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The impact of the rulings of the European Court of Justice in the area of direct taxation 2010

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

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STUDY

Abstract

This study describes the impact of the rulings of the European Court of Justice (respectively now the Court of Justice of the European Union) on Members States' direct tax systems. It is the updated version (as of 31 December 2010) of the study PE 404.888 published in 2008. The case-law of the Court is characterised 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 economic globalisation. Focusing on an analysis of the Court's judgments, particular attention is also paid to major trends in the implementation of the Court's case-law by Member States. Finally, the limits of the so-called 'negative integration' through the case-law of the Court are discussed and suggestions are made for possible further European action, notably the adoption of legislative acts in direct tax matters.

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List of abbreviations

AG	Advocate General (at the Court of Justice of the EU)
Ann. Sénat	Annales Sénat (Senate's minutes, Belgium)
BFH	Bundesfinanzhof (Federal Tax Court, Germany)
BGBI	Bundesesetzblatt (Federal Law Gazette, Germany)
BSTBI	Bundesteuerblatt (Federal Tax Gazette, Germany)
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 (legal journal, Belgium)
Cah. dr. fisc. intern.	Cahiers de droit fiscal international (legal journal, The Netherlands)
CGI	Code Général des Impôts (General Tax Code, France)
CJEU	Court of Justice of the European Union
C.M.L.R.	Common Market Law Review (U.K./The Netherlands)
Dr. Fiscal	Revue de droit fiscal (legal journal, France)
DTC	Double Tax Convention
EC	Treaty establishing the European Community
ECJ	European Court of Justice
ECR	European Court Reports – Reports of Cases before the Court of Justice and the Court of First Instance
EC Tax Rev.	EC Tax Review (legal journal, The Netherlands)
E.L.Rev.	European Law Review (legal journal, U.K.)
Eur. Tax.	European Taxation (legal journal, The Netherlands)
Intertax	Intertax (legal journal, The Netherlands)
IStR	Internationales Steuerrecht (legal journal, Germany)

ITC Income Tax Code

JORF Journal Officiel de la République française (official journal, France)

J.T. Journal des Tribunaux (legal journal, Belgium)

JTDE Journal des tribunaux de droit européen (legal journal, Belgium)

LIR Loi d'impôt sur le revenu (tax code, Luxembourg)

NTER Nederlands tijdschrift voor Europees recht (legal journal, The Netherlands)

OJ Official Journal (of the European Union)

Rev. dr. intern. comp. Revue de droit international et de droit comparé (legal journal, Belgium)

R.G.F. Revue générale de fiscalité (legal journal, Belgium)

R.M.U.E. Revue du marché unique européen (legal journal, France)

RTDE Revue trimestrielle de droit européen (legal journal, France)

SWI Steuer und Wirtschaft International (legal journal, Austria)

TFEU Treaty on the Functioning of the European Union

TNI Tax Notes International (legal journal, U.S.A.)

TNS Tax News Service (IBFD online service, The Netherlands)

VAT Value Added Tax

WFR Weekblad voor fiscaal recht (legal journal, The Netherlands)

W.P.N.R. Weekblad voor privaatrecht, notariaat en registratie (legal journal, The Netherlands)

EXECUTIVE SUMMARY

Over recent years, the influence of EU 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 (ECJ) in direct tax matters.

Contrary to what is the case for indirect taxes, as VAT and excise duties which have been significantly harmonised by Union legislation, the EU 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 115 TFEU (ex Article 94 EC), are scarce and deal with specific cross border tax obstacles to intra-Community operations, such as corporate reorganisations or intra-group dividends, interest and royalties.

However, differences between the national direct tax systems may distort the allocation of resources and generate double taxation, which hinders the achievement of the Internal market, an objective affirmed in Article 26 TFEU (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 non-harmonised areas, like direct taxation, Member States are bound to respect their general commitment to Community loyalty under Article 4.3 TEU (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. EU 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 on 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] 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*".

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[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).

According to the principle laid down in the Schumacker case, a non-resident taxpayer is deemed to be in the same situation as 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 (now repealed) and on Article 18 EU (now Article 21 TFEU), introduced by the Maastricht Treaty. As a consequence, many other direct tax obstacles have been removed as a result of the Court’s judgments, 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 judgments 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 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 restitution of 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. Tax restrictions also 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 reserve 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 realised 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 participation 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 EU law: In the absence of harmonising 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 persons 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 judgments. However, the effectiveness of the implementation by the Member States of the EU 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 EU law subsequent to judgments of the ECJ. 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 harmonisation, 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 EU freedoms, has potentially a rather large and originally unexpected impact on the exercise by Member States of their taxing powers. If taxation on the basis of residence by Member States is not fundamentally jeopardised 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 decentralised bodies are or could also be strongly influenced by the development of the Court's case-law.

In the international context, EU 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 their superior EU Treaty obligations. A DTC as such is no justification for restricting the EU 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 neutralised 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 EU 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).

It cannot be derived from the case-law so far that juridical double taxation must be considered as a breach of the EU 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 of domestic and cross-borders situations: such rules have been declared incompatible with EU law. However, the case-law

[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.

of the Court has in some circumstances resulted in the acceptance of national rules by which cross-border transactions are taxed more heavily than domestic transactions.

The fact that the EU freedoms primarily rely on the – juridical – concept of discrimination makes it difficult to analyse 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 a full harmonisation 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 harmonisation of corporate taxation by the introduction of a common consolidated corporate tax base (CCCTB) or any other EU instrument on the elimination of double taxation, would not effectively better serve not only Community objectives, but also Member States' and taxpayers' interests.

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, 2010. The case-law of the Court is characterised 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 globalisation.

The study is divided in four chapters.

(1) 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 EU Treaties provisions and secondary EU legislation relevant for direct taxation. Finally, the methods of reasoning used by the Court of Justice are outlined, with particular reference to direct taxation.

(2) In the second chapter, the Court's judgments in the area of direct taxation are analysed. To facilitate comprehension, the cases have been divided in three main categories, namely taxation of individuals, taxation of companies and taxation of company shareholders, with an 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 EU law.

(3) 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.

(4) 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 EU legislative acts in direct tax matters.

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

1.1. 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 of them 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 E (the State where a permanent establishment is situated) or S (the State of source or situs)*". 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 E (or S) 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 paragraphs 201-203), 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 I, Glossary, "Territorial taxation"). Capital import neutrality allows foreign investors

[4] In 2008, 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, 2010, at 68.
[5] OECD Model Convention (2008), Commentary, 23/13 A & B and 23/57 A & B.

to compete in the State of source on an equal footing with local investors. 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 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 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 26 TFEU - Article 14 EC).

1.2. Extent and scope of EU competence in the area of taxation

1.2.1. EU Treaty provisions regarding taxation

8. Unlike Member States, the European Union 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 EU Treaty (TFEU – hereafter also referred to as the "EU Treaty") by the distinction drawn between "tax provisions" (Articles 110 to 113 TFEU (former Articles 90 to 93 EC)) under Part III (Common Policies) and "Financial Provisions" (Articles 310 to 325 TFEU (268 to 280 EC)).

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

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[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 and the last one in 2001) 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 taxes 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 EU competences and EU revenues exist. Customs duties and agricultural levies show very strong characteristics of an EU tax. Harmonised 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.See also the Communication from the Commision "the EU Budget Review", COM(2010) 700 Final.

10. The first type of EU Treaty provisions enables the Council (and only the Council) to adopt harmonisation 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. In respect of indirect taxation, a distinction between empowerment provisions and – directly applicable – tax prohibitions is clearly drawn in the EU Treaty. On the one hand, **Article 113 TFEU** (Art. 93 EC) empowers "*the Council … acting unanimously [in accordance with a special legislative procedure 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 [and to avoid distortion of competition*]".[9] 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.[10] On the other hand, **Article 110 TFEU** (Art. 90 EC) prohibits discriminatory internal taxation.[11] Together with **Article 30 TFEU** (Art. 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.[12]

11. As regards direct taxation, the above-mentioned two types of provisions – empowerment and prohibitions – are to be found in the EU 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 **EU Treaty does not explicitly grant legislative competence to the Council in the area of direct taxation**, neither alone nor jointly with the European Parliament.[13] Moreover, Article 114 TFEU (Art. 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 115 or 352 TFEU (Art. 94 or 308 EC), and only to the extent that these acts serve Community objectives. Moreover, and independently of the provisions on taxation, the EU Treaty confers upon European citizens general rights and freedoms aiming at guaranteeing non-discrimination and freedom to circulate and to undertake economic activities throughout the Union. These rights and freedoms are the **free movement of workers** (Articles 45 to 48 TFEU (Art. 39 to 42 EC)), **the right of establishment** (Articles 49 to 55 TFEU (Art. 43 to 48 EC)), **the freedom to provide and to receive services** (Articles 56 to 62 TFEU (Art. 49 to 55 EC)), **the free movement of capital and payments** (Articles 63 to 66 and 75 TFEU (art. 56 to 60 EC)), and, since the Treaty of Maastricht, **the right to move and reside freely within the territory of the EU** (Article 21 TFEU (Art. 18 EC)). Since the scope of application of these rights and freedoms is not limited to the extent of the Community's/Union's legislative competence, it encompasses the direct tax provisions of the Member States. According to settled case-law, "*although, as Community law stands*

[9] Changes resulting from the Treaty of Lisbon are between brackets.
[10] A complete list of Community legislation in the field of indirect taxes is available on the EUR-Lex site (http://eur-lex.europa.eu/).
[11] Article 111 TFEU (Art. 91 EC),) on excessive export tax repayments and Article 112 TFEU (Art. 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.
[12] Articles 30 and 110 TFEU (Art. 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.
[13] Article 293 EC was viewed as a mere exhortation to the Member States to negotiate agreements in order to remove double taxation. It did not grant competence to the Community and was 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 was abrogated by the Treaty of Lisbon.

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".[14]

1.2.2. EU 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** (now **Article 115 TFEU)**. 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 EU legislation, adopted in 1990 and in 2003.

13. Concerning company taxation, the Council has so far adopted three directives. The Merger **Directive**[15] aims at mitigating the negative tax consequences that arise from reorganising one or more companies at a European level. The **Parent-Subsidiary Directive**[16] 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**[17] 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.[18] These three Directives are supplemented by the **Arbitration Convention**, adopted by the Member States on the basis of Article 293 EC (abrogated by the Treaty of Lisbon) in order to address the problems of transfer pricing of goods, services and intangibles between associated companies.[19]

14. In the area of personal taxation, the only legislative act adopted by the Council is the **Savings Directive.**[20] This Directive does not harmonise 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-

[14] 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 I-441.

[15] 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, now abrogated and replaced by a coordinated text under Directive 2009/113/EC of 19 October 2009, *OJ* L310/34 of 25.11.2009.

[16] 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.

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

[18] 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). See also the "draft" Report based on Art. 8 of the Directive, COM(2009) aaa final, available at http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/com(2009)179_en.pdf.

[19] 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. See also the Communication from the Commission on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 and a related proposal for a revised Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990), COM(2009)472 of 14 September 2009. More details on the EU Joint Transfer Pricing Forum are available on the DG TAXUD website (see fn 19).

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

operation mechanisms contained in the **Mutual Assistance Directive 2011/16/EU**[21] and in **Directive 2008/55/EC** on mutual assistance for the **recovery of claims.**[22]

1.2.3. Other EC/EU acts and initiatives in the field of direct taxation

Besides the EU/EC legislation and the case-law of the Court of Justice, several initiatives of the European Commission deserve a mention.[23] 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.

1.2.3.1. Fight against harmful tax competition

15. The problems caused by divergences between the corporate income tax systems of the Member States, among which (harmful) tax competition,[24] have been the object of numerous reports and studies on behalf of the Commission since the very start of European integration.[25] 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.[26] This method was the basis of the Council's Code of Conduct for Business taxation,[27] 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.[28]

1.2.3.2. Prohibition of fiscal State aid and use of tax incentives

16. 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 107 and 108 TFEU (Art. 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.[29] These documents confirm the applicability of Articles 87 and

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[21] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and replacing Directive 77/799/EC, *OJ* L 64, 11.03.2011, p. 1-12 (replacing Council Directive 77/799/EEC of 19 December 1977, *OJ* L 336, 27.12.1977, p. 15–20).).

[22] Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures , *OJ* L 150 , 10.06.2008, p. 28, which codified former Council Directive 76/308/EEC of 15 March 1976, *OJ* L 73, 19.3.1976, p. 18.

[23] 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,* Wolters Kluwer, *Alphen aan den Rijn*, 2008, p. 1 and p. 21.

[24] 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.

[25] 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.

[26] 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.

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

[28] 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.

[29] 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.

88 EC (now Art. 107 and 108 TFEU) to direct tax measures and provide guidelines for the Member States. 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 107 and 108 TFEU (Art. 87 and 88 EC)[30] and to regional taxation.[31] 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.[32]

1.2.3.3. Towards coordination and harmonisation of corporate taxation

17. 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.[33] As time goes by, citizens are recognised rights by the Treaty in order to facilitate their free movement within the Union. The obstacles of a fiscal nature, e.g. as regards inheritance taxation and car taxation, are now specifically addressed by the Commission.[34]

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**[35] **–** this latter issue having also been the object of a Parliament resolution.[36] 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.[37] However, as regards corporate taxation, the most signification project of

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[30] 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.

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

[32] 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)).

[33] 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.

[34] Commission Communication of December 2010, Removing cross-border tax obstacles for EU Citizens, COM(2010), available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/tax_policy/com(2010)769_en.pdf

[35] 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.

[36] 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).

[37] See among others, Commission Communication of 21 April 2010, *Tax and Development. Cooperating with developing countries on promoting good governance in the tax matters*, COM(2010) 163 final; 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;; Commission Communication of 1st December 2008 on a coordinated strategy to improve the fight against VAT

the Commission is its proposal for a Common consolidated corporate tax base (CCCTB), first announced for the end of 2008. This ambitious project had already been suggested in 2001 in line with the Lisbon Strategy.[38] Since 2004, working groups of Member States' experts and Commission's delegates have been clearing the ground.[39] The Parliament has issued resolutions to support the project.[40] A new impulse is given to the project in 2010 and the Commission has presented its proposal in 2011.[41]

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.

18. 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".[42] Moreover, enhanced cooperation would certainly add further complexity to the already sensitive issues to be solved.

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fraud in European Union, COM(2008) 807 final; Commision Communication of 28 April 2009, *Promoting good governance in tax matters*, COM(2009) 201 final.

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

[39] 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).

[40] 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.

[41] Proposal of 16 March 2011 for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121, accompanied by Commission working paper "Summary of the impact assessment" SEC (2011) 135 and Commission working document "Impact assessment" SEC (2011) 136; Lang, M., Pistone, P. SChuch, J. and Staringer C., ed., *Common Consolitaed Corporate Tax Base*, Vienna, Linder, 2008; Schön, W., Schreiber, U., Spengel, C., ed., *A Common Consolitaed Corporate Tax Base for Europe*, Berlin-Heidelberg, Springer, 2008.

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

1.3. The role of the Court of Justice of the European Union in matters of direct taxation

19. 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 259 TFEU ((Art. 227 EC)) or the request of a national jurisdiction for a preliminary ruling concerning the interpretation of EU law. Contrary to infringement procedures, where the Court may declare national rules to be incompatible with EU 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 – now, in substance, Article 4, para. 3, TFEU -, 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**.[43] According to the Court, when a national tax measure is found to infringe European law, taxpayers may obtain a refund of unduly paid taxes[44] 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.[45]

20. The role of the Court is not limited to the strict application and interpretation of the Treaty and of a 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 or in any tax directive, it is part of Community law, and it can protect taxpayers against, for example, retroactive tax laws, at least in harmonised areas.[46] 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.[47] In tax matters, the Court has made applications of this principle in order to limit the scope of national anti-abuse provisions.[48]

21. 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 "exemption" (***Cobelfret***[49]), of "withholding tax" (***Epson Europe,***[50] ***Athinaiki Zithopoïaa,***[51] ***Océ van der Grinten***[52]), of "ownership of the shareholding" (***Vergers du Vieux Tauves***[53]), of "listed companies" (***Gaz de France***[54]) and of "holding

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[43] See for example ECJ, 3 December 1998, Case C-381/97, *Belgocodex v Belgian State, ECR* I-8153. See Lang, M. (ed.), *Procedural Rules in Tax Law in the Context of European Union and Domestic Law*, Wolters Kluwer, 2010, 752 p.; Douma, "Doorwerking van rechtspraak van het HvJ EG in de nationale rechtsorde", *WFR*, 2008, p. 1175.

[44] 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.

[45] 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.

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

[47] This principle has to be distinguished from the principle laid down at Article 5 TEU (Art. 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).

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

[49] ECJ, 12 February 2009, Case C-138/07, *Belgische Staat v Cobelfret N.V*, *ECR* I-731.

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

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

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

[53] ECJ, 22 December 2008, Case C-48/07, *Les Vergers du Vieux Tauves*, ECR I-10627.

period" (***Denkavit and others***[55]**)** under the Directive. Concerning the Merger Directive, the Court has contributed a.o. to the definition of the operations which fall within its scope of application (***Andersen og Jensen,***[56] ***Leur-Bloem,***[57] ***Kofoed***[58]**)** and of "anti-abuse" clause (***Zwijnenburg***[59]).

22. 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 EU/TFEU Treaty freedoms, in particular the free movement of persons, the free provision of services and the free movement of capital.[60]

The **free movement of persons** covers the right of employees to take up residence for work purposes (Article 45 TFEU (Art. 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 49 to 54 TFEU (Art. 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.*"[61]

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 56 TFEU (Art. 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.

23. 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,[62] or where a shareholder has an "*insufficient level of participation*" in a company in order to benefit from Article 43 EC (now Article 49 TFEU).[63]

In ascertaining which freedom is to be applied, the Court states that "*the purpose of the legislation concerned must be taken into consideration*".[64] 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,[65] 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 EU freedoms

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[54] ECJ, 1st October 2009, Case C-247/08, *Gaz de France-Berliner Investissement SA. v Bundeszentralamt für Steuern*, *ECR* I-9225.
[55] ECJ, 17 October 1996, Cases C-283/94, C-291/94 and C-292/94, *Denkavit International v Bundesamt für Finanzen*, *ECR* I-5063.
[56] ECJ, 15 January 2002, Case C-43/00, *Andersen og Jensen v Skatteministeriet*, *ECR* I-379.
[57] ECJ, 17 July 1997, Case C-28/95, *Leur-Bloem v Inspecteur der Belastingdienst*, *ECR* I-2471.
[58] ECJ, 5 July 2007, Case C-321/05, *Kofoed v Skatteministeriet, ECR I-5795.*
[59] ECJ, 20 May 2010, Case C-352/08, *Zwijnenburg*.
[60] 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.
[61] 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.
[62] See, e.g. ECJ, 11 October 2007, Case C-451/05, *ELISA v Directeur général des impôts.*
[63] *X and Y*, para. 67. *ECR* I-10829.
[64] For instance, see ECJ, 24 May 2007, C-157/05, *Holböck*, *ECR* I-4051, para. 22.
[65] Nevertheless, Article 64 TFEU (Art. 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.

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 leads to the same result (covert or indirect discrimination).[66] Income tax raises a specific difficulty in this context, as it usually refers to residence rather than to nationality as a connecting factor. However, since the Court considers that the use of the residence criterion by Member States is likely to favour their own nationals,[67] the key to identifying whether a measure at issue is incompatible with EU 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.[68]

25. According to the Court of Justice, overt discrimination may be justified by those grounds set out explicitly in the EU 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*".[69] In the field of direct taxation, several **justifications** could potentially apply: the need for effective fiscal supervision;[70] the need to maintain fiscal cohesion,[71] the prevention of abuse[72] or the need to protect the balanced allocation of taxing powers between Member States.[73] In contrast, the Court has never accepted justifications like the prevention of a reduction of tax revenue[74] or the existence of other, compensating, tax advantages.[75]

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[66] For example, ECJ, 13 July 1993, Case C-330/91, *Commerzbank*, *ECR* I-4017, paras.14, 15, 19.
[67] *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".*
[68] 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.
[69] For example ECJ, 11March 2004, Case C-9/02, *de Lasteyrie du Saillant*, *ECR* I-2409, para. 49.
[70] 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.
[71] ECJ, 28 January 1992, Case C-204/90, *Bachmann v Belgian State*, *ECR* I-249.
[72] ECJ, 18 July 2007, Case C-231/05, *Oy AA*, paras. 62- 63.
[73] See ECJ, 8 November 2007, C-379/05, *Amurta,* para. 56.
[74] 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.
[75] *Saint-Gobain*, para. 53 and C-294/97, *Eurowings*, para. 44.

2. 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 EU law that comes before the Court is growing.[76]

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 scrutinised by the Court. On December 31st, 2010, very few or no cases had been decided involving the direct tax system of Member States like Ireland or Italy[77] (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.[78] 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.[79]

29. 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 State has undertaken numerous reforms in order to comply with the EC/EU freedoms as interpreted by the ECJ in judgments regarding other countries. The same diligence can be observed in Finland, a country whose legislation is often the object of ECJ rulings.[80] 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 EU freedoms.[81]

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

[77] As regards Italy, only 3 direct tax cases have been decided up to December 31, 2010 (and none prior to 2008), while 2 are pending.

[78] 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. Shou, S., *Die Zinsschranke im Unternehmensteuerreformgesetz 2008 – Zur Frage ihrer Vereinbarkeit mit dem Verfassungs-, Europa- und Abkommensrecht*, Munich, Verlag C.H. Beck, 2010, 197 p.

[79] 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)).

[80] 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.

[81] 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/EU freedoms, but the taxation of Community grants. 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 December 2010. 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 (2.1), companies (2.3) and shareholders (2.4). A special section (2.2) is dedicated to the question of "costs related to the economic activity of the taxpayer" which deals with both individuals and companies.

2.1. Taxation of individuals

31. Regarding the application of EU 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 18 and 21 TFEU (Art. 12 and 18 EC, introduced by the Maastricht Treaty.)[82]

2.1.1. 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 …*".[83] The Court dealt with such a provision in an early case on direct taxation of individuals (***Biehl***[84]**)**. 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 (Article 45 TFEU): "*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 …".*[85]

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***).[86]

The Court has dealt in more recent cases with national tax or social security provisions which hinder an individual's **ability to transfer his residence from one Member State to another**.[87] For example, the application of exit taxes on unrealised capital gains on shares owned by individuals transferring their residence to another Member State or of

[82] ECJ, 11 July 2002, Case C-224/98, *D'Hoop v Office national de l'emploi, ECR* I-6191.
[83] 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.
[84] ECJ, 8 May 1990, Case 175/88, *Biehl v Administration des contributions du Luxembourg*, *ECR* I-273.
[85] *Biehl,* para. 12.
[86] ECJ, 26 October 1995, Case 151/94, *Commission v Luxembourg (Biehl II)*, *ECR* I-3685.
[87] In the area of social security, the ECJ considered to a transfer of residency the double payment of social security contributions to be deterrent (ECJ, 26 January 1999, Case C-18/95, *Terhoeve, ECR* I-345, para. 42) and the obligation to reimburse a savings-pension bonus on termination of full liability to taxation (ECJ, 10 September 2009, Case C-269/07, *Commission v. Germany*).

taxes on persons immigrating to another Member State after their retirement often leads to situations of double taxation.[88]

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*".[89] The Treaty indeed prohibits only **direct or indirect discrimination or unjustified obstacles** to the exercise of the EC freedoms, whether by the country of origin or by the country of settlement.[90] 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 21 TFEU (Art. 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 (now Article 21 TFEU), 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.[91]

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 – now Article 63 TFEU),[92] the only freedom applicable to third countries.

2.1.2. 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 45 TFEU (Art. 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*"**.[93]

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**.[94] However, depending on the

[88] On the taxation of pensions, see no. 41 *et seq*. On the taxation of capital gains, see no.142 *et seq*. See also Commission's infringement procedure against Spain (2007/2373, Press release IP/08/1531 of 16 October 2008).

[89] 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/45 TFEU) 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/49 TFEU).

[90] For an example of indirect discrimination by the country of settlement, see ECJ, 23 April 2009, Case C-544/07, *Rüffler*, no. 44.

[91] *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.

[92] 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.

[93] 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.

[94] 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

circumstances of the case, the Court may consider that a specific tax burden imposed only on non-residents, or the denial by a Member State 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*".[95]

An example of the first situation was found in ***Talotta***,[96] 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.[97]

As regards the second situation (the denial of a tax advantage to non-residents), 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; this latter point is dealt with in a special section hereafter (2.2), as it also is of interest for companies.

2.2. Tax advantages related to the personal and family situation

35. The leading case in respect of personal and family situation is Schumacker[98] 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 45 TFEU (Art. 39 EC).

The *Schumacker* doctrine can be summarised 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**.[99]
- **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.[100]

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).

[95] *Schumacker*, paras 36-38, and *Asscher*, para. 42.

[96] ECJ, 22 March 2007, Case C-383/05, *Talotta v Belgian State, ECR* I-2555.

[97] 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.

[98] ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v Schumacker, ECR* I-225.

[99] 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.

[100] *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 judgment followed the **Commission's unsuccessful attempts** to harmonise the income tax systems of the Member States in this respect, first through the 1979 Commission proposal for a directive concerning the harmonisation 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.[101]

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.[102] 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 DM 24,000 outside Germany.[103] 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 45 TFEU (Art. 39 EC).[104] In ***Meindl***, the Court held that, in order to calculate the 90% fraction being the minimum to be earned in the State, the State of activity could not take into consideration income of one of the spouses (*in casu* maternity allowances) which was not considered taxable by the Member State of such spouse's residence.[105]

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.[106] Moreover, amongst these Member States, there are several important differences. Some countries, like the Netherlands,[107] Austria,[108] Germany, Luxembourg,[109] Portugal[110] or Sweden[111] 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%[112] or of 90%[113] of their worldwide income in the State of source.[114]

A brief comparison between the Dutch, the Austrian and the German system will 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

[101] *OJ* L 039, 10.02.1994, pp. 22-28.
[102] *Gschwind*, para. 6:
[103] *Gschwind*, para. 32. Commission Recommendation 94/79/EC (see above) referred to a 75% threshold.
[104] ECJ, 16 May 2000, Case C-87/99, *Zurstrassen, ECR* I-3339, at 3353. See also the pending case C-240/10 *Schulz-Delzers und Schulz*, *O.J.,* C 221, 14.08.2010, p.18.
[105] 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.
[106] 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).
[107] 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.
[108] 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.
[109] TNS-218 (1997).
[110] *TNI*, 2008, 390.
[111] IBFD Individual Taxation Database, January 2007.
[112] A.o. Belgium, Denmark, Estonia, Finland (as from 1st January 2006), Hungary, Ireland, Latvia, Spain.
[113] For example the Czech Republic, Greece, Luxembourg, Portugal.
[114] Since fiscal year 2010, in Luxembourg, the 90% requirement refers to all the income irrespective of its nature (professional or passive) : law of 26 July 2010, *Memorial* A-N°120 of 28 July 2010.

means that they are taxed on their worldwide income,[115] 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.[116] A Liechtenstein resident does not fall within those conditions and, thus, can not benefit from this rule.[117]

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 EUR 10,000 outside Austria and limits the resident treatment to the income sourced in the country.[118]

A third system applies in Germany, which also has the 90% threshold, but sets up the alternative maximal foreign sourced income criterion at EUR 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).[119]

Luxembourg grants the resident treatment to non-residents earning more than 90% of their income in the country; the tax is computed taking into account foreign income (reserve of progression); the regime is optional and does not apply if less favourable.[120] Belgium, Cyprus, the Czech Republic and Latvia extend the benefit of personal and family provisions to qualifying non-residents.

Greece had to amend its provision providing for the deductibility of consumer expenditures granted only to resident taxpayers.[121]

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.[122]

After *Wallentin*, Sweden subsequently amended its legislation which provided that the taxpayer's worldwide net earned income is exclusively, or almost exclusively, from Swedish source.[123]

In Belgium, a flat-rate tax reduction is granted by the Flemish Region to its residents; the reduction is denied to persons who are resident in another Member State and are

[115] *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.
[116] Spain applies similar rules with specific formalities (see R.D. 326/1999 of 26 February 1999, O.G. 27 February 1999, *TNS*-51 (1999). On a case involving Liechtenstein, see Lower Court of Breda, 4 August 2010, n° 10/523, *TNS Online*, 12 August 2010.
[117] Lower Court of Breda, 4 August 2010, n° 10/523, *TNS Online*, 12 August 2010.
[118] 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.
[119] Information on Member States tax legislation has been found on the IBFD online database (December 2010).
[120] 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).
[121] Commission Press Release IP/10/85 of 28 January 2010; Greece complied.
[122] 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 Belastingdienst, ECR* I-5821, para. 36.
[123] 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.

working in the Flemish Region and earning most of their income in that Region. In October 2010, the Commission initiated an infringement procedure,[124] and a few weeks later, the Flemish region abrogated its reduction for future tax-years.[125] Similarly, the Commission is challenging a special tariff granted by the Region of Brussels-Capitale for gifts of immovable properties subject to the condition that the donee be a resident of that Region for a period of at least 5 years.[126]

In **Gielen**, the Court further added that a tax measure preventing non-residents from benefiting of from a tax advantage (in this case a deduction for self-employed persons conditioned on a minimum amount of working hours per year in the Netherlands) could not be justified by the right given to such non-residents to opt for the regime applicable to resident taxable persons, avoiding thus this discriminatory treatment.[127]

As to **Gielen**, a decree of June 2010 by the Minister of Finances clarifies that, as regards non-residents, the number of worked hours to take into consideration includes hours worked both in the Netherlands and in another Member State.[128] The Dutch Supreme Court confirmed the ECJ judgment.[129] The decree provides for a full imputation of the incentive on the Dutch income of the non-resident. Confirming the ECJ judgment, the Dutch Supreme Court further held, contrary to the AG's opinion, that the imputation rule announced by the Ministry had created a legitimate expectation for the taxpayer and therefore granted him the same treatment;[130] AG Wattel however suggested another computation.[131]

Based on the ability to pay principle underlying the ECJ case-law in those types of situations, a Dutch Court granted to a "Schumacker non-resident" the benefit of a special tax rule allowing for an averaging of the income earned during a period of three subsequent years.[132]

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***)[133] or benefits from a comparable advantage in the State of residence (***De Groot*** and ***Gerritse***),[134] 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***).[135]

In implementing **De Groot**, the Netherlands amended their legislation but, it would seem, not perfectly.[136] Belgium and Austria have been investigated by the

[124] IP/10/1403 of 28 October 2010.
[125] Decree of the Flemish Region (Budget Bill 2011) of 23 December 2010, *M.B.*, 31 December 2010.
[126] Commission Press Release IP/11/159 of 16 February 2011.
[127] ECJ, 18 March 2010, Case C-440/08, *Gielen*.
[128] Besluit van 10 juni 2010, nr DGB2010/2574M, Staatscourant 2010, 8449.
[129] Hoge Raad der Nederland, 29 October 2010, nr 43.761bis.
[130] Hoge Raad der Nederland, 29 October 2010, nr 43.761bis.
[131] See also criticisms by AG Wattel on the ECJ decision.
[132] Court of Appeal of 's-Hertogenbosch, 18 June 2010, n° 09/00099, *TNS Online*, 16 August 2010.
[133] 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 income from savings and investments.
[134] *De Groot*, para. 100; *Gerritse*, para. 51.
[135] 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.
[136] 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.

Commission[137] in relation with some personal deductions which were not granted to residents who earned part of their income abroad, and have now complied, as well as Luxembourg. Regarding Belgian resident spouses working in Belgium and The Netherlands, a Belgian Court decided to grant some personal tax advantages pro-rata to the Belgian and Dutch income, even where The Netherlands did not grant equivalent advantages, so that part of the tax advantages were lost.[138]

Finland adjusted the domestic tax rules to make the tax burden on cross-border situations equal to the domestic ones.[139]

2.3. 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 (Article 56 TFEU).[140] Moreover, in ***Scorpio***[141] 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 …*".[142] 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.[143]

Following Scorpio, the Netherlands changed their legislation by simply abolishing, under certain conditions, the taxation of non-resident artists.[144] 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.[145] A case has recently been referred to the ECJ on the old Dutch regime.[146]

On the contrary, the circular[147] issued by the German Ministry of Finance seems to restrict the application of Scorpio, especially as regards proving a deduction for costs,

[137] Cf. Commission Press Release of 26 March 2007, IP/07/414 (Austria) and of 20 July 2006, IP/06/1048 (Belgium).
[138] Court of Appeal of Antwerpen, 2 February 2010, *TNS Online*, 24 June 2010.
[139] *TNS Online* 15 February 2006.
[140] 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.
[141] 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).
[142] *Scorpio,* para. 47.
[143] *Conijn,* para. 20-25.
[144] See Molenaar, D., and Grams, H., Scorpio and the Netherlands: Major changes in Artist and Sportsman Taxation in the European Union, *Eur. Tax.*, 2007, p. 67-68.
[145] 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*.
[146] Dutch Hoge Raad, 24 September 2010; ECJ pending case C-498/10.
[147] BMF-Schreiben IV C 8 – S 2411/07/0002 of 5 April 2007.

the timing of cost deductions and the introduction of a net tax rate of 40%.[148] Likewise, the German implementation of Gerritse consisted in the release of Federal administrative instructions in the 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.[149] Germany at last complied in 2009.[150]

As from 1 January 2010, in Sweden, non-resident athletes and artists may opt to be taxed as residents. However, their income will now be subject to 30 percent social security contribution. Such option is also granted by Belgium.[151]

In the line of Scorpio and Commission v Belgium (C-433/04), a German Court held incompatible with the free provision of services a withholding tax charged on the recipient of services on fees paid to non-resident providers, who face higher administrative burden when having to ask for reimbursement of the withholding tax or to present a valid certificate of exemption.[152] The BFH ruled that for the assessment of the withholding tax on the paying agent, directly linked expenses notified to the paying agent could be taken into consideration for the assessment while indirectly linked expenses could be considered in an assessment procedure by the artist; the flat 25% rate is satisfactory on the paying agent.[153]

Some other tax systems seem not to fully comply with the ECJ case-law: the Czech Republic,[154] Estonia,[155] Italy,[156] Latvia,[157] Poland,[158] Portugal a.o. still apply a final withholding tax system on gross income from certain types of income or activities. Finland amended its legislation following a Reasoned Opinion of the Commission[159] as per 1 January 2010.[160]

Combining the principles led down in Asscher and Gerritse, the Commission extends their application to other situations where non-residents are taxed in the Member State of source on their gross income while residents are taxed on their net income. Some infringement procedures have as a consequence been initiated as, for example, Spain.[161]

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 56 TFEU (Art. 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

[148] 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).
[149] 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 criticised by Cordewener, A., Germany in Brokelind (2007), p. 154 and *Internationales Steuerrecht* (2004), p. 109 seq.
[150] In May 2009: see Commission Press Release IP/08/144 of 31 January 2008.
[151] Law of 22 December 2008, *M.B.,* 29 December 2008; in force as from 1st January 2008, following a request of the Commission of 28 February 2008.
[152] Finanzgericht Berlin-Brandenburg, 8 July 2008, *TNS Online* 4 September 2008.
[153] BFH, 5 May 2010, n° IR 104/08 (*PwC EU Tax News* 2010/5, 7).
[154] 25% final withholding tax (WHT) on income from independent activities and from services paid to non-residents.
[155] Final WHT on gross income from artistic and sport activities and on fees from professional services provided in Estonia.
[156] Final 30% WHT on compensation for independent work carried out in Italy by non-residents (including director's fees).
[157] Final WHT on artists, sportsmen and coachs, directors' fees (25%), management and consultancy fees (10%).
[158] Final 20% WHT on some advisory and management services, entertainment and sport activities, directors' fees.
[159] Commission Press Release IP/09/292 of 19 February 2009; closed.
[160] *PwC EU Tax News*, 2010/1, 10.
[161] Commission Press Release, IP/08/1553 of 16 October 2008 ; Spain amended its rules on taxation of non-residents on gross income (2010).

deductions of business expenses incurred on their territory. In ***Vestergaard***,[162] a Danish certified auditor, employed by a company of which he was the sole shareholder, was denied the deduction of the expenses incurred while 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.

2.3.1. 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 harmonisation directives have been adopted, although none concerning direct taxation.[163]

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***,[164] 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 (Articles 45 and 49 TFEU). 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.[165] The Court admitted that this non-deductibility was nevertheless justified by "*the need to safeguard the cohesion of the applicable tax system*".[166] This is the first – and almost the only[167] - case in which the Court has admitted such a justification and it is likely to remain so in the light of the subsequent judgments on the income tax treatment of insurance contributions, which have progressively restricted and then abandoned the justification used in Bachmann.[168]

Germany extended the deductibility of contributions for health, accident, liability and life insurance paid to EU insurance companies in 1994.[169] Belgium changed its law in 2004;[170] Sweden followed in 2008.[171].

[162] ECJ, 28 October 1999, Case C-55/98, *Skatteministeriet v Vestergaard, ECR* I-07641.
[163] 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.
[164] 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.
[165] Binon, (1996), p. 131.
[166] *Bachmann,* para. 23; *Commission v Belgium* (C-300/90), para. 16.
[167] The coherence of the tax system has been accepted as a justification by the Court in the Papillon case, where however, the national provision was considered as disproportionate.
[168] ECJ, 30 January 2007, Case C-150/04, *Commission v Denmark, ECR* I-1163 (on Articles 39, 43 and 49 EC/ 45, 49 and 56 TFEU)); 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.
[169] See Sec. 10(2) no 2 of ITA ; *TNS* Online, 9 May 1994.
[170] Law of 27 December 2004, *M.B.*, 31 December 2004; R.D. of 7 December 2008, *M.B.*, 12 December 2008. .
[171] *TNS Online,* 27 February 2008.

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, from the perspective both of the insurance companies established in other Members State and of their clients (***Safir***, ***Danner***, ***Skandia/Ramstedt***[172]***)***.

The Dutch Supreme Court held to be contrary to the freedom of services a guaranty condition required only from foreign insurers in order to be recognised in the Netherlands.[173]The Czech Republic has amended its legislation accordingly.[174]

43. The case-law contains a number of other instances of discrimination or unjustified restrictions under the EU freedoms where pensions are involved. In ***Turpeinen***, the Court considered incompatible with Article 18 EC (now Art. 21 TFEU) 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.[175] In ***Pusa***, the Court considered that, in a situation involving a resident of Spain who received a pension in Finland, "[Article 18 EC/21 TFEU] *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*".[176]

44. Although the taxation of pensions forms the major part of the case-law in this area, the Court has also issued judgments concerning the fiscal treatment of other social benefits. In ***Merida***,[177] the Court held that there was discrimination under Article 39 EC (Article 45 TFEU) against frontier workers in respect of whether taxes on wages could be taken into consideration for the computation of unemployment benefits. The ***Meindl*** case concerned maternity allowances.[178] In ***Rüffler***[179] and ***Filipiak***[180], the Court sanctioned the refusal by the State of residence to grant the tax deductions normally applicable to payments of health insurance and social security contributions on the ground that they had been made to an institution located in another Member State. Moreover, in this area, the cases interpreting the EC Regulations concerning the coordination of the Members States' social security systems can have a direct or indirect relevance for the application of tax provisions. For example, in the **Derouin** case, the Court considered that [EC law] *"does not preclude a Member State whose social legislation is alone applicable to a resident self-employed worker, from excluding from the tax base for [social] contributions income*

[172] 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*, *ECR* I-1163.
[173] Hoge Raad der Nederlanden, 22 October 2010, n° 09/01881.
[174] Law of November 2010, in force as from January 1st, 2011 (*TNS Online*, 23 November 2010).
[175] ECJ, 9 November 2006, Case C-520/04*, Turpeinen, ECR* I-10685. See also the pending case C-39/10, Commission v. Estonia, O.J., C 63, 13.03.2010, p.42.
[176] 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 (now Art. 49 TFEU)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).
[177] ECJ, 16 September 2004, Case C-400/02, *Merida v Germany*, *ECR* I- 8471.
[178] ECJ, 25 January 2007, Case C-329/05, *Finanzamt Dislaken v Meindl.*
[179] ECJ, 23 April 2009, Case C-544/07, *Rüffler v Dyrektor Izby Skarbowej w Wroclawiu Osrodek Zamiejscowy w Walbrzychu, ECR I-03389*
[180] ECJ, 19 November 2009, Case C-314/08, *Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, *ECR I-11049.*

earned by the worker in another Member State, by application, in particular, of a convention for the avoidance of double taxation with respect to taxes on income".[181]

Regarding the income tax regimes applicable to pensions, a rather reluctant attitude of the Member States can be particularly damaging to the effectiveness of EU 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[182] and the efforts made by the Commission,[183] or even by Member States on a bilateral basis.[184] Today, many Member States still do not fully comply with the requirements imposed by EU freedoms, a situation that motivated the Commission to initiate infringement procedures (Estonia,[185] Belgium,[186] Sweden[187]) some of them having already led to compliance by Members States (Sweden, Czech Republic[188] or to judgments stating the incompatibility of national legislation (Belgium, Denmark, and Germany)[189], while others are still pending. Some countries comply, such as Finland.[190]

2.3.2. 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.[191]

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.

[181] ECJ, 3 April 2008, Case 103/06, *Derouin v Urssaf de Paris – Région parisienne*.
[182] 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. Ronfeld, Th. And Werlauff, E., "Danish taxation of pensions in the perspectrive of EU Law. A legal assessment of Denmark's reaction to the judgment against Denmark in Case C-150/04, the Commission v Denmark", *Intertax*, 2008, p. 302; Garcia Garretero, B., La fiscalidad de los residentes comunitarios que ejercitan sus libertades fundamentales: particular referencia a la tributacion de las pensiones, *NUE*, 2008, n° 278, p. 77.
[183] 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.
[184] 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.
[185] Pending case *Comm. v Estonia*, C-39/10; Commission Press Release IP/09/1636 of 29 October 2009. On pensions paid to non-residents: Commission Press Release IP/08/1532 of 16 October 2008.
[186] As to pension savings: Commission Press Release, IP/10/1559 of 24 November 2010.
[187] Commission Press Release, IP/10/1406 of 28 October 2010.
[188] Commission Press Release, IP/10/1406 of 28 October 2010: Czech Republic complied in February 2011.
[189] See *Commission v Denmark (C-150/04*) and *Commission v. Germany (C-269/07)*. 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. Germany amended its legislation by a Law of 26 March 2010, *BGBl*, 14 April 2010.
[190] As of 1st January 2006; see also the ruling of the Finnish Supreme Administrative Court, 25 May 2007, *TNS* Online 2 July 2007.
[191] 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 organisations (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).

