Direct Taxation: Is the ECJ Heading in a New Direction?

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Contents

1. *MARKS & SPENCER* – A SURPRISE?

The European Court of Justice (ECJ) judgment in *Marks & Spencer*[1] came as a surprise to many commentators.[2] Numerous experts had anticipated that the ECJ would require the United Kingdom to allow group relief for cross-border situations in exactly the same way that group relief is applied domestically, without any "ifs or buts". The Member States had feared that, from a revenue point of view, this would cause problems and that the ECJ would disregard their revenues completely. The ECJ, however, arrived at a solution under which the residence Member State of the parent company must allow a loss deduction only if the losses cannot be used in the subsidiary's residence Member State. Commentators saw a link between *Marks & Spencer* and the proposition, expressed during the debates leading up to the adoption of the EU Constitution, to prohibit the ECJ from drawing any tax-related conclusions whatsoever from the provisions of the EC Treaty relating to the fundamental freedoms or to force the Court to treat the Member States' budgetary concerns as overriding reasons in the public interest to justify a restriction.[3] In any event, the Member States were relieved by the ECJ's judgment. Many experts also have the impression that the judgment could be an indication that the ECJ wants to head in a new direction, thereby removing the pressure on the Member States.[4]

Shortly after the judgment in *Marks & Spencer*, the author analysed it and tried to explain why it, to a large extent, contradicted previous case law.[5] It is, however, necessary to examine more than one judgment to predict whether, in the long run, the ECJ is heading in another direction, in which direction this may be or whether the judgment is exceptional. Accordingly, in this article, the author reviews some of the recent ECJ judgments and Advocate Generals' Opinions and considers whether or not there is evidence that *Marks & Spencer* is setting a trend and, therefore, is at the beginning of a new direction in the ECJ's case law.

2. COMPARABLE SITUATIONS

2.1. Comparable situations and grounds of justification

In *Marks & Spencer*, the ECJ held that a UK parent with a resident subsidiary and a UK parent with a non-resident subsidiary are in a comparable situation. This enabled the ECJ to develop its analysis. In this respect, *Marks & Spencer* is within the usual framework of ECJ judgments. There are, however, other recent cases in which the ECJ stopped its examination at this stage by denying the comparability of the legal situations without providing further reasoning. The cases of "*D*",[6] *Schempp*[7] and *Blanckaert*[8] are examples of this.

These cases reveal how much the issues of comparability and justification are related.[9] In "*D*", *Schempp* and *Blanckaert*, the ECJ used arguments to decide on the comparability of situations that it had previously

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1. ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*.
2. Herzig and Wagner, "EuGH-Urteil Marks & Spencer – Grenzüberschreitende Verlustverrechnung in der Gruppe", *Der Konzern* (2006), p. 178 and "EuGH-Urteil 'Marks & Spencer' – Begrenzter Zwang zur Öffnung nationaler Gruppenbesteuerungssysteme für grenzüberschreitende Sachverhalte", *Deutsches Steuerrecht* (2006), p. 1; Hey, "Die EuGH-Entscheidung in der Rechtssache Marks & Spencer und die Zukunft der deutschen Organschaft", *GmbH Rundschau* (2006), p. 113; and Lang, "*Marks & Spencer* – Eine erste Analyse des EuGH-Urteils", *Steuer und Wirtschaft International* (2006), p. 3 and "The *Marks & Spencer* Case – The Open Issues Following the ECJ's Final Word", 46 *European Taxation* 2 (2006), p. 54.
3. Wathelet, "*Marks & Spencer plc v Halsey*: lessons to be drawn", *British Tax Review* 2 (2006), p. 131.
4. Herzig and Wagner, *Der Konzern*, note 2, p. 180 and *Deutsches Steuerrecht*, note 2, p. 8; Hey, note 2, p. 113; and Lang, *Steuer und Wirtschaft International*, note 2, pp. 11-12 and *European Taxation*, note 2, pp. 66-67.
5. Lang, *Steuer und Wirtschaft International*, note 2, p. 3 et seq.. and *European Taxation*, note 2, p. 54 et seq.
6. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2005] ECR I-5821, Para. 61.
7. ECJ, 12 July 2005, Case C-403/03, *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421, Para. 35.
8. ECJ, 8 September 2005, Case C-512/03, *J.E.J. Blanckaert v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2005] ECR I-7685, Para. 50.
9. See Lang, "Die Bindung der Doppelbesteuerungsabkommen an die Grundfreiheiten des EU-Rechts", in Gassner, Lang and Lechner, *Doppelbesteuerungsabkommen und EU-Recht* (Vienna: Linde, 1996), p. 37.

employed when it discussed the grounds of justification.[10] Concurrently, the ECJ modified the substance of these arguments quite radically (see 3.). As the ECJ was using these modified arguments to determine comparability, the Court saw no need to make the change in its case law explicit.[11] Comparability had always been a step in identifying infringements of the fundamental freedoms. Previously, the ECJ did not spend much time on the question of comparability, as the Court simply assumed that certain situations were comparable and, therefore, focussed on justifications. The ECJ is now, however, examining the question of comparability in more detail. The Court gives the impression that this does not constitute a change in its case law, as considering comparability has always been one of the steps when the ECJ examines whether or not a provision infringes the fundamental freedoms.[12] The only difference appears to be that there are currently more cases in which the ECJ decides that the situations are not comparable. If these decisions are examined more carefully it is, however, clear that the transfer of these arguments from the level of justification to the level of comparability goes hand-in-hand with a change in the substance of the arguments.[13]

2.2. Different treatment in different situations?

Under the ECJ's approach, there is a significant difference if the Court concludes that one situation is not comparable with another. The immediate result, in the ECJ's view, is that the domestic rule in question is not discriminatory. If, however, the ECJ considers situations to be comparable, whether or not different treatment of these situations complies with the fundamental freedoms depends on the result of the analysis of the justifications and proportionality. The ECJ also gives the impression that when two situations are not comparable, the national legislator is free to treat these situations in whatever way it wants. This approach is, however, not fully convincing. There is no reason why justifications and the principle of proportionality should not be considered if different situations are treated differently.[14] Different treatment should depend on how different the legal situations are.[15] Accordingly, if the legal situations are neither alike nor completely different, the treatment should not be completely different either, but only different insofar as the situations are actually different.[16]

In *Marks & Spencer*, the ECJ missed an opportunity to elaborate on these issues. Whilst the ECJ exclusively compared UK parents with domestic subsidiaries with UK parents that had foreign subsidiaries,[17] Advocate General Poiares Maduro also considered the treatment of subsidiaries versus permanent establishments (PEs).[18] Specifically, the Advocate General concluded that subsidiaries and PEs were not in a comparable situation. As far as the comparison between subsidiaries and PEs was concerned the analysis stopped there. He should, however, have asked whether or not it was justified to treat subsidiaries and PEs completely differently, as their legal situations are not completely different.

