigen gemeinschaftsrechtlich geboten ist. Eine solche Vergleichbarkeit ist dabei trotz der bestehenden zivil- und steuerrechtlichen Unterschiede zwischen Tochtergesellschaften und Betriebsstätten dann gegeben, wenn im Rahmen der Betriebsstättenbesteuerung das Besteuerungsrecht über die fraglichen Einkommensteile beansprucht wird[65].

Die Mitgliedstaaten müssen daher nach *Avoir Fiscal* ihre im *nationalen* Steuerrecht vorgesehenen Begünstigungen für ansässige Tochtergesellschaften – wie beispielsweise die Gewährung

51) Dazu *W. Loukota/Hohenwarter*, SWI 2004, 539 (539 ff); siehe zB auch *G. Kofler*, ÖStZ 2003/613, 307 (309 mwN).
52) Siehe BFH 28. 4. 2004, I R 39/04, BFHE 206, 120, BStBl 2004 II 878; *Cordewener*, IStR 2004, 109 (115 f).
53) So zB *Haarmann/Fuhrmann*, IStR 2003, 558 (559); *Cordewener*, IStR 2004, 109 (115 f).
54) Dazu EuGH 8. 3. 2001, C-397/98 und C-410/98, Slg 2001, I-1727, *Metallgesellschaft und Hoechst*– Tz 54.
55) Siehe BFH 28. 4. 2004, I R 39/04, BFHE 206, 120, BStBl 2004 II 878, beim EuGH geführt als Rs C-290/04, *Scorpio*; siehe auch *W. Loukota/Hohenwarter*, SWI 2004, 539 (539 ff).
56) Beschluss VwGH 17. 11. 2004, 2002/14/0056.
57) Siehe zB Rz 8059 EStR 2000.
58) Siehe aus dem jüngeren Schrifttum zB *Tumpel*, SWI 2001, 55 (55 ff); *Hruschka/Bendlinger*, SWI 2003, 271 (271 ff); *Doralt/Ludwig*, EStG[9] (2005) § 102 Tz 37.
59) Zur Regelung im Verhältnis zu Deutschland siehe ausf *Loukota*, SWI 2001, 163 (164 ff); dazu auch UFS Wien 6. 12. 2004, RV/2450-W/02.
60) Rz 8059 EStR 2000; so unlängst auch UFS Wien 21. 3. 2005, RV/0495-W/04 (zum DBA Frankreich); UFS Wien 3. 8. 2005, RV/1266-W/04 (zum DBA Niederlande); siehe ausf auch *Loukota* in *Achatz/D. Aigner/G. Kofler/Tumpel* (Hrsg), Internationale Umgründungen (2005) 367 (386 ff).
61) EuGH 28. 1. 1986, 270/83, Slg 1986, 273, *Kommission/Frankreich* („*Avoir fiscal*"); EuGH 21. 9. 1999, C-307/97, Slg 1999, I-6161, *Saint-Gobain*; dazu sogleich unten III.1.2.1 und III.1.2.2.
62) Dies noch offen gelassen vom VwGH 18. 11. 2003, 99/14/0011, ÖStZB 2004/462.
63) EuGH 28. 1. 1986, 270/83, Slg 1986, 273, *Kommission/Frankreich* („*Avoir fiscal*"); EuGH 13. 7. 1993, C-330/91, Slg 1993, I-4017, *Commerzbank*; EuGH 12. 4. 1994, C-1/93, Slg 1994, I-1137, *Halliburton*; EuGH 15. 5. 1997, C-250/95, Slg 1997, I-2471, *Futura Participations and Singer*; EuGH 29. 4. 1999, C-311/97, Slg 1999, I-2651, *Royal Bank of Scotland*; EuGH 21. 9. 1999, C-307/97, Slg 1999, I-6161, *Saint-Gobain*; EuGH 23. 2. 2006, C-253/03, *CLT-UFA*.
64) EuGH 28. 1. 1986, 270/83, Slg 1986, 273, *Kommission/Frankreich* („*Avoir fiscal*").
65) Dazu zB EuGH 28. 1. 1986, 270/83, Slg 1986, 273, *Kommission/Frankreich* („*Avoir fiscal*") – Tz 19 f; siehe auch EuGH 29. 4. 1999, C-311/97, Slg 1999, I-2651, *Royal Bank of Scotland* – Tz 29 ff; EuGH 21. 9. 1999, C-307/97, Slg 1999, I-6161, *Saint-Gobain* – Tz 48 f.

einer Anrechnung ausländischer Quellensteuer oder Körperschaftsteuer oder die Anwendung eines Schachtelprivilegs – auf Betriebsstätten von gebietsfremden EU-Gesellschaften ausdehnen[66]. Österreich ist diesen Anforderungen in § 21 Abs 1 Z 2a KStG grundsätzlich nachgekommen: So ist zwar die Beteiligungsertragsbefreiung des § 10 KStG ist für beschränkt stpfl Körperschaften grundsätzlich nicht anzuwenden. Den Anregungen des Schrifttums[67] folgend wurde allerdings in § 21 Abs 1 Z 2 lit a KStG[68] die Rsp des EuGH zur Niederlassungsfreiheit insofern berücksichtigt[69], als § 10 KStG dann Anwendung findet, wenn die Beteiligung einer österreichischen Betriebsstätte einer EU-Gesellschaft zuzurechnen ist. Dieses Ergebnis geht damit auch über das traditionelle Verständnis des Betriebsstättendiskriminierungsverbots des Art 24 Abs 3 OECD-MA hinaus[70].

Im Einzelnen ist allerdings ungeklärt, wie weit die durch *Avoir Fiscal* angedeutete „Freiheit der Rechtsformwahl" im Gaststaat reicht. Gesichert erscheint aber zunächst, dass ein höherer Steuersatz auf Betriebsstätten ausländischer Gesellschaften als auf inländische Gesellschaften unzulässig ist[71]. Nach wie vor offen ist aber zB der Einfluss des Gemeinschaftsrechts auf die Betriebsstättengewinnermittlung; vor dem Hintergrund der umstrittenen abkommensrechtlichen Ausgangslage des Art 7 Abs 2 OECD-MA[72] finden sich hier aber sowohl auf Ebene der Gemeinschaft als auch auf jener der OECD klare Tendenzen in Richtung einer weitreichenden Unabhängigkeitsfiktion der Betriebsstätte auch bei unternehmensinternen Sachverhalten[73]. Umgekehrt dürfte es aber ausgeschlossen sein, dass eine ausländische Muttergesellschaft dadurch mit gemeinschaftsrechtlicher Relevanz beschwert wird, dass ihre Tochtergesellschaft im Gaststaat weniger vorteilhaft behandelt wird als eine dortige Betriebsstätte[74]. Überdies können wohl für eine Betriebsstätte einer *natürlichen* Person auf der Basis der „Freiheit der Rechtsformwahl" nicht jene Begünstigungen in Anspruch genommen werden, für die das nationale Steuerrecht oder Abkommensrecht des Betriebsstättenstaates den *Kapitalgesellschaftscharakter* des Zurechnungssubjekts voraussetzt, wie es insbesondere bei Schachtelprivilegien der Fall ist[75].

1.2.3 Saint-Gobain und die gemeinschaftsrechtskonforme Auslegung abkommensrechtlicher Betriebsstättendiskriminierungsverbote

In *Saint-Gobain*[76] trafen Prinzipien des Gemeinschaftsrechts und jene des internationalen Steuerrechts aufeinander: Während Art 43 Abs 2 zweiter Satz EG die Niederlassung in Form einer Betriebsstätte jener in Form einer Tochtergesellschaft gleichstellt wird, wird abkommensrechtlich einer Betriebsstätte prinzipiell die Inanspruchnahme von Vorteilen verwehrt[77]. Auf einer Linie mit seiner außersteuerlichen Rsp[78] und in konsequenter Fortsetzung von *Avoir Fiscal* hat der EuGH das Gebot der Gleichbehandlung von Betriebsstätten in *Saint-Gobain* explizit auch auf *abkommensrechtliche* Begünstigungen ausgedehnt und dabei auch eine drohende Störung des einem Doppelbesteuerungsabkommen innewohnenden Gleichgewichts als Rechtfertigungsgrund abgelehnt. Einer inländischen Betriebsstätte einer EU-Gesellschaft iSd Art 48 EG sind daher im Falle objektiver Vergleichbarkeit auch die für ansässige Gesellschaften vorgesehenen abkommensrechtlichen Begünstigungen zu gewähren[79], und zwar unabhängig davon, ob es sich konkret um ein Abkommen mit einem Mitgliedstaat oder mit einem Drittstaat handelt[80]. Die zuvor angedachte und gemeinschaftsrechtlich wenig überzeugende Unterscheidung danach, ob eine Begünstigung im originär nationalen Recht oder im Völkervertragsrecht vorgesehen ist[81], ist damit jedenfalls überholt.

Solcherart hat *Saint-Gobain* aber nicht zur Folge, dass das Abkommen mit dem Quellenstaat auf die Betriebsstätte anwendbar und die Betriebsstätte als ansässige Person im Sinne des Art 1 iVm Art 4 OECD-MA angesehen wird[82]. Vielmehr richtet sich die Niederlassungsfreiheit gegen das nationale Recht des Betriebsstättenstaates, der gehalten ist, die fraglichen und auch in zeitlicher Hinsicht anwendbaren Abkommensbegünstigungen zumindest durch unilaterale Maßnahmen auf die Betriebsstätte der beschränkt steuerpflichtigen, natürlichen Person oder Gesellschaft zu erstrecken[83]. Diese Verpflichtung wird man aber nicht nur für die im *Saint-Gobain*-Fall fraglichen Dividenden, sondern jedenfalls auch für Zinsen und Lizenz-

66) Siehe nur *Kostense*, EC Tax Rev. 2000, 220 (220); *Offermanns/Romano*, ET 2000, 180 (188); *Martín Jiménez/García Prats/Calderón Carrero*, BIFD 2001, 241 (243 f).

67) *Tumpel*, Harmonisierung der direkten Unternehmensbesteuerung in der EU (1994) 392 f.

68) Eingefügt durch BGBl 1994/681.

69) So ausdrücklich Rz 1462 KStR 2001; *Bauer/Quantschnigg/Schellmann/Werilly*, KStG (1998) § 21 Tz 16. Die Materialen (ErlRV 1701 BlgNR 18. GP) begründen dies mit den Vorgaben der Mutter-Tochter-RL, deren Anwendung auf Betriebsstätten damals allerdings höchst umstritten war und erst unlängst ausdrücklich geregelt wurde (siehe die Richtlinie 2003/123/EG, ABl L 007/41 ff [13. 1. 2004]).

70) Obwohl der OECD-MK die Ausdehnung eines nationalen Anrechnungsmechanismus für ausländische Körperschaftsteuer (Art 24 Tz 42 f OECD-MK) bzw die Gewährung eines nationalen Schachtelprivilegs (Art 24 Tz 29 ff OECD-MK) tendenziell befürwortend diskutiert, wird diese Beurteilung letztlich den Mitgliedstaaten überlassen. Österreich folgt hier aber offenbar der im OECD-MK angedachten progressiven Sichtweise; siehe etwa EAS 2404 = SWI 2004, 244.

71) Siehe EuGH 23. 2. 2006, C-253/03, *CLT-UFA* – Tz 11 ff; so bereits bisher zB *Lausterer*, 4 EC Tax J. 1999, 45 (53 f); *Schön*, EWS 2000, 281 (288); *Lausterer*, IStR 2001, 212 (212 ff).

72) Zu den zwischen einer absoluten und einer eingeschränkten Selbstständigkeitsfiktion schwankenden Ansätzen vgl nur *Hemmelrath* in *Vogel/Lehner*, DBA4 (2003) Art 7 Rz 77 ff. Aufgrund der Wortgleichheit mit Art 7 Abs 2 OECD-MA pflanzt sich diese Auslegungsunsicherheit auch auf der Ebene der Schiedskonvention fort (siehe Art 4 Abs 2 des Übereinkommens 90/436/EWG, ABl L 225/10 ff [20. 8. 1990]; dazu auch *Terra/Wattel*, European Tax Law[4] [2005] 589 f).

73) So auf Basis der Niederlassungsfreiheit *Hintsanen*, ET 2003, 114 (114 ff); ebenso *Prokisch* in *Vogel/Lehner*, DBA[4] (2003) Art 4 Rz 12; zumindest rechtspolitisch ebenso *Europäische Kommission*, Doppelbesteuerungsabkommen und Recht der Europäischen Gemeinschaft, DOC(05)2306/B (9. 6. 2005) – Anhang A, 6. Auch die Arbeiten auf OECD-Ebene gehen in Richtung einer weitreichenden *„fiction of independence"*; siehe *OECD*, Discussion Draft on the Attribution of Profits to Permanent Establishments – Part I (General Considerations) (2004) (abrufbar unter *www.oecd.org*); siehe dazu etwa *Ditz*, IStR 2005, 37 (37 ff); *Bennet/Dunahoo*, Intertax 2005, 51 (54 ff).

74) *Wattel*, EC Tax Rev. 2003, 194 (198); *Schnitger*, IStR 2004, 821 (824).

75) So wohl auch EuGH 23. 2. 2006, C-253/03, *CLT-UFA* – Tz 33; ebenso *Kemmeren*, Principle of Origin in Tax Conventions (2001) 188; *Lüdicke* in *Lang/Schuch/Staringer* (Hrsg), ECJ – Recent Developments in Direct Taxation (2006) 113 (132); zum Problem ausf *Schnitger*, ET 2004, 522 (524 ff); *Schnitger*, IStR 2004, 821 (823 ff).

76) EuGH 21. 9. 1999, C-307/97, Slg 1999, I-6161, *Saint-Gobain*.

77) Siehe zur möglichen Wirkung des Betriebsstättendiskriminierungsverbots aber Art 24 Tz 49 bis 54 OECD-MK

78) EuGH 27. 9. 1988, 235/87, Slg 1988, 5589, *Matteucci*; EuGH 15. 1. 2002, C-55/00, Slg 2002, I-413, *Gottardo*; EuGH 5. 11. 2002, C-467/98, Slg 2002, I-9519, *Kommission/Dänemark* („*Open Skies*").

79) EuGH 21. 9. 1999, C-307/97, Slg 1999, I-6161, *Saint-Gobain* – Tz 59; dazu nur *Schuch*, SWI 1999, 451 (451); *Jann/Toifl*, SWI 1999, 488 (482); *Kostense*, EC Tax Rev. 2000, 220 (222 f); krit *Avery Jones*, EC Tax Rev. 1998, 95 (103).

80) Siehe einerseits EuGH 21. 9. 1999, C-307/97, Slg 1999, I-6161, *Saint-Gobain* – Tz 59, und EuGH 15. 1. 2002, C-55/00, Slg 2002, I-413, *Gottardo* – Tz 33 f (zu Drittstaatsabkommen), sowie andererseits EuGH 27. 9. 1988, 235/87, Slg 1988, 5589, *Matteucci* – Tz 16 (zu einem Abkommen zwischen Mitgliedstaaten).

81) Dazu etwa *de Weerth*, IStR 1999, 628 (628); *Lausterer*, 4 EC Tax J. 1999, 45 (52); *Oliver*, BTR 2000, 174 (179).

82) Ebenso *Jann/Toifl*, SWI 1999, 488 (492); *Jirousek*, ÖStZ 1999, 604 (606); *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 689; *Göschl/Kovar/Wahrlich* in *Lang/Jirousek* (Hrsg), Praxis des Internationalen Steuerrechts, FS Loukota (2005) 111 (128 ff).

83) *Pistone*, The Impact of Community Law on Tax Treaties (2002) 148.

gebühren[84] und darüber hinaus auch für alle anderen der Betriebsstätte zuzurechnenden Einkünfte bejahen können[85]. In diesem weiten Sinne geht auch die österreichische Finanzverwaltung nunmehr davon aus, dass „*in einem EU-Mitgliedstaat ansässigen Steuerpflichtigen [...] dieselben Abkommensvorteile aus mit dritten Staaten abgeschlossenen DBA, welche unbeschränkt Steuerpflichtige genießen, einzuräumen*“ sind[86].

1.3 Abkommensrechtliche Meistbegünstigung?

Vor dem Hintergrund der unterschiedlichen Doppelbesteuerungsabkommen zwischen den Mitgliedstaaten wird im Schrifttum seit gut 15 Jahren heftig diskutiert, ob dem Gemeinschaftsrecht ein Verbot der *horizontalen* Diskriminierung zwischen zwei Gebietsfremden inhärent ist: Diese Fragestellung läuft darauf hinaus, ob das Gemeinschaftsrecht zu einer Form der „Meistbegünstigung“ im Rahmen von DBA insofern verpflichtet, dass zB der Quellenstaat zwei aus verschiedenen Mitgliedstaaten stammende Investoren gleich behandeln und damit die jeweils günstigste Abkommenrechtslage (etwa den günstigsten Quellensteuersatz) gewähren muss. Die Meinungen in der Literatur rangierten zwischen einer klaren Befürwortung einer solchen „*Inbound*-Meistbegünstigung“ und einer vehementen Ablehnung einer solchen Verpflichtung[87], wobei sich die nationalen Gerichte bislang durchwegs auf die Seite der „Gegner“ geschlagen hatten[88]. In diesem Sinne hat zuletzt auch der UFS Wien hinsichtlich der österreichischen Quellensteuer auf Lizenzzahlungen nach Holland eine gemeinschaftsrechtliche Meistbegünstigungsverpflichtung abgelehnt[89].

Wohl auch aufgrund der enormen potenziellen Konsequenzen für die mitgliedstaatlichen Fisci und des drohenden „Chaos“ hat der EuGH den Befürwortern einer Meistbegünstigungsverpflichtung in den Rs *D*[90] und *Bujara*[91] allerdings unlängst eine deutliche Absage erteilt[92]. In diesen Fällen ging es um die Frage, ob es den Niederlanden gemeinschaftsrechtlich gestattet ist, Deutschen jene personenbezogenen vermögen- bzw einkommensteuerlichen Freibeträge zu verwehren, die die Niederlande auf Basis des Diskriminierungsverbots im belgisch-niederländischen DBA einem Belgier in derselben faktischen Situation gewähren würden. Anders als Generalanwalt *Colomer*[93] kam der EuGH hier zu dem Ergebnis, dass sich zwei in unterschiedlichen Mitgliedstaaten ansässige Gebietsfremde im Hinblick auf die fraglichen holländischen Freibeträge schon deshalb nicht in einer vergleichbaren Lage befinden, weil eine unterschiedliche Behandlung – abkommensrechtliche Gewährung der Vergünstigung an einen Belgier, nicht jedoch an einen Deutschen – im Wesen eines bilateralen DBA liege. Dies gelte selbst dann, wenn in einem DBA an Ansässige eines bestimmten DBA-Partnerstaates *prima vista* einseitig Vorteile gewährt werden, zumal auch ein solcher Vorteil im Gesamtkontext des Abkommens gesehen werden müsse und zu dessen allgemeiner Ausgewogenheit beitrage.

Trotz aller Bedenken gegen die Lösung des EuGH scheint die Reichweite der Entscheidungen in *D* und *Bujara* eine generelle zu sein und lässt bei genauerer Betrachtung kaum Raum für einen „Restanwendungsbereich“ einer *Inbound*-Meistbegünstigung[94]: Geht man nämlich von einer grundsätzlichen, gemeinschaftsrechtlichen Verpflichtung zu einer Gleichbehandlung von Gebietsfremden in vergleichbaren Situationen aus, wäre angesichts der differenzierten hA[95] gerade die „einseitige“ Begünstigung in *D* durch einen Freibetrag, der mangels Vermögenssteuer im DBA-Partnerstaat keiner *konkreten* Reziprozität unterliegt, ein „Paradefall“ für eine Bejahung der Meistbegünstigung gewesen und hätte durchaus noch Spielraum für diese Frage in den Kernbereichen der Doppelbesteuerung (zB unterschiedliche Quellensteuersätze) gelassen. Der EuGH geht aber offensichtlich davon aus, dass jede Abkommensbestimmung – unabhängig von ihrem *konkret* allokativen oder reziproken Charakter – einen Bestandteil des bilateralen Verhandlungsergebnisses darstellt und damit letztlich der Abgrenzung der Steuerhoheiten zwischen den DBA-Partnerstaaten dient[96]. Die von Generalanwalt *Ruiz-Jarabo Colomer* angedachte Differenzierung je nachdem, ob eine Abkommensbestimmung konkret der Teilung der Steuerhoheit diene[97], lehnt der EuGH damit implizit, aber deutlich ab. Vor diesem Hintergrund wäre es daher eine Überraschung, wenn der EuGH in der derzeit noch anhängigen Rs *ACT Group Litigation* hinsichtlich einseitig gewährter Steuergutschriften durch das

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84) Ebenso *de Weerth*, IStR 1998, 628 (628); *Saß*, DB 1999, 2381 (2381 f); *Haunold/Tumpel/Widhalm*, SWI 1999, 504 (507); *Jirousek*, ÖStZ 1999, 604 (606 f); *Jann/Toifl*, SWI 1999, 488 (493); *Kostense*, EC Tax Rev. 2000, 220 (223 ff); *Wassermeyer* in *Debatin/Wassermeyer*, DBA, Art 10 Rz 178, Art 11 MA Rz 140 und Art 12 Rz 154; *Martín Jiménez/García Prats/Calderón Carrero*, BIFD 2001, 241 (241 ff); *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 689; *Zanotti*, ET 2004, 493 (497); wohl auch *Oliver*, BTR 2000, 174 (181) (Zinsen).

85) Umfassend auch *Europäische Kommission*, Doppelbesteuerungsabkommen und Recht der Europäischen Gemeinschaft, DOC(05)2306/B (9. 6. 2005) – Tz 27; ebenso *Kemmeren*, Principle of Origin in Tax Conventions (2001) 192.

86) Rz 7910 EStR 2000. Zur entsprechenden Auslegung der DBA-Diskriminierungsverbote siehe etwa *Jirousek*, ÖStZ 1999, 604 (604 ff); weiters EAS 1611 = SWI 2000, 269; EAS 2157 = SWI 2003, 2.

87) Siehe die Übersicht zum Meinungsstand bei *G. Kofler/Schindler*, ET 2005, 530 (530 ff); umfassend zum Problem *G. Kofler*, 5 Hous. Bus. & Tax Law J. 1 (1 ff) (2005).

88) Vgl BFH 31. 10. 1990, II R 176/87, BFHE 162, 374, BStBl 1991 II 161; BFH 26. 5. 2004, I R 54/03, BFHE 206, 332, BStBl 2004 II 767; siehe für Holland *Betten*, ET 1997, 417 (417 ff); *de Graaf/Janssen*, EC Tax Rev. 2005, 173 (178 f).

89) UFS Wien 23. 6. 2005, RV/1799-W/03; krit *Hofbauer*, SWI 2005, SWI 2005, 376 (376 ff); siehe auch *Stefaner*, 39 Tax Notes Int'l 589 (589 f) (Aug. 15, 2005).

90) EuGH 5. 7. 2005, C-376/03, *D*; dazu *G. Kofler*, ÖStZ 2005/949, 432 (432 ff); *Lang*, SWI 2005, 365 (365 ff); *Petritz*, ecolex 2005, 642 (642 ff); *Schindler*, taxlex 2005, 459 (459 ff); siehe aus dem internationalen Schrifttum *Weber*, Intertax 2005, 420 (420 ff); *van Thiel*, Intertax 2005, 454 (454 ff); *G. Kofler/Schindler*, ET 2005, 530 (530 ff); *de Graaf/Janssen*, EC Tax Rev. 2005, 173 (173 ff); *O'Shea*, EC Tax Rev. 2005, 190 (190 ff); *Wattel*, BTR 2005, 575 (575 ff).

91) EuGH 27. 10. 2005, C-8/04, *Bujara*. Der EuGH hat die Rs *Bujara* aufgrund des vorangegangenen Urteils in der Rs *D* im verkürzten Verfahren nach Art 104 § 3 seiner Verfahrensordnung (Verfahrensordnung des Gerichtshofes der Europäischen Gemeinschaften vom 19. Juni 1991, ABl L 176/7 [4. 7. 1991]) am 27. 10. 2005 per Beschluss entschieden. Am 15. 12. 2005 hat der EuGH allerdings mit Hinweis auf die am 5. 12. 2005 erfolgten Rücknahme der Vorlage durch das nationale Gericht die Streichung dieser aus dem Register beschlossen. Diese verwirrende Situation beruht offenbar darauf, dass einerseits dem nationalen Gericht der Beschluss des EuGH noch nicht bekannt war, und dass andererseits der EuGH seinen eigenen – noch nicht veröffentlichten – Beschluss bei der Streichung übersehen hat. Wenngleich unklar ist, inwieweit dadurch die Rechtswirkungen des Beschlusses vom 27. 10. 2005 beeinflusst werden, kommt diesem zweifelsfrei argumentative Bedeutung zu.

92) Siehe nur die ausf Judikaturanalyse bei *G. Kofler*, 5 Hous. Bus. & Tax Law J. 1 (34 ff) (2005).

93) Schlussanträge GA *Colomer* 26. 10. 2004, C-376/03, *D*; dazu etwa *G. Kofler*, ÖStZ 2004/1066, 558 (558 ff); *Hofbauer*, SWI 2004, 586 (586 ff); *Schnitger*, IStR 2004, 793 (801 ff).

94) In diese Richtung auch die Analyse von *de Graaf/Janssen*, EC Tax Rev. 2005, 173 (184 ff); deutlich *Schuch*, EC Tax Rev. 2006, 6 (8) .

95) Siehe zB *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 836 ff; *Jacobs*, Internationale Unternehmensbesteuerung[5] (2002) 262 ff; *Weggenmann*, IStR 2003, 677 (681 ff); *van der Linde*, EC Tax Review 2004, 10 (14 ff); *G. Kofler*, 5 Hous. Bus. & Tax Law J. 1 (68 ff) (2005).

96) In diese Richtung auch *Wattel*, BTR 2005, 575 (581 f); *O'Shea*, EC Tax Rev. 2005, 190 (196); *de Graaf/Janssen*, EC Tax Rev. 2005, 173 (183 f, 185); *Kemmeren* in *Lang/Schuch/Staringer* (Hrsg), ECJ – Recent Developments in Direct Taxation (2006) 219 (251); in diese Richtung auch *Schnitger*, FR 2005, 1079 (1082).

97) Schlussanträge GA *Colomer* 26. 10. 2004, C-376/03, *D* – Tz 82.

Vereinigte Königreich an Ansässige *gewisser* DBA-Partnerstaaten (zB an holländische, nicht aber an deutsche Gesellschaften) zu einem anderen Ergebnis käme. Generalanwalt *Geelhoed* hat in seinen diesbezüglichen Schlussanträgen jedenfalls auf das Urteil in der Rs *D* rekurriert, dessen Grundsätze auch auf die abkommensrechtliche Gewährung von Steuergutschriften übertragen und daher eine Meistbegünstigungsverpflichtung abgelehnt[98].