In ***Ritter-Coulais*** and later in ***Busley-Cibrian***, 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 on the taxpayer's worldwide income, whereas positive income deriving from the use of such a dwelling was taken into account for that purpose.[192] In ***Lakebrink***, the Court confirmed its position in respect of a similar Luxembourg provision.[193] In ***Renneberg***, it applied the same reasoning to the deduction of the negative rental income on his dwelling in Belgium resulting from the mortgage interest paid in relation to that dwelling, by a Belgian resident who delivered most of his taxable income from Dutch sources.[194]

Since the tax treatment of losses or expenses 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***, ***Ritter-Coulais*** and ***Renneberg*** are thus applications of the *Schumacker* doctrine.[195]

Luxembourg complied with *Lakebrink.*[196]

Considering the *Ritter-Coulais* case, a German Court granted loss relief for a dwelling in Portugal; the Ministry of Finance however limited the relief to a foreign dwelling personally used by the individual.[197]

Following the ECJ in Renneberg, the Hoge Raad der Nederlanden granted the deduction from the tax base in the Netherlands of the negative rental income resulting from the deduction of the loan interest from the imputed rental income as applicable to resident taxpayers.[198]

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***[199] and ***Sweden***,[200] the Court ruled that under Articles 18, 39 and 43 EC (Articles 21, 45 and 49 TFEU) 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

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[192] ECJ, 21 February 2006, Case C-152/03, *Ritter-Coulais v Finanzamt Germersheim*, *ECR* I-1711, para. 40. ECJ, 15 October 2009, Case C-35/08, *Busley/Cibrian v. Finanzamt Stuttgart, ECR I-9807.* (see comment by Schwenke, M., *IstR*, 2009, p. 843) In *Busley Cibrian*, the Court further added that Germany could not apply more favourable depreciation rules to immovable property acquired or constructed on the national territory. Germany amended its legislation on this point (Law of 26 March 2010, *BGBl*, 14 April 2010). On losses, see also ECJ Order, 12 September 2002, Case C-431/01, *Mertens v Belgian State*, *ECR* I- 7073.

[193] ECJ, 18 July 2007, Case C-182/06, *Luxembourg v Lakebrink, ECR* I-6705, 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).

[194] ECJ, 16 October 2008, Case C-527/06, *Renneberg v Staatssecretaris van Financien, ECR I-7735.*

[195] *Lakebrink*, para. 34; *Renneberg,* para.63 See also the Opinion of AG Léger in *Ritter-Coulais*, paras. 97-99, and the pending case C-450/09, *Schröder v. Finanzamt Hameln, OJ* C 37, 13.02.2010, p. 3 (Opinion AG Bot of 9 December 2010).

[196] Law of 21 December 2007 modifying Art. 157 ter LIR, *Memorial* A – N° 234 of 27 December 2007; Luxembourg circular n° 157ter/1 of 27 June 2008. See also on the deduction of interest paid for the acquisition of a dwelling in foreign country by a non-resident from Luxembourg: circular n° 53 of 19 November 2008, commenting a Law dated 21 December 2007 modifying Article 157ter LIR.

[197] Finanzgericht Hamburg, 14 December 2007; "non-application" decree concerning Sec. 2a(1) n° 6ITA of the Ministry of Finance of 24 November 2006, *TNS Online*, 12 June 2008.

[198] Hoge Raad, 26 June 2009, n° 39258bis (and the specific views of AG Wattel), available at www.rechtspraak.nl

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

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

State, thus excluding real property reinvestments in other Member States.[201] A similar conclusion was reached in ***Commission v. Germany*** relating to a subsidy for the construction or purchase of a dwelling for personal occupation, requiring the dwelling to be situated in Germany.[202]

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)*[203] Portugal also complied.[204] The Commission also could close 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.[205] A re-investment condition exists in Hungary;[206] Poland abolished that condition as from 1st January 2007.[207] Within the EEA, Iceland was asked to comply.[208]

Germany complied in 2010 after a Reasoned Opinion.[209] A German Court denied the taxpayer the right to file a claim in order to be granted allowances for owner-occupied dwelling, based on ECJ case-law, on the argument that the tax assessment had become final; this is in line with ECJ judgment on procedural consequences of preliminary rulings.[210]

Similarly, EU law, in particular Article 63 TFEU (Art. 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*** and ***Commission v Spain***).[211] In a similar scheme, the Court condemned a national provision whereby Portuguese residents were allowed a 50% reduction of the tax base and were taxed at the progressive tax rate, the maximum of which was 42%, whereas non-residents were taxed at 25% on the whole gain.[212]

Finland had to amend its discriminatory taxation rules of forest income earned by non-residents.[213]

48. Moreover, the Court has applied Article 56 EC (now Article 63 TFEU) to direct taxes on immovable property other than income tax, such as inheritance and gift taxes, in the cases

[201] 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.

[202] ECJ, 18 January 2008, Case C-152/05, *Commission v Germany*, *ECR* I-6957.

[203] 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 judgment. 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 judgment* (...)", and a new infringement procedure has been opened which led to ECJ, 18 January 2007, C-104/06.

[204] Law 53-A/06, Budget for 2007, O.J. 29 December 2006, *TNS Online*, 4 January 2007.

[205] Commission Press Release IP/12/07 of 8 January 2007.

[206] No difference is made according to the place of re-investment in a permanent home for the seller (IBFD – Europe – Individual Taxation database – Hungary, point 2.4.1.

[207] IBFD – Europe – Individual Taxation database – Poland, point 2.4.

[208] ESA PR(08)32.

[209] Commission Press Release IP/09/433 of 19 March 2009 (immovable located abroad); IP/08/146 of 31 January 2008 (depreciation of foreign immovables).

[210] Finanzgericht Niedersachsen, 28 October 2009, n° 9 K 146/09, *TNS Online*, 26 January 2010.

[211] ECJ, 11 October 2007, Case C-443/06, *Hollmann v Fazenda pública, ECR I-8491;* ECJ, 6 October 2009, Case C-562/07 *Commission v. Spain, ECR I-9553* (this latter case concerns all capital gains and not only those arising from the disposal of immovable property).

[212] ECJ, 17 June 2010, Case C- 105/08, *Commission v Portugal*.

[213] Commission Press Release, IP/09/171 of 29 January 2009.

Heirs of Barbier, ***Jäger***, ***Arens-Sikken***, ***Eckelkamp*** and ***Mattner***,[214] and wealth taxes, in ***D.***[215] These levies can indeed cause potential restrictions to intra-Community investments. In ***Heirs of Barbier***, ***Eckelkamp***, and to a lesser extent, ***Arens-Sikken***, the Court declared incompatible with the free movement of capital a law which restricted certain debts from being deducted from the value of immovable property for the computation of the taxable base for inheritance tax, when the deceased was a non-resident at the time of his death, whilst allowing it for residents.[216] The Court similarly rejected differences in valuation of land property for inheritance and gift tax purposes based on territorial criteria, respectively to the effect that, in ***Jäger***, only property located in Germany was valued under special rules lowering the tax base far under market value whereas property located abroad was assessed at market value, and that, in ***Mattner***, that larger tax allowances could be deducted only where the donor or the donee was resident in the national territory at the date of the gift. The ECJ also rejected a Greek provision granting exemption on the real estate transfer tax to Greek permanent residents for the purchase of a first residential real estate in Greece (***Commission v. Greece***).[217]

In ***D.***, the Court held that Articles 56 and 58 CE (Articles 63 and 65 TFEU) 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.[218]

Several other cases are pending before the Court.[219]

The Dutch tax authorities apply the *Barbier* doctrine.[220]

In 2009, Luxembourg complied on the deduction of debts on inheritance by non-residents.[221] Upon a request of the Commission,[222] Luxembourg abrogated its provision requiring from non-resident heirs a special guarantee that was not required from residents.

In a situation similar to *Mattner* referred by the Financial Court of Düsseldorf, the Financial Court of Baden-Württemberg held that the legislation at stake was not contrary to EU law.[223]

In the case of a German resident individual who inherited a 100% shareholding in a Canadian company and who was denied a special tax-free amount granted for German shareholdings, the German Court held that this denial is not contrary to EU law as the

[214] ECJ, 11 December 2003, Case C-364/01, *Heirs of Barbier v Inspecteur van de Belastingdienst, ECR* I-15013; ECJ, 17 January 2008, Case C-256/06, *Jäger v Finanzamt Kusel-Landstuhl; ECJ,* 11 September 2008, Case C-43/07, *Arens-Sikken v Staatssecretrais van Financien;* ECJ*,* 11 September 2008*,* Case C-11/07*, Eckelkamp v Belgische Staat*; ECJ, 22 April 2010, Case C-510/08, *Mattner v. Finanzamt Velbert.* On Arens-Sikken, see the decision of the Dutch Hoge Raad: of 29 May 2009, n° 39819bis.

[215] ECJ, 5 July 2005, Case C-376/03, *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, ECR p. I-5821*.

[216] See also the Dutch Hoge Raad, 29 May 2009, n° 39819, which follows the ECJ judgment (*TNS Online*, 24 July 2009).

[217] ECJ, 20 January 2011, Case C-155/09, *Commission v Greece*.

[218] 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.

[219] For example, case C-250/08, *Commission v. Belgium, O.J.,* C 22, 30.08.2008, p.25; case C-155/09 Commission v. Greece, *O.J.*, C 167 of 18.07.2009, p.4; case C-253/09, *Commission. v. Hungary*, *O.J.,* C 233, 26.09.2009, p.6 (Opinion AG Mazàk of 9 December 2010). On inheritance taxes, see also case ECJ, 10 February 2010, case C-25/10, *Missionswerk Werner Heukelbach*,

[220] Reply to a parliamentary question of 18 February 2004, *TNS* Online, 5 March 2004.

[221] Art. 12 bis of the Modified Law of 27 December 1817 on heritance taxes, inserted by a Law of 18 December 2009, *Memorial* A-N°256 of 28 December 2009.

[222] IP/10/794 of 24 June 2010.

[223] 29 October 2008, n° 2 K 1986/07, *TNS Online*, 28 April 2009.

free movement of capital does not apply where the taxpayer has a definite influence on decisions and activities of the company.[224]

Denmark complied with Jäger.[225]

UK had to amend its inheritance tax relief granted only for agricultural and forestry property located within the UK.[226]

49. Based on the case-law of the Court prohibiting such kind of "territorial" condition, the Commission initiated procedures against Member States in the area of movable investments. For example, Bulgaria exempted tax income from Bulgarian governmental, municipal and corporate bonds, whereas no such exemption applied for similar bonds issued abroad;[227] Bulgaria complied; Portugal also had to amend its rules in similar situation.[228]

2.3.3. Other income or expenses in relation to cross-border services and investments

50. A final category of cases includes various situations concerning cross-border services and investments. As to services, 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, in the case of income taxes,[229] can concern either the taxability of certain sources of income or the deductibility of specific expenses.

51. An example of the first type of disadvantage is found in ***Lindman*** and ***Commission v. Spain (C-153/08).***[230] The Court held that legislation exempting from the calculation of taxable income winnings from (some) domestic lotteries but not winnings from lotteries established in other Member States was not compatible with the free provision of services.[231] Likewise, the Court ruled in ***Commission v France***[232] 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 (now Articles 56 and 63 TFEU).[233].

52. As to the deductibility of foreign expenses, the cases ***Commission v Germany, Schwarz*** and ***Zanotti***[234] concern tuition fees paid to private educational establishments in

[224] Finanzgericht Bremen, 28 October 2009, n° 3 K 34/09, *PwC EU Tax News*, 2010/2, 10.
[225] Bill of 2009.
[226] Commission Press Release IP/09/170 of 29 January 2009.
[227] Commission Press Release IP/09/289 of 19 February 2009.
[228] Commission Press Release IP/08/339 of 28 February 2008.
[229] For an application of the freedom to provided services to a regional hunting tax, see ECJ, 15 July 2010, case C-70/09, *Hengartner and Gasser*.
[230] ECJ, 13 November 2003, Case C-42/02, *Lindman*, *ECR* I-13519; 6 October 2009, C-153/08 *Commission v. Spain*, *ECR* I-9735.
[231] An infringement procedure has been initiated against Spain for the same type of provision, case C-153/08; (see ECJ, 6 October 2009, *ECR* I-9735; a reasoned opinion was sent to Poland which complied (Commission Press Release IP/06/1360 of 12 October 2006).
[232] 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).
[233] 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.
[234] ECJ, 11 September 2007, Case C-318/05, *Commission v Germany, ECR* I-6957*;* ECJ, 11 September 2007, Case C-76/05, *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach, ECR* I-6844*;* ECJ, 20 May 2010, Case C-56/09, *Zanotti v. Agenzia delle Entrate – Ufficio Roma 2*. In this latter case, the Court states that "*the freedom to provide services includes the freedom of the persons for whom the services are intended to go to another Member State*" (para. 26).

other Member States. The Court considered that Member States could not under Articles 18, 39, 43 and 49 EC (now Articles 21, 45, 49 and 56 TFEU) authorise the partial deduction, on certain conditions, of those fees when paid to establishments established on domestic soil, while refusing it in all cases in respect of fees paid to similar establishments located in other Member States. However, Member States are not precluded to limit the amount deductible in respect of tuition fees incurred abroad to a given level, provided that similar limits apply to tuition fees paid to a domestic estatablishment.[235]

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.[236]

After Schwarz, Germany changed its law;[237] some practical questions were raised as to the equivalence between German and EU institutions covered.

Following the decision Commission v Spain on lotteries, Spain[238] complied.

Belgium extended its tax relief for nursery costs to cost paid for children placed in foreign nurseries in EEA countries.[239]

53. As to cross-border investments, in ***Persche***, the Court extended its reasoning to the deductibility of gifts to charitable bodies established in other Member States,[240] allowing however Member States to verify that these charitable bodies satisfy the same requirements and that they promote the same interests as those imposed upon similar domestic bodies.

Germany,[241] Austria,[242] Belgium,[243] Czech Republic,[244] Denmark,[245] Estonia,[246] France,[247] Hungary,[248] Luxembourg,[249] Spain,[250] the UK[251] implemented the Persche

[235] See *Commission v Germany,* paras. 97-99 *; Schwarz*, paras. 80-81; *Zanotti*, paras. 54-58.
[236] ECJ, 18 December 2007, Case C-281/06, *Jundt v Finanzamt Offenburg, ECR* I-12231. Accordingly, the German Court held that only the term "domestic" public law legal person should not be considered in applying domestic provision (BFH, 22 July 2008 (VIII R 101/02, Jundt), *TNS Online* 17 September 2008.
[237] 2009 Tax Act; Wohlfahrt, M. and Köhler, K., Deduction of School Fees Under German Law, *TNI*, 2009, 419. see also the Guidance by the Ministry of Finance dated 9 March 2009, *TNS Online*, 31 March 2009. BFH, 17 July 2008, n° X R 62/04, *TNS Online*, 5 November 2008.
[238] Law 2/2010 of 1st March 2010*, O.G.*, 2 March 2010.
[239] Law of 22 December 2008, *M.B.*, 29 December 2008, following a request by the Commission of 28 February 2008 (IP/08/337).
[240] ECJ, 27 January 2009, C-318/07, *Persche v. FA Lüdenscheid, ECR* I-359*.* See also pending Case C-10/10, *Commission v. Austria* (Opinion AG Trstenjak 8 March 2011).
[241] German Law of 26 March 2010, *BGBl*, 14 April 2010; BFH, 27 May 2009, n° X R 46/05 (*TNS Online* 27 April 2010). German Law adds a requirement of promoting German residents or German reputation: that condition might be considered as a breach of EU freedoms (*PwC EU Tax News*, 2009/2 at 13).
[242] Austria adopted a new Foundation Tax Act (Stiftungseingangssteuergesetz) extending preferential tax rate to foreign foundations which are comparable to Austrian private foundation; *TNI*, 2008, 931.
[243] Belgian law of 22 December 2009, *O.G.*, 31 December 2009, Art. 13.
[244] Law of November 2010, in force as from January 1st, 2011 (*TNS Online*, 23 November 2010).
[245] Denmark complied after a letter of final notice from the Commission (*TNI*, 2008, 847).
[246] Also in order to comply with reasoned opinion from the Commission IP/08/1818 of 27 November 2008; *PwC EU Tax News*, 2009/6, 15.
[247] Art. 35 of the *Loi de finances rectificative* n° 2009-1674 , *JORF* 0303 of 31 December 2009, p. 22940;
[248] Infringement procedure closed in 2008: Commission Press Release IP/08/512 of 3 April 2008.
[249] Art. 4 of the Law of 18 December 2009 (Finance Bill for 2010) modifying Art. 112 LIR; Circ. N° 112/2 of 7 April 2010 replacing as of tax year 2010 the circ. LIR 112/2 of 20 July 2009 (available at www.impotsdirects.public.lu/legislation).
[250] Law 2/2010 of 1st March 2010*, O.G.*, 2 March 2010.
[251] Finance Bill 2010 (*TNS Online* 25 March 2010).

decision in 2010. Estonia complied following an infringement procedure.[252] Germany,[253] Austria,[254] Belgium,[255] Czech Republic,[256] Denmark,[257] Estonia,[258] France,[259] Hungary,[260] Luxembourg,[261] Spain,[262] the UK[263] implemented the Persche decision in 2010.

It is worth noticing that the EU Commission is challenging national measures that refer to such kind of territoriality requirement, so extending to a wide field of tax provisions the ECJ case-law principles.

For example, the Commission is challenging a Belgian provision whereby interest paid in excess of an interest market rate is rejected from the deductible professional expenses, except where they are paid to Belgian financial institutions.[264]

The Commission is also challenging a special reduced tariff for gift tax and inheritance tax in favour only of non-profit organisation which are established in Belgium; the regional provision of the Region of Brussels-Capitale is specifically concerned but similar provisions also exist in the other Belgian Regions.[265]

As regards interest income, the Commission is challenging national provisions providing for privileged taxation of national bonds compared to similar foreign instruments.[266].

2.3.4. International inheritance

54. Moreover, important obstacles to cross-border investments by individuals are caused by **inheritance taxes**, an area in which much remains to be done, all the more that, in spite of the existence of an ancient OECD model treaty,[267] the actual bilateral treaties network is quite scarce,[268] whilst the principles of taxation (tax on the estate or on the heir, interaction with taxation of gifts) and the jurisdictional criteria (global jurisdiction affirmed by virtue of domicile of deceased or of domicile of heir, local jurisdiction only on real estate or also on certain personal property) are quite different between States. The European Commission has announced a Communication targeting this kind of taxes by the end of 2011.

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[252] IP/08/1818; closed on 24 November 2010.

[253] German Law of 26 March 2010, *BGBl*, 14 April 2010; BFH, 27 May 2009, n° X R 46/05 (*TNS Online* 27 April 2010). German Law adds a requirement of promoting German residents or German reputation: that condition might be considered as a breach of EU freedoms (*PwC EU Tax News*, 2009/2 at 13).

[254] Austria adopted a new Foundation Tax Act (Stiftungseingangssteuergesetz) extending preferential tax rate to foreign foundations which are comparable to Austrian private foundation; *TNI*, 2008, 931.

[255] Belgian law of 22 December 2009, *O.G.*, 31 December 2009, Art. 13.

[256] Law of November 2010, in force as from January 1st, 2011 (*TNS Online*, 23 November 2010).

[257] Denmark complied after a letter of final notice from the Commission (*TNI*, 2008, 847).

[258] Also in order to comply with reasoned opinion from the Commission IP/08/1818 of 27 November 2008; *PwC EU Tax News*, 2009/6, 15.

[259] Art. 35 of the *Loi de finances rectificative* n° 2009-1674 , *JORF* 0303 of 31 December 2009, p. 22940;

[260] Infringement procedure closed in 2008: Commission Press Release IP/08/512 of 3 April 2008.

[261] Art. 4 of the Law of 18 December 2009 (Finance Bill for 2010) modifying Art. 112 LIR; Circ. N° 112/2 of 7 April 2010 replacing as of tax year 2010 the circ. LIR 112/2 of 20 July 2009 (available at www.impotsdirects.public.lu/legislation).

[262] Law 2/2010 of 1st March 2010*, O.G.*, 2 March 2010.

[263] Finance Bill 2010 (*TNS Online* 25 March 2010).

[264] Commission Press Release, IP/10/1403 of 28 October 2010.

[265] Commission Press Release, IP/11/159 of 16 February 2011.

[266] Belgium: IP/10/1253 of 30 September 2010

[267] Model Double Taxation Convention on Estates and Inheritances and on Gifts, 1982.

[268] "*Currently 33 bilateral treaties are in force and 351 would be required to secure a complete coverage for all citizens*" (Copenhagen Economics, *Study on inheritance taxes in EU Member States and possible mechanisms to resolve problems of double inheritance Taxation in the EU,* 2010, p. 49, http://ec.europa.eu/taxation_customs /resources/documents/common/consultations/tax/2010/08/inheritance_taxes_report_2010_08_26_en.pdf).

Although the fundamental freedoms do not prohibit international double taxation of inheritance *per se*, they may apply in some circumstances. As to double taxation, the Court has considered that, when a German resident deceased and left his estate to his German resident heir, Ms. ***Block***, Germany was not obliged to grant a credit for the inheritance tax levied by Spain on the positive balance of a Spanish bank account, Spain locating movable assets by reference to the debtor, Germany by reference to the creditor: [269] "that fiscal disadvantage is the result of the exercise in parallel by the two Member States concerned of their fiscal sovereignty".

However, the Court considered in several other cases national inheritance duties incompatible with EU law. Besides the cases relating to the taxation of immovable property (see above n° 45), the ***Geurts and Vogten*** case[270] 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.

55. Next to inheritance duties comes wealth tax. In ***Heinrich Bauer Verlag,***[271] the Court held that the valuation, for the computation of a German wealth tax, - the valuation of foreign shares aton their market value – including an element of profit expectation -, while domestic shares are valued at their net asset value, constitutes a restriction on the freedom of establishment.

The Flemish Region amended its inheritance tax Code.[272]

The wealth tax is no longer levied in Germany.

2.4. Taxation of companies

56. Starting with the early ***Avoir fiscal*** case, the majority of judgments issued by the Court regarding company taxation concerns direct tax provisions which hinder the freedom of establishment.[273] Other cases address the freedom to provide services. A specific section focuses on the much-debated question of the application of EU freedoms to national mechanisms for the compensation of cross-border losses and to consolidation. The corporate tax aspects of the Court's case-law on the taxation of dividends, interest and capital gains on shares, and the application of the free movement of capital and payments in this respect are analysed in section C devoted to the taxation of company shareholders.

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

57. According to Articles 49 and 54 TFEU (Art. 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[274] which can only arise when two "objectively comparable" situations receive a different tax treatment[275] can be found in the corporate income tax systems of the Member State, but can also concern other types of

[269] ECJ, 12 February 2009, C-67/08, *Margarete Block v. FA Kaufbeuren, ECR* I-883.
[270] ECJ, 25 October 2007, Case C-464/05, *Geurts and Vogten v Administratie van de BTW, registratie en domeinen and Belgische Staat*, *ECR* I-9325.
[271] ECJ, 2 October 2008, Case C-360/06, *Heinrich Bauer Verlag Beteiligungs GmbH v Finanzamt für Grossunternehmen in Hamburg*, *ECR*, 2008-I, 7333.
[272] Art. 20 of a Decree of 21 December 2007*, M.B.*, 31 December 2007.
[273] ECJ, 28 January 1986 Case 270/83 *Commission v France, "Avoir fiscal", ECR* 273, para. 18.
[274] *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.
[275] 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.

taxes imposed on companies, as ***Halliburton***[276] 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 (Article 49 TFEU) insofar as it did not apply when the transferring company was incorporated under the law of another Member State.

58. 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 EU 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 EU law.[277]

2.4.1.1. In the Host State

59. 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. Contrarily 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.[278] With regard to branches, EU 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.

2.3.1.1.1. Tax treatment of permanent establishments of EU companies

60. In ***Avoir fiscal***[279] (1986), the first decision in the field of direct taxation, a system of shareholder tax credit was held to be in breach of Article 43 EC (Article 49 TFEU), 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.

61. In ***Royal Bank of Scotland***,[280] 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

[276] ECJ, 12 April 1994 Case C-1/93, *Halliburton Services v Staatssecretaris van Financiën*, *ECR* I-1137.
[277] 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*).
[278] For the purpose of the study, the terms permanent establishment, a tax treaty term, and branch, a company law term, are used synonymously.
[279] Case 270/83, *Avoir fiscal*.
[280] ECJ, 29 April 1999, Case C-311/97, *Royal Bank of Scotland*, *ECR* I-2651.

(worldwide income v domestic source income).[281] In ***Commission v. Greece (C-406/07)***, the Court confirmed its viewpoint as regards the same discriminatory tax treatment applied to unincorporated companies.[282] In ***CLT-UFA***, the Court condemned under Article 43 EC (Article 49 TFEU) 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.[283]

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.[284] However, in the comparable CLT-UFA case regarding Germany, the German *Bundesfinanzhof* decided in reaction to the ECJ judgment that profits earned by a non-resident company through a permanent establishment had to be taxed like the wholly distributed profits of a comparable resident subsidiary ("distribution fiction"), which meant the lower of the two tax rates.[285]

The Dutch Supreme Court ruled that different conditions required for the attribution of assets to permanent establishments, as opposed to the holding of assets by subsidiaries, are justified by the need to make a distinction between the establishment and its head office.[286]

62. 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***,[287] 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.

Even before the Court delivered its judgment, the German tax legislator extended treaty relief provisions embodied in DTCs to non-resident taxpayers.[288] 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.[289]

63. Discrimination may also be found in procedural rules. In ***Commerzbank***,[290] 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

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[281] *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).

[282] On 28 January 2010, the Commission opened a new infringement procedure for non implementation of this decision : IP/10/93.

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

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

[285] 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"".

[286] Hoge Raad der Nederlanden, 8 August 2008, n° 40586, *TNS Online,* 13 August 2008.

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

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

[289] 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).

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

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.[291]

Following the judgment, 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 1 October 1993.[292]

64. 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 harmonisation 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.[293] However, the Court did not accept any of these grounds of justification. The ***Futura Participations and Singer*** case[294] (paragraph 93) 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.[295]

2.3.1.1.2. Tax treatment of subsidiaries of EU companies

65. 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 Treaty freedoms in a number of cases.

66. The ***Baxter*** case[296] 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.[297] This unequal treatment cannot be justified by the need for effectiveness of fiscal supervision.[298]

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[291] *Commerzbank*, para. 13-15.
[292] Press Release from 23 July 1993, DT1955 - Non-residents: UK income: Repayment supplement, *http://www.hmrc.gov.uk/manuals/dtmanual/DT1955.htm*.
[293] *Avoir fiscal*, paras. 21-26, *Saint-Gobain*, paras. 53-55; *CLT-UFA*, paras. 19-30.
[294] 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.
[295] 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.
[296] ECJ, 8 July 1999, Case C-254/97, *Baxter, ECR* I-4811. See also ECJ, 13 March 2008, Case C-248/06, *Commission v. Spain*, *ECR* I-47. .
[297] *Baxter*, para. 12.
[298] *Baxter,* paras. 18, 19.

Shortly after the outcome of the judgment, 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.[299] After a reasoned opinion, Ireland has amended its requirement for exemption of patent royalties on the condition that research leading to the patent had to be carried out in Ireland.[300]

67. Similarly, in ***Commission v. Spain***,[301] where an exemption of distributed dividends by a subsidiary to its parent company is subject to a higher shareholding requirement when dividends are paid by non-resident parent companies than by resident parents. This also is contrary to the freedom of establishment.

68. 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***[302] (paragraph 121) and ***Franked Investment Income (FII) Group Litigation***[303] (paragraph 138).

69. 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***[304] (paragraph 107) and ***Test Claimants in the Thin Cap Group Litigation***[305] (paragraph 108). 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 paragraphs 105 *et seq.*).

70. In contrast, the Court in ***Oy AA***[306] 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. 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.[307] 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.[308]

[299] 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*).

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

[301] ECJ, 3 June 2010, Case C-487/08, Commission v Spain.

[302] 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.

[303] ECJ 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, ECR I-11753.

[304] ECJ, 12 December 2002, Case C-324/00, Lankhorst-Hohorst, ECR I-11779.

[305] Case C-524/04, Test Claimants in the Thin Cap Group Litigation, ECR I-2107.

[306] ECJ, 18 July 2007, Case C-231/05, Oy AA.

[307] Oy AA, para. 56.

[308] Oy AA, para. 58.

2.4.1.2. In the State of residence

71. The freedom of establishment does not only restrict the tax competence of the Host State, but also the taxing power of the State of (principal) establishment of a company willing to move or expand its activity in another Member State.[309] Although the freedom of establishment may also apply to the setting-up of a branch (permanent establishment), 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. The question whether EU law may mitigate the negative tax consequences of a transfer of seat remains debated (see paragraph 224).

2.3.1.2.1. Tax treatment of permanent establishments in other Member States

72. A Member State can hinder a resident company wanting to establish a foreign branch. The ***AMID*** case (paragraph 90)[310] 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. However, it results from more recent ECJ case-law that there would be an obligation for the State of residence to grant relief for losses incurred by foreign (EU) permanent establishments only where all the possibilities to carry-over the losses in the Host State have been exhausted. This statement results in timing differences detrimental to foreign established entities[311] (nos. 88 *et seq.*).

73. Another 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***[312] a German resident company allotted capital to its permanent establishment in Italy. The allotted capital was shown both on the Italian balance sheet and on 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 to Germany, the exchange rate had fallen and the German company suffered a substantial currency loss. This loss, however, was not 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*".[313]

Obstacles to the establishment of a foreign branch can also result from the application of parafiscal levies. In CIBA,[314] which concerned an Hungarian contribution to a public fund dedicated to vocational training, levied on companies and calculated on the basis of the total wage costs, the Court considered that the wage costs related to an establishment in another Member State could not be taken into account in the contribution basis if, because they employed workers in a foreign and not domestic establishment, the companies were in

[309] *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.
[310] ECJ, 14 December 2000, Case C-141/99, *AMID v Belgische Staat*, *ECR* I-11619. See no. 90.
[311] ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium v Finanzamt Heilbronn*. See also, ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer, ECR* I-10837.
[312] ECJ, 28 February 2008, Case C-293/06 *Deutsche Shell v Finanzamt für Grossunternehmen in Hamburg, ECR* I-1129.
[313] *Deutsche Shell*, para. 44.
[314] ECJ, 15 April 2010, Case C-96/08, *CIBA*.

practice precluded from benefiting from that fund or from being allowed a deduction of training expenses.

According to a letter issued by the Ministry of Finance, Germany will accept as a rule the deduction of exchange losses, as stated in Deutsche Shell; however, it is up to the taxpayer to prove the existence of the currency loss.[315]

2.3.1.2.2. Tax treatment of subsidiaries established in other Member States

74. The Court of Justice has issued various rulings on the taxation of multi-national groups of companies. Some of these cases, such as ***ICI***,[316] ***Marks and Spencer***,[317] ***Rewe Zentralfinanz***,[318] ***Lidl Belgium***[319] and ***Krankenheim***[320] refer to the deductibility of foreign losses, and are discussed in nos. 88 *et seq*.

75. Other cases concern the fiscal treatment of intra-group transactions. In the case of ***X AB and Y AB***,[321] 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 paragraph 105).

76. The Court found furthermore unjustified differences between parent companies on the basis of the State of residence of their subsidiaries in ***Bosal***[322] and in ***Keller Holding***[323] as to the deductibility of holding and financing costs (see nos. 146 *et seq*.)

77. Anti-abuse rules may also conflict with the freedom of establishment. ***Cadbury Schweppes***[324]and ***CFC and Dividend Group Litigation***[325] 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.[326] 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.

78. However, the Court considered in ***Columbus Container***[327] that CFC legislation (in the case at hand, the provision challenged provided for a switch from the exemption to the credit method) 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.

[315] Letter of the BMF of 23 November 2009, *TNS Online*, 1st December 2009.
[316] Case C-264/96, *ICI,* fn 67, esp. para. 28. .
[317] Case C-446/03, *Marks & Spencer,* fn 213.
[318] ECJ, 29 March 2007, Case C-347/04, *Rewe Zentralfinanz v Finanzamt Köln-Mitte*.
[319] ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium v Finanzamt Heilbronn*.
[320] ECJ, 23 October 2008, Case C-157/07, *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz GmbH.*
[321] ECJ, 18 November 1999, Case C-200/98 *X AB, Y AB, ECR* I-8264.
[322] ECJ, 18 September 2003, Case C-168/01, *Bosal Holding, ECR* I-9401.
[323] ECJ, 23 February 2006, Case C-471/04, *Keller Holding, ECR* I-2107.
[324] ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes, ECR* I-7995.
[325] ECJ, Order of 23 April 2008, Case C-201/05, *The Test Claimants in the CFC and Dividend Group Litigation.*
[326] *Cadbury Schweppes*, para. 44.
[327] ECJ, 6 December 2007, *Columbus Container v Finanzamt Bielefeld-Innenstadt, ECR* I-10451. 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. Interestingly enough, the German *Bundesfinanzhof* ruled in a judgment of 21 October 2009 that despite the ECJ ruling, the provision containing this switch-over clause was contrary to EU law (see IStR, 2010, p. 149 with comments of B. Lieber p.142- and S. Sydow p. 174)

79. The European Council issued Resolution 2010/C156/01[328] whereby it recommends to the Member States to retain, from a non-exhaustive list given, some indicators suggesting that profits may be artificially diverted to a CFC; similar guidelines are also given as to thin-capitalisation rules.

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[329] CFC rules might nevertheless be considered as contravening European law.[330] However, the UK Government issued in 2010 a discussion document aiming at modernising UK CFC rules without especially targeting EU compliance questions.[331] [332]

The EU Commission is now challenging two UK provisions:[333] first, when a UK resident individual transfers assets to a company in another Member State, the investor is subject to tax on the income generated by the company to which he contributed the assets. Such taxation does not exist in the case of a contribution to a UK company;[334] similarly, when a UK resident-company acquires more than a 10% share of a company in another Member State, it is liable to tax in the UK on capital gains realised on the sale of assets by the other company, while no taxation is due in the case of a similar share investment in the UK.

Implementation by national jurisdictions may raise difficulties: in a Vodafone case, the UK High Court[335] decided, based on Cadbury, that the UK CFC regime violated the EU freedom of establishment; the Court of Appeal[336] reversed the decision.

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,[337] so that add-back taxation does not apply, when the taxpayer can prove that the controlled company (resident in another EU or EEA Member State) carries on a "genuine economic activity".[338] 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

[328] *OJ* L156/1 of 16 June 2010.
[329] 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.
[330] UK *Doc*. 2010-1875 commented by O'Shea, T., "U.K. Has New CFC Regime in Pipeline", *TNI*, 2010, 571; 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. See also information given at www.hm-treasury.gov.uk/controlled_foreign_companies.htm . These rules would be introduced in Finance Bill 2012.
[331] Evans, D. and Delahunty, L., *Ibid*., p. 15.
[332] *Ibid*., p. 15.
[333] Commission Press Release IP/11/158 of 16 February 2011.
[334] A similar provision also exists under Belgian law (see Art. 344, §2, BITC).
[335] *Vodafone 2 v Revenue & Customs Commissioners,* [2008] EWHC 1569 (Ch), *Doc*. 2008-15070.
[336] May 2009 [2009] EWCA Civ 446, Doc. 2009-11898; the UK Supreme Court dismissed Vodafone's appeal (*TNI*, 2010, 320). The case had been referred to the ECJ by the Special Commissioners of income tax London in 2005; the case was removed in 2008 by an Order of the ECJ, 20 August 2008, Case C-203/05.
[337] Cf. Article 24 of the Jahressteuergesetz 2008 (JStG) of 20 December 2007, which entered into force on 1 January 2008 (BGBl I 2007 Nr. 69; *http://217.160.60.235/BGBL/bgbl1f/bgbl107s3150.pdf*).
[338] German Foreign Tax Act, AStG, Sec. 8 para. 2 as amended by the Jahressteuergesetz 2008.

movement of services. Following *Columbus*, the German Supreme Court ruled that the pre-2008 German CFC rules infringed the EU Treaty and concluded that, as the switchover clause was a consequence of the EU-incompatible rules, it also infringed EU law.[339]

Germany,[340] Denmark,[341] Finland,[342] Sweden[343] and Hungary[344] amended their CFC legislation.

France published lengthy guidelines,[345] commenting on changes made by Finance Law for 2006 and Rectificative Finance Law for 2005.

Italy introduced new rules in 2009, completed with a Circular Letter, thus executing the ECJ case-law in line with the Council Resolution.[346] [347]

80. In ***Lammers***, the Court held as infringing the freedom of establishment a Belgian provision under which interest paid, under certain circumstances, by a Belgian company to a director which is a company established in another Member State are reclassified as dividends, whereas such reclassification does not apply to interest paid, under the same circumstances, to a director which is a Belgian company.[348]

Belgium has not yet amended its provision on interest reclassification.

Some other national provisions could be challenged in a similar way, as, for example, Article 155A of the French CGI, providing for taxation in France of some services fees paid to non-resident persons, on the basis of a general anti-abuse presumption; domestic Courts have divergent opinions as to its compatibility with EU principles.[349]

The disallowance of the deduction of excessive interest on a loan in a cross-border situation, whereas in a pure domestic situation no disallowance would occur, is considered as an unjustified restriction on the freedom of establishment, said a German Court.[350]

81. 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 be treated like domestic branches or subsidiaries.[351]

[339] German Supreme Court, 21 October 2009 *TNI*, 2010, 322, *TNS Online*, 25 January 2010.
[340] 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).
[341] Revised Bill amending CITA of 1 June 2007, *TNS Online*, 6 June 2007.
[342] The new rules apply as from 1 January 2009 except as regards a foreign entity's permanent establishment (income year 2015), *TNI*, 2009, 666.
[343] Draft Bill of 25 June 2007, *TNS Online*, 2 July 2007.
[344] As per 1 January 2010; the CFC rules do not apply to companies having their seat or residence within the EEA (*PwC EU Tax News*, 2010/1, 13).
[345] BOI 4H-1-07 of 16 January 2007, *TNS Online*, 29 January 2007.
[346] Decree Law n° 78 of 1st July 2009; circular Letter n° 51/E.
[347] Council Resolution of 8 June 2010 on *Coordination of the Controlled Foreign Corporations (CFC) and thin capitalisation rules within the European Union*, *OJ* C156/1 of 16 June 2010.
[348] ECJ, 17 January 2008, Case C-105/07, *NV Lammers & Van Cleeff v Belgium*, *ECR* I-173.
[349] Incompatibility, re company management : CAA Douai, 14 December 2010, Concl. Minne, *Dr. Fisc.*, 2011, nr. 133, 48: Compatibility, re a football player and his image: CAA Lyon, 23 November 2010, concl. Monnier, *Dr. Fisc.,* 2011, nr. 132, 42, obs. de la Mardière, Ch.
[350] Finanzgericht Münster, 22 February 2008, *TNS Online,* 16 July 2008.
[351] For a comment, see Terra/Wattel, (2005), p. 150.

2.4.2. Cross-border provision of services and investments

2.4.2.1. In the State of activity or investment

82. Besides restrictions linked to the establishment of companies in other Members States, other tax obstacles may hinder either cross-border investment or cross-border provision of services. Cross-border investment and services are directly affected when Member States exempt from a particular tax resident companies only, as the Court considered in ***ELISA*** (tax on immovable property)[352] and ***Regione Sardegna*** (tax on stopovers for tourist purposes by aircraft or by recreational craft).[353] Such restriction might be justified, as regard EEA countries (Article 40 EEA), as the Court said in ***Rimbaud***, by the need to prevent tax evasion insofar as it targets purely artificial contrivance, and by the existence of a different legal framework where no possibility exists for the tax authorities concerned to check with the third country information that would be disclosed by the taxpayers.[354] In ***Prunus***,[355] the Court will examine the same French tax on immovable property in relation with specific rules of the TFEU on "overseas countries and territories" (OCTs).

> The Dutch Supreme Court recently ruled on a provision providing for the taxation of a deemed income on shareholdings (4% of the fair market value of the shares) in companies which are not based in the Netherlands. Such provision is covered by the "standstill" clause of Article 63 TFEU and therefore the freedom of capital cannot be invoked.[356]

83. Concerning cross-borders services, the case-law of the Court of Justice on Article 66 TFEU (Art. 59 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").[357] 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***, paragraph 39) but also for companies.

84. In Germany, non-residents are subject to a 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***[358] (paragraph 84) 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 under Article 66 TFEU (Art. 59 EC).[359] 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 EU law. It denied for the computation of the withholding by non-residents the right to claim a deduction of business expenses that were directly economically linked to their German-sourced income, while permitting the immediate deduction of these expenses for residents.[360]

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[352] ECJ, 11 October 2007, Case C-451/05, *ELISA v Directeur général des impôts, ECR* I-8251*.* The French Supreme Court (Cour de Cassation) applied Elisa in a decision of 29 September 2009, n° 08-14.538, available at www.courdecassation.fr.
[353] ECJ, 17 Novembre 2009, Case C-169/08, Regione Sardegna, *ECR* I-1084.
[354] ECJ, 28 October 2010, Case C-72/09, *Ets Rimbaud.*
[355] Pending Case C-384/09, Prunus SARL v Directeur des Services fiscaux (Opinion AG, 9 December 2010).
[356] Hoge Raad, 17 December 2010, *PwC EU Tax News,* 2011/1, 14.
[357] *Danner*, para. 29; C-433/04, *Commission v Belgium,* para. 28 with referral to previous judgments, among others 25 July 1991, Case C-76/90, *Säger, ECR* I-4221.
[358] ECJ, 3 October 2006, Case C-290/04, *Scorpio, ECR* I-9461.
[359] *Scorpio*, paras. 33-34.
[360] *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.