In *Scorpio*, Advocate General Léger gives the impression that he adopts this approach. Specifically, he concludes that residents and non-residents are, in respect of the levy of withholding taxes, not in the same situation and also notes that Germany is justified in applying its withholding tax procedure to non-residents.[19] Although this part of the Opinion is rather short, considering a possible justification in such a situation only makes sense if Advocate General Léger assumes that there must also be a justification for a different treatment of different situations. The differences in legal consequences between residents and non-residents must be proportionate in as far as the differences in the legal situations are concerned.[20]

If earlier ECJ decisions are considered, the Court has often emphasized that, under the fundamental freedoms, not only must comparable situations be treated alike, but different situations must also be treated differently. *Futura Participations* can be seen as an example in which the ECJ has adopted this approach.[21] Although the ECJ did not make this explicit, it appeared to have assumed that a non-resident taxpayer with its head office outside Luxembourg and only a PE in Luxembourg was not in the same situation as a Luxembourg resident with its head office in Luxembourg. As the situation was dissimilar, there was no reason to require that a non-resident had to keep its books in Luxembourg in the same way that a resident of Luxembourg had to.

In *van Hilten*, the ECJ missed an opportunity to develop this approach further.[22] Netherlands inheritance tax law provided for an extended unlimited tax liability for Netherlands nationals who relinquished their Netherlands residence within a ten-year period of emigration. The ECJ saw no infringement of the fundamental freedoms, as Netherlands nationals who had relinquished their Netherlands residence and Nether-

10. Lang, "Das EuGH-Urteil in der Rechtssache D. – Gerät der Motor der Steuerharmonisierung ins Stottern?", *Steuer und Wirtschaft International* (2005), p. 372 and "Das EuGH-Urteil in der Rechtssache Schempp – Wächst der steuerpolitische Spielraum der Mitgliedsstaaten?", *Steuer und Wirtschaft International* (2005), p. 412 et seq.; and Lang and Jettmar, "Steuerrecht und Sozial(versicherungs)recht – Anmerkungen zum Schlussantrag in der Rs.Blanckaert", *Internationale Wirtschaftsbriefe* (2005), p. 742.

11. See Wathelet, note 3, p. 133: "As usual, ECJ case law pretends not to change".

12. Lang, "Eine Wende in der Rechtsprechung des EuGH zu den direkten Steuern?", in Hebig, Kaiser, Koschmieder and Oblau (eds.), *Festschrift für Wilhelm H. Wacker* (Berlin: Erich Schmidt, 2006), (in print).

13. Id.

14. Id.

15. Lyal, "Non-discrimination and direct tax in Community Law", *EC Tax Review* (2003), p. 68 et seq.

16. Lang, "Marks and Spencer – more questions than answers: an analysis of the Opinion delivered by Advocate General Maduro", *EC Tax Review* (2005), p. 96.

17. ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, Para. 33.

18. ECJ, Advocate General Poiares Maduro's Opinion, 7 April 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (HM Inspector of Taxes)*, Para. 42 et seq.

19. ECJ, Advocate General Leger's Opinion, 16 May 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, Para. 47 et seq.

20. Critical of the role of the proportionality principle, see Wathelet, note 3, p. 131.

21. ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions* [1997] ECR I-2471, Para. 23 et seq.

22. ECJ, 23 February 2006, Case C-513/03, *Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*.

lands residents were treated alike. Treating two taxpayers alike, however, only accords with the fundamental freedoms if the situations are comparable. In *van Hilten*, the position could have been taken that residents and former residents who emigrated within the last ten years are not in a similar situation.[23] If the ECJ had viewed these situations as being different, this would have required a different treatment.

2.3. Two cross-border situations can be comparable

Amongst the cases referred to "*D*" is special.[24] Specifically, the ECJ denied the comparability of the legal situations because of the type of legal instrument involved. It must, therefore, be concluded from the judgment that two non-residents, who are residents of different Member States, are not in a comparable situation if both are covered by different tax treaties. It is not at all convincing that the type of the legal instrument involved, and not the relevant provisions, should be decisive. It can, however, be concluded from the judgment that two non-residents who are residents of different Member States are not always in a non-comparable situation.[25] The ECJ, therefore, appears to be willing to extend its pairs of comparison. In addition to the comparison of residents and non-residents and that of residents who are in a cross-border situation with residents who are in a domestic situation, the ECJ is also prepared to compare two different cross-border situations. The only reason why comparability was denied in "*D*" was that a tax treaty was the source of the different treatment. The impression is, therefore, that the comparability of the situations of non-residents who were residents of two different Member States would have been considered if the different treatments were due to domestic law.[26]

Advocate General Geelhoed took the same position in *Test Claimants in Class IV of the ACT Group Litigation*,[27] i.e.:

> The question here is whether it is permissible to distinguish between non-residents which are resident in the same Member State and thus covered by the same DTC, depending on whether the non-resident is controlled by a resident of a Member State (or third country) whose DTC with the UK does not make provision for partial tax credits. Are these non-residents comparable for the purposes of the non-discrimination principle? ... The answer to this question must in my view be in the negative. The distinction in a DTC between non-residents on the basis of the country of residence (and thus applicable DTC) of their controlling shareholder, forms a part of the equilibrium of jurisdiction and priority reached by the Contracting States in the exercise of their competence ... As a result, enquiry into the reasons and justifications for this choice of equilibrium – which may only be appreciated in the light of the broader balance reached in the extensive network of bilateral DTCs that exists at present – does not fall within the proper scope of the Treaty free movement provisions.

The position taken by the Advocate General is rather surprising. He did not even refer to the *Open Skies*[28] case law of the ECJ, which could have led in a completely different direction.[29] He also appears to be of the view that a distinction that is due to a tax treaty is not merely non-comparable, but not even covered by the fundamental freedoms. Advocate General Geelhoed, however, gives the impression that he might have considered comparing non-residents with each other if their different treatment derived from domestic law and not from tax treaty law.

This approach is not completely new. In *Futura Participation*, the ECJ did not accept that Luxemburg required non-resident taxpayers to keep their accounts in Luxemburg if they wanted to use their losses, whilst no such requirement was imposed if profits were involved.[30] Accordingly, the ECJ compared, without expressly saying so, two different categories of non-resident, i.e. non-residents in a loss-making situation and those realizing profits.[31]