Nicht angesprochen hat der EuGH aber bisher einige andere Problemkreise, die im Schrifttum ebenfalls unter dem Schlagwort der „Meistbegünstigung" diskutiert werden:

- Unklar ist zunächst, ob auf der vorgelagerten und grundsätzlichen Ebene eine Ungleichbehandlung zweier Gebietsfremder *in vergleichbaren Situationen* im Sinne der *horizontalen* Diskriminierung im *nationalen* Recht eines Mitgliedstaates gemeinschaftsrechtlich rechtfertigungsbedürftig ist[99]. Die Argumentation des EuGH deutet zumindest in diese Richtung[100]. Damit ist die Rsp aber dem Vorwurf ausgesetzt, dass zwei Mitgliedstaaten gemeinsam Dinge tun dürfen, die ihnen einzeln verboten sind[101].
- Ein weiterer Themenkomplex betrifft die Überlegung, ob es im direkten Steuerrecht auf Ebene der Doppelbesteuerungsabkommen einen allgemeinen Grundsatz der Gemeinschaftspräferenz gibt, der die Mitgliedstaaten dazu verpflichtet, Angehörige anderer Mitgliedstaaten auf der DBA-Ebene jedenfalls nicht schlechter zu behandeln als Drittstaatsangehörige[102]. Abgesehen vom möglichen argumentativen Einfluss der Rs *D* und *Bujara* auf diese Konstellation lässt sich dagegen aber einwenden, dass diese Variante der Meistbegünstigung jedenfalls nicht auf das Idealbild der Wettbewerbsgleichheit im europäischen Binnenmarkt gestützt werden kann und überdies das für eine solche Überlegung herangezogene Prinzip der Gemeinschaftspräferenz insofern nicht tragfähig erscheint, als dieses den völlig anders gearteten Gesichtspunkt einer protektionistischen Abschirmung des Binnenmarktes gegenüber Drittstaaten betrifft[103].
- Erst in jüngerer Zeit ist die durch *D* und *Bujara* nicht zweifelsfrei geklärte Frage in das gemeinschaftsrechtliche Blickfeld gerückt, ob sich ein StPfl iS einer *Outbound*-Meistbegünstigung auf Basis der Grundfreiheiten gegenüber seinem *Ansässigkeitsstaat* auf das jeweils günstigste DBA, das dieser mit einem anderen Mitgliedstaat oder gar einem Drittstaat geschlossen hat, berufen kann[104]. Ein potenzieller Anwendungsbereich einer *Outbound*-Meistbegünstigung scheint aber gerade außerhalb der Abkommenssituationen zu bestehen. Konkret angesprochen sind hier jene Normen, in denen das nationale Recht insb zur „Missbrauchverhinderung" eine Vergünstigung an eine bestimmte ausländische Steuerbelastung knüpft, wie dies beispielsweise § 10 Abs 4 KStG tut[105]. Eine entsprechende Vorlagefrage ist in der Rs *De Graaf und Daniels*[106] bereits beim EuGH anhängig.

2. „Outbound"-Situationen

In ihrer Ausrichtung als „Diskriminierungsverbote" hat der EuGH die primärrechtlichen Grundfreiheiten schrittweise über ein Verbot der Benachteiligung ausländischer Staatsangehöriger auf Basis eines *ad personam*-Vergleichs zu einem weitgefassten Verbot der Benachteiligung von grenzüberschreitenden gegenüber vergleichbaren (hypothetischen) rein landesinternen Wirtschaftsvorgängen auf Basis eines *ad rem*-Vergleichs fortent-wickelt: Diskriminierungsverdächtig sind somit im Grunde auch alle Benachteiligungen von Auslands- gegenüber vergleichbaren Inlandsaktivitäten durch den Ansässigkeits- bzw Herkunftsstaat[107]. Der konkrete Verpflichtungsinhalt für den Ansässigkeits- bzw Herkunftsstaat ist allerdings Gegenstand einer evolutionären Entwicklung der Rsp. Grundsätzlich besteht die wesentliche Verpflichtung der Ansässigkeitsstaaten darin, Einkünfte von Gebietsansässigen aus ausländischen Quellen folgerichtig nach Maßgabe dessen zu behandeln, „*wie sie ihre Besteuerungsgrundlage aufgeteilt haben*"[108]. Soweit also Einkünfte aus ausländischen Quellen im Rahmen der unbeschränkten Steuerpflicht in die Besteuerung einbezogen werden, ist eine Differenzierung zwischen Einkünften aus ausländischer Quelle und inländischen Einkünften grundsätzlich rechtfertigungsbedürftig[109]. Dieser *Grundgedanke* kommt etwa in der Rs *Marks & Spencer*[110] deutlich zum Ausdruck: Dort hat der EuGH entschieden, dass ein Mitgliedstaat, der keine Besteuerungskompetenz über eine gebietsfremde Tochtergesellschaft einer gebietsansässigen Gesellschaft ausübt, *im Grundsatz* die Verluste dieser ausländischen Tochtergesellschaften nicht berücksichtigen muss.

Aus dieser Einkommensverteilung auf mehrere Mitgliedstaaten resultierende negative Effekte für die grenzüberschreitende Tätigkeit werden im Schrifttum gelegentlich als *Tax Base Fragmentations* klassifiziert und als außerhalb des grundfreiheitsrechtlichen Eingriffsbereichs liegend betrachtet[111]. Der EuGH vertritt freilich in seiner bisherigen Rsp insofern eine extensive Sichtweise der Grundfreiheiten, als Abzugsposten in der Gemeinschaft selbst im Falle einer Einkommensverteilung über mehrere Mitgliedstaaten zumindest einmal berücksichtigt werden sollen. Neben

98) Schlussanträge GA *Geelhoed* 23. 2. 2006, C-374/04, *ACT Group Litigation* – Tz 92 ff; zum Fall bereits *Gammie* in *Lang/Schuch/Staringer* (Hrsg), ECJ – Recent Developments in Direct Taxation (2006) 323 (330 ff).

99) So zuletzt *Gudmundsson*, Intertax 2006, 58 (81 ff); ähnlich auch *Schnitger*, FR 2005, 1079 (1082).

100) EuGH 5. 7. 2005, C-376/03, *D* – Tz 59.

101) Siehe auch *Weber*, Intertax 2005, 429 (441).

102) Vgl etwa *Kokott* in *Lehner* (Hrsg), Grundfreiheiten im Steuerrecht der EU-Staaten (2000), 1 (8 f); *van Thiel*, Free Movement of Persons and Income Tax Law (2002) 346 ff und 520 ff; *De Ceulaer*, BIFD 2003, 493 (497); *Troberg/Tiedje* in *von der Groeben/Schwarze*, EGV/EUV I[6] (2004) Vorb Art 43-48 EG Rz 34; *Heydt* in *Haarmann* (Hrsg), Auslegung und Anwendung von Doppelbesteuerungsabkommen (2004) 32 (50); *Lüdicke* in *Gocke/Gosch/Lang* (Hrsg), Körperschaftsteuer – Internationales Steuerrecht – Doppelbesteuerung, FS Wassermeyer (2005) 473 (483).

103) Siehe auch *Schnitger/Papantonopoulos*, BB 2005, 407 (414).

104) Derartige *Outbound*-Situationen wurden im Schrifttum vor allem andiskutiert bei *Wassermeyer* in *Lang et al* (Hrsg), Multilateral Tax Treaties (1997) 15 (23 f); *Wassermeyer*, DB 1998, 28 (30 f); *Wassermeyer*, IStR 2000, 65 (66); *van Thiel*, Free Movement of Persons and Income Tax Law (2002) 519 f; *Schnitger*, FR 2004, 185 (196 f); *Haslinger*, SWI 2005, 170 (175 ff); *Lang*, IStR 2005, 289 (295); *Lang*, IStR 2005, 289 (295); *Lang*, SWI 2005, 365 (373); *Rödder/Schönfeld*, IStR 2005, 523 (523 ff); *G. Kofler*, ÖStZ 2005/949, 432 (438); *Schindler*, taxlex 2005, 459 (464); *Schnitger*, FR 2005, 1079 (1081 ff).

105) Dazu vor allem *Haslinger*, SWI 2005, 170 (170 ff); *Schnitger*, FR 2005, 1079 (1079 ff).

106) Rs C-436/05, *De Graaf und Daniels*; die Vorlagefragen sind in ABl C 36/24 (11. 2. 2006) abgedruckt.

107) *Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht (2002) 200 ff und 824 ff.

108) So Schlussanträge GA *Geelhoed* 23. 2. 2006, C-374/04, *ACT Group Litigation* – Tz 58.

109) Siehe beispielsweise EuGH 16. 7. 1998, C-264/96, Slg 1998, I-4695, *ICI*; EuGH 6. 6. 2000, C-35/98, Slg 2000, I-4071, *Verkooijen*; EuGH 14. 12. 2000, C-141/99, Slg 2000, I-11619, *AMID*; EuGH 12. 9. 2002, C-431/01, Slg 2002, I-7073, *Mertens*; EuGH 4. 3. 2004, C-334/02, Slg 2004, I-2229, *Kommission/Frankreich*; EuGH 15. 7. 2004, C-315/02, Slg 2004, I-7063, *Lenz*; EuGH 7. 9. 2004, C-319/02, Slg 2004, I-7477, *Manninen*.

110) EuGH 13. 12. 2005, C-446/03, *Marks & Spencer*.

111) Siehe vor allem *Wattel*, EC Tax Rev. 2003, 194 (194 ff), *Wattel*, LIEI 2004, 81 (89 f), und *Terra/Wattel*, European Tax Law[4] (2005) 58 ff; diesen implizit folgend Schlussanträge GA *Geelhoed* 23. 2. 2006, C-374/04, *ACT Group Litigation* – Tz 58 ff.

der *Schumacker*-Rsp geben vor allem *Bosal* und *Marks & Spencer* dafür ein beredtes Zeugnis ab: In *Bosal* erblickte der EuGH eine gemeinschaftsrechtliche Verpflichtung des Ansässigkeitsstaates der Muttergesellschaft, Fremdfinanzierungskosten für den Erwerb ausländischer Tochtergesellschaften zuzulassen, selbst wenn deren Gewinne nicht besteuert wurden[112)]. Eine ähnliche Asymmetrie hat der EuGH letztlich auch in *Marks & Spencer* hergestellt: Sofern nämlich Verluste im Staat der Tochtergesellschaft nicht berücksichtigt worden sind und nicht (mehr) berücksichtigt werden können, muss der Ansässigkeitsstaat unter dem Gesichtspunkt der Verhältnismäßigkeit sein Gruppenbesteuerungsregime auch auf diese Verluste erstrecken, obwohl er die Gewinne dieser Tochtergesellschaft nicht besteuert[113)].

2.1 Besteuerung ausländischer Kapitalerträge

2.1.1 Schmid, Lenz und das BudgetbegleitG 2003

Unstrittig sind steuerliche Beschränkungen grenzüberschreitender Portfoliodividendenflüsse tatbestandlich vom sachlichen Schutzbereich der Kapitalverkehrsfreiheit nach Art 56 EG erfasst[114)]. Entsprechend der überzeugenden stRsp des EuGH stellt eine nachteilige Behandlung grenzüberschreitender Dividendenflüsse – im Vergleich zu innerstaatlichen Dividendenflüssen – eine grundsätzlich verbotene diskriminierende Beschränkung der Kapitalverkehrsfreiheit dar, wenn sie den „aktiven" Marktteilnehmer (den Investor) oder dessen „passives" Gegenstück (die kapitalsuchende Gesellschaft) betrifft[115)]. Sofern also in Schedulensystemen bei Hereinausschüttungen ausländischer Gesellschaften die wirtschaftliche Doppelbesteuerung nicht ebenso wie im Fall einer rein inländischen Ausschüttung gemildert wird, bestanden bereits bisher im Schrifttum[116)] und auch bei der Kommission[117)] wenig Zweifel, dass dies den freien Kapitalverkehr verletzt. Nach der gescheiterten Vorlage in *Schmid*[118)] hat der EuGH diese Ansicht in der vom VwGH vorgelegten Rs *Lenz*[119)] eindrucksvoll bestätigt: Demnach verstieß das damalige österreichische Regime der Besteuerung „inländischer" Dividenden nach § 37 Abs 4 (Hälftesteuersatz) bzw § 93 iVm § 97 Abs 1 EStG (25%ige Abgeltungssteuer) im Vergleich zur vollen Tarifbesteuerung „ausländischer" Dividenden unabhängig von der ausländischen Körperschaftsteuervorbelastung gegen die Kapitalverkehrsfreiheit.

Der österreichische Gesetzgeber ist dieser Entscheidung bereits im BudgetbegleitG 2003[120)] zuvorgekommen und hat eine umfassende Neukonzeption nicht nur der Dividenden-, sondern der gesamten Kapitalertragbesteuerung vorgenommen[121)]: Soweit technisch und rechtlich möglich, werden zunächst auch „ausländische" Kapitalerträge in das Kapitalertragsteuerabzugssystem und die Endbesteuerung einbezogen; darüber hinaus unterwirft § 37 Abs 8 EStG gewisse Kapitalerträge ohne Inlandsbezug einer der Endbesteuerung nach § 97 EStG angenäherten 25%igen Abgeltungssteuer[122)]. Ebenfalls im Rahmen des BudgetbegleitG 2003 wurde § 37 Abs 4 EStG dahin gehend adaptiert, dass nunmehr auch die betriebliche Veräußerung ausländischer Beteiligungen halbsatzbegünstigt wird[123)]; damit war bereits vorweg dem Urteil in *Weidert und Paulus*[124)] Genüge getan, das letztlich keinen Zweifel daran lässt, dass für den Erwerb und die Veräußerung inländischer Gesellschaftsanteile vorgesehene Begünstigungen auch auf den Erwerb und die Veräußerung von Anteilen an EU-Gesellschaften ausgedehnt werden müssen.

2.1.2 Besteuerung ausländischer Investmentfonds

Aufgrund der umfassenden Benachteiligung des Investments in ausländische Investmentfonds stand die Fondsbesteuerung lange im Fokus gemeinschaftsrechtlicher Bedenken[125)], die in den vergangenen Jahren allerdings durch legistische Aktivität weitgehend beseitigt wurden[126)]. Als ein „Grundübel" der Besteuerung ausländischer Investmentfonds verbleibt jedoch die weite Tatbestandsbildung des § 42 Abs 1 InvFG, derzufolge auch ausländischen Kapitalgesellschaften, zB risikogestreuten Investitions-Tochtergesellschaften, für Zwecke des österreichischen Steuerrechts die Abschirmwirkung versagt werden kann[127)]. Aus gemeinschaftsrechtlicher Sicht ist allerdings ein derart genereller und *nur* bei *ausländischen* Körperschaften erfolgender „Durchgriff" jedenfalls bedenklich[128)], weshalb § 42 Abs 1 InvFG – ebenso wie § 42 Abs 1 ImmoInvFG – wohl insofern nicht dem Gemeinschaftsrecht entspricht[129)].

2.1.3 Erstattung ausländischer Quellensteuern

Es bestehen nach dem *Gilly*-Urteil[130)] wohl kaum Zweifel, dass ein abkommensrechtlicher Anrechnungshöchstbetrag grundsätzlich gemeinschaftsrechtskonform ist[131)]. In diesem Zusammenhang stellt sich allerdings die – unlängst vom VwGH ausdrücklich offen gelassene[132)] – Folgefrage, ob es dem Gleichbe-

112) EuGH 18. 9. 2003, C-168/01, Slg 2003, I-9409, *Bosal*.
113) Siehe vor allem EuGH 13. 12. 2005, C-446/03, *Marks & Spencer*; dazu krit etwa die Schlussanträge GA *Geelhoed* 23. 2. 2006, C-374/04, *ACT Group Litigation* – Tz 65.
114) EuGH 6. 6. 2000, C-35/98, Slg 2000, I-4071, *Verkooijen* – Tz 28 ff; EuGH 15. 7. 2004, C-315/02, Slg 2004, I-7063, *Lenz*; EuGH 7. 9. 2004, C-319/02, Slg 2004, I-7477, *Manninen*; ausf dazu *Englisch*, ET 2004, 323 (324).
115) Dazu *Englisch*, Intertax 2005, 200 (202).
116) Siehe zB *Toifl*, SWI 1999, 255 (255 ff); *Staringer*, ÖStZ 2000/119, 26 (28); *Raventós*, ET 2000, 73 (74); *Tumpel*, SWI 2002, 454 (454 ff); *Jacobs*, Internationale Unternehmensbesteuerung[5] (2002) 229 ff; *Liede/Hintsanen*, ET 2003, 31 (34); *Polivanova-Rosenauer/Toifl*, SWI 2004, 228 (228 ff); *Englisch*, ET 2004, 323 (325).
117) Mitteilung der Kommission zur „Besteuerung von Dividenden natürlicher Personen im Binnenmarkt", KOM(2003)810 endg, 16 f.
118) Mangels Vorlageberechtigung des Berufungssenats; EuGH 30. 5. 2002, C-516/99, Slg 2002, I-4573, *Schmid*.
119) VwGH 27. 8. 2002, 99/14/0164, ÖStZB 2002/660.
120) BGBl I 2003/71.
121) Dazu *D. Aigner/H. J. Aigner/G. Kofler*, IWB 2003, Fach 5, Gruppe 2, 593 (593 ff); *D. Aigner/H. J. Aigner/G. Kofler*, ecolex 2003, 480 (480 ff); *Schmidt*, GeS 2003, 187 (187 ff); *Tissot*, RdW 2003/588, 672 (672 ff).
122) Zur Gemeinschaftsrechtskonformität der Neuregelung siehe die Mitteilung zur „*Besteuerung von Dividenden natürlicher Personen im Binnenmarkt*", KOM(2003)810 endg, 9; siehe auch *Beiser*, GesRZ 2003, 187 (197 f).
123) Krit zur früheren Rechtslage etwa *Reiner/Reiner*, RdW 1999, 230 (230); *Keppert*, SWK 2000, 776 (777).
124) EuGH 15. 7. 2004, C-242/03, Slg 2004, I-7379, *Weidert und Paulus*; dazu *G. Kofler*, ÖStZ 2004/897, 470 (470 ff).
125) Grundlegend *Sedlaczek*, Die EG-Rechtsverträglichkeit der unterschiedlichen Besteuerung in- und ausländischer Investmentfonds (1998); *Widhalm* in *Lechner/Staringer/Tumpel* (Hrsg), Kapitalverkehrsfreiheit und Steuerrecht (2000) 119 (121 ff)
126) Vor allem durch die Gleichbehandlung mit inländischen Kapitalerträgen im Rahmen des § 37 Abs 8, §§ 93 und 97 EStG durch das BudgetbegleitG 2003 (BGBl I 2003/71), durch die Möglichkeit des „Weißrechnens" schwarzer Fonds durch den StPfl und die Schaffung einer kapitalertragsteuerlichen Transparenz für „Meldefonds" bzw „blütenweißen" Fonds im Rahmen des AbgÄG 2004 (BGBl I 2004/180) sowie durch den Entfall der Sicherungssteuer bei „blütenweißen" Fonds durch die InvFG-Novelle 2005 (BGBl I 9/2005). Siehe auch die vorangehende Rsp VfGH 7. 3. 2002, G 278/01, ÖStZB 2002/572 (zur Endbesteuerung); VfGH 15. 10. 2004, G 49/05, ÖStZB 2005/526 = ecolex 2005/80 m Anm *G. Kofler* (zur Pauschalbesteuerung); weiters auch VwGH 11. 12. 2003, 99/14/0081, ÖStZB 2004/471.
127) Siehe zB EAS 984 = SWI 1997, 90; EAS 1485 = SWI 1999, 407; dazu *D. Aigner/G. Kofler*, SWI 2002, 528 (528 ff).
128) Ebenso BFH 25. 2. 2004, I R 42/02, BFHE 206, 5, BStBl 2005 II 14 = IStR 2004, 527 m Anm *Philipowski* und Anm *Wolff*.
129) Siehe dazu *Tumpel*, SWI 2004, 501 (501 ff); *G. Kofler*, ecolex 2005, 321 (324).
130) EuGH 12. 5. 1998, C-336/96, Slg 1998, I-2793, *Gilly*.
131) Vgl zuletzt *Cordewener/Schnitger*, StuW 2006, 50 (62 f mwN).
132) Siehe VwGH 21. 1. 2004, 2001/13/0017, ÖStZB 2005/132 = ecolex 2005/81 m Anm *Petritz*, und VwGH 21. 10. 2004, 2001/13/0264, ÖStZB 2005/133.

handlungsgebot der Grundfreiheiten entspricht, wenn zwar eine Vollanrechnung oder Erstattung *inländischer* Quellensteuern erfolgt, die Anrechnung *ausländischer* Quellensteuern aber durch einen Anrechnungshöchstbetrag begrenzt ist. Virulent wird dies vor allem bei in- und ausländischen Schachteldividenden, sofern diese zwar gleichermaßen befreit sind, jedoch nur die *inländische* Quellensteuervorbelastung erstattungs- oder anrechnungsfähig ist[133)]. Während ein Verstoß gegen das Gemeinschaftsrecht in der dRsp bisher mit unterschiedlichen Begründungen abgelehnt wurde[134)], fordert eine im Vordringen begriffene Auffassung eine Vollanrechnung ausländischer Quellensteuern und macht zutreffend geltend, es komme andernfalls zu einer *diskriminierenden* Höherbelastung der ausländischen Einkünfte im Vergleich zu inländischen Einkünften[135)]. Geht man hier nämlich zutreffend davon aus, dass – nach *Manninen*[136)] – der Umstand, dass es sich bei der inländischen Quellensteuer technisch um eine Vorauszahlung auf die inländische Steuerschuld des Investors handelt, während die ausländische Quellensteuer die (abschließende) Belastung zugunsten des ausländischen Fiskus sicherstellt, keinen Einfluss auf die Vergleichbarkeit der Situationen nimmt[137)], wird man dieser Ansicht beizupflichten haben.

2.2 „Wegzugsbesteuerung": X und Y, Hughes de Lasteyrie du Saillant und das AbgÄG 2004

Das österreichische Steuerrecht kannte und kennt verschiedene Wegzugs- bzw Entstrickungsnormen – § 6 Z 6, § 31 Abs 2 Z 2 EStG und die Entstrickungsbesteuerung im UmgrStG –, die wegen ihrer mobilitätshemmenden Wirkung bereits lange auf gemeinschaftsrechtliche Bedenken gestoßen sind[138)], die letztlich durch die Urteile in den Rs *X und Y*[139)] und *Hughes de Lasteyrie du Saillant*[140)] verschärft wurden. In diesen Urteilen wurde sowohl für den Fall eines grenzüberschreitenden Aktientauschs als auch für den Fall des Wegzugs einer natürlichen Person die sofortige Aufdeckung und Besteuerung stiller Reserven auch für solche Wirtschaftsgüter für unzulässig erklärt, für welche die Besteuerungshoheit dem Wegzugsstaat dauernd entzogen wurde. Im Schrifttum wurde aus diesen Urteilen sowohl für das Einkommen- wie auch das Körperschaft- und Umgründungssteuerrecht überwiegend gefolgert, dass – zumindest im Kontext der Niederlassungs- und Arbeitnehmerfreizügigkeit[141)] – eine Erfassung der vor dem Ausscheiden aus der österreichischen Steuerhoheit entstandenen stillen Reserven zwar grundsätzlich zulässig sei, die Steuer aber erst bei tatsächlicher Realisierung erhoben werden dürfe[142)].

Vor dem Hintergrund der europarechtlichen Bedenken gegen eine sofortige Entstrickungsbesteuerung und der bestehenden Unklarheiten[143)] hat der österreichische Gesetzgeber als europäischer Vorreiter im Rahmen des AbgÄG 2004[144)] eine „Komplettlösung" vorgesehen[145)]. Sofern nunmehr das Besteuerungsrecht an einen EU-Mitgliedstaat oder einen EWR-Staat, mit dem eine umfassende Amts- und Vollstreckungshilfe besteht[146)], verloren geht, ist die Steuer auf Antrag vorerst nicht festzusetzen. Kommt es nach der Entstrickung zu einer (tatsächlichen oder gesetzlich fingierten) Realisierung der stillen Reserven, so wird dies als rückwirkendes Ereignis iSd § 295a BAO gewertet, das – innerhalb der 10jährigen Verjährungsfrist des § 209 Abs 3 BAO – die Festsetzung der Steuer im Wege der Abänderung des Bescheides des Entstrickungsjahres ohne Anspruchsverzinsung nach § 205 BAO nach sich zieht. Im Rahmen dieser Besteuerung werden aber auch nach dem „Wegzug" eingetretene Wertverluste berücksichtigt. Die Bemessungsgrundlage ist insofern „doppelt gedeckelt", als lediglich die positive Differenz zwischen den Anschaffungskosten und dem gemeinen Wert im Entstrickungszeitpunkt bzw dem – niedrigeren – (tatsächlichen oder fiktiven) Veräußerungserlös steuerlich erfasst wird. Im Rahmen des AbgÄG 2004 wurde auch die „Zuzugsproblematik" in der Weise gelöst, dass Vermögen, das erstmals in die österreichische Besteuerungshoheit hereinwächst, mit dem gemeinen Wert anzusetzen ist und damit die im Ausland entstandenen stillen Reserven vom österreichischen Steuerzugriff abgeschirmt werden[147)].

2.3 Verwertung ausländischer Verluste im Inland

2.3.1 „Befreite" ausländische Betriebsstättenverluste und § 2 Abs 8 EStG

Vor allem im deutschen[148)] und österreichischen[149)] Steuerrecht gehörte es jahrzehntelang zu den Grundfesten richterlicher Abkommensauslegung, dass Verluste im Rahmen einer durch Abkommen freigestellten Einkunftsart nicht gegen steuerbare Einkünfte verrechnet, sondern nur im Rahmen eines „negativen

133) In diese Richtung auch *Jacobs*, Internationale Unternehmensbesteuerung[5] (2002) 250.

134) BFH 3. 12. 2003, I S 10/03 PKH, IStR 2004, 279 m Anm *Wassermeyer*; zur unilateralen Anrechnung ausländischer Erbschaftssteuer FG Rheinland-Pfalz 6. 6. 2002, 4 K 2643/00, EFG 2002, 1242; BFH 5. 4. 2004, II R 33/02, IStR 2004, 759; FG Rheinland-Pfalz 16. 6. 2005, 4 K 1951/04 (Rev: II R 35/05), EFG 2005, 1446 m Anm *Neu*; weiters FG Köln 11. 7. 2002, 7 K 8572/98, EFG 2002, 1391 m zust Anm *Herlinghaus* = FR 2002, 1234 m krit Anm *IMN*.

135) Siehe *Schaumburg*, StuW 2000, 369 (375); *Schaumburg* in *Ebling* (Hrsg), Besteuerung von Einkommen, DStJG 24 (2001) 225 (251); *Jacobs*, Internationale Unternehmensbesteuerung[5] (2002) 249; *Cordewener/Schnitger*, StuW 2006, 50 (67 ff); ebenso speziell zu § 34c dEStG *Spengel/Jaeger/Müller*, IStR 2000, 257 (259 f); *Wassermeyer*, IStR 2001, 113 (117); in diesem Sinne auch im *IDW*, WPg 2000, 243 (244). Keine Bedenken aber offenbar bei *Schön*, IStR 2004, 289 (293); *Schönfeld* in *Flick/Wassermeyer/Baumhoff* (Hrsg), AStG[6] (2005) Vor § 34c EStG Rz 31.

136) EuGH 7. 9. 2004, C-319/02, Slg 2004, I-7477, *Manninen*.

137) Ebenso *Cordewener/Schnitger*, StuW 2006, 50 (67 ff); aA *Schönfeld* in *Flick/Wassermeyer/Baumhoff* (Hrsg), AStG[6] (2005) Vor § 34c EStG Rz 31.

138) Vgl zB *Tumpel*, Harmonisierung der direkten Unternehmensbesteuerung in der EU (1994) 390.

139) EuGH 21. 11. 2002, C-436/00, Slg 2002, I-10829, *X und Y*.