In ***Centro Equestre da Lezíria Grande,***[361] 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 EU 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.[362]

Germany did not immediately properly implement the judgment in Scorpio and Centro Equestre. It complied following a Reasoned Opinion of the Commission.[363] In its decision of 29 November 2007, the BFH considered the withholding tax applied to a non-resident artist as compatible with EU law.[364]

The Hoge Raad der Nederlanden recently referred a case relating to withholding taxes on fees paid to football clubs asking whether the withholding obligation would be a restriction on the provision of services.[365]

The EU Commission had to initiate procedure against some Member States: Luxembourg amended its legislation so that non-resident can benefit taxation on net income with standard progressive rates if lower than the 15% withholding tax on gross professional income.[366] Belgium[367] also had to amend its regulation.

A similar rule now applies in Portugal with, however, low practical consequence as most of its double tax treaties provide for exemption of foreign service providers in Portugal.[368]

85. Surprisingly, in a similar situation relating to outbound interest, the Court denied comparability between residents and non-residents, applying the comparability test from the viewpoint of the State of source ***(Truck Center***).[369] The Court points out that the non-resident recipient is not in a cash-flow disadvantage position compared to the resident;[370] this can be criticised as well as the fact that no attention was paid to the question of taxation on gross or net income. It seems however that this case should be considered as isolated.[371] This question of considering gross or net income on interest paid to non-resident was submitted to the Court in a ***Commission v Portugal*** case, which was rejected on formal grounds (no. 47).[372]

The view that the non-resident taxpayer receiving dividends or interest should be taxed on its net income is supported by the Dutch District Court of Haarlem.[373]

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***

However, the restriction was held to be justified by the necessity to ensure the proper functioning of source taxation (see paras. 53-61).

[361] ECJ, 15 February 2007 Case C- 345/04, Centro Equestre da Lezíria Grande v Bundesamt für Finanzen, ECR I-1425.

[362] 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 judgment. The Court considered that this was not relevant for the purposes of assessing the compatibility of the situation of the taxpayer with EU law.

[363] See Commission Press Release IP/07/413 of 26 March 2007.

[364] BFH, 29 November 2007, *TNS Online* 28 February 2008.

[365] Hoge Raad der Nederlanden, n° 09-00296 and 09-00400, Feyenoord.

[366] See Law of 26 July 2010 modifying Art. 157, 157 bis and 157 ter LIR (*Memorial* A-N°120 of 28 July 2010); *Parl. Doc*. Lux., 2009-2010, n° 6130, p. 2.

[367] Commission Press Release IP/08/337 of 28 February 2008; Law of 4 May 2007, *M.B.*, 15 May 2007.

[368] Budget Law for 2009, *TNI*, 2008, 389.

[369] ECJ, 22 December 2008, Case C-282/07*, Etat belge v Truck Center SA, ECR* I-10767, sp. Paras 42, 43, 45.

[370] Para. 49.

[371] ECJ Task Force of the CFE, Opinion Statement on Truck Center, *E.T.*, 2009, p. 491.

[372] ECJ, 17 June 2010, Case C- 105/08, Commission v Portugal.

[373] District Court of Haarlem, 3 August 2010, case 2008/05180; Oudemans, Ch., "The Compatibility of Dutch Dividend Withholding Taxes with EU Law", *TNI*, 2010, 575-576.

Belgium,[374] 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 59 and 60 EC (now Articles 66 and 75 TFEU).[375]

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 44 TFEU (Art. 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, paragraph 51, Safir, paragraph 42, Danner, paragraph 42, Skandia/Ramstedt, paragraph 42, Schwarz/Gootjes-Schwarz, paragraph 52 and Case C-318/05 Commission v. Germany, paragraph 52).

86. A company's Member State of residence may hinder through restrictive tax rules the cross-border provision of services to clients established in other Member States. In ***Jobra***, an Austrian provision limiting the benefit of an investment premium for the acquisition of tangible assets to assets used in a domestic place of business was held incompatible with EU law, insofar as it excluded from the premium new vehicles that had been leased to the foreign establishment of a domestic company and were used primarily in other Member States.[376] A similar territorial condition was found incompatible with the free movement of capital in ***Tankreederei***, which concerned a Luxemburg provision denying the benefit of a tax credit for investments to domestic undertaking as regards capital goods, physically used in the territory of another Member State.[377]

2.4.2.2. In the State of residence

87. Article 59 TFEU (Art. 52 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***[378] 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.[379] Similarly, in ***Laboratoires Fournier***, and later in ***Commission v Spain (C-248/06)***,[380] the Court considered that a national legislation restricting the benefit of a tax credit for research expenses incurred in other Member States was contrary to Article 49 EC (now Article 56 TFEU),[381] 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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[374] ECJ, 9 November 2006, Case C-433/04, *Commission v Belgium*, *ECR* I-10653. See also the pending case C-498/10, *X*, *O.J.*, C 13, 15.01.2011, p.19

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

[376] ECJ, 4 December 2008, Case C-330/07, *Jobra GmbH, ECR* I-9099.

[377] ECJ, 22 December 2010, Case C-287/10, *Tankreederei.*

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

[379] *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.

[380] ECJ, 10 March 2005, Case C-39/04, *Laboratoires Fournier, ECR* I-2057; *Commission v. Spain (C-248/06)*

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

In France, the ***Laboratoires Fournier*** judgment has been implemented properly through legislative amendments.[382] On the contrary, Belgian law still subjects a specific profit exemption to the condition that the researcher is employed in Belgium,[383] and also contains several provisions subjecting tax advantages to a "territorial" condition. In Finland, accelerated depreciation is granted only to certain investments in some developing regions.[384] 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.[385]

2.4.3. Consolidation and losses

88. 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.

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

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

2.3.3.1.1. In the State of residence

90. In ***AMID***[386] the issue concerned the tax treatment of a loss incurred in the State of residence by a company which had a permanent establishment in another Member State (Luxembourg), 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 established a differentiated tax treatment as between those two categories incompatible with EC law.[387]

[382] 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.
[383] Article 67 ITC. Such a requirement also exists as regards capital gains spread taxation under the condition of reinvestment in Belgium.
[384] IBFD Database. December 2007.
[385] See Commission Press Release of 23 March 2007 IP/07/408.
[386] ECJ, 14 December 2000, Case C-141/99, *AMID v Belgian State*, *ECR*, I-11679.
[387] *AMID*, paras. 23 and 31.

Belgium has not yet modified its tax legislation. However, the tax authorities comply with the ruling, though in a very narrow reading.[388] The Court's statement has been extended to Belgian companies having non-EU permanent establishments in treaty countries, on the basis of the Belgian Constitution non-discrimination clause.[389].

91. A similar situation regarding an individual was solved in the same way.[390] 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*".[391]. In the absence of justification, the Court ruled that the provisions in question contravened the free movement of persons.

92. The company's Home State can also create an unfavourable tax treatment for losses of a permanent establishment incurred in the Host State. In ***Stahlwerk Ergste Westing,***[392] 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 case ***Lidl Belgium,***[393] 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. The Court bases its reasoning on the fact that "*a permanent establishment constitutes, under tax convention law* [*and international legal practice*[394]], *an autonomous entity*",[395] and on the statement that loss compensation is to be considered as a "*tax advantage*",[396] to consider that the tax regime at issue involves a restriction on the freedom of establishment, restriction as the tax advantage is denied to enterprises operating through foreign permanent establishments while being granted to pure national enterprises. This restriction however is justified[397] but does not preclude the State of Residence to grant losses compensation when there is no more possibility for the losses to be taken into account in the State of source.[398]

[388] 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.
[389] Court of Appeal of Brussels, 17 September 2009, FJF 2010/77confiming Trib. 1st Instance of Brussels, 26 October 2007, JDF, 2009, at 30.
[390] ECJ, 12 September 2002, Case C-431/01, *Mertens v Belgian State*, *ECR*, I-7073.
[391] *Mertens*, para. 36.
[392] ECJ, Order of 6 November 2007, Case C-415/06, *Stahlwerk Ergste Westig v Finanzamt Düsseldorf-Mettmann*, *ECR* I-151.
[393393] ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium v Finanzamt Heilbronn*, *ECR* I-3601.
[394] *Lidl Belgium*, para. 22.
[395] Para. 21.
[396] Para. 23.
[397] As to the first justification – preservation of the allocation of the power to impose taxes -, the Court relies on the "*symmetry between the right to tax profits and the right to deduct losses*" under tax conventions, and on the need to avoid any possibility to allow companies to choose freely the Member State in which their losses could be deducted. The Court also recognizes a danger that losses may be taken into consideration twice.
[398] The starting point of the Court that a P.E. is an "autonomous entity" as well as the theory of loss compensation as being a "tax advantage" may be critisised: see a.o. Opinion Statement of the ECJ Task Force of the Confédération Fiscale Européenne on Losses Compensation within the EU for Individuals and Companies Carrying Out Their Activities through Permanent Establishments, *Eur. Tax*., 2009, 487.

Moreover, in the case ***Krankenheim Ruhesitz***,[399] the Court of Justice had to decide whether freedom of establishment allows a Home State to reintegrate losses incurred by a foreign branch in a case where the loss has been deducted in the Home State but cannot be effectively deducted in the other State. According to the Court, such rule constitutes a restriction on the right of establishment which is justified by the need to guarantee the coherence of the German tax system. Since losses are reintegrated only up to the amount of profits made by the permanent establishment, the restriction is proportionate to the objective pursued. The Home State does not have to consider the fact that the State of Source does not allow for carrying-over the losses.

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.[400] However, a tax credit system with no refund or carry-over of excess tax credit applies in Slovenia, Spain, Portugal[401] and the Czech Republic. A similar breach of EC Law might also occur under certain circumstances under the Irish,[402] French,[403] Finnish, Polish, Bulgarian, and Luxembourg systems.[404]

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,[405], Poland,[406] 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,[407] 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.

Prior to Lidl Belgium, the German Supreme Court ruled that, as to an individual taxpayer, the denial to set-off in Germany foreign losses arising from tourism activities is not compatible with EU freedom of establishment. The counteraction of tax avoidance can not justify such a general exclusion.[408]

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[399] ECJ, 23 October 2008, case C-157/07, *ECR* I-8061.

[400] 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.

[401] This country applies a "per country" tax credit system.

[402] Recently, Ireland introduced a "pooling" system authorising 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).

[403] 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 (available at bictel.ulg.ac.be/ETD-db/collection/available/ULgetd-12112009-150120/).

[404] In non-DTC situations, the credit method applies.

[405] This is only the case when the exemption is provided for by a DTC.

[406] *Ibid*.

[407] Tribunal Administratif Luxembourg, 19 April 2005, no. 17.820 confirmed by the Cour Administrative, 10 August 2005; see also in Austria a similar situation.

[408] BFH, 29 January 2008, *TNS Online*, 13 June 2008.

After Lidl Belgium, the Financial Court of Düsseldorf ruled that, based on the German principle of symmetry and the ECJ case-law, losses incurred in its Italian and French permanent establishment by a German company could not be set-off against German profits as they were not "final". According to the Court, "final" losses can only be deducted for the tax period where the "no-possibility" test is fulfilled.[409] The Court of Hamburg,[410] on the contrary, is of the opinion that such "final" losses should be taken into consideration in the year where they occurred first, not in the year where they become final; the case is now referred to the Federal Financial Court.[411]

A final Lower Court decision rules that Germany is not obliged to "import" Austrian losses where this country denies off-setting because losses are not shown in a balance-sheet.[412]

2.3.3.1.2. In the Host State

93. In ***Futura Participations and Singer***,[413] 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. 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.[414] 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.

2.4.3.2. Intra-group losses and transfers (consolidation)

94. Most countries restrict the setting-off of losses to the taxpayer who has incurred them.[415] 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,[416] except by the application of specific tax provisions on group consolidation.[417] 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, Cyprus, Finland, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden and the UK).[418]

2.3.3.2.1. Loss offset within EU multinational groups

[409] Finanzgericht Düsseldorf, 8 September 2009, n° 6 K 308/04 K, *TNS Online*, 16 March 2010.
[410] Finanzgericht Hamburg, 18 November 2009, n° 6 K 147/08, *TNS Online*, 18 March 2010.
[411] BFH, 10 August 2010, cases I R 107/09 and 100/09.
[412] Finanzgericht Münster, 17 September 2010, *PwC EU Tax News*, 2001/1, 12.
[413] Case C- 250/95, *Futura Participations & Singer v Administration des contributions*, *ECR* I-2471.
[414] *Futura Participations and Singer,* para. 22.
[415] 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.
[416] 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.
[417] On the existing and possible systems of "consolidation", see Masui, (2004).
[418] "*This is a new trend among European countries especially since 2000.*"; Masui, Y., (2004), pp. 53-54.

95. 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".

96. ***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.[419]

97. 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.[420] The Court of Justice dealt with this question in ***Marks and Spencer***.[421] 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.[422] The Court recognised 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 minimise 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.[423]

[419] ECJ, 16 July 1998, case C-264/96, Imperial Chemical Industries (plc v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes), ECR I-471, 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.

[420] Boon, R., and Pelinck, M., De ICI-zaak en Articles 15 en 13, eerste lid, Wet Vpb. 1969, *WFR*, 1998, p. 1824.

[421] ECJ (Grand Chamber), 13 December 2005, Case C-446/03, *Marks & Spencer, ECR* I-10837.

[422] *Marks & Spencer*, para. 51.

[423] *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.

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.[424]

98. As regards the other Member States, the Court has also decided on the "contribution scheme" which is applicable in Finland and Sweden. In ***X AB and Y AB***, the ECJ concluded that the Swedish contribution relief must be granted also when the contributing company (to a Swedish loss-making recipient) is not a Swedish resident company but an EU resident company.[425] In the reverse situation of a contribution made by a Finnish company to its loss-making parent in another Member State, the ECJ upheld in ***Oy AA***[426] (commented at n° 69) the Finnish law allowing a Finnish subsidiary to make a tax deductible financial transfer to a Finnish parent but not to its non-resident (loss-making) EU parent; according to the Court, 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.

99. The French integration system was under scrutiny in ***Papillon***, which was denied integration because it held its loss-making French sub-subsidiary through a 100% subsidiary in the Netherlands. This restriction on the freedom of establishment can be justified by the need for coherence which requires that the intra-group provision for depreciation on the shares be neutralised in order to avoid the risk that losses be taken into consideration twice; the French provision was nevertheless "overruled" as the Court[427] pointed out that that risk can be avoided by the provision of documentary evidence required from the group companies.

100. In ***X Holding***, the Court had to consider the Dutch fiscal unity regime which is denied to a subsidiary non resident in the Netherlands. Such a scheme is justified by the need to safeguard the allocation of the power to impose taxes between the Member States: "*Since the parent company is at liberty to decide to form a tax entity with its subsidiary and, with equal liberty, to dissolve such an entity from one year to the next, the possibility of including a non-resident subsidiary in the single tax entity would be tantamount to granting the parent company the freedom to choose the tax scheme applicable to the losses of that subsidiary and the place where those losses are taken into account*".[428] The Court rejected the argument based on the comparability with the situation of permanent establishments.

In Sweden, loss relief is granted through a contribution mechanism leading to the taxation of the contribution at the level of the receiving company.

101. 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 realised on its territory.

> 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 cannot be compensated in that Member

[424] *Marks & Spencer,* paras. 54-56. Cf. also AG Poiares Maduro, paras. 49, 82.
[425] ECJ, 18 November 1999, Case C-200/98 *X AB, Y AB, ECR* I-8264.
[426] ECJ, 18 July 2007, Case C-231/05, *Oy AA*, *ECR* I-6373.
[427] ECJ, 27 November 2008, Case C-418/07, *Société Papillon v Ministère du Budget*, *ECR* I-8947.
[428] ECJ, 25 February 2010, Case C-337/08*, X Holding BV v Staatsecretaris van Financiën*, para. 31.

State.[429] 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.[430] Several claims have been lodged with UK Courts on the implementation of Marks and Spencer decision. Two main practical difficulties appear concerning the application of the "no-possibilities test" and the prescribed time limit to introduce claims. This illustrates how difficult it can be to integrate general statements laid down by the ECJ, into national practical rules.[431] The EU Commission on its side is challenging the UK rules, considering that conditions imposed make it virtually impossible for taxpayers to benefit from the relief.[432]

On 18 August 2009, a UK case on whether British permanent establishment's losses could be granted the loss group relief was decided in the line of ***Papillon***; HMRC is appealing.[433]

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.[434] 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.[435]

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.[436] In Slovenia, the group regime introduced in 2005 in which groups could only be formed by two resident companies[437] has been abrogated as from 1 January 2007. Cyprus grants loss offsetting only to resident companies and to permanent establishments of non-resident companies that elect the resident companies treatment.

[429] 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/.

[430] 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.

[431] For a summary of the national decisions, see Parillo, K., "Highlights – U.K. Court Hands Marks&Spencer Partial Victory", *TNI*, 2010, 319.

[432] Commission Press Release, IP/09/1461 of 8 October 2009.

[433] Philips Electronics v HMRC, [2009] UKFTT 226 (TC), TC00176 (Aug. 18, 2009).

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

[435] 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.

[436] 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.

[437] New CITA rule introduced in 2005 (*TNS Online*, 13 June 2005).

The Danish[438] and the Italian[439] consolidation regimes also seem to be in line with the Marks and Spencer decision. In France, although the consolidation regime[440] is normally limited to French resident companies and French permanent establishments of foreign companies, the "consolidated income regime" granted upon ministerial approval[441] 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.[442] Following ***Papillon***, the French consolidation regime has been amended.[443]

Ireland also made amendments to enact Marks and Spencer.[444]

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.[445] Thus, no compensation of losses from foreign subsidiaries is allowed while such setting off exists as regards domestic subsidiaries.[446]

Furthermore, the Luxembourg *Cour Administrative* 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.[447]

Under the German *Organschaft* regime, parents and subsidiaries must be German resident companies. They can conclude for a minimum period of five years[448] a "profit and loss pooling agreement" whereby the controlling parent covers the losses of the controlled company. This regime, which was denied to foreign subsidiaries of a German parent company, is under scrutiny before the German Courts as well as the EU Commission.[449] These cases have now to be considered taking also into

[438] 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.

[439] 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.

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

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

[442] 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 & Spencers', *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.

[443] Art. 33 of the *Loi de finances rectificative* n° 2009-1674 , *JORF* 0303 of 31 December 2009, p. 22940.

[444] 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.

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

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

[447] Cour Administrative Luxembourg, 19 April 2007, no. 21979C confirmed by the Administrative Tribunal, 1st December 2010, n° 26754, *PwC EU Tax News,* 2011/1, 14.

[448] Anticipated termination of the agreement leads to retroactive cancellation of the group regime.

[449] The Commission initiated an infringement procedure against Germany on January 29, 2009 (2008/4409): Eckhardt, Th., A German View on Cross-Border Consolidated Losses, *TNI*, 2010, 520; Lower Financial Court of

consideration the X Holding decision. By a Decree of 2011, Germany extends its regime to EU/EEA companies with place of effective management in Germany[450] in order to comply with a Commission's request.[451]

In a "final losses" situation, a German Lower Tax Court disallowed the set-off of Italian losses; the case is now under appeal.[452]

In the same way, the Dutch "fiscal unity regime"[453] is limited to resident companies and it is now clear that this restriction is justified under EU law, confirming some Dutch lower courts' decisions.[454] The Portuguese tax relief regime is also limited to resident companies; no change has been made since Marks and Spencer.[455]

Similarly, Finland restricts its group contribution regime to resident companies. Interestingly, in the *Oy AA* case (discussed above paragraph 98), the Court ruled that Article 49 TFEU (Art. 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.[456] In a situation similar to Marks and Spencer, the Finnish Supreme Administrative Court 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.[457] It can 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).

Swedish law was amended to comply with the ***X AB and Y AB*** case. It seems that the Swedish government at first glance considered Marks & Spencer as overruled by *Oy AA*. However, the Swedish Supreme Administrative Court granted the benefit of the contribution relief to Swedish companies paying a contribution to their parent in other Member States, in situation where the losses were final. The Supreme Court applied the Marks & Spencer criteria. The national law was changed accordingly.[458]

Finally, the legislation of the Member States that did not adopt any consolidation regime, as, for example, Belgium, Hungary, the Czech Republic, Estonia, Slovakia 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.[459] Recently, Latvia and Lithuania introduced an intra-group loss relief which is deemed to be EU friendly.[460]

Both Marks & Spencer and Lidl raise practical questions relating to the "no-possibilities test" (especially whether one must take into consideration the legal possibility to use losses or the factual economical circumstances), to the timing for the deduction to be

Saxony, 11 February 2010, n° 6 K 406/08, considers that the exclusion of the foreign subsidiaries losses from the fiscal unity regime is not compatible with EU rules (*PwC EU Tax News*, 2010/2, 9).

[450] German Decree, 28 March 2011, *TNS Online*, 6 April 2011.

[451] Commission Press Release IP/10/1253 of 30 September 2010.

[452] Eckhardt, Th., *op. cit*., at 521.

[453] Art. 13c, 13d and 15 Dutch Law on Corporate Tax.

[454] Lower Court of Harlem, 20 February 2008, n° 06/6167, *TNS Online*, 27 February 2008.

[455] Art. 63-66 CIRC.

[456] Finnish Supreme Administrative Court, 31 December 2007, SAC 2007:93: the Court follows the ECJ's judgement.

[457] SAC 2007:92, of 31 December 2007.

[458] Dahlberg, M., Sweden – Lawmakers Considering Cross-Border Group Contributions, *TNI*, 2010, 384-385.

[459] Zorman, G., The Slovenian Tax Reform 2006, *Eur. Tax*., 2007, p. 204, at 205.

[460] IBFD Data Base Latvia - Lithuania.

made (at the time when losses occurred or at the time the become final), to the computation of the losses (according to the national law or the State of source law).

The German BFH qualifies as "final losses", as regards permanent establishement, restriction by factual means which hinder the taxpayer to set-off its losses;[461] thus, losses can not be compensated where the permanent establishment was closed before the ending of the carry-forward period in the State of source.

102. In the line of the Lidl Belgium and Marks & Spencer cases, the Court will have to decide on a provision restricting the loss group relief when a resident company claims for relief of the losses incurred by the permanent establishment in the same State of a group company established in another Member State to the condition that the loss can not at any moment be taken into consideration in another State.[462]

2.3.3.2.2. Deduction of losses from intra-group participations

103. 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. In ***Rewe Zentralfinanz***,[463] 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.[464] 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 …*".[465] 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*".[466]

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

[461] BFH, 10 August 2010, n° IR 100/09 and IP 107/09. See also Wunderlich, C., Germany in the Aftermath of Lidl Belgium, *TNI*, 2010, 969; Bal, A., Latest Developments on Cross-Border Loss Relief in Germany, *Eur. Tax.*, 2010, 530.
[462] Pending case C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v Philips Electronics UK Ltd.*
[463] ECJ, 29 March 2007, Case C-347/04, *Rewe Zentralfinanz v Finanzamt Köln-Mitte*, *ECR* I-2647.
[464] *Rewe Zentralfinanz*, para. 36.
[465] *Rewe Zentralfinanz*, para. 43. See also Opinion AG, para. 32.
[466] *Rewe Zentralfinanz*, para. 48. The Rewe Zentralfinanz ruling is in line with the decisions in *Bosal* and *Keller Holding*.

not the shareholding confers a definite influence over the company's decisions and allows the shareholders to determine its activities.[467]

104. Following the Rewe Zentralfinanz, Germany amended its Law on corporation Tax, with effect as to holdings in resident companies for tax-year 2002 and as to holdings in non-resident companies for tax-year 2001. In ***STEKO***, this differentiation was held contrary to the free movement of capital; the transitional nature of the discrimination was no justification.[468]

Thus, the "partial-income rule" introduced in Germany applies to foreign shareholdings as from fiscal year 2001 and to domestic shareholdings as from fiscal year 2002. For the year 2001, write-downs and capital losses on foreign shareholdings were partly deductible and capital gains were partly taxable, whereas capital gains on domestic shareholdings were fully taxable. Following STEKO, the German Courts ruled in favour of full deductibility of capital losses and write-downs on foreign participations for tax year 2001. However, it also decided that capital gains were fully taxable; the case is now referred to the Supreme Court.[469] shareholders to determine its activities.[470]

2.3.3.2.3. Intra-group transfers

105. Restrictions may also arise in relation to the tax treatment of intra-group transfers of assets.[471] In ***X and Y***,[472] 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.

106. ***SGI*** challenged a national provision aiming at taxing unusual and gratuitous advantages – in that case, an interest-free loan - granted by a company to a foreign company being in a relationship of interdependence. The provision addresses only cross-border situations and as such is restrictive. However, the Court[473] considered it as justified and proportionate insofar as it allows the State of the lending company to exercise its tax jurisdiction in relation to activities carried out in its territory, so preserving a balanced allocation of the power to tax between Member States and to prevent tax avoidance. It is up to the national courts to verify that the corrective tax measure is confined to the part of the profit which would have been agreed if the companies would not have had a relationship of interdependence.

2.3.3.2.4. Intra-group loans

107. 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 capitalisation 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

[467] Ernst & Young, *EuGH-Rechtsprechung Ertragsteuerrecht* (2007), p. 531.
[468] ECJ 22 January 2009, Case C-377/07, *Finanzamt Speyer-Germersheim v Steko Industriemontage GmbH*, *ECR* I-299.
[469] Pending case BFH (IV R 23/10) ; Lower Fiscal Court of Munich, 30 March 2010 (*PwC EU Tax News*, 2010/5, 9.
[470] Ernst & Young, *EuGH-Rechtsprechung Ertragsteuerrecht* (2007), p. 531.
[471] These restrictions are partially addressed by the Merger Directive (2009/113/EC of 19 October 2009, *OJ* L310/34 of 25.11.2009. /EEC).
[472] ECJ, 21 November 2002, Case C-436/00, *X and Y v Risskatteverket*, *ECR* I-10829.
[473] ECJ, 21 January 2010, Case C-311-08, *Société de Gestion Industrielle SA (SGI) v Etat belge*.

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.[474] ***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.[475]

108. 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.[476]

In reaction to the Lankhorst judgment, Germany abolished discrimination of cross-border thin capitalisation by extending the disadvantage, namely the treatment of interest payments on loans as covert dividend, to purely domestic activities.[477] 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.

Subsequent changes have been made in order to reinforce the compliance to EU rules and to render Germany more attractive; according to commentators, these rules still could be challenged under EU law:[478] German rules are now based on income statement limitations. Italy was widely inspired by the German model.

In Germany, some restrictive rules restricting interest deductibility do not apply within a fiscal unity structure ("Organschaft"). The BHF has been referred the case of an inter-company loan between two German companies controlled by a UK company. The fiscal unity was denied, and the restrictive rule applied by the Lower Court, with the effect of increasing the tax basis. The Lower Court considered that this result does not infringe EU law.[479] The compatibility of the German regime might probably also be challenged as regards exclusion of German permanent establishment from the fiscal unity regime.[480]

Following *Thin Cap Group*, the UK changed its rules with the effect to rely on the arm's length principle in order to regulate excessively leveraged financing structure. This

[474] Sec. 8a of the German Corporation Tax Law.
[475] ECJ, 12 December 2002, Case C-324/00, *Lankhorst-Hohorst v Finanzamt Steinfurt*, *ECR* I-11779.
[476] Case C-524/04, *Test Claimants in the Thin Cap Group Litigation* (fn 45).
[477] Sec. 8a German Corporate tax law (KStG).
[478] Webber, S., Thin Capitalization and Interest Deduction Rules : A worldwide Survey, *TNI*, 2010, p. 683 sq,, esp. p. 692-693.
[479] Finanzgericht Hessen, 18 May 2010, n° 8 K 3137/06; pending case BFH IR 54/10 (PwC EU Tax News, 2010/5, 10.
[480] Shou, S., *Die Zinsschranke in Unterrechmensteuerreformgesetz 2008. Zur Frage iherer Vereinbarkeit miet dem Verfassungs – Europa – une Abkommensrecht*, Munich, Beck, 2010, p.109.

might conflict with the principle of certainty.[481] UK Court decided not to apply the rule only when the arrangement was commercially driven rather than tax driven.[482]

In a similar way, after the French *Conseil d'Etat* had found French thin capitalisation rules to the sole detriment of foreign parents to be incompatible with the non-discrimination clause of some double tax treaties,[483] France decided with effect from 1 January 2007 to amend Art. 212 CGI.[484]

In Portugal, with effect from 1 January 2006, thin capitalisation rules are no longer applicable to non-resident entities resident in an EU Member State.[485] 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.[486] Thin capitalisation 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.[487]

109. 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,***[488] 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.

2.5. Taxation of company shareholders

110. 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.

111. 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

[481] Webber, S., "Thin Capitalization and Interest Deduction Rules: A worldwide Survey", *TNI*, 2010, p. 683 sq, esp. p. 695.
[482] Klass, D., "Rereading U.K. Legislation to Reflect ECJ Decisions", *TNI*, 2010, 543.
[483] Conseil d'Etat, 30 December 2003, *Andritz*.
[484] Gutmann, D., *Droit fiscal des affaires*, Paris, Montchrestien, 2010, pp. 285-287 ; Maitrot de La Motte, A., La sous-capitalisation à l'épreuve des libertés de circulation, *L'Année Fiscale 2010, Dr. Fisc*., 2010/8-9, étude 196.
[485] *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.*
[486] For a Court decision applying *Lankhorst-Hohorst*: see Spanish Central Economic-Administrative Court no. 00/2396/2004.
[487] See Marres, O., "The Netherlands", in Brokelind (2007), p. 102 and 107.
[488] 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.

foreign and domestic shareholders and of inbound dividends from foreign and domestic sources which are paid to domestic shareholders.

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

2.5.1. Tax treatment of outbound dividends

2.5.1.1. Withholding tax on outbound dividends

113. 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,[489] 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.

114. The Court has recently issued a number of important judgments on the compatibility of withholding taxes on outbound dividends with EU law.

115. In ***Denkavit Internationaal***,[490] 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.

116. In ***Amurta***,[491] 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

[489] From, in most cases, 25% to 15% or even 5 or 0% in favour of parent companies.
[490] ECJ, 14 December 2006, Case C-170/05, *Denkavit Internationaal v Ministre de l'Economie, ECR* I-11949.
[491] ECJ, 8 November 2007, Case C-379/05, *Amurta v Inspecteur van de Belastingdienst, ECR* I-9564.

Community law, it may, however, achieve conformity with Community law by treaty provisions, subject to the scrutiny of national Courts.

Again in ***Aberdeen***,[492] the Host State exempted dividends paid by a subsidiary to its domestic parent whereas a withholding tax was charged on dividends paid to non-residents companies – in the case at hand a SICAV under Luxembourg law. The Parent-subsidiary Directive does not apply, as a SICAV is not a listed company under that Directive. A difference in treatment can not be justified by the fact that the legal form of a SICAV is unknown under the law of the subsidiary "*since, as the company law of the Member States has not been fully harmonised at Community level, that would deprive the freedom of establishment of all effectiveness*".[493]

117. The reasoning has been extended to an EEA-situation, where **the Netherlands**[494] levied a withholding tax on dividends paid to Norwegian or Icelandic affiliates holding less than respectively 25% or 10% of the shares and exempted dividends paid to EU affiliates holding as little as 5% of the shares. That was found to be a prohibited restriction of the movement of capital under article 40 of the EEA Agreement.

118. In situations not covered by the parent-subsidiary directive, ***Italy***[495] levied a withholding tax[496] on dividends paid to foreign companies but exempted dividends paid to Italian companies. The Court found a restriction of movement of capital; Italy argued that the levy aimed to fight tax evasion, a contention that was dismissed in the case of EU companies, where directive 77/799/EEC on mutual assistance applies, but upheld concerning the EEA countries (Iceland, Norway, Liechtenstein) with which Italy argued[497] that it does not have a provision of exchange of information in tax matters.

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.[498] 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.[499] The waiver also benefits foreign exempt legal persons, such as pension funds, which would be exempt if they were Dutch. Iceland also abolished the existing 15% withholding tax on dividends paid to non-Icelandic resident companies.[500]

The Commission on its side has initiated procedure against numerous Member States: some of them complied (Austria and Germany, Belgium and Spain;[501] Italy and The Netherlands have been referred to the ECJ.[502] In Italy, as from January 1st, 2008, the

[492] ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy, ECR* I-5145.
[493] Para. 50.
[494] ECJ, 11 June 2009, Case C-521/07, *Commission v. Netherlands, ECR* I-4873.
[495] ECJ, 19 November 2009, C-540/07, *Commission v. Italy, ECR* I-10983.
[496] 27%., subject to a refund of 4/9ths
[497] A somehow surprising affirmation, in view, notably, of article 27 of its conventions of 17 June 1985 with Norway (ratified by Italian law No. 108/1987) and of 10 September 2002 with Iceland (ratified by Italian law No. 138/2008). The Court noted that Italy had "maintained, without being contradicted" (para. 71).
[498] 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).
[499] As regards Court decisions applying Denkavit, see: Hoge Raad, 30 November 2007, no.42679. See also Marres, O., "The Netherlands" in Brokelind (2007), p. 101, at 114.
[500] *TNS Online*, 16 April 2007.
[501] Commission Press Release IP/07/06 of 22 January 2007 and Press Release IP/06/1060 of 25 July 2007.
[502] Italy ; ECJ, 19 November 2009, Case C-540/07 ; The Netherlands : ECJ, 11 June 2009, Case C-521/07.

withholding tax on dividends paid to EU residents has been reduced to 1.375 percent, representing the same tax burden as on dividends paid to Italian residents.[503]

The Netherlands complied by a Decree dated 2009, in force as from 11 June 2009:[504] waiver of withholding tax on dividends paid to EEA countries is granted under a.o. a condition of taxation in the State of residence of the recipient.

As to Finland,[505] regarding outbound dividends and non-resident individuals, first, the Finnish Central Tax Board 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;[506] second, the Finnish Supreme Administrative Court considered the Finnish regime as incompatible with EU rules. Last, the Finnish rules are amended as from 1 January 2009, for both individual and company non-resident shareholders; as to these latter, waiver of withholding tax is granted on the condition that no tax credit is available in the State of residence.[507]

A Dutch Court denied to a Spanish company the right to lodge an appeal after the appeal period, based on the Denkavit case-law.[508] The same Court denied the refund of the Dutch withholding tax paid on dividends to a Spanish investment fund; it considered the Spanish fund could not be fiscally equated to a Dutch fund because it was not obliged to distribute its profits and was subject in Spain to a profit tax (at a rate of 1%) while Dutch fund were not.[509]

Another Dutch Court[510] had to scrutinise Dutch domestic rules providing for a tax credit on the withholding tax paid to resident recipients while, for non-residents, the withholding tax is final (and costs related to the dividends received are not deductible); according to the Court, both residents and non-residents are treated equally as they must pay the withholding tax. At the corporate tax level, however, the difference resulting from a tax credit being granted only to resident recipients is mitigated by the application of the tax treaty. When the non-resident recipient is in a loss position in his State of residence, so that there is no tax credit available or to carry-over, the State of source must grant a tax refund of that part of the corporate tax exceeding what a resident recipient is charged, taking into consideration costs directly related to the dividends received, the burden of the proof of the excess being on the taxpayer.

The *Amurta* case is followed by the Dutch Supreme Court in a Dutch/UK situation, where the DTC provides for a tax credit in the UK as State of residence.[511]

The Austrian Supreme Administrative Court ruled that a corporate tax exemption of dividends granted on the condition of a 10% participation in the foreign distributing company whereas no such participation condition is required for domestic dividends is contrary to the EU freedoms. Administrative Guidelines followed this decision.[512]

In Portugal, the conditions for non-residents companies to be granted a corporate income tax exemption on dividends received from Portuguese subsidiaries were more

[503] Tax Bill for 2007, *TNI*, 2008, 991.
[504] Decree n° CPP2009/1310M, *O.G.*, 21 July 2009, *TNS Online*, 3 August 2009.
[505] For a general comment see Helminen, M., "The future of source State Dividend Withholding taxes in Finland and the European Union", *Eur.Tax.*, 2008, p. 354.
[506] Advance ruling no. 10/2007, March 2007.
[507] *TNS Online*, 26 March 2009.
[508] Lower Court of Breda, 2 December 2009, *TNS Online*, 10 February 2010.
[509] Lower Court of Breda, 22 March 2010, *TNS Online*, 14 April 2010.
[510] Lower Court of Haarlem, 3 August 2010, n° AWB 08/5180, 09/2310, 09/3860, 09/3861, *TNS Online*, 11 August 2010.
[511] Hoge Raad der Nederlanden, 8 August 2008, n° 40586, *TNS Online,* 13 August 2008.
[512] VwGH, 17 April 2008, n° 2008/15/0054; Administrative Guidelines of 13 June 2008, *TNS Online*, 7 July 2008.

stringent (higher ownership percentage and longer ownership period). The case is now referred to the ECJ by the Supreme Administrative Court. This regime should be amended by the 2011 State Budget Law.[513]

2.5.1.2. Tax credit for dividends

119. In ***Fokus Bank***,[514] 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.

120. 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.

121. In ***Metallgesellschaft/Hoechst***,[515] the Court found that the denial of the group income election to foreign parent companies constituted an unjustified restriction of the freedom of establishment. 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.[516]

122. ***ACT Group Litigation***[517] raised various questions concerning the ACT regime (see paragraph 120). 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

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[513] Pending case C-199/10; on 15 September 2010, in another case, the Portuguese Court decided to stay the proceedings until the ECJ issues its decision in the pending case (*PwC EU Tax Alert*, 2010/6, p. 12).
[514] EFTA Court, 23 November 2004, Case E-1/04, *Fokus Bank v The Norwegian State*, *OJ* C 45, 23.2.2006, p. 10.
[515] ECJ, 8 March 2001, Cases C-397/98 and C-410/98, *Metallgesellschaft/Hoechst*, *ECR* I-1727.
[516] 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.
[517] 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.

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[518] 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 harmonisation, in particular in the field of elimination of double taxation, Member States are free to allocate fiscal jurisdiction amongst them 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.[519]

In ***Burda***,[520] the Court analysed the German dual corporate tax rate system as it applied under the Corporation Tax Law 1996. Resident shareholders only were entitled to benefit a tax credit of 30% for the tax paid by the corporation. Furthermore, an additional tax was charged when the amount of dividend distributed exceeded the profits taxed at 30% available for distribution. Burda was charged this additional tax despite the fact that half of the dividend distributed was paid to a non-resident shareholder which was not entitled to the corresponding tax credit.

According to the Court, there was no discrimination since the additional tax was charged irrespective of the residence of the shareholder, so that Burda's tax burden was not aggravated on the basis of the residence of its parents. The tax credit itself is granted in order to mitigate an economic double taxation. In a cross-border situation, it is up to the State of residence of the shareholder to prevent economic double taxation of dividends.[521] [522]

In *Burda*, the Court also held that "*a provision of national law which, in relation to cases where profits are distributed by a subsidiary to its parent company, provides for the taxation of income and asset increases of the subsidiary which would not have been taxed if they had remained with the subsidiary and had not been distributed to the parent company does not constitute withholding tax within the meaning of Article 5(1) of Council Directive 90/435/EEC*". Estonia, which was just about to change its distribution tax system in order to comply with *Athinaiki*, now seems to consider, on the base of Burda, that this distribution tax system does not contravene EU law so that no change should be made.[523]

2.5.2. Tax treatment of inbound dividends

123. The treatment of inbound dividends has also been scrutinised 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

[518] 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.
[519] *http://www.hmrc.gov.uk/stats/corporate_tax/introduction.pdf.*
[520] ECJ, 26 June 2008, Case C-284/06, Finanzamt Hamburg – Am Tierpark v Burda GmbH, formerly Burda Verlagsheteiligungen GmbJ, *ECR* I-4571.
[521] Para. 88-89.
[522] The Bundesfinanzhof decided accordingly: BFH, 26 November 2008, I R 56/05, *TNS Online*, 24 March 2009.
[523] *TNS Online*, 8 September 2008.

resident companies. A further group of judgments specifically addresses the issue of intra-group dividends between parent companies and subsidiaries which are located in different Member States.

2.5.2.1. Branches and economic double taxation of dividends

124. A national tax regime of dividends can discriminate between branches of non-resident companies and subsidiaries of domestic companies. The very first case brought before the Court of Justice in the field of direct taxation concerned the "***avoir fiscal***",[524] 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.[525] 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.[526]

125. 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. The Court also held that "*as far as the exercise of the power of taxation so allocated is concerned, the Member States nevertheless may not disregard Community rules….although direct taxation is a matter for the Member States, they must nevertheless exercise their taxation powers consistently with Community law*".[527]

As from 1994,[528] even before the judgment was delivered, German law extended to permanent establishments both the dividend exemptions granted by DTCs[529] and the indirect credit on account of foreign corporation tax paid by a subsidiary on distributed profits.[530] The discriminatory provision concerning wealth tax was also repealed.[531]

2.5.2.2. Differential taxation of shareholders based on company residence

126. 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***,[532] the Court found a Dutch exemption only available for dividends received from a domestic company to be contrary to the free movement of capital.

127. Discrimination can also occur as regards a difference in the tax rate on foreign and domestic inbound dividends, as the Court held in ***Lenz.***[533] 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. In the same line, discrimination exists where the tax system provides for an exemption

[524] *Avoir fiscal,* (see fn 179).
[525] French CGI, Art. 158 bis, Art. 158 ter and Art. 204 CGI.
[526] French CGI , Art. 158 bis, Art. 158 *ter* CGI and Art. 204 CGI.
[527] Para. 56-57.
[528] Law to Maintain and Improve the Attraction of the Federal Republic as a Site for Business of 13 September 1993, BGBl. I, p.1569.
[529] Sec. 8b (4) German Corporate tax law (KStG).
[530] Sec. 26(7) KStG.
[531] Law on the Furtherance of Corporation Tax Reform of 29 October 1997.
[532] ECJ, 6 June 2000, Case C-35/98, *Staatssecretaris van Financiën v Verkooijen*, *ECR* I-4073.
[533] ECJ, 15 July 2004, Case C-315/02, *Lenz v Finanzlandesdirektion für Tirol*, *ECR* I-7063.

of income tax at the level of the individual shareholder for dividends paid by a national company while a tax is due – even with a tax credit being granted – in the case of dividends received from a EU company.[534] The Court ruled in a similar way as regards a company shareholder, in ***Haribo***, concerning inter-company dividends.[535]

128. 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. The credit did not apply in respect of foreign dividends. In ***Manninen,***[536] 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 judgment, Finland abolished the tax credit regime,[537] as did France,[538] the United Kingdom and Germany.