23. Plansky and Hohenwarter, "Besteuerung von Erbschaften nach Wegzug in einen Drittstaat im Gemeinschaftsrecht – Schlussanträge des GA Leger in der Rs. van Hilten-van der Heijden", *Steuer und Wirtschaft International* (2005), p. 422 and Lang, "Wohin geht das Internationale Steuerrecht?", *Internationales Steuerrecht* (2005), p. 291.
24. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2005] ECR I-5821, Para. 61.
25. Lang, *Steuer und Wirtschaft International* (1), note 10, p. 371 et seq.
26. See Lang, "Gemeinschaftsrechtliche Verpflichtung zur Rechtsformneutralität im Steuerrecht?", *Internationales Steuerrecht* (2006), p. 398.
27. ECJ, Advocate General Geelhoed's Opinion, 23 February 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation (Pirelli, Essilor and Sony), Test Claimants in Class IV of the ACT Group Litigation (BMW) v. Commissioners of Inland Revenue*, Para. 100 et seq.
28. ECJ, 5 November 2002, Case C-466/98, *Commission of the European Communities v. United Kingdom* [2002] ECR I-9427; ECJ, 5 November 2002, Case C-467/98, *Commission of the European Communities v. Kingdom of Denmark* [2002] ECR I-9519; ECJ, 5 November 2002, Case C-468/98, *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-9575; ECJ, 5 November 2002, Case C-469/98, *Commission of the European Communities v. Republic of Finland* [2002] ECR I-9627; ECJ, 5 November 2002, Case C-471/98, *Commission of the European Communities v. Kingdom of Belgium* [2002] ECR I-9681; ECJ, 5 November 2002, Case C-472/98, *Commission of the European Communities v. Grand Duchy of Luxembourg* [2002] ECR I-9741; ECJ, 5 November 2002, Case C-475/98, *Commission of the European Communities v. Republic of Austria* [2002] ECR I-9797; and ECJ, 5 November 2002, Case C-476/98, *Commission of the European Communities v. Federal Republic of Germany* [2002] ECR I-9855.
29. Craig, Rainer, Thoemmes and Tomsett, "ECJ renders wide-reaching decision on German Thin Capitalization rules", *Tax Notes International* (2002), p. 1166; Craig, "Open your eyes: What the '*Open Skies'* Cases Could Mean for the US Tax Treaties with the EU Member States", 57 *Bulletin for International Fiscal Documentation* 2 (2003), p. 63 et seq.; Clark, "Limitation on Benefits: Changing forms in the New US–UK Tax Treaty", 43 *European Taxation* 3 (2003), p. 97 et seq.; Tumpel, "Der Einfluss der Grundfreiheiten des EG-Rechts auf die Doppelbesteuerungsabkommen", *Österreichische Steuer-Zeitung* (2003), pp. 156-157; HJI Panayi, "Open skies for European Tax?", *British Tax Review* (2003), p. 189 et seq.; De Ceulaer, "Community Most-Favoured-Nation Treatment: One Step Closer to the Multilateralization of Income Tax Treaties in the European Union?", 57 *Bulletin for International Fiscal Documentation* 10 (2003), p. 493 et seq.; Sepho, "Does the U.K.–U.S. tax treaty conflict with the EC's freedom of establishment principle?", *Tax Notes International* (2003), p. 279 et seq.; Schnitger, "Die Entscheidung des EuGH zu den „Open Skies"-Abkommen", *Internationale Wirtschafts-Briefe* (2004), p. 37 et seq.; van den Hurk, "Is the ability of the Member States to conclude tax treaties chained up?", *EC Tax Review* (2004), pp. 25-26; and Kofler, "European taxation under an 'Open Sky': LoB clauses in tax treaties between the U.S. and the Member States", *Tax Notes International* (2004), p. 45 et seq. and "Treaty Shopping, Quota Hopping und Open Skies: Die gemeinschaftsrechtliche Problematik von Limitation on Benefits Klauseln in Doppelbesteuerungsabkommen mit den Vereinigten Staaten", in Jirousek and Lang (ed.), *Praxis des Internationalen Steuerrechts – Festschrift für Helmut Loukota zum 65. Geburtstag* (Vienna: Linde, 2005), p. 213 et seq.
30. ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions* [1997] ECR I-2471, Para. 37 et seq.
31. See Lang, note 26, p. 398.

In *Marks & Spencer*, Advocate General Poiares Maduro also considered the comparison between subsidiaries and PEs.[32] As already stated in 2.2., he did not find that the situations were comparable enough. The ECJ did not consider this issue. Accordingly, it is difficult to conclude that the ECJ shared the position adopted by the Advocate General or that the Court did not in any way accept the proposition that subsidiaries and PEs could be compared.

In *CLT-UFA*, the ECJ, however, confirmed that it is willing to compare taxpayers in different cross-border situations.[33] In this case, a German PE with its head office abroad was treated worse than a German subsidiary with its parent abroad. As the ECJ did not find any justification for different treatment, the Court concluded that the fundamental freedoms were infringed.

Advocate General Léger also adopts this approach in *Cadbury Schweppes*.[34] One of the pair of comparisons that he considers is a UK parent with a subsidiary in a low-tax country and a UK parent with a subsidiary resident in a state in which the tax burden is higher. Accordingly, the Advocate General compares two different cross-border situations.[35]

3. GROUNDS OF JUSTIFICATION

3.1. Fiscal cohesion

Fiscal cohesion has been amongst the most relevant possible grounds of justification in ECJ case law. It is one of the few grounds of justification that has been accepted by the ECJ regarding taxation and for many years it was the only argument that led to the finding that a given domestic provision was in accordance with the fundamental freedoms.[36] Accordingly, many experts were surprised that the concept was not even referred to in *Marks & Spencer*.[37] Especially in a judgment in which justifications were accepted by the ECJ, it was expected that cohesion would be at the centre of the Court's reasoning. As a result, the impression is given that the ECJ deliberately did not refer to this. One reason could be that no agreement was reached on how this rather vague concept could be further developed. Although the concept of cohesion was not referred to, it was obviously being considered.[38]

The ECJ introduced fiscal cohesion as a possible justification in *Bachmann*.[39] In this case, a different treatment between insurance premiums paid to a domestic and a foreign company under Belgian law was accepted by the ECJ, as insurance benefits paid by these companies were also treated differently. Specifically, insurance premiums paid to domestic companies were deductible and benefits were exempt, whilst insurance premiums paid to foreign companies were neither deductible nor were the benefits tax exempt. These provisions were so closely related that there was a coherent treatment.

Soon after *Bachmann*, the ECJ clarified that a Member State may waive the cohesion of its own tax system by concluding a tax treaty. That is, cohesion can be transferred to the level of a tax treaty. As an example, *Wielockx* concerned an old-age reserve that could only be built up by resident taxpayers.[40] Accordingly, the termination of the old-age reserve, which, generally, had to be done at a certain age, gave rise to taxation only for non-resident taxpayers. If, however, the taxpayer moved to another Member State, the ECJ assumed that the tax treaty prevented the termination of the old-age reserve being a taxable event. The underlying assumption was that, by concluding a tax treaty, a Member State could waive cohesion.

In subsequent decisions, the ECJ has clarified that fiscal cohesion could only be an argument if provisions are directly linked to each other.[41] The same tax and the same taxpayer had to be involved. Accordingly, a worse tax treatment of *shareholders* receiving dividends from foreign companies compared to dividends from domestic companies could never be offset by a more beneficial tax treatment of foreign *companies*. Shareholders and companies are different taxpayers.