140) EuGH 11. 3. 2004, C-9/02, Slg 2004, I-2409, *Hughes de Lasteyrie du Saillant*.

141) Zur möglichen Erfassung des Wegzugs durch die Kapitalverkehrsfreiheit bzw – in einem privaten Kontext – durch die allgemeine Freizügigkeit nach Art 18 EG siehe etwa *G. Kofler*, ÖStZ 2003/503, 262 (262 ff mwN); siehe zu dieser Frage auch die beim EuGH angängige Rs *van Dijk* (C-470/04; Vorlagefragen abgedruckt in ABl C 31/5 [5. 2. 2005]), und dazu bereits die Anwendbarkeit des Art 18 EG bejahend Schlussanträge GA *Kokott*, 30. 3. 2006, C-470/04, *N*. Allerdings hat der EuGH unlängst judiziert, dass die bloße Verlegung des Wohnsitzes und der damit einhergehende Wechsel von der unbeschränkten zur beschränkten StPfl keinen Kapitalverkehrsvorgang darstellt; siehe EuGH 23. 2. 2006, C-513/03, *van Hilten-van der Heijden* – Tz 49 f (zur verlängerten Erbschaftssteuerpflicht).

142) In diese Richtung nunmehr Schlussanträge GA *Kokott* 30. 3. 2006, C-470/04, *N*; siehe aus dem Schrifttum zB *G. Kofler*, ÖStZ 2003/503, 262 (266), und ÖStZ 2004/483, 195 (197 f); *D. Aigner/Tissot*, SWI 2004, 293 (295); *Schön*, IStR 2004, 289 (296); *Schindler*, IStR 2004, 300 (309); *Schön/Schindler*, IStR 2004, 571 (571 ff); *Schön*, 34 Tax Notes Int'l 197 (201 f) (Apr. 12, 2004); *Schnitger*, BB 2004, 804 (807); *Wassermeyer*, GmbHR 2004, 613 (615). AA wohl *Beiser*, ÖStZ 2004/661, 282 (285); *Franz*, EuZW 2004, 270 (272).

143) Siehe zB die Überlegungen von *Beiser*, ÖStZ 2004/661, 282 (284 ff).

144) BGBl I 180/2004.

145) Zur Neuregelung ausführlich Rz 2517a ff und Rz 6677 ff EStR 2000; aus dem Schrifttum *D. Aigner/G. Kofler*, taxlex 2005, 6 (6 ff); *Lechner* in *Jirousek/Lang* (Hrsg), Praxis des Internationalen Steuerrechts, FS Loukota (2005) 289 ff; *Staringer*, SWI 2005, 213 (213 ff); ausf zum neuen System *Achatz/G. Kofler* in *Achatz/D. Aigner/G. Kofler/Tumpel* (Hrsg), Internationale Umgründungen (2005) 23 (31 ff und 54 ff).

146) Derzeit nur im Verhältnis zu Norwegen.

147) Zum Unterbleiben der Neubewertung in „Rückkehrersituationen" siehe Rz 2517h f EStR 2000.

148) Grundlegend RFH 26. 6. 1935, VI A 414/35, RFHE 38, 64, RStBl 1935, 1358; zuletzt BFH 13. 11. 2002, I R 13/02, BFHE 201, 73, BStBl 2003 II 795; siehe auch *Wassermeyer* in *Debatin/Wassermeyer*, DBA, Art 23A MA Rz 57 mwN.

149) Siehe aus der älteren Rsp VwGH 6. 3. 1984, 83/14/0107, ÖStZB 1985, 34; VwGH 21. 5. 1985, 85/14/0001, ÖStZB 1985, 347.

Progressionsvorbehaltes" berücksichtigt werden durften[150]. Begründet wurde dies damit, dass der Begriff der Einkünfte auch „negative Einkünfte" umfasse und – im Sinne der Symmetriethese – auch solche nicht in der Bemessungsgrundlage zu berücksichtigen seien[151]. Diese Sichtweise ist allerdings zunehmend auf gemeinschaftsrechtliche Kritik gestoßen[152], zumal der vergleichbare Inlandssachverhalt aufgrund der sofortigen Verlustverrechnungsmöglichkeit steuerlich günstiger behandelt würde. Solcherart entstehe bis zur allfälligen Verwertbarkeit im Betriebsstättenstaat zumindest ein Liquiditätsnachteil[153], der auch nicht durch den – idR ohnehin nur bei natürlichen Personen relevanten – negativen Progressionsvorbehalt gemeinschaftsrechtskonform beseitigt werde[154]. In Österreich ist diese Problematik aber mittlerweile durch zwei richtungsweisende Erkenntnisse des VwGH[155] und die darauf basierende Neuregelung in § 2 Abs 8 EStG im StRefG 2005[156] entschärft worden: Demnach wird der nach innerstaatlichem Recht vorzunehmende Verlustausgleich mit negativen ausländischen Einkünften durch die Anwendung eines Doppelbesteuerungsabkommens mit Befreiungsmethode nicht beeinträchtigt, es sei denn, die Verluste wurden im Ausland bereits verwertet; der hereingenommene Verlust führt jedoch zu einer Nachversteuerung, wenn er in den Folgejahren im Ausland zB im Wege eines Verlustvortrages genutzt werden kann[157].

Vor allem aufgrund der Streichung des § 2a Abs 3 dEStG, der bis vor kurzem eine Verlusthereinverrechnung gestattete[158], ist die Versagung der Hereinnahme „befreiter" Auslandsverluste aber auch im deutschen Schrifttum auf erhebliche Bedenken gestoßen[159], die zunehmend von der dRsp geteilt wurden[160].

150) In vielen anderen Staaten fehlt es bereits deshalb an einem vergleichbaren Diskussionsstoff, weil entweder durch die Anrechnungsmethode das Problem entweder nicht auftritt oder auf eine „symmetrische" Anwendung der Freistellungsmethode verzichtet wird; siehe etwa *Bendlinger*, SWI 1994, 221 (223 ff); *Vogel*, IStR 2002, 91 (91 mwN); *Vogel* in *Vogel/Lehner*, DBA[4] (2003) Art 23 Rz 49; unlängst auch *Winandy*, ET 2006, 82 (82 ff) (zu Luxemburg).

151) Zu dieser „Symmetriethese" siehe nur BFH 28. 3. 1973, I R 59/71, BFHE 109, 127, BStBl 1973 II 531; dazu ausführlich *Wassermeyer* in *Debatin/Wassermeyer*, DBA, Art 23A MA, Rz 57 mwN; *Schuch* in *Lehner* (Hrsg), Verluste im nationalen und Internationalen Steuerrecht (2004) 63 (74 ff); *Cordewener* in *von Groll* (Hrsg), Verluste im Steuerrecht, DStJG 28 (2005) 255 (282 ff).

152) Siehe vor allem die gemeinschaftsrechtlichen Bedenken bei *Lechner* in *Gassner/Lang/Lechner* (Hrsg), Doppelbesteuerungsabkommen und EU-Recht (1996) 85 (93 ff).

153) Deutlich *Zorn*, SWI 2001, 456 (457).

154) Dazu *Cordewener*, DStR 2004, 1634 (1636 f); aA FG Baden-Württemberg 30. 6. 2004, 1 K 312/03, EFG 2004, 1694.

155) VwGH 25. 9. 2001, 99/14/0217, ÖStZB 2002/365, und VwGH 25. 10. 2001, 99/15/0149, ÖStZB 2002/732; dazu insb *Zorn*, SWI 2001, 456 (456 ff); *Loukota*, SWI 2001, 466 (466 ff); *Trenkwalder/Firlinger*, SWI 2001, 514 (514 ff); *Lang*, SWI 2002, 86 (86 ff). Der VwGH stützte sein Ergebnis allerdings auf eine Interpretation des DBA und verwies nur zur Begründung dafür, dass es für die Rechtsprechungsänderung keines verstärkten Senates bedürfe, kurz auf das Gemeinschaftsrecht; krit dazu *Trenkwalder/Firlinger*, ÖStZ 2001/1036, 550 (550).

156) BGBl I 2004/57.

157) Siehe dazu ausf *Mayr*, RdW 2005/236, 189 (189 f), sowie nunmehr Rz 187 ff EStR 2000.

158) Siehe BTDrs 14/23, 7, 231; vgl weiters FG Baden-Württemberg 30. 6. 2004, 1 K 312/03, EFG 2004, 1694 mwN.

159) Für einen Verstoß gegen die Niederlassungsfreiheit zuletzt zB *Kessler/Schmitt/Janson*, IStR 2003, 307 (308 f); *Cordewener*, ET 2003, 294 (294 ff); *Cordewener*, DStR 2004, 1634 (1634 ff); *Kessler* in *Lehner* (Hrsg), Verluste im nationalen und Internationalen Steuerrecht (2004) 83 (103 ff); *Portner*, IStR 2005, 376 (379); *Cordewener* in *von Groll* (Hrsg), Verluste im Steuerrecht, DStJG 28 (2005) 255 (282 ff); *Schaumburg/Schaumburg*, StuW 2005, 306 (310).

160) BFH 13. 11. 2002, I R 13/02, BFHE 201, 73, BStBl 2003 II 795; Niedersächsisches FG 14. 10. 2004, 6 V 655/04, EFG 2005, 286 m Anm *Herlinghaus*; FG München 14. 2. 2005, 1 V 305/04 EFG 2005, 928; FG Berlin 11. 4. 2005, 8 K 8101/00, IStR 2005, 571 m Anm *Schönfeld*; keine Bedenken hingegen beim FG Baden-Württemberg 30. 6. 2004, 1 K 312/03, EFG 2004, 1694.

Allerdings hat die vom BFH[161] dem EuGH vorgelegte Rs *Ritter-Coulais* hinsichtlich der Berücksichtigung fiktiver ausländischer Vermietungsverluste nicht zur Klärung dieser Frage beigetragen: Dort hat der EuGH die vom BFH primär gestellte Frage der Verlusthereinverrechnung aufgrund des konkreten Ausgangsfalles ausdrücklich unbeantwortet gelassen und sodann auf die eventualiter gestellte Vorlagefrage geantwortet, dass Verluste im Rahmen des negativen Progressionsvorbehaltes berücksichtigt werden müssen, sofern entsprechende Gewinne ebenfalls für die Progressionsberechnung herangezogen werden[162]. Wenngleich der negative Progressionsvorbehalt nur ein *minus* gegenüber der bemessungsgrundlagenbezogenen Verlusthereinnahme ist, kann in *Ritter-Coulais* dennoch keine prinzipielle Ablehnung der gemeinschaftsrechtlichen Verlusthereinnahmeverpflichtung erblickt werden. Vielmehr spricht die – zu Tochtergesellschaften ergangene, aber in ihrer Grundüberlegung wohl auch auf die Betriebsstättenproblematik übertragbare[163] – Rsp in *Marks & Spencer*[164] dafür, dass zwar die primäre Verlustberücksichtigungsverpflichtung dem Betriebsstättenstaat obliegt[165] und – entgegen den Überlegungen im Schrifttum – trotz allfälliger Liquiditätsnachteile eine sofortige Verlusthereinnahme nicht erforderlich ist, umgekehrt aber im Falle der Nicht(mehr)verwertbarkeit des Verlustes im Betriebsstättenstaat die subsidiäre Berücksichtigungspflicht des Stammhausstaates eingreift. § 2 Abs 8 EStG geht damit offenbar über die gemeinschaftsrechtlichen Anforderungen hinaus.

2.3.2 Marks & Spencer und die österreichische Gruppenbesteuerung

Der *Marks & Spencer*-Fall zur grenzüberschreitenden Berücksichtigungsverpflichtung von Verlusten ausländischer Tochtergesellschaften war aufgrund seinen potenziellen Budgetauswirkungen sicherlich einer der spektakulärsten Fälle der vergangenen Jahre. Im Wesentlichen ging es um die Frage, ob die Niederlassungsfreiheit der britischen Steuerregelung des „Konzernabzugs" *(group relief)* entgegensteht, wonach die Verrechenbarkeit von Verlusten innerhalb eines Konzerns von der Voraussetzung abhängig ist, dass die Tochtergesellschaften ihren Sitz im Vereinigten Königreich haben. Die Große Kammer des EuGH[166] kam hier unlängst zu dem Ergebnis, dass der Ansässigkeitsstaat der Muttergesellschaft *grundsätzlich* nicht verpflichtet ist, den Verlust einer ausländischen gleich jenem einer inländischen Tochtergesellschaft zur Verwertung zuzulassen. Unter dem Gesichtspunkt der Verhältnismäßigkeit verstößt es nach Ansicht des EuGH aber dennoch gegen die Niederlassungsfreiheit, wenn die Verlusthereinnahme abgelehnt wird, sofern ein noch nicht berücksichtigter Verlust im Sitzstaat der Tochtergesellschaft auch zukünftig nicht mehr berücksichtigt werden kann[167].

Obwohl Österreich das durch das StRefG 2005 geschaffene neue Gruppenbesteuerungsregime bereits progressiv an den gemeinschaftsrechtlichen Anforderungen ausgerichtet hat, ergibt sich doch aus *Marks & Spencer* ein punktueller Anpassungs-

161) BFH 13. 11. 2002, I R 13/02, BFHE 201, 73, BStBl 2003 II 795.

162) EuGH 21. 2. 2006, C-152/03, *Ritter-Coulais*.

163) Ebenso *Sutter*, EuZW 2006, 85 (88).

164) EuGH 13. 12. 2005, C-446/03, *Marks & Spencer*.

165) Zu § 102 Abs 2 EStG siehe bereits oben III.A.1.d.

166) EuGH 13. 12. 2005, C-446/03, *Marks & Spencer*; dazu etwa *Thömmes*, IWB 24/2005, Fach 11a, 933 (938 ff); *Lang*, SWI 2006, 3 (3 ff); *Englisch*, IStR 2006, 19 (22 f); *Herzig/Wagner*, DStR 2006, 1 (1 ff); *Scheunemann*, Intertax 2006, 54 ff; *G. Kofler*, ÖStZ 2006/87, 48 (48 ff); *Lang*, ET 2006, 54 (54 ff); *Wiesner/Mayr*, RWZ 2006/1 (1 ff); *Petritz/Schilcher*, ecolex 2006, 147 (147 ff); *Sutter*, EuZW 2006, 85 (87 f).

167) Dazu ausführlich *G. Kofler*, ÖStZ 2006/87, 48 (48 ff).

bedarf[168]: So zeigt sich zunächst, dass die generelle Möglichkeit der grenzüberschreitenden Verlustverrechnung im Rahmen der österreichischen Gruppenbesteuerung (§ 9 Abs 6 Z 6 KStG) vor dem Hintergrund des *Marks & Spencer*-Urteils gemeinschaftsrechtlich zwar nicht zwingend erforderlich, standortpolitisch aber jedenfalls positiv zu beurteilen ist[169]. § 9 Abs 6 Z 6 KStG dürfte aber insofern zu eng sein, als eine Nachversteuerung auch in jenen Fällen vorgesehen ist, in denen keine Verlustverrechnung im Ausland möglich ist[170]: So wird nach *Marks & Spencer* in den Fällen, in denen die Verlustverwertung des ausländische Gruppenmitglieds nach Ausscheiden nicht mehr möglich ist, eine Nachversteuerung vollständig zu unterbleiben haben[171]; auch im Liquidations- und Insolvenzfalle erscheint die Kürzung des Nachversteuerungsbetrags mit den während der Gruppenzugehörigkeit nicht steuerwirksamen Teilwertabschreibungen (§ 9 Abs 6 Z 6 letzter Satz KStG) gemeinschaftsrechtlich dann unzureichend, wenn eine Verlustverwertung endgültig ausgeschlossen ist. Da es in *Marks & Spencer* um Verluste ausländischer Enkelgesellschaften ging, werden entgegen der Einschränkung auf eine Auslandsebene im österreichischen Gruppenbesteuerungsregime (§ 9 Abs 2 iVm Abs 6 KStG) zukünftig auch Verluste von Enkel- und Urenkelgesellschaften etc berücksichtigt werden müssen[172]. Offen ist allerdings auch nach *Marks & Spencer*, ob die prozentuell mit dem unmittelbaren Beteiligungsausmaß beschränkte Verlusthereinnahme im Falle ausländischer Konzerngesellschaften im Vergleich zur vollständigen Verlustverrechnung im Falle inländischer Konzerngesellschaften gemeinschaftsrechtlich bedenklich ist[173].

2.4 Ausländische Schachteldividenden: § 10 Abs 1 versus § 10 Abs 2 KStG

Vor dem Hintergrund der gemeinschaftsrechtlichen Grundfreiheiten erweist sich auch die Unterscheidung zwischen der bedingungslosen Beteiligungsertragsbefreiung für Ausschüttungen *inländischer* Gesellschaften nach § 10 Abs 1 KStG einerseits im Vergleich zu der an die Voraussetzungen der Mindestbeteiligungshöhe von 10 % und der Mindestbeteiligungsdauer von einem Jahr geknüpfte Beteiligungsertragsbefreiung für Ausschüttungen *ausländischer* Gesellschaften nach § 10 Abs 2 KStG als problematisch[174]. Insofern hat auch der UFS Linz unlängst zutreffend entschieden, dass die Begünstigung des § 10 Abs 1 KStG auf Beteiligungen an ausländischen Gesellschaften auszudehnen sei und auch die Mutter-Tochter-RL, an der § 10 Abs 2 KStG orientiert ist, nicht als Rechtfertigung für die Diskriminierung herangezogen werden könne[175]. Eine entsprechende Amtsbeschwerde ist derzeit allerdings beim VwGH anhängig[176].

Vor diesem Hintergrund ist auch § 10 Abs 4 KStG bedenklich, der einen Wechsel von der Befreiung ausländischer Dividenden nach § 10 Abs 2 KStG zur indirekten Anrechnung vorsieht, wenn die ausländische Gesellschaft passive Einkünfte erzielt und niedrig besteuert[177] wird[178]. Es zeigt sich zwar in einem *ersten* Schritt, dass ein solcher Methodenwechsel durch die Mutter-Tochter-RL gedeckt ist, da die Richtlinie sowohl den Mitgliedstaaten die Befreiungsmethode und die Anrechnungsmethode als gleichwertige Alternativen zur Verfügung stellt und daher einerseits die Anwendung beider Methoden auch im Verhältnis zu ein und demselben Mitgliedstaat ermöglicht[179] sowie andererseits das Heranziehen einer ausländischen Niedrigbesteuerung als Grundlage für die konkrete Methodenwahl gestattet[180]. Diese Deckung durch das *sekundäre* Gemeinschaftsrecht hindert freilich in einem *zweiten* Schritt nicht die Feststellung, dass der Methodenwechsel dem *primären* Gemeinschaftsrecht widerspricht: Denn solange nach § 10 Abs 1 KStG inländische Holdinggesellschaften mit ausschließlichen Passiveinkünften akzeptiert werden, kann bei ausländischen Gesellschaften nicht unter Berufung auf den niedrigeren Steuersatz im Ausland die Anwendung des – an § 10 Abs 1 KStG zu messenden – internationalen Schachtelprivilegs versagt und nach § 10 Abs 4 KStG zur Anrechnungsmethode gewechselt werden[181]. Erst in einem *dritten* Schritt ist sodann zu überprüfen, ob der diskriminierende Methodenwechsel gem § 10 Abs 4 KStG als eine durch Art 1 Abs 2 der Mutter-Tochter-RL akzeptierte und durch die Rsp des EuGH gedeckte Anti-Missbrauchsbestimmung gerechtfertigt werden kann: Wenngleich zwar § 10 Abs 4 KStG durchaus auch der Verhinderung der Steuerumgehung dient, wird diese generelle Missbrauchsvermutung nicht den strengen, auf den Einzelfall bezogenen Anforderungen des EuGH gerecht[182]. Solcherart wird § 10 Abs 4 KStG als gemeinschaftswidrig zu beurteilen sein[183].

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168) Dazu bereits *G. Kofler*, ÖStZ 2006/87, 48 (52 ff); *Wiesner/Mayr*, RWZ 2006/1, 1 (4 f).

169) Ebenso *Haunold/Tumpel/Widhalm*, SWI 2006, 44 (47 f).

170) *Petritz/Schilcher*, ecolex 2006, 147 (150); siehe bereits *Tumpel/Tissot* in *Quantschnigg et al* (Hrsg), Kommentar zur Gruppenbesteuerung (2005) 435 (468 ff).

171) Ebenso *Wiesner/Mayr*, RWZ 2006/1, 1 (5), allerdings unter „Gegenrechnung" der aufgrund der Liquiditätsvorteile aufgrund der – gemeinschaftsrechtlich nicht gebotenen – sofortigen Verlusthereinnahme.

172) *G. Kofler*, ÖStZ 2006/87, 48 (54). Hier wirft sich freilich die Frage auf, wann zB die Enkelgesellschaft die *„vorgesehenen Möglichkeiten zur Berücksichtigung von Verlusten ausgeschöpft"* hat (zu diesem Erfordernis EuGH 13. 12. 2005, C-446/03, *Marks & Spencer* – Tz 55); so ist zB vollkommen offen, ob auch eine allfällige Möglichkeit zur Gruppenbildung im Ausland genutzt werden müsste (so *Wiesner/Mayr*, RWZ 2006, 1 [5]).

173) Dazu *Tumpel/Tissot* in *Quantschnigg et al* (Hrsg), Gruppenbesteuerung (2005) 435 (465 ff).

174) Zur Gemeinschaftswidrigkeit dieser Divergenz bereits bisher etwa *Hirschler*, Rechtsformplanung im Konzern (2000) 58 ff; *Konezny/Züger*, SWI 2000, 218 (218 ff); *Toifl*, SWI 2002, 458 (466); *Heinrich*, ÖStZ 2002/970; *Blasina*, SWI 2003, 14 (14 ff); *D. Aigner*, SWI 2003, 63 (63 ff); *Beiser*, GesRZ 2003, 187 (197 f); *G. Kofler*, ÖStZ 2003/1175, 554 (556); *Postl*, ecolex 2004, 968 (968 ff); *D. Aigner*, SWK 2004, S 1008 (S 1008 f).

175) So UFS Linz 13. 1. 2005, RV/0279-L/04; aus dem Schrifttum etwa *D. Aigner/G. Kofler*, taxlex 2005, 49 (49 ff); *G. Kofler/Toifl*, ET 2005, 232 (232 ff mwN); *Gudmundsson*, Intertax 2006, 58 (74).

176) Zu Zl 2005/14/0020.

177) Zur Problemlage, wenn sich die Niedrigbesteuerung aus einer gemeinschaftsrechtlich genehmigten Beihilfe ergibt, siehe zuletzt *G. Kofler*, RdW 2005/859, 786 (786 ff mwN).

178) Siehe *Toifl*, RdW 2004/230, 250 (251); *Polivanova-Rosenauer/Toifl*, SWI 2004, 228 (237); *Beiser*, GesRZ 2003, 187 (197 f).

179) *De Hosson*, Intertax 1990, 414 (432); *Tumpel*, Harmonisierung der direkten Unternehmensbesteuerung in der EU (1994) 270; *Thömmes* in *Thömmes/Fuks* (Hrsg), EC Corporate Tax Law, Chapter 6.4 Rz 15; *Terra/Wattel*, European Tax Law[4] (2005) 505.

180) *Terra/Wattel*, European Tax Law[4] (2005) 505; ebenso wohl *Thömmes* in *Thömmes/Fuks* (Hrsg), EC Corporate Tax Law, Chapter 6.4 Rz 15.

181) Dazu ausf *G. Kofler/Toifl*, ET 2005, 232 (238 f mwN); siehe weiters auch *Beiser*, GesRZ 2003, 187 (197 f); allgemein in diese Richtung auch *Terra/Wattel*, European Tax Law[4] (2005) 505.

182) Siehe etwa EuGH 17. 7. 1997, C-28/95, Slg 1997, I-4161, *Leur-Bloem* – Tz 44; EuGH 26. 9. 2000, C-478/98, Slg 2000, I-7587, *Kommission/Belgien* – Tz 45. Obwohl es in diesem Zusammenhang auch argumentierbar wäre, dass § 10 Abs 4 KStG lediglich eine *widerlegbare* Missbrauchsvermutung darstellt (so ausführlich *G. Kofler*, Die steuerliche Abschirmwirkung ausländischer Finanzierungsgesellschaften (2002) 394 ff mwN), folgt zumindest die österreichische Finanzverwaltung dieser Ansicht nicht (*Quantschnigg*, ÖStZ 1995, 12 [13]; *Loukota/Quantschnigg*, SWI 1995, 9 [13 f]; *Wiesner*, SWI 1995, 127 [130]). Überdies würde auch eine solche Beweislastumkehrung *per se* einen Verstoß gegen das Gemeinschaftsrecht darstellen; vgl nur EuGH 28. 10. 1999, C-55/98, Slg 1999, I-7641, *Vestergaard* – Tz 21; siehe auch *Haslinger*, SWI 2005, 170 (180).

183) Sofern man § 10 Abs 4 KStG auch auf Veräußerungsgewinne nach § 10 Abs 3 KStG für anwendbar erachtet (dazu jüngst befürwortend und mwN *Haslinger*, SWI 2005, 170 [170 f mwN]) könnte aufgrund der

2.5 Verbleibende Problembereiche

Österreich hat sich in den vergangenen Jahren zum gemeinschaftsrechtlichen „Musterschüler“ entwickelt. Anders als manche eher zurückhaltende Mitgliedstaaten[184)] ist Österreich den Anforderungen des Gemeinschaftsrechts in den meisten Bereichen mit progressiven Ansätzen gefolgt, sodass sich im geltenden Ertragsteuerrecht wohl nur mehr in Randbereichen bedenkliche Steuerregime finden. Neben den bereits genannten Problemfeldern gehören dazu etwa die auf Auslandssachverhalte beschränkte Anwendung der Verrechnungspreisregeln des § 6 Z 6 EStG[185)], die Inlandsbezogenheit des Sonderausgabenabzugs von Versicherungsprämien nach § 18 Abs 1 Z 2 EStG[186)], die Inlandsvoraussetzung für die begünstigte Anschaffung junger Aktien nach § 18 Abs 1 Z 4 iVm Abs 3 Z 4 EStG[187)], das österreichische Besteuerungsregime für Beiträge an ausländischen Pensionskassen[188)] und das Erfordernis der Beschäftigung durch einen *in*ländischen Betrieb für die Inanspruchnahme der Montagebegünstigung des § 3 Abs 1 Z 10 EStG[189)].