129. The same conclusion was reached in ***Meilicke***[539] 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.[540] The imputation system has been replaced by a partial income system whereby 60 percent only of the dividends received are subject to tax in the hand of the shareholder.[541] In Meilicke II, the Court will have to decide on practical questions relating to the computation of the tax credit and to procedural requirements.[542]

Greece complied by subjecting both domestic and foreign dividends in the hands of resident individual shareholders to a final 10% withholding tax; no relief is provided for a foreign withholding tax, in line with the Kerckhaert-Morres and Damseaux cases.

130. As regards non-final shareholders (i.e. companies), the Court had to decide on several cases (a.o. ***Denkavit Internationaal*** (no 115), ***Amurta*** (no 116***), F II Group Litigation*** (no 68), ***Haribo*** (no 127), ***Orange Smallcap***). In ***Glaxo Wellcome,***[543] which arose in the framework of an intra-group reorganisation, the national provision granted to the resident shareholder a full imputation whereby the tax paid by the resident subsidiary was credited against the tax to be paid by the parent recipient; an excess tax credit could be carried over; furthermore, those taxpayers were entitled, on reception of the dividends, to reduce the value of the holding in its tax balance sheet, thus reducing the tax basis resulting from the gross amount distributed. Such advantages were denied to the recipient receiving dividends from a non-resident company. The Court first held that the case dealt with the free movement of capital rather than freedom of establishment, the purpose of the legislation at issue being to prevent non-resident shareholders from obtaining undue tax

[534] ECJ, 23 April 2009, Case C-406/07, *Commission v Hellenic Republic*.
[535] ECJ, 10 February 2011, Joined Cases C-436/028 and C-437/08, *Haribo Lakritzen Hans Riegel BetriebsgmbH* and *Österreichische Salinen AG v Finanzamt Linz*: Operative part of the judgment at point 3.
[536] ECJ, 7 September 2004, Case C-319/02, *Manninen*, *ECR* I-7215.
[537] 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.
[538] 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.
[539] ECJ, 6 March 2007, Case C-292/04, *Meilicke, Weyde, Stöffler v Finanzamt Bonn-Innenstadt, ECR* I-1835.
[540] Sec. 175 of the General Tax Code; Cordewener, A., Germany, in Brokelind (2007), p. 151.
[541] Krämer, J., "German Credit Should Match Foreign Tax Rate Up to 30 Percent, AG Says", *TNI*, 2011, p. 275.
[542] Pending Case C-262/09, Meilicke II, AG Opinion of 13 January 2011.
[543] ECJ, 17 September 2009, Case C-182/08, *Glaxo Wellcom Gmbh v Finanzamt München II, ECR* I-8591.

advantage.[544] Such a regime is not precluded under the free movement of capital where it "*does not exceed what is necessary to maintain a balanced allocation of the power to impose tax between the Member States and to prevent wholly artificial arrangements which do not reflect economic reality and whose purpose is unduly to obtain a tax advantage*"; that must be checked by the national courts.

131. However, an unfavourable tax treatment of foreign dividends is not always contrary to the EC Treaty. In ***Kerckhaert-Morres***,[545] 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.

132. In a similar case, ***Damseaux***, the Court went on to say that, although the tax convention between Belgium and France allows both countries to tax cross-border dividends, Member States are free under Community law to allocate powers of taxation between them and to take measures preventing double taxation. The Member State of residence is not compelled by the freedom of movement of capital to take such a measure itself.[546] On the contrary, Spain discriminates against non-resident shareholdings, when exemption of dividends taxation is granted on a shareholding requirement which is higher for non-residents holdings than for holdings in resident companies (paragraph 67).[547]

133. The ECJ also applied this viewpoint in ***Orange European Smallcap*** when considering that there is no differentiation, in the case at hand, by the State of residence in the tax treatment of the dividends received by a Dutch investment funds on the basis of their origin.[548]

Following Damseaux, in September 2009, the Austrian Ministry of Finance disallowed the possibility to carry-over unused foreign tax credits.[549] The case of Austrian residents receiving foreign dividends is at present referred to the ECJ.[550]

134. Where the withholding tax is final in Belgium for both national and foreign dividends (and interest), the foreign dividend that has not borne the withholding tax must be reported in the individual tax return and is charged with a tax at the same rate as the withholding tax, increased by local taxes. Such local taxes discriminate against foreign dividends (and interest), said the ECJ in ***Dijkman***.[551]

[544] Paras. 50-52.
[545] 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.
[546] ECJ, 16 July 2009, Case C-128/08, *Jacques Damseaux v Etat belge*, *ECR* I-6823.
[547] ECJ, 3 June 2010, Case C-487/08, *Commission v Spain*.
[548] ECJ, 20 May 2008, Case C-194/06, *Staatssecretaris van Financiën v Orange Smallcap Fund N.V.*, *ECR* I-3747, at para. 36-37.
[549] *PwC EU Tax News*, 2010/2, 6.
[550] Pending case C-437/08, *Salinen*.
[551] ECJ, 1 July 2010, Case C-233/09, *Gerhard Dijkman, Maria Dijkman-Lavaleije v Belgische Staat*. Administrative circular of 19 October 2010, www.fisconet.be.

135. Dividends could also come from a non-EU Member State. In ***Holböck***,[552] the Court held that the free movement of capital was applicable to dividends received by an Austrian shareholder from a Swiss company.[553] In this case, however, the restriction created under Austrian law could be upheld under Article 64 TFEU (Article 57 EC), grandfathering provisions in existence in 1993.

136. Investment in a third country was also discussed in ***A and B.***[554] 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.

137. In the **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.[555]

138. 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***,[556] 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 paragraph 130), some of which were found incompatible with EC law. Especially, the Court held that when the State of residence grants relief to mitigate double taxation of dividends received from resident companies, it must treat dividends paid by non-resident companies in the same way; however, it is not precluded by EU law for the State of residence to provide for exemption of domestic dividends and to tax dividends paid by non-resident companies if, for those latter, a tax credit is granted in such a way that the dividend paid by a non-resident company is not tax higher than the domestic dividend. The Court repeated this statement in the ***Test Claimants in the CFC and Dividend Group Litigation.***[557]

These cases led to the demise of imputation systems in the Union (see paragraph 128). 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.[558] However as regards inbound dividends received by UK-resident individuals, the tax credit should be

[552] ECJ, 24 May 2007, Case C 157/05, *Holböck v FA Salzburg-Land*,, *ECR* I-4051.
[553] 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.
[554] ECJ, 10 May 2007, Case C-102/05, *Skatteverket v A and B, ECR* I-3871.
[555] ECJ, 18 December 2007, Case C-101/05, *A*, paras. 60-64.
[556] Case C-446/04, *Test Claimants in the FII Group Litigation, ECR* I-11753.
[557] ECJ Order, 23 April 2008, Case C-201/05, *The Test Claimants in the CFC and Dividend Group Litigation v Commissioners of Inland Revenue, ECR* I-2875.
[558] 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.

extended to dividends from non-UK companies.[559] France on its side finally withdrew the whole tax credit for dividends,[560] which formerly had been extended to French permanent establishments of non-resident companies in application of the Avoir Fiscal case.[561]

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.[562]

After FII GLO, in 2008, Ireland amended its tax regime in order to grant benefit of the lower 12.5% tax rates on dividends paid out of trading profits of EU resident subsidiaries or of subsidiaries in a country with which Ireland has a DTC.[563] The FII Group Litigation judgment raises some practical questions which are now submitted to the CJEU.[564]

139. Special attention must now be given to the method used in order to prevent the international double taxation of dividends.

In a recent ***Commission v. Greece*** case, the Court held as discriminatory a tax regime providing for an exemption of income tax at the level of the individual shareholder receiving dividends from a national company while a tax is due – even with a tax credit being granted – in the case of dividends received from an EU company.[565]

In ***Cobelfret,***[566] where the Court had to interpret the Parent-Subsidiary Directive, it held that exemption and imputation "*in the case of shareholders receiving those dividends, do not necessarily lead to the same result*". This is an ambiguous statement by the ECJ, that might be understood either as meaning that Member States are at liberty to construe their exemption or tax credit system in the less detrimental way for their revenue or as meaning that, due to the different tax burden in the State of source, equivalence of the methods can not be guaranteed in all figures. According to the Belgian "dividend received deduction" regime, the parent company is indirectly taxed on its dividends in subsequent years which is contrary to the Directive. The Court suggests that, where the tax system provides for loss carry-over, such carry-over also must be granted for dividends which have not been effectively exempted under the Directive.[567] [568]

140. One may conclude from the ECJ case-law – a.o. the cases ***Test Claimant in the FII Group Litigation*** and ***Haribo*** - that Member States are allowed to apply different methods for eliminating double taxation to internal dividends, on the one hand, and to foreign dividends, on the other hand. Therefore, where internal dividends are exempt, taxation of foreign dividends is allowable provided "*that the tax paid in the State in which the*

[559] 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.
[560] Law no. 2003-1311 of 30 December 2003, art. 93.
[561] See Brokelind (2007), p. 157, 161.
[562] 13 January 2005. Based on the "acte clair" doctrine, the case was not referred to the ECJ.
[563] Finance Act 2008; the regime is extended to a.o. dividends from shares which are traded on a recognised sotck exchange in the EU (Finance Bill 2010) (*PwC EU Tax News*, 2010/2, 12: this regime might not be fully compatible with EU law).
[564] Pending case C-35/11, Test Claimants in the Group Litigation.
[565] ECJ, 23 April 2009, Case C-406/07, *Commission v Hellenic Republic*, *ECR* I-62.
[566] ECJ, 12 February 2009, Case C-138/07, *Belgische Staat v Cobelfret N.V*, *ECR* I-731.
[567] Para. 39-40.
[568] In the Joined Cases KBC and Risicokapitaal, the Court confirmed its statement in Cobelfret, as regards dividends paid by Belgian companies and by third-countries companies (ECJ, 4 June 2009, Cases C-439/07 ancd C-499/07, Belgische Staat v KBC Bank NV and Beleggen, Risicokapitaal Beheer NV v Belgische Staat – *ECR* I-4409). Belgium complied: see Law of 21 December 2009, Art. 8, in force as from 1 January 2010, and circulars of 23 June and 12 October 2009.

[distributing] company is resident is credited against the tax payable in the Member State of the recipient company and the administrative burdens imposed on the recipient company in order to qualify for such a credit are not excessive".[569]

141. Under the international tax practice, the tax credit is in most cases limited to that part of the State of residence tax that relates to the foreign income; in most cases, there is no possibility to carry-over non-imputed tax credits. This of course leads effective double taxation.

2.5.2.3. Differential treatment of in- and outbound dividends transiting through an investment fund

The tax burden on dividends received and paid by investment funds, and specifically pension funds came under special scrutiny of by the ECJ and the EU Commission which undertakes specific infringement procedures as a consequence of its analysis of the ECJ case-law.[570]

142. ***Orange European Smallcap Fund***,[571] a fiscal investment enterprise under Dutch law, complained against an excess tax burden resulting from the refusal of a tax credit on foreign dividends received in order to compensate foreign withholding tax. Such a tax credit is granted only on the basis of a double tax treaty. The investment fund is taxed at a zero rate, and no withholding tax is withheld on domestic dividends. The higher tax burden on foreign dividends results, in this case, from the foreign withholding tax. However, the Court said, there is no obligation under the free movement of capital principle for the State of residence to grant relief for the foreign withholding tax.[572] Member States are allowed under EU law to grant a tax credit for dividends paid from some other Member States, through their DTCs, and this should not be considered as a discrimination against Member States which do not benefit such advantage.[573] Nor does the free movement of capital preclude the granting of a domestic compensation for foreign withholding tax in DTCs situation, refused in the absence of DTC with the State of source.[574]

However, it is contrary to the free movement of capital for a Member State to limit the concession granted to the investment fund on account of withholding tax on dividends withheld in another Member State where and to the extent to which the shareholders of the fund are not natural persons resident in the Member State of residence of the fund or bodies subject to corporate tax in that State.

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[569] *Haribo*, Operation part of the judgment, point 2.
[570] See Commission Press Releases IP/09/1640 of 29 October 2009 (Germany – payments to foreign funds – *Pending case* C-600/10); IP/09/1018 of 25 June 2009 (Denmark, Finland – outbound dividends – *Pending case* (Finland) C-342/10); IP/09/780 of 14 May 2009 (Poland); IP/08/1817 of 27 November 2008 (Portugal (*Pending Case* C-493/09) and Spain); IP/08/1022 of 26 June 2008 (Italy and Czech Republic – both countries have modified their legislation in 2009)
[571] ECJ, 20 May 2008, Case C-194/06, *Staatssecretaris van Financiën v Orange Smallcap Fund N.V.*, *ECR* I-3747.
[572] Para. 42.
[573] Para. 51. See also the *D. Case*, para. 54 (no. 48).
[574] Para. 64 (both situations are not comparable).

The EU Commission initiated infringement procedure against several Member States:[575]

Italy complied[576] so that EEA pension funds are subject to an 11% withholding tax on the gross dividend.

The exemption granted by the Netherlands to dividends paid to domestic pension funds has been extended to EEA entities,[577] following ECJ and Supreme Court decisions. The Dutch Hoge Raad followed the ECJ in the Orange case.[578]

Norway and Finland did the same as to UCITS funds.

In Czech Republic, the special 5% rate for qualifying pension funds is now extended to include foreign collective investment funds within the EEA.[579]

As from 1st January 2011, Poland grants its corporate income tax exemption to EEA foreign investment and pension funds.[580]

Denmark reduced the withholding tax rate on foreign pension funds to the domestic 15% rate, but refuses to allow taxation on net income as regards foreign funds.[581]

Recently, an Estonian Court of appeal confirmed a lower court's decision whereby the compatibility of domestic rules on dividends paid to a non-resident UCIT were deemed non compatible with EU law; both courts refused to refer the case to the ECJ.[582]

In Italy, proceeds distributed by foreign EU/EEA non-UCITS funds to Italian resident individuals are still taxes whereas similar proceeds from Italian non-UCITS funds are not.[583]

As regards capital gains, an infringement procedure is initiated against Belgium.[584]

In France, dividends paid by French companies to French pension funds (treated as non-profit organisations) are tax exempt while dividends paid to EU pension funds are taxed.

In its decision of 13 February 2009, the French Supreme Administrative Court ("Conseil d'Etat") considered this constitute an infringement on the free movement of capital.[585]

A "test-case" is still pending before the French Supreme Administrative Court.[586]

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[575] See a.o. Commission Press Releases IP/07/616 of 7 May 2007; IP/07/1152; IP/08/143; IP/08/712; IP/08/1022; IP/08/1817, against Austria Bulgaria, Czech Republic, Estonia, Finland, Germany, Italy, Luxembourg, Romania (procedures closed); against Portugal: pending case C-493/09; Denmark, Poland, Slovenia, Sweden.
[576] Legge comunitaria 2008.
[577] As from 1 January 2007;
[578] Hoge Raad, 9 January 2009, n° 40037.
[579] Law of November 2010, in force as from January 1st, 2011 (*TNS Online*, 23 November 2010).
[580] *PwC EU Tax News,* 2011/1, 17.
[581] Court of appeal of Tallin, 25 November 2009, now appealed to the Supreme Court, *PwC EU Tax News*, 2010/1, 9; Skovby, R., Tranto, M. and Bjornhom, N., Denmark Reacts to Allegations of EU Treaty Violations, *TNI*, 2008, p. 846-848.
[582] Tallinn Administrative Court, 10 May 2007, appealed. The Court mainly considered Estonian and non-resident UCITS as non comparable.
[583] As a consequence of the repeal of the Decree n° 135 of 2009 which aimed at abrogating that discrimination: *PwC EU Tax News*, 2010/1, 14 and 2009/6, 18.
[584] Commission Press Release, IP/10/1253 of 30 September 2010.
[585] Conseil d'Etat de France, 13 February 2009, n° 298108, *Société Stichting Unilever Pensionfonds Progress and others*, *Dr. Fisc.*, 2009, comm. 253, obs. Agulhon, V.,and Senechant, N. ; *TNI*, 2009, 671 ; *TNS Online*, 19 February 2009. See also the decisions of the Administrative Court of Appeal of Paris of 6 December 2007, *TNS Online*, 26 June 2008.
[586] *PwC EU Tax News*, 2010/6, at 7.

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

143. Shareholders of EU companies which are resident in other Member States can also suffer income tax 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 and the tax treatment of capital gains arising from the alienation of these shares (on the application of inheritance duties and wealth taxes to participations, see Taxation of individuals, paragraph 54).

2.5.3.1. Acquisition and holding of shares

144. 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***,[587] Luxembourg law granted tax relief up to LUF 60,000[588] 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.

145. 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[589] 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.[590]

2.5.3.2. Costs related to participations

146. Discrimination can arise with regard to the possibility of deducting the costs connected with participations in foreign companies. For example, under Dutch law, costs (including interest) linked to participations could be deducted only if they were incurred in connection with profits taxable in the Netherlands,[591] 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.[592] Indeed, even though the Parent-Subsidiary Directive allows Member States to provide that charges relating to a holding may fail to 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 judgment in the Netherlands by amending the Corporation Tax Law in 2004 was closely linked with the adoption of thin capitalisation rules.[593] See above paragraph 97. In late 2008,[594] the Dutch Government announced a study on the tax treatment of group interest. Two main proposals should be investigated: the first one would be not to take intra-group interest into consideration in the Dutch tax basis, for both paid and received interest; the second one would be to create an "interest box" subject to specific tax rules.

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[587] ECJ, 15 July 2004, Case C-242/03, *Ministre des Finances v Weidert, Paulus*, *ECR* I-7379.
[588] Art. 129 c). Income Tax Law of 4 December 1967 as amended by the Law of 22 December 1993.
[589] Art. 7 (2) and 3 (c) Luxembourg Wealth Tax Law 1964.
[590] ECJ, 13 April 2000, Case C-251/98, *Baars*, *ECR* I-2787.
[591] Art. 13(1) Dutch Law on Corporation tax 1969.
[592] ECJ, 18 September 2003, Case C-168/01, *Bosal Holding v Staatssecretaris van Financiën*, *ECR* I-9401.
[593] 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.
[594] Letter of 15 December 2008, *TNI*, 2009, 55.

147. In ***Keller Holding,***[595] 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.[596] Keller Holding, a German company, was barred from deducting the fraction of its financing costs corresponding to the participation in 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.[597] 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.[598]

2.5.3.3. Capital gains on shares

148. 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 realised by individuals selling a substantial holding to a foreign company, whilst they were not taxed when selling to a Belgian company.[599] In ***De Baeck,***[600] 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.

Belgium amended its legislation accordingly and restricted the taxation to sales to companies having their head office outside of the EEA.[601]

Similarly, in ***Commission v Spain,***[602] 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.

149. In ***Grønfeldt,***[603] the Court examined a German law, which has been 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.[604] This differentiation was held to be contrary to the

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[595] ECJ, 23 February 2006, Case C-471/04, *Keller Holding*, *ECR* I-2107.
[596] Sec. 8 b(1) German Corporation Tax Law 1991.
[597] Sec. 36 (2) (3) German Income Tax Law 1990.
[598] See § 8b Abs. 5 Körperschaftssteuergesetz 2002, *www.bundesrecht.iuris.de*. See also Ernst & Young, *EuGH-Rechtsprechung Ertragsteuerrecht* (2007), p. 398. See also the Tax authorities guidance dated 30 September 2008 (*TNI*, 2008, 275).
[599] Art. 67 (8) of the Belgian Income Tax Code 1964, now Article 90 (9) of the Income Tax Code 1992.
[600] ECJ, 8 June 2004, Case C-268/03, *De Baeck v Belgische Staat* (Order), *ECR* I-5961.
[601] Income Tax Code, Article 90, 9, as amended by the law of 11 December 2008, applicable to transfers affected since 12 January 2009. However, in some cases, the Belgian Tax Administration tried to substitute to the tax on specific capital queries the more general taxation of capital queries resulting from transactions exceeding the private management of assets (Article 90, 1), which is due at the rate of 33% rather than 16.5%.
[602] ECJ, 9 December 2004, Case C-219/03, *Commission v Spain*, not published in ECR.
[603] ECJ, 21 December 2007, Case C-436/06, *Grønfeldt v Finanzamt Hamburg-Am Tierpark, ECR* I-12357.
[604] Sec. 17 of the German Income Tax Law, amended by the Law on Tax Reduction 2001/2002 of 23.10.2000.

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.

150. 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***[605] 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 characterised 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,[606] 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.[607] However, the income is still categorised 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 realised, whereas the non-resident taxpayer may not, since his income is considered to be a dividend.[608]

151. 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***[609] a French provision under which unrealised capital gains on important shareholdings were taxable at the time of transfer of the taxpayer's residence was found contrary to Article 43 EC (now Article 49 TFEU). 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 unrealised gain which he would not have had to pay had he stayed in France.

France complied by abrogating the tax provision in respect of all emigrations starting in 1 January 2005.[610] The former carry-over of tax base in the event of expatriation was reinstated for queries tax-years and the taxes levied cancelled, but only in request of departures to the EU or to EEA countries with which a treaty provides for administrative assistance.[611]

152. In ***N.***,[612] 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

[605] ECJ, 19 January 2006, Case C-265/04, *Bouanich v Skatteverket*, *ECR* I-923.
[606] OECD Commentary, Article 13.31.
[607] 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.
[608] Brokelind C. and Kanter M., "Sweden" in Brokelind (2007), p. 273.
[609] ECJ, 11 March 2004, Case C-9/02, *de Lasteyrie du Saillant*, *ECR* I-2409.
[610] French Finance Law 2005 (law 2004-1484 of 30 December 2004), *O.J.* no. 304 of 31 December; article 19, abrogating articles 167.1bis and 167bis of the General Tax Code.
[611] Rectificative Finance Law 2005, Article 61. The system was therefore not disapplied in old cases concerning Switzerland: Administrative Court of Paris, 3 July 2008*, R.J.F.*, 2009, 4, no. 348; 5 August 2008, *R.J.F.*, 2009, 2, no. 123.
[612] ECJ, 7 September 2006, Case C-470/04, *N v Inspecteur van de Belastingdienst, ECR* I-7409.

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.[613]

According to the Court's case law, Germany retroactively amended its exit tax for individuals[614] after that the Ministry of Finance tried to render it compatible with EU law by an administrative order.[615] Non-compatible rules must be applied in a compatible way, as amended later on by retroactive law; non-compatibility does not necessarily lead to the non-assessment of the tax, said the Supreme Court.[616]

Similarly, France, although it has complied with the Lasteyrie judgment as to individual taxation,[617] 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 (acc. to the Court) be applied following a case-by-case standard.[618] In the N. case, the Dutch Hoge Raad held that "the preserving assessment system was not contrary to the good faith principle under tax treaties, since it did not result in a unilateral extension by the Netherlands of its taxing rights".[619] Denmark[620] and Austria amended their law. In Austria capital gains on shares are taxable, when a taxpayer holds at least 1% of a company, as soon as Austria loses its right to tax the gain.[621] The tax may be deferred until actual realisation in the event of emigration to the EU or to an EEA country with which a DTC providing for administrative assistance is in force.

As regards businesses, the Commission has initiated infringement procedures against Belgium[622] (capital gains taxation for company residence transfer to another country), Denmark[623] (transfer of assets), Ireland,[624] The Netherlands[625] (exit tax on companies and enterprises), Portugal,[626] Spain[627] and Sweden[628] (closed as Sweden complied). As to individuals, cases are pending regarding Spain,[629] and Portugal.[630]

[613] *N*, para. 46.
[614] 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 when the shareholder moves outside the EU. Germany decided to modify its legislation after the Commission launched an infringement procedure.
[615] Brokelind (2007), p. 149.
[616] BFH, 23 September 2008, *PwC EU Tax News*, 2009/2, 12.
[617] French Finance Law 2005 (law 2004-1484 of 30 December 2004), *O.J.* no. 304 of 31 December 2004.
[618] French CGI, Art. 210 B.
[619] Hoge Raad, 2 February 2009, n° 42701, 43760 nad 07/12314, *TNS Online* 25 February 2009.
[620] Danish Law L199 of 30 March 2004, *TNS Online*, 19 May 2004.
[621] Income Tax Law, Article 31.
[622] Commission Press Release IP/10/299 of 18 March 2010.
[623] IP/10/1565 of 24 November 2010. See also Ronfeldt, T., 'Double Domicile: A Pseudo-problem in the Taxation of Departing Companies. On Double Taxation and Special Terms Resulting from Suspension rules on Capital Gains Tax', 39 *Intertax* 2011, 132 at 138: Danish law provides for fictitious realisation and fictitious recapture of previously deducted losses upon departure from Denmark. However, suspension of the tax is granted if departure is covered by a DTC. A tax return must be submitted. Guarantees must be provided if the move is to a country which is not covered by the Mutual Assistance Directive or the Nordic Convention on Mutual Assistance. Double taxation is not always avoided as the exit and entrance countries will not necessarily agree on the value of the shares at the time of exit for the computation of the gain in both countries in the event of realisation after relocation.
[624] IP/11/78 of 27 January 2011.
[625] IP/10/1565 of 24 November 2010; See also the pending case National Grid Indus BV, C-371/10.
[626] Pending Case C-38/10; Commission Press Release IP/09/1460 of 8 October 2009.
[627] Pending Case C-64/11; Commission Press Release IP/09/1460 of 8 October 2009 and IP/10/1565 of 24 November 2010.
[628] IP/08/1362 of 18 September 2008.
[629] Pending Case C-269/09; IP/09/431 of 19 March 2009.
[630] Pending case C-38/10; IP/09/1460 of 8 October 2009.

3. TOWARDS THE EUROPEANISATION OF DIRECT TAX SYSTEMS

The Court's case law has, at the same time, reinforced the freedom to undertake and even to use tax optimisation but also compelled business to respect a number of common principles, such as the abstention from abuse, the division of taxing power between States and, to a limited extent, the coherence of fiscal systems.[631]

3.1. Adaptation of national tax systems

153. 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.

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

154. 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.[632] This is reflected by DTCs practice.[633] 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 which favour the exemption method; in the latter case, the actual taxation is limited to the domestic territory although exempt foreign income is generally taken into account to determine the progressive rate applying to domestic income.

155. 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 EU law. The Treaty freedoms are also specific expressions of the non-discrimination principle voiced by Article 18 TFEU (Article 12 EC). As such they prohibit Member States to discriminate nationals of other Member States as against their own nationals.[634] 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**

[631] Marchessou, P., L'apport de la jurisprudence de la CJCE en matière d'imposition des entreprises, in *Ecrits de fiscalité des entreprises – Etudes à la mémoire du Professeur Maurice Cozian*, Paris, LexisNexis Litec, 2009, p. 618.

[632] 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.

[633] Note that the USA also refer to the criterion of nationality.

[634] While at the origin limited to economic activities, the freedom of movement is now recognised to all EU citizens (Article 18 EC, introduced by the Treaty of Maastricht).

of the non-resident taxpayer earning almost all his income in the State of activity (paragraph 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 (paragraph 39).

As to corporate taxation, the freedom of establishment enshrines the right to choose the **form of establishment** (Article 49 TFEU (Art. 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***, paragraph 61), the right to interest on overpaid tax (***Commerzbank***, paragraph 63) or as to a tax deduction of research expenses carried out in other Member States (***Baxter***, paragraph 66).

Another clear-cut situation incompatible with the EU 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,*** paragraph38, ***Laboratoires Fournier*** and ***Commission v. Spain (C-248/06),*** paragraph 87).

156. Nevertheless, the EU 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***, paragraph 97).

157. It remains unclear to what extent the EU 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.[635] 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 EU freedoms, but can often be justified (***Gerritse, Scorpio,*** paragraph 39). Withholding taxes on dividends can also contravene the EU freedoms, when they apply only to non-resident shareholders (***Denkavit Internationaal,*** paragraph 115).[636] In all cases, however, it must be always proven that residents and non-residents are in comparable situations (***Truck Center***, paragraph 85) and that, as the Court clearly stated in ***Commission v. Portugal*** (C-105/08, paragraph 47), it must be always proven that the application of different tax systems does not lead in practice to a higher tax burden for non-residents than for residents in comparable situation.[637]

158. 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.[638] The Court considered that within the framework of bilateral double

[635] *Scorpio*, paras. 36-38.
[636] 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).
[637] ECJ, 17 June 2010, *Commission v. Portugal*, paras. 27-31.
[638] See also infra on a most-favoured nation clause in DTCs.

taxation conventions, Member State were under no obligation to extend the benefits they had agreed upon in a DTC with a Member State to residents of other Members States (***D.***, paragraph 48).[639]

159. 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[640] - is at stake. This happens, in particular, for outbound investments by EU residents in third country companies, as the ***Holböck*** case (paragraph 135) shows. However, numerous exceptions, such as the "grandfathering clause" of Article 64 TFEU (Article 57 EC) and justifications for the restrictions on this freedom, such as the effectiveness of fiscal supervision (***A****,* paragraph 137), are allowed by the EC Treaties.

160. Accordingly, taxation on the basis of residence by Member States is not fundamentally jeopardised by the application of EU freedoms. However, uncertainties continue to exist as to the **tax status of non-resident taxpayers**.[641] The ***Schumacker*** doctrine (paragraph 103) 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*",[642] 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 EU initiatives towards **better coordination between Member States**.

3.1.2. Adoption of tax incentives

161. The area of tax incentives is often related to the **prohibition of State aid** (Articles 107 and 108 TFUE).[643] However, the EU 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).

162. As to individuals, Member States willing to encourage the acquisition of **housing** (***Commission v Sweden and v Portugal****,* paragraph 47) or of **shares** (***Weidert-Paulus****,* paragraph 144), or to foster the transmission of **family enterprises** (***Geurts and***

[639] Concerning situations outside the scope of DTCs, see 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. This procedure has not been brought to the ECJ yet.

[640] 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).

[641] 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.

[642] De Groot, para. 115.

[643] 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.

Vogten, paragraph 54), the **education and vocational training** (***Schwarz/Gootjes-Schwarz***, ***Commission v Germany*** and, **Zanotti**, no 52[644]) or the constitution of **private pensions** (amongst others, ***Commission v Denmark***, paragraph 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, especially after the Court's decisions in **Persche** (paragraph 53) and ***Missionswerk Heukelbach***: infringement procedures have been launched against Belgium, Ireland, Poland and the United Kingdom,[645] which all complied.

163. The application of the EU 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 EU 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. Moreover, from the Member States' prospective, this limits the option for the deployment of national policies.[646] In order to avoid such an undesirable result, better coordination at the EU level seems appropriate.

164. Concerning company taxation, national tax incentives for research and development have been examined by the Court (***Baxter,*** paragraph 66, ***Laboratoires Fournier*** and ***Commission v. Spain,*** paragraph 87). This area is particularly important as regards the EU objectives of the Lisbon agenda. Recommendations on an improved EU coordination, both concerning the EU freedoms and the prohibition of State aid, have already been issued by the Commission in a 2006 Communication, which also synthesised the Court's case-law.[647] Nevertheless, there might be further room for European coordination in that field.

3.1.3. Fight against tax evasion and fraud

165. 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 tax jurisdictions; such measures thus often conflict with the freedom of establishment.[648]

166. 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 EU

[644] See also Commission Press Releases IP /11/295 of 14 March 2011 relating to a tax discount in community real estate taxes available to students subject to tax in the UK and studying in the UK, but not granted to students subject to tax in the UK but studying in another Member State.
[645] 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).
[646] 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.
[647] 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).
[648] 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.

Treaty. For example, an intra-EU transfer of residence must not trigger specific actual tax liability in the State of origin, such as a tax of unrealised capital gains (***de Lasteyrie,*** paragraph 130*,* ***N.***, paragraph 131).

167. As to corporate taxation, CFC and thin capitalisation 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***, paragraph 77; ***Thin Cap GLO***, paragraph 108; ***CFC and Dividend GLO***, paragraph 138; ***SGI***, paragraph 106). Member States may impose in this respect certain compliance requirements in order to verify the reality and substance of the economic activity in the other Member State, provided that such requirements do not entail « *undue administrative constraints* » for the taxpayer. The principles of the Internal Market require that (genuine) economic activities could be carried out on the entire territory of the EU 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, EU 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. The State of residence is thus allowed to introduce mechanisms targeted at avoiding that, by pretending to exercise their right under EU law, resident taxpayers substantially diminish their tax burden in comparison with taxpayers who have not entered into cross-border activities (***Columbus Container***, paragraph 78).

168. 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**, paragraph 98). Indeed, EU law cannot be interpreted as granting (corporate) taxpayers the right to freely decide in which Member State they ought to be taxed. In harmonised 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.[649]

169. 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,*** paragraph 109; ***Thin Cap GLO,*** paragraph 108 and ***Fidium Finanz***[650]). 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 fiscally more attractive third country (***Van Hilten–Van der Heijden***, paragraph 33). Nevertheless, the free movement of capital (Article 63 TFEU (Art. 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*** (paragraph 137)).

170. As the Commission pointed out in its Communication of 2008, coordination between Member States in that area is necessary, not only for exit taxes, but for anti-abuse

[649] 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 (2008), p. 557.

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

measures in general.[651] 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***, paragraph 107). Moreover, the possible application of Article 63 TFEU (Art. 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.

3.1.4. Transfer of taxing powers to regional and local authorities

171. The decentralisation 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. 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.

172. 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 **EU State aid regime** (Articles 107 and 108 TFEU), the main issue being their potentially selective (i.e. limited to certain undertakings) character .[652]

173. On the other hand, those transfers could require the institution of intra-State apportionment criteria as to the delimitation of those "new" tax competences and the creation of a concept of regional or local residence. In a purely national context, those 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 decentralised structure, which inevitably leads to the application of different rules to different parts of the country.

174. However, those constitutional choices could not lead to deprive EU citizens and companies of their existing European freedoms. The Member States' institutional autonomy, and the corresponding Court's neutrality as to internal fiscal federalism, should not be interpreted as a justification to violations of fundamental freedoms. Therefore, in the light of ***Geurts and Vogten*** (paragraph 54),[653] it is still unclear whether the application of EU law could jeopardise 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. The question needs to be put whether the decentralisation 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.[654] As the Court stated, EU law requires indeed a **uniform**

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[651] 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.

[652] 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.

[653] 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.

[654] On these issues, see Traversa, E., '*Is There Still Room Left in EU Law for Tax Autonomy of Member States' Regional and Local Authorities?*', *EC Tax Review*, 2011, n°1, p. 4-15; 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*

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.[655]

3.2. Allocation of taxing powers between Member States

175. 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 EU 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.

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

176. DTCs are part of the national law of the Member State for the purpose of the application of EU law. Besides 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 A and B of the OECD Model Convention). Since these conventions allocate taxing powers and thus (potential) revenue between States, incompatibilities between some of their provisions and EU 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.

177. As decided in the ***Saint-Gobain*** case (paragraph 125), "*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…*".[656] 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.[657]

178. However, when it comes to exercising the allocated jurisdiction thus confirmed, Member States "*may not disregard Community rules*"[658] 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.[659] According to the national treatment principle, a Member State which is party to a DTC (even one signed with a third country) is required to grant to permanent establishments of non-resident

expériences belge et italienne, Bruxelles, Larcier, 2010; La Scala, A.E., ed., *Federalismo fiscale e autonomia degli enti territoriali*, Torino, Giappichelli, 2010.

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

[656] *Saint-Gobain*, para. 56; *Gilly*, paras 24 and 30; *Denkavit Internationaal*, para. 43.

[657] *Gilly*, para. 31.

[658] *Saint-Gobain*, para. 58; *De Groot*, para. 94.

[659] *De Groot*, para. 94; *Saint-Gobain*, paras. 57-58.

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***).[660]

179. 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*".[661]

180. **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 EU freedom. Notably, they must permit 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.[662] If different systems of taxation apply to residents and non-residents because of a DTC, the Court, rather than rejecting 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.[663]

181. 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. when their only connecting factor with one of these States is the fact that they have invested or performed a service there.

3.2.2. Existence of a DTC as a limit to EU Treaty freedoms

182. 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*** (paragraph 124), the Court has generally ruled that the freedom of establishment is unconditional and cannot be limited by a tax treaty with another Member State.[664] DTCs could neither hinder the application of secondary legislation, as the Court ruled in ***Athinaïki Zythopoiia***[665] (paragraph 21), concerning the Parent-Subsidiary Directive, save for the exceptions provided by the legislation itself (***Océ van der Grinten,***[666] paragraph 21).

183. However, the Court's case-law concerning the taxation of cross-border dividends seems to mitigate this view. In ***ACT Class IV*** (paragraph 122) 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

[660] *Saint-Gobain*, para. 59.
[661] *Gilly*, para. 53.
[662] *De Groot*, para. 101.
[663] *Bouanich*, para. 56.
[664] *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 organised the effect of the British rules on re-characterisation 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.
[665] *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."*
[666] *Océ van der Grinten*, paras. 84-89.

treaty policy. Moreover, according to ***Amurta*** (paragraph 116), ***Denkavit Internationaal*** (paragraph 115) and Commission v. Italy (paragraph 118), 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 authorises it also organises 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[667] so that the withholding tax is neutralised.[668] Thus, in some situations, the State of source becomes dependent on how the State of residence exercises its taxing power.

184. Nevertheless, the Court pointed out that it would be sufficient for the withholding tax to be considered compatible with EU law that the tax credit be granted unilaterally by the Member State of residence.[669] 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*".[670] This judgment 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.

185. Conversely, as the Court stated in ***Elisa***[671] (paragraph 82), the absence of applicable DTC provisions, in particular as to the exchange of information, between the Member State of source and the Member State of residence could not in itself justify the failure to respect of EU Law.

186. 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 neutralised 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 **multiangular situations**.[672]

3.2.3. EU Treaty freedoms as intra-Community most favoured nation clauses

187. 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 (paragraph 48) it was asked whether the EU 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.[673]

[667] *Denkavit Internationaal*.
[668] *Amurta*.
[669] *Amurta*, para. 78.
[670] *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.
[671] ECJ, 11 October 2007, Case C-451/2005, Européenne et Luxembourgeoise d'Investissement SA (ELISA) v Directeur général des impôts, Ministère public.
[672] 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*" organised by the EU Commission in Brussels on 5 July 2005, available on the DG TAXUD website (see fn 17).
[673] Numerous authors have criticised 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

In ***ACT CLASS IV***, the Court came to the same conclusion after scrutinising 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".*[674]

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.

188. 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%.

189. The case-law on DTCs leaves **many questions unsolved**, which causes uncertainties from the point of view of the taxpayers and of the Member States.[675] The Court's contribution to the creation of a "European international tax law"[676] 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.

3.3. Avoidance of double taxation within the EU

190. According to ***Saint-Gobain***[677] (paragraph 125), 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 EU 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.

3.3.1. Avoidance of international - juridical - double taxation

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

192. According to the Court, double taxation may result "*from the exercise in parallel by two Member States of their fiscal sovereignty*", for income taxation (***Kerckhaert-Morres***, paragraph 131) or inheritance taxation (***Block***, paragraph 54). 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

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.

[674] *ACT Class IV*, para. 90.

[675] Kofler (2007), p. 1067.

[676] 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.

[677] *Saint-Gobain*, para. 57-58.

legislation, "*no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level*".[678]

The solution is not even guaranteed when there exists a bilateral treaty (***Damseaux***, paragraph 132). That judgment may have been a lost opportunity to draw all the inferences from the saying about the lack of generally laid down criteria"[679]: since Belgium as residence State had recognised the jurisdiction of France as source State to levy a tax on the concerned income, it had supplied the criterion for the attribution of that *area of competence* and could arguably not exercise its own jurisdiction to tax without allowing for the foreign tax it had itself authorised, and thus organised.[680] Alternatively, the Court could have found that by concluding a treaty institutionalising double taxation, Belgium and France had jointly breached the Community freedoms and could have held either of them - and thus also Belgium[681] – accountable for that. Obviously, a more correct economic view is that France has exhausted its legitimate claim to tax by levying the corporate income tax and should relinquish the taxation of the dividend to the State of residence.[682]

193. That **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 harmonisation.[683] 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.[684]

In the area of **social security**, which addresses 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 harmonisation (Art. 58 TFEU (Art. 51 EC)).)). As a consequence, national rules organising the social security system remain – at least in theory- not affected by EU/EC intervention, while the latter focuses more on "bridging the gaps" that could arise when people exercise their freedom of movement, i.e. potentially move from one national social security system to another. An EU/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 EU/EC regulation[685] which has established the principle of the unity 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.

194. Thus, there is a divergence 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

[678] *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.

[679] ECJ, 16 July 2009, C-128/08, *Damseaux v. Belgian State*, para. 35.

[680] Note that the bilateral treaty provides that Belgium eliminates the double taxation by granting a foreign tax credit, but Belgium considers that it has validly overruled that provision by internal legislation.

[681] Considering that France does grant a credit in the reverse situation and that Belgium has unilaterally repealed the foreign tax credit, holding Belgium accountable would have been quite fair.

[682] Dassesse, M., Double taxation of foreign dividends: The Damseaux case aiming at the wrong target ! Criticism should be directed towards France and not Belgium, *ECTax Rev*., 2010, p. 117.

[683] See the second recital of the 8th VAT Directive.

[684] 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.

[685] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

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 EU/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.[686] That view can be reinforced by the omission of Article 293 EC in the TFEU, which cannot mean that "the abolition of double taxation within the Community" no longer would be a goal or would have been achieved and which thus must mean that Member States negotiations no longer are the preferred way to that goal.

3.3.2. Avoidance of economic double taxation

195. 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.