In *Manninen,* Advocate General Kokott, however, proposed that the ECJ should change its position on coherence.[42] In particular, the concept of cohesion, which is accepted as a ground of justification, should be

32. ECJ, Advocate General Poiares Maduro's Opinion, 7 April 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (HM Inspector of Taxes)*, Para. 42 et seq.
33. ECJ, 23 February 2006, Case C-253/03, *CLT-UFA SA v. Finanzamt Köln-West*, Para. 11 et seq.
34. ECJ, Advocate General Leger's Opinion, 2 May 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, Para. 67 et seq.
35. See Lang, note 26, p. 399.
36. ECJ, 28 January 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State* [1992] ECR I-249, Para. 21 et seq.; ECJ, 28 January 1992, Case C-300/90, *Commission of the European Communities v. Kingdom of Belgium* [1992] ECR I-305, Para. 14 et seq.; ECJ, 11 August 1995, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen* [1995] ECR I-2493, Para. 22 et seq.; ECJ, 14 November 1995, Case C-484/93, *Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, Para. 18; ECJ, 27 June 1996, Case C-107/94, *P.H. Asscher v. Staatssecretaris van Financiën* [1996] ECR I-3089, Para. 55 et seq.; ECJ, 26 October 1999, Case C-294/97, *Eurowings LuftverkehrsAG v. Finanzamt Dortmund-Unna* [1999] ECR I-7447, Para. 42; ECJ, 13 April 2000, Case C-251/98, *C. Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem* [2000] ECR I-2787, Para. 40; ECJ, 6 June 2000, Case C-35/98, *Staatssecretaris van Financiën v. B.G.M. Verkooijen* [2000] ECR I-4071, Para. 56 et seq.; ECJ, 18 September 2003, Case C-168/01, *Bosal Holding BV v. Staatssecretaris van Financiën* [2003] ECR I-9409, Para. 29 et seq.; ECJ, 11 March 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409, Para. 63 et seq.; and ECJ, 7 September 2004, Case C-319/02, *Petri Manninen* [2004] ECR I-7477, Para. 61 et seq.
37. Herzig and Wagner, *Deutsches Steuerrecht*, note 2, p. 7; Hey, note 2, p. 121; and Lang, *European Taxation*, note 2, p. 60.
38. Lang, *European Taxation*, note 2, p. 60.
39. ECJ, 28 January 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State* [1992] ECR I-249, Para. 21 et seq.
40. ECJ, 11 August 1995, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen* [1995] ECR I-2493, Para. 2.
41. ECJ, 14 November 1995, Case C-484/93, *Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, Para. 18; ECJ, 27 June 1996, Case C-107/94, *P.H. Asscher v. Staatssecretaris van Financiën* [1996] ECR I-3089, Para. 55 et seq.; ECJ, 26 October 1999, Case C-294/97, *Eurowings LuftverkehrsAG v. Finanzamt Dortmund-Unna* [1999] ECR I-7447, Para. 42; ECJ, 13 April 2000, Case C-251/98, *C. Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem* [2000] ECR I-2787, Para. 40; ECJ, 6 June 2000, Case C-35/98, *Staatssecretaris van Financiën v. B.G.M. Verkooijen* [2000] ECR I-4071, Para. 57 et seq.; ECJ, 18 September 2003, Case C-168/01, *Bosal Holding BV v. Staatssecretaris van Financiën* [2003] ECR I-9409, Para. 29 et seq.; and ECJ, 11 March 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409, Para. 63 et seq.
42. ECJ, Advocate General Kokott's Opinion, 18 March 2004, Case C-319/02, *Petri Manninen* [2004] ECR I-7477, Para. 61 et seq.

widened. The tax rules applying to a corporation and its shareholders should also be considered as a coherent system. Although the ECJ did not expressly respond to Advocate General Kokott's request, the Court appears to have followed her approach and accepted a rather wide concept of cohesion, at least at the level of proportionality.[43] It was considered proportionate that the tax burden of shareholders receiving foreign dividends was higher to the extent that the underlying corporate tax burden of the foreign corporation was lower compared to that of a domestic corporation.

Further, in *Blanckaert*, the ECJ used the cohesion argument at the level of comparability.[44] In *Schempp*, the ECJ did not use the term "cohesion", but accepted the worse treatment of cross-border alimony payments compared to those paid to residents because of the tax treatment in the other Member State.[45] The absence of taxation in the other Member State, in the ECJ's view, resulted in the non-comparability of cross-border and domestic alimony payments. Consequently, provisions of different tax systems regarding different taxpayers who were not related were linked. Although the term "fiscal cohesion" was not even referred to in *Schempp* and the ECJ did not admit that it had changed its case law, it is clear that the ECJ has widened the concept of cohesion in the extreme.[46]

It, however, appears to be uncertain whether or not the final word has yet been given. In *Stauffer*, Advocate General Stix-Hackl left it open as to whether or not fiscal cohesion should be interpreted in a narrow or a broad sense.[47] In *Commission v. Denmark*, she referred to the concept of fiscal cohesion as diffuse and argued that this is due to the fact that the concept of fiscal cohesion cannot be understood convincingly.[48]

The ECJ was inconsistent in another respect, as the Court did not return to its previous case law to the effect that a Member State could waive its coherence by concluding a tax treaty. In "*D*", the ECJ not only raised the different treatment of non-residents who were residents of different other Member States, but also of residents and non-residents.[49] Residents were entitled to a certain net wealth allowance, whilst non-residents were not. Some non-residents were treated as residents due to a specific non-discrimination clause of a tax treaty, whilst others were not. In *Wielockx*, the ECJ could have argued that the Netherlands had waived the coherence of its tax system by granting the allowance to certain non-residents.[50] This could have prevented the Netherlands denying the benefit to other non-residents. The ECJ did not, however, refer to this argument.[51]

A similar point could also have been raised in *Schempp*.[52] The ECJ could have examined why non-residents are not taxed on their alimony payments under German tax law. Even if Germany had provided for the taxation of alimony received by non-residents, it could not have enforced this. Under Art. 21 of the OECD Model Convention (hereinafter: the OECD Model), the exclusive taxing right lies with the residence state. As, however, the ECJ did not look at the taxation in Germany but rather at the taxation in the other Member State, this was not considered by the Court.[53]

Another example is *Stauffer*, which concerns an Italian foundation that is treated differently under German tax laws compared to a German foundation.[54] One of the arguments raised by Advocate General Stix-Hackl is that, in the Germany-US tax treaty, there is a non-discrimination clause ensuring the equal treatment of German and US foundations in Germany. She does not consider this argument to be decisive. It could be easily concluded that Germany is not in a position to treat Italian foundations differently compared to German foundations because, if there was ever any fiscal cohesion argument for such a different treatment, Germany could not invoke this argument, as it had already granted third-country foundations more favourable treatment.[55]

In *Commission v. Denmark*, Advocate General Stix-Hackl, however, reconfirms that a disadvantage cannot be justified if fiscal cohesion is not established in relation to the same person by a strict correlation between the deductibility of contributions and the taxation of pensions, but is, rather, transferred to another level, i.e. that of the reciprocity of the rules that apply in the other Member State. The result is that the principle of cohesion cannot be invoked to justify the refusal of a deduction.[56] The argument that a Member State waives the cohesion of its tax systems is, therefore, confirmed even for a *Bachmann*-type situation, although, in *Bachmann*, the ECJ did not invoke this limitation of the cohesion justification.