IV. Ausblick

Die Rsp des EuGH hat in den vergangenen Jahren zu einer wahren Euphorie in der internationalen Steuerplanung geführt. Wenn man sich vor Augen hält, dass bis Mitte 2005 lediglich knapp 10 % der Fälle zu Ungunsten der StPfl entschieden wurden, überrascht dies freilich nicht[190)]. In jüngerer Zeit scheint sich allerdings eine Trendwende abzuzeichnen: Wohl insb wegen der zunehmenden Komplexität der Fälle, deren Lösung auch unter Experten umstritten ist, aber auch aufgrund einer stärken Berücksichtung der Interessen der nationalen Fisci durch den EuGH ist die „Erfolgsquote“ der StPfl auf etwa 40 % gesunken[191)]. Der EuGH scheint nunmehr nicht nur die Vergleichbarkeit von Situationen enger zu betrachten[192)] bzw den Rechtfertigungsspielraum der Mitgliedstaaten auszudehnen[193)], sondern ganz generell in Richtung einer ausgewogenen Gesamtbetrachtung unter Vermeidung von „Überbegünstigungen“ zu tendieren[194)] und auch vermehrt Aspekte aus seiner Grundfreiheitsprüfung auszuschließen, die sich letztlich auf bloße – nur durch positive Harmonisierung beseitigbare – Disparitäten zwischen den mitgliedstaatlichen Steuerrechtsordnungen zurückführen lassen[195)]. Diese sich abzeichnende Tendenz macht die zukünftige Judikatur freilich schwer prognostizierbar. Es darf daher mit Spannung erwartet werden, wie sich der EuGH den großen offenen Fragenkomplexen nähern wird: Hier geht es zukünftig vor allem um den Einfluss von DBA auf die Grundfreiheitsprüfung[196)], die tatsächliche Reichweite der „*Erga-Omes*“-Wirkung der Kapitalverkehrsfreiheit bei Drittstaatssachverhalten[197)], die Einschränkung der Rückwirkung von budgetär besonders bedeutsamen EuGH-Urteilen[198)] sowie um die nach wie vor offene Bedeutung des Beschränkungsverbots (ieS) im direkten Steuerrecht, insb bei Fragen der unentlasteten Doppelbesteuerung[199)].

Steuerpflicht solcher Gewinne im rein nationalen Kontext eine *vertikalen* Diskriminierung diesbezüglich wohl nicht begründet werden; siehe dazu auch *G. Kofler/Toifl*, ET 2005, 232 (239). Allerdings könnte die Nichtanwendbarkeit des § 10 Abs 4 KStG aus einer *Outbound*-Meistbegünstigung folgern (dazu oben III.1.3).

184) Siehe etwa den Bericht zur deutschen Situation bei *Drüen/Kahler*, StuW 2005, 171 (171 ff).

185) Dazu *D. Aigner/G. Kofler*, taxlex 2005, 6 (9).

186) Siehe *Haunold/Tumpel/Widhalm*, EuGSWI 2002, 546 (546 ff); diese Problematik wird allerdings durch Rz 463 LStR 2002 und VwGH 20. 1. 1999, 98/13/0002, ÖStZB 1999, 505 entschärft, wonach EWR-Versicherungsunternehmen die Erlaubnis zum Geschäftsbetrieb im Inland besitzen und daher Prämien an diese Versicherungen als Sonderausgaben abgezogen werden können.

187) *Haunold/Tumpel/Widhalm*, SWI 2005, 97 (97 ff).

188) Dazu *G. Kofler*, ÖStZ 2003/874, 404 (407 ff).

189) Dies wurde unlängst vom UFS Feldkirch 5. 10. 2005, RV/0016-F/04, als Verstoß gegen Art 39 EG beurteilt.

190) Von den 50 bis Mitte 2005 ergangenen Entscheidungen zum Verhältnis zwischen dem direkten Steuerrecht und den Grundfreiheiten gingen lediglich 4 mehr oder weniger vollständig zugunsten der Mitgliedstaaten aus (dies sind EuGH 27. 9. 1988, 81/87, Slg 1988, 5483, *Daily Mail*; EuGH 26. 1. 1993, C-112/91, Slg 1993, I-429, *Werner*; EuGH 12. 5. 1998, C-336/96, Slg 1998, I-2793, *Gilly*, und EuGH 14. 9. 1999, C-391/97, Slg 1999, I-5451, *Gschwind*).

191) Von den 10 von Mitte 2005 bis März 2006 gefällten Entscheidungen sind immerhin 6 mehr oder weniger zuungunsten des StPfl oder nur mit starker Einschränkungen zulasten der Mitgliedstaaten entschieden worden (dies sind EuGH 5. 7. 2005, C-376/03, *D*; EuGH 12. 7. 2005, C-403/03, *Schempp*; EuGH 8. 9. 2005, C-512/03, *Blanckaert*; EuGH 27. 10. 2005, C-8/04, *Bujara*; EuGH 13. 12. 2005, C-446/03, *Marks & Spencer*, und EuGH 23. 2. 2006, C-513/03, *van Hilten-van der Heijden*).

192) Siehe zB EuGH 5. 7. 2005, C-376/03, *D*; EuGH 12. 7. 2005, C-403/03, *Schempp*.

193) So etwa in EuGH 13. 12. 2005, C-446/03, *Marks & Spencer*.

194) Siehe etwa EuGH 7. 9. 2004, C-319/02, Slg 2004, I-7477, *Manninen*.

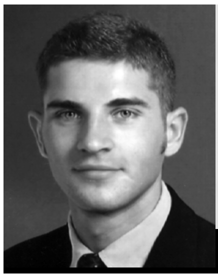
195) Siehe etwa EuGH 12. 5. 1998, C-336/96, Slg 1998, I-2793, *Gilly*; EuGH 12. 7. 2005, C-403/03, *Schempp*, und EuGH 23. 2. 2006, C-513/03, *van Hilten-van der Heijden*.

196) Vgl die anhängigen Fälle in den Rs *ACT Group Litigation* (C-374/04), *Kerckhaert-Morres* (C-513/04), *Columbus Container Services* (C-298/05), *Denkavit II* (C-170/05) und *Amurta* (C-379/05); siehe auch bereits EuGH 19. 1. 2006, C-265/04, *Bouanich*.

197) Zu diesem Themenkreis sind aber mittlerweile mehrere Fälle anhängig: Rs *Fidium Finanz AG* (C-452/04), *Lasertec* (C-492/04), *Thin Cap Group Group Litigation* (C-524/04); *A* (C-101/05) und *A und B* (C-102/05), sowie *Holböck* (C-157/05); in der Rechtssache *van Hilten-van der Heijden* (C-513/03) wurde hingegen der Drittstaatsaspekt weder vom Generalanwalt (Schlussanträge GA *Léger* 30. 6. 2005, C-513/03, *van Hilten-van der Heijden* – Tz 69) noch vom EuGH (EuGH 23. 2. 2006, C-513/03, *van Hilten-van der Heijden*) behandelt.

198) Vgl die anhängigen Rs *Banca Popolare di Cremona* (C-475/03) und *Meilicke* (C-292/04).

199) Dazu jüngst ausf *G. Kofler*, SWI 2006, 62 (62 ff).



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Article

Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions

Michael Lang[*]

Recent European Court of Justice (ECJ) case law has caused a lot of uncertainty with regard to direct taxation. It seems that the ECJ has thrown up more questions than it gave answers. Therefore, Michael Lang tries to explain recent trends, tensions, and contradictions in direct taxation resulting from that case law. He thereby focuses on the most recent cases, such as Belgium SPF Finance v. Truck Center SA *(hereinafter* 'Truck Center'*),* Eckelkamp*,* Orange European Smallcap*, and* Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt *in order to analyze whether the concept of comparability has been developed further by the Court. Furthermore, Michael Lang tries to ascertain which and how many grounds of justifications need to be brought forward at the ECJ in order to successfully defend a tax measure. Finally, he takes a closer look at proportionality.*

1. The Freedoms and Direct Taxation

The number of direct tax cases that the ECJ has to decide is increasing every year. Most of these cases concern the compatibility of domestic tax provisions with the freedoms. A large number of the cases are referred by domestic courts or tribunals under the procedure provided for by Article 234 European community (EC). In addition, the Commission is more and more often initiating infringement procedures against Member States that, in the view of the Commission, do not comply with EC law.

The obvious result of these developments is that the Court is getting more opportunities to provide answers to questions of the interpretation of Community law, which had been raised in academic writing or by practitioners. However, at the same time, the risk is growing that the Court is creating tensions between different lines of its case law or that individual judgments even contradict each other. Like for every other Court, it is important for the ECJ to see how academics and practitioners react to its judgments. These reactions enable the Court to reconsider its case law and, as a consequence, either to adjust a certain line of case law or maintain a certain case law, by either revising the reasoning or being even more convinced that opposing arguments are not too strong. The ECJ therefore needs to receive criticism. Hence, it is the responsibility of academics not so much to praise the Court where its case law is convincing but to point at possible tensions or contradictions.

In that light, the following considerations have to be examined. I will focus on the more recent judgments delivered within the last eighteen months. However, I do not intend to provide a full analysis but highlight some issues that I find specifically interesting. Inter alia, I have omitted the case law on third-country relations and the case law on the scope of the different freedoms, which is also mostly relevant for third-country situations.

2. Comparability

2.1. In search of the comparator

One of the key elements of ECJ judgments in the area of direct taxation is usually the comparability analysis. The Court gives judgment on the comparability of the tax treatment in a certain intra-Community situation with the tax treatment in other situations, taking into account the specific legal environment in a Member State, as described by a domestic court. However, in *Deutsche Shell*, both the Advocate General and the ECJ had problems in applying this approach.[1] The case was about the currency loss that arose in a foreign permanent establishment and was not deductible under the tax law of the State of residence. It is obvious that in a mere domestic situation, a currency loss would not have arisen and would therefore not have been deductible, either.

Although Advocate General Sharpston acknowledged that 'the decision as to whether there is (or is not)

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[1] ECJ, 18 Feb. 2008, Case C-293/06, *Deutsche Shell* [2008] ECR I-1129, para. 31; Opinion of Advocate General Sharpston, 8 Nov. 2007, Case C-293/06, *Deutsche Shell* [2008] ECR I-1129, points 29 et seq.

discriminatory treatment often turns upon the precise choice of comparator',[2] she ultimately took the position that:

> in the specific circumstances of this case a lengthy discussion of discrimination is unnecessary. For the Commission, the decisive factor in reaching an answer to the preliminary question referred by the Finanzgericht is not whether there has been discriminatory treatment, but whether the German national law produces a situation which has a restrictive effect on those who wish to exercise their freedom of establishment.[3]

It is of course true that it is sometimes quite burdensome to determine the right comparator. However, the Advocate General convincingly assumes that the decision as to whether there is discriminatory treatment depends on the choice of comparator. Therefore, she implicitly takes – and in my view completely correctly[4] – the position that, in the freedoms cases, it is always possible to identify comparable situations, even in situations that, at first sight, give the impression that a mere 'restriction approach' is required. Having accepted that premise, however, one would have expected that the comparability question had been dealt with in *Deutsche Shell* as well.

The ECJ did not avoid that issue; however, its reasoning is misleading. For the Court, it was crucial that:

> because it exercised its freedom of establishment *Deutsche Shell* suffered financial loss which was not taken into account either by the national tax authorities for the purposes of calculating the basis of assessment for corporation tax in Germany or with respect to the assessment for tax of its permanent establishment in Italy.[5]

Losses that are nowhere taken into account do not lead to discrimination as such. Certain expenses may not be deductible in the State of residence or in the State of source, without constituting an infringement of the freedoms. A State of residence not permitting the deduction of certain expenses complies with the freedoms, as long as that State treats domestic and cross-border situations alike. The same is true for a State of source that does not permit non-residents to deduct these expenses, as long as its resident taxpayers have to suffer from the same treatment. Expenses that can be deducted nowhere should be treated like income or property, which is taxed twice. The Court has recently convincingly summarized its case law in *Block*:

> that, in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty.[6]

However, in *Deutsche Shell*, the ECJ has dealt with the comparability issue as well:

> As the Advocate General observed in points 43 and 44 of her Opinion, the tax system concerned in the main proceedings increases the economic risks incurred by a company established in one Member State wishing to set up a body in another Member State where the currency used is different from that of the State of origin. In such a situation, not only does the principal establishment face the normal risks associated with setting up such a body, but it must also face an additional risk of a fiscal nature where it provides start-up capital for it.[7]

Thus, the Court emphasized that 'a company established in one Member State wishing to set up a body in another Member State where the currency used is different from that in the State of origin' is in a different situation as a company setting up a body in its own State, since in 'such a situation, not only does the principal establishment face the normal risks associated with setting up such a body, but it must also face an additional risk of a fiscal nature where it provides start-up capital for it'. Therefore, the Court in substance had activated its often repeated but rarely used phrase according to which 'discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations'.[8] The cross-border situation in which the currency loss may arise is different from the domestic situation where the taxpayer does not have to face such an additional risk. Discrimination arises since the currency loss cannot be deducted in either situation, despite the additional risk existing in cross-border situations.[9] Since the situation is different, the application of different rules is required. The complete denial of the

2 *Ibid.*, point 34.

3 *Ibid.*, points 30 et seq.

4 Lang, *Die Rechtsprechung des EuGH zum direkten Steuerrecht* (2007): 96 et seq.

5 ECJ, 18 Feb. 2008, Case C-293/06, *Deutsche Shell* [2008] ECR I-1129, para.31.

6 ECJ, 12 Feb. 2008, Case C-67/08, *Block*, para. 31.

7 ECJ, 18 Feb. 2008, Case C-293/06, *Deutsche Shell* [2008] ECR I-1129, paras 29 et seq.

8 ECJ, 14 Feb. 1995, Case C-279/93, *Schumacker* [1995] ECR I-225, para. 30; ECJ, 29 Apr. 1999, Case C-311/97, *Royal Bank of Scotland* [1999] ECR I-2651, para. 26; ECJ, 22 Mar. 2007, Case C-383/05, *Talotta* [2007] ECR I-2555, para. 18; ECJ, 17 Jul. 2007, Case C-182/06, *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705, para. 27; see Dommes & Metzler, Das Staatsangehörigendiskriminierungsverbot bei natürlichen Personen, in *Die Diskriminierungsverbote im Recht der Doppelbesteuerungsabkommen* Lang, Schuch, & Staringer (eds), (2006), 116; Lang, 2007: 25 et seq.; Eicker & Obser, *EuGH-Rechtsprechung Ertragssteuerrecht*[2] (2007): 44; Denys, 'The ECJ Case Law on Cross-Border Dividend Revisited', ET (2007): 221; Pons, 'The *Denkavit Internationaal* Case and Its Consequences: The Limit between Distortion and Discrimination?', ET (2007): 215.

9 Both the ECJ and the AG mentioned the German rule contained in s. 3c EStG, according to which 'expenditure may not be deducted as constituting operating expenditure or costs of acquiring, securing and maintaining income', where it has 'a direct economic link to tax-free income'. From that rule, one can infer that outside of the scope of s. 3c EStG, expenditures are deductible. In my view, this is relevant. If German rules had not allowed the deduction of expenditures at all, the freedoms would not require the deduction of currency losses either. However, one could have expected a more careful analysis of the legal situation in Germany, since under German rules not all expenditures are deductible.

loss deduction in the cross-border situation is not acceptable.[10]

A further consequence of that convincing approach is that differences in the legal situation do not permit the legislator to provide for completely different treatment. The differences in treatment have to be proportionate in relation to the differences in the legal situations.[11] Advocate General Kokott has followed that approach in her Opinion in *Belgium SPF Finance v. Truck Center SA* (hereinafter '*Truck Center*') by referring to an earlier Opinion delivered by Advocate General Maduro:

> As Advocate General Poiares Maduro has rightly pointed out recently, however, '[f]or a finding of non-discrimination, it is not sufficient to point out that … citizens and foreign nationals are not in the same situation. It is also necessary to demonstrate that the difference in their respective situations is capable of justifying the difference in treatment. In other words, the difference in treatment must relate and be proportionate to the difference in their respective situations'.[12]

It is true, however, that this may lead to the result that arguments are considered at the level of comparability, which had been considered at the level of proportionality in other cases. However, the alternative would be that in cases where the legal situation is not completely comparable, domestic rules could not be examined by the ECJ at all. Furthermore, the different levels of analysis in freedom cases are to a certain extent exchangeable, as has been seen in earlier cases where the Court already dealt with justifications at the level of comparability.[13]

In *Truck Center*, however, the solution that the ECJ came up with is not convincing.[14] Truck Center was a company incorporated and resident in Belgium. It was owned for 48% by a company incorporated and resident in Luxemburg. Whereas withholding tax had to be levied on interest on a loan that was paid to the Luxemburg parent, no such withholding tax would have been levied if the parent were a resident of Belgium. In such a case, corporation tax would be levied at the level of the parent company instead. The ECJ analyzed whether a resident and a non-resident taxpayer receiving interest were in a comparable situation. The Court offered three reasons why the two situations were not comparable:

> Firstly, when both the company paying the interest and the company receiving that interest are resident in Belgium, the position of the Belgian State is different to that in which it finds itself when a company resident in Belgium pays interest to a non-resident company, because, in the first case, the Belgian State acts in its capacity as the State of residence of the companies concerned, while, in the second case, it acts in its capacity as the State in which the interest originates.[15]

The ECJ refers to the basic differences between residents and non-residents. If these differences were decisive, then residents and non-residents would never be in a comparable situation.[16] 'Secondly, the payment of interest by one resident company to another resident company and the payment of interest by a resident company to a non-resident company give rise to two distinct charges which rest on separate legal bases.'[17] In short, the ECJ refers to the fact that in the *Truck Center* case, a withholding tax has been charged, whereas in the case of a payment of another Belgian corporation to its domestic parent, no withholding tax would be levied but corporation tax would be levied at the level of the parent instead. This is a fair description of the facts of the case; however, it is not such a reason why the situations are not comparable:[18]

> Finally, those different taxation arrangements reflect the difference in the situations in which those companies find themselves with regard to recovery of the tax.… While resident recipient companies are directly subject to the supervision of the Belgian tax authorities, which can ensure compulsory recovery of taxes that is not the case with regard to non-resident recipient companies inasmuch as, in their case, recovery of the tax requires the assistance of the tax authorities of the other Member State.[19]

This, again, correctly describes basic differences between residents and non-residents. These arguments should either have been dealt with at the level of proportionality or, if they are already dealt with at the level of comparability, one would have expected to hear from the Court to which extent these differences permit a different treatment. Instead, the Court obviously took the position that once the legal situations

10 This case could be viewed as a different treatment of same situation as well. If one assumes that business expenses are deductible in Germany (which is not under all circumstances the case), the foreign currency loss could be seen as another business expense. If business expenses are seen as comparable situations, the different treatment of business expenses that are usually deductible but non-deductible in the case of a foreign currency loss requires a justification. However, applying different rules in different situation and identical rules in similar situations are two sides of the same coin. It is therefore not surprising that both approaches are to a certain extent exchangeable. For another example, see Lang, 2007: 35 et seq.

11 See an earlier discussion in *Ibid.*, 88 et seq.; for further deliberations on that issue, see Lyal, 'Non-discrimination and direct tax in Community law', *EC Tax Review* (2003): 68 et seq; Lang, 'Das EuGH-Urteil in der Rechtsache Schempp – Wächst der steuerpolitische Spielraum der Mitgliedsstaaten?', SWI (2005a): 412 et seq.; Lang, 'Direct Taxation: Is the ECJ Heading in a New Direction?', ET (2006): 422.

12 Opinion of Advocate General Maduro, 3 Apr. 2008, Case C-524/06, *Huber*, point 7; and Opinion of Advocate General Kokott, 18 Sept. 2008, Case C-282/07, *Belgium SPF Finance v. Truck Center SA* (hereinafter '*Truck Center*'), point 37.

13 See Lang & Jettmar, 'Steuerrecht und Sozial (versicherungs) recht – Anmerkungen zum Schlussantrag in der Rs. Blanckaert', IWB (2005): 695 et seq. for an analysis of the *Blanckaert* case; 'Das EuGH-Urteil in der Rechtsache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?' SWI (2005b): 365 et seq. for an analysis of the *D.* case, and Lang, 2005a, 412 et seq. for an analysis of the *Schempp* case in this respect.

14 ECJ, 22 Dec. 2008, Case C-282/07, *Truck Center*.

15 *Ibid.*, para. 42.

16 CFE, Opinion Statement of the CFE ECJ Taskforce on the judgment in the case of *Truck Center* (Case C-282/07) Judgment of 22 Dec. 2008, MN 14-16.

17 ECJ, 22 Dec. 2008, Case C-282/07, *Truck Center*, para. 43.

18 CFE, Opinion Statement of the CFE ECJ Taskforce on the judgment in the case of *Truck Center* (Case C-282/07) Judgment of 22 Dec. 2008, MN 17.

19 ECJ, 22 Dec. 2008, Case C-282/07, *Truck Center*, paras 47 et seq.

are different, even if only to a small extent, the legislator is permitted to treat these situations completely differently. This approach is not convincing at all.

2.2. The *Schumacker* exception: factual comparability

According to the settled case law of the ECJ, the legal situation is relevant in determining the comparability of two situations.[20] The Court already took that position in *Commission v. France* (hereinafter '*Avoir Fiscal*') where it emphasized that:

> French tax law does not distinguish, for the purpose of determining the income liable to corporation tax, between companies having their registered office in France and branches and agencies situated in France of companies whose registered office is abroad. By virtue of Article 209 of the Code Général des Impots, both are liable to taxation on profits made in undertakings carried on in France, to the exclusion of profits which are made abroad or which France is entitled to tax under the terms of a double-taxation agreement.… Since the rules at issue place companies whose registered office is in France and branches and agencies situated in France of companies whose registered office is abroad on the same footing for the purpose of taxing their profits, those rules, cannot, without giving rise to discrimination, treat them differently in regard to the grant of the advantage related to taxation, such as shareholders' tax credits. By treating the two forms of establishment in the same way for the purposes of taxing their profits, the French legislature has in fact admitted that there is no objective difference between their positions in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.[21]

This case law had been confirmed recently. In *Arens-Sikken*, the ECJ held that:

> the situation of the heirs of the deceased concerned in the main proceedings is comparable to that of any heir whose inheritance includes an immovable property situated in The Netherlands and left by a person who was residing in that State at the time of death.… The Netherlands legislation deems, in principle, both the heirs of resident persons and the heirs of persons who were non-resident at the time of death to be taxable persons for the purposes of collecting inheritance and/or transfer duties on immovable properties situated in The Netherlands. It is only in respect of the deduction of overendowment debts resulting from a testamentary parental partition inter vivos that the inheritances of residents and non-residents are treated differently.… Where national legislation places the heirs of a person who, at the time of death, had the status of resident and those of a person who, at the time of death, had the status of non-resident on the same footing for the purposes of taxing an inherited immovable property which is situated in the Member State concerned, that legislation cannot, without giving rise to discrimination, treat those heirs differently in the taxation of that property so far as concerns the deductibility of charges secured on it. By treating the inheritances of those two categories of persons in the same way (except in relation to the deduction of debts) for the purposes of taxing their inheritance, the national legislature has in fact admitted that there is no objective difference between them in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.[22]

Another recent example of ECJ case law requiring a legal comparison is its judgment in *Eckelkamp* where the Court used almost identical words.[23]

However, the big exception to this case law has always been *Schumacker* and the judgments following that approach.[24] In these judgments, the Court never required legal comparability but focused on factual comparability instead.[25] The ECJ held the situation of a resident taxpayer and a non-resident taxpayer to be comparable if:

> the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.… There is no objective difference of the situation of such a non-resident and a resident engaged in comparable employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances.… In the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than his residence, discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment.[26]

The weaknesses of this approach are obvious, are numerous, and have been repeatedly mentioned.[27] The Court had to determine what 'almost all of his

[20] ECJ, 28 Jan. 1986, Case 270/83, *Commission/France* [1986] ECR I-273; ECJ, 21 Sep. 1999, Case C-307/97, *Saint Gobain ZN* [1999] ECR I-6161; ECJ, 29 Apr. 1999, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651; in contrast ECJ, 14 Feb. 1995, Case C-279/93, *Schumacker* [1995] ECR I-225; Gutmann, 'The *Marks & Spencer* Case: Proposals for an Alternative Way of Reasoning', *EC Tax Review* (2003): 155; Lang, 2006, 422; Lang, 2007: 39 et seq.

[21] ECJ, 28 Jan. 1986, Case C-270/83, *Commission/France* [1986] ECR I-273, paras 19 et seq.

[22] ECJ, 11 Sep. 2008, Case C-43/07, *Arens-Sikken*, paras 55 et seq.

[23] ECJ, 11 Sep. 2008, Case C-11/07, *Eckelkamp*.

[24] ECJ, 14 Feb. 1995, Case C-279/03, *Finanzamt Köln/Altstadt/Schumacker* [1995] ECR I-225; ECJ, 11 Aug. 1995, Case C-80/94, *Wielockx/Inspecteur der directe belastingen* [1995] ECR I-2493; ECJ, 27 Jun. 1996, Case C-107/94, *Asscher/Staatssecretaris van Financiën* [1996] ECR I-3089; ECJ, 12 May 1998, Case C-336/96, *Gilly/Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793; ECJ, 14 Sep. 1999, Case C-391/97, *Gschwind* [1999] ECR I-5451; ECJ, 16 May 2000, Case C-87/99, *Zurstrassen* [2000] ECR I-3337; ECJ, 12 Jun. 2003, Case C-234/01, *Gerritse* [2003] ECR I-5933; ECJ, 1 Jul. 2004, Case C-169/03, *Wallentin* [2004] ECR I-6446; ECJ, 9 Nov. 2006, Case C-520/04, *Turpeinen* [2006] ECR I-10685; ECJ, 17 Jul. 2007, Case C-182/06, *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705; ECJ, 16 Oct. 2008, Case C-527/06, *Renneberg*; also Opinion of Advocate General Colomer, 26 Oct. 2004, Case C376/03, *D.* [2005] I-5821; Opinion of Advocate General Léger, 1 Mar. 2005, Case C-125/03, *Ritter-Coulais* [2006] ECR I-1711.

[25] See Cordewener et al., 'The Tax Treatment of Foreign Losses: Ritter, M & S, and the Way Ahead (Part Two)', ET (2004): 225 and 230; Lang, 'Ist die Schumacker-Rechtsprechung am Ende?', RIW (2005c): 344.

[26] ECJ, 14 Feb. 1995, Case C-279/03, *Finanzamt Köln/Altstadt/Schumacker* [1995] ECR I-225, para. 36.

[27] Wattel, 'Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice', ET (2000): 210 et seq.; Avery-Jones, A Comment on 'Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances', ET (2000), 375 et seq.; Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* (2002), 493 et seq.; Mattson, 'Does the tice Understand the Policy

income' means and it accepted a 90% threshold, which has been correctly criticized as arbitrary. Moreover, the phrase 'almost all of his income' makes sense only if there is a European-wide definition of income. However, such a definition does not exist. As a consequence, the Court's attempt to distinguish between *D.*[28] and *Wallentin*[29] by introducing a concept of income by 'nature' failed completely.[30] Even if it were possible to apply the threshold uniformly, it is not satisfactory that non-resident taxpayers whose income is above that threshold are entitled to all benefits that resident taxpayers get, while those non-resident taxpayers whose income is below the threshold would not get any of these benefits.[31] In addition, in a trilateral situation, the *Schumacker* approach does not work.[32] Although the *Schumacker* case law intends to guarantee that personal and family circumstances are taken into account somewhere, this result cannot be achieved even in a bilateral situation, since neither State is obliged to take into account such circumstances at all.[33] Moreover, it is arbitrary, if not impossible, to distinguish between rules that are aimed at taking personal and family circumstances into account and other rules.[34] In *Gerritse*, the Court, using this approach, even felt obliged to distinguish between different types of allowances.[35] In addition, the *Schumacker* approach is limited to taxes. However, the area between tax law and social law is sometimes grey. Under some country's tax systems, allowances may turn into transfer payments if the taxpayer has not earned a certain amount of income. While the Court usually does not have to distinguish between the different areas of the law when it applies the freedoms since the standards for the application of the freedoms are identical, the *Schumacker* case law forces the ECJ to determine whether a rule is still part of tax law or has to be treated already as a non-tax rule. The Court was faced with this problem in *Blanckaert*.[36] Wherever the Court draws the border line, the result will be arbitrary.[37]

From this perspective, it is highly surprising that the Court has neither explicitly given up nor at least silently stopped applying its *Schumacker* case law, but has even confirmed and extended that approach. Under the earlier *Schumacker* case law, the ECJ required that the applicable rules had to be aimed at taking into account personal and family circumstances.[38] More recent judgments, however, no longer seem to require a link to the personal and family situation. In *Turpeinen*, the Court had to deal with a disadvantageous treatment of non-resident pensioners whose pensions were taxed at a flat rate of 35% while resident taxpayers could benefit from the progressive tax rate.[39] The ECJ applied its *Schumacker* case law and required (only) that non-resident taxpayers who receive almost all of their income in the State of source have to be treated like resident taxpayers. In *Turpeinen*, the ECJ referred only to personal and family circumstances insofar as Finnish tax legislation provided 'that retirement pensions such as that paid to Ms Turpeinen are, in the case of resident taxpayers, taxed in the same way as any income deriving directly from an economic activity, on a progressive scale and with allowances to take into account the taxpayers' ability to pay tax and his personal and family circumstances'.[40] *Wielockx*, to which the Court had referred in its *Turpeinen* judgment, however, was about deductions from the taxable base that were denied to non-resident taxpayers.[41] Mr Wielockx at least could complain that these deductions were nowhere taken into account if he was not entitled to them in the State of employment where he received almost all of his income. If, however, the existence of a 'progressive scale with allowances to take into account the taxpayers ability to pay tax and his personal and family circumstances' in the State of residence as such justifies the application of the *Schumacker* case law, that case law could be applied to nearly all income tax cases.