196. 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 its 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.[687]

As regards withholding tax, the TFEU is found 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. That finding 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***, paragraph 115). That finding is not modified either by the fact that the State of the receiving company unilaterally grants a full tax credit to avoid double taxation of dividends even though that credit should prevent economic double taxation (***Amurta***, paragraph 116). Such measures might however be justified by the application of a DTC (***ACT Group Litigation***, paragraph 122; ***Denkavit Internationaal***, ***Amurta***).

That view 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,[688] but it is in line with the system of the Parent-Subsidiary Directive.[689] If the source State cannot withhold tax on

[686] 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.
[687] *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*).
[688] 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.
[689] 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.

dividends paid to a foreign parent (often with foreign individual shareholders), why could it withhold tax on dividends paid directly to foreign individual shareholders?

197. As to inbound dividends, the tax system must not result in the penalisation 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***, paragraph 128; ***Meilicke,***[690] [691] paragraph 129). It follows from ***Manninen*** that the tax credit must be based on the amount of corporate tax paid in the State of source,[692] 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 satisfies 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.**

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***, paragraph 126; ***Baars***, paragraph 145; ***Lenz***, paragraph 127). 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 stemming from to the application of the two methods should be eliminated (***FII Group Litigation***, paragraph 138).

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.

198. 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*** (paragraph 131) 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.

199. 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".[693] Further EU coordination, in the spirit of the Commission

[690] In *Meilicke II* (Pending Case C-262/09 ; AG Opinion of 13 January 2011), the Court will decide on the way to calculate the tax credit.
[691] In *Meilicke II* (Pending Case C-262/09 ; AG Opinion of 13 January 2011), the Court will decide on the way to calculate the tax credit.
[692] *Manninen*, paras. 46, 53, 54.
[693] 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

Communications,[694] or even harmonisation 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.

3.3.3. Choice between capital export and import neutrality

200. 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,[695] 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.[696]

201. **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.

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.

202. Traditionally, CEN is presented as **economically more efficient** than CIN.[697] This postulate is questionable.[698] 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

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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.

[694] 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.

[695] 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.

[696] 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).

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

[698] 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.

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 subsidises 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 subsidising, 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 frustrates 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.

203. 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.

204. From the viewpoint of the **State of residence**, CEN has as advantages an equal treatment of domestic and foreign investment 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. 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.

205. 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.[699] 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.[700]

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[699] 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.

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

206. The choice between CEN and CIN may be by-passed by switching on the new concept of "capital ownership neutrality" (CON), under which "*the transfer of an investment to a new investor should not be distorted by a tax wedge*".[701]

It is predicated on the idea that the owners of capital influence the return on investment by the very organisation of the former, at least in the field of MNEs. CON can be achieved either under residence only or under source only taxation.

207. It has often been asked whether **the Court's case-law serves better the purpose of either one of the two classical objectives**.[702] 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.[703] 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*** (paragraph 128) 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.

208. 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 (paragraph 115), 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 harmonisation of the national direct tax systems.

209. 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***, paragraph 90; ***Marks & Spencer***, paragraph 97). 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 recognise that taxation must take place where the income accrues. This is not fully satisfactory as regards losses

[701] Schön, W., International Tax Coordination for a Second-Best World, *World Tax Journal*, 2009, 67 and 81.
[702] 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.
[703] 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.

because territoriality appears to be economically inefficient and to hinder 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.

210. As regards individuals, the ***Schumacker*** doctrine (paragraph 103) 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.

211. The concepts of CEN and CIN are used to generally qualify situations that negatively affect the allocation of investment (and labour). They do not distinguish 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 (paragraph 97), 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.[704]

212. The case-law method has the inherent flaw that preliminary rulings are typically issued in the context of a dispute between a taxpayer and one Member State, whilst in essence, that State and another one are sharing the guilt of the double taxation: it seems that the Court cannot choose in disfavour of the sole State present in the litigation, and therefore rules in disfavour of the taxpayer and, implicitly, of the effectiveness of the Internal Market.

The Court is anxious not to impose on the residence State the burden to alleviate double taxation, which would give a free hand to the source State - whose tax claim may be less legitimate, since it imposes taxation without representation -, that otherwise is subject to a natural brake: if it imposes an excessive double taxation, it will lose the income from foreign residents that will simply be resourced. Case-law expresses that "*the fact that both the Member State in which the dividends are paid and the Member State in which the shareholder resides are liable to tax those dividends does not mean that the Member State of residence is obliged, under Community law, to prevent the disadvantages which could*

[704] 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.

arise from the exercise of competence thus attributed by the two Member States".[705] The only logical solution is to insist on a proper apportionment of the taxing power between source and residence States, which so far has typically but not always successfully been attempted though bilateral agreement, but should probably be made through multilateral agreement or secondary EU legislation.

3.4. Relations between Member States and third countries

213. As a rule, EU 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 63 TFEU (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***, paragraph 125). The goal of the provision is to develop the market of the EU and to facilitate the use of the euro.

A grandfathering provision allows Member States to continue to apply in respect of capital movements with third countries restrictions which existed in 1993 concerning direct investment, establishment, the provision of financial services and the admission of securities to capital markets (Article 64 TFEU (ex Article 57 EC)). Direct investment is defined as investment the purpose of which is to create lasting ties between the investor and the enterprise. This grandfathering provision is not applicable in relation with EEA countries under the EFTA Agreement.

On the other hand, provision distinguishing between investors which are not in the same position as to their place of residence or as to the location where their capital is invested are upheld, provided that they do not constitute an arbitrary discrimination or a disguised restriction on the free movement of capital with third countries (Art. 65 TFUE, Art. 57.2 EC). As to secondary legislation, the regimes laid down by some directives have been extended, through EU-Member States joint agreements, to some third countries.[706]

214. 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 (***A and B***, paragraph 136). If a restriction to the movement of capital is the unavoidable consequence of a restriction to the freedom of establishment or of the freedom to provide services (***Fidium Finanz***, paragraph 169) vis-à-vis third countries, the case will be decided on the basis of the latter freedom.

If the legislation which is criticised is susceptible to be applied as well on issues falling under the freedom of movement of capital as to issues covered by another freedom, the main purpose of the legislation must be considered (***Lasertec***, paragraph 109, ***A and B***). In the ***Holböck*** judgment (paragraph 135), however, the Court recognised 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 scrutinised the legislation under the angle of Article 56 EC (now Article 63 TFEU).[707] The EU 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 why the Court for the time being did not pursue the

[705] ECJ, 16 July 2009, C-128/08, *Damseaux v. Belgian State*, para. 34.
[706] 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.
[707] 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 judgment).

line of the ***Holböck*** case and has refused in other cases to grant EU law protection to capital movements in third country situations.[708]

215. It must be noted that an intermediate category between EU countries and third countries exists, i.e. EEA countries. In respect to those countries, the Court has adopted a specific approach, applying in some cases its case-law as if it were an intra-EU situation, and in other cases, accepting justifications to the restriction to EEA freedoms which were similar to those accepted for situations involving "genuine" third countries. In some instances, the Court has found that a valid reason to deny a tax benefit in a third country situation was the non-applicability of the Mutual Assistance Directive enabling a Member State to verify in a reliable manner factual elements to be ascertained in the third country (A, paragraph 137).

This reasoning has been applied also in respect of EEA Member States (***Commission v Italy***, paragraph 118).[709] The application of the freedom of movement of capital to an EEA country (Liechtenstein) was denied because, failing a convention providing for exchange of information, there existed between Member States and that country no general framework of administrative assistance similar to the one provided by the mutual assistance directive. (***Rimbaud*** (paragraph 82) and ***Commission v. Italy***). The Court applied a similar approach to cross-border situations involving Switzerland (**A**.), with which the EU has signed several sectoral agreements, regarding among other the free movement of persons.[710]

We believe that there is no obligation to equate such a convention with the mutual assistance directive, especially since the latter has been replaced by a considerably expanded version,[711] since the application of the directive is subject to control by the ECJ, whereas the application of a treaty is not. However, recent cases, such as ***Haribo Lakritzen*** and ***Österreichische Salinen*** (paragraph 140), show that the mere absence of a certain type of international agreement does not *ipso facto* amount to a justification of a difference in tax treatment of domestic and foreign income. Member States have to give evidence that the requirement of a bilateral convention that they impose is proportional to the objective that they pursue.

216. 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 globalised 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.[712]

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

[709] Chevalier, B., 'En l'absence d'engagement d'assistance mutuelle dans le domaine fiscal, les Etats de l'Espace économique européen (EEE) non membres de l'Union européenne s'exposent à être traités comme des pays tiers', *R.A.C.-L.E.A.*, 2009-2010, 619.

[710] Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, *O.J.*, 2002, L 114, p. 6.

[711] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EC, *OJ* L 64/1 of 11.03.2011.

[712] 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, 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* organised by the EU Commission in Brussels on 5 July 2005, available on the DG TAXUD website (see fn 17).

3.5. Tax treatment of European groups of companies (consolidation)

217. 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.[713] In this context, specific questions arise in loss situations.

218. 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.[714] The difference lies in the fact that the compensation was made with an income that was not taxed in the State of residence,[715] with the consequence of economic double taxation.[716] 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 also has been decided by the Court:[717] it is 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. This restriction however is justified. Nevertheless, the State of residence is not precluded to grant loss compensation where there is no more possibility for their off-setting in the State of source. This conception of cross-border losses compensation seems to be in breach of the basic principles resulting from the worldwide taxation[718] and rather lead to territorial taxation which affects the effectiveness of the Internal Market.

219. 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

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

[714] 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.

[715] Due to exemption granted by DTCs.

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

[717] ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium; .* ECJ, 23 October 2008, Case C-157/07, *Krankenheim*.

[718] See Richelle, I., *Notion et traitement des soldes déficitaires. Aspects nationaux et internationaux*, Doctoral dissertation, Free University of Brussels, 1998, chap. 11 (available at bictel.ulg.ac.be/ETD-db/collection/available/ULgetd-12112009-150120/ ; Opinion Statement of the ECJ Task Force of the Confédération Fiscale Européenne on "Losses Compensation within the EU for Individuals and Companies Carrying Out Their Activities through Permanent Establishments", *Eur. Tax*., 2009, 487.

exhausted all possibilities in its Member State of residence to deduct or carry forward its losses by itself or by a third party.

220. 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.[719] 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.[720] This might lead Member States to limit their possibilities for loss carry-over[721] which would hamper economic efficiency.[722]

221. The consolidation perimeter is also a fundamental question to be considered. ***ICI*** (paragraph 96) 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*** (paragraph 97) the Court considered sub-subsidiaries of the UK parent company. In ***Oy AA*** (paragraph 98), 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.

222. 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 harmonisation project launched by the Commission as to corporate taxation not only refers to a common tax base, but to a consolidated one.

3.6. Transfer of company seat to another Member State

223. In the developing case-law of the ECJ, the question is now raised whether companies enjoy freedom of establishment as individuals do. As regards the tax practice, it is a matter of determining whether a company is allowed to transfer its seat to another Member State without limitation such as liquidation in the State of departure or compliance with conditions going as far as reincorporation in the State of arrival.

The tax treatment of the transfer of seat is strictly connected to the founding theories of the corporate law and to the rules of conflict of law which are bound to it[723]; it must be analysed, within the European frame, at the light of the EU fundamental principles.

[719] It must be noted that the ECJ did not examine as such that comparison which however had been suggested.
[720] 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.
[721] Carry-over in time, in case of restructuring or change of control.
[722] 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).
[723] Impact assessment on the Directive on the cross-border transfer of registered office, Commission Staff Working Document, 12 December 2007, StC (2007) 1707, 9; Maresceau, K., Het vrij vestigingsrecht, de problematiek van

Under company law, the *Lex Societatis* is the law which applies to the recognition and to the functioning of a company has to be determined. As to this Lex Societatis, two conflicting theories co-exist. Under the "incorporation theory", a company is governed by the law of the country where its statutory seat is located (its seat under its by-laws). This theory requires a formal decision by the company in order to transfer its seat. Under the "real seat theory", a company is governed by the law of State where its real seat is located, under the form of its main establishment or of its central administration.[724] Under this theory, a transfer of seat may be decided by the company or result from a factual change of the centre of administration of the company, even inadvertently.

The adoption of either theory traditionally influences on two questions: first, the recognition of the company, tied to the determination of the law applicable to its existence and functioning; second, the transfer of its statutory or effective seat. Nowadays, when a foreign company is viewed as duly formed and existing under the law applicable to it, its recognition is implied.

The real seat theory can be applied in two forms. Under its "absolute" form, a foreign company will be recognised as validly existing only if the company has its real seat in the country where it was created or, as the case may be, where its statutory seat is located. Existence will therefore be denied if the company, foreign at its inception, has now its real seat in the foreign country. Emigration of a domestic company is not possible as it would lead to the loss of legal personality. Under the real seat theory in its "relative" form, a State will recognise a company incorporated in another country and having its real seat in a third country but will apply to the personal status of the company the law of the third country where the real seat is located. The change of the real seat of the company will be allowed under conditions. In the event of immigration of a company, the State will accept the transfer of the real seat to its jurisdiction subject to subjections the imperative provisions of its company law. In the event of emigration, the State will accept the transfer of the real seat out of its jurisdiction if the foreign country also accepts it. Applicable national law will change with a continuity of the legal personality of the company.[725]

224. Under EU law, Article 44 TFEU grants freedom of establishment to natural persons and to companies or firms formed in accordance with the law of Member States and having their registered office, central administration or principal place of business within the Union.

225. The Court of justice decided several cases on the transfer of seat. In ***Daily Mail***,[726] the United Kingdom forbade companies resident for tax purposes to cease to be resident without Treasury consent.[727] A company wanted to move its real seat to Netherlands in order to avoid capital gains tax on the sale of its assets. The Court stated that the connecting factor of a company with a territory and the modification of the connecting factor were so far governed by national laws which showed considerable differences.

226. The issue of a transfer of the real seat of a company without loss of legal personality arose again in the ***Cartesio***,[728] a case dealing with a Hungarian limited partnership which requested a Hungarian court to register the transfer of its real seat to Italy while the company would continue to be subject to Hungarian company law. Hungarian company law

de zetelverplaatsing en zijn impact op het internationaal privaatrecht: een stand van zaken na de zaak Cartesio, Tijdschrift voor Belgisch Handelsrecht-Revue de Droit commercial belge, 2009, p. 581 at 582.

[724] Among the Member States, Austria, Belgium, Estonia, France, Greece, Luxembourg, Lettonia, Lituania, Portugal, Slovenia and Spain apply the "real seat" theory. Germany and Hungary have switched to the "incorporation" theory.

[725] Belgium is a good example of such attitude. The courts allowed the transfer to Belgium of the seat of the British company "Lamot" which had to adapt its by-laws to conform with Belgian imperative company law (Supreme Court, 12 November 1965, Lamot, Pasicrisie, 1965, I, p. 336).

[726] ECJ, Case C-81/87, Daily Mail, 27 September 1998, *ECR* I-5505.

[727] ICTA 1970, sec. 482(I) (a).

[728] ECJ, Case C-210/06, Cartesio, 16 December 2008.

governs companies having their seat in Hungary. The Court departed from the opinion of its advocate general, Mr Poiares Maduro who had considered that Daily Mail no longer reflected the state of European case-law. The transfer of seat to another country in the EU constitutes an exercise of the freedom of establishment and an outright prohibition of such transfer, resulting in the cost of liquidation to achieve it, is a disproportionate measure. A Member may impose less stringent conditions to safeguard public interest in such a case, such as the requirement that the company ceases to be governed by its law of origin. Also, the Cadbury Schweppes jurisprudence allows a State to put limits to the use of "wholly artificial arrangements" which do not reflect the economic reality". It is therefore no longer accurate to write, as in Inspire Art, that a company is totally free to elect its country of incorporation even with the purpose to circumvent the law of the country of its real seat. For the same reasons, some authors think that Cartesio should be overruled and that legal persons should be treated as natural persons.

227. Other ECJ decisions may be considered relevant for the transfer of seat from the perspective of the State of immigration. In ***Centros***[729] and ***Inspire Art,***[730] the Court held that a State of immigration may not hinder the transfer of the real seat of a company through the opening of a secondary establishment.[731] The Court held then in ***Überseering***[732] that a company incorporated in another State and having its statutory or real seat in the EU must be granted standing in court. In ***Sevic,***[733] the ECJ was called upon to answer a question concerning the absorption by a German company of a Luxembourg company which was denied registration in the German commercial registry. The denial made the liquidation of the foreign company necessary. The Court held that a transnational merger was the exercise of the right of establishment. A Member State had to apply a similar treatment to national and transnational mergers. An outright prohibition went beyond what the "rule of reason" would allow. In the pending case ***Vale,***[734] the Supreme Court of Hungary has addressed to the ECJ questions concerning the registration in Hungary of an Italian company moving its seat and requesting the application of provisions on the conversion of corporate form.

228. From this case-law, one may conclude that the reach of ***Daily Mail*** is limited by ***Cartesio***: the change of the real seat with continuation of legal personality may be impeded by the State of origin, but not if the State of destination allows the move with an attendant change of applicable law. The State of immigration must, according to ***Überseering***, ***Centros*** and ***Inspire Art***, recognise the legal personality of foreign companies which have transferred their real seat to such State, but only if they have retained their legal personality under the law of their EU State of origin. Nothing is said about an eventual obligation of the State of destination to allow immigration with a change of applicable law.[735]

229. As to EU legislation, according to the 2009/133/EC Merger Directive (codifying the 90/434/EC Merger Directive and its various amendments), the transfer must be tax neutral if the company is a European company (SE) and if the SE moves at the same time its registered office and its real seat and keeps a permanent establishment in the country of origin. Tax neutrality applies only in respect of assets invested in that PE.[736] A 14th

[729] Centros Case, C-212/97, 9 March 1999, *ECR*, I-1459.
[730] ECJ, 30 September 2003, Inspire Art, Case C-167/01, *ECR*, I-10155.
[731] ECJ, 9 March 1999, Centros, Case C-212/97, *ECR* I-01459.
[732] ECJ, 5 November 2002, Überseering, Case C-208/00, *ECR*, I-9929.
[733] ECJ, 13 December 2005, Sevic, Case C-411/03, *ECR* I-10805.
[734] Case C-378/01, Vale Építési Kft.
[735] Bellingswout, J.W., Cartesio : mijlpaal en doorbraak na Daily Mail, *W.F.R.*, 2009, p. 217.
[736] Council Directive of 19 October 2009 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, *OJ* L 310/34 of 25 November 2009.

Company Law Directive on the transfer of the company seat[737] was proposed and withdrawn. It did not harmonise connecting criteria. The transfer of the "registered office", i.e. of the place where a company is registered or of the place where a company is registered and has its central administration was made possible. It could however be refused if the central administration of the company was not located in the State of its new registration. The procedure guaranteed a.o. the correspondence of legal forms between the countries concerned.

230. As to the tax consequences, exit taxes imposed upon companies moving their seat within the EU may be questioned each time it is found that liquidation may not be imposed upon a departing company. In the pending case ***National Grid Indus BV***, [738] such is the case of the fiction imposed by Dutch law under which a company moving its real seat outside of the Netherlands is deemed to retain it in the country for corporate tax and withholding tax purposes.[739] [740]

In its 2006 Communication, the Commission extends to companies the principles led down as to individuals in the de Lasteyrie case, and applies the same reasoning to transfers of assets from a country to a permanent establishment located in another country. The Commission also extends this rule to the assets of an SE or SCE which would not remain invested in the permanent establishment of such a company in the country of origin when the seat – and the main establishment – of the SE or SCE transferred abroad.[741] The Council subsequently suggested that the immigration country accepts for tax purposes the values of the assets as determined by the country of emigration to tax the unrealised capital gains.[742] Finally, the Commission initiated infringement procedures against several Member States.[743]

[737] Proposal for a fourteenth European Parliament and Council Directive in the Transfer of the registered office of a company from one Member State to another with a change of applicable law, XV/D2/6002/97 – EN R EV. 2 ; Rammeloo, S., "The 14th EC Company Law Directive on the Cross-Border Transfer of the Registered Office of Limited Liability Companies – now or never ?", 15 *Maastricht Journal of European and Comparative Law* 3 (2008), p. 359.
[738] Pending case *National Grid Indus BV*, C-371/10, Case C-328/10.
[739] Law Corporate Tax 1969, art. 2, par. 4; Law Dividend Tax, 1965, art. 1, para. 3.
[740] Belgium, in its draft law on diverse provisions 2011, plans to abolish exit taxes on deemed liquidations in all cases of transfer of seat of a Belgian company to another EU Member State (draft new art. 214 bis: *Doc. Parl.* 2010-2011, n° 53/1208)
[741] COM (2006) 825 final.
[742] Resolution of 2 December 2008, 2008/C 323/01, *OJ* C 323/1.
[743] Infringement procedures against Sweden, 2007/2372, Commission press release IP/08/1362 of 18 September 2008 ; Portugal, 2007/2365, Commission press release IP/08/1813 of 27 November 2008 and Spain, 2007/2382, same press release.

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

231. 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.

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 (Articles 3 to 6 TFEU - 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 EU competence for attaining the level of harmonisation, approximation or coordination in direct taxation that would be required in order to remove the existing tax obstacles to intra-Community trade and industry.

232. 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 the fact of subjecting foreigners to a treatment different from national treatment 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 EU individual rights and freedoms, i.e. their **open-endedness**. There is indeed no restricting measure that cannot be caught by the EU fundamental freedoms. As to the judicial protection of European citizens and businesses, this is undoubtedly an improvement.

233. 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 judgment 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*** (paragraph 77) and upheld in ***Columbus Container*** (paragraph 78). Another example can be found in cross-border losses: it seems that the principle laid down by the Court is that EU law does not oblige a Member State to allow a company in its jurisdictions to take into account the losses of PE's and subsidiaries situated in another Member State, since their profits are not taxed in the first State (***Lidl Belgium***). However, the landmark cases ***ICI*** and ***Marks and Spencer's*** (paragraph 91) provide for the opposite solution, which makes it difficult to distinguish between the principle and the exception.

234. In defence of the Court, it is always difficult to decide a case where no sufficiently precise (EU 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 organise the allocation of

powers of taxation between two States, without regard to the situation of double taxation in the hands of the taxpayer.[744]

235. 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 EU freedoms. The failed attempt by some Member States to limit the Court's jurisdiction in direct tax matters is eloquent evidence that that interpretation cannot be followed.[745]

236. 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.[746]

237. 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, recognising 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.[747]

238. 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 EU 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 EU freedoms can be enlightening.

239. In **VAT matters**, the existence of a rather extensive and detailed set of harmonised 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 30 and 110 TFEU (25 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[748] or to national indirect taxes that are not (yet) harmonised, like taxes on vehicles.[749] The issue of the cases involving VAT is thus generally more predictable than in direct tax matters. Notable exceptions where the role of the Court has

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[744] See for example the taxation of cross-border dividends under the DTC between France and Belgium (*Damseaux*, no. 131).

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

[746] 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.

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

[748] 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.

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

been more creative deserve to be mentioned like the judgments on the compatibility of national taxes with the prohibition of turnover taxes having the same characteristics as the VAT,[750] 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.[751]

240. However, the path towards greater harmonisation 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 EU freedoms by the Court, often lead to damaging consequences for the taxing powers of the Member States themselves, not to mention for the taxpayers.

241. Also **social security** could inspire the European legislator as to direct taxation, especially as to issues where both areas almost collide, and synchronisation (i.e. the horizontal harmonisation between two different areas of law) is urgently needed, like the treatment of frontier workers or of cross-border pensions.[752] Nevertheless, the essential differences between social security and direct taxation make the hypothesis of a comprehensive EU regulation concerning the allocation of direct taxing powers between Members States very unlikely. In particular, the fact that powers as to social security are, by virtue of the **coordination** made by Reg. 1408/71 and soon by Reg. 883/2004, allocated 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.[753] 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 elicits revenues. However, using different connecting factors may create deep injustice, since unquestionably there exists a certain "*vases communicants*" (communicating vessels) effect: within a jurisdiction, higher tax rates coincide with lower social security contribution rates and conversely. Moreover, EU regulation on social security only concerns physical persons, i.e. employed or self-employed workers and their family, while a hypothetical comprehensive EU direct tax regulation replacing the existing DTCs between Member States would also have to include legal persons in its scope of application.

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

243. **Non-intervention** is certainly the solution that leaves the most room to the Court. Again, it must be emphasised that it is not a room that the Court has itself created. In this perspective, the phrases "negative harmonisation" or "negative integration" can be misleading, because harmonisation implies that the "harmonisators" consciously decide to adopt and implement common rules in order to attain a common objective whilst there is no real harmonisation between the national tax systems as a result of the ECJ judgment, since these systems continue to co-exist without looking alike.

244. **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 (paragraph 21). As the Commission has

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

[751] 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).

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

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

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 115 TFEU (94 EC).[754] Several authors have proposed -and even drafted- a multilateral EU convention, but such proposals have never received much attention from the Member States.[755] However, an instrument of secondary legislation would better fit into the institutional framework of the Internal Market.

245. Finally, **harmonisation** aims at adopting common principles or general rules at the European level and leaves to the Member States the task of implementing 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.

246. The theoretical distinction between harmonisation and coordination is not always simple to translate 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, which is then free to tax it according to its own national rules. However, from the Parent company' State perspective, the Directive can be regarded as an *harmonisation* 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.

247. The proposal for a **Common consolidated corporate tax base** clearly belongs to the harmonisation 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 judgments 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 Court of Justice".[756] Of course, it has to be borne in mind that the CCCTB, if adopted on an optimal basis, would apply only –at least in a first phase- to a limited number of companies. 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.[757] Moreover, as the failure of an early attempt to introduce a common imputation system of corporation taxes in the EU[758] has shown, harmonisation of corporate tax systems cannot be achieved

[754] 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.

[755] 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.

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

[757] 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 harmonisation of the national corporate tax systems.

[758] Proposal for a Council Directive concerning the harmonisation of systems of company taxation and of withholding taxes on dividends, COM (75) 392, *OJ* C 253, 5 November 1975, p. 2, withdrawn 23 April 1990; Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), SEC (2011) 315 final – SEC (2011) 316 final, COM (2011) 121 final, 16 March 2011.

without some kind of compensation mechanism in order to avoid improper shifting of tax revenues between Members States.

248. If harmonisation of the corporate income taxes of the Member States falls into the scope of the Internal Market, full harmonisation 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.

249. Nevertheless, unjustified obstacles to the free movement of individuals could be removed without jeopardising 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 harmonise the taxation of companies (CCCTB) and to coordinate, i.e. allocate the taxing powers in respect of, the taxation of certain income of natural persons. Income from work (and assimilated, like pensions) would be allocated according to the same criteria as the ones used in social security, both instruments being under the Court's jurisdiction. Much like interest income, income from dividends would be allocated to the state of residence, according to the logic embodied in the parent-subsidiary directive and in the absence of withholding tax on a deemed distribution from a PE. Intra-EU DTC would see their scope reduced to non-harmonised and non-coordinated categories of income (mostly income of physical persons from immovable property and from other types of investment), where the Court would directly apply the EC Treaty freedoms.

250. Moreover, coordination or harmonisation 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 judgments' effects in time was subject to lively discussions by the AGs[759] and academics[760], 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.[761]

251. Before the ***Meilicke*** (paragraph 115) decision for example, the German legislator was perfectly aware of the fact that the German imputation system was contrary to EU law as interpreted by the Court in ***Manninen*** (paragraph 116). 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.[762] 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 EU law.

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[759] 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).

[760] 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.

[761] 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 have to examine the question of time limits anymore.

[762] See Thömmes (2005), p. 560.

252. 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 judgment 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.

253. This raises the question whether a **more comprehensive scheme**, such as harmonisation of corporate taxation or any other EU instrument on the elimination of double taxation, would not effectively serve not only Community objectives, but also Member States' interests.[763] 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, harmonisation 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.

[763] 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 realised 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.

REFERENCES

Manuals and books

- AIGNER, H.-J. and ZÜGER, M. (ed.), Permanent Establishments in International Tax Law, Vienna, Linde, 2003.
- AIGNER, H.-J. and LOUKOTA, W. (ed.), Source Versus Residence in International Tax Law, Wien, Linde, 2005.
- AMATUCCI, A., International tax law, Alphen aan den Rijn, Kluwer Law International, 2006.
- AUSSANT, J., FORNASIER, R., LOUIS, J.-V., SECHE, J.-Cl. and VAN RAEPENBUSCH, S., Dispositions fiscales – Rapprochement des législations, coll. "Commentaire Megret – Le droit de la CEE", Ed. de l'Université de Bruxelles, 2nd ed., 1990.
- AUTENNE, J. AND DI PIETRO, A. (DIR.), L'Europe face à la régionalisation fiscale: compétence, concurrence, compétitivité et efficacité, Brussels, Bruylant, 2009.
- BÄCHLE, E. and RUPP, Th., Internationales Steuerrecht, Stuttgart, Schäffer-Poeschel, vol. 14, 2002.
- BIRK, D. (ed.), Handbuch des Europäischen Steuer- und Abgabenrechts, Herne/Berlin, Neue Wirtschafts-Briefe, 1995.
- BRÄHLRE, K., Controlled foreign companies-rules: eine steuersystematische Analyse im Rahmen eines Ländervergleichs unter Berücksichtigung der Vereinbarkeit mit den Doppelbesteuerungsabkommen und dem Europäischen Gemeinschaftsrecht, Frankfurt am Main, Peter Lang, 2007.
- BROKELIND, C. (ed.), Towards a homogeneous EC direct tax law: an assessment of the Member States' responses to the ECJ's case law, Amsterdam, IBFD Publications, 2007.
- CALLEJA, D., VIGNES, D. and WÄGENBAUR, R., Dispositions fiscales – Rapprochement des législations, coll. "Commentaire Megret - Le droit de la CEE", Ed. de l'Université de Bruxelles, 2nd ed., 1993.
- CARTOU, L., Droit fiscal international et européen, Paris, Dalloz, 1981.
- CERIONI, L., EU Corporate Law and EU Company Tax Law - Corporations, Globalisation and the Law, Edward Elgar Publishing, 2007.
- Colucci, M. et Sica, S. (ed.), L'Unione europea e il trattato costituzionale. Principi-Istituzioni-Politiche-Costituzione, Bologna, Zanichelli, 2005.
- COMMUNIER, J.-M., Droit fiscal communautaire, Brussels, Bruylant, 2001.
- CORDEWENER, A., Europäische Grundfreiheiten und nationales Steuerrecht, Köln, O. Schmidt, 2002.
- DAHLBERG, M., Direct taxation in relation to the freedom of establishment and the free movement of capital, EUCOTAX Series on European Taxation, London, Kluwer Law International, vol. 9, 2005.
- DAUTZENBERG, N., Unternehmensbesteuerung im EG-Binnenmarkt, Köln, Heymanns, 1997.
- DAVIES, D., Booth: Residence, domicile and UK taxation, Haywards Heath, Tottel, 10th ed., 2006.

- DE GREEF, R.M.J.M., Fiscale pensioenbelemmeringen in de gemeenschappelijke markt, Fiscale wetenschappelijke reeks, Amersfoort, Sdu Fiscale & Financiële Uitgevers, 2004.
- DEBATIN, H., and WASSERMEYER, F., Doppelbesteuerung: DBA, Loose Leaf ed. München, Beck, 2007.
- Derenne, J. and Merola, M. (ed.), Economic analysis of state aid rules – contributions and limits, Berlin, Lexxion, 2007.
- DEROUIN, P. and MARTIN, Ph., Droit communautaire et fiscalité: sélection d'arrêts et de décisions, Paris, LexisNexis Litec, 2004.
- DI PIETRO, A. (ed.), Lo stato della fiscalità nell'Unione europea - L'esperienza e l'efficacia dell'armonizzazione, Rome, Ministero delle Finanze, vol. I and II, 2003.
- DOURADO, A.P., Lições de Direito Fiscal Europeu - Tributação Directa, Coimbra Editora, 2010.
- EICKE, R., Tax Planning with Holding Companies - Repatriation of US Profits from Europe - Concepts, Strategies, Structures, Alphen aan den Rijn, Kluwer Law International, 2009.
- EICKER, K., and OBSER, R., ed. (ERNST & YOUNG – EU Competence Group), EuGH-Rechtsprechnung Ertragsteuerrecht: Grundlagen, Kommentierte Entscheidungen, Materialien, Checkliste, Bonn, Stollfuß, 2nd ed., 2007.
- ENDRES, D., OESTREICHER, A., SCHEFFLER, W. and SPENGEL, Ch., The Determination of Corporate Taxable Income in the [25] EU Member States, Alphen, Kluwer Law, 2007.
- ESSERS, P. and RIJKERS, A. (ed.), The notion of income from capital, Amsterdam, IBFD Publications, 2005.
- FALLON, M., Droit matériel général de l'Union européenne, Bruylant-Academia, Louvain-la-Neuve, 2nd ed., 2002.
- FARMER, P. and LYAL, R., EC Tax Law, Oxford, Clarendon Press, 1994.
- FERNANDEZ MARIN, F., La Tutela de la Unión Europea al Contribuyente en el Intercambio de Información Tributaria, Barcelona, Atelier Libros Juridicos, 2007.
- FERNANDEZ MARIN, F. (DIR.) AND FORNIELES GIL, A. (Coord.), Derecho Comunitario y Procedimiento Tributario, Atelier Libros Juridicos, 2010.
- FIBBE, G., EC Law Aspects of Hybrid Entities, Amsterdam, IBFD Publications, 2009.
- FROTSCHER, G., Internationales Steuerrecht, Munich, C.H. Beck, 2001.
- FROTSCHER, G. (ed.), Anforderungen an ein Modernes Steuersystem angesichts der Globalisierung, Hamburg, Haufe, 2006.
- GAILLARD, E., CARREAU, D. and LEE, W.L., Le marché unique européen, Ed. A. Pedone, Paris, 1989.
- GASSNER, W., LANG, M. and LECHNER, E., Tax Treaties and EC Law, coll. "Series on International Taxation", London – The Hague – Boston, Kluwer Law International, vol. 16, 1997.
- GINTER, E., MICHAUD, B. and CHARTIER, E., Fiscalité directe et droit communautaire, Paris, EFE Editions, Analyses – Experts, www.analysesexperts.com, 2006.
- GONZALEZ SANCHES, E., Corporate tax harmonisation in the European Union: harmonisation of the tax connecting factors, Bilbao, Servicio Editorial de la Universidad del País Vasco/Euskal Herriko Unibertsitatea, 2005.

- GORMLEY, L.W., EU taxation law, Richmond, Richmond Law & Tax, 2005.
- GRIDEL, J.P., Déclin des spécificités françaises et éventuel retour d'un droit commun européen, Rec. Dalloz, 1999, n°13.
- GROTHERR, S., HERFORT, C. and STRUNK, G., Internationales Steuerrecht, Achim, Erich Fleischer, vol. 17, 1998.
- HARDING, Ch. and SHERLOCK, A., European Community Law, London and New York, Longman, 1995.
- HEIDENBAUER, S. and STÜRZLINGER, B. (Eds.), The EU's External Dimension in Direct Tax Matters, Vienna, Linde, 2010.
- HINNEKENS, L. and HINNEKENS, Ph. (ed.), A vision of taxes within and outside European Borders, Festschrift in honor of Prof. Dr. F. Vanistendael, The Netherlands, Kluwer Law International BV, 2008.
- ISENBAERT, M., EC Law and the Sovereignty of the Member States in Direct Taxation, Amsterdam, IBFD Publications, 2010.
- JURGENS, E.C.M. and VERMEEND, W., Een onparlementair stelsel: Het Europees belastingrecht na Maastricht, Deventer, Kluwer, 1993.
- KAVELAARS, P., Tax case law of the Court of Justice of the European Union: direct taxes, social security law, procedural law, pending cases, Amersfoort, Sdu Fiscal & Financial Publishers, 2006.
- KEMMEREN, E.C.C.M., Principle of origin in tax conventions, Dongen, Pijnenburg, 2001.
- KILIAN, W., Europäisches Wirtschaftsrecht, Munich, C.H. Beck, 2nd ed., 2003.
- KOFLER, G., Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht, Wien, Linde, 2007.
- LANG, M., Avoidance of double non-taxation, Vienna, Linde, vol. 26, 2003.
- LANG, M., Double taxation conventions and social security conventions, Vienna, Linde, 2006.
- LANG, M. (ed.), EU-Tax, Vienna, Linde, 2008.
- LANG, M. and JIROUSEK, H. (ed.), Praxis des Internationalen Steuerrechts, Vienna, Linde, 2005.
- LANG, M. and PISTONE, P., The EU and third countries: direct taxation, Vienna, Linde, 2007.
- LANG, M., SCHUCH, J. and STARINGER, C., ECJ – Recent Developments in Direct Taxation, coll. "Eucotax Series on European Taxation", The Hague, Kluwer law International, Vienna, Linde, vol. 13, 2006.
- LANG, M., SCHUCH, J. and STARINGER, C., ECJ - Recent Developments in Direct Taxation 2007, Vienna, Linde, 2007.
- LANG, M., SCHUCH, J. and STARINGER, C., Tax treaty law and EC law, Vienna, Linde/Alphen aan den Rijn, Kluwer Law International, 2007.
- LASARTE, J. and ADAME, FR. (Coord.), Armonización y coordinación fiscal en la Unión Europea. Situación actual y posibles líneas de reforma, Centro de Estudios Financieros, 2010.
- LEHNER, M., Grundfreiheiten im Steuerrecht der EU-Staaten, München, Beck, 2000.

- LIER, A.P., VLIET, D.G., VAN HEERING, A.D.C. and ZEVENBOOM, G.H., Tax and legal aspects of EC harmonisation, Deventer, Kluwer Law, 1993.
- LÜDICKE, J. (ed.), Europarecht - Ende der nationalen Steuersouveränität?, Köln, O.Schmidt, 2006.
- MAISTO, G. (ed.), Courts and tax treaty law, Amsterdam, IBFD Publications, 2007.
- MAISTO, G., Residence of Companies under Tax Treaties and EC Law, Amsterdam, IBFD Publications, 2009.
- MAISTO, G. (ed.), Tax treaties and domestic law, Amsterdam, IBFD Publications, 2006.
- MAISTO, G. (ed.), Multilingual texts and interpretations of tax treaties and EC tax law, Amsterdam, IBFD Publications, 2005.
- MAITROT DE LA MOTTE, A., Souverainté fiscale et construction communautaire - Recherche sur les impôts directs, Paris, L.G.D.J., 2005.
- MALHERBE, J., Droit fiscal international, Brussels, Larcier, 1994.
- MATTERA, A., Le marché unique européen – Ses règles, son fonctionnement, Paris, Jupiter, 2nd ed., 1990.
- MITROYANNI, I., Integration Approaches to Group Taxation in the European Internal Market, PhD Thesis Queen Mary University of London, 2007.
- OECD, Fundamental reform of personal income tax, OECD, vol. 13 and vol. 16, 2006 and 2007.
- OECD, Fundamental reform of corporate income tax, OECD, vol. 16, 2007.
- PANAYI, Ch. HJI, Tax Treaty, Treaty Shopping and the European Community, The Hague, Kluwer Law International, 2007.
- PEETERS, B. (ed.), Europees belastingrecht, Gent, Larcier, 2005.
- PELKA, J. (ed.), Europa- und verfassungsrechtliche Grenzen der Unternehmens-besteuerung, Köln, O.Schmidt, 2000.
- PINTO, C., Tax competition and EU law, Kluwer Law International, The Hague/London/New York, 2003.
- PISTONE, P., The impact of Community law on tax treaties - Issues and Solutions, coll. "Eucotax Series on European Taxation", The Hague - London - New York, Kluwer Law International, vol. 4, 2002.
- RADAELLI, C., The Politics of Corporate Taxation in the European Union, London, Routledge, 1997.
- RICHELLE, I., Notion et traitement des soldes déficitaires. Aspects nationaux et internationaux, Doctoral dissertation, 1998 (available at www.bictel.ulg.ac.be/ETD-db/collection/available/ULgetd-12112009-150120/).
- SCHEFFLER, W., Internationale betriebswirtschaftliche Steuerlehre, Munich, Verlag Franz Vahlen, 2009.
- SCHERER,T.B., Doppelbesteuerung und Europäisches Gemeinschaftsrecht, München, Beck, 1995.
- SCHÖN, W., SCHREIBER, U. and SPENGEL, CH. (Eds.), A Common Consolidated Corporate Tax Base for Europe – Eine einheitliche Körperschaftsteuerbemessungsgrundlage für Europa, Springer-Verlag, 2008.

- SCHÖN, W., Tax competition in Europe, Amsterdam, IBFD Publications, 2003, 518 p.
- SIMONART, H., REMICHE, B. and DE CORDT, Y. (ed.), Liber Amicorum Jacques Malherbe, Brussels, Bruylant, 2006.
- SHOU, S., Die Zinsschranke im Unternehmensteuerreformgesetz 2008 - Zur Frage ihrer Vereinbarkeit mit dem Verfassungs-, Europa- und Abkommensrecht, Munich, Verlag C.H. Beck, 2010.
- TERRA, B.J.M. and WATTEL, P.J., European Tax Law, Alphen aan den Rijn, Kluwer Law International, 2008.
- TERRA, B.J.M. and WATTEL, P.J., European Tax Law, Deventer, Kluwer Law International, 5th ed., 2005.
- Thuronyi, V. (ed.), Tax Law design and drafting, Washington, IMF, 1996, 2 volumes.
- 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 Thesis), Brussels, Larcier, 2010.
- UCKMAR, V. (ed.), Diritto tributario internazionale, Padova, CEDAM, 2005.
- VALENDUC, Ch., L'harmonisation fiscale et la construction européenne. L'accompagnement du marché ou le renforcement du pouvoir politique?, Courrier hebdomadaire du CRISP n° 1441-1442, 1994.
- VAN ARENDONK, H., ENGELEN, F. and JANSEN, S. (ed.), A Tax Globalist, Essays in honour of Maarten J. Ellis, IBFD Publications, 2005.
- VAN RAAD, K., Materials on International & EC Tax Law, Leiden, International Tax Center, vol. 2, 6th ed., 2006.
- VAN THIEL, S., Free Movement of Persons and Income Tax Law: the European Court in search of principles, Amsterdam, IBFD Publications, 2002.
- VAN THIEL, S. (ed.), The internal market and direct taxation: Is the European Court of Justice taking a new approach?, Brussels, CFE, 2007.
- VANISTENDAEL, F. (ed.), EU freedoms and taxation: EATLP Congress, Paris 3-5 June 2004, Amsterdam, IBFD Publications, 2006.
- VOGEL, K., Taxation of cross-border income, harmonization, and tax neutrality under European Community Law. An Institutional approach. With commentary by Johan Brands and Kees van Raad, Deventer, Kluwer Law, 1994.
- VOGEL, K., and LEHNER, M., DBA: Doppelbesteuerungsabkommen Kommentar, 4th ed., Munich, C.H. Beck, 2003.
- WEBER, D., The influence of European Law on direct taxation: recent and future developments, Alphen aan den Rijn, Kluwer Law International, 2007.
- WILLIAMS, D.W., EC Tax Law, coll. "European Law Series", London and New York, Longman, 1998.
- WINKELJOHANN, N., Handbuch Umwandlungssteuerrecht: Kommentar für die praktische Fallbearbeitung: Deutsch – Englische Textausgabe mit Gesetzesbegründung, Düsseldorf, IDW, 2007.
- XENOPOULOS, X.L. (ed.), Direct tax rules and the EU fundamental freedoms: origin and scope of the problem; national and Community responses and solutions: FIDE 2006 National Reports, Nicosia, FIDE, 2006.