Accordingly, as far as cohesion is concerned, it is not clear whether or not recent developments point the same direction. The ECJ has implicitly changed its concept of cohesion since *Bachmann*. There is, however, uncertainty as to how wide this concept is in the

43. ECJ, 7 September 2004, Case C-319/02, *Petri Manninen* [2004] ECR I-7477, Para. 46.
44. ECJ, 8 September 2005, Case C-512/03, *J.E.J. Blanckaert v. Inspecteur van de Belastingdienst/ Particulieren/ Ondernemingen buitenland te Heerlen* [2005] ECR I-7685, Paras. 45 and 49.
45. ECJ, 12 July 2005, Case C-403/03, *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421, Paras. 36 and 47.
46. Lang, *Steuer und Wirtschaft International* (2), note 10, p. 413.
47. ECJ, Advocate General Stix-Hackl's Opinion, 15 December 2005, Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften,* Para. 107, with a preference for a narrow interpretation.
48. ECJ, Advocate General Stix-Hackl's Opinion, 1 June 2006, Case C-150/04, *Commission of the European Communities v. Kingdom of Denmark,* Para. 77.
49. ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* [2005] ECR I-5821, Para. 57 et seq.
50. Lang, note 9, p. 42 and *Steuer und Wirtschaft International* (1), note 10, p. 369.
51. ECJ, 11 August 1995, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen* [1995] ECR I-2493, Para. 22 et seq.
52. ECJ, 12 July 2005, Case C-403/03, *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421. See also Lang, *Steuer und Wirtschaft International* (2), note 10, p. 415 and note 12.
53. Lang, *Steuer und Wirtschaft International* (2), note 10, p. 415.
54. ECJ, Advocate General Stix-Hackl's Opinion, 15 December 2005, Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften,* Para. 93.
55. See Reimer, "Grenzüberschreitende Gemeinnützigkeit? – Von der Entscheidung des EuGH in im Fall 'Centro di Musicologia Walter Stauffer'", *Steuer und Wirtschaft International* (2006), p. 201 et seq.
56. ECJ, Advocate General Stix-Hackl's Opinion, 1 June 2006, Case C-150/04, *Commission of the European Communities v. Kingdom of Denmark,* Para. 78 et seq.

ECJ's view. Advocate General Stix-Hackl is right in referring to this concept as diffuse.[57] Although it is clear that cohesion at the level of a tax treaty can limit the importance of this argument at the level of national law, it is not easy to predict when the limitation of the cohesion argument is relevant and when it can be ignored.

3.2. Double utilization of losses

In *Marks & Spencer*, the ECJ was very concerned with the danger of the double use of losses, i.e. "[a]s regards the second justification, relating to the danger that losses would be used twice, it must be accepted that Member States must be able to prevent that from occurring".[58] As the avoidance of double non-taxation and preventing the double use of losses are closely related, *Marks & Spencer* appears to be in line with *Schempp*, in which the ECJ accepted that the rules of a Member State may ensure single taxation and avoid double non-taxation, even if an intra-Community cross-border situation is treated worse than a purely domestic one, at least from the viewpoint of a single taxpayer. It is, however, unconvincing that, in an EU tax framework in which the tax base is not harmonized and, therefore, in which some of the income of a taxpayer could easily be taxed either twice or not at all, the ECJ places so much emphasis on the avoidance of double non-taxation.[59]

In her Opinion in "*N*", Advocate General Kokott does not, however, appear to be concerned by the possibility of the double use of losses, although she does not expressly refer to the issue nor does she indicate that she proposes that the ECJ should deviate from *Marks & Spencer*.[60] "*N*" concerns Netherlands exit taxation. Specifically, Advocate General Kokott derives from the fundamental freedoms that it has to be

> ensured that the tax in fact levied on a disposal following emigration is not higher than the tax which would have been levied on disposal within the territory, assuming all other circumstances to be the same.[61]

Accordingly, subsequent reductions in value must be considered. Concurrently, she emphasizes that

> the approach of the Netherlands tax system is coherent in that in the case of immigrating taxpayers taxation of profits on the disposal of substantial shareholdings is based on the value of the shareholding at the time of immigration ("*step-up*").[62]

Consequently, in respect of a reduction of the value of the shares incurred after emigration, this may be used both in the immigration and the emigration Member States. Advocate General Kokott did not think that the subsequent reductions in value should only be considered in the emigration Member State if the immigration Member State does not also take them into account.[63]

In *Rewe*, Advocate General Poiares Maduro also raises the issue of the danger of the double use of losses.[64] He refers to *Marks & Spencer* and argues that the situation in *Rewe* is different compared to that in *Marks & Spencer*. Specifically, *Rewe* concerns a reduction in value of a participation in a subsidiary that, under German tax law, could be considered if the subsidiary is a German resident, which is not deductible if the subsidiary is a foreign resident. The Advocate General distinguishes *Rewe* from *Marks & Spencer* by emphasizing that, in *Rewe*, the loss can be used abroad only at the level of the subsidiary. Losses at the levels of the parent and the subsidiary are treated differently and this double use of losses at both the levels of the parent and the subsidiary could also arise in a purely domestic situation. If, however, the parent sold its shares in the subsidiary, a loss deriving from this alienation could be incurred at the level of the parent in the Member State of residence of the subsidiary. The parent selling the shares is treated as a non-resident taxpayer and could be liable to tax on capital gains deriving from sources in this country. This could result in a loss if there was a reduction in value of the shares after the acquisition.

Although tax treaties often allocate taxing rights of capital gains to the residence state of the parent, they do not prevent contracting states from allowing a loss deduction. Accordingly, a reduction in the value of shares in a subsidiary could be considered at the level of the parent both in its residence Member State and the other Member State.[65] It is interesting to note that the Advocate General did not refer to the risk of the double use of a loss at the level of the same taxpayer. Under *Marks & Spencer*, this danger should have given rise to concern.

3.3. Two or more justifications "taken together"

It was puzzling in *Marks & Spencer* that the ECJ did not refer to one single ground of justification, but, rather, to three different justifications that had to be "taken together". These were the protection of a balanced allocation of the power to impose taxes between the various Member States concerned, the danger that losses would be used twice and the risk of tax avoidance.[66] Accordingly, the ECJ has created uncertainty.[67] First, each justification alone is insufficient to accept different treatment. Second, it is not known which of the justifications that have been rejected in the past could be relevant again and could serve, if "taken together", as a justification.