Therefore, it had to be expected that domestic courts would request from the ECJ guidance whether the *Schumacker* case law has to be applied on income taxpayers incurring losses from sources outside of the State where they receive almost all of their income. In *Ritter-Coulais*, the Court had to deal with a couple who received all their employment income from sources in Germany but who, however, were not permitted to deduct the foreign loss they incurred from the use of their French private dwelling from the German tax base.[42] For procedural reasons, the ECJ did not deal with whether the deduction of the loss had to be allowed in Germany. The Court only dealt with whether the loss had to be deducted for the purpose of determining the tax rate in Germany. While the Advocate General had treated the couple as residents of France and non-residents in Germany who had received all their income outside of their State of residence and had therefore applied the *Schumacker*

contd.

behind Tax Benefits Based on Personal and Family Circumstances?', ET (2003): 193; Lang, 'Wohin geht das Internationale Steuerrecht?', IStR (2005d): 290; Lang, 2005c, 337 et seq.

28 ECJ, 14 Sep. 2000, Case C-384/98, *D.* [2000] ECR I-6796.

29 ECJ, 1 Jul. 2004, Case C-169/03, *Wallentin* [2004] ECR I-6446.

30 Lang, 'Die Neuregelung der beschränkten Steuerpflicht nach dem Abgabenänderungsgesetz 2004', SWI (2005d): 156 et seq.; Lang, 2005b, 365 et seq.

31 Wattel, 2000, 212 et seq.; Schnitger, 'Die Rechtsprechung des EuGH zur Berücksichtigung der persönlichen Verhältnisse, eine Sackgasse?', IStR (2002): 279; Kofler & Schindler, '"Dancing with Mr D": The ECJ's Denial of Most-Favoured-Nation Treatment in the "*D*" case', ET (2005): 536 et seq.

32 Wattel, 'The Schumacker Legacy Introduction Taxing Non-Resident Employees: Coping with Schumacker', ET (1995): 351; Cordewener & Reimer, 'The Future of Most-Favoured-Nation Treatment in EC Tax Law – Did the ECJ Pull the Emergency Brake without Real Need?' – Part 2, ET (2006): 302.

33 See for instance Wattel, 2000, 214 et seq.

34 Wattel, 1995, 349 et seq.; Lang, 2005c, 342 et seq.

35 ECJ, 12 Jun. 2003, Case C-234/01, *Gerritse* [2003] ECR I-5933.

36 ECJ, 8 Sep. 2005, Case C-512/03, *Blanckaert* [2005] ECR I-7685.

37 Lang & Jettmar, 2005, 695 et seq.

38 Lang, 2005c, 337 et seq.

39 ECJ, 9 Nov. 2006, Case C-520/04, *Turpeinen* [2006] ECR I-10685.

40 *Ibid.*, para. 30.

41 ECJ, 11 Aug. 1995, Case C-80/94, *Wielockx/Inspecteur der directe belastingen* [1995] ECR I-2493, para. 20; ECJ, 9 Nov. 2006, Case C-520/04, *Turpeinen* [2006] ECR I-10685, para. 28.

42 ECJ, 21 Feb. 2006, Case C-152/03, *Ritter-Coulais* [2006] ECR I-1711.

case law,[43] the Court followed a slightly different approach. The ECJ held:

> that individuals such as the appellants in the main proceedings, who worked in Germany whilst residing in their own home in another Member State, were not entitled, in the absence of positive income, to have income losses relating to the use of their home taken into account for the purposes of determining their income tax rate, in contrast with individuals working and residing in their own homes in Germany.… Even though the national legislation is not specifically directed at non-residents, the latter are more likely to own a home outside Germany than resident citizens.… It follows that the treatment of non-resident workers under the national legislation is less favourable than that afforded to workers who reside in Germany in their own homes.

The Court concluded that Article 48 EC precludes:

> national legislation, such as that at issue in the main proceedings, which does not permit natural persons in receipt of income from employment in one Member State, and assessable to tax on their total income there, to have income losses relating to their own use of a private dwelling in another Member State taken into account for the purposes of determining the rate of taxation applicable to their income in the former state, whereas positive rental income relating to such a dwelling is taken into account.[44]

Ritter-Coulais, therefore, was finally not considered to be a case where resident and non-resident taxpayers were treated differently but where a resident taxpayer with foreign losses was discriminated against compared to another resident taxpayer with domestic losses.[45]

However, the ECJ considered *Lakebrink* as the appropriate case in which to develop its *Schumacker* case law further.[46] The couple resided in Germany, was employed in Luxemburg and received the major part of their income there but incurred a loss from rental of immovable property in Germany. They requested that the loss should be taken into account for the determination of the tax rate. The Court held that:

> discrimination arises from the fact that the personal and family circumstances of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence are taken into account neither in the State of residence nor in the State of employment (*Schumacker*, paragraph 38).… the ground, recalled at paragraph 31 of the present judgment, on the basis of which the Court made its finding of discrimination in *Schumacker* concerns … all the tax advantages connected with the non-resident's ability to pay tax which are not taken into account either in the State of residence or in the State of employment … since the ability to pay tax may indeed be regarded as forming part of the personal situation of the non-resident within the meaning of the judgment in *Schumacker*.… Consequently, the refusal by a Member State's tax authorities to take into consideration negative rental income concerning a taxpayer's properties abroad constitutes discrimination prohibited by Article 39 EC.[47]

After the ECJ's judgment in *Turpeinen*, it was not surprising that the Court extended its *Schumacker* case law to losses as well.

In *Renneberg*, which was about the tax base and not only the tax rate, the ECJ confirmed this approach once more.[48] Mr Renneberg was living in Belgium but received all his income from sources in The Netherlands, where he was employed and liable to unlimited taxation. He suffered losses that had arisen from his Belgian home. Under the tax treaty between Belgium and The Netherlands, his State of residence was Belgium and profits from immovable property situated in Belgium could not be taxed in The Netherlands. However, under The Netherlands domestic tax law, losses from such sources were deductible if the taxpayer was not only liable to unlimited taxation in The Netherlands but also qualified as resident under the tax treaty. Since Mr Renneberg was not a Netherlands resident under The Netherlands-Belgium tax treaty, he was not entitled to that deduction. The Court applied its *Schumacker* case law and required that the deductions have to be extended to those non-residents who receive all or almost all of their income in The Netherlands. The ECJ convincingly did not accept the balanced allocation of taxing rights as a justification.[49] The Netherlands had granted the foreign loss deduction to those resident taxpayers who were considered residents under the treaty without being obliged to do so under the treaty. If a country voluntarily grants benefits that it was not obliged to grant under EC law to its resident taxpayers, it has to extend those benefits to all other taxpayers who are in a comparable situation. In such a case, that country may no longer refuse to do so by referring to the balanced allocation of taxing rights. If that Member State grants these benefits unilaterally in some circumstances, one may assume that it is not too concerned about preserving the balanced allocation of taxing rights.

It is interesting that the ECJ treated Mr Renneberg as a Belgian resident. For the Court, it was obviously not relevant that he was liable to unlimited taxation in The Netherlands as well. That position seems to differ from the approach that the Court followed in the

43 Opinion of Advocate General Léger, 1 Mar. 2005, Case C-125/03, *Ritter-Coulais* [2006] ECR I-1711, points 84 et seq.

44 ECJ, 21 Feb. 2006, Case C-152/03, *Ritter-Coulais* [2006] ECR I-1711, paras 35 et seq.

45 Ritter-Coulais is, in this respect, similar to Bachmann: In Bachmann, the ECJ held that distinguishing between two Belgian residents, one of them paying insurance premiums to a foreign insurance company and therefore not being able to deduct them, whereas payments to a domestic insurance company are deductible, may mean that it is mainly residents of other EU Member States who will suffer since they typically have concluded insurance contracts with insurance companies in their Member States before they moved to Belgium (see ECJ, 28 Jan. 1992, Case C-204/90, *Bachmann/Belgian State* [1992] ECR I-249; see further Lang, 2007, 30.).

46 ECJ, 17 Jul. 2007, Case C-182/06, *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705.

47 *Ibid.*, paras 31 et seq.

48 ECJ, 16 Oct. 2008, Case C-527/06, *Renneberg*.

49 Different opinion Kemmeren, 'The Netherlands I: The Renneberg, *X Holding and Commission v. the Netherlands* Cases', in, *ECJ – Recent Developments in Direct Taxation 2008*, ed., Lang et al. (2008): 284 et seq.; see also Englisch, 'Grundfreiheitsbeschränkung zwecks Wahrung der Aufteilung der Besteuerungsbefugnis', SWI (2007): 399 et seq.

Ritter-Coulais case. Under tax treaty law, Mr and Mrs Ritter-Coulais were only French residents; however, under German tax law, they were German residents as well.[50] Contrary to *Renneberg*, the ECJ in *Ritter-Coulais* put emphasis on the unlimited tax liability of the couple under German law and required for *all* taxpayers subject to unlimited tax liability in Germany that losses incurred from foreign dwellings should be deductible. The exclusion of foreign dwellings might have more likely hurt those taxpayers subject to unlimited taxation in Germany who reside outside Germany.[51] The approach of the ECJ in *Renneberg* is to a certain extent narrower and to a certain extent broader than its *Ritter-Coulais* judgment. It is narrower since only those Belgian residents are entitled to the loss deduction in The Netherlands who receive all or almost all of their income from Netherlands sources. It is broader since not only taxpayers who are subject to unlimited tax liability in The Netherlands benefit but other taxpayers as well if they earn all or almost all of their income in The Netherlands. Therefore, if the ECJ had applied the same reasoning as in *Ritter-Coulais*, Mr Renneberg would have been able to deduct his losses on his Belgian home even if he had received only part of his income from Netherlands sources.

It is doubtful whether the fact that *Renneberg* was about the tax base while *Ritter-Coulais* (merely) dealt with the tax rate justifies a different approach. The answer to this question depends on whether one assumes that a tax treaty that prohibits the taxation of certain foreign profits has any impact on the treatment of foreign losses. This issue will be discussed below when justifications are more closely analyzed. However, as far as the comparison is concerned, the comparator should not have been different in *Ritter-Coulais* and in *Renneberg*. In my view, the tensions between the two judgments demonstrate that a careful search for a legal comparison, on the one hand, and the *Schumacker* case law, on the other hand, do not fit together and that the Court should overturn *Schumacker*.

2.3. Comparing two cross-border situations

The traditional approach to determining comparability is to focus on the different treatment of residents and non-residents, on the one hand, and of residents who have domestic and foreign income or property, on the other hand. For a long time, the Court has, however, applied other approaches as well. Different cross-border situations have in many cases been found comparable. This goes back to old judgments like *Schumacker* where, in another part of its reasoning, the Court found it worth mentioning that under The Netherlands-Germany tax treaty, Mr Schumacker would have been entitled to benefits he was denied because of his status as Belgian resident. The *D.* judgment is one of the leading cases in this respect.[52] Although the Court could not find Mr D., a German resident, to be in a comparable situation to a Belgian resident, who would have been entitled to the beneficial treatment requested by Mr D. from The Netherlands, it indirectly confirmed that different non-residents may be in a comparable situation. The only reason why the Court did not hold that German and Belgian residents were in a comparable situation was that their different treatment was due to a tax treaty. Thus, one may assume that in other situations where the different treatment is the result of the application of domestic law, the Court is willing to compare different cross-border situations.[53] This has been confirmed by the ECJ repeatedly. In *CLT-UFA*, the situation of a subsidiary with a parent in another Member State was comparable to the situation of a permanent establishment with a head office in the other Member State.[54] In *Cadbury Schweppes*, a UK corporation with a subsidiary in a low tax jurisdiction was not only held comparable with a UK corporation with a domestic subsidiary but also with UK corporations with subsidiaries in other Member States where no beneficial tax regime is applicable.[55] In *Denkavit Internationaal*, parent companies receiving dividends paid by resident subsidiaries were held 'as regards taxation in France of those dividends, in a comparable situation, whether they receive those dividends as resident parent companies or as non-resident parent companies which have a fixed place of business in France, or as non-resident parent companies which do not have a fixed place in France'.[56] In *Amurta*, the Court made reference to the domestic system in the source State under which not only dividends distributed to domestic companies were exempt from withholding tax but also dividends paid to companies having a permanent establishment there, which owns the shares in the company making the distribution.[57]

Columbus Container, however, led to a lot of speculation.[58] Contrary to the Opinion of the Advocate General,[59] the ECJ did not follow the approach it already had taken in *Cadbury Schweppes* when comparing two cross-border situations, namely, resident taxpayers receiving income from a low tax jurisdiction within the European Union (EU) compared to resident taxpayers receiving income from other

50 ECJ, 21 Feb. 2006, Case C-152/03, *Ritter-Coulais* [2006] ECR I-1711.

51 Meussen, 'The *Ritter-Coulais* Case – A Wrong Decision in Principle by the ECJ', ET (2006): 335 et seq.

52 ECJ, 5 Jun. 2005, Case C-376/03, *D.* [2005] ECR I-5821, paras 28 et seq.; see Kofler & Schindler, 531 et seq.; Cordewener & Reimer, 291 et seq.

53 See Weber & Spierts, 'The "*D* Case": Most-Favoured-Nation Treatment and Compensation of Legal Costs before the European Court of Justice', ET (2004): 67; Lang, 2005b, 367 et seq.; Kofler & Schindler, 531; Cordewener & Reimer, 293 et seq.

54 ECJ, 23 Feb. 2006, Case C-253/03, *CLT-UFA* [2006] ECR I-1831, para. 30.

55 ECJ, 12 Sep. 2006, Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, para. 44.

56 ECJ, 14 Dec. 2006, Case C-170/05, *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, para. 36.

57 ECJ, 8 Nov. 2007, Case C-379/05, *Amurta* [2007] ECR I-9569, para. 51.

58 See, e.g., Gstöttner, 'Rs Columbus Container – Absage an die "Outbound-Meistbegünstigung"?', *Taxlex* 2008, 288 et seq.

59 Opinion of Advocate General Mengozzi, 29 Mar. 2007, Case C-298/05, *Columbus Container Services* [2007] ECR I-10451, point 67.

Member States.[60] The ECJ has not provided any reasoning why it deviated from both its own approach in *Cadbury Schweppes* and the Opinion of the Advocate General in *Columbus Container*. However, those who assumed that the Court has completely given up comparing two different cross-border situations were refuted by the Court's judgment in the *A.* case where the Grand Chamber of the Court, no more than two weeks after its First Chamber had decided *Columbus Container*, held that Swedish residents receiving dividends from EU and European Economic Area (EEA) countries and Swedish residents receiving dividends from third countries like Switzerland are in a comparable situation.[61]

Orange European Smallcap is an even more recent judgment where the Grand Chamber of the Court confirmed this line of reasoning:[62] A shareholder investing through the intermediary of a fiscal investment enterprise gets a tax benefit in The Netherlands insofar as the investment enterprise receives dividends from corporations located in countries with which The Netherlands has concluded tax treaties. Therefore, The Netherlands legislation distinguishes between two different situations:

> where a fiscal investment enterprise receives dividends from Member States with which the Kingdom of The Netherlands has concluded a convention providing for shareholders who are natural persons to be entitled to credit the tax which those Member States have deducted from the dividends to the income tax for which those shareholders are liable in The Netherlands, the situation of that enterprise is different from that in which it finds itself when receiving dividends from Member States with which the Kingdom of The Netherlands has not concluded such a convention, as there is no such entitlement in respect of those dividends.[63]

The ECJ referred to its judgment in *D.*; however, the Court acknowledged that the case is different since:

> the payment of the concession granted in Article 28(1)(b) of the Law on corporation tax, in conjunction with Article 6 of the Royal Decree, results, not from the automatic application of such a bilateral tax convention, but from the unilateral decision of the Kingdom of The Netherlands to extend the benefit of such conventions to fiscal investment enterprises.[64]

The Court gives reasons why the two different situations are not comparable:

> by granting the concession, The Netherlands legislation at issue in the main proceedings seeks to make dividends received by a shareholder investing directly subject as far as possible to the same treatment for tax purposes as those received by a shareholder investing through the intermediary of a fiscal investment enterprise, so as to prevent investments abroad by such an enterprise from being regarded as less appealing than direct investments.… However, under such legislation, where a fiscal investment enterprise receives dividends from Member States, with which the Kingdom of The Netherlands has concluded a convention providing for shareholders who are natural persons to be entitled to credit the tax which those Member States have deducted from the dividends to the income tax for which those shareholders are liable in The Netherlands, the situation of that enterprise is different from that in which it finds itself when receiving dividends from Member States, with which the Kingdom of The Netherlands has not concluded such a convention, as there is no such entitlement in respect of those dividends.… In fact, it is only as regards investments in the Member States with which the Kingdom of The Netherlands has concluded such a bilateral tax convention that, without the concession granted by the legislation at issue in the main proceedings, the decision to invest through the intermediary of a fiscal investment enterprise runs the risk of being less advantageous to a shareholder who is a natural person than direct investment.… By contrast, as regards the Member States with which the Kingdom of The Netherlands has not concluded such a convention, the decision, by a natural person, to invest through the intermediary of such an enterprise does not involve the risk of losing a benefit which he could have enjoyed if he had chosen to invest directly in those Member States. Accordingly, that situation is not objectively comparable to the situation in which the Kingdom of The Netherlands has concluded such a tax convention.… It follows that, in the case of legislation such as that at issue in the main proceedings, pursuant to which – in order to make the tax treatment of direct investments and of those made through the intermediary of investment enterprises the same, as far as possible – a Member State has decided to grant those enterprises a concession in respect of tax deducted at source on dividends from Member States vis-à-vis which it has undertaken, under the terms of bilateral agreements, to allow natural persons to credit those deductions to the income tax for which they are liable under national law, Articles 56 EC and 58 EC do not preclude that Member State from withholding that concession in respect of dividends from other Member States with which it has not concluded bilateral agreements containing such provisions, as these are not objectively comparable situations. [65]

There is only a need for such a careful and lengthy reasoning if unilateral rules granting benefits for income from sources in certain countries in other circumstances than the special situation described in the decision run the risk of being incompatible with the freedoms. Thus, in *Orange European Smallcap*, the ECJ implicitly confirmed that the situation of taxpayers who receive income from different Member States may be viewed as comparable.

The judgment on the *Belgian care insurance scheme*, decided by the Grand Chamber of the Court as well, fits within this case law.[66] Under regional legislation in Belgium, employed and self-employed workers performing their activities in the Dutch-speaking and the bilingual region of Belgium could only benefit from a care insurance scheme if they either resided in one of the two regions or in another Member State but not if they resided in the French-speaking

[60] See ECJ, 12 Sep. 2006, Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, para. 44 and ECJ, 6 Dec. 2007, Case C-298/05, *Columbus Container Service* [2007] ECR I-10451, para. 39.

[61] ECJ, 18 Dec. 2007, Case C-101/05, *A.* [2007] ECR I-11531, paras 41-42.

[62] ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund*, para. 105.

[63] *Ibid.*, para. 61.

[64] *Ibid.*, para. 54.

[65] ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund*, para. 60.

[66] ECJ, 1 Apr. 2008, Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*.

region of Belgium. Although the ECJ, contrary to the position taken by the Advocate General,[67] refused to apply the freedoms in merely internal situations, the freedoms were not completely inapplicable:

> the legislation at issue in the main proceedings may also exclude from the care insurance scheme employed or self-employed workers falling within the ambit of Community law, that is to say, both nationals of Member States other than the Kingdom of Belgium working in the Dutch-speaking region or in the bilingual region of Brussels-Capital but who live in another part of the national territory, and Belgian nationals in the same situation who have made use of their right to freedom of movement.[68]

The Court made an interesting statement:

> Migrant workers, pursuing or contemplating the pursuit of employment or self-employment in one of those two regions, might be dissuaded from making use of their freedom of movement and from leaving their Member State of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed. In other words, the fact that employed or self-employed workers find themselves in a situation in which they suffer either the loss of eligibility care insurance or a limitation of the place to which they transfer their residence is, at the very least, capable of impeding the exercise of the rights conferred by Articles 39 EC and 43 EC.[69]

In essence, the Court compared workers who leave their Member State of origin and perform their activities in the Dutch-speaking or in the bilingual region of Belgium and reside in one of the two regions with other workers who leave their Member State of origin and perform their activities in one of these two regions but who reside in the French-speaking region of Belgium. Thus, the ECJ accepted two different cross-border situations as comparable.

It is obvious that not all cross-border situations are automatically comparable to each other. Neither are domestic and cross-border situations always comparable. Comparability depends on the legal situation of the case. However, in the meantime, one may assume that it is settled case law that, *depending on the legal situation at stake*, cross-border situations may be considered comparable to domestic situations and to other cross-border situations.[70] Although after *Columbus Container*, because of the lack of reasoning, it was not clear whether the Court had just not found the two cross-border situations to be comparable in that case or whether the Court intended to refrain from comparing two different cross-border situations in general, more recent ECJ case law confirms that the Court has not given up comparing one cross-border situation with another.[71]

3. Justifications and Proportionality

3.1. Which and how many justifications?

Looking at the recent case law regarding justifications, one has to acknowledge that the case law of the ECJ is furthering a continual state of development. On the one hand, the Court is willing to accept new grounds of justification. For example, in *Jäger*, the ECJ did not want to rule out that 'objectives connected with the carrying on of the activities of agricultural and forestry holdings and preservation of jobs in the latter in cases of inheritance may in themselves, in certain circumstances and under certain conditions, be in the public interest and capable of justifying restrictions on the free movement of capital'.[72] This requires distinguishing these objectives from more general objectives mentioned in cases like *Verkooijen*.[73] The UK Government had submitted that a legislative provision 'may be objectively justified by the intention to promote the economy of the country by encouraging investment by individuals in companies with their seat in The Netherlands'.[74] The Court was quick to respond that 'it need merely be pointed out that, according to settled case law, aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty'.[75] An alternative reading of the statement in *Jäger* is that, from now on, the Court may consider accepting justifications of a mere economic nature, which it had rejected in its earlier case law.

In the case of the *Belgium care insurance scheme*, the ECJ confirmed its settled case law according to which constitutional requirements cannot justify a different treatment of comparable situations.[76] The Flemish Government had referred exclusively to the requirements inherent in the division of powers within the Belgian federal structure and, particularly, to the fact that the Flemish Community could exercise no competence in relation to care insurance in respect of persons residing in the territory of other linguistic communities of Belgium.[77] This line of argument was rejected by the Court:[78] 'the Court has consistently held that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organization of that State, to justify the failure to observe obligations arising under Community law'.

67 Opinion of Advocate General Sharpston, 28 Jun. 2007, Case C-212/06, *Gouvernement de la Communauté française and gouvernement wallon*, point 101.
68 ECJ, 1 Apr. 2008, Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*, para. 41.
69 *Ibid.*, para. 48.
70 Lang, 'ECJ Case Law on Cross-Border Dividend Taxation – Recent Developments', *EC Tax Review* (2008): 73 et seq.
71 See Schmidtmann, 'Zur vertikalen und horizontalen Vergleichspaarbildung des EuGH aus ökonomischer Sicht', IW (2008): 1101, who supports horizontal comparison from an internal market point of view.
72 ECJ, 17 Jan. 2008, Case C-256/06, *Jäger* [2008] ECR I-123, para. 50.
73 ECJ, 6 Jun. 2000, Case C-35/98, *Verkooijen* [2000] I-4071, para. 46.
74 *Ibid.*, para. 47.
75 *Ibid.*, para. 48.
76 ECJ, 1 Apr. 2008, Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*, para. 58.
77 *Ibid.*, para. 57.
78 *Ibid.*, para. 58.

Although the Court is correct in referring to its settled case law, this approach is, however, limited to the scope of the freedoms. In the area of State aid, the Court has taken a different route. In order to determine regional selectivity, the ECJ has followed the suggestion of the late Advocate General Geelhoed of developing criteria under which regions may be considered autonomous.[79] If these requirements are met, beneficial measures that are limited to a certain region are not considered to be selective. In its case law on the limitation of the temporal effects of its judgments, the ECJ applies a less elaborate approach but focuses as well on local entities in order to determine how severe the economic consequences of its judgments would be.[80] For example, in *EKW*, the Court held that 'calling in question legal relations which have exhausted their effects in the past … would retroactively cast into confusion the system whereby Austrian municipalities are financed'.[81] Contrary to its approach on regional selectivity, it was not the situation of the *individual* municipality that was relevant but the whole 'system whereby Austrian municipalities are financed'. This approach, however, differs from the position taken by the Court in the area of the freedoms, since in *EKW*, it made a difference that it was not the federal government of Austria but the municipalities that benefited from that tax.[82] A different approach is followed in the area of procedural law when the Court requires equivalent treatment of recoveries under Community law and domestic law. The Court only takes into account rules that had been introduced by *the same* legislator.[83] Thus, legislation on recovery of Community charges introduced by a region may be considered to be in accordance with the equivalency requirement, even if domestic recoveries are treated more favourably by a rule introduced by another level of government for charges levied by that level, as long as there is no rule introduced by the same provincial legislator that is more beneficial for domestic recoveries. One cannot exclude that there are convincing reasons why the ECJ applies different standards in different areas of Community law. However, it could at least be expected that the Court would provide reasons for the different approaches.