- ZÜGER, M., Schiedsverfahren für Doppelbesteuerungsabkommen, Vienna, Linde, vol. 16, 2001.

Articles

- 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.
- ADAME MARTINEZ, FR., "The Inheritance Tax in Spain from the Perspective of Free Movement of Capital and Right of Establishment", Intertax, 2010, p. 359.
- ADDA, M., "The supposed autonomy of the PE's definition in EU Tax Law", Fis. Int., 2008, p. 155.
- AIGNER, D., "ECJ - The Bosal Holding BV case: Parent-Subsidiary Directive and freedom of establishment", Intertax, 2004, p. 148.
- AIRS, G., "Lankhorst-Hohorst GmbH: Thin Capitalisation Rules and the EC Treaty", B.T.R., 2003, p. 268.
- AIRS, G., "OY AA - Limitations on transfers of profits to domestic situations not precluded by the EC treaty", B.T.R., 2007, p. 597.
- ALARCON GARCIA, G., "Subcapitalización, prácticas abusivas y libertad de stablecimiento. Comentarios a la Sentencia Lammers & Van Cleef NV contra el Estado Belga (As. C-105/07)", NUE, 2010, n° 306, p. 153.
- ALBERT, P.G.H., "Verdragsrechtelijke complicaties bij de intrekking van het betalingsuitstel van een conserverende aanslag na emigratie", WFR, 2007, p. 753.
- ALIAGA AGULLO, E., "Libre circulación de capitales e Impuesto sobre Sucesiones. El caso TheodorJäger", NUE, 2010, n° 304, p. 73.
- ALIOUA, M., "De Marks & Spencer-uitspraak: de relevantie voor de fiscale eenheid in Nederland", WFR, 2004, p. 286.
- ALONSO MURILLO, F., "¿Puede impedirse la deducción en el IRPF de los gastos de escolaridad de los hijos porque asistan a un colegio situado en otro Estado miembro? (Sentencias Comisión vs. R.F. Alemanay Schwarz - Gootjes - Schwarz, de 11 de septiembre de 2007)", NUE, 2009, n° 297, p. 83.
- ANDRIOLA, M., "Quale incidenza della clausola anti-abuso comunitaria nella imposizione sui redditi in Italia?", Rass. Trib., 2008, p. 270.
- AUJEAN, M., "The elimination of direct tax obstacles and the new approach to tax-coordination in the EU", in The internal market and direct taxation: Is the European Court of Justice taking a new approach?, Brussels, CFE, 2007, p. 275.
- AUTENNE, A. and NAVEZ, E.-J., "Cartesio - Les contours incertains de la mobilité transfrontalière des sociétés revisités", Cah.dr.eur., 2009, p. 91.
- AVERY JONES, J.F., "A comment on 'AMID: The wrong bridge or a bridge too far?", Eur. Tax., 2001, p. 251.
- AVERY JONES, J.F., "Flows of capital between the EU and third countries and the consequences of disharmony in European international tax law", EC Tax Rev, 1998, p. 95.

- AXER, G., "Der Europäische Gerichtshof auf dem Weg zur doppelten Kohärenz – Eine Zukunft der Hinzurechnungsbesteuerung nach dem Cadbury Schweppes-Urteil", IStR, 2007, p. 162.
- BAKER, Ph., "Are the 2006 amendments to the CFC legislation compatible with Community Law?", B.T.R., 2007, p. 1.
- BAL, A., "Latest Developments on Cross-Border Loss Relief in Germany", Eur.Tax., 2010, p. 530.
- BARANGER, S., "France - Court Holds Passive Foreign Investment Company Regime To Be Incompatible with Freedom of Establishment and Free Movement of Capital", Eur.Tax., 2009, p. 42.
- BARCIELA PEREZ, J.A., "La fiscalidad de los dividendos transfronterizos matriz-filial en la Unión Europea", Quincena fiscal, 2010, n° 15-16, p. 15.
- BARDINI, C., "The Ability to Pay in the European Market: An Impossible Sudoku for the ECJ", Intertax, 2010, p. 2.
- BARDINI, Ch., "The Fine Line between Anti-Abuse Measures and the Delimitation of a Member State's Tax Jurisdiction: The Italian Case", Eur.Tax., 2010, p. 374.
- BARENTS, R., "The Court of Justice after the Treaty of Lisbon", CMLRev., 2010, p. 709.
- BARRY, Fr. and HEALY-RAE, R., "FDI Implications of Recent European Court of Justice Decisions on Corporation Tax Matters", European Business Law Review, 2010, p. 125.
- BARTOLOTTA, E., "Gli effetti temporali delle sentenze pregiudiziali della Corte di Giustizia e il vincolo del giudicato", Rass. Trib., 2008, p. 1201.
- BEISER, R., "Kohärenz und Steuersymmetrie im Gemeinschaftsrecht", IStR, 2009, p. 236.
- BELLINGWOUT, J.W., "Cartesio: mijlpaal en doorbraak na Daily Mail", WFR, 2009, p. 217.
- BENDER, T., "Grensoverschrijdende verliesverrekening: niet afschaffen maar uitbreiden", WFR, 2004, p. 1519.
- BENDER, T., DOUMA, S.C.W. and ENGELEN, F.A., "Werken aan winst? Werken aan de interne markt! (1 and 2)", WFR, 2005, p. 1029 and 1069.
- BERGERES, M-Ch., "Droit communautaire et conventions fiscales internationales", Dr. Fiscal, 2007, p. 487.
- BERGERES, M.-Ch., "Une limite à la liberté d'établissement : la répartition équilibrée du pouvoir d'imposition", Dr. Fiscal, 2007, p. 880.
- BERGERES, M.-CH., "La CSG, la CRDS, le droit communautaire et les conventions de lutte contre les doubles impositions", Dr. Fiscal, 2008, p. 349.
- BERGERES, M-Ch., "Déduction des pertes des établissements stables et droit communautaire", Dr. Fiscal, 2008, p. 512.
- BERLIN, D., "Jurisprudence fiscale européenne", RTDE, 1999, p. 451; 2000, p. 547; 2002, p. 579 et 725; 2003, p. 737; 2005, p. 711; 2006, p. 329; 2007, p. 111.
- BERNARDEAU, L., "Jurisprudence de la CJCE: fiscalité directe", Dr. Fiscal, 2007, p. 649, 778 and 955.
- BERNARDEAU, L., "Jurisprudence de la CJCE - fiscalité directe (juill./déc. 2009)", Dr. Fiscal, 2009, p. 92.

- BERNARDEAU, L., "Jurisprudence de la CJUE: fiscalité directe (janv./juin 2010)", Dr. Fiscal, 2010, p. 520.
- BERNARDEAU, L. and SCHMIED, F., "Jurisprudence de la CJCE - fiscalité directe (oct.-déc. 2007)", Dr. Fiscal, 2008, p. 183.
- BERNARDEAU, "Jurisprudence de la CJCE: fiscalité directe (janv./mars 2008), Dr. Fiscal, 2008, p. 287.
- BERNARDEAU, L. and SCHMIED, F., "Jurisprudence de la CJCE - fiscalité directe (avr./juin 2008)", Dr. Fiscal, 2008, p. 476.
- BERNARDEAU, L. and SCHMIED, F., "Jurisprudence de la CJCE - fiscalité directe (juill./déc. 2008)", Dr. Fiscal, 2009, p. 193.
- BERNARDEAU, L. and SCHMIED, F., "Jurisprudence de la CJCE - fiscalité directe (janv./juin 2009)", Dr. Fiscal, 2009, p. 428.BERGSTRÖM, S. and BRUZELIUS, A., "Home-State restrictions on the freedom of establishment in a Swedish income tax law perspective", Intertax, 2001, p. 233.
- BIEBL, E., "EuGH in der Rs. Amurta: Einschränkung der Kapitalverkehrsfreiheit durch Quellensteuer auf Outbound-Dividenden", SWI, 2008, p. 29.
- BINON, J. M., "Avantages fiscaux en assurances de personne et droit européen", R.M.U.E., 1996, p. 129.
- BOLKESTEIN, F., "The future of European tax policy", EC Tax Rev., 2002, p. 19.
- BOLKESTEIN, F., "Taxation and competition: the realization of the Internal Market", EC Tax Rev., 2000, p. 78.
- BOON, R. and PELINCK, M., "De ICI-zaak en Articles 15 en 13, eerste lid, Wet Vpb. 1969", WFR, 1998, p. 1824.
- BOT, S.H.E. and NIJHUIS, O., "Het territorialiteitsbeginsel: weg ermee?", WFR, 2005, p. 1161.
- BOULOGNE, G.F., "Een Papillon fiscale eenheid met derde landen? Art. 24, vijfde lid, OESOmodelverdrag biedt uitkomst", WFR, 2010, p. 1255.
- BOUTEMY, B. and MEIER, E., "Non-conformité au droit communautaire du dispositif français de l'avoir fiscal et du précompte", Dr. Fiscal, 2007, p. 37.
- BOVENBERG, A.L., CNOSSEN, S. and DE MOOIJ, R.A., "Hoe harmoniseren we de vennootschapsbelasting: rechtsom of linksom?", WFR, 2002, p. 107.
- BOXEM, R.A.V., "HvJ EG, quo vadis met het paard achter de wagen?", WFR, 2003, p. 1231.
- BRANDSMA, R.P.C.W.M., "De zaak Bosal: uitlaatklep of katalysator?", WFR, 2003, p. 1385.
- BROKELIND, C., "The ECJ Bouanich case: the capital gains and dividend classification of share buy-backs in Swedish tax law", Eur. Tax., 2006, p. 268.
- BROOS, J.A. and SCHOEMAN, T., "De andere Bosal-reparatie", WFR, 2003, p. 1937.
- BROSENS, L., "Thin capitalization rules and EU law", EC Tax Rev., 2004, p. 188.
- CALDERON CARRERO, J.M., "¿Pueden emplearse los métodos para eliminar la doble imposición internacional en la lucha contra la competencia fiscal? (Comentario a la STJCE en el caso Columbus Container Services BVBA & Co.)", NUE, 2009, n° 290, p. 45.

- CALDERON CARRERO, J.M. and BAEZ, A., "The Columbus Container Services ECJ Case and Its Consequences: A Lost Opportunity to Shed Light on the Scope of the Non-discrimination Principle", Intertax, 2009, p. 212.
- CALISTO PATO, A., "EC Law and Investment Funds: the Aberdeen Case", ECTax Rev., 2009, p. 114.
- CARRIROLO, F., "Norme fiscali e libertà di stabilimento: nuovi orientamenti della Corte di Giustizia UE", Fis. Int., 2009, p. 29.
- CASAS AGUDO, D., "Respeto a la soberanía fiscal de los estados miembros en materia de imposición directa versus garantía de la libertad de establecimiento en el contexto de la compensación transfronteriza de pérdidas", Quincena fiscal, 2009, n° 22, p. 65.
- CAUMONT CAIMI, C. and FRANZE, R., "Participation exemption for inbound dividends and anti-tax-haven rules", Eur. Tax., 2001, p. 187.
- CHATZIIOAKEIMIDOU, E., The impact of EU law on national dividend tax systems, Frontiers in Finance and Economics, 2007 (Vol.4).
- CERIONI, L., "A hypothesis for radical tax reform in the European Union - The implications of the abolition of corporate income taxes", Eur. Tax., 2007, p. 377.
- CERIONI, L., "The possible introduction of common consolidated base taxation via enhanced coopération: some open issues", Eur. Tax, 2006, p. 187.
- CERIONI, L., "The “abuse of right” in EU company law and EU tax law: A re-reading of the ECJ caselaw and the quest for a unitary notion", European Business Law Review, 2010, p. 783.
- CFE ECJ TASK FORCE, "Opinion Statement of the CFE ECJ Taskforce on Losses Compensation within the EU for Individuals and Companies Carrying Out Their Activities through Permanent Establishments - Paper Submitted by the Confédération Fiscale Européenne to the European Institutions in July 2009", Eur.Tax., 2009, p. 487.
- CFE ECJ TASK FORCE, "Comment by the CFE Task Force on ECJ Cases on the Judgment in Belgium SPF Finance v. Truck Center SA, Case C-282/07, Judgment of 22 December 2008 - Paper submitted by the Confédération Fiscale Européenne to the Council of the European Union, the European Commission and the European Parliament in 2009", Eur.Tax., 2009, p. 491.
- CFE ECJ TASK FORCE, "Opinion Statement of the CFE on the Auto Lease Holland BV Case (C -185/01) - Paper Submitted by the Confédération Fiscale Européenne to the European Institutions in November 2009", Eur.Tax., 2010, p. 43.
- CFE ECJ TASK FORCE, "Opinion Statement of the CFE on the Gielen Case (C-440/08) - Submitted to the European Institutions in April 2010", Eur.Tax., 2010, p. 317.
- CFE ECJ TASK FORCE, "Opinion Statement of the CFE on Outbound Dividends: Commission v. Italy (C-540/07) - Submitted to the European Institutions in April 2010", Eur.Tax., 2010, p. 312.
- CFE ECJ TASK FORCE, "Opinion Statement of the CFE ECJ Task Force on ECJ, Columbus Container Services BVBA & Co v. Finanzamt Bielefeld-Innenstadt, 6 December 2007, C-298/05 - April 2008 – Paper submitted by the Confédération Fiscale Européenne to the Council of the European Commission, the European Commission and the European Parliament in 2008"", Eur.Tax., 2008, p. 541.
- CFE ECJ TASK FORCE, "Opinion Statement of the CFE ECJ Task Force on ECJ Cases on the Judgment in the Case of Lidl Belgium GmbH & Co KG v. Finanzamt Heilbronn (Case

C-414/06) - Judgment Delivered 15 May 2008 - Paper submitted by the Confédération Fiscale Européenne to the Council, the European Commission and the Parliament in 2008", Eur.Tax., 2008, p. 590.

- CFE ECJ TASK FORCE, "Opinion statement of the CFE Task Force on ECJ cases on the judgment in the case of Marks & Spencer plc v. Halsey (case C-446/03) - Judgment delivered 13 December 2005", Eur. Tax., 2007, p. 51.
- CHEVALIER, B., "En l'absence d'engagement d'assistance mutuelle dans le domaine fiscal, les États de l'Espace économique européen (EEE) non membres de l'Union européenne s'exposent à être traités comme des pays tiers", RAE, 2009-2010, p. 619.
- CIPOLLINA, S., "CFC legislation e abuso della libertà di stabilimento: il caso Cadbury Schweppes", Riv. dir.fin., 2007, p. 13.
- CLEAVE, B., "Boake Allen LDT and others v HMRC - Group income elections and nondiscrimination", B.T.R., 2007, p. 604.
- CNOSSEN, S., "De lange weg naar een Europese vennootschapsbelasting", WFR, 2002, p. 1855.
- COHEN, D., "When is a dividend not a dividend", B.T.R., 2006, p. 7.
- CONTRINO, A., "The new Italian tax regime of 'inbound dividends' paid by subsidiaries resident in non-EU countries", EC Tax Rev., 2001, p. 101.
- CORDEWENER, A., Company taxation, cross-border financing and Thin Capitalization in the EU internal market: some comments on Lankhorst-Hohorst GmbH", Eur. Tax., 2003, p. 102.
- CORDEWENER, A., "Das EuGH-Urteil „Gerritse" und seine Umsetzung durch das BMFSchreiben vom 3. 11. 2003* - Steine statt Brot für die Besteuerungspraxis!", IStR, 2004, p. 109.
- CORDEWENER, A., "Auslandsverluste und EG-Grundfreiheiten: Kurskorrektur am falschen Fall? – Kritische Anmerkungen zum Vorlagebeschluss des BFH vom 13.11.2002", IStR, 2003, p. 413.
- CORDEWENER, A. and DÖRR, I., "Case C-446/03, Marks & Spencer plc v. David Halsey (HM Inspector of Taxes)", CMLR, 2006, p. 855.
- CORDEWENER, A. and REIMER, E., "The future of most-favoured-nation treatment in EC tax law - Did the ECJ pull the emergency brake without real need? - Parts 1 and 2", Eur. Tax, 2006, p. 239 and 291.
- CORDEWENER, A., DAHLBERG, M., PISTONE, P., REIMER, E. and ROMANO, C., "The tax treatment of foreign losses: Ritter, M & S, and the way ahead (parts one and two)", Eur. Tax., 2004, p. 135 and 218.
- CORDEWENER, A., GRAMS, H. and MOLENAAR, D., "Neues aus Luxemburg zur Abzugsbesteuerung nach § 50a EStG - Erste Erkenntnisse aus dem EuGH-Urteil vom 3.10.2006 (C-290/04, "FKP Scorpio Konzertproduktionen GmbH")", IStR, 2006, p. 739.
- CORDEWENER, A., KOFLER , G.W. and SCHINDLER, C. Ph., "Free movement of capital, third country relationships and national tax law: an emerging issue before the ECJ", Eur. Tax., 2007, p. 107.
- CORDEWENER, A., KOFLER, G. W. and 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.

- CORDEWENER, A., KOFLER, G. and VAN THIEL, S., "The clash between European freedoms and national direct tax law: public interest defences available to the Member States", CMLRev., 2009, p. 1951.
- COSTA, G., "Ancora sul regime fiscale dei dividendi "in uscita" in contesto comunitario", Riv.dir.trib., 2010, VII-VIII, p. 210.
- COUZIN, R. and OWEN, Ph., "Corporate residence and international taxation", B.T.R., 2005, p. 568.
- CRUZ BARREIRO CARRIL, M., "National Tax Sovereignty and EC Fundamental Freedoms: The Impact of Tax Obstacles on the Internal Market", Intertax, 2010, p. 105.
- DASSESSE, M., "The Wielockx and the Svensson judgments: "Fiscal cohesion" with a different flavour?", EC Tax Journ., 1995-96, p. 181.
- DASSESSE, M., "Double taxation of foreign dividends: The Damseaux case aiming at the wrong target ! Criticism should be directed towards France and not Belgium", ECTax Rev., 2010, p. 117.
- DE BONT, G., "Taxation and the free movement of capital and payments", EC Tax Rev., 1995, p. 136.
- DE BRABANTER, V., "The Danner case: elimination of Finnish tax obstacles to the crossborder contributions to voluntary pension schemes", EC Tax Rev., 2003, p. 167.
- DE BROE, L., "Hard times for emigration taxes in the EC", in van Arendonk, H./Engelen, F. /Jansen, S. (ed.), A Tax Globalist, Essays in honour of Maarten J. Ellis, 2005, p. 210.
- DE BROE, L., "Some observations on the 2007 communication from the Commission: The application of anti-abuse measures in the area of direct taxation within the EU and in relation to third countries", ECTax Rev., 2008, p. 142.
- DE BROE, L. and BAMMENS, N., "Truck Center – Belgian Withholding Tax on Interest Payment to Non-Resident Companies Does Not Violate EC Law: A critical Look at the ECJ's Judgment in Truck Center", ECTax Rev., 2009, p. 131.
- DE FREMINET, P., "La Communauté européenne dispose-t-elle d'un véritable juge fiscal?", Dr. Fiscal, 2007, p. 647.
- DE GRAAF, A., "Cross-border direct tax issues of investment funds from the perspective of European law", ECTax Rev., 2008, p. 197.
- DE GRAAFF, R., "De houdsterverliesregeling versus de EU-verdragsvrijheden", WFR, 2010, p. 1108.
- DE HOSSON, F. C., "On the controversial role of the European Court in corporate tax cases", Intertax, 2006, p. 294.
- DE HOSSON, F.C., "Het onderscheid vaste inrichting - Dochtervennootschap bezien vanuit gemeenschapsrechtelijk perspectief", WFR, 2003, p. 1581.
- DE KORT, J.W.J., "De emigratieheffing bij aanmerkelijk belang voor het Europese hof: een nieuwe start (zaak C-470/04)", WFR, 2006, p. 1418.
- DE KORT, J.W.J., "Ontwikkelingen emigratieheffing bij aanmerkelijk belang: N-zaak en verder", WFR, 2008, p. 551.
- DE LA FERIA, R., "Prohibition of abuse of (community) law: the creation of a new general principle of EC law through tax", CMLRev., 2008, p. 395.

- DE LA MARDIERE, Ch., "Compatibilité avec le droit communautaire de l'article 155 A du CGI", Dr. Fiscal, 2009, p. 397.
- DE MOFFARTS D'HOUCHENEE, S., "Vers un rapprochement du régime fiscal des succursales et des filiales?", Ann. dr. Liège, 1986, p. 429.
- DE MONES, S., DURAND, P-H., MANDELBAUM, J-F., KLEIN, M. and NIEMANN, A., "Abuse of Tax Law across Europe (Part I)", ECTax Rev., 2010, p. 85.
- DE SMIT, R.C. and THEUNISSEN, K.M.H.J., "Verslag van de rondetafelbijeenkomst 'Het fiscale concern binnen het EG-recht", WFR, 2008, p. 1287.
- DE TROYER, I., "A European Perspective on Tax Recovery in Cross-Border Situations", ECTax Rev., 2009, p. 211.
- DE WILDE, M.F., "Some thoughts on a fair allocation of Corporate Tax in a Globalizing Economy", Intertax, 2010, p. 281.
- DE WILDE, M.F., "On X Holding and the ECJ's Ambiguous Approach towards the Proportionality Test", ECTax Rev., 2010, p. 170.
- DE WILDE, M.F., "Over de (on)verenigbaarheid van het fiscale-eenheidsregime met de vestigingsvrijheid", WFR, 2009, p. 1546.
- DEL SOLE, A., "I principi sanciti dalla Corte Europea in materia di imposte dirette", Fis. Int., 2008, p. 437.
- DEIDDA, A., "The reform of the Italian tax system", Intertax, 2002, p. 307.
- DELAUNAY, B., "L'évolution de la jurisprudence relative aux justifications des restrictions fiscales aux libertés communautaires", Dr. Fiscal, 2009, p. 248.
- DEN BOER, S., "Freedom of Establishment versus Free Movement of Capital: Ongoing Confusion at the ECJ and in the National Courts?", Eur.Tax., 2010, p. 250.
- DENYS, L.A., "Previous EU proposals for cross-border loss relief", Eur. Tax., 2006, p. 443.
- DENYS, L.A. , "The ECJ case law on cross-border dividends revisited", Eur. Tax., 2007, p. 221.
- DEVEREUX, M.P., Taxes in the EU New Member States and the Location of Capital and Profit, University of Warwick, IFS and CEPR, 2006, p. 27.
- 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, n° 48, p. 1475.
- DIBOUT, P., "Le périmètre des groupes de sociétés et la liberté d'établissement - A propos de CJCE, 27 nov. 2008, C-418/07, Sté Papillon", Dr. Fiscal, 2008, p. 640.
- DIBOUT, P., "Le précompte : incompatibilité avec le droit communautaire ? Eclairage sur le renvoi préjudiciel à la Cour de Justice", Dr. Fiscal, 2009, p. 427.
- DIETVORST, G.J.B., "Danner, een wolf in schaapskleren", WFR, 2002, p. 1739.
- DIETVORST, G.J.B., "Proposal for a pension model with a compensating layer", EC Tax Rev., 2007, p. 142.
- DIETZ, H. and BUXBOM, D., "Denmark - New less restrictive CFC legislation", Eur. Tax., 2002, p. 515.
- DOERR, I., "A step forward in the field of European corporate taxation and cross-border loss relief: some comments on the Marks and Spencer case", Intertax, 2004, p. 180.

- DONNELLY, M. and YOUNG, A., "Aspects of constructing a rational framework for loss relief: a sample of how four countries compete", B.T.R., 2005, p. 432.
- DOUMA, S. and NAUMBURG, C., "Marks & Spencer: are national tax systems éclairé ?", Eur. Tax, 2006, p. 431.
- DOUMA, "Doorwerking van rechtspraak van het HvJ EG in de nationale rechtsorde", WFR, 2008, p. 1175.
- DOURADO, A.P. and PISTONE, P., "Looking Beyond Cartesio: Reconciliatory Interpretation as a Tool to Remove Tax Obstacles on the Exercise of the Primary Right of Establishment by Companies and Other Legal Entities", Intertax, 2009, p. 342.
- DOURADO, A.P., "From the Saint-Gobain to the Metallgesellschaft case: scope of nondiscrimination of permanent establishments in the EC Treaty and the most-favoured-nation clause in EC Member States tax treaties", EC Tax Rev., 2002, p. 147.
- DURAND, P-H., and RUTSCHMANN, Y., "The Papillon Case: A First Step Toward a New Era in European Tax Treatment of Groups?", ECTax Rev., 2009, p. 122.
- DÜRRSCHMIDT, D., "Comprehensive Approaches to Company Taxation in the European Union and Cross-Border Corporate Reorganisations", Intertax, 2007, p. 152.
- DWI NUGROHO, A., "Treatment of Losses in an EU Corporate tax Group: Ending a Series of Unfortunate Events", ECTax Rev., 2009, p. 29.
- DYRBERG, P., "Full free movement of companies in the European Community at last", E.L.Rev., 2003, p. 528.
- ECKL, P., "Recent cases on Direct Tax provisions that may breach EC Law", Eur. Tax., 2002, p. 352.
- EDEN, S., "Capital gains tax – Round in a full circle", B.T.R., 2007, p. 668.
- EGELIE, W.F.E.M. and DE NEELING, G.T., "De zaak-Bosal en deelnemingen in derde landen: gaan we opnieuw naar Luxemburg?", WFR, 2007, p. 91.
- EISMA, M., "Big Bad Bosal kwam niet onverwacht", NTER, 2003, p. 267.
- EISMA, M., "Exitheffing exit?", NTER, 2004, p. 217.
- EISMA, M., "Vrij verkeer en voorkoming van dubbele belasting", NTER, 2003, p. 15.
- ELSWEIER, F., "Dutch experience with european developments; the story of Dr. Jekyll and Mr. Hyde continues...", Intertax, 2006, p. 186.
- ENGLISCH, J., "Fiscal cohesion in the taxation of cross-border dividends (parts one and two)", Eur. Tax., 2004, p. 323 and 355.
- ENGLISCH, J., "Dividenden aus einem anderen Mitgliedstaat: Keine Anrechnung der Quellensteuer im Wohnsitzstaat", IStR, 2007, p. 66-69.
- ENGLISCH, J., "Taxation of Cross-Border Dividends and EC Fundamental Freedoms", Intertax, 2010, p. 197.
- ENGLISCH, J., "Europarechtliche Einflüsse auf den Untersuchungsgrundsatz im Steuerverfahren", IStR, 2009, p. 37.
- ESSERS, P. and ELSWEIER, F., "Dutch experience with European developments: a story of Dr. Jekyll and Mr. Hyde", EC Tax Rev., 2003, p. 82.
- ESSERS, P.H.J., "De Bosal-wetgeving en het Titanic-gevoel", WFR, 2003, p. 1843.

- ESSERS, P.H.J., "De Nederlandse vennootschapsbelasting in Europees perspectief: overzicht van het harmonisatieproces", WFR, 2003, p. 1573.
- ESSERS, P.H.J., "CCCTB dreigt aan vlijt ten onder te gaan", WFR, 2007, p. 741.
- EUROPEAN TEAM of the IBFD, "The Océ van der Grinten case: implications for other EU member states - a critical assessment", Eur. Tax., 2003, p. 394.
- EVANS, D. and DELAHUNTY, L., "E.U. perspective on U.K. CFC rules", in 01/08 European Court of Justice Tax Cases 2007, BNA International, London, p. 13-15.
- EVERS, M. and DE GRAAF, A., "Limiting Benefit Shopping: Measures of Four Large EU Member States to Counter Erosion of Their Dividend Tax", ECTax Rev., 2010, p. 188.
- EVERS, M. and DE GRAAF, A., "Limiting Benefit Shopping: Outline of a Measure to Counter Erosionof the Dividend Tax Base in the EU", ECTax Rev., 2010, p. 238.
- FABRA VALLS, M., "Régimen fiscal aplicable a los dividendos entrantes percibidos por personas físicas y relaciones entre el Derecho Comunitario y los Convenios de Doble Imposición (Comentarios la STJCE de 14 de noviembre de 2006, Keckhaert - Morres, As. C-513/04)", NUE, 2009, n° 292, p. 73.
- FALCAO, T., "Third-Country Relations with the European Community: A Growing Snowball", Intertax, 2009, p. 307.
- FARMER, P., "Columbus Container Services BVBA & Co v Finanzamt Bielefeld-Innenstadt: the ECJ fails to grasp the tax competition nettle in relation to foreign income rules", B.T.R., 2008, p. 105.
- FARMER, P., "The Court's case law on taxation: a castle built on shifting sands?", EC Tax Rev., 2003, p. 75.
- FARMER, P., "EC law and national rules on direct taxation: a phoney war?", EC Tax Rev., 1998, p. 13.
- FARMER, P., "EC law requires multilateral tax treaty", EC Tax Rev., 1998, p. 13.
- FASE, A.A., "Het rangordevraagstuk in derdelandenverhoudingen", WFR, 2008, p. 687.
- FERNANDES FERREIRA, R. M. and FERNANDES DE OLIVEIRA, A., "Taxation of dividends distributed by Portuguese resident companies ", Intertax, 2006, p. 559.
- FERNANDEZ MARIN, F., "Tassazione dei non residenti: tra scambio d'informazione e principio di proporzionalità", Rass. Trib., 2008, p. 541.
- FERNANDEZ, F.J.M., "Tax treatment of corporate losses in Spain", Intertax, 2000, p. 168.
- FLORA, P., "Riflessioni in tema di ritenuta sui dividendi transnazionali corrisposti a soggetti comunitari", Fis. Int., 2008, p. 39.
- FONTANA, R., "Direct investments and third countries: things are finally moving...in the wrong direction", Eur. Tax., Oct. 2007, p. 431.
- FONTANA, R., "The uncertain future of CFC regimes in the member states of the European Union – Part 2", Eur. Tax., 2006, p. 317.
- FORTUIN, A., "Denkavit Internationaal: the procedural issues", Eur. Tax., May 2007, p. 239.
- FORTUIN, A., "The influence of European law on direct taxation - Recent and future developments", Eur. Tax., March 2007, p. 144.
- FREEDMAN, J., "Tax - A political issue", B.T.R., 2007, p. 657.

- FREEDMAN, J., "Defining taxpayer responsibility: in support of a general anti avoidance principle", B.T.R., 2004, p. 332.
- GAMMIE, M., "The impact of the Marks & Spencer case on US-European planning", Intertax, 2005, p. 485.
- GAMMIE, M. and BRANNAN, G., "EC law strikes at the UK Corporation Tax – The Death Knell of UK imputation", Intertax, 1995, p. 389. GARCIA CARACUEL, M., "Incompatibilidad de la libertad de establecimiento en el Derecho Comunitario con las legislaciones nacionales de lucha contra la evasión fiscal (STJCE Cadbury Schweppes, C-196/04, de 2 de septiembre de 2006)", NUE, 2008, n° 282, p. 55.
- GARCIA CARRETERO, B., "La fiscalidad de los residentes comunitarios que ejercitan sus libertades fundamentales: particular referencia a la tributación de las pensiones", NUE, 2008, n° 278, p. 77.
- GARCIA PRATS, F.A., "The evolution of income taxation under EC law requirements", EC Tax Rev., 2002, p. 137.
- GARCIA PRATS, F.A., "The potential impact of EC non-discrimination principle on Spanish income taxation", EC Tax Rev., 1998, p. 176.
- GASSNER, W., "Company taxation in the Internal Market – An Austrian Perspective", Eur. Tax., 2002, p. 317.
- GEORGOPOULOS, Th., "Le rôle créatif du juge communautaire en matière de fiscalité directe", RTDE, 2005, p. 61.
- GERZOVA, L., LOZEV, K., PERDELWITZ, A. and MKRTCHYAN, T., "Vienna Conference on "Recent and Pending Cases at the European Court of Justice on Direct Taxation"", Eur.Tax., 2009, p. 37.
- GIACONIA, M. and GRECO, L., "La comunicazione della Commissione Europea sull'applicazione delle misure anti-abuso nell'area delle imposte dirette (COM (2007) 785)", Fis. Int., 2008, p. 243.
- GIBERT, B., "A French reaction to the communication from the Commission 'Towards an Internal Market without tax obstacles'", Eur. Tax., 2002, p. 309.
- GODDIN, G. and GODDIN, B., "Arrêt "Cartesio": l'étendue de la liberté d'établissement pour les sociétés "émigrantes", JT eur., 2009, p. 77.
- GOUDSMIT, C.M., "Een driehoekssituatie vanuit het EG-perspectief van de betrokken EGlidstaten", WFR, 2003, p. 1628.
- GOUTHIERE, B., "Thin Capitalization Rules and the Non-discrimination Principle", Eur. Tax., 2002, p. 159.
- GOUTHIERE, B., "Removal of discrimination – a Never-Ending story", Eur. Tax., 1994, p. 296.
- GRACIA, J-Ch., "Liberté d'établissement et imputation des pertes d'un établissement stable – Restriction justifiée par la nécessité de garantir la cohérence du système fiscal national (oui)", Dr. Fiscal, 2008, p. 616.
- GRACIA, J-Ch., "La prévention de la double imposition comme obligation des Etats membres", Dr. Fiscal, 2010, p. 189.
- GRAMS, H. and SCHÖN, I., "Zur Umsetzung des EuGH-Urteils in Sachen Scorpio Konzertproduktionen GmbH (C-290/04) durch BMF-Schreiben vom 5. 4. 2007 – wird die

Europäische Kommission ihr Vertragsverletzungsverfahren gegen Deutschland einstellen?", IStR, 2007, p. 658.

- GRAU, R. and GENOT, E., "Application discriminatoire d'une retenue à la source sur les dividendes versés à une SICAV", Dr. Fiscal, 2009, p. 445.
- GRAU, R. and GENOT, E., "Liberté d'établissement - Application discriminatoire d'une retenue à la source sur les dividendes versés à une SICAV", Dr. Fiscal, 2009, p. 445.
- GREGGI, M., "Recenti sviluppi e questioni di compatibilità comunitaria delle disposizioni di contrasto al fenomeno della cosiddetta "esterovestizione" societaria", Rass. Trib., 2009, p. 105.
- GRILLI, S., "Le costruzioni di puro artificio nella giurisprudenza della Corte di Giustizia: considerazioni in tema di effettiva attività economica", Rass. Trib., 2008, p. 1169.
- GUTMAN, O., "Cartesio Oktato es Szolgaltato bt - the ECJ gives its blessing to corporate exit taxes", B.T.R., 2009, p. 385.
- GUTMANN, D., "The Marks & Spencer case: proposals for an alternative way of reasoning", EC Tax Rev., 2003, p. 154.
- GUTMANN, D., "Tax treaty interpretation in France, the relevance of EC law", EC Tax Rev., 2001, p. 201.
- 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.
- GUTMANN, D. and HINNEKENS, L., "The Lankhorst-Hohorst case. The ECJ finds German thin capitalization rules incompatible with freedom of establishment", EC Tax Rev., 2003, p. 90.
- HAHN, H., "Im Westen nichts Neues überlegungen zur Entscheidung des EuGH in der Rechtssache Papillon", IStR, 2009, p. 198.
- HAHN, H., "Unterschiedliche Behandlung von Gebietsansässigen und Gebietsfremden beim Rückkauf von Aktien – DBA und Gemeinschaftsrecht (Bouanich)", IStR, 2006, p. 169-173.
- HAHN, H., "EuGH: Kein Ausschluss der Abgeltungswirkung durch Steuerabzug bei Steuerausländern", IStR, 2004, p. 275.
- HEITHUIS E.J.W., "De reparatiewetgeving naar aan aanleiding van het Bosal-arrest: een gemiste kans!", WFR, 2003, p. 1869.
- HELMINEN, M., "The future of source State Dividend Withholding taxes in Finland and the European Union", Eur.Tax., 2008, p. 354.
- HELMINEN, M., "Freedom of establishment and OyAA", Eur. Tax., 2007, p. 490.
- HELMINEN, M., "Is there a future for CFC-regimes in the EU", Intertax, 2005, p. 117.
- HELMINEN, M., "The Esab case (C-231/05) and the future of group taxation regimes in EU", Intertax, 2005, p. 595.
- HELMINEN, M., "Arrest HvJ EG in de zaak-Danner en de fiscale behandeling van buitenlandse pensioen-verzekeringsstelsels", WFR, 2003, p. 553.
- HEMELS, S., "References to the Mutual Assistance Directive in the Case Law of the ECJ: A Systematic Approach", Eur.Tax., 2009, p. 583.

- HEMELS, S., ROMPEN, J., SMET, P., DE WAELE, I, ADFELDT, S., BREUNINGER, G., ERNST, M., CARPENTIER, V. and MOSTAFAVI, S., "Freedom of Establishment or Free Movement of Capital: Is There an Order of Priority? Conflicting Visions of National Courts and the ECJ", ECTax Rev., 2010, p. 19.
- HEMELS, S.J.C. and ROMPEN, J.W., "Vestiging of kapitaalverkeer: welke vrijheid heeft prioriteit?", WFR, 2010, p. 1058.
- HERRERA MOLINA, P.M., "STJCE 13.12.2005 (Gran Sala), Marks & Spencer plc contra David Halsey (Her Majesty s Inspector of Taxes), As. C-446/03: ¿El principio del fin?: un giro radical sobre la incidencia de las libertades comunitarias en la fiscalidad internacional", CT, 2009, n° 130, p. 229.
- HEY, J., "Erosion nationaler Besteuerungsprinzipien in Binnenmarkt? - Zugleich zu den Rechtfertigungsgründen der 'Europatauglichkeit' und 'Wettbewerbsfähigkeit' des Steuersystems", SWI, 2005, p. 317.
- HEYDT, V., " Das Verbot der Doppelbesteuerung – ein rechtsverbindlicher Bestandteil des Binnenmarktes", EuZW, 2000, p. 33.
- HINES, J.R., "Tax competition in Europe", B.T.R., 2006, p. 209.
- HINNEKENS, L., "The new path of ECJ tax case law", in The internal market and direct taxation: Is the European Court of Justice taking a new approach?, Brussels, CFE, 2007, p. 38.
- HINNEKENS, L., "The Marks and Spencer case: UK special commissioners find UK group relief rules compatible with freedom of establishment", Eur. Tax., 2003, p. 175.
- HINNEKENS, L., "European Court challenges flat rate withholding taxation of non-resident artist: comment on the Gerritse decision", EC Tax Rev., 2003, p. 207.
- HINNEKENS, L., "The search for the framework conditions of the fundamental EC Treaty principles as applied by the European Court to member States' direct taxation", EC Tax Rev., 2002, p. 112.
- 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.
- HINNEKENS, L., "The Monti-Report: the uphill task of harmonizing direct tax systems of EC Member States", EC Tax Rev., 1997, p. 31.
- HINNEKENS, L., "Non-discrimination in EC Income Tax Law: painting in the colours of a Chameleon-Like principle", Eur. Tax., 1996, p. 286.
- HINNEKENS, L., "Compatibility of bilateral tax treaties with european community law. The rules", EC Tax Rev., 1994, p. 144.
- HINNEKENS, L., "The Uneasy Case and Fate of Article 293 Second Indent EC", Intertax, 2009, p. 602.
- HINTSANEN, L. and PETTERSSON, K., "The implications of the ECJ Holding the denial of Finnish imputation credits in cross-border situations to be incompatible with the EC treaty in the Manninen case", Eur. Tax., 2005, p. 130.
- HOLTHAUS, J., "New German Withholding Tax for Artistes and Sportsmen: Opportunities and Risks", Eur.Tax., 2009, p. 333.
- HREHOROVSKA, L., "Tax harmonization in the European Union", Intertax, 2006, p. 158.
- IFA, "Trends in company/shareholder taxation: single or double taxation?", Cah. dr. fisc. intern. LXXXVIIIa, 2003, p. 71.