Advocate General Poiares Maduro gives his interpretation of this requirement, which was developed by the ECJ in *Marks & Spencer*, in his Opinion in *Rewe*. He suggests that the criterion of a balanced allocation of

57. Id., Para. 72.
58. ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, Para. 47.
59. Lang, *European Taxation*, note 2, p. 66.
60. See Lang, "Die gemeinschaftsrechtlichen Rahmenbedingungen für 'Exit Taxes' im Lichte der Schlussanträge von GA Kokott in der Rechtssache N.", *Steuer und Wirtschaft International* (2006), p. 215 et seq.
61 ECJ, Advocate General Kokott's Opinion, 30 March 2006, Case C-470/04, *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, Para. 123.
62. Id., Para. 107.
63. Lang, note 60, p. 226.
64. ECJ, Advocate General Poiares Maduro's Opinion, 31 May 2006, Case C-347/04, *Rewe Zentralfinanz eG als Gesamtrechtsnachfolgerin der ITS Reisen GmbH v. Finanzamt KölnMitte,* Para. 36 et seq.
65. For a different opinion, see Thoemmes, "Beschränkung steuerlicher Teilwertabschreibungen auf Beteiligungen an EU-Tochtergesellschaften", *Internationale Wirtschafts-Briefe* (2006), p. 523.
66. ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, Para. 43.
67. Critical, see Lang, *European Taxation*, note 2, p. 59.

taxing powers between the Member States cannot stand alone.[68] This criterion cannot be separated from the other two criteria, i.e. the danger of the double use of losses and the risk of tax avoidance. From this, he concludes that only these two criteria must be examined. In the author's opinion, this is a very elegant attempt to dispose of the balanced allocation of the power to impose taxes between the Member States as a possible justification. Specifically, if the other two criteria are considered exclusively, it is unnecessary to deal with the question of whether or not the power to impose taxes is allocated in a balanced way. In the author's view, this is wise.[69] Former ECJ judge, Wathelet, already suspects that the introduction of this justification in *Marks & Spencer* could be the

> insidious impact of the numerous statements made by Member states' governments, which complained about the significant budget repercussions of the ECJ's ruling relating to direct taxation.[70]

Advocate General Poiares Maduro also tends to consider the other two criteria separately. Obviously, each of the two criteria could serve as a justification. Consequently, if the ECJ follows the Advocate General's proposal, nothing is left of the requirement in *Marks & Spencer* that the justifications must be taken together. The author approves of this.

4. PROPORTIONALITY

4.1. Less restrictive measures

In *Marks & Spencer*, the ECJ accepted a domestic measure that was definitely not the least restrictive in relation to the justification brought forward.[71] Specifically, to avoid the double use of losses it was unnecessary to disallow the deduction of losses if they could be used abroad. It would have been sufficient to introduce a recapture clause if profits were later realized at the level of the subsidiary. The ECJ was, therefore, criticized for not requiring the United Kingdom to apply the least restrictive measure.

In "*N*", Advocate General Kokott confirms that

> measures must comply with the principle of proportionality, that is they must be suitable to achieve the aims they pursue and they must not go beyond what is necessary to achieve them.[72]

It is, however, not completely clear whether or not determining the tax on immigration is the least restrictive measure possible.[73] Advocate General Kokott emphasizes that it

> is not apparent that there is any less burdensome and legally and factually possible means of taxing the increase in value of shares which has occurred up to the time of emigration. In particular, it appears hardly possible for the home State to assess the tax after emigration at the time of actual disposal. ... Even if it were in law possible to assess the tax on the shares due to the Netherlands only subsequently, at the time of disposal, this would not be a less burdensome means less disadvantageous to the taxpayer. This is because the taxpayer would have to retain not only evidence for the subsequent calculation of value but also of deductible costs connected to the profit up to the time of emigration. For that reason the early, temporary determination of tax is ultimately also in the interests of the taxpayer.[74]

A less restrictive measure would have been to grant an option to the taxpayer to have the tax determined on emigration or, instead, to retain evidence for the subsequent calculation of value and deductible costs.[75] The Advocate General, however, indicates that it could be legally impossible to assess the tax on the increase in the value of the shares that occurred up to the time of emigration. She could have, however, implicitly have referred to Art. 13(5) of the OECD Model. Under this, the alienator's state of residence has exclusive taxing rights. As a result, the state of emigration could lose its taxing right if the tax is not assessed before alienation, even in respect of the increase in the value of the shares that occurred before emigration. In the author's opinion, the taxing right of the emigration Member State would be seriously endangered. The position that the emigration Member State can levy a tax on the increase in the value of the shares if the tax base is determined on emigration could, however, be challenged. Even so, the event that gives rise to taxation is the alienation. Accordingly, there are good reasons to believe that the emigration Member State cannot levy the tax, even if the tax base had already been determined.[76]

Consequently, Advocate General Kokott's Opinion in "*N*" cannot serve as an additional example that the ECJ or the Advocate Generals tend to accept measures that are not the least restrictive. There are even arguments that determining the tax base on emigration is not sufficient to allow the emigration Member State to levy the tax on the increase in the value of the shares on emigration later.[77]

4.2. Risk of tax avoidance and wholly artificial arrangements

In addition to cohesion, the requirement to counter tax avoidance has recently been important as a possible ground of justification in ECJ case law. In many judgments, the risk of tax avoidance has, in principle, been accepted as a possible justification.[78] The ECJ's deci-

68. ECJ, Advocate General Poiares Maduro's Opinion, 31 May 2006, Case C-347/04, *Rewe Zentralfinanz eG als Gesamtrechtsnachfolgerin der ITS Reisen GmbH v. Finanzamt KölnMitte,* Para. 34.
69. For a similar view, see Thoemmes, note 65, p. 522.
70. Wathelet, note 3, p. 131.
71. Lang, *Steuer und Wirtschaft International*, note 2, p. 8 et seq.; *European Taxation*, note 2, p. 61 et seq.; and note 12.
72. ECJ, Advocate General Kokott's Opinion, 30 March 2006, Case C-470/04, *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, Para. 110.
73. Critical, see Lang, *Steuer und Wirtschaft International*, note 2, p. 9 et seq.; *European Taxation*, note 2, p. 61 et seq.; and note 12.
74. ECJ, Advocate General Kokott's Opinion, 30 March 2006, Case C 470/04, *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, Para. 120.
75. Lang, *Steuer und Wirtschaft International*, note 2, p. 9 et seq.; *European Taxation*, note 2, p. 61 et seq.; and note 12.
76. Lang, *Steuer und Wirtschaft International*, note 2, p. 9 and *European Taxation*, note 2, p. 61 et seq.
77. Lang, note 60, p. 216 et seq.
78. ECJ, 16 July 1998, Case C-264/96, *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* [1998] ECR I-4695, Para. 26 et seq.; ECJ, 8 March 2001, Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others, Hoechst AG, Hoechst UK Ltd v. Commissioners of Inland Revenue, H.M. Attorney General* [2001] ECR I-1727, Para. 52 et seq.; ECJ, 3 October 2002, Case C-136/00, *Rolf*

sion in *Marks & Spencer* was, however, special in one respect. In other judgments, the ECJ was only prepared to accept such a justification if the measure was proportionate. This was the case if the measure was not general, but covered only specific situations. In *Marks & Spencer*, it was relevant that

> the possibility of transferring the losses incurred by a non-resident company to a resident company entails the risk that within a group of companies losses will be transferred to companies established in the Member States which apply the highest rate of taxation and in which the tax value of the losses is therefore the highest.[79]

Accordingly, excluding group relief for losses incurred by non-residents was justified if they could not be used in the Member State of the subsidiary, at least in combination with the other justifications referred to "taken together". This leads to the question as to the role of the risk of tax avoidance in the future. Specifically, will *Marks & Spencer* continue to be the exception or will it be the start of a new generation of the ECJ's case law on the risk of tax avoidance?