Recently, the Court had to come back to its *Marks & Spencer* judgment where it had dealt with the protection of a balanced allocation of the power to impose taxes between the various Member States concerned, the danger that losses would be used twice, and the risk of tax avoidance as possible justifications and had concluded that these justifications, 'taken together', were acceptable.[84] Authors have been speculating since whether from *Marks & Spencer*, one has to draw the conclusion that each justification alone is insufficient to accept different treatment and whether justifications that have been rejected in the past individually could be relevant again and could, if 'taken together', get accepted by the Court.[85]

Advocate General Poiares Maduro gave his interpretation of this requirement in his Opinion in *Rewe*.[86] He suggested that the criterion of a balanced allocation of taxing powers between the Member States cannot stand alone. This criterion cannot be separated from the other two criteria, that is, the danger of the double utilization of losses and the risk of tax avoidance. From this, he concluded that only these two criteria must be examined.[87] This was, in the author's view, a very elegant attempt to dispose of the balanced allocation of the power to impose taxes between the Member States as a possible justification.[88] Specifically, if the other two criteria are considered exclusively, it is unnecessary to deal with the question of whether or not the power to impose taxes is allocated in a balanced way. The ECJ in *Rewe*, however, approvingly referred to the Opinion of its Advocate General but seemed to have left it open whether it would go as far:

> As the Advocate General stated at point 32 of his Opinion, it is necessary to define the scope to be accorded to the legitimate requirement of the balanced allocation of the power to impose taxes between the Member States. In particular, it must be noted that such a justification was accepted by the Court in the judgment in *Marks & Spencer* only in conjunction with two other grounds, based on the taking into account of tax losses twice and on tax avoidance (see, to that effect, *Marks & Spencer*, paragraphs 43 and 51).

In her Opinion in *Oy AA*, Advocate General Kokott dealt with the three justifications mentioned in *Marks & Spencer* as well and emphasized that they should be seen together:

> The formulation cited above already makes it clear that all three elements are closely linked to one another and cannot be viewed in isolation. In this connection preserving the allocation of the power to impose taxes is at the heart of these elements.… The second element of justification recognised in *Marks & Spencer*, namely preventing the danger that losses are used twice, is closely connected to the allocation of the power to impose taxes.… The allocation of

[79] Opinion of Advocate General Geelhoed, 20 Oct. 2005, Case C-88/03, *Portuguese Republic/Commission of the European Communities* [2006] ECR I-7115, point 54.

[80] Lang, 'Die Beschränkung der zeitlichen Wirkung von EuGH-Urteilen im Lichte des Urteils Meilicke', IStR (2007a): 235; see also ECJ, 6 Mar. 2007, Case C-292/04, *Meilicke* [2007] ECR I-1835.

[81] ECJ, 9 Mar. 2000, Case C-437/97, *EKW and Wein & Co.* [2000] ECR I-1157, para. 59.

[82] Lang, 2007a, 238; Lang, 'Limitation of the Temporal Effects of Judgments of the ECJ', *Intertax* (2007b), 238.

[83] ECJ, 2 Oct. 2003, Case C-147/01, *Weber's Wine World and others* [2003] ECR I-11365; see Lang, *Die landesabgabenrechtlichen Rückzahlungssperren im Lichte des Getränkesteuer-Urteils des EuGH vom*, 2 Oct. 2003, C-147/01 Teil 1, *StZ* [2003], 464 et seq.

[84] ECJ, 19 Sep. 2006, Case C-356/04, *Lidl Belgium* [2006] ECR I-8501, paras 38-43.

[85] Lang, 2006, 426 et seq., Lang, 'The *Marks & Spencer* Case – The Open Issues Following the ECJ's Final Word', ET (2006): 59 et seq.; Douma & Naumburg, '*Marks & Spencer*: Are National Tax Systems Éclairé?', ET (2006): 433; Kessler & Eicke, 'Gedanken zur grenzüberschreitenden Verlustnutzung nach Lidl Belgium', IStR (2008): 583; Kube, 'Grenzüberschreitende Verlustverrechnung und die Zuordnung von Verantwortung', IStR (2008): 307 et seq.; Petutschnig & Six, 'EuGH Urteil Lidl Belgium – Neues zur grenzüberschreitenden Verlustverrechnung', SWI (2008): 370.

[86] Opinion of Advocate General Poiares Maduro, 31 May 2006, Case C-347/04, *Rewe Zentralfinanz*.

[87] *Ibid*., point 34.

[88] Lang, 2006, 427.

> power to impose taxes on the basis of elements of territoriality (an undertaking's residence or source of income within the territory) serves to confer on a State a primary right to tax certain income. This, taken together with the rules to prevent double taxation, creates an international system of tax competence.… The risk of tax avoidance as the third element of justification is also closely linked to the other two elements of justification. One might regard intra-group transfers to companies resident in Member States in which such payments are not taxable in itself as tax avoidance. To that extent this justification may be considered together with the second justification.[89]

In the judgment in *Oy AA*, the Court held that the balanced allocation of the power to tax may be jeopardized and could be undermined if the scope of the Finnish group contribution system would have to be extended.[90] The Finnish system was able to prevent practices that are designed only to avoid the tax normally due in the Member State of the subsidiary on its profits. Concerning, however, the risk that losses might be utilized twice, the ECJ pointed out that the Finnish system of intra-group financial transfers did not concern the deductibility of losses.[91] Although only two of the three grounds of justifications were accepted, the Court viewed this as sufficient, without providing further reasoning:

> Having regard to the combination of those two factors, concerning the need to safeguard the balanced allocation of the power to tax between the Member States and the need to prevent tax avoidance, this Court therefore finds that a system, such as that at issue in the main proceedings, which grants a subsidiary the right to deduct a financial transfer in favour of its parent from its taxable income only where the parent and the subsidiary both have their principal establishment in the same Member State, pursues legitimate objectives compatible with the Treaty and justified by overriding reasons in the public interest, and is appropriate to ensuring the attainment of those objectives.[92]

In *Lidl Belgium*, the Court returned to its *Marks & Spencer* judgment:

> The national court asks, however, whether the justifications set out in paragraphs 44 to 50 of the judgment in *Marks & Spencer*, which also include the need to prevent the risk of tax avoidance, must be understood as being cumulative or whether the existence of only one of those factors is sufficient for the tax regime at issue in the main proceedings to be treated, in principle, as being justified…, bearing in mind the wide variety of situations in which a Member State may put forward such reasons, it cannot be necessary for all the justifications referred to in paragraph 51 of the *Marks & Spencer* judgment to be present in order for national tax rules which restrict the freedom of establishment laid down in Article 43 EC to be capable, in principle, of being justified.… Thus, in the judgment in *Oy AA*, the Court acknowledged in particular that the national tax legislation at issue could, in principle, be justified on the basis of two of the three justifications referred to in paragraph 51 of the judgment in *Marks & Spencer*, namely the need to safeguard the allocation of the power to tax between the Member States and the need to prevent tax avoidance, taken together (see *Oy AA*, paragraph 60).… Likewise, the tax regime at issue in the main proceedings can, in principle, be justified in the light of two of the factors referred to in paragraph 51 of the judgment in *Marks & Spencer*, namely the need to safeguard the allocation of the power to tax between the Member States and the need to prevent the danger that the same losses will be taken into account twice.[93]

Whether focusing on two justifications instead of three is more convincing is doubtful.[94] Neither of the justifications is very clear, and they leave room for interpretation, as can be seen by taking a closer look at *Lidl Belgium*.

3.2. Symmetry

In *Lidl Belgium*, one of the key words was 'symmetry': The Court:

> pointed out that the Member State in which the registered office of the company to which the permanent establishment belongs is situated would, in the absence of a double taxation convention, have the right to tax the profits generated by such an entity. Consequently, the objective of preserving the allocation of the power to impose taxes between the two Member States concerned, which is reflected in the provisions of the convention, is capable of justifying the tax regime at issue in the main proceedings, since it safeguards symmetry between the right to tax profits and the right to deduct losses.[95]

The underlying assumption of the Court, however, is questionable. It is highly controversial whether tax treaty provisions that exempt certain parts of the income are applicable to losses as well. Case law seems to diverge. Whereas German courts take the position that the application of a tax treaty prevents the taxpayer from deducting a loss incurred on an exempt source of income,[96] courts in Austria and Luxemburg arrived at the opposite result.[97] In any case, a tax treaty does not prevent legislation from granting deduction of losses, even if the profits are exempt.[98]

Referring to the symmetry between the right to tax profits and the right to deduct losses is definitely a more recent development and cannot be traced back to some of the older case law. *Wielockx*, inter alia, would have been decided differently if the Court had applied this approach.[99] In *Wielockx*, the ECJ did not accept as a justification for refusing to non-resident

89 ECJ, 29 Mar. 2007, Case C-347/04, *Rewe Zentralfinanz* [2007] ECR I-2647, para. 41.
90 ECJ, 18 Jul. 2007, Case C-231/05, *Oy AA* [2007] ECR I-6373, para. 56.
91 ECJ, 18 Jul. 2007, Case C-231/05, *Oy AA* [2007] ECR I-6373, para. 65.
92 *Ibid.*, para. 60.
93 ECJ, 19 Sep. 2006, Case C-356/04, *Lidl Belgium* [2006] ECR I-8501, para. 38.
94 See Seiler & Axer, 'Die EuGH-Entscheidung im Fall "Lidl Belgium" als (Zwischen-) Schritt auf dem Weg zur Abstimmung von nationaler Steuerhoheit und europäischem Recht', IStR (2008): 841.
95 ECJ, 19 Sep. 2006, Case C-356/04, *Lidl Belgium* [2006] ECR I-8501, para. 33.
96 BFH, 11 Mar. 2008, I R 116/04 NV.
97 VwGH, 25 Sep. 2001, 99/14/0217; Luxemburg Cour Administrative 10 Aug. 2005, No. 17 820.
98 See the former German rule in s. 2a EStG.
99 ECJ, 11 Aug. 1995, Case C-80/94, *Wielockx/Inspecteur der directe belastingen* [1995] ECR I-2493, para. 25.

taxpayers the right to reduce their tax base by setting up a pension reserve the fact that, according to the tax treaty, the pension would not be taxed either. The Court held that:

> [F]iscal cohesion has not therefore established in relation to one and the same person by a strict correlation between the deductibility of contributions and the taxation of pensions but is shifted to another level, that of reciprocity of the rules applicable in the contracting states. … Since fiscal cohesion is secured by a bilateral convention concluded with another Member State, that principle may not be invoked to justify the refusal of a deduction such as that in issue.[100]

In other words, the Member State cannot claim that its tax treatment is coherent if it has waived the right to tax under a tax treaty. If the Court had applied that approach in *Lidl Belgium*, the deductibility of the loss could not have been denied just because Germany has waived its right to tax foreign profits under a tax treaty.

In *Wielockx*, the relevant ground of justification was fiscal cohesion.[101] The same justification had been accepted in *KR Wannsee* where the Court developed symmetry arguments as well. The Court:

> noted that the reintegration of losses provided for by the German tax system at issue in the main proceedings cannot be dissociated from their having earlier been taken into account. That reintegration, in the case of a company with a permanent establishment in another State in relation to which that company's State of residence has no power of taxation, as the referring court indicates, reflects a logical symmetry. There was thus a direct, personal and material link between the two elements of the tax mechanism at issue in the main proceedings, the said reintegration being the logical complement of the deduction previously granted.… It must be concluded that the restriction which follows from the reintegration thus provided for is justified by the need to guarantee the coherence of the German tax system.[102]

It is worth mentioning that the key argument both in *Lidl Belgium* and in *KR Wannsee*, symmetry, is identical, although the Court applied different grounds of justifications.[103] In *KR Wannsee*, fiscal cohesion was dealt with,[104] whereas *Lidl Belgium* was about the prevention of the double utilization of losses and the balanced allocation of taxing powers.[105] The justifications seem to become exchangeable. Two grounds of justifications, taken 'together' as one of the legacies of the *Marks & Spencer* reasoning, can be replaced by the somehow magical concept of 'fiscal cohesion'. However, it is, at least, difficult to bring both judgments in line with each other as far as the utilization of the foreign losses is concerned. In *Lidl Belgium*, the ECJ referred to *Marks & Spencer,* where it had held:

> that a measure which restricts the freedom of establishment goes beyond what is necessary to attain the objectives pursued where a non-resident subsidiary has exhausted the possibilities for having the losses incurred in the Member State where it is situated taken into account for the accounting period concerned and also for previous accounting periods and where there is no possibility for that subsidiary's losses to be taken into account in that State for future periods. …
>
> In paragraph 56 of that judgment, the Court also stated that where, in one Member State, the resident parent company demonstrates to the national tax authorities that those conditions are fulfilled, it is contrary to Article 43 EC to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.[106]

The ECJ continued by pointing out:

> that Luxembourg tax legislation provides for the possibility of deducting a taxpayer's losses in future tax years for the purposes of calculating the tax base.… As was confirmed at the hearing before the Court, *Lidl Belgium* has in fact benefited from such an offsetting of the losses incurred by its permanent establishment in 1999 in a subsequent tax year, namely 2003, in which that entity generated profits.[107]

Thus, it remains unclear whether the mere existence of loss carry forward rules is sufficient, irrespective whether they are applicable in the actual case or whether it has to be ensured that the taxpayer actually benefitted from these rules in order to relieve the State of residence from its subsidiary obligation to utilize the loss. In *KR Wannsee*, however, the Court did not see it as a responsibility of the State of residence to allow deduction of the foreign loss although the other contracting State did not make that possible either. The Court held that it was the responsibility of the State of the permanent establishment to allow the loss to be utilized.[108] One might speculate why the Court did not take that position in *Lidl Belgium* as well. Under that position, the ECJ would not have had to worry whether Luxemburg provides for a loss carry forward, since Germany would not have any responsibility for taking into account the loss incurred in Luxemburg.

The reasoning of the ECJ in *KR Wannsee* is questionable. The starting point of the reasoning of the Court is that:

> in the absence of any unifying or harmonising Community measures, Member States retain the power to define the criteria for taxing income and wealth with a view to eliminating double taxation, by means of conventions if necessary … That competence also implies that a Member State cannot be required to take account, for the purposes of applying its tax law, of the possible negative results arising from particularities of legislation of another Member State applicable to a permanent establishment situated in the territory of the said State which belongs to a company with a registered

[100] *Ibid.*, para. 24.
[101] *Ibid.*, para. 25.
[102] ECJ, 23 Oct. 2008, Case C-157/07, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, para. 42.
[103] For a critical analysis of the symmetry argument, see also Englisch, 2007: 402 et seq; Englisch, Anmerkung, IStR (2008): 404 et seq.
[104] ECJ, 23 Oct. 2008, Case C-157/07, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, para. 42.
[105] ECJ, 19 Sep. 2006, Case C-356/04, *Lidl Belgium* [2006] ECR I-8501, para. 42.
[106] *Ibid.*, para. 42, *Ibid.*, para. 48.
[107] ECJ, 19 Sep. 2006, Case C-356/04, *Lidl Belgium* [2006] ECR I-8501, paras 49-50.
[108] ECJ, 23 Oct. 2008, Case C-157/07, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paras 50 et seq.

> office in the first State … The Court has held that freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a company as to the establishment of commercial structures abroad may be to the company's advantage or not, according to circumstances (*Deutsche Shell*, paragraph 43).… Even supposing that the combined effect of taxation in the State where the principal company of the permanent establishment concerned is situated and tax due in the State where that establishment is situated might lead to a restriction of the freedom of establishment, such a restriction is imputable only to the latter of those States.[109]

However, the reasoning in *Lidl Belgium* demonstrates that such a restriction is not necessarily 'imputable only to the latter State'.[110] Even if the State of residence is not obliged to ensure, 'in all circumstances', taxation that removes disparities, there are, as can be inferred from *Lidl Belgium*, obviously some circumstances in which the State of residence is responsible. The question remains which rules of the permanent establishment State do *not* have to be considered as 'peculiarities of legislation' of that State[111] and, thus, have to be taken into account by the State of residence.

The main problem of the ECJ's approach is that the Court is trying to develop criteria under which under certain conditions, a Member State is responsible for taking into account losses. The ECJ tries to use the tax treaty rules for that purpose; however, tax treaties neither ensure that a loss can be utilized once nor prevent the risk of double utilization of a loss. In these judgments, the ECJ ignores, contrary – in this respect – to its convincing approach in judgments like *Columbus Container* or *Amurta*, that the interpretation of tax treaties is not within the Court's competence. The ECJ would go far beyond what is its settled case law so far if it were to really require the country to which the loss is 'imputable' to grant a deduction to non-residents, *irrespective* of whether the legislation of that country grants it to comparable residents. It is contradictory that the Court, on the one hand, tries to ensure that a loss has to be taken into account only in one country, whereas, on the other hand, it accepts that, outside of the scope of a tax treaty, its case law makes it possible that debts may be deducted twice from the (inheritance) tax base, as was the case in *Eckelkamp*.[112]

In my view, the approaches taken in *Eckelkamp* and in *Block* are more promising.[113] The Court should limit its analysis exclusively to the legislation of one Member State in each individual case and should refrain from taking into account the legal situation in the other Member State. Since tax systems are not harmonized yet, the Court cannot avoid results that lead either to double taxation or to non-taxation or, translated to losses, to a situation where losses cannot be deducted anywhere or where they are deducted twice. Among other reasons, the fact that no common rules exist on how a loss has to be determined should prevent the ECJ from attempting to establish a system in which every 'loss' is utilized once, but not more often or not less, throughout the EU. The ECJ cannot replace the Community legislator but can only make sure that each single Member State complies with its obligations under Community law. If the results are, from a policy point of view, not satisfactory, since neither double taxation nor non-taxation is in the long run ideal, either the Community legislator or the Member States may step in and take action. The more it becomes visible that the interaction of tax systems that are, individually, perfectly consistent, creates both tax planning opportunities and burdens, the more pressure the Community legislator may feel.

3.3. Proportionate and disproportionate measures

The proportionality test has not played an important role in the case law of the ECJ in the area of direct taxation for a long time. However, since the ECJ has recently been more willing to accept justifications for different treatment, it has had to deal more often with the question whether a certain domestic measure is proportionate in regard to the justification.

Even in the 'old days', the Court frequently had to answer the question whether different treatment can be justified because of the need for fiscal supervision. The ECJ had dealt with that issue at the level of proportionality:

> As regards effective fiscal supervision, the Commission has rightly referred to 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), which can be invoked by a Member State in order to check whether payments have been made in another Member State, or to obtain all necessary information, where those payments and that information must be taken into account in determining the correct amount of income taxes (see *Bachmann*, cited above, paragraph 18, and Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraphs 26 and 28). Member States are free to resort to these arrangements when it appears appropriate to them to do so.[114]

However, more recently, the Court put more emphasis on the obligation of the taxpayer to contribute to the procedure. For example, in *Jäger*, the Court held that regarding practical difficulties:

> it should be noted that, while it may indeed prove difficult for national authorities to apply the assessment procedure provided for in paragraphs 140 to 144 of the BewG to agricultural land and forestry situated in another Member State,

[109] *Ibid.*, paras 48 et seq.

[110] See Thömmes, 'Nachversteuerung zuvor zum Abzug zugelassener Betriebsstättenverluste verstößt nicht gegen die Niederlassungsfreiheit', IWB (2008), 1115 et seq.

[111] ECJ, 19 Sep. 2006, Case C-356/04, *Lidl Belgium* [2006] ECR I-8501, para. 54.

[112] ECJ, 11 Sep. 2008, Case C-11/07, *Eckelkamp*, para. 65 et seq.

[113] *Ibid.*, para. 68 et seq; ECJ, 12 Feb. 2009, Case C-67/08, *Block*, para. 31 et seq.

[114] ECJ, 4 Mar. 2004, Case C-334/02, *Commission/France* [2004] ECR I-2229, para. 31.

> that difficulty cannot justify a categorical refusal to grant the tax advantage in question since the taxpayers concerned could be asked themselves to supply the authorities with the data which they consider necessary to ensure application of that procedure in such a way that it is adapted to holdings in other Member States.[115]

A related question concerned the compatibility of withholding taxes that are exclusively levied on income of non-residents if the directive on the mutual assistance on the recovery of debt claims is applicable. In *Scorpio*, the Court explicitly left that question open since the case concerned a period in which the directive had not been in force for direct taxes.[116] In *Truck Center*, Advocate General Kokott had to deal with that issue as well.[117] Although in the tax years at issue, Belgium was likewise unable to rely on the directive to facilitate the recovery of taxes in another Member State, even then there was, however, the Benelux Convention signed in Brussels on 5 September 1952 on mutual administrative assistance in the recovery of tax claims:

> It should therefore be considered whether charging the withholding tax in the hands of the Luxembourg recipient of the interest payment – calling if need be on the administrative assistance of the Luxembourg tax authorities – might not be a less intrusive measure than deducting tax at source.… Despite the possibility of administrative assistance, however, it is by no means necessarily the case that collecting tax from the foreign parent company to which the interest is due in fact constitutes a less severe means than collection at source within the country from the subsidiary company. If the foreign recipient were the tax debtor of the withholding tax, it would have to make a tax declaration to the tax authorities of the Member State of the source of the income, despite not being resident there. The authorities of that State would have to register that company as a taxable person and supervise the making of the tax declaration and the payment of the tax. In a case of enforcement they would also have to turn to the authorities of the State of residence of the recipient of interest, by means of administrative assistance. Altogether, this form of tax collection would probably give rise to substantially greater expense for the tax authorities, and for the group of companies, than taxation at source in the hands of the subsidiary company, which is liable to taxation within the country in any event. Especially in the case of one-off or small tax claims, the additional expense would be out of proportion to the administrative burden of deducting tax at source, as the Commission too suggests.… Those considerations show that creating a proportionate procedure for collecting taxes requires a complex assessment which the national legislature has to undertake when it exercises its competence to regulate direct taxation.… In a situation such as the present the legislature's margin of discretion … is in any event not obviously exceeded if the Member State introduces a withholding tax, even though it could rely on bilateral arrangements for administrative assistance for the enforcement of taxes abroad.[118]

It is interesting that Advocate General Kokott took into account whether a less restrictive measure would give rise to substantially greater expense *both* for the tax authority and the taxpayer. In the older case law, the burden for the tax authorities has not been taken into account. As far as the additional expenses of the taxpayers are concerned, it would also have been possible to leave it to the taxpayer to calculate and decide which measure is less burdensome and expensive by allowing him *to opt* for the withholding tax. However, the Court had already followed a similar approach in the *N.* case where it accepted a rule requiring assessment at the time of emigration since this rule relieves the taxpayer from keeping all the documents in the future,[119] without considering that it could have been possible as well to leave it to the taxpayer whether he prefers to be assessed at the time of the emigration or at the time of the alienation in case he is willing to keep all the records. In its judgment in *Truck Center*, the ECJ was not concerned about the proportionality of the measure. It already dealt with the directive at the level of comparability:

> While resident recipient companies are directly subject to the supervision of the Belgian tax authorities, which can ensure compulsory recovery of taxes, that is not the case with regard to non-resident recipient companies inasmuch as, in their case, recovery of the tax requires the assistance of the tax authorities of the other Member State.[120]

Thus, the Court regarded the situations of non-resident and resident taxpayers as not comparable because requiring the assistance of the tax authorities of the other Member State is not equivalent to directly supervising taxpayers. Although it is surprising that the Court dealt with this issue at the level of comparability, one can conclude that the ECJ would not require the application of the directive at the level of proportionality, either. One may speculate whether it makes a difference if assistance may be required under a directive, whose application can be enforced by initiating infringement procedures and taking legal action at the level of the ECJ, or a mere treaty under international public law, as was the case in *Truck Center*. The application of such a treaty by the government of the other contracting State can hardly be enforced by the contracting State that is requesting the other State to cooperate. However, case law on the relevance of the mutual assistance directive on exchange of information indicates that the ECJ is not inclined to distinguish between directives and treaties under international public law for that purpose.[121]

Both in *Truck Center* and in *Lidl Belgium*, the issue was raised whether a cash-flow disadvantage was proportionate.[122] In her Opinion in *Lidl Belgium*, Advocate

[115] ECJ, 17 Jan. 2008, Case C-256/06, *Jäger* [2008] ECR I-123, para. 54.

[116] ECJ, 3 Oct. 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen* [2006] ECR I-946.

[117] Opinion of Advocate General Kokott, 18 Sep. 2008, Case C-282/07, *Truck Center*, points 40-41.

[118] *Ibid.*, points 42 et seq.

[119] ECJ, 7 Sep. 2006, Case C-470/04, *N.* [2006] ECR I-7409, para. 50.

[120] ECJ, 22 Dec. 2008, Case C-282/07, *Truck Center*, para. 48.

[121] ECJ, 18 Dec. 2007, Case C-101/05, *A.* [2007] ECR I-11531, para. 54.

[122] ECJ, 19 Sep. 2006, Case C-356/04, *Lidl Belgium* [2006] ECR I-8501; ECJ, 22 Dec. 2008, Case C-282/07, *Truck Center*, paras 48 et seq.

General Sharpston politely criticized the Court for its *Marks & Spencer* judgment, which she regarded was not in line with its older case law according cash-flow advantages:

> The Court is well aware of the significance of cash-flow to undertakings. It has repeatedly held that the exclusion of a cash-flow advantage in a cross-border situation where it is available in an equivalent domestic situation is a restriction on the freedom of establishment.… Indeed it made this very point forcefully in *Marks & Spencer*. There, it explained in terms that, by speeding up the relief of the losses of the loss-making companies by allowing them to be set off immediately against the profits of other group companies, the group loss relief at issue conferred a cash advantage on the group. The exclusion of such an advantage in respect of the losses incurred by a subsidiary established in another Member State was such as to hinder the exercise by that parent company of its freedom of establishment by deterring it from setting up subsidiaries in other Member States. Thus, it constituted a restriction on freedom of establishment.… That statement was made in the (analytically prior) context of whether the inability to deduct cross-border losses was a restriction contrary to Article 43. It seems anomalous that, having clearly accepted the potential significance of the denial of a cash-flow advantage and categorised it (correctly) as a prima facie infringement of Article 43 EC, the Court did not also examine expressly whether, where the restriction was prima facie justified, the denial of a cash-flow advantage which was an unavoidable consequence was disproportionate.[123]

Although she suggested that the ECJ should not accept the cash-flow disadvantage, the Court, without any explanation, did not follow her approach.[124]

In *Truck Center*, Advocate General Kokott revisited that issue:

> Finally, whether a possible cash-flow disadvantage, threatened in the Commission's view because the withholding tax is payable immediately, is relevant at all appears doubtful in the light of the recent case-law of the Court. Thus in its recent judgment in *Lidl Belgium* … the Court did not even mention this issue, although Advocate General Sharpston had reached a different conclusion from the Court's precisely because of the cash-flow disadvantage.… If cash-flow effects were now no longer relevant, that would however be a rejection of the earlier case-law, to which Advocate General Sharpston had expressly referred.… In my view, a cash-flow disadvantage can indeed be of importance in assessing the proportionality of a national provision. In the present case, however, it is doubtful whether such a disadvantage actually occurs to an appreciable extent. The Belgian Government pointed out at the hearing that undertakings resident in the country, whose income from interest flows into the general basis of assessment to corporation tax, have to make regular advance payments of tax in the current tax year. In practice, therefore, the withholding tax deducted probably falls due only slightly earlier than the advance payments of corporation tax for the equivalent income from interest of domestic recipients. In any case, slight cash-flow disadvantages that nevertheless occur are compensated by the administrative simplification that can be achieved by deducting tax at source.[125]

The last-mentioned assumptions are questionable. It is doubtful whether the levy of a withholding tax compared to regular advance payments really leads just to a 'slight' cash-flow disadvantage in all possible cases. Her additional assumption that 'there are scarcely likely to be significant operating expenses in connection with loan transactions between associated undertakings' may have had relevance for the factual situation in the case referred but, according to practical experience, cannot be supported for intra-group financing arrangements in general. However, since the Court arrived at its solution at the level of comparability, it did not go into these issues at all.