- ISENBAERT, M., "M & S judgment: the ECJ caught between a rock and a hard place", EC Tax Rev., 2006, p. 10.
- ISENBAERT, M., "The ECJ condones Belgian personal income taxation of dividends. A temporary state of affairs?", EC Tax Rev., 2007, p. 236.
- ISENBAERT, M., "The Contemporary Meaning of 'Sovereignty' in the Supranational Context of the EC as Applied to the Income Tax Case Law of the ECJ", ECTax Rev., 2009, p. 264.
- JABALERA RODRIGUEZ, A., "Tratamiento fiscal de los dividendos transfronterizos en España y su incompatibilidad con la libre circulación de capitales", Quincena fiscal, 2010, n° 18, p. 13.
- JANSEN, J.J.M., "Bosal-Holding - Gedachten naar aanleiding van de conclusie van A-G Alber", WFR, 2002, p. 1779.
- JIMENEZ-VALLADOLID DE L'HOTELLERIE-FALLOIS, D.J., "La compatibilidad del principio de simetría en la aplicación del método de exención con la libertad de establecimiento: comentario a la STJCE de 15 de mayo de 2008, asunto "Lidl Belgium" (C-414-06)", CT, 2008, n° 128, p. 171.
- KAMPHUIS, H.J. and PÖTGENS, F.P.G., "Schumacker ofwel onder welke omstandigheden wordt de buitenlands belastingplichtige behandeld als een binnenlands belsatingplichtige?, WFR, 1995, p. 643.
- KAVELAARS, P., "Grensoverschrijdende zekerheidstellingen europeesrechtelijk getoetst", WFR, 2003, p. 575.
- KAVELAARS, P., "The right of option for non-residents in Dutch income tax law", EC Tax Rev., 2001, p. 165.
- KAVELAARS, P. and SMITTENBERG, R.A.H., "Het groepsbegrip in de thincapregeling", WFR, 2004, p. 165.
- KEMMEREN, E.C.C.M, "Marks & Spencer: balanceren op grenzeloze verliesverrekening", WFR, 2006, p. 211.
- KEMMEREN, E.C.C.M., "Renneberg Endangers the Double Tax Convention System or Can a Second Round bring Recovery?", ECTax Rev., 2009, p. 4.
- KEMMEREN, E.C.C.M. and PEETERS, H-P., "Avoidance of Double Taxation and Its Interaction with European Triangular Arrangements", ECTax Rev., 2010, p. 4.
- KERSSENBROCK, O-F. G., "In the wake of Lankhorst-Hohorst", Intertax, 2004, p. 306.
- KESSLER, W. and SPENGEL, Ch., "Germany – Direct tax provisions potentially incompatible with EC law – A checklist for practitioners", Eur. Tax., 2003, p. 355.
- KESSLER, W., "Gedanken zur grenzüberschreitenden Verlustnutzung nach Lidl Belgium", IStR, 2008, p. 581.
- KIBLBÖCK, I., "Developments in the wake of the 'Schumacker Decision", EC Tax Rev., 1996, p. 47.
- KIEKEBELD, B. J. and SMIT, D. S., "Freedom of establishment and free movement of capital in Association and Partnership Agreements and direct taxation", EC Tax Rev., 2007, p. 216.
- KIEKEBELD, B.J., "Europa-overeenkomsten en vrij verkeer van kapitaal: een onderschatte combinatie", WFR, 2004, p. 902.

- KIEKEBELD, B.J., MERKS, P.F.E.M. and SMIT, D.S., "Cadbury Schweppes: analyse en de gevolgen voor de fiscale behandeling van buitenlandse concernfinanciering onder de huidige Wet VPB 1969", WFR, 2007, p. 129.
- KINGSTON, S., "A light in the darkness: recent developments in the ECJ's direct tax jurisprudence", C.M.L.R., 2007.
- KOELE, I.A., "How Will International Philanthropy Be Freed from Landlocked Tax Barriers?", Eur.Tax., 2010, p. 409.
- KOFLER, G. and MASON, R., "Double Taxation: A European Switch in Time?", Columbia Journal of European Law, 2007, p. 63.
- KOFLER, G. and TOIFL, G., "Austria's differential treatment of domestic and foreign intercompany dividends infringes the EU's free movement of capital", Eur. Tax., 2005, p. 232.
- KÖHLER, S. and TIPPELHOFER, M., "Kapitalverkehrsfreiheit auch in Drittstaatenfällen?", IStR, 2007, p. 645.
- KOK, C. and TE BOEKHORST, P., "German tax regime for non-resident employees incompatible with EC law", Eur. Tax., 1995, p. 13.
- KOK, Q., "De onmogelijkheid van een grensoverschrijdende fiscale eenheid in de vennootschapsbelasting", WFR, 2010, p. 607.
- KOK, R., "Domestic and Cross-Border Loss Relief in the European Union", Intertax, 2010, p. 663.
- KÖRNER, A., "The ECJ's Lankhorst-Hohorst judgment – Incompatibility of Thin Capitalization rules with European Law and further consequences", Intertax, 2003, p. 162.
- KOSTENSE, H.E., "The Saint-Gobain case and the application of tax treaties. Evolution or revolution?", EC Tax Rev., 2000, p. 220.
- KRAFT, G., "Profit and loss attribution between head office and permanent establishment in different jurisdictions: the German tax administration's point of view critically analysed", Eur. Tax., 2001, p. 82.
- KRAFT, G. and SCHULZ, K.A., "The Compatibility of the German Taxation of Foreign Private Foundations with EU Law", Eur.Tax., 2010, p. 215.
- LAMENSCH, M. and VAN THIEL, S., "The Elimination of Double taxation of Dividends in the EU: Cobelfret Means the End of Belgium's Final Taxation", Intertax, 2009, p. 473.
- LAMPRECHT, Ph., "Betriebsstättenverluste, Verlustvortragsrecht und Aufteilung der Besteuerungsbefugnisse nach dem Urteil des EuGH in der Rs. KR Wannsee, nachfolgend S. 769", IStR, 2008, p. 766.
- LANG, M., "Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions and Contradictions", ECTax Rev., 2009, p. 98.
- LANG, M., "Die Verdrängung nationalen Rechts durch Gemeinschaftsrecht: In dubio pro fisco?", SWI, 2009, p. 216.
- LANG, M., "Der Anwendungsbereich der Grundfreiheiten – Maßgeblichkeit des Sachverhaltes oder der nationalen Rechtsvorschrift?", in Festschrift für Joachim Lang zum 70. geburtstag - Gestaltung der Steuerrechtsordnung, Cologne, Verlag Dr. Otto Schmidt, 2010, p. 1003 to 1030.

- LANG, M., "Der Anwendungsbereich der Grundfreiheiten – Maßgeblichkeit des Sachverhaltes oder der nationalen Rechtsvorschrift?", FS Fritz Rödler, in: Lang/Weinzierl (Hrsg) Europäisches Steuerrecht, 2010, p. 521 to 534.
- LANG, M., "Limitation of the temporal effects of judgments of the ECJ", Intertax, 2007, p. 230.
- LANG, M., "Direct taxation: is the ECJ heading in a new direction?", Eur. Tax, 2006, p. 421.
- LANG, M., "The Marks & Spencer case – The open issues following the ECJ's final word", Eur. Tax, 2006, p. 54.
- LANG, M., "Gemeinschaftsrechtliche Verpflichtung zur Rechtsformneutralität im Steuerrecht", IStR, 2006, p. 397.
- LANG, M., "Steuerabzug, Haftung und Gemeinschaftsrecht", SWI, 1/2007, 017.
- LANG, M., "CFC Legislation and Community Law", Eur. Tax., 2002, p. 374.
- LANG, M., "Das EuGH-Urteil in der Rechtssache Schempp - Wächst der steuerpolitische Spielraum der Mitgliedstaaten?", SWI, 2005, p. 411-416.
- LANG, M. and SCHUCH, J., "Europe on its way to a multilateral tax treaty", EC Tax Rev., 2000, p. 39.
- LARKING, B., "Fokus bank: the end of withholding tax as we know it?", EC Tax Rev., 2005, p. 69.
- LAUSTERER, M. and DE WEERTH, J., "Körperschaftssteuer: Die deutsche Regelung über die Abzugsfähigkeit von Verlusten aus Abschreibungen auf den Beteiligungswert an Tochtergesellschaften beschränkt die Niederlassungsfreiheit", IStR, 2007, p. 291-298.
- LECOCQ, A., "Affaire X Holding BV. et l'autonomie du principe de répartition équilibrée du pouvoir d'imposition entre Etats membres", RGF, 2010, n° 5, p. 2.
- LEHNER, M., "Limitation of the national power of taxation by the fundamental freedoms and non-discrimination clauses of the EC Treaty", EC Tax Rev., 2000, p. 5.
- LENAERTS, K. and BERNARDEAU, L., "L'encadrement communautaire de la fiscalité directe", Cah. dr. eur., 2007, p. 19.
- LINDENCRONA, G., "The abolition of joint taxation – the Swedish experience", Intertax, 2002, p. 474.
- LINN, A., "Verfahrensrechtliche Aspekte der Erstattung gemeinschaftsrechtswidriger Quellensteuer auf Dividenden", IStR, 2010, p. 275.
- LODIN, S-O, "The competitiveness of EU Tax Systems", Eur. Tax., 2001, p. 166.
- LOHSE, W. Ch., "Einfluss ausländischer ESt auf Pfändungsfreigrenzen (Pusa)", IStR, 2005, p. 62-65.
- LOPEZ ESPADAFOR, C.M., "Deduction for dividends for non-residents with a permanent establishment in Spain", Intertax, 2000, p. 25.
- 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.
- LOVELL'S INTERNATIONAL TAX TEAM, "Impact of Cadbury Schweppes on CFC Legislation", in 01/08 European Court of Justice Tax cases: A Review, BNA International, London, p. 12.

- LUPO, A., "Reliefs from economic double taxation on EU dividends: impact of the Baars and Verkooijen cases", Eur. Tax., 2000, p. 270.
- LYAL, R., "Non-discrimination and direct tax in Community law", EC Tax Rev., 2003, p. 68.
- LYONS, T., "Tax in a single market - Bosal and Marks and Spencer plc", B.T.R., 2003, p. 443.
- LYONS, T., "What will the ECJ decide tomorrow", B.T.R., 2006, p. 399.
- LYONS, T., "Marks & Spencer: something for everyone", B.T.R., 2006, p. 9.
- LYONS, T., "A drive to curb the power of the ECJ", B.T.R., 2005, p. 449.
- MAGLIOCCO, A. and SANELLI, A., "Should Outbound Dividends Remain Taxed at Source in the European Union? Some Hints from the Italian Example", Eur.Tax., 2009, p. 199.
- MAISTO, G. and PISTONE, P., "A European Model For Member States' Legislation on the Taxation of Controlled Foreign Subsidiaries (CFCs) - Part 1", Eur.Tax., 2008, p. 503.
- MAISTO, G. and PISTONE, P., "A European Model For Member States' Legislation on the Taxation of Controlled Foreign Subsidiaries (CFCs) - Part 2", Eur.Tax., 2008, p. 554.
- MAISTO, G., "Shaping EU company tax policy: the EU Model Tax Treaty", Eur. Tax., 2002, p. 303.
- MAITROT DE LA MOTTE, A., "La sous-capitalisation à l'épreuve des libertés de circulation", Dr. Fiscal, 2010, p. 196.
- MAITROT DE LA MOTTE, A. and DUBOUT, E., "L'extension de la liberté de circulation des capitaux aux Etats membres de l'EEE et le principe de proportionnalité", Dr. Fiscal, 2010, p. 588.
- MALHERBE, J. and BERLIN, D., "Conventions fiscales bilatérales et droit communautaire", RTDE, 1995, p. 245.
- MALHERBE, J. and CASIMIR, L., "Fiscalité internationale française et mise en œuvre du droit communautaire", J.T.D.E., 2005, p. 225.
- MALHERBE, J. and DE WOLF, M., "Droit fiscal (1er mars 2002 - 1er mars 2003)", J.T.D.E., 2003, p. 173.
- 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.
- MALHERBE, J., DE WOLF, M., and BERTIN, O., "Droit fiscal (1er mars 2001 – 1er mars 2002)", J.T.D.E., 2002, p. 143.
- MALHERBE, Ph., "Le régime fiscal communautaire des réorganisations de sociétés", J.T.D.E., 2005, p. 257.
- MALHERBE, Ph., "Belgian Report -Trends in Company Taxation – Single or Double Taxation", International Fiscal Association; 2003 Sydney Congress, Cah. Dr. Fisc. intern., 2003, Vol. 88 a., p. 203.
- MARCHESSOU, Ph., "L'apport de la jurisprudence de la CJCE en matière d'imposition des entreprises", in Ecrits de fiscalité des entreprises - Etudes à la mémoire du professeur Maurice Cozian, LexisNexis Litec, 2009, p. 617.
- MARTIN, Ph., "La jurisprudence fiscale de la CJCE du point du vue du Conseil d'Etat (France)", Dr. Fiscal, 2009, p. 247.

- MARTIN, L., "The Saint-Gobain judgment of the ECJ", ECTax Journ. , 1999, vol. 4, p. 45.
- MARTIN, Ph., "The Marks & Spencer EU group relief case – a rebuttal of the 'taxing jurisdiction' argument", EC Tax Rev., 2005, p. 61.
- MASUI, Y., General Report – Group Taxation, Cah. dr.fisc.int., 2004, Vol. 89b.
- MATHISEN, G., "Consistency and coherence as conditions for justification of Member State measures restricting free movement", CMLRev., 2010, p. 1021.
- MATTSSON, N., "Does the European Court of Justice understand the policy behind tax benefits based on personal and family circumstances?", Eur. Tax., 2003, p. 186.
- MATTSSON, N., "Multilateral tax treaties - A model for the future?", Intertax, 2000, p. 301.
- MAUBLANC, J-P., "Compatibilité avec le droit communautaire des exonérations de taxe de 3% prévues aux anciens articles 990 E, 2° et 3° du CGI", Dr. Fiscal, 2010, p. 180.
- MEIER, E. and TORLET, R., "Précompte, régime mère-fille et droit communautaire: un trio incompatible", Dr. Fiscal, 2008, p. 534.
- MEIER, E. and TORLET, R., "Le fabuleux destin des retenues à la source...", Dr. Fiscal, 2009, p. 382.
- MEIRELLES, M., "Tax Sparing Credits in Tax Treaties: The Future and the Effect on EC Law", Eur. Tax., 2009, p. 263.
- MELIS, G., "Motivazione e argomentazione nelle sentenze interpretative della Corte di Giustizia in materia tributaria: alcuni spunti di riflessione", Rass. Trib., 2005, p. 405.
- MERKUS, M.J.C., "Emigratieheffingen in de vennootschapsbelasting", WFR, 2006, p. 1293.
- MEUSSEN, G., "Denkavit Internationaal: the practical issues", Eur. Tax., 2007, p. 244.
- MEUSSEN, G., "Cadbury Schweppes: the ECJ significantly limits the application of CFC rules in the member states", Eur. Tax., 2007, p. 13.
- MEUSSEN, G., "Recent EU developments in relation to the Marks & Spencer case", Eur. Tax., 2006, p. 449.
- MEUSSEN, G., "The Ritter-Coulais case - A wrong decision in principle by the ECJ", Eur. Tax., 2006, p. 335.
- MEUSSEN, G., "Fiscale eenheid en grensoverschrijdende verlies verrekening na Marks & Spencer", WFR, 2005, p. 752.
- MEUSSEN, G., "Exit meestbegunstiging", WFR, 2005, p. 1027.
- MEUSSEN, G., "De verhouding tussen het EG-verdrag en internationaal belastingrecht: enkele recente ontwikkelingen", WFR, 2003, p. 777.
- MEUSSEN, G., "Bosal Holding case and the freedom of establishment: a Dutch perspective", Eur. Tax., 2004, p. 59.
- MEUSSEN, G., "Cross-Border Loss Compensation and Permanent Establishments: Lidl Belgium and Deutsche Shell", Eur.Tax., 2008, p. 233.
- MEUSSEN, G., "Columbus Container Services – A Victory for the Member States’ Fiscal Autonomy", Eur.Tax., 2008, p. 169.

- MICHIELSE, G.M.M., "Jurisdictional criteria and new Member States", EC Tax Rev., 2002, p. 172.
- MOLENAAR, D., "Obstacles for International Performing artists", Eur. Tax., 2002, p. 149.
- MOLENAAR, D. and GRAMS, H., "Scorpio and the Netherlands: major changes in artiste and sportsman taxation in the European Union", Eur. Tax., 2007, p. 63.
- MOLENAAR, D. and GRAMS, H., "Die Folgen des Scorpio-Urteils für die Besteuerung von Künstlern und Sportlern", SWI, 2007, p. 57.
- MONDINI, A., "Coerenza fiscale e principio di propozionalità: crisi del sistema o dell'armonizzazione?", Riv.dir.fin., 2007, p. 52.
- MURRAY, C., "Futura Participations: Luxembourg Account-Keeping requirement unlawful", ECTax Journ., 1997, p. 133.
- MUTÉN, L., "The Delimitation between the Country of Residence and other Countries of the Power to Tax Corporations and/or their Shareholders", Cah. dr. fisc. int., vol XLIXb, 1964.
- NEWEY, R., "Hoechst decision: interest as compensation for discriminatory tax charge", Eur. Tax., 2001, p. 287.
- NEWEY, R., "Gschwind Decision – German tax law not discriminatory for non-resident married couples", Eur. Tax., 2000, p. 114.
- NEWEY, R., "Discrimination against whose spouse lived in another Member State", Eur. Tax., 2000, p. 554.
- NIJKAMP, H., "Ambitious plan for EU company tax reform fails to address critical issues", EC Tax Rev., 2002, p. 2.
- NIJKEUTER, E., "Samenloop van art. 43 EG en art. 56 EG", WFR, 2006, p. 249.
- NOVOA, C.G., "Tax Neutrality in the Exercise of the Right of Establishment within the EU and the Funding of Companies", Intertax, 2010, p. 568.
- O'BRIEN, M., "Taxation and the third country dimension of free movement of capital in EU law: the ECJ's rulings and unresolved issues", B.T.R., 2008, p. 628.
- O'BRIEN, M., "Company taxation, state aid and fundamental freedoms: is the next step enhanced cooperation?", E.L.Rev., 2005, p. 209.
- O'SHEA, T., "The UK's CFC rules and the freedom of establishment: Cadbury Schweppes plc and its IFSC subsidiaries - tax avoidance or tax mitigation?", EC Tax Rev., 2007, p. 13.
- O'SHEA, T., "Marks and Spencer v Halsey (HM Inspector of Taxes): restriction, justification and proportionality", EC Tax Rev., 2006, p. 66.
- O'SHEA, T., "The ECJ, the 'D' case, double tax conventions and most-favoured nations: comparability and reciprocity", EC Tax Rev., 2005/4, p. 190.
- OESTREICHER, A and SPENGEL, Ch., "Tax harmonization in Europe: the determination of corporate taxable income in the member states", Eur. Tax, 2007, p. 437.
- OFFERMANNS, R. and ROMANO, C., "Treaty benefits permanent establishment: the Saint-Gobain case", Eur. Tax., 2000, p. 180.
- OLIVER, J.D., "The impact of EU non-discrimination provisions in UK corporate tax law", EC Tax Rev., 1998, p. 170.

- OORTWIJN, J.J., "EG-recht versus dividendbelasting over inbound en outbound dividend", WFR, 2006, p. 928.
- OREBY HANSEN, A., "Holding Company Regime Amendments", Eur. Tax., 2001, p. 229.
- OSTERWEIL, E., "Reform of company taxation in the EU internal market", Eur. Tax., 2002, p. 271.
- PACHE, S. and ENGLERT, M., "'Das Spiel ist aus!' - Kein positives Signal des EuGH für ein binnenmarktorientiertes Konzernbesteuerungsrecht", IStR, 2007, p. 844.
- PANAYI, Ch. HJI, "The Schempp case: EU citizenship, rights and axes - a new leaf in ECJ jurisprudence or just a fig leaf?", Eur. Tax., 2005, p. 482.
- Panayi, "Reverse subsidiarity and EU tax law: can Member States be left to their own devices?", B.T.R., 2010, p. 267.
- PANCHAM, S.R. and BRANDSMA, R.P.C.W.M., "Fokus op bronstaatheffing over dividenden in de Europese Unie", WFR, 2005, p. 701.
- PARK, A., "A judge's tale: corporation tax and community law", B.T.R., 2006, p. 322.
- PASTEGER, D., "Arrêt Cartesio: nouvelles précisions sur les modalités de transfert du siège social au regard de la liberté d'établissement", JT, 2009, p. 794.
- PENNINGS, F. and WEEREPAS, M., "Towards a convergence of coordination in social security and tax law?", EC Tax Rev., 2006, p. 215.
- PERSOFF, M., "Marks & Spencer: more questions than answers", B.T.R., 2005, p. 260.
- PETERS, C. and GOOIJER, J., "The free movement of capital and third countries: some observations", Eur. Tax., 2005, p. 475.
- PETERS, C. and SNELLAARS, M., "Non-discrimination and tax law: structure and comparison of the various non-discrimination clauses", EC Tax Rev., 2001, p. 13.
- PETERS, M.J., "De dividendstrippingmaatregel getoest aan het EG-recht", WFR, 2004, p. 239.
- PETKEVICA, J., "Cross-Border Loss Relief in Latvia: The Lessons to Be Learned", Eur. Tax., 2007, p. 424.
- PISTONE, P., "Expected and Unexpected Developments of European Integration in the Field of direct Taxes", Intertax, 2007, p. 70.
- PISTONE, P., "Tax Treaties and the Internal Market in the New European Scenario", Intertax, 2007, p. 75.
- PISTONE, P., "The Need for Tax Clarity and the Application of the Acte Clair Doctrine to Direct Taxes", Intertax, 2007, p. 534.
- PISTONE, P., "The impact of European law on the relations with third countries in the field of direct taxation", Intertax, 2006, p. 234.
- PISTONE, P., "Towards European international tax law", EC Tax Rev., 2005, p. 4.
- PISTONE, P., "National treatment for all non-resident EU nationals: looking beyond the D decision", Intertax, 2005, p. 412.
- PISTONE, P., "Test Claimants in class IV of the ACT group litigation: limitation-of-benefits clauses are clearly different from most-favoured-nation clauses", B.T.R., 2007, p. 363.
- PISTONE, P., "An EU Model Tax Convention", EC Tax Rev., 2002, p. 129.

- PISTONE, P. and PANAYI, Ch. HJI , "The impact of Community law on tax treaties: issues and solutions", B.T.R., 2004, p. 582.
- PLASSCHAERT, R.F., "Comprehensive approaches to EU Company Taxation: to which companies should they apply?", Eur. Tax., 2002, p. 7.
- PLASSCHAERT, S.R.F., "Further thoughts on the 'European Union company income tax' and its first cousins", Eur. Tax., 2002, p. 336.
- PONS, Th., "The Denkavit Internationaal Case and its consequences: the limit between distorsion and discrimination?", Eur. Tax., May 2007, p. 214.
- QUAGHEBEUR, M., "Kerckhaert-Morres v Belgian State: the wrong battle", B.T.R., 2007, p. 121.
- QUAGHEBEUR, M., "Océ van de Grinten NV - The wrong answer to the wrong question", B.T.R., 2004, p. 88.
- QUINN, A. and DUGGAN, G., "Direct Tax Rules and the EU Fundamental Freedoms: Origin and Scope of the Problem; National and Community Responses and Solutions: Ireland National Report", Irish Journal of European Law, 2006, p. 101.
- RÄDLER, A.J., "Recent trends in European and international taxation", Intertax, 2004, p. 365.
- RAMBHADJAN, A.P.J.D. and KORTEKAAS, S., "Uitbreiding van een belang in een verliesvennootschap", WFR, 2008, p. 1193.
- RAVENTOS-CALVO, S. and DE JUAN Y PENALOSA, J.L., "The Commission's proposals on company taxation from a Spanish perspective", Eur. Tax., 2002, p. 331.
- REICHL, A. and WITTKOWSKI, A., "Das EuGH-Urteil in der Rs. Rewe Zentralfinanz: Neues zur grenzüberschreitenden Verlustverrechnung?", IStR , 2007, p. 385.
- RICHELLE, I., "L'exemption conventionnelle: assiette, base ou calcul de l'impôt?", R.G.F., 2005/11, p. 24.
- RIVIER, J.M., "The formation of a common tax law in the European Union and in Switzerland", EC Tax Rev., 1996, p. 81.
- RIVOLTA, A., "Transfer of Residence within the European Union: The Treatment of Pre-Existing Losses Part 1", Eur.Tax., 2010, p. 26.
- RIVOLTA, A., "Transfer of Residence within the European Union: The Treatment of Pre-Existing Losses Part 2", Eur.Tax., 2010, p. 66.
- ROLLE, G., "Is corporate income tax a withholding tax? Some comments on the Athinaïki Zythopoiia case", EC Tax Rev., 2003, p. 36.
- ROS, E.W., "Burgerschap van de EU en fiscaliteit", WFR, 2008, p. 1139.
- ROS, I.A., "Gemeenschapsrecht en verdragen inzake dubbele belasting na het arrest-Saint-Gobain", WFR, 2000, p. 1122.
- ROSS, M. and HAHN, H. , "Ritter-Coulais: Grenzüberschreitender Verlustabzug oder nur negativer Progressionsvorbehalt für Haus im Elsass?", IStR, 2006, p. 196.
- ROSSI-MACCANICO, P., "Principi comunitari di fiscalità diretta delle imprese. Il principio di non discriminazione", Fis. Int., 2008, p. 226.
- ROUMELIAN, O., "The end of French Thin Capitalization rules?", Intertax, 2003, p. 244.

- ROUSSELLE, O. and LIEBMAN, M., "The doctrine of the abuse of community law: the sword of Damocles hanging over the head of EC corporate tax law?", Eur. Tax, 2006, p. 559.
- RUDING, O., "The long way to removing obstacles in company taxation in Europe", Eur. Tax., 2002, p. 3.
- RUDING, O., "After the euro: corporation tax harmonization?", EC Tax Rev., 1998, p. 72.
- RUSSO, R., "CCCTB: een tussenstand mede naar aanleiding van de conferentie van 15 en 16 mei 2007 in Berlijn", WFR, 2007, p. 743.
- RUTSCHMANN, Y., DIBOUT, P. and DE LA ROCQUE, L., "Arrêt Sté Papillon: quelles incidences pratiques?", Dr. Fiscal, 2009, p. 277.
- SAÏAC, J., "Deduction of losses incurred in another member state by a non-resident subsidiary following Marks & Spencer", Eur. Tax., 2007, p. 550.
- SANCHEZ E.G. and FLUXA J.F., "The transfer of the seat of and the freedom of establishment for companies in the European Union: an analysis of ECJ case law and the regulation on the statute for a European Company", Eur. Tax., 2005, p. 219.
- SANTIAGO, B., "Non-Discrimination Provisions at the Intersection of EC and International Tax Law", Eur.Tax., 2009, p. 249.
- SANZ CLAVIJO, A., "The European Commission's Infringement Cases about Spanish Exit Taxes Provisions for Indivuals and Companies", Intertax, 2010, p. 371.
- SCAPA PASSALACQUA, A. and Henie, L., "The Norwegian CFC Rules after the Cadbury Schweppes Case", Intertax, 2008, p. 379.
- SCARIONI, P. and MUNI, S., "The New Italian CFC Rules: EU Holding Companies Challenge the 'Artificial Arrangement' Assessment", Intertax, 2010, p. 527.
- SCHNEEWEISS, H., "Exit Taxation after Cartesio: The European Fundamental Freedom’s Impact on Taxing Migrating Companies", Intertax, 2009, p. 363.
- SCHEUNEMANN, M.P., "Decision in the Marks & spencer case: a step forward, but no victory for cross-border group taxation in Europe", Intertax, 2006, p. 54.
- SCHNITGER, A., "German CFC legislation pending before the uropean Court of Justice – abuse of the law and revival of the most-favoured-nation-clause?", EC Tax Rev., 2006, p. 151.
- SCHÖN, W., "Besteuerung im Binnenmarkt - die Rechtsprechung des EuGH zu den direkten Steuern", IStR, 2004, p. 289.
- SCHÖN, W., "Tax competition in Europe - the legal perspective", EC Tax Rev., 2000, p. 90.
- SCHÖN, W., "The European Commission's report on company taxation", Eur. Tax., 2002, p. 276.
- SCHON, W., "International Tax Coordination for a Second-Best World (Parts I, II and III)", World Tax Journal, 2009, pp. 67 to 261.
- SCHÖNFELD, J., "Besteuerung von Dividenden, die von einer in einem Drittstaat ansässigen Gesellschaft gezahlt werden ", IStR, 2007, p. 441.
- SCHUCH, J., "Critical notes on the European Court of Justice's D case decision on mostfavoured-nation treatment under tax treaties", EC Tax Rev., 2006, p. 6.

- SEDEMUND, J., "Erneute Vorlage S. 472 an den EuGH in Sachen Meilicke - Klärung aller
- Anschlussfragen in Sicht?", IStR, 2009, p. 461.
- SEILER, C. and AXER, G., "Die EuGH-Entscheidung im Fall "Lidl Belgium" als (Zwischen-) Schritt auf dem Weg zur Abstimmung von nationaler Steuerhoheit und europäischem Recht", IStR, 2008, p. 838.
- SIKKEMA, S.T. and DIETVORST, P.C.M., "Pensioenen in Europees perspectief", WFR, 2002, p. 127.
- SIMPSON, Ph., "Cadbury Schweppes plc v Commissioners of Inland Revenue: the ECJ sets strict test for CFC legislation", B.T.R., 2006, p. 677.
- SMIT, D.S., "Capital movements and direct taxation: the effect of the non-discrimination principles", EC Tax Rev., 2005, p. 128.
- SMIT, D.S. and DE SMIT R.C., "De ondernemer in de Nederlanse inkomstenbelasting en het EU-recht", 2010, p. 794.
- SMIT, P.M., "Marks & Spencer: the paradoxes", Eur. Tax, 2006, p. 411.
- SOLER ROCH, M.T., "Corporate tax in the EU: a never-ending story?", EC Tax Rev., 2005, p. 116.
- SPENGEL, Ch., "Common corporate consolidated tax base - don't forget the tax rates!", EC Tax Rev., 2007, p. 118.
- STAHL, K., "The application of the Treaty non-discrimination principle in Sweden", Intertax, 2000, p. 195.
- STARINGER, C., "Where does foreign loss utilization go in Europe?", SWI, 2007, p. 5.
- STEINBRÜCK, P., "Taxation in a European context - a German Presidency perspective", EC Tax Rev., 2007, p. 3.
- STEVENS, L., "Worrying about pension problems in the European Union", EC Tax Rev., 2003, p. 66.
- STEVENS, L.G.M., "Corporate income tax in Europe: a Dutch perspective", EC Tax Rev., 2002, p. 104.
- SULLIVAN, J.E., "The Non-Exercise of Taxing Powers by Member States and its Compatibility with EC Law", Eur.Tax., 2009, p. 189.
- SVENSSON, M. and HILLING, A., "Legislative changes following the Saint-Gobain decision", Eur. Tax., 2001, p. 448.
- SWINKELS, J.J.P., "Onjuiste rechtspraak van de hoge raad in Europees perspectief", WFR, 2004, p. 396.
- SWINKELS, J.J.P., "Belastingneutraliteit en grensoverschrijdende dienstverlening in Europa", WFR, 2001, p. 1514.
- SZUDOCZKY, R., "The compatibility of the hungarian tax system with EC law", Eur. Tax, 2007, p. 577.
- SZUDOCZKY, R., "How Does the European Court of Justice Treat Precedents in Its Case Law? Cartesio and Damseaux from a Different Perspective: Part I", Intertax, 2009, p. 346.
- SZYSZKA, A., "Polish Personal Tax Changes for 2009", Eur.Tax., 2009, p. 290.

- TARIGO, P., "Principio generale comunitario di eliminazione della doppia imposizione, libertà fondamentali e obblighi convenzionali: il caso Damseaux", Rass. Trib., 2010, p. 1477.
- TAYLOR, D. and SYKES, L., "Controlled foreign companies and foreign profits", B.T.R., 2007, p. 609.
- TE BOEKHORST, P., "The need for elimination of withholding taxes in a common market", Eur. Tax., 1995, p. 156.
- TEFERNER, A., "Absence of loss relief rules for non-residents may violate EC treaty", Eur. Tax., 2007, p. 308.
- TENORE, M., "Taxation of Cross-Border Dividends in the European Union from Past to Future", ECTax Rev., 2010, p. 74.
- THOMAS, E., "De Europeesrechtelijke verhouding tussen richtlijn en vestigingsvrijheid", WFR, 2001, p. 970.
- THÖMMES, O., "Effect of ECJ decisions on budgets of EU member states: EC law without mercy?", Intertax, 2005, p. 560.
- THÖMMES, O., "Group financing and EC law", Intertax, 2003, p. 2.
- THÖMMES, O., "Corporate taxation in the European Union in the year 2002 - a single currency and fifteen different tax jurisdictions", Intertax, 2002, p. 123.
- TIJNAGEL, H.J., "Een tweede woning in Europa", WFR, 2009, p. 808.
- TOIFL, G., "Can a discrimination in the state of residence be justified by the taxable situation in the state of source?", EC Tax Rev., 1996, p. 165.
- TOMSETT, E., "ECJ Confirms Rulings Relating to U.K. Taxation of Foreign Dividends and CFCs", Intertax, 2008, p. 416.
- TRAVERSA, E. and PAOLILLO, M., "Convergences et divergences entre le droit fiscal et le droit de la sécurité sociale à la lumière du contexte communautaire et international", RGF, 2008, n° 1, p. 23.
- TRAVERSA, E., "Chronique de droit fiscal communautaire", J.T.D.E., annual, 2005, p. 171; 2006, p. 169; 2007, p. 170.
- TRAVERSA, E., "La fiscalità comunitaria" in Colucci, M.et Sica, S., L'Unione europea e il trattato costituzionale. Principi-Istituzioni-Politiche-Costituzione, Bologna, Zanichelli, 2005, p. 403.
- TRAVERSA, E. and ROCCATAGLIATA, F., "Droit fiscal européen 2003-2004", J.T.D.E., 2004, p. 175.
- TREDICINE, S., "Witholding tax on the equalization tax refund in breach of EC law", Eur. Tax., 2002, p. 257.
- TRYFONIDOU, A., "In search of the aim of the EC free movement of persons provisions: has the Court of Justice missed the point?", CMLRev., 2009, p. 1591.
- VALZ, C. and LA PIETRA, L., "Libertà di stabilimento e consolidato fiscale: il regime dei Paesi Bassi supera l'esame della Corte Ue", Fis. Int., 2010, p. 229.
- VAN BRUSTEM, E., "Liberté de circulation des capitaux - L'incidence des mécanismes d'échange d'informations entre Etats membres sur les délais de reprise de l'Administration", Dr. Fiscal, 2009, p. 424.

- VAN DEN HURK, H., WEENING, G., VAN DEN BROEK, H. and KORVING, J., "Dutch Withholding Tax Rules As Applied to FIIs Partially Incompatible with EC Law", Intertax, 2008, p. 410.
- VAN DER BRUGGEN, E., "The European Court of Justice and the free Movement of Tax Treaty judgments", EC Tax Rev., 2002, p. 52.
- VAN DER JAGT, R.A. and LARKING, B.H., "Bronbelastingheffing binnen de EU op nettobasis: een niet te missen kans?", WFR, 2010, p. 885.
- VAN DER VEGT, P.C., "Het grensvlak van eerlijke en oneerlijke belastingconcurrentie in Europa", WFR, 2009, p. 690.
- VAN DER VEGT, P.C., "Bescherming van Europese winstbelastingjurisdicties tegen misbruik", WFR, 2009, p. 761.
- VAN DER WAL, N.M., "Ook buitenlandse rechtspersonen hebben recht op volledige teruggaaf van Nederlandse dividendbelasting", WFR, 2006, p. 635.
- VAN DER WOUDE, A.W., "EG-rechten, discriminaties en belemmeringen", WFR, 2000, p. 1471.
- VAN DIJK, C., "Verliesverwerking", WFR, 2009, p. 235.
- VAN DOESUM, A.J. and VAN NORDEN, G.J., "De territoriale begrenzing van de fiscale eenheid BTW (1 and 2)", WFR, 2006, p. 823 and 853.
- VAN EIJSDEN, J.A.R., "De schadevergoeding ter zake van in strijd met het Europese recht betaalde belasting; grenzen aan formele rechtskracht", WFR, 2003, p.1707.
- VAN EIJSDEN, A. and Van Dam, J., "The Impact of European Law on Domestic Procedural Tax Law: Wrongfully Underestimated?", ECTax Rev., 2010, p. 199.
- VAN EIJSDEN, A. and VAN DAM, J., "Possibilities and Impossibilities for Challenging Final Tax Assessments and Decisions in Tax Cases that Contravene EC Law", ECTax Rev., 2010, p. 247.
- VAN HERPEN, A., "De zaak-Blanckaert nader bezien", WFR, 2006, p. 177.
- VAN HERPEN, A., "Heffingskorting bij grensoverschrijdende werkzaamheden binnen de Europese Unie", WFR, 2005, p. 1046.
- VAN HOUTE, C.P.M., "Tegemoetkoming wegens dubbele belasting bij fictief binnenlands belastingplichtigen", WFR, 2000, p. 1338.
- VAN HUIJGEVOORT, B.F.A., "De rechters in Luxemburg zijn niet blind", WFR, 2009, p. 1033.
- VAN RAAD, K., "Revisiting a 1981 perspective on EC non-discrimination rules in income tax matters", B.T.R., 2006, p. 318.
- VAN RAAD, K., "Fractionele belastingheffing van EU buitenlands belastingplichtingen", in Liberale Gifte (Festschrift Ferdinand Grappenhaus), Deventer, Kluwer, 1999.
- VAN RAAD, K., "Nondiscriminatory income taxation of non-resident taxpayers by Member States of the European Union: A Proposal", Brooklyn Journal of International law, Vol. XXVI (2001) No. 4, p. 1481.
- VAN STEENWINCKEL, J., "Taxation of capital gains realised by a Belgian resident in case of assignment of a major holding in the capital of a Belgian company to a company established in another Member State European Court of Justice, 8 June 2004, C-268/03", EC Tax Rev., 2005, p. 24.

- VAN THIEL, S., "Why the ECJ should interpret directly applicable European law as a right to intra-community most-favoured-nation treatment - Parts 1 and 2", Eur. Tax., 2007, p. 263 and p. 314.
- VAN THIEL, S., "A slip of the European Court in the D case (C-376/03): denial of the mostfavoured-nation treatment because of absence of similarity", Intertax, 2005, p. 454.
- VAN THIEL, S., "Removal of income tax barriers to market integration in the European Union: litigation by the Community citizen instead of harmonization by the Community legislature?", EC Tax Rev., 2003, p. 4.
- VAN THIEL, S., "Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules That Can Be Readily Applied by National Courts – Part 1", Eur.Tax., 2008, p. 279.
- VAN THIEL, S., "Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules That Can Be Readily Applied by National Courts – Part 2", Eur.Tax., 2008, p. 339.
- VAN THIEL, S. and VASCEGA, M., "X Holding: Why Ulysses Should Stop Listening to the Siren", Eur.Tax., 2010, p. 334.
- VAN VIJFEIJKEN, I.J.F.A., "Barbier en de gevolgen voor het recht van overgang", W.P.N.R., 2004, p. 631.
- VAN WEEGHEL, S., "Verliesverrekening over de grens – de vrijstellingsmethode ingekaderd", WFR, 2005, p. 744.
- VANISTENDAEL, F., "Denkavit International: the balance between fiscal sovereignty and the fundamental freedoms", Eur. Tax., 2007, p. 201.
- VANISTENDAEL, F., "The ECJ at the crossroads: balancing tax sovereignty against the imperatives of the single market", Eur. Tax., 2006, p. 413.
- VANISTENDAEL, F., "Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?", EC Tax Rev., 2006, p. 192.
- VANISTENDAEL, F., "The compatibility of the basic economic freedoms with the sovereign national tax systems of the Member States", EC Tax Rev., 2003, p. 136.
- VANISTENDAEL, F., "Memorandum on the taxing powers of the European Union", EC Tax Rev., 2002, p. 120.
- VANISTENDAEL, F., "How nice was Nice to European taxation?", EC Tax Rev., 2001, p. 2.
- VANISTENDAEL, F., "Tax revolution in Europe: The impact of non-discrimination", Eur. Tax., 2000, p. 3.
- VANISTENDAEL, F., "European Taxation in the 21st Century: The Road towards Integration", Eur. Tax., 1998, p. 331.
- VERDONER, L., "The Coherence Principle under EC Tax Law", Eur.Tax., 2009, p. 274.
- VERLOREN VAN THEMAAT, P., "Pleidooi voor een Europese venootschapsbelasting", WFR, 2002, p. 1212.
- VERMEEND, W., "The Court of Justice of the European Communities and direct taxes: 'Est-ce que la justice est de ce monde?", EC Tax Rev., 1996, p. 54.

- VINTHER, N. and WERLAUFF, E., "Tax motives are legal motives – The borderline between the use and abuse of the freedom of establishment with reference to the Cadbury Schweppes case", Eur. Tax, 2006, p. 383.
- VOGEL, K., "Tax treaties between Member States and third States: 'reciprocity' in bilateral tax treaties and non-discrimination in EC law", EC Tax Rev., 2006, p. 83.
- VOGEL, K., "Harmonisierung des Internationalen Steuerrechts in Europa als Alternative zur Harmonisierung des (materiellen) Körperschaftssteuerrechts", StW, 1993, p. 380.
- VORDING, H. and LUBBERS, A., "The ECJ, retrospectivity and the member states' tax revenues", B.T.R., 2006, p. 91.
- VORDING, H., "Renneberg v Staatssecretaris van Financien - the problems of an extended Schumacker rule", B.T.R., 2009, p. 67.
- VROOM, A., "The Compatibility of the Netherlands Taxation of Dividends Derived by Foreign Shareholders with EC Law", Eur.Tax., 2009, p. 592.
- WALDHOFF, Ch., "Recent developments relating to the retroactive effect of decisions of the ECJ", CMLRev., 2009, p. 173.
- WATHELET, M., "Direct taxation and EU law: integration or disintegration?", EC Tax Rev., 2004, p. 2.
- WATHELET, M., "Marks & Spencer plc v Halsey: lessons to be drawn", B.T.R., 2006, p. 128.
- WATTEL, P. and KAVELAARS, P., "Grensarbeidersregeling: werkstaat is beter dan woonstaat", WFR, 2001, p. 58.
- WATTEL, P.J., "Eénjurisdictionele- of overalltoepassing van EG- verboden op bronheffingen", WFR, 2006, p. 847.
- 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.
- WATTEL, P.J., "EC law does not require most-favoured nation tax treatment and a disparity is not a discrimination: D. v inspecteur van de belastingdienst", B.T.R., 2005, p. 575.
- WATTEL, P.J., "Progressive taxation of non-residents and intra-EC allocation of personal tax allowances: why Schumacker, Asscher, Gilly and Gschwind do not suffice", Eur. Tax., 2000, p. 210.
- WEBER, D., "In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC", Intertax, 2006, p. 585.
- WEBER, D., "Most-favoured-nation treatment under tax treaties rejected in the European Community: background and analysis of the D case", Intertax, 2005, p. 429.
- WEBER, D., "Belastingheffing binnen de EG over dividend: geen tijd voor nuances meer", WFR, 2005, p. 463.
- WEBER, D., "Dividendbelasting en het Gemeenschapsrecht", WFR, 2003, p. 101.
- WEBER, D., "Exit taxes on the transfer of seat and the applicability of the freedom of establishment after Überseering", Eur. Tax., 2003, p. 350.
- WEBER, D., "The Bosal Holding case: analysis and critique", EC Tax Rev., 2003, p. 220.