It should be noted that two days after the ECJ delivered its judgment in *Marks & Spencer*, Advocate General Stix-Hackl confirmed the Court's traditional position.[80] This is that the prevention of tax avoidance and tax fraud are recognized as grounds of justification. A provision only referring to foreign situations and excluding foreign foundations from a tax benefit in general must be seen as not proportionate.

It should also not be ignored that *Marks & Spencer* was, to a certain extent, contradictory with regard to the risk of tax avoidance. In addition to the statement just referred to, the ECJ referred to one of its other statements that had already been made in previous decisions.[81] The ECJ emphasized, without any obvious reason for doing so, that it

> is also important, in that context, to make clear that Member states are free to adopt or to maintain in force rules having the specific purpose of precluding from a tax benefit wholly artificial arrangements whose purpose is to circumvent or escape national tax law.[82]

Accordingly, the ECJ referred to similar statements in previous case law. In other words, although *Marks & Spencer*, in this regard, is not in line with decisions like *ICI*[83] and *Lasteyrie du Saillant*[84] as the ECJ accepted general domestic measures to reduce the risk of tax avoidance (something that it had not done before), the Court did refer to the phrase "wholly artificial arrangements", which originated in these judgments.

In *Cadbury Schweppes*, Advocate General Léger also refers to this, which reconfirms the ECJ's pre-*Marks & Spencer* case law that the risk of tax avoidance may only serve as justification to the extent the legislation at issue has the specific purpose of preventing wholly artificial arrangements, and tries to explain what he understands by "wholly artificial arrangements".[85] In his view, three criteria must be met:

> 112. The first of those criteria relates to whether the subsidiary is genuinely established in the host State. It means examining whether the subsidiary has the premises, staff and equipment necessary to carry out the services provided to the parent company which have resulted in the reduction of the tax due in the State of origin. If that is not the case, the subjection of those services to the tax sovereignty of the host State does appear to be a wholly artificial arrangement designed to avoid tax.
>
> 113. The second of those criteria relates to the genuine nature of the services provided by the subsidiary. In that connection, it is a question of looking at the competence of the subsidiary's staff in relation to the services provided and the level of decision-making in carrying out those services. If, for example, the subsidiary proves to be nothing but a mere tool of execution because the decisions necessary to carry out the services it is paid for are taken at another level, it is also right to consider that the subjection of those services to the tax sovereignty of the host State constitutes a wholly artificial arrangement.
>
> 114. The third criterion, relating to the value added by the subsidiary's activity, is no doubt trickier to apply where the services provided by it in fact reflect the exercise of genuine activities in the host State. This criterion seems to me to be relevant, however, in so far as it might make it possible to take account of an objective situation in which the services provided by the subsidiary have no economic substance in the light of the parent company's activity. If that were the case, I think it can be accepted that there is a wholly artificial arrangement because there appears, in effect, to be no consideration for the payment by the parent company for the services in question. Payment for such services could therefore be viewed quite simply as a transfer of profits from the parent company to the subsidiary.

It should be noted that the Advocate General refuses to accept a subjective criterion,[86] i.e. whether or not the taxpayer intends to achieve a tax advantage is irrelevant. The criteria referred to by the Advocate General could be understood, to a large extent, as merely emphasizing that the facts must be well established. It must also be examined "whether the subsidiary has the premises, staff and equipment necessary to carry out the services provided to the parent company",[87]

Dieter Danner [2002] ECR I-8147, Para. 44 et seq.; ECJ, 21 November 2002, Case C-436/00, *X, Y v. Riksskatteverk* [2002] ECR I-10829, Para. 60 et seq.; ECJ, 4 March 2004, Case C-334/02, *Commission of the European Communities v. French Republic* [2004] ECR I-2229, Para. 27 et seq.; and ECJ, 11 March 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409, Para. 50 et seq.

79. ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, Para. 49.

80. ECJ, Advocate General Stix-Hackl's Opinion, 15 December 2005, Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften,* Para. 115.

81. Lang, *Steuer und Wirtschaft International*, note 2, p. 7 et seq. and *European Taxation*, note 2, p. 65 et seq.

82. ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, Para. 57.

83. ECJ, 16 July 1998, Case C-264/96, *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* [1998] ECR I-4695.

84. ECJ, 11 March 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409.

85. ECJ, Advocate General Leger's Opinion, 2 May 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, Paras. 112-114.

86. For a different approach, see ECJ, Advocate General Stix-Hackl's Opinion, 16 March 2006, Case C-452/04, *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht*, Para. 93. Advocate General Stix-Hackl assumes that the ECJ's judgment in *Marks & Spencers* indicates that the Court takes the position that determining abuse requires a subjective criterion.

87. ECJ, Advocate General Leger's Opinion, 2 May 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, Para. 112.

whether the decisions are taken at the level of the parent or of the subsidiary, and whether the services provided have economic substance. Accordingly these criteria do not leave much room for the Member States to assume that there is a "wholly artificial arrangement".[88]

Although the Advocate General gives the impression that his Opinion is in line with the ECJ in *Halifax*,[89] the opposite is the case.[90] In *Halifax*, the taxpayer's intention was relevant. Only if he intended to achieve a tax benefit did the object and purpose of the provision have to be considered. Compared to *Halifax*, Advocate General Léger's Opinion is more convincing. Specifically, a subjective element as one of the criteria to counter abuse is problematic, as it is difficult to prove whether or not the criterion has been met. It is also peculiar that the object and the purpose of a Community law provision should only be considered if the taxpayer intends to achieve a tax advantage and not in all situations, irrespective of the intention.

Advocate General Poiares Maduro also reconfirmed the pre-*Marks & Spencer* case law when he stated in his Opinion in *Rewe* that not every transfer of activities from one Member State to another Member State constitutes tax avoidance.[91] He acknowledged that such a transfer gives rise to a loss of revenue, but not every loss of revenue is the result of an arbitrary arrangement. A domestic provision that covers general situations in which subsidiaries have their residence in another Member State may not be justified by the risk of tax avoidance.

4.3. Transferring the burden of proof

In *Marks & Spencer*, the ECJ gave the impression that the burden of proof lies completely with the taxpayer.[92] That is if

> the resident company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to Articles 43 EC and 48 EC to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.

This is especially interesting as it is not entirely clear from the judgment whether or not the ECJ really wanted to transfer the burden of proof completely to the taxpayer or only to emphasize the active role of the taxpayer, even though it did not want to rule out that there are situations in which proof must be established in another way.