On the one hand, the Court seems to have lowered the standards and increased the room for Member States to treat residents and non-residents differently. Had the Court already taken this position in its earlier case law, *Höchst and Metallgesellschaft* would have been decided in favour of the tax authorities as well.[126] At least cash-flow disadvantages seem to no longer be of concern to the Court. However, in this context as well, one can see how difficult it is to see whether there is a trend. In the case of the *Belgian care insurance scheme*, the ECJ held that:

> as regards the Flemish Government's argument that that legislation could in any case have only a marginal effect on freedom of movement, in view of the limited nature of the amount of benefits in question and the number of persons concerned, it need merely be observed that, according to the Court's case-law, the articles of the Treaty relating to the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited.…[127]

Since even 'minor' restrictions have to be taken into account, one would assume that cash-flow disadvantages should be considered all the more.

4. Conclusions

It is difficult to see whether there are certain trends in the most recent case law of the ECJ in the area of direct taxation. On the one hand, the Court is no longer so rigid in accepting justifications for different treatment. As far as proportionality is concerned, the Court does not seem to require the Member States to impose only the least restrictive measure. The Court has recently been more generous to the Member States compared to the 'old days'. On the other hand, the Court implicitly or explicitly accepts that the comparator for a cross-border situation may not only be a domestic situation but another cross-border situation as well. To this extent, the Court has taken a route that

[123] Opinion of Advocate General Sharpston, 14 Feb. 2008, Case C-414/06, *Lidl Belgium*, points 28 et seq.

[124] For a critical analysis, see also Watrin & Wittkowski & Lindscheid, 'EuGH: Keine Sofortverrechnung ausländischer Betriebsstättenverluste', IStR (2008): 637 et seq.

[125] Opinion of Advocate General Kokott, 18 Sep. 2008, Case C-282/07, *Truck Center*, points 48 et seq.

[126] ECJ, 8 Mar. 2001, Case C-397/98, *Metallgesellschaft and others* [1995] ECR I-1727.

[127] ECJ, 1 Apr. 2008, Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*, para. 52.

will probably not be appreciated by governments of the Member States for whom in this respect it becomes more difficult to defend their rules. Hence, it is difficult to see a trend that leads in one direction only.

As has been illustrated, more frequently, the judgments contradict each other in one way or the other, or at least there are more tensions in the case law of the ECJ to point out. In order to achieve more consistency, I submit the following proposals on the way in which the Court should change its case law:

(1) The ECJ should overturn its *Schumacker* case law. It is not convincing that the Court looks at the factual situation in order to determine whether situations are comparable. Instead, the ECJ should follow its usual case law in these cases as well, according to which comparability depends on the legal situation alone.
(2) The ECJ should be consistent in requesting equal treatment for comparable situations and different treatment for different situations. The latter case law should be developed further in order to avoid giving the wrong impression that a mere restriction-based approach is needed for direct taxes.
(3) The ECJ should continue to compare one cross-border situation with another cross-border situation, as it is settled case law already, with *Columbus Container* as an exception. Within an internal market, justifications are required both for the different treatment of cross-border situations compared to domestic situations and for the different treatment of cross-border situations compared to other cross-border situations.
(4) The ECJ should be consistent in taking into account the legal situation *in one Member State only* when deciding whether a Member State has not complied with the freedoms ('per country approach'). An 'overall approach' makes it difficult to determine responsibility for infringements of the freedoms.[128] As long as there is no harmonized European tax system, double taxation and double non-taxation may occur. Such a 'per country approach' may increase the sensitivity of the Member States to the fact that the Court cannot replace the legislator and that there is a need for harmonization, which has to be created by the legislator.[129]
(5) The ECJ should give up its case law distinguishing between measures implemented by tax treaties and by mere domestic provisions. An approach that distinguishes on the basis of the legal instrument is not convincing. Both the *D.* judgment as well as the more recent case law that is searching for the balance of the allocation of powers to tax under tax treaties should be overturned.
(6) The ECJ should avoid combining different grounds of justification. The approach that was first introduced in *Marks & Spencer* and revised, but not abolished, in *Oy AA* and *Lidl Belgium* should be overturned.
(7) The ECJ should refrain from introducing new grounds of justification that lead to uncertainty. Cohesion and balanced allocation of taxing powers seem to be exchangeable and lead to a large amount of uncertainty.[130] Instead, the Court should develop accepted justifications further.
(8) The ECJ should request that Member States that treat comparable situations differently and that can come up with acceptable justifications should apply the least restrictive measure.
(9) The ECJ should reconcile its approaches on the relevance of the separation of competences between the central level and the provincial level. In the area of the freedoms, the Court applies a strict approach, whereas its approach in its case law on the limitation of the temporal effects of its judgments, on equivalence of procedural measures, and on State aids is different.
(10) The ECJ should make it explicit whenever it changes its case law.

However, one should also be aware of the fact that tensions like those that have been illustrated are not completely avoidable. The more cases that have to be decided by the ECJ, the higher the risk and probability of such contradictions and tensions. This is true for every other Court as well. The record of the ECJ does not seem worse compared to other courts in this respect. However, this should not prevent the Court from taking the opportunity to reconsider its judgments and to benefit from the fact that throughout Europe academics and practitioners are dealing with ECJ case law and reflecting on it.

128 See Kemmeren, 'The Internal Market Approach Should Prevail over the Single Country Approach', in *A Vision of Taxes within and outside the European Borders*, ed. Hinnekens & Hinnekens (2008): 557 et seq. who is a strong supporter of the overall approach'.

129 For a third approach, which has not been followed by the ECJ yet, see Mason, Made in America for European Tax: The Internal Consistency Test, *Boston College Law Review* (2008): 1277 et seq.

130 See Wattel, 'Fiscal Cohesion, Fiscal Territoriality and Preservation of the (Balanced) Allocation of Taxing Power: What is the Difference?', in *The Influence of European Law on Direct Taxation – Recent and Future Developments*, ed. Weber (2008) 154 et seq.

Part II
Tax Harmonization and Tax Competition

Texts of the Directives

- Parent-Subsidiary-Directive
- Merger Directive
- Interest-Royalties-Directive

►B

COUNCIL DIRECTIVE

of 23 July 1990

on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

(90/435/EEC)

(OJ L 225, 22.9.1990, p. 6)

Amended by:

		Official Journal		
		No	page	date
►M1	Council Directive 2003/123/EC of 22 December 2003	L 7	41	13.1.2004
►M2	Council Directive 2006/98/EC of 20 November 2006	L 363	129	20.12.2006

Amended by:

►A1	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995
►A2	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

Corrected by:

►C1 Corrigendum, OJ L 23, 29.1.1991, p. 35 (90/435)

►C2 Corrigendum, OJ L 16, 18.1.1997, p. 98 (90/435)

▼B

COUNCIL DIRECTIVE

of 23 July 1990

on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

(90/435/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal of the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the Economic and Social Committee [3],

Whereas the grouping together of companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas it is therefore necessary to introduce with respect to such grouping together of companies of different Member States, tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

Whereas such grouping together may result in the formation of groups of parent companies and subsidiaries;

Whereas the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies;

Whereas where a parent company by virtue of its association with its subsidiary receives distributed profits, the State of the parent company must:

— either refrain from taxing such profits,

— or tax such profits while authorizing the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits;

Whereas it is furthermore necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax; whereas, however, the Federal Republic of Germany and the Hellenic Republic, by reason of the particular nature of their corporate tax systems, and the Portuguese Republic,

[1] OJ No C 39, 22. 3. 1969, p. 7 and Amendment transmitted on 5 July 1985.
[2] OJ No C 51, 29. 4. 1970, p. 6.
[3] OJ No C 100, 1. 8. 1969, p. 7.

▼B

for budgetary reasons, should be authorized to maintain temporarily a withholding tax,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. Each Member State shall apply this Directive:

— to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

— to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries,

▼M1

— to distributions of profits received by permanent establishments situated in that State of companies of other Member States which come from their subsidiaries of a Member State other than that where the permanent establishment is situated,

— to distributions of profits by companies of that State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries.

▼B

2. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.

Article 2

►M1 1. ◄ For the purposes of this Directive 'company of a Member State' shall mean any company which:

(a) takes one of the forms listed in the Annex hereto;

(b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;

(c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:

— impôt des sociétés/vennootschapsbelasting in Belgium,

— selskabsskat in Denmark,

— Körperschaftsteuer in the Federal Republic of Germany,

— φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα in Greece,

— impuesto sobre sociedades in Spain,

— impôt sur les sociétés in France,

— corporation tax in Ireland,

— imposta sul reddito delle persone giuridiche in Italy,

— impôt sur le revenu des collectivités in Luxembourg,

— vennootschapsbelasting in the Netherlands,

— imposto sobre o rendimento das pessoas colectivas in Portugal,

— corporation tax in the United Kingdom,

▼A1

— Körperschaftsteuer in Austria,

— yhteisöjen tulovero/inkomstskatten för samfund in Finland,

— statlig inkomstskatt in Sweden,

▼A2

— *Daň z příjmů právnických osob* in the Czech Republic,

— *Tulumaks* in Estonia,

— *Φόρος Εισοδήματος* in Cyprus,

— *uzņēmumu ienākuma nodoklis* in Latvia,

— *Pelno mokestis* in Lithuania,

— *Társasági adó, osztalékadó* in Hungary,

— *Taxxa fuq l-income* in Malta,

— *Podatek dochodowy od osób prawnych* in Poland,

— *Davek od dobička pravnih oseb* in Slovenia,

— *daň z príjmov právnických osôb* in Slovakia,

▼M2

— *корпоративен данък* in Bulgaria,

— *impozit pe profit* in Romania,

▼B

or to any other tax which may be substituted for any of the above taxes.

▼M1

2. For the purposes of this Directive the term 'permanent establishment' means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law.

▼B

Article 3

1. ►M1 For the purposes of applying this Directive:

(a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 20 % in the capital of a company of another Member State fulfilling the same conditions;

such status shall also be attributed, under the same conditions, to a company of a Member State which has a minimum holding of 20 % in the capital of a company of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State;

from 1 January 2007 the minimum holding percentage shall be 15 %;

from 1 January 2009 the minimum holding percentage shall be 10 %;

(b) 'subsidiary' shall mean that company the capital of which includes the holding referred to in (a). ◄

2. By way of derogation from paragraph 1, Member States shall have the option of:

▼B

— replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights,

— not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.

Article 4

▼M1

1. Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the State of the parent company and the State of its permanent establishment shall, except when the subsidiary is liquidated, either:

— refrain from taxing such profits, or

— tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.

1 a. Nothing in this Directive shall prevent the State of the parent company from considering a subsidiary to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that subsidiary arising from the law under which it is constituted and therefore from taxing the parent company on its share of the profits of its subsidiary as and when those profits arise. In this case the State of the parent company shall refrain from taxing the distributed profits of the subsidiary.

When assessing the parent company's share of the profits of its subsidiary as they arise the State of the parent company shall either exempt those profits or authorise the parent company to deduct from the amount of tax due that fraction of the corporation tax related to the parent company's share of profits and paid by its subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.

▼B

2. However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5 % of the profits distributed by the subsidiary.

3. ►M1 Paragraphs 1 and 1a shall apply until the date of effective entry into force of a common system of company taxation. ◄

The Council shall at the appropriate time adopt the rules to apply after the date referred to in the first subparagraph.

▼B

Article 5

1. ►M1 Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax. ◄

▼M1

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▼B

Article 6

The Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary.

Article 7

1. The term 'withholding tax' as used in this Directive shall not cover an advance payment or prepayment (précompte) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company.

2. This Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive before 1 January 1992. They shall forthwith inform the Commission thereof.

2. Member States shall ensure that the texts of the main provisions of domestic law which they adopt in the field covered by this Directive are communicated to the Commission.

Article 9

This Directive is addressed to the Member States.

▼**M2**

ANNEX

LIST OF COMPANIES REFERRED TO IN ARTICLE 2(1)(A)

(a) companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees and cooperative societies incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;

(b) companies under Belgian law known as 'société anonyme'/'naamloze vennootschap','société en commandite par actions'/'commanditaire vennootschap op aandelen', 'société privée à responsabilité limitée'/'besloten vennootschap met beperkte aansprakelijkheid', 'société coopérative à responsabilité limitée'/'coöperatieve vennootschap met beperkte aansprakelijkheid', 'société coopérative à responsabilité illimitée'/'coöperatieve vennootschap met onbeperkte aansprakelijkheid', 'société en nom collectif'/'vennootschap onder firma', 'société en commandite simple'/'gewone commanditaire vennootschap', public undertakings which have adopted one of the abovementioned legal forms, and other companies constituted under Belgian law subject to Belgian corporate tax;

(c) companies under Bulgarian law known as: 'събирателното дружество', 'командитното дружество', 'дружеството с ограничена отговорност', 'акционерното дружество', 'командитното дружество с акции', 'неперсонифицирано дружество', 'кооперации', 'кооперативни съюзи''държавни предприятия' constituted under Bulgarian law and carrying on commercial activities;

(d) companies under Czech law known as: 'akciová společnost', 'společnost s ručením omezeným';

(e) companies under Danish law known as 'aktieselskab' and 'anpartsselskab'. Other companies subject to tax under the Corporation Tax Act, insofar as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to 'aktieselskaber';

(f) companies under German law known as 'Aktiengesellschaft', 'Kommanditgesellschaft auf Aktien', 'Gesellschaft mit beschränkter Haftung', 'Versicherungsverein auf Gegenseitigkeit', 'Erwerbs- und Wirtschaftsgenossenschaft', 'Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts', and other companies constituted under German law subject to German corporate tax;

(g) companies under Estonian law known as: 'täisühing', 'usaldusühing', 'osaühing', 'aktsiaselts', 'tulundusühistu';

(h) companies under Greek law known as 'ανώνυμη εταιρεία',·'εταιρεία περιορισμένης ευθύνης (Ε.Π.Ε.)'·and other companies constituted under Greek law subject to Greek corporate tax;

(i) companies under Spanish law known as: 'sociedad anónima', 'sociedad comanditaria por acciones', 'sociedad de responsabilidad limitada', public law bodies which operate under private law. Other entities constituted under Spanish law subject to Spanish corporate tax ('Impuesto sobre Sociedades');

(j) companies under French law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée', 'sociétés par actions simplifiées', 'sociétés d'assurances mutuelles', 'caisses d'épargne et de prévoyance', 'sociétés civiles' which are automatically subject to corporation tax, 'coopératives', 'unions de coopératives', industrial and commercial public establishments and undertakings, and other companies constituted under French law subject to French corporate tax;

(k) companies incorporated or existing under Irish law, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;

(l) companies under Italian law known as 'società per azioni', 'società in accomandita per azioni', 'società a responsibilità limitata', 'società cooperative', 'società di mutua assicurazione', and private and public entities whose activity is wholly or principally commercial;

▼M2

(m) under Cypriot law: 'εταιρείες' as defined in the Income Tax laws;

(n) companies under Latvian law known as: 'akciju sabiedrība', 'sabiedrība ar ierobežotu atbildību';

(o) companies incorporated under the law of Lithuania;

(p) companies under Luxembourg law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée', 'société coopérative', 'société coopérative organisée comme une société anonyme', 'association d'assurances mutuelles', 'association d'épargne-pension', 'entreprise de nature commerciale, industrielle ou minière de l'Etat, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public', and other companies constituted under Luxembourg law subject to Luxembourg corporate tax;

(q) companies under Hungarian law known as: 'közkereseti társaság', 'betéti társaság', 'közös vállalat', 'korlátolt felelősségű társaság', 'részvénytársaság', 'egyesülés', 'szövetkezet';

(r) companies under Maltese law known as: 'Kumpaniji ta' Responsabilita' Limitata', 'Soċjetajiet en commandite li l-kapital tagħhom maqsum f'azzjonijiet';

(s) companies under Dutch law known as 'naamloze vennnootschap', 'besloten vennootschap met beperkte aansprakelijkheid', 'Open commanditaire vennootschap', 'Coöperatie', 'onderlinge waarborgmaatschappij', 'Fonds voor gemene rekening', 'vereniging op coöperatieve grondslag', 'vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt', and other companies constituted under Dutch law subject to Dutch corporate tax;

(t) companies under Austrian law known as 'Aktiengesellschaft', 'Gesellschaft mit beschränkter Haftung', 'Versicherungsvereine auf Gegenseitigkeit', 'Erwerbs- und Wirtschaftsgenossenschaften', 'Betriebe gewerblicher Art von Körperschaften des öffentlichen Rechts', 'Sparkassen', and other companies constituted under Austrian law subject to Austrian corporate tax;

(u) companies under Polish law known as: 'spółka akcyjna', 'spółka z ograniczoną odpowiedzialnością';

(v) commercial companies or civil law companies having a commercial form and cooperatives and public undertakings incorporated in accordance with Portuguese law;

(w) companies under Romanian law known as: 'societăți pe acțiuni', 'societăți în comandită pe acțiuni', 'societăți cu răspundere limitată';

(x) companies under Slovenian law known as: 'delniška družba', 'komanditna družba', 'družba z omejeno odgovornostjo';

(y) companies under Slovak law known as: 'akciová spoločnosť', 'spoločnosť s ručením obmedzeným', 'komanditná spoločnosť';

(z) companies under Finnish law known as 'osakeyhtiö'/'aktiebolag', 'osuuskunta'/'andelslag','säästöpankki'/'sparbank'and 'vakuutusyhtiö'/'försäkringsbolag';

(aa) companies under Swedish law known as 'aktiebolag', 'försäkringsaktiebolag', 'ekonomiska föreningar', 'sparbanker', 'ömsesidiga försäkringsbolag';

(ab) companies incorporated under the law of the United Kingdom.

►B

►M1 COUNCIL DIRECTIVE

of 23 July 1990

on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office, of an SE or SCE, between Member States

(90/434/EEC) ◄

(OJ L 225, 20.8.1990, p. 1)

Amended by:

		Official Journal		
		No	page	date
►M1	Council Directive 2005/19/EC of 17 February 2005	L 58	19	4.3.2005
►M2	Council Directive 2006/98/EC of 20 November 2006	L 363	129	20.12.2006

Amended by:

►A1	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995
►A2	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

▼B

▼M1

COUNCIL DIRECTIVE

of 23 July 1990

on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office, of an SE or SCE, between Member States

(90/434/EEC)

▼B

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal of the Commission ([1]),

Having regard to the opinion of the European Parliament ([2]),

Having regard to the opinion of the Economic and Social Committee ([3]),

Whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

Whereas tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State; whereas it is necessary to remove such disadvantages;

Whereas it is not possible to attain this objective by an extension at the Community level of the systems presently in force in the Member States, since differences between these systems tend to produce distortions; whereas only a common tax system is able to provide a satisfactory solution in this respect;

Whereas the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the State of the transferring or acquired company;

Whereas in respect of mergers, divisions or transfers of assets, such operations normally result either in the transformation of the transferring company into a permanent establishment of the company receiving the assets or in the assets becoming connected with a permanent establishment of the latter company;

Whereas the system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment,

([1]) OJ No C 39, 22. 3. 1969, p. 1.
([2]) OJ No C 51, 29. 4. 1970, p. 12.
([3]) OJ No C 100, 1. 8. 1969, p. 4.

▼B

permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the State of the transferring company at the date of their disposal;

Whereas it is also necessary to define the tax regime applicable to certain provisions, reserves or losses of the transferring company and to solve the tax problems occurring where one of the two companies has a holding in the capital of the other;

Whereas the allotment to the shareholders of the transferring company of securities of the receiving or acquiring company would not in itself give rise to any taxation in the hands of such shareholders;

Whereas it is necessary to allow Member States the possibility of refusing to apply this Directive where the merger, division, transfer of assets or exchange of shares operation has as its objective tax evasion or avoidance or results in a company, whether or not it participates in the operation, no longer fulfilling the conditions required for the representation of employees in company organs,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

General provisions

▼M1

Article 1

Each Member State shall apply this Directive to the following:

(a) mergers, divisions, partial divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved,

(b) transfers of the registered office from one Member State to another Member State of European companies (Societas Europaea or SE), as established in Council Regulation (EC) No 2157/2001 of 8 October 2001, on the statute for a European Company (SE) ([1]), and European Cooperative Societies (SCE), as established in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) ([2]).

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Article 2

For the purposes of this Directive:

(a) ‘merger’ shall mean an operation whereby:

— one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their shareholders of securities respresenting the capital of that other company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities,

— two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, in exchange for the issue to their

([1]) OJ L 294, 10.11.2001, p. 1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).

([2]) OJ L 207, 18.8.2003, p. 1. Regulation as amended by Decision of the EEA Joint Committee No 15/2004 (OJ L 116, 22.4.2004, p. 68).

▼B

shareholders of securities representing the capital of that new company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities,

— a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital;

(b) 'division' shall mean an operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more existing or new companies, in exchange for the pro rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;

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(b)(a) 'partial division' shall mean an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;

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(c) 'transfer of assets' shall mean an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;

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(d) 'exchange of shares' shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;

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(e) 'transferring company' shall mean the company transferring its assets and liabilities or transferring all or one or more branches of its activity;

(f) 'receiving company' shall mean the company receiving the assets and liabilities or all or one or more branches of the activity of the transferring company;

(g) 'acquired company' shall mean the company in which a holding is acquired by another company by means of an exchange of securities;

(h) 'acquiring company' shall mean the company which acquires a holding by means of an exchange of securities;

(i) 'branch of activity' shall mean all the assets and liabilities of a division of a company which from an organizational point of view constitute an independent business, that is to say an entity capable of functioning by its own means;

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(j) 'transfer of the registered office' shall mean an operation whereby an SE or an SCE, without winding up or creating a new legal person, transfers its registered office from one Member State to another Member State.

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Article 3

For the purposes of this Directive, 'company from a Member State' shall mean any company which:

(a) takes one of the forms listed in the Annex hereto;

(b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;

(c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:

— impôt des sociétés/vennootschapsbelasting in Belgium,

— selskabsskat in Denmark,

— Körperschaftsteuer in the Federal Republic of Germany,

— φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα, in Greece,

— impuesto sobre sociedades in Spain,

— impôt sur les sociétés in France,

— corporation tax in Ireland,

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— imposta sul reddito delle società in Italy,

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— impôt sur le revenu des collectivités in Luxembourg,

— vennootschapsbelasting in the Netherlands,

— imposto sobre o rendimento das pessoas colectivas in Portugal,

— corporation tax in the United Kingdom,

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— Körperschaftsteuer in Austria,

— yhteisöjen tulovero/inkomstskatten för samfund in Finland,

— statlig inkomstskatt in Sweden,

▼A2

— Daň z příjmů právnických osobin the Czech Republic,

— Tulumaks in Estonia,

— Φόρος Εισοδήματος in Cyprus,

— uzņēmumu ienākuma nodoklis in Latvia,

— Pelno mokestis in Lithuania,

— Társasági adó in Hungary,

— Taxxa fuq l-income in Malta,

— Podatek dochodowy od osób prawnych in Poland,

— Davek od dobička pravnih oseb in Slovenia,

— Daň z príjmov právnických osôb in Slovakia,

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— корпоративен данък in Bulgaria,

— impozit pe profit in Romania,

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or to any other tax which may be substituted for any of the above taxes.

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TITLE II

Rules applicable to mergers, divisions, partial divisions, and exchanges of shares

Article 4

1. A merger, division or partial division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.

For the purpose of this Article the following definitions shall apply:

(a) 'value for tax purposes': the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger, division or partial division but independently of it;

(b) 'transferred assets and liabilities': those assets and liabilities of the transferring company which, in consequence of the merger, division or partial division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes.

2. Where paragraph 1 applies and where a Member State considers a non-resident transferring company as fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted and therefore taxes the shareholders on their share of the profits of the transferring company as and when those profits arise, that State shall not tax any income, profits or capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.

3. Paragraphs 1 and 2 shall apply only if the receiving company computes any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company or companies if the merger, division or partial division had not taken place.

4. Where, under the laws of the Member State of the transferring company, the receiving company is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities transferred computed on a basis different from that set out in paragraph 3, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.

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Article 5

The Member States shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the transferring company are partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by the permanent

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establishments of the receiving company which are situated in the Member State of the transferring company, the receiving company thereby assuming the rights and obligations of the transferring company.

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Article 6

To the extent that, if the operations referred to in Article 1, paragraph a, were effected between companies from the Member State of the transferring company, the Member State would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the take-over of such losses by the receiving company's permanent establishments situated within its territory.

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Article 7

1. Where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall not be liable to any taxation.

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2. The Member States may derogate from paragraph 1 where the receiving company has a holding of less than 20 % in the capital of the transferring company.

From 1 January 2007 the minimum holding percentage shall be 15 %. From 1 January 2009 the minimum holding percentage shall be 10 %.

Article 8

1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

2. On a partial division, the allotment to a shareholder of the transferring company of securities representing the capital of the receiving company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

3. Where a Member State considers a shareholder as fiscally transparent on the basis of that State's assessment of the legal characteristics of that shareholder arising from the law under which it is constituted and therefore taxes those persons having an interest in the shareholders on their share of the profits of the shareholder as and when those profits arise, that State shall not tax those persons on income, profits or capital gains from the allotment of securities representing the capital of the receiving or acquiring company to the shareholder.

4. Paragraphs 1 and 3 shall apply only if the shareholder does not attribute to the securities received a value for tax purposes higher than the value the securities exchanged had immediately before the merger, division or exchange of shares.

5. Paragraphs 2 and 3 shall apply only if the shareholder does not attribute to the sum of the securities received and those held in the transferring company, a value for tax purposes higher than the value the securities held in the transferring company had immediately before the partial division.

6. The application of paragraphs 1, 2 and 3 shall not prevent the Member States from taxing the gain arising out of the subsequent

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transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition.

7. In this Article the expression 'value for tax purposes' means the value on the basis of which any gain or loss would be computed for the purposes of tax upon the income, profits or capital gains of a shareholder of the company.

8. Where, under the law of the Member State in which he is resident, a shareholder may opt for tax treatment different from that set out in paragraphs 4 and 5, paragraphs 1, 2 and 3 shall not apply to the securities in respect of which such an option is exercised.

9. Paragraphs 1, 2 and 3 shall not prevent a Member State from taking into account when taxing shareholders any cash payment that may be made on the merger, division, partial division or exchange of shares.

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TITLE III

Rules applicable to transfers of assets.

Article 9

The provisions of Articles 4, 5 and 6 shall apply to transfers of assets.

TITLE IV

Special case of the transfer of a permanent establishment

▼M1

Article 10

1. Where the assets transferred in a merger, a division, a partial division or a transfer of assets include a permanent establishment of the transferring company which is situated in a Member State other than that of the transferring company, the Member State of the transferring company shall renounce any right to tax that permanent establishment.

The Member State of the transferring company may reinstate in the taxable profits of that company such losses of the permanent establishment as may previously have been set off against the taxable profits of the company in that State and which have not been recovered.

The Member State in which the permanent establishment is situated and the Member State of the receiving company shall apply the provisions of this Directive to such a transfer as if the Member State where the permanent establishment is situated were the Member State of the transferring company.

These provisions shall also apply in the case where the permanent establishment is situated in the same Member State as that in which the receiving company is resident.

2. By way of derogation from paragraph 1, where the Member State of the transferring company applies a system of taxing worldwide profits, that Member State shall have the right to tax any profits or capital gains of the permanent establishment resulting from the merger, division, partial division or transfer of assets, on condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.

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TITLE IVa

Special case of transparent entities

Article 10a

1. Where a Member State considers a non-resident transferring or acquired company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, it shall have the right not to apply the provisions of this Directive when taxing a direct or indirect shareholder of that company in respect of the income, profits or capital gains of that company.