- WESTBERG, B., "Consolidated corporate tax bases for EU-Wide activities: Evaluation of four proposals presented by the European Commission", Eur. Tax., 2002, p. 322.
- WHITEHEAD, S., "Practical implications arising from the European Court's recent decisions concerning CFC legislation and dividend taxation", EC Tax Rev., 2007, p. 176.
- WIMAN, B., "Equalizing the income tax burden in a group of companies", Intertax, 2000, p. 352.
- WOLVERS, S., "Belastingverdragsrechtelijke meestbegunstiging binnen de EG", WFR, 2005, p. 551.
- ZALASINSKI, A., "The Limits of the EC Concept of 'Direct Tax Restriction on Free Movement Rights', the Principles of Equality and Ability to Pay, and the Interstate Fiscal Equity", Intertax, 2009, p. 282.
- ZANOTTI, E., "Taxation of inter-company dividends in the presence of a PE: the impact of the EC fundamental freedoms (parts one and two)", Eur. Tax., 2004, p. 493 and 535.
- ZAPF, H., and ANDREAE-NEHLSEN, D., "L'affaire Marks & Spencer et ses incidences sur la fiscalité française", Petites Affiches, 23 novembre 2005, 233.
- ZUIJDENDORP, B., "The N case: the European Court of Justice sheds further light on the admissibility of exit taxes but still leaves some questions unanswered", EC Tax Rev., 2007, p. 5.
- ZUKOWSKI, R., "Estonian corporate income tax and the European Union: the implications", Eur. Tax., 2006, p. 128.
- ZUKOWSKI, R., "Estonian corporate income tax and the European Union: the implications", Eur.Tax., 2006, p. 128.

EU DOCUMENTS

Council

- Council Resolution of 8 June 2010 on Coordination of the Controlled Foreign Corporations (CFC) and thin capitalisation rules within the European Union, OJ C 156 of 16 June 2010, p. 1; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:156:0001:0002:EN:PDF.
- Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (2009/C 322/01), OJ C 322 30 December 2009, p. 1; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:322:0001:0010:EN:PDF.

European Commission

- Proposal of 16 March 2011 for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121, accompanied by Commission working paper "Summary of the impact assessment" SEC (2011) 135 and Commission working document "Impact assessment" SEC (2011) 136.
- Communication of 21 April 2010, Tax and Development. Cooperating with developing countries on promoting good governance in the tax matters, COM(2010) 163 final.
- Commission Recommendation of 19 September 2009 on withholding tax relief procedures, C(2009) 7924 final.
- Communication of 14 September 2009 "On the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 and a related proposal for a revised Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990)", COM(2009)472.
- Communication of 28 April 2009, Promoting good governance in tax matters, COM(2009) 201 final.
- 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.
- 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.
- 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).
- Taxation Trends in the European Union, Luxembourg, Office for official publications of the European Communities, 2007.
- Communication of 19 December 2006, Co-ordinating Member States' direct tax systems in the Internal Market, COM (2006) 823.
- Communication of 19 December 2006 Tax Treatment of Losses in Cross-Border Situations, COM (2006) 824 and and Staff Working Document, SEC (2006) 1690.

- Communication of 19 December 2006, Exit taxation and the need for co-ordination of Member States' tax policies, COM (2006) 825.
- Communication of 22 November 2006, Towards a more effective use of tax incentives in favour of R&D, COM (2006) 728.
- Communication of 31 May 2006 concerning the need to develop a co-ordinated strategy to improve the fight against fiscal fraud, COM (2006) 254.
- Communication, Implementing the Community Lisbon Programme: Progress to date and next steps towards a Common Consolidated Corporate Tax Base (CCCTB), COM (2006) 157.
- Communication of 23 November 2003, An Internal Market without company tax obstacles: achievements, ongoing initiatives and remaining challenges, COM (2003) 726.
- 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.
- 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.
- 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.
- Report of the Committee of Independent Experts on Company Taxation, (Ruding Report), 1992.
- 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, withdrawn 23.4.1990.

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).
- 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, Document A6-0066/2007 (rapporteur: A. Lamassoure).
- Report on the proposal for a council decision on the system of European communities own resources, Committee of Budgets, 23 July 2006, Document 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).

ANNEX I: GLOSSARY

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

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.

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.

ANNEX II: ALPHABETICAL TABLE OF JUDGMENTS

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11.12.2008	C-285/07	**A.T. v Finanzamt Stuttgart-Körperschaften (D)**	ECR I-9329	
18.06.2009	C-303/07	**Aberdeen Property Fininvest Alpha v Finland**	ECR I-5145	**116**
14.12.2000	C-141/99	**AMID (B)**	ECR I-11619	72, **90**, 209
08.11.2007	C-379/05	**Amurta (NL)**	ECR I-9569	**116**, 130, 183, 196
15.01.2002	C-43/00	**Andersen & Jensen (DK)**	ECR I-379	21
11.09.2008	C-43/07	**Arens-Sikken** v Staatsecr. Fin **(NL)**	ECR I-6887	**48**
27.06.1996	C-107/94	**Asscher (NL)**	ECR I-3089	
04.10.2001	C-294/99	**Athinaiki (EL)**	ECR I-6797	21, 182
13.04.2000	C-251/98	**Baars (NL)**	ECR I-2787	**145**, 197
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	
03.04.2008	C-27/07	**Banque Fédérative du Crédit Mutuel (F)**	ECR I-2067	
08.07.1999	C-254/97	**Baxter (F)**	ECR I-4811	**66**, 155, 164
22.06.2006	C-182/03 C-217/03	**Belgium v Commission**	ECR I-5479	
08.05.1990	175/88	**Biehl I (L)**	ECR I-1779	**32**
08.09.2005	C-512/03	**Blanckaert (NL)**	ECR I-7685	38
12.02.2009	C-67/08	**Block**	ECR I- 883	**54**, 192
18.09.2003	C-168/01	**Bosal Holding (NL)**	ECR I-9401	76, **146**
19.01.2006	C-265/04	**Bouanich (S)**	ECR I-923	**150**
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26.06.2008	C-284/06	**Burda** Verlagsbeteilingungen GmbH v FA Hamburg **(D)**	ECR I-4571	**122**
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12.9.2006	C-196/04	**Cadbury Schweppes (UK)**	ECR I-7995	**77**, 167, 233
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28.01.1992	C-300/90	**Commission v Belgium**	ECR I-305	**42**
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05.07.2007	C-522/04	**Commission v Belgium**	ECR I-5701	
08.05.2008	C-392/07	Commission v **Belgium**	ECR I-72	
22.06.2006	C-399/03	**Commission v Council**	ECR I-05629	
30.01.2007	C-150/04	**Commission** v **Denmark** (supported by **Sweden**)	ECR I-1163	162
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18.01.2008	C-152/05	Commission v Germany	ECR 1-6957	**47**
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11.06.2009	C-521/07	**Commission v Netherlands (NL)**	ECR I-4873	**0**
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05.07.2005	C-376/03	**D. (NL)**	ECR I- 5821	**48**, 158, 187
11.07.2002	C-224/98	**D'Hoop (B)**	ECR I-6191	
27.09.1988	81/87	**Daily Mail (UK)**	ECR 5505	225, 228
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03.10.2002	C-136/00	**Danner (FIN)**	ECR I-8147	**42**, 85

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12.12.2002	C-385/00	**de Groot (NL)**	ECR I-11819	38, 155
11.03.2004	C-9/02	**de Lasteyrie du Saillant (F)**	ECR I-2409	**151**, 166, 0
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17.10.1996	C-283/94 C-291/94 C-292/94	**Denkavit International, VITIC, Voormeer**	ECR I-5063	21, 130, 183, 196, 208
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08.06.2000	C-375/98	**EPSON Europe BV (P)**	ECR I-4245	21
28.10.2010	C-72/09	**Establissments Rimbaud (FR)**	not published	**82**, 215
26.10.1999	C-294/97	**Eurowings (D)**	ECR I- 7449	**2.4.2.2**
14.07.1994	C-91/92	**Faccini Dori**	ECR I-3325	
19.06.1990	C-213/89	**Factortame (Factortame I)**	ECR I-2433	
25.07.1991	C-221/89	**Factortame (Factortame II)**	ECR I-3905	
24.06.2010	C-338/08; C-339/08	**Ferrero and General Beverage Europe** v Agenzia Entrate **(IT)**	not published	
03.10.2006	C-452/04	**Fidium Finanz (D)**	ECR I- 9521	169, 214
19.11.2009	C-314/08	**Filipiak (PL)**	ECR I-11049	**44**
19.11.1991	C-6/90 C-9/90	**Francovich**	ECR I-53-57	
14.09.1999	C-391/97	**Frans Gschwind (D)**	ECR I-5453	
15.05.1997	C-250/95	**Futura Participations and Singer (L)**	ECR I-2471	**64**, **93**
01.10.2009	C-247/08	**Gaz de France – Berliner Investissement** v BZfS **(D)**	ECR I-9225	21
12.06.2003	C-234/01	**Gerritse (D)**	ECR I-5933	38, **39**,83, 84, 155, 157
25.10.2007	C-464/05	**Geurts** and **Vogten (B)**	ECR I-9325	**54**, 162, 174
18.03.2010	C-440/08	**Gielen v Staatsecr. van Fin (NL)**	ECR I-2323	**37**
12.05.1998	C-336/96	**Gilly (F)**	ECR I-2823	
18.09.2009	C-182/08	**Glaxo Wellcome** v FA Munchen **(D)**	ECR I-8591	**130**
18.12.2007	C-436/06	**Grønfeldt (D)**	ECR I-12357	**149**
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12.04.1994	C-1/93	**Halliburton (NL)**	ECR I-1137	**57**

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24.05.2007	C-157/05	**Holböck (A)**	ECR I-4051	**135**, 159, 214
11.10.2007	C-443/06	**Hollmann (P)**	ECR I-8491	**47**
16.07.1998	C-264/96	**ICI (UK)**	ECR I-471	74, **96**, 221, 233
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17.01.2008	C-256/06	**Jäger (D)**	ECR I-123	**48**
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04.12.2008	C-330/07	**Jobra GmbH** v FA Amstetten **(A)**	ECR I-9099	
18.12.2007	C-281/06	**Jundt (D)**	ECR I-12231	**52**
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23.02.2006	C-471/04	**Keller Holding (D)**	ECR I-2107	76, **147**
14.11.2006	C-513/04	**Kerckhaert-Morres (B)**	ECR I-10967	**131**, 192, 198
05.07.2007	C-321/05	**Kofoed (Dk)**	ECR I-5795	21
23.10.2008	C-157/07	**Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt (D)**	ECR I-8061	74, **92**
10.03.2005	C-39/04	**Laboratoires Fournier (F)**	ECR I-2057	**2.4.2.2**, 155, 164
18.07.2007	C-182/06	**Lakebrink** v **Luxemburg**	ECR I-6705	**46**
17.01.2008	C-105/07	**Lammers & Van Cleeff (B)**	ECR I-173	**80**
12.12.2002	C-324/00	**Lankhorst-Hohorst (D)**	ECR I-11779	69, **107**, 170
10.05.2007	C-492/04	**Lasertec (D)**	ECR I-3775	169, 214
15.07.2004	C-315/02	**Lenz (A)**	ECR I-7063	**127**, 131, 197
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17.07.1997	C-28/95	**Leur-Bloem (NL)**	ECR I-4161	21
15.05.2008	C-414/06	**Lidl Belgium (D)**	ECR I-3601	74, **92**, 233
13.11.2003	C-42/02	**Lindman (FIN)**	ECR I-13519	**51**, 85
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13.12.2005	C-446/03	**Marks and Spencer (UK)**	ECR I-10837	74, **97**, 156, 209, 211, 221, 233
13.11.1990	C-106/98	**Marleasing**	ECR I-4135	
22.04.2010	C-510/08	**Mattner (D)**	ECR I-3553	**48**
06.03.2007	C-292/04	**Meilicke (D)**	ECR I-1835	**129**, 197, 251
25.01.2007	C-329/05	**Meindl (D)**	ECR I-1107	**36**, 44
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12.09.2002	C-431/01	**Mertens (B)**	ECR I-7073	**91**
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21.09.1999	C-307/97	**Saint-Gobain (D)**	ECR I-6163	**62**, **125**, 177, 178, 190, 213
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13.11.2003	C-209/01	**Schilling (D)**	ECR I-13389	
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13.04.2000	C-420/98	**W.N.**	ECR I - 2847	
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18.11.1999	C-200/98	**X AB et Y AB (S)**	ECR I-8264	75, **98**
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ANNEX III: CHRONOLOGICAL TABLE OF JUDGMENTS

Date	*Case number*	*Parties*	*European Court Report*	*Paragraph number*
05.02.1963	26/02	**Van Gend & Loos**	ECR 1	
15.07.1964	6/64	**Costa v Enel**	ECR 585	
16.06.1966	57/65	**Lütticke GmbH v Hauptzollamt Saarlouis**	ECR 205	
09.03.1978	106/77	**Simmenthal**	ECR 629	
19.01.1982	8/81	**Ursula Becker**	ECR 53	
28.01.1986	270/83	**Commission v France "avoir fiscal"**	ECR 273	56, **60**, **124**, 182
27.09.1988	81/87	**Daily Mail (UK)**	ECR 5505	225, 228
08.05.1990	175/88	**Biehl I (L)**	ECR I-1779	**32**
19.06.1990	C-213/89	**Factortame (Factortame I)**	ECR I-2433	
13.11.1990	C-106/98	**Marleasing**	ECR I-4135	
25.07.1991	C-221/89	**Factortame (Factortame II)**	ECR I-3905	
04.10.1991	C-246/89	**Commission v U.K.**	ECR I-4585	
19.11.1991	C-6/90 C-9/90	**Francovich**	ECR I-53-57	
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**
26.01.1993	C-112/91	**Werner (D)**	ECR I-429	
13.07.1993	C-330/91	**Commerzbank (UK)**	ECR I-4017	**63**, 155
12.04.1994	C-1/93	**Halliburton (NL)**	ECR I-1137	**57**
14.07.1994	C-91/92	**Faccini Dori**	ECR I-3325	
14.02.1995	C-279/93	**Schumacker (D)**	ECR I-225	**0**, 36, 155, 160, 210
11.08.1995	C-80/94	**Wielockx (NL)**	ECR I-2508	
26.10.1995	C-151/94	**Commission v Luxembourg - Biehl II**	ECR I-3699	
14.11.1995	C-484/93	**Svensson & Gustavsson (L)**	ECR I-3955	
05.03.1996	C-46/93 C-48/93	**Brasseries du Pêcheur and Factortame (Factortame IV)**	ECR I-1029	
27.06.1996	C-107/94	**Asscher (NL)**	ECR I-3089	
17.10.1996	C-283/94 C-291/94 C-292/94	**Denkavit International, VITIC, Voormeer**	ECR I-5063	21, 130, 183, 196, 208
15.05.1997	C-250/95	**Futura Participations and Singer (L)**	ECR I-2471	**64**, **93**
17.07.1997	C-28/95	**Leur-Bloem (NL)**	ECR I-4161	21
28.04.1998	C-118/96	**Jessica Safir (S)**	ECR I-1897	
28.04.1998	C-118/96	**Safyr**	ECR I-1897	**42**, 85
12.05.1998	C-336/96	**Gilly (F)**	ECR I-2823	

Date	Case number	Parties	European Court Report	Paragraph number
16.07.1998	C-264/96	**ICI (UK)**	ECR I-471	74, **96**, 221, 233
26.01.1999	C-18/95	**Terhoeve (NL)**	ECR I-345	
29.04.1999	C-311/97	**Royal Bank of Scotland (EL)**	ECR I-2651	**61**, 155
08.07.1999	C-254/97	**Baxter (F)**	ECR I-4811	**66**, 155, 164
14.09.1999	C-391/97	**Frans Gschwind (D)**	ECR I-5453	
14.09.1999	C-391/97	**Gschwind**	ECR I-5451	**36**
21.09.1999	C-307/97	**Saint-Gobain (D)**	ECR I-6163	**62**, **125**, 177, 178, 190, 213
26.10.1999	C-294/97	**Eurowings (D)**	ECR I-7449	**2.4.2.2**
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	75, **98**
13.04.2000	C-251/98	**Baars (NL)**	ECR I-2787	**145**, 197
13.04.2000	C-420/98	**W.N.**	ECR I - 2847	
16.05.2000	C-87/99	**Zurstrassen (L)**	ECR I-3339	**36**
06.06.2000	C-35/98	**Verkooijen (NL)**	ECR I-4073	**126**, 131, 197, 251
08.06.2000	C-375/98	**EPSON Europe BV (P)**	ECR I-4245	21
14.12.2000	C-141/99	**AMID (B)**	ECR I-11619	72, **90**, 209
08.03.2001	C-397/98 C-410/98	**Metallgesellschaft/Hoechst (UK)**	ECR I-1727	68, **121**
04.10.2001	C-294/99	**Athinaiki (EL)**	ECR I-6797	21, 182
15.01.2002	C-43/00	**Andersen & Jensen (DK)**	ECR I-379	21
19.03.2002	C-393/99 C-394/99	**INASTI**	ECR I-2829	
11.07.2002	C-224/98	**D'Hoop (B)**	ECR I-6191	
12.09.2002	C-431/01	**Mertens (B)**	ECR I-7073	**91**
03.10.2002	C-136/00	**Danner (FIN)**	ECR I-8147	**42**, 85
21.11.2002	C-436/00	**X and Y (S)**	ECR I-10829	**105**
12.12.2002	C-385/00	**de Groot (NL)**	ECR I-11819	38, 155
12.12.2002	C-324/00	**Lankhorst-Hohorst (D)**	ECR I-11779	69, **107**, 170
12.06.2003	C-234/01	**Gerritse (D)**	ECR I-5933	38, **39**,83, 84, 155, 157
26.06.2003	C-422/01	**Skandia and Ramstedt (S)**	ECR I-6817	**42**, 85
18.09.2003	C-168/01	**Bosal Holding (NL)**	ECR I-9401	76, **146**
25.09.2003	C-58/01	**Océ Van der Grinten (UK)**	ECR I-	21, 182

Date	*Case number*	*Parties*	*European Court Report*	*Paragraph number*
			9809	
13.11.2003	C-42/02	**Lindman (FIN)**	ECR I-13519	**51**, 85
13.11.2003	C-209/01	**Schilling (D)**	ECR I-13389	
11.12.2003	C-364/01	**The Heirs of H. Barbier (NL)**	ECR I-15013	**48**
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	**151**, 166, 0
29.04.2004	C-224/02	**Pusa (FIN)**	ECR I-5763	**43**
29.04.2004	C-387/01	**Weigel (A)**	ECR I-4981	
08.06.2004	C-268/03	**De Baeck (B)**	ECR I-5961	**148**
01.07.2004	C-361/02 C-362/02	**Tsavalos and Diamantakis**	ECR I-6405	
01.07.2004	C-169/03	**Wallentin (S)**	ECR I-6443	**37**
15.07.2004	C-315/02	**Lenz (A)**	ECR I-7063	**127**, 131, 197
15.07.2004	C-242/03	**Weidert/Paulus (L)**	ECR I-7379	**144**, 162
07.09.2004	C-319/02	**Manninen (FIN)**	ECR I-7477	**128**, 131, 197, 207, 251
16.09.2004	C-400/02	**Merida**	ECR I-8471	**44**
09.12.2004	C-219/03	**Commission v Spain**	not published in ECR	**148**
10.03.2005	C-39/04	**Laboratoires Fournier (F)**	ECR I-2057	**2.4.2.2**, 155, 164
05.07.2005	C-376/03	**D. (NL)**	ECR I-5821	**48**, 158, 187
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	74, **97**, 156, 209, 211, 221, 233
19.01.2006	C-265/04	**Bouanich (S)**	ECR I-923	**150**
21.02.2006	C-152/03	**Ritter-Coulais (D)**	ECR I-1711	**46**
23.02.2006	C-253/03	**CLT-UFA (D)**	ECR I-1831	**61**
23.02.2006	C-471/04	**Keller Holding (D)**	ECR I-2107	76, **147**
23.02.2006	C-513/03	**van Hilten-van der Heijden (NL)**	ECR I-1957	**33**, 169
22.06.2006	C-182/03 C-217/03	**Belgium v Commission**	ECR I-5479	
22.06.2006	C-399/03	**Commission v Council**	ECR I-05629	

Date	*Case number*	*Parties*	*European Court Report*	*Paragraph number*
06.07.2006	C-346/04	**Conijn (D)**	ECR I-6137	**39**, 155
06.09.2006	C-88/03	**Portugal** (supported by **Spain)** v **Commission**	ECR I-7115	
07.09.2006	C-470/04	**N. (NL)**	ECR I-7409	**152**
12.9.2006	C-196/04	**Cadbury Schweppes (UK)**	ECR I-7995	**77**, 167, 233
14.09.2006	C-386/04	**Stauffer (D)**	ECR I-8203	
03.10.2006	C-475/03	**Banca Popolare di Cremona** (I) – IRAP	ECR I-9373	
03.10.2006	C-452/04	**Fidium Finanz (D)**	ECR I-9521	169, 214
03.10.2006	C-290/04	**Scorpio (D)**	ECR I-9461	39, **84**, 157
26.10.2006	C-345/05	**Commission v Portugal**	ECR I-10633	**47**
09.11.2006	C-433/04	**Commission v Belgium**	ECR I-10653	**85**
09.11.2006	C-520/04	**Turpeinen (FIN)**	ECR I-10685	**43**
14.11.2006	C-513/04	**Kerckhaert-Morres (B)**	ECR I-10967	**131**, 192, 198
12.12.2006	C-374/04	**Test Claimants in Class IV of the ACT Group Litigation (UK)**	ECR I-11673	**122**, 183, 187, 196
12.12.2006	C-446/04	Test Claimants in the **Franked Investment Income (FII) Group Litigation (UK)**	ECR I-11753	68, 130, **138**, 140, 197
14.12.2006	C-170/05	**Denkavit Internationaal (F)**	ECR I-11949	**115**, 157
18.01.2007	C-104/06	**Commission** v **Sweden**	ECR I-671	**47**, 162
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	162
15.02.2007	C-345/04	**Centro Equestre da Lezíria Grande (D)**	ECR I-1425	**84**
06.03.2007	C-292/04	**Meilicke (D)**	ECR I-1835	**129**, 197, 251
13.03.2007	C-524/04	**Test Claimants in the Thin Cap Group Litigation (UK)**	ECR I-2107	69, **108**, 167, 169
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	74,**103**
10.05.2007	C-102/05	**A and B (S)**	ECR I-3871	**136**, 214
10.05.2007	C-492/04	**Lasertec (D)**	ECR I-3775	169, 214
24.05.2007	C-157/05	**Holböck (A)**	ECR I-4051	**135**, 159, 214
05.07.2007	C-522/04	**Commission v Belgium**	ECR I-5701	
05.07.2007	C-321/05	**Kofoed (Dk)**	ECR I-5795	21

Date	*Case number*	*Parties*	*European Court Report*	*Paragraph number*
18.07.2007	C-182/06	**Lakebrink** v **Luxemburg**	ECR I-6705	**46**
18.07.2007	C-231/05	**Oy AA**	ECR I-6373	**70**, **98**, 168, 221
11.09.2007	C-318/05	Commission v **Germany**	ECR I-6957	**52**, 85
11.09.2007	C-76/05	**Schwarz (D)**	ECR I-6849	**52**, 85, 162
11.10.2007	C-451/05	**Elisa (F)**	ECR I-8251	**82**, 185
11.10.2007	C-443/06	**Hollmann (P)**	ECR I-8491	**47**
25.10.2007	C-464/05	**Geurts** and **Vogten (B)**	ECR I-9325	**54**, 162, 174
06.11.2007	C-415/06	**Stahlwerk Ergste Westig (D) - order**	ECR I-151	**92**
08.11.2007	C-379/05	**Amurta (NL)**	ECR I-9569	**116**, 130, 183, 196
06.12.2007	C-298/05	**Columbus Container Services (D)**	ECR I-10451	**78**, 167, 233
18.12.2007	C-101/05	**A (S)**	ECR I-11531	**137**
18.12.2007	C-436/06	**Grønfeldt (D)**	ECR I-12357	**149**
18.12.2007	C-281/06	**Jundt (D)**	ECR I-12231	**52**
17.01.2008	C-256/06	**Jäger (D)**	ECR I-123	**48**
17.01.2008	C-105/07	**Lammers & Van Cleeff (B)**	ECR I-173	**80**
18.01.2008	C-152/05	Commission v Germany	ECR 1-6957	**47**
28.02.2008	C-293/06	**Deutsche Shell (D)**	ECR I-1129	**73**
13.03.2008	C-248/06	**Commission v Spain**	ECR I-47	**2.4.2.2**, 155, 164
03.04.2008	C-27/07	**Banque Fédérative du Crédit Mutuel (F)**	ECR I-2067	
23.04.2008	C-201/05	**Test Claimants in the CFC and Dividend Group Litigation v Commissioners of Inland Revenue (order-UK)**	ECR I-2875	**77**, **138**, 167
08.05.2008	C-392/07	Commission v **Belgium**	ECR I-72	
15.05.2008	C-414/06	**Lidl Belgium (D)**	ECR I-3601	74, **92**, 233
20.05.2008	C-194/06	**Orange European Smallcup Fund NV v. Staatssecr. van Fin. (NL)**	ECR I-3747	130, 133, **142**
26.06.2008	C-284/06	**Burda** Verlagsbeteilingungen GmbH v FA Hamburg **(D)**	ECR I-4571	**122**
11.09.2008	C-43/07	**Arens-Sikken** v Staatsecr. Fin **(NL)**	ECR I-6887	**48**
11.09.2008	C-11/07	**Eckelkamp v Belgium**	ECR I-6845	**48**
02.10.2008	C-360/06	**Heinrich Bauer Verlag** v FA für Groβunternehmen Hamburg **(D)**	ECR I-7333	**55**
16.10.2008	C-527/06	**Renneberg** v Staatsecr. Fin **(NL)**	ECR I-7735	**46**

Date	*Case number*	*Parties*	*European Court Report*	*Paragraph number*
23.10.2008	C-157/07	**Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt (D)**	ECR I-8061	74, **92**
27.11.2008	C-418/07	**Société Papillon** v Min of Fin. **(F)**	ECR I-8947	**99**
04.12.2008	C-330/07	**Jobra GmbH** v FA Amstetten **(A)**	ECR I-9099	
11.12.2008	C-285/07	**A.T. v Finanzamt Stuttgart-Körperschaften (D)**	ECR I-9329	
16.12.2008	C-210/06	**Cartesio (HU)**	ECR I-9641	
22.12.2008	C-48/07	**Les Vergers du Vieux Tauves** v SPF Finances **(BE)**	ECR I-10627	
22.12.2008	C-282/07	**S.A. Truck Center v Belgium**	ECR I-10767	
22.12.2008	C-282/07	**Truck Center**	ECR I-10767	**85**
22.01.2009	C-377/07	**STEKO Industriemontage** v FA Speyer-Germersheim (D)	ECR I-299	**104**
27.01.2009	C-318/07	**Persche** v FA Lüdenscheid **(D)**	ECR I-359	**53**, 162
12.02.2009	C-138/07	**Cobelfret v Belgium**	ECR I-731	21, **139**
12.02.2009	C-67/08	**Margarete Block** v FA Kaufbeuren (D)	ECR I-883	
23.04.2009	C-406/07	Commission v **Greece**	ECR I-62	**61, 139**
23.04.2009	C-544/07	**Uwe Rüffler (PL)**	ECR I-3389	**44**
04.06.2009 Order	C-439/07 C-499/07	**KBC** Bank and Beleggen, **Risicokapitaal,** Beheer NV v Belgian State (**BE)**	ECR I-4409	
11.06.2009	C-521/07	**Commission v Netherlands (NL)**	ECR I-4873	**0**
11.06.2009	C-429/07	**X (NL)**	ECR I-4833	
11.06.2009	C-155/08; C-157/08	**X and Passenheim-van Schoot (NL)**	ECR I-5093	
18.06.2009	C-303/07	**Aberdeen Property Fininvest Alpha v Finland**	ECR I-5145	**116**
16.07.2009	C-128/08	**Damseaux v** Belgian State **(BE)**	ECR I-6823	**132**, 192
10.09.2009	C-269/07	Commission v **Germany**	ECR I-7811	162
18.09.2009	C-182/08	**Glaxo Wellcome** v FA Munchen **(D)**	ECR I-8591	**130**
01.10.2009	C-247/08	**Gaz de France – Berliner Investissement** v BZfS **(D)**	ECR I-9225	21
06.10.2009	C-562/07	Commission v **Spain**	ECR I-9553	**47**
06.10.2009	C-153/08	Commission v **Spain**	ECR I-9735	**51**
15.10.2009	C-35/08	**Busley and Cibrian** v Finanzamt Stuttgart **(D)**	ECR I-9807	**46**
17.11.2009	C-169/08	**Regione Sardegna**	ECR I-10821	**82**
19.11.2009	C-540/07	Commission v **Italy**	ECR I-10983	**118**, 215
19.11.2009	C-314/08	**Filipiak (PL)**	ECR I-	**44**

Date	*Case number*	*Parties*	*European Court Report*	*Paragraph number*
			11049	
12.12.2009	C-67/08	**Block**	ECR I-883	**54**, 192
21.01.2010	C-311/08	Société de Gestion Industrielle **(SGI) (BE)**	ECR I-487	**106**, 167
25.02.2010	C-337/08	**X Holding** v Staatsecr. van Fin. **(NL)**	ECR I-1215	**100**
18.03.2010	C-440/08	**Gielen v Staatsecr. van Fin (NL)**	ECR I-2323	**37**
15.04.2010	C-96/08	**CIBA (HU)**	ECR I-2911	**73**
22.04.2010	C-510/08	**Mattner (D)**	ECR I-3553	**48**
20.05.2010	C-56/09	**Zanotti (IT)**	not published	**52**, 162
20.05.2010	C-352/08	**Zwijnenburg (NL)**	not published	
03.06.2010	C-487/08	Commission v **Spain**	not published	**67**
17.06.2010	C-105/08	Commission v **Portugal**	not published	**85**, 157, 162
24.06.2010	C-338/08 C-339/08	**Ferrero and General Beverage Europe** v Agenzia Entrate **(IT)**	not published	
01.07.2010	C-233/09	**Dijkman and Dijkman-Lavaleije (BE)**	not published	**134**
15.07.2010	C-70/09	**Hengartner and Gasser (A)**	not published	
28.10.2010	C-72/09	**Establissments Rimbaud (FR)**	not published	**82**, 215
22.12.2010	C-287/10	**Tankreederei I (L)**	not published	**86**
10.02.2011	C-436/028	**HARIBO**	not published	127, 130, 140, 215

ANNEX IV: 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-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**	**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**	**NL**	**F**	**Fin**	**S**
Free movement of persons (Art. 39-42 EC/ Articles 45 to 48 TFEU)	X	X	X	X	X	X	X	X		X	X	X		X	X		X			X			X
Right of establishment (Art. 43-48 EC/ Articles 49 to 55TFEU)				X		X		X															
Free provision of services (Art. 49-55 EC/ Articles 56 to 62 TFEU)		X	X						X				X			X		X	X		X		
Free movement of capital (Art. 56-60 EC/ Articles 63 to 66 and 75 TFEU)									X											X	X		
Citizenship of the Union (Art. 18 EC/ Article 21 TFEU)																						X	
Transfer of residence	X						X				X												
Tax advantages related to the personal and	X			X	X		X	X				X		X			X						X
Deduction of costs related to the economic						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		
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	11/12/2003	04/03/2004	29/04/2004	01/07/2004

TAXATION OF INDIVIDUALS	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-11/07	C-43/07	C-527/06
	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**	**Eckelkamp**	**Arens-Sikken**	**Renneberg**
Country	**D**	**NL**	**D**	**NL**	**D**	**NL**	**D**	**D**	**P**	**Fin**	**S**	**D**	**Dk**	**B**	**B**	**L**	**G**	**G**	**P**	**B**	**NL**	**NL**
Free movement of persons (Art. 39-42 EC / Articles 45 to 48 TFEU)	X				X				X		X		X		X	X		X				X
Right of establishment (Art. 43-48 EC/ Articles 49 to 55 TFEU)							X		X		X	X	X	X	X			X				
Free provision of services (Art. 49-55 EC/ Articles 56 to 62 TFEU)								X					X		X		X	X				
Free movement of capital (Art. 56-60 EC/ Articles 63 to 66 and 75 TFEU)		X		X		X													X	X	X	
Citizenship of the Union (Art. 18 EC/ Article 21 TFEU)			X						X		X				X		X	X		X		
Transfer of residence			X			X																
Tax advantages related to the personal and												X										X
Other tax advantages																	X	X				
Deduction of costs related to the (economic)							X													X	X	
Pensions and other social benefits				X						X			X		X							
Immovable property					X				X		X					X			X	X	X	X
DTC	X	X		X	X	X		X					X	X	X	X						
Inheritance taxation																				X	X	
State of activity – Inbound situation		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	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	11/09/2008	11/09/2008	16/10/2008

TAXATION OF INDIVIDUALS	C-318/07	C-67/08	C-544/07	C-269/07	C-562/07	C-153/08	C-35/08	C-314/08	C-440/08	C-510/08	C-56/09	C-70/09	C-155/09
	Persche	Margarete Block	Uwe Rüffler	COM v Germany	COM v Spain	COM v Spain	Busley-Cibrian	Filipiak	Gielen	Mattner	Zanotti	Hengartner and Gasser	COM v Greece
Country	D	D	PL	D	E	E	D	PL	NL	D	I	A	G
Free movement of persons (Art. 39-42 EC/ Articles 45 to 48 TFEU)				X				X	X		X	X	X
Right of establishment (Art. 43-48 EC/ Articles 49 to 55TFEU)											X		X
Free provision of services (Art. 49-55 EC/ Articles 56 to 62 TFEU)								x			X		
Free movement of capital (Art. 56-60 EC/ Articles 63 to 66 and 75 TFEU)	X	X			X	X	X			X			
Citizenship of the Union (Art. 18 EC/ Article 21 TFEU)			X	X							X		X
Transfer of residence													
Tax advantages related to the personal and family													
Other tax advantages	X		X	X	X	X		X	X	X	X		
Deduction of costs related to the (economic) activity													
Pensions and other social benefits			X					X					
Immovable property					X		X						X
DTC													
Inheritance taxation/gift tax	X	X								X			
State of activity – Inbound situation					X				X			X	X
State of residence – Outbound situation	X		X	X		X		X			X		
Date of Decision	27/01/2009	12/02/2009	23/04/2009	10/09/2009	06/10/2009	06/10/2009	15/10/2009	19/11/2009	18/03/2010	22/04/2010	20/05/2010	15/07/2010	20/01/2011

COMPANY TAXATION	Avoir fiscal	Daily Mail	Commerzbank	Halliburton	Futura and Singer	ICI	Royal Bank of Scotland	Baxter	Saint-Gobain	Eurowings	X AB and Y AB	AMID	Metallgesellschaft/ Hoechst	X and Y	Lankhorst-Hohorst	Bosal Holding	Laboratoires Fournier	Marks & Spencer	CLT-UFA	Keller Holding	Cadbury Schweppes	Scorpio	COM. v Belgium	Test Claimants FII GL	Denkavit Internationaal	Test Claimants Thin Cap	Centro Equestro	Rewe Zentralfinanz
	270/83	81/87	C-330/91	C-1/93	C-250/95	C-264/96	C-311/97	C-254/97	C-307/97	C-294/97	C-200/98	C-141/99	C-397/98	C-436/00	C-234/00	C-168/01	C-39/04	C-446/03	C-253/03	C-471/04	C-196/04	C-290/04	C-433/04	C-446/04	C-170/05	C-524/04	C-345/04	C-247/04
Country	F	UK	UK	NL	L	UK	EL	F	D	D	S	B	UK	S	D	NL	F	UK	D	D	UK	D	B	UK	F	UK	D	D
Right of establishment (Art. 43-48 EC/ Articles 49 to 55TFEU)	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X		X	X	X	X			X	X	X		X
Free provision of services (Art. 49-55 EC/ Articles 56 to 62 TFEU)										X							X					X	X				X	
Free movement of capital (Art. 56-60 EC/ Articles 63 to 66 and 75 TFEU)														X										X		X		
Transfer of residence		X																										
Choice of form of establishment	X			X			X												X									
Losses					X	X						X						X										X
Tax advantage/exemption/relief	X			X					X	X	X				X		X											
CFC legislation																					X							
Anti-abuse provisions (e.g. thin cap															X											X		
DTC									X			X							X						X			
Deduction of expenses/costs								X								X				X		X					X	
Intra-group transfers											X		X	X										X		X		
Host State – Inbound situation	X		X	X	X		X	X	X				X		X				X					X		X		
State of residence – Outbound		X				X					X	X		X		X		X		X	X				X			X
Permanent establishment	X		X		X		X		X			X							X									
Subsidiary						X		X			X		X	X	X	X		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	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

COMPANY TAXATION	C-492/04 Lasertec	C-231/05 Oy AA	C-415/06 Stahlwerk Ergste Westig	C-298/05 Columbus Cotainer	C-105/07 Lammers	C-293/06 Deutsche Shell	C-248/06 COM v Spain	C-414/06 Lidl Belgium	C-157/07 Krankenheim	C-418/07 Papillon	C-330/07 Jobra	C-282/07 Truck Center	C-311/08 SGI	C-337/08 X Holding	C-96/08 CIBA	C-105/08 COM v Portugal	C-72/09 Ets Rimbaud	C-287/10 Tankreederei
Country	D	Fin	D	D	B	D	S	D	D	F	A	B	B	NL	HU	P	F	L
Right of establishment (Art. 43-48 EC/ Articles 49 to 55 TFEU)	X	X		X	X	X	X	X	X	X		X	X	X	X			
Free provision of services (Art. 49-55 EC/ Articles 56 to 62 TFEU)							X				X					X		
Free movement of capital (Art. 56-60 EC/ Articles 63 to 66 and 75 TFEU)	X		X	X	X							X				X	X	X
Transfer of residence																		
Choice of form of establishment																		
Losses			X					X	X									
Tax advantage/exemption/relief										X	X							X
CFC legislation				X														
Anti-abuse provisions (e.g. thin cap	X				X							X	X				X	
DTC				X														
Deduction of expenses/costs						X	X								X			
Intra-group transfers	X	X											X	X				
Host State – Inbound situation		X															X	
State of residence – Outbound	X		X	X	X	X		X		X		X	X	X	X	X		X
Permanent establishment			X			X		X	X						X			
Subsidiary	X	X								X				X				
Date of decision	10/05/2007	18/07/2007	06/11/2007	06/12/2007	17/01/2008	28/02/2008	13/03/2008	15/05/2008	23/10/2008	27/11/2008	4/12/2008	22/12/2008	21/01/2010	25/02/2010	15/04/2010	17/06/2010	28/10/2010	22/12/2010

TAXATION OF COMPANY SHAREHOLDERS	270/83	C-307/97	C-251/98	C-35/98	397/98, C-	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 Internationaal**	**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 / Articles 49 to 55 TFEU)	X	X	X		X	X	X	X						X		X	X	X		X		X			
Free provision of services (Art. 49-55 EC/ Articles 56 to 62 TFEU)												X													
Free movement of capital (Art. 56-60 EC/ Articles 63 to 66 and 75 TFEU)				X	X			X	X	X	X	X	X		X	X	X		X	X	X	X	X	X	X
Citizenship (Art. 18 EC/ Article 21 TFEU)														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						X																			
DTC		X			X					X	X		X		X	X	X	X					X	X	
State of source – Inbound	X	X		X					X		X		X		X		X		X	X	X			X	
State of residence – Outbound			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

TAXATION OF COMPANY SHAREHOLDERS	C-201/05	C-194/06	C-284/06	C-360/06	C-377/07	C-406/07	C-521/07	C-303/07	C-128/08	C-182/08	C-540/07	C-487/08	C-233/09
	Test Claimant CFC	**Orange European**	**Burda**	**Heinrich Bauer Verlag**	**Steko**	**COM v Greece**	**COM v Netherlands**	**Aberdeen**	**Damseanx**	**Glaxo Wellcome**	**COM v Italy**	**COM v Spain**	**Dijckman**
Country	UK	NL	D	D	D	G	NL	Fin		D	I	S	B
Freedom of establishment (Art. 43-48 EC/ Articles 49 to 55 TFEU)	X					X		X					
Free provision of services (Art. 49-55 EC/ Articles 56 to 62 TFEU)													
Free movement of capital (Art. 56-60 EC/ Articles 63 to 66 and 75 TFEU)	X	X	X	X	X	X		X	X	X	X	X	X
Citizenship (Art. 18 EC/ Article 21													
Withholding tax		X					X	X	X		X	X	
Taxation of dividends	X	X	X			X			X				X
Acquisition/holding of shares				X	X	X							X
Capital gains on shares													
Deduction of costs related to					X								
DTC									X				
State of source – Inbound dividends			X						X				
State of residence – Outbound		X		X	X	X	X	X		X	X	X	X
Individual shareholder				X		X			X				X
Corporate shareholder	X	X	X		X		X	X		X	X	X	
Date of Decision	23/04/2008	20/05/2008	26/06/2008	02/10/2008	22/01/2009	23/04/2009	11/06/2009	18/06/2009			19/11/2009	03/06/2010	01/07/2010

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