Pre-*Marks & Spencer*, the ECJ either exclusively referred to the Mutual Assistance Directive,[93] which the tax authorities have to apply,[94] or referred to the Directive and encouraged the tax authorities to require the taxpayer to provide the information that was necessary to establish the facts.[95] Advocate General Poiares Maduro's Opinion in *Rewe* demonstrates that at least this Advocate General has not changed the approach since *Marks & Spencer*. On the one hand, he refers to the Mutual Assistance Directive and emphasizes that the competent authorities can ask the competent authorities of other Member States for all the necessary information they need to calculate the corporate income tax correctly.[96] On the other hand, he states that nothing prevents the tax authorities from demanding all the necessary information from the taxpayer.[97] Advocate General Stix-Hackl took a similar position in *Commission v. Denmark*.[98] In *Stauffer* she even referred to the Mutual Assistance Directive only, without mentioning the possibility that the tax authorities could demand information from the taxpayer.[99]

Advocate General Léger, in his Opinion in *Cadbury Schweppes*, elaborated on the circumstances under which the burden of proof may be transferred to the taxpayer.[100] He concluded that, for a company that provides services situated in a low-tax regime that does not distribute taxable dividends, the tax authorities could require that the taxpayer establish that the whole transaction is not to be considered as a "wholly artificial arrangement". What is important to the Advocate General is that the presumption in the law in question may be rebutted.[101] If these conditions (providing services, low taxation and no distributions) are not met, it is obviously for the tax authorities to establish the facts and give the reasons for the existence of a "wholly artificial arrangement". Although the Advocate General's Opinion distinguishes more precisely between the obligations of the taxpayers and those of the tax authorities than in previous case law, the approach is still well balanced.

Recent Opinions indicate that the Directive on the Mutual Assistance for the Recovery of Claims since its amendment in 2001 requires the Member States to

88. Implicit in Lang, *Steuer und Wirtschaft International*, note 2, p. 7 et seq. and *European Taxation*, note 2, p. 65 et seq.
89. ECJ, 21 February 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd, v. Commissioners of Customs & Excise*.
90. See Lang, "Rechtsmissbrauch und Gemeinschaftsrecht im Lichte von Halifax und Cadbury Schweppes", *Steuer und Wirtschaft International* (2006), p. 276 et seq.
91. ECJ, Advocate General Poiares Maduro's Opinion, 31 May 2006, Case C-347/04, *Rewe Zentralfinanz eG als Gesamtrechtsnachfolgerin der ITS Reisen GmbH v. Finanzamt Köln-Mitte,* Para. 40.
92. ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, Para. 56.
93. Directive 76/308/EEC on the Mutual Assistance for the Recovery of Claims.
94. ECJ, 28 January 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State* [1992] ECR I-249, Para. 18 and ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions* [1997] ECR I-2471, Para. 41.
95. ECJ, 28 October 1999, Case C-55/98, *Skatteministeriet v. Bent Vestergaard* [1999] ECR I-7641, Para. 26; ECJ, 26 September 2000, Case C-478/98, *Commission of the European Communities v. Kingdom of Belgium* [2000] ECR I-7587, Para. 39; ECJ, 3 October 2002, Case C-136/00, *Rolf Dieter Danner* [2002] ECR I-8147, Para. 49; ECJ, 26 June 2003, Case C-422/01, *Foersaekringsaktiebolaget Skandia (publ), Ola Ramstedt v. Riksskatteverket* [2003] ECR I-6817, Paras. 42-43; and ECJ, 10 March 2005, Case C-39/04, *Laboratoires Fournier SA v. Direction des vérifications nationales et internationales* [2005] ECR I-2057, Para. 24.
96. ECJ, Advocate General Poiares Maduro's Opinion, 31 May 2006, Case C-347/04, *Rewe Zentralfinanz eG als Gesamtrechtsnachfolgerin der ITS Reisen GmbH v. Finanzamt KölnMitte,* Para. 45.
97. Id., Para. 46.
98. ECJ, Advocate General Stix-Hackl's Opinion, 1 June 2006, Case C 150/04, *Commission of the European Communities v. Kingdom of Denmark,* Para. 91 et seq.
99. ECJ, Advocate General Stix-Hackl's Opinion, 15 December 2005, Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften,* Para. 111 et seq.
100. ECJ, Advocate General Leger's Opinion, 2 May 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, Para. 142 et seq.
101. Id., Para. 143.

cooperate in the collection of taxes. This could have some effect on issues of proportionality. Advocate General Kokott has already considered this Directive in her Opinion in "*N*".[102] In Advocate General Léger's Opinion in *Scorpio*, in which he argued that the levying of withholding taxes on non-residents only can, in principle, be in accordance with the fundamental freedoms, he repeatedly emphasized that the Directive on the Mutual Assistance for the Recovery of Claims in its 2001 version was not yet in force for the periods under examination.[103] It can be inferred from these statements that withholding taxes could be more difficult to defend under that Directive. Advocate General Léger also referred to this Directive in his Opinion in *Pirkko Marjatta Turpeinen*.[104] Specifically, additional administrative difficulties for tax authorities due to the foreign residence of a taxpayer cannot justify a higher tax burden for non-residents. This higher burden cannot be justified, as, in that Directive, the Member States have an additional instrument to ensure that taxes can be collected from non-residents. Recent Opinions, therefore, indicate that it will become even more difficult for the tax authorities to transfer the burden of proof to the taxpayer.

5. CONCLUSIONS

On the one hand, *Marks & Spencer* is not completely exceptional in ECJ case law. The case clearly deviates from previous judgments, but, this is also true for decisions such as "*D*", *Schempp* and *Blanckaert*, which were also given in 2005. Starting with *Manninen*, from late 2004, the ECJ has reduced the requirements for the Member States under its case law regarding fiscal coherence. Accordingly, *Marks & Spencer* is part of a bigger picture.

On the other hand, *Marks & Spencer* is, to a certain extent, extreme. The ECJ took a view on the issues of justification and proportionality that very much favoured the Member States. The critical position taken by Advocate General Geelhoed, for whom

> it would seem clear that the position of a domestic parent company with a subsidiary whose profits are taxable in that Member State, on the one hand, and such a parent company with a subsidiary whose profits are not taxable (exempt) in that Member State, on the other hand, are not comparable

and who, therefore, would have been in favour of an even more generous approach towards the Member States, is, to date, the exception.[105] There is no indication that the ECJ and the Advocates General have continued the approach of *Marks & Spencer* or have even developed it further, to the disadvantage of the taxpayers, as was requested by Advocate General Geelhoed. On the contrary, the impression is given that the ECJ and most of the Advocates General are trying to limit the effects of *Marks & Spencer* as much as possible. Again, therefore, whilst pretending not to change, the ECJ appears to be silently retracting some of the arguments raised in *Marks & Spencer*.

102. ECJ, Advocate General Kokott's Opinion, 30 March 2006, Case C-470/04, *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo,* Para. 112.
103. ECJ, Advocate General Leger's Opinion, 16 May 2006, Case C-290/04, *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel,* Para. 29.
104. ECJ, Advocate General Leger's Opinion, 18 May 2006, Case C-520/04, *Pirkko Marjatta Turpeinen*, Para. 80.
105. ECJ, Advocate General Geelhoed's Opinion, 23 February 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation (Pirelli, Essilor and Sony), Test Claimants in Class IV of the ACT Group Litigation (BMW) v. Commissioners of Inland Revenue*, Paras. 63 and 65.