2. A Member State exercising the right referred to in paragraph 1 shall give relief for the tax which, but for the provisions of this Directive, would have been charged on the fiscally transparent company on its income, profits or capital gains, in the same way and in the same amount as that State would have done if that tax had actually been charged and paid.

3. Where a Member State considers a non-resident receiving or acquiring company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, it shall have the right not to apply Article 8 paragraphs 1, 2 and 3.

4. Where a Member State considers a non-resident receiving company to be fiscally transparent on the basis of that State's assessment of the legal characteristics of that company arising from the law under which it is constituted, that Member State may apply to any direct or indirect shareholders the same treatment for tax purposes as it would if the receiving company were resident in that Member State.

TITLE IVb

Rules applicable to the transfer of the registered office of an SE or an SCE

Article 10b

1. Where,

(a) an SE or an SCE transfers its registered office from one Member State to another Member State, or

(b) in connection with the transfer of its registered office from one Member State to another Member State, an SE or an SCE, which is resident in the first Member State, ceases to be resident in that Member State and becomes resident in another Member State,

that transfer of registered office or the cessation of residence shall not give rise to any taxation of capital gains, calculated in accordance with of Article 4(1), in the Member State from which the registered office has been transferred, derived from those assets and liabilities of the SE or SCE which, in consequence, remain effectively connected with a permanent establishment of the SE or of the SCE in the Member State from which the registered office has been transferred and play a part in generating the profits or losses taken into account for tax purposes.

2. Paragraph 1 shall apply only if the SE or the SCE computes any new depreciation and any gains or losses in respect of the assets and liabilities that remain effectively connected with that permanent establishment, as though the transfer of the registered office had not taken place or the SE or the SCE had not so ceased to be tax resident.

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3. Where, under the laws of that Member State, the SE or the SCE is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities remaining in that Member State computed on a basis different from that set out in paragraph 2, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.

Article 10c

1. Where,

(a) an SE or an SCE transfers its registered office from one Member State to another Member State, or

(b) in connection with the transfer of its registered office from one Member State to another Member State, an SE or an SCE, which is resident in the first Member State, ceases to be resident in that Member State and becomes resident in another Member State,

the Member States shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the SE or the SCE before the transfer of the registered office are partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by a permanent establishment of the SE or the SCE which is situated within the territory of the Member State from which the registered office was transferred.

2. To the extent that a company transferring its registered office within the territory of a Member State would be allowed to carry forward or carry back losses which had not been exhausted for tax purposes, that Member State shall allow the permanent establishment, situated within its territory, of the SE or of the SCE transferring its registered office, to take over those losses of the SE or SCE which have not been exhausted for tax purposes, provided that the loss carry forward or carry back would have been available in comparable circumstances to a company which continued to have its registered office or which continued to be tax resident in that Member State.

Article 10d

1. The transfer of the registered office of an SE or of an SCE shall not, of itself, give rise to any taxation of the income, profits or capital gains of the shareholders.

2. The application of paragraph 1 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of the securities representing the capital of the SE or of the SCE that transfers its registered office.

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TITLE V

Final provisions

Article 11

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1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III, IV and IVb where it appears that the merger, division, partial division, transfer of assets, exchange of shares or transfer of the registered office of an SE or an SCE:

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(a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives;

(b) results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation.

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2. Paragraph 1 (b) shall apply as long as and to the extent that no Community law provisions containing equivalent rules on representation of employees on company organs are applicable to the companies covered by this Directive.

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 1992 and shall forthwith inform the Commission thereof.

2. By way of derogation from paragraph 1, the Portuguese Republic may delay the application of the provisions concerning transfers of assets and exchanges of shares until 1 January 1993.

3. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13

This Directive is addressed to the Member States.

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ANNEX

LIST OF COMPANIES REFERRED TO IN ARTICLE 3(a)

(a) companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, and cooperative societies incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;

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(aa) companies under Bulgarian law known as: 'събирателното дружество', 'командитното дружество', 'дружеството с ограничена отговорност', 'акционерното дружество', 'командитното дружество с акции', 'кооперации', 'кооперативни съюзи', 'държавни предприятия' constituted under Bulgarian law and carrying on commercial activities;

(ab) companies under Romanian law known as: 'societăți pe acțiuni', 'societăți în comandită pe acțiuni', 'societăți cu răspundere limitată';

▼M1

(b) companies under Belgian law known as 'société anonyme'/'naamloze vennootschap', 'société en commandite par actions'/'commanditaire vennootschap op aandelen', 'société privée à responsabilité limitée'/'besloten vennootschap met beperkte aansprakelijkheid''société coopérative à responsabilité limitée'/'coöperatieve vennootschap met beperkte aansprakelijkheid', 'société coopérative à responsabilité illimitée'/'coöperatieve vennootschap met onbeperkte aansprakelijkheid', 'société en nom collectif'/'vennootschap onder firma', 'société en commandite simple'/ 'gewone commanditaire vennootschap', public undertakings which have adopted one of the abovementioned legal forms, and other companies constituted under Belgian law subject to the Belgian Corporate Tax;

(c) companies under Czech law known as: 'akciová společnost', 'společnost s ručením omezeným';

(d) companies under Danish law known as 'aktieselskab' and 'anpartsselskab'. Other companies subject to tax under the Corporation Tax Act, in so far as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to 'aktieselskaber';

(e) companies under German law known as 'Aktiengesellschaft', 'Kommanditgesellschaft auf Aktien', 'Gesellschaft mit beschränkter Haftung', 'Versicherungsverein auf Gegenseitigkeit', 'Erwerbs- und Wirtschaftsgenossenschaft', 'Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts', and other companies constituted under German law subject to German corporate tax;

(f) companies under Estonian law known as: 'täisühing', 'usaldusühing', 'osaühing', 'aktsiaselts', 'tulundusühistu';

(g) companies under Greek law known as 'ανώνυμη εταιρεία', 'εταιρεία περιορισμένης ευθύνης (Ε.Π.Ε.)';

(h) companies under Spanish law known as 'sociedad anónima', 'sociedad comanditaria por acciones', 'sociedad de responsabilidad limitada', and those public law bodies which operate under private law;

(i) companies under French law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée', 'sociétés par actions simplifiées', 'sociétés d'assurances mutuelles', 'caisses d'épargne et de prévoyance', 'sociétés civiles' which are automatically subject to corporation tax, 'coopératives', 'unions de coopératives', industrial and commercial public establishments and undertakings, and other companies constituted under French law subject to the French Corporate Tax;

(j) companies incorporated or existing under Irish laws, bodies registered under the Industrial and Provident Societies Act, building societies incorporated under the Building Societies Acts and trustee savings banks within the meaning of the Trustee Savings Banks Act, 1989;

(k) companies under Italian law known as 'società per azioni', 'società in accomandita per azioni', 'società a responsabilità limitata', 'società coop-

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erative', 'società di mutua assicurazione', and private and public entities whose activity is wholly or principally commercial;

(l) under Cypriot law: 'εταιρείες' as defined in the Income Tax laws;

(m) companies under Latvian law known as: 'akciju sabiedrība', 'sabiedrība ar ierobežotu atbildību';

(n) companies incorporated under the law of Lithuania;

(o) companies under Luxembourg law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée', 'société coopérative', 'société coopérative organisée comme une société anonyme', 'association d'assurances mutuelles', 'association d'épargne-pension', "entreprise de nature commerciale, industrielle ou minière de l'État, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public', and other companies constituted under Luxembourg law subject to the Luxembourg Corporate Tax;

(p) companies under Hungarian law known as: 'közkereseti társaság', 'betéti társaság', 'közös vállalat', 'korlátolt felelősségű társaság', 'részvénytársaság', 'egyesülés', 'közhasznú társaság', 'szövetkezet';

(q) companies under Maltese law known as: 'Kumpaniji ta' Responsabilita Limitata', 'Soċjetajiet en commandite li l-kapital tagħhom maqsum f'azzjonijiet';

(r) companies under Dutch law known as 'naamloze vennootschap', 'besloten vennootschap met beperkte aansprakelijkheid', 'Open commanditaire vennootschap', 'Coöperatie', 'onderlinge waarborgmaatschappij', 'Fonds voor gemene rekening', 'vereniging op coöperatieve grondslag' and 'vereniging welke op onderlinge grondslag als verzekeraar of kredietinstelling optreedt', and other companies constituted under Dutch law subject to the Dutch Corporate Tax;

(s) companies under Austrian law known as 'Aktiengesellschaft', 'Gesellschaft mit beschränkter Haftung', 'Erwerbs- und Wirtschaftsgenossenschaften';

(t) companies under Polish law known as: 'spółka akcyjna', 'spółka z ograniczoną odpowiedzialnością';

(u) commercial companies or civil law companies having a commercial form as well as other legal persons carrying on commercial or industrial activities, which are incorporated under Portuguese law;

(v) companies under Slovenian law known as: 'delniška družba', 'komanditna družba', 'družba z omejeno odgovornostjo';

(w) companies under Slovak law known as: 'akciová spoločnosť ', 'spoločnosť s ručením obmedzeným', 'komanditná spoločnosť '.

(x) companies under Finnish law known as 'osakeyhtiö'/'aktiebolag', 'osuuskunta'/'andelslag', 'säästöpankki'/'sparbank' and 'vakuutusyhtiö'/'försäkringsbolag';

(y) companies under Swedish law known as 'aktiebolag', 'försäkringsaktiebolag', 'ekonomiska föreningar', 'sparbanker', 'ömsesidiga försäkringsbolag';

(z) companies incorporated under the law of the United Kingdom.

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COUNCIL DIRECTIVE 2003/49/EC

of 3 June 2003

on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

(OJ L 157, 26.6.2003, p. 49)

Amended by:

		Official Journal		
		No	page	date
►M1	Council Directive 2004/66/EC of 26 April 2004	L 168	35	1.5.2004
►M2	Council Directive 2004/76/EC of 29 April 2004	L 195	33	2.6.2004
►M3	Council Directive 2006/98/EC of 20 November 2006	L 363	129	20.12.2006

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COUNCIL DIRECTIVE 2003/49/EC

of 3 June 2003

on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the opinion of the European Parliament ([2]),

Having regard to the opinion of the European Economic and Social Committee ([3]),

Whereas:

(1) In a Single Market having the characteristics of a domestic market, transactions between companies of different Member States should not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies of the same Member State.

(2) This requirement is not currently met as regards interest and royalty payments; national tax laws coupled, where applicable, with bilateral or multilateral agreements may not always ensure that double taxation is eliminated, and their application often entails burdensome administrative formalities and cash-flow problems for the companies concerned.

(3) It is necessary to ensure that interest and royalty payments are subject to tax once in a Member State.

(4) The abolition of taxation on interest and royalty payments in the Member State where they arise, whether collected by deduction at source or by assessment, is the most appropriate means of eliminating the aforementioned formalities and problems and of ensuring the equality of tax treatment as between national and cross-border transactions; it is particularly necessary to abolish such taxes in respect of such payments made between associated companies of different Member States as well as between permanent establishments of such companies.

(5) The arrangements should only apply to the amount, if any, of interest or royalty payments which would have been agreed by the payer and the beneficial owner in the absence of a special relationship.

(6) It is moreover necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse.

(7) Greece and Portugal should, for budgetary reasons, be allowed a transitional period in order that they can gradually decrease the taxes, whether collected by deduction at source or by assessment, on interest and royalty payments, until they are able to apply the provisions of Article 1.

([1]) OJ C 123, 22.4.1998, p. 9.
([2]) OJ C 313, 12.10.1998, p. 151.
([3]) OJ C 284, 14.9.1998, p. 50.

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(8) Spain, which has launched a plan for boosting the Spanish technological potential, for budgetary reasons should be allowed during a transitional period not to apply the provisions of Article 1 on royalty payments.

(9) It is necessary for the Commission to report to the Council on the operation of the Directive three years after the date by which it must be transposed, in particular with a view to extending its coverage to other companies or undertakings and reviewing the scope of the definition of interest and royalties in pursuance of the necessary convergence of the provisions dealing with interest and royalties in national legislation and in bilateral or multilateral double-taxation treaties.

(10) Since the objective of the proposed action, namely setting up a common system of taxation applicable to interest and royalty payments of associated companies of different Member States cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Scope and procedure

1. Interest or royalty payments arising in a Member State shall be exempt from any taxes imposed on those payments in that State, whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State.

2. A payment made by a company of a Member State or by a permanent establishment situated in another Member State shall be deemed to arise in that Member State, hereafter referred to as the 'source State'.

3. A permanent establishment shall be treated as the payer of interest or royalties only insofar as those payments represent a tax-deductible expense for the permanent establishment in the Member State in which it is situated.

4. A company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.

5. A permanent establishment shall be treated as the beneficial owner of interest or royalties:

(a) if the debt-claim, right or use of information in respect of which interest or royalty payments arise is effectively connected with that permanent establishment; and

(b) if the interest or royalty payments represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii) or in the case of Belgium to the 'impôt des non-résidents/belasting der niet-verblijfhouders' or in the case of Spain to the 'Impuesto sobre la Renta de no Residentes' or to a tax which is identical or substantially similar and which is imposed after the date of

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entry into force of this Directive in addition to, or in place of, those existing taxes.

6. Where a permanent establishment of a company of a Member State is treated as the payer, or as the beneficial owner, of interest or royalties, no other part of the company shall be treated as the payer, or as the beneficial owner, of that interest or those royalties for the purposes of this Article.

7. This Article shall apply only if the company which is the payer, or the company whose permanent establishment is treated as the payer, of interest or royalties is an associated company of the company which is the beneficial owner, or whose permanent establishment is treated as the beneficial owner, of that interest or those royalties.

8. This Article shall not apply where interest or royalties are paid by or to a permanent establishment situated in a third State of a company of a Member State and the business of the company is wholly or partly carried on through that permanent establishment.

9. Nothing in this Article shall prevent a Member State from taking interest or royalties received by its companies, by permanent establishments of its companies or by permanent establishments situated in that State into account when applying its tax law.

10. A Member State shall have the option of not applying this Directive to a company of another Member State or to a permanent establishment of a company of another Member State in circumstances where the conditions set out in Article 3(b) have not been maintained for an uninterrupted period of at least two years.

11. The source State may require that fulfilment of the requirements laid down in this Article and in Article 3 be substantiated at the time of payment of the interest or royalties by an attestation. If fulfilment of the requirements laid down in this Article has not been attested at the time of payment, the Member State shall be free to require deduction of tax at source.

12. The source State may make it a condition for exemption under this Directive that it has issued a decision currently granting the exemption following an attestation certifying the fulfilment of the requirements laid down in this Article and in Article 3. A decision on exemption shall be given within three months at most after the attestation and such supporting information as the source State may reasonably ask for have been provided, and shall be valid for a period of at least one year after it has been issued.

13. For the purposes of paragraphs 11 and 12, the attestation to be given shall, in respect of each contract for the payment, be valid for at least one year but for not more than three years from the date of issue and shall contain the following information:

(a) proof of the receiving company's residence for tax purposes and, where necessary, the existence of a permanent establishment certified by the tax authority of the Member State in which the receiving company is resident for tax purposes or in which the permanent establishment is situated;

(b) beneficial ownership by the receiving company in accordance with paragraph 4 or the existence of conditions in accordance with paragraph 5 where a permanent establishment is the recipient of the payment;

(c) fulfilment of the requirements in accordance with Article 3(a)(iii) in the case of the receiving company;

(d) a minimum holding or the criterion of a minimum holding of voting rights in accordance with Article 3(b);

(e) the period for which the holding referred to in (d) has existed.

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Member States may request in addition the legal justification for the payments under the contract (e.g. loan agreement or licensing contract).

14. If the requirements for exemption cease to be fulfilled, the receiving company or permanent establishment shall immediately inform the paying company or permanent establishment and, if the source State so requires, the competent authority of that State.

15. If the paying company or permanent establishment has withheld tax at source to be exempted under this Article, a claim may be made for repayment of that tax at source. The Member State may require the information specified in paragraph 13. The application for repayment must be submitted within the period laid down. That period shall last for at least two years from the date when the interest or royalties are paid.

16. The source State shall repay the excess tax withheld at source within one year following due receipt of the application and such supporting information as it may reasonably ask for. If the tax withheld at source has not been refunded within that period, the receiving company or permanent establishment shall be entitled on expiry of the year in question to interest on the tax which is refunded at a rate corresponding to the national interest rate to be applied in comparable cases under the domestic law of the source State.

Article 2

Definition of interest and royalties

For the purposes of this Directive:

(a) the term 'interest' means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest;

(b) the term 'royalties' means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties.

Article 3

Definition of company, associated company and permanent establishment

For the purposes of this Directive:

(a) the term 'company of a Member State' means any company:

(i) taking one of the forms listed in the Annex hereto; and

(ii) which in accordance with the tax laws of a Member State is considered to be resident in that Member State and is not, within the meaning of a Double Taxation Convention on Income concluded with a third state, considered to be resident for tax purposes outside the Community; and

(iii) which is subject to one of the following taxes without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes:

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— impôt des sociétés/vennootschapsbelasting in Belgium,

— selskabsskat in Denmark,

— Körperschaftsteuer in Germany,

— Φόρος εισοδήματος νομικών προσώπων in Greece,

— impuesto sobre sociedades in Spain,

— impôt sur les sociétés in France,

— corporation tax in Ireland,

— imposta sul reddito delle persone giuridiche in Italy,

— impôt sur le revenu des collectivités in Luxembourg,

— vennootschapsbelasting in the Netherlands,

— Körperschaftsteuer in Austria,

— imposto sobre o rendimento da pessoas colectivas in Portugal,

— yhteisöjen tulovero/inkomstskatten för samfund in Finland,

— statlig inkomstskatt in Sweden,

— corporation tax in the United Kingdom,

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— Daň z příjmů právnických osob in the Czech Republic,

— Tulumaks in Estonia,

— φόρος εισοδήματος in Cyprus,

— Uzņēmumu ienākuma nodoklis in Latvia,

— Pelno mokestis in Lithuania,

— Társasági adó in Hungary,

— Taxxa fuq l-income in Malta,

— Podatek dochodowy od osób prawnych in Poland,

— Davek od dobička pravnih oseb in Slovenia,

— Daň z príjmov právnických osôb in Slovakia,

▼M3

— корпоративен данък in Bulgaria,

— impozit pe profit, impozitul pe veniturile obținute din România de nerezidenți in Romania;

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(b) a company is an 'associated company' of a second company if, at least:

(i) the first company has a direct minimum holding of 25 % in the capital of the second company, or

(ii) the second company has a direct minimum holding of 25 % in the capital of the first company, or

(iii) a third company has a direct minimum holding of 25 % both in the capital of the first company and in the capital of the second company.

Holdings must involve only companies resident in Community territory.

However, Member States shall have the option of replacing the criterion of a minimum holding in the capital with that of a minimum holding of voting rights;

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(c) the term ‘permanent establishment’ means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on.

Article 4

Exclusion of payments as interest or royalties

1. The source State shall not be obliged to ensure the benefits of this Directive in the following cases:

(a) payments which are treated as a distribution of profits or as a repayment of capital under the law of the source State;

(b) payments from debt-claims which carry a right to participate in the debtor's profits;

(c) payments from debt-claims which entitle the creditor to exchange his right to interest for a right to participate in the debtor's profits;

(d) payments from debt-claims which contain no provision for repayment of the principal amount or where the repayment is due more than 50 years after the date of issue.

2. Where, by reason of a special relationship between the payer and the beneficial owner of interest or royalties, or between one of them and some other person, the amount of the interest or royalties exceeds the amount which would have been agreed by the payer and the beneficial owner in the absence of such a relationship, the provisions of this Directive shall apply only to the latter amount, if any.

Article 5

Fraud and abuse

1. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.

2. Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive.

Article 6

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Transitional rules for the Czech Republic, Greece, Spain, Latvia, Lithuania, Poland, Portugal and Slovakia

1. Greece, Latvia, Poland and Portugal shall be authorised not to apply the provisions of Article 1 until the date of application referred to in Article 17(2) and (3) of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments ([1]). During a transitional period of eight years starting on the aforementioned date, the rate of tax on payments of interest or royalties made to an associated company of another Member State or to a permanent establishment situated in another Member State of an associated company of a Member State must not exceed 10 % during the first four years and 5 % during the final four years.

Lithuania shall be authorised not to apply the provisions of Article 1 until the date of application referred to in Article 17(2) and (3) of Directive 2003/48/EC. During a transitional period of six years starting on the aforementioned date, the rate of tax on payments of royalties

([1]) OJ L 157, 26.6.2003, p. 38.

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made to an associated company of another Member State or to a permanent establishment situated in another Member State of an associated company of a Member State must not exceed 10 %. During the first four years of the six-year transitional period, the rate of tax on payments of interest made to an associated company of another Member State or to a permanent establishment situated in another Member State must not exceed 10 %; and for the following two years, the rate of tax on such payments of interest must not exceed 5 %.

Spain and the Czech Republic shall be authorised, for royalty payments only, not to apply the provisions of Article 1 until the date of application referred to in Article 17(2) and (3) of Directive 2003/48/EC. During a transitional period of six years starting on the aforementioned date, the rate of tax on payments of royalties made to an associated company of another Member State or to a permanent establishment situated in another Member State of an associated company of a Member State must not exceed 10 %. Slovakia shall be authorised, for royalty payments only, not to apply the provisions of Article 1 during a transitional period of two years starting on 1 May 2004.

These transitional rules shall, however, remain subject to the continued application of any rate of tax lower than those referred to in the first, second and third subparagraphs provided by bilateral agreements concluded between the Czech Republic, Greece, Spain, Latvia, Lithuania, Poland, Portugal or Slovakia and other Member States. Before the end of any of the transitional periods mentioned in this paragraph the Council may decide unanimously, on a proposal from the Commission, on a possible extension of the said transitional periods.

2. Where a company of a Member State, or a permanent establishment situated in that Member State of a company of a Member State:

— receives interest or royalties from an associated company of Greece, Latvia, Lithuania, Poland or Portugal,

— receives royalties from an associated company of the Czech Republic, Spain or Slovakia,

— receives interest or royalties from a permanent establishment situated in Greece, Latvia, Lithuania, Poland or Portugal, of an associated company of a Member State,

or

— receives royalties from a permanent establishment situated in the Czech Republic, Spain or Slovakia, of an associated company of a Member State,

the first Member State shall allow an amount equal to the tax paid in the Czech Republic, Greece, Spain, Latvia, Lithuania, Poland, Portugal, or Slovakia in accordance with paragraph 1 on that income as a deduction from the tax on the income of the company or permanent establishment which received that income.

3. The deduction provided for in paragraph 2 need not exceed the lower of:

(a) the tax payable in the Czech Republic, Greece, Spain, Latvia, Lithuania, Poland, Portugal or Slovakia, on such income on the basis of paragraph 1,

or

(b) that part of the tax on the income of the company or permanent establishment which received the interest or royalties, as computed before the deduction is given, which is attributable to those payments under the domestic law of the Member State of which it is a company or in which the permanent establishment is situated.

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Article 7

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 2004. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive, together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 8

Review

By 31 December 2006, the Commission shall report to the Council on the operation of this Directive, in particular with a view to extending its coverage to companies or undertakings other than those referred to in Article 3 and the Annex.

Article 9

Delimitation clause

This Directive shall not affect the application of domestic or agreement-based provisions which go beyond the provisions of this Directive and are designed to eliminate or mitigate the double taxation of interest and royalties.

Article 10

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Article 11

Addressees

This Directive is addressed to the Member States.

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ANNEX

List of companies covered by Article 3(a) of the Directive

(a) Companies under Belgian law known as: 'naamloze vennootschap/société anonyme, commanditaire vennootschap op aandelen/société en commandite par actions, besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée' and those public law bodies that operate under private law;

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(aa) companies under Bulgarian law known as: 'събирателното дружество', 'командитното дружество', 'дружеството с ограничена отговорност', 'акционерното дружество', 'командитното дружество с акции', 'кооперации', 'кооперативни съюзи', 'държавни предприятия' constituted under Bulgarian law and carrying on commercial activities;

(ab) companies under Romanian law known as: 'societăți pe acțiuni', 'societăți în comandită pe acțiuni', 'societăți cu răspundere limitată';

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(b) companies under Danish law known as: 'aktieselskab' and 'anpartsselskab';

(c) companies under German law known as: 'Aktiengesellschaft, Kommanditgesellschaft auf Aktien, Gesellschaft mit beschränkter Haftung' and 'bergrechtliche Gewerkschaft';

(d) companies under Greek law known as: 'ανώνυμη εταιρία';

(e) companies under Spanish law known as: 'sociedad anónima, sociedad comanditaria por acciones, sociedad de responsabilidad limitada' and those public law bodies which operate under private law;

(f) companies under French law known as: 'société anonyme, société en commandite par actions, société à responsabilité limitée' and industrial and commercial public establishments and undertakings;

(g) companies in Irish law known as public companies limited by shares or by guarantee, private companies limited by shares or by guarantee, bodies registered under the Industrial and Provident Societies Acts or building societies registered under the Building Societies Acts;

(h) companies under Italian law known as: 'società per azioni, società in accomandita per azioni, società a responsabilità limitata' and public and private entities carrying on industrial and commercial activities;

(i) companies under Luxembourg law known as: 'société anonyme, société en commandite par actions and société à responsabilité limitée';

(j) companies under Dutch law known as: 'naamloze vennootschap' and 'besloten vennootschap met beperkte aansprakelijkheid';

(k) companies under Austrian law known as: 'Aktiengesellschaft' and 'Gesellschaft mit beschränkter Haftung';

(l) commercial companies or civil law companies having a commercial form, cooperatives and public undertakings incorporated in accordance with Portuguese law;

(m) companies under Finnish law known as: 'osakeyhtiö/aktiebolag,osuuskunta/andelslag, säästöpankki/sparbank' and 'vakuutusyhtiö/försäkringsbolag';

(n) companies under Swedish law known as: 'aktiebolag' and 'försäkringsaktiebolag';

(o) companies incorporated under the law of the United Kingdom;

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(p) companies under Czech law known as: 'akciová společnost', 'společnost s ručením omezeným', 'veřejná obchodní společnost', 'komanditní společnost', 'družstvo';

(q) companies under Estonian law known as: 'täisühing', 'usaldusühing', 'osaühing', 'aktsiaselts', 'tulundusühistu';

(r) companies under Cypriot law known as: companies in accordance with the Company's Law, Public Corporate Bodies as well as any other Body which is considered as a company in accordance with the Income tax Laws;

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(s) companies under Latvian law known as: 'akciju sabiedrība', 'sabiedrība ar ierobežotu atbildību';

(t) companies incorporated under the law of Lithuania;

(u) companies under Hungarian law known as: 'közkereseti társaság', 'betéti társaság', 'közös vállalat', 'korlátolt felelősségű társaság", 'részvénytársaság', 'egyesülés', 'közhasznú társaság', 'szövetkezet';

(v) companies under Maltese law known as: 'Kumpaniji ta' Responsabilita' Limitata', 'Soċjetajiet in akkomandita li l-kapital tagħhom maqsum f'azzjonijiet';

(w) companies under Polish law known as: 'spółka akcyjna', 'spółka z ograniczoną odpowiedzialnością';

(x) companies under Slovenian law known as: 'delniška družba', 'komanditna delniška družba', 'komanditna družba', 'družba z omejeno odgovornostjo', 'družba z neomejeno odgovornostjo';

(y) companies under Slovak law known as: 'akciová spoločnos', 'spoločnosť s ručením obmedzeným', 'komanditná spoločnos', 'verejná obchodná spoločnos', 'družstvo